

COMMENT

Tanner Hazardous Waste Streams — Controversy Over “Fair-Share” Responsibility

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INTRODUCTION

Every year modern technology creates millions of tons¹ of hazardous waste.² Local and national governments presently emphasize source re-

¹ See ENVIRONMENTAL QUALITY, 15TH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY, 1984 U.S. COUNCIL ENVTL. QUALITY REP. [hereafter COUNCIL ENVTL. QUALITY REP.]. The Council on Environmental Quality (CEQ) reported disposal of 14.7 billion gallons of hazardous waste in 1981. *Id.* at 164. CEQ also reported that manufacturing industries removed 145.8, 99.4, and 89.0 million short tons of solid waste in 1981, 1982, and 1983 respectively. *Id.* at 610.

Industry reported to the Environmental Protection Agency (EPA) that plants and facilities released 22.5 billion pounds of toxic pollutants into the air, water, and land during 1987. Hebert, *'Startling' Level of Toxic Disposal*, Sacramento Bee, Apr. 13, 1989, at A13, col. 1. EPA noted that it had not analyzed this raw data before it was made public. *Id.*

² See CAL. HEALTH & SAFETY CODE § 25117 (West Supp. 1990). "Hazardous waste" means:

A waste, or combination of wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may either: (A) Cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness. (B) Pose a substantial present or potential hazard to human health or environment when improperly treated, stored, transported, or disposed of, or otherwise

duction to manage hazardous wastes,³ but even with the best methods of source reduction, some toxic residuals will still remain.⁴ Thus, communities need treatment facilities⁵ that eliminate or neutralize hazard-

managed.

Id.

³ See, e.g., *id.* § 25135.1(d)(3). California law requires each county to analyze its ability to recycle hazardous waste and to reduce the volume at the source of generation. *Id.* The California Legislature encourages source reduction and recycling because a major hazardous waste disposal problem faces the state as it phases out conventional disposal practices. *Id.* §§ 25135 historical note, 25170 historical note; see also OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, SERIOUS REDUCTION OF HAZARDOUS WASTE (OTA-ITE 317, 1986) (setting national waste reduction goal at 10% annually to reduce environmental spending); Toxic Substances Control Div., Cal. Dep't of Health Servs., Guidelines for the Preparation of Hazardous Waste Management Plans (June 30, 1987) [hereafter DHS Guidelines]. Eliminating the generation of hazardous waste at the source of manufacturing or chemical processing, where technically feasible, is the most desirable option. *Id.* at 1-1. Waste reduction is "[o]n-site practices which reduce, avoid, or eliminate the need for off-site hazardous waste facilities." *Id.* at 1-15; Belliveau, *Pollution Prevention — An Idea Whose Time Has Come*, CITIZENS FOR A BETTER ENV'T-ENVTL. REV., Summer 1987, at 5 (advocating toxic source reduction because control programs are not solving toxic pollution); Caldart & Ryan, *Waste Generation Reduction: A First Step Toward Developing a Regulatory Policy to Encourage Hazardous Substance Management Through Production Process Change*, 2 HAZARDOUS WASTE & HAZARDOUS MATERIALS 309, 310-11 (1985) (discussing use of source reduction to reduce waste stream); Note, *Legal Incentives for Reduction, Reuse, and Recycling: A New Approach to Hazardous Waste Management*, 95 YALE L.J. 810, 817 (1986) (stating that reducing production, disposal, and risks of hazardous waste is best long-term solution to hazardous waste problem).

⁴ See Belliveau, *supra* note 3, at 5; Crumpler, *Status of Chemical, Physical and Biological Treatment Processes in Hazardous Waste Management*, in HAZARDOUS WASTE DISPOSAL 77, 88 (J. Lehman ed. 1983).

⁵ The legislature defines treatment as "any method, technique, or process which changes . . . the physical, chemical, or biological character or composition of any hazardous waste . . . or removes or reduces its harmful properties or characteristics for any purpose." CAL. HEALTH & SAFETY CODE § 24123.5 (West Supp. 1990). For discussions on treatment and treatment facilities, see generally Crumpler, *supra* note 4; Ghassemi, *Innovative On-Site Treatment/Destruction Technologies for Remediation of Contaminated Sites*, in HAZARDOUS AND TOXIC MATERIALS: SAFE HANDLING AND DISPOSAL 345 (H. Fawcett 2d ed. 1988); Nels, *Hazardous Waste Incineration*, in HAZARDOUS WASTE DISPOSAL, *supra* note 4, at 171, 177-87; Riegel, *Hazardous Waste Reduction and Recycling*, in *id.* at 105. Toxic Substances Control Div., Cal. Dep't of Health Servs., Technical Reference Manual of the Guidelines for the Preparation of Hazardous Waste Management Plans J-1 to J-11 (June 30, 1987) [hereafter DHS Technical Reference Manual] (describing characteristics of hazardous waste treatment facilities); see also *infra* note 166 and accompanying text (describing facilities). This Comment uses the terms "management facilities" and "treatment facilities" interchangeably.

ous waste materials and that lessen the health threatening toxic accumulation in the environment.⁶ Unfortunately, few communities want a hazardous waste treatment facility in their neighborhood. This “not-in-my-back-yard” attitude often scuttles a waste-treatment project before developers ever receive a government permit for locating the facility.⁷

In response to the growing amount of hazardous waste in California⁸

⁶ For discussion of the effects of hazardous waste, see M. GREENBERG & R. ANDERSON, HAZARDOUS WASTE SITES: THE CREDIBILITY GAP 84-105 (1984) (discussing economic, environmental, and health effects of hazardous waste sites); Fawcett, *The ABCs of Chemical Safety*, in HAZARDOUS AND TOXIC MATERIALS, SAFE HANDLING AND DISPOSAL, *supra* note 5, at 1; Fawcett, *Legal, Cost/Benefit, and Ethical Aspects*, in *id.* at 29, 40-43; Weisburger, *Long-Term Toxicity*, in *id.* at 97 (discussing medical and biological effects from hazardous chemicals).

⁷ See Tarlock, *Anywhere But Here: An Introduction to State Control of Hazardous-Waste Facility Location*, 2 UCLA J. ENVTL. L. & POL'Y 1, 3 (1981) (stating that communities throughout the country exclude hazardous waste facilities through local zoning). Many authors view the “not in my backyard” attitude as a major obstacle to successful siting of hazardous waste facilities. See, e.g., J. WRIGHT, MANAGING HAZARDOUS WASTES: A PROGRAMMATIC APPROACH 60-61 (1986) (stating that good or bad, hazardous waste facility would decrease property values, increase health risks, and be politically unpalatable); Andreen, *Defusing the “Not In My Back Yard” Syndrome: An Approach to Federal Preemption of State and Local Impediments to the Siting of PCB Disposal Facilities*, 63 N.C.L. REV. 811, 813 (1985) (describing arrests of over 500 people who blocked facility to prevent PCB disposal); Bacow & Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265, 267-73 (1982) (stating that the public can create costly delays or resort to civil disobedience to stop siting of unwanted facilities); Belliveau, *supra* note 3, at 7 (discussing effect of not-in-my-backyard attitudes); Davis, *Approaches to the Regulation of Hazardous Wastes*, 18 ENVTL. L. 505, 517 (1988) (noting that because of high citizen interest and widespread fear of hazardous waste risks, public agencies face difficult dilemma in siting hazardous waste facilities); English, *The Search for Political Authority in Massachusetts’ Toxic Waste Management Law*, 16 B.C. ENVTL. AFF. L. REV. 39, 41 (1988) (discussing how intense local hostility prevented five hazardous waste facility projects in Massachusetts); Lewis, *Hazardous Waste Facility Siting: Ultimate Authority Vested in Local Opinion*, 2 NAT. RESOURCES & ENV'T 24, 25 (1986) (stating that proponents of new disposal facilities should anticipate vigorous local objections at siting process); *NIMBY Squared*, Sacramento Bee, Nov. 15, 1988, at B4, col. 1 [hereafter *NIMBY Squared*] (stating that a not-in-my-backyard attitude — i.e., “NIMBY” — plagues toxic waste management in California).

⁸ See S. TANNER & L. BROWN, HAZARDOUS WASTE MANAGEMENT PLAN: RECOMMENDATIONS OF THE HAZARDOUS WASTE MANAGEMENT COUNCIL 74 (Draft, 1984). In 1983 the California Department of Health Services (DHS) prepared a report for the California Hazardous Waste Management Council. *Id.* DHS found that approximately 10 million tons per year (MTY) of hazardous wastes are generated in California. *Id.* DHS divided the state into six regions and reported waste generation

and to the corresponding lack of disposal facilities, the 1986 California Legislature passed the Tanner Planning Act.⁹ The Act authorizes each California county to prepare a county hazardous waste management plan (County Plan) to expedite the siting of hazardous waste management facilities.¹⁰ A county preparing a County Plan under the Act must provide for additional necessary hazardous waste management facilities based on an analysis of the hazardous waste stream¹¹ in that county.¹²

from each region as: San Francisco Bay Area, 4.7 MTY; Southern San Joaquin Valley, 2.3 MTY; Los Angeles Area, 2.1 MTY; San Diego Area, 0.33 MTY; Sacramento Area, 0.22 MTY; and other unspecified areas, 0.55 MTY. *Id.* at 74-76. Major industries generating hazardous waste in California include petroleum refining (27%), oil and gas extraction (20%), and chemicals and allied products (19%). *Id.* at 78.

In California, five industries — petrochemical, oil, agribusiness, electronics, and weapons — produce about \$100 billion worth of products annually and generate an estimated three-fourths of the State's toxic waste. Belliveau, *supra* note 3, at 6.

The Toxics Coordinating Project (TCP) has estimated that the amount of hazardous waste generated in California represents nearly one-half ton of hazardous waste per person per year. Toxics Coordinating Project, *A Community Perspective of Hazardous Waste Management Planning: A Handbook Describing Opportunities and Problems Related to Implementation of AB 2948* (Sept. 25, 1987) [hereafter TCP Handbook]. The TCP is a network of public health, labor, environmental, and other public interest groups in California who are concerned about the proliferation of toxics. *See* Toxics Coordinating Project, *A Community Perspective of Hazardous Waste Management Planning: Developing Effective Policies on Source Reduction for Hazardous Waste Management Plans Under AB 2948*, at 1 (May 1988) [hereafter TCP Policies on Source Reduction].

⁹ Ch. 1540, 1986 Cal. Stat. 5389 (codified as amendment at scattered sections of CAL. HEALTH & SAFETY CODE and CAL. GOV'T CODE).

¹⁰ CAL. HEALTH & SAFETY CODE § 25135 (West Supp. 1990).

¹¹ Hazardous waste streams consist of the movements of hazardous wastes from hazardous waste generators to final disposal site. *See* DHS Technical Reference Manual, *supra* note 5, at A-4 to A-6. DHS has designated 17 waste groups that categorize waste generation. *Id.* These groups define 17 waste streams, and include waste oil, halogenated solvents, nonhalogenated solvents, organic liquids, pesticides, dioxins, oily sludges, metal containing substances, nonmetallic substances, cyanides, and miscellaneous wastes. *Id.* The groups are divided into organic liquids and solids (or sludges) and inorganic liquids and solids (or sludges). *Id.* at A-3.

DHS requires counties to calculate the number of additional needed facilities for hazardous waste management using waste stream analysis information. *Id.* at E-1 to E-8. The method uses a three-stage analysis based on waste generation, capacity assessment, and capacity shortfall. *Id.* at E-1. The capacity shortfall (or excess) equals the capacity needs assessment minus the existing capacity. *Id.* The needs assessment considers the waste generation analysis in terms of the most likely type of treatment technology that may be used. *Id.*

¹² CAL. HEALTH & SAFETY CODE § 25135.1(d) (West Supp. 1990); *see also* DHS Guidelines, *supra* note 3, at 3-2 to 3-7 (stating criteria for county plans as to waste generation).

What constitutes a county's waste stream, however, or a county's "fair share"¹³ of a waste stream is a controversial question. California's counties and the California State Department of Health Services (DHS), the agency administering the Tanner Planning Act,¹⁴ disagree on how to allocate responsibility for hazardous waste streams that cross county borders.¹⁵

Counties view the Tanner Planning Act as requiring counties to bear responsibility only for waste streams generated within their county — their fair share.¹⁶ Therefore, counties claim that their plans need only describe siting for facilities that accommodate local waste streams.¹⁷ In contrast, DHS wants the County Plans to include site locations for regional facilities and thus to assume responsibility for waste in intercounty streams.¹⁸ Further tensions arise out of the counties' belief that the DHS view may result in preemption of county land-use decisions.¹⁹

¹³ See *infra* note 135 and accompanying text (citing the source of the "fair share" concept within the Tanner Planning Act).

¹⁴ For a list of DHS's powers and duties under the Act, see CAL. HEALTH & SAFETY CODE § 25135.5 (West Supp. 1990).

¹⁵ Waste stream analysis determines the location, size, and type of facilities that counties must include in their hazardous waste management plans. The counties and DHS *do* agree on the methods for calculating the waste stream. Telephone interview with Judi Frantz, Associate Hazardous Materials Specialist, DHS Region 1, Toxic Substances Control Division [hereafter Frantz telephone interview] (Nov. 3, 1989) (transcript available at U.C. Davis Law Review). This Comment discusses waste stream analysis in terms of its management effects, with emphasis on the problem of intercounty streams. This Comment does not discuss the actual methods used in determining the contents of the waste stream. See *supra* note 11 and accompanying text.

¹⁶ See TCP Policies on Source Reduction, *supra* note 8. The Tanner Act "provides . . . a format for discussion of the siting of treatment facilities which . . . is appropriately occurring at the local level as counties analyze the waste streams generated by their industries and plan for adequate facilities. However, [DHS Guidelines] go further. . . . This is not what [the Tanner Planning Act] intended." *Id.* at 12; see also *infra* notes 131-35 and accompanying text.

¹⁷ See County Supervisors Association of California, Press Release, Tanner Background Paper (Oct. 13, 1988) [hereafter CSAC, Tanner Background Paper].

¹⁸ See *infra* notes 83-125 and accompanying text.

¹⁹ See, e.g., Lennard & Labadie, *Coping With Tanner*, WESTERN CITY, Nov. 1988, at 23 (discussing counties' claim that DHS insists every county adopt siting criteria for all types of hazardous waste facilities, even if some are not needed for processing county's waste stream); Wood, *Decision Due On Toxic Waste*, Sacramento Bee, Aug. 7, 1989, at B1, col. 5 (reporting that activists in Calaveras County have proposed initiative in apparent conflict with Tanner Planning Act and that activists in Kern and Tulare counties have mounted legal challenges to the Act); *NIMBY Squared*, *supra* note 7 (stating that CSAC threatens legal action unless DHS agrees to allow counties

If counties fail to recognize responsibility for the hazardous waste streams as DHS requires, DHS may refuse to accept the plans.²⁰ As a result, counties without authorized hazardous waste management plans may be vulnerable to unwanted DHS land-use decisions.²¹ Counties, via the County Supervisors Association of California (CSAC),²² recently announced that they may seek additional legislation or corrective litigation to resolve these conflicts.²³ Litigation could delay siting of necessary waste management facilities and increase economic costs, health risks, and environmental harm to California.²⁴ Consequently, instead of litigating, the counties and DHS should resolve the controversy and

to refuse to handle other counties' waste, while state denies that it requires counties to handle other's wastes); Lapin, *Coming to a Site Near You: Toxic Waste*, San Jose Mercury News, Aug. 30, 1988, at A, col. 1 (reporting county's claim that DHS wants it to make room for hazardous wastes facilities that could handle toxic waste from miles around).

In particular, DHS told Santa Clara County that it must be capable of treating hazardous waste from San Francisco, San Mateo, Alameda, and Contra Costa Counties. *Id.* Santa Clara County voters found this repulsive, especially because San Francisco (due to its urban environment) is exempt from treating the worst toxic wastes. *Id.*

Humboldt County and several other counties also object to the DHS Guidelines. *See* Rathjen, *Battle Looms Over Waste Plan*, Eureka Times Standard, Jan. 21, 1988, at 5, col. 2; *see also infra* notes 140-44 and accompanying text.

²⁰ *See* CAL. HEALTH & SAFETY CODE § 25135.7 (West Supp. 1990); *see also infra* note 26 and accompanying text (explaining rejection of Kern County Plan).

²¹ *See infra* notes 113-17 & 140 and accompanying text.

²² The County Supervisors Association of California (CSAC) represents counties in their protests against the DHS Guidelines. The League of California Cities performs this function for cities. *See* Lennard & Labadie, *supra* note 19, at 23.

²³ *See* California Supervisors Association of California, Press Release (Oct. 13, 1988) [hereafter CSAC, Press Release]. The CSAC Tanner Hazardous Waste Task Force claims that "[DHS] Guidelines . . . appear to go well beyond the intent of the Tanner Statute." *Id.*

²⁴ *See* W. BROWN, M. ROOS, S. TANNER & L. KILLEA, TURNING OFF THE TOXICS TAP: A PROGRAM TO HALT THE LAND DISPOSAL OF UNTREATED TOXIC WASTES, 1986 ASSEMBLY DOC. NO. 0111-A, at 1 (1986) [hereafter TURNING OFF TOXICS]. The California Legislature reported that it will cost over \$2 billion to clean up the 222 known California sites on the state superfund list. *Id.* The costs may exceed \$8 billion as the list expands. *Id.* In 1985, industry sent more than 70% of hazardous wastes to offsite dumps without any treatment. *Id.* at 2. The legislature recognizes that the problem of shrinking hazardous waste disposal capacity results in increased costs to industry, and may also cause increased illegal dumping. *Id.* The legislature concluded that "California's environmental and economic well-being requires safe and reliable capacity for the management of hazardous wastes. This capacity does not exist and will not be developed in the near future unless aggressive actions are taken immediately." *Id.* at 12.

expedite the safe management of hazardous wastes in California.²⁵

This Comment focuses on the responsibility for and analysis of hazardous waste streams required under the Tanner Planning Act. Section I surveys the hazardous waste management issue and the Tanner Planning Act. Section II examines the statutory construction of the Act and the interpretation of hazardous waste stream management according to DHS and the counties. Section III proposes a statutory requirement that counties enter into intercounty agreements for siting regional hazardous waste facilities to fulfill the legislative intent for a comprehensive plan.

I. OVERVIEW OF HAZARDOUS WASTE MANAGEMENT AND THE TANNER PLANNING ACT

A. *Evolution of Hazardous Waste Management Planning*

In 1982, the California Legislature realized that closure of several Class I²⁶ land disposal sites would threaten the management of millions of tons of hazardous waste in the State.²⁷ On the other hand, public opposition to construction of new hazardous waste facilities also concerned the legislature.²⁸ Responding to these difficult realities, the legis-

²⁵ The legislative purpose of the Tanner Planning Act includes expeditious enactment of statewide hazardous waste management plans for protection of the State's public health, environment, and economic well being. CAL. HEALTH & SAFETY CODE § 25135 & historical note (West Supp. 1990).

²⁶ Class I disposal sites provide protection for the quality of ground and surface water and for public health and wildlife resources from wastes deposited in the site. S. TANNER & L. BROWN, *supra* note 8, at 318. Currently Class I sites accept dry and solid hazardous waste. DHS Guidelines, *supra* note 3, at 1-8.

²⁷ See TURNING OFF TOXICS, *supra* note 24, at 7. In 1979 California had 11 Class I commercial dumps. *Id.* at 8-9. By 1986 only four facilities remained open to dumping. *Id.*; see also CAL. HEALTH & SAFETY CODE § 25179.6 (West Supp. 1990) (prohibiting disposal of untreated hazardous waste at all land disposal sites after May 8, 1990).

²⁸ See TURNING OFF TOXICS, *supra* note 24, at 7; S. TANNER & L. BROWN, *supra* note 8, at 56-57. Tanner and Brown provide two examples of public opposition to siting of hazardous waste facilities in southern California. In 1977 the IT Corporation proposed a comprehensive hazardous waste treatment plant and disposal facility in the Sand Canyon area of Los Angeles County. The corporation withdrew its permit application four years later because of insurmountable public and political opposition to the project. *Id.* at 259-60.

In March 1981 Chemical Waste Management, Inc. submitted an application to construct a new industrial liquid chemical treatment and transfer facility to the City of Long Beach. The Long Beach Planning Department, claiming the proposed site location was poor, refused to accept the application. Chemical Waste disagreed and indi-

lature enacted AB 1543,²⁹ which established the Hazardous Waste Management Council.³⁰ The Council prepared recommendations to the Governor and the legislature on developing a workable plan for siting and permitting new hazardous waste facilities in California.³¹ In 1986, the legislature implemented the Council's recommendations and enacted the Tanner Planning Act.³² In a related move that same year, the legislature also passed the California Hazardous Waste Management Act.³³ This law prohibits the land disposal of untreated hazardous waste after May 8, 1990,³⁴ and promotes the treatment and recycling of hazardous wastes.³⁵

While California developed its hazardous waste legislation,³⁶ Con-

cated that the rejection was politically motivated. In 1982 the City adopted an ordinance that effectively prohibited the siting of a hazardous waste management facility within the city boundaries. *Id.* at 263-64.

²⁹ Act approved March 2, 1982, ch. 89, § 28, 1982 Cal. Stat. 275 (repealed 1984).

³⁰ The Council consisted of 16 members from various government agencies, local governments, industry, and the legislature; a geologist experienced in toxic and solid waste disposal; and a public interest representative. *Id.*

³¹ See TURNING OFF TOXICS, *supra* note 24, at 7; see also S. TANNER & L. BROWN, *supra* note 8, at 3-45 (listing Council's recommendations). After 18 months of study, the Council completed a final plan which considered all the known weaknesses and problems of the then-existing permitting and siting process. See *id.*; TURNING OFF TOXICS, *supra* note 24, at 7. The previous procedure's weaknesses included: a lengthy, complicated, and expensive permitting process involving several government agencies; the lack of public involvement in site selection; the lack of a comprehensive assessment of the local and regional needs for new hazardous waste management facilities; the lack of a regional approach to planning for hazardous waste management in some areas of the state; and the power of local politics to cause the rejection of technically sound proposals. S. TANNER & L. BROWN, *supra* note 8, at 56-57.

³² The legislature had passed the Tanner Planning Act in both the 1984 and 1985 legislative sessions, but the Governor vetoed it both years. TURNING OFF TOXICS, *supra* note 24, at 8-9. The Act finally became law in 1986 after the Governor's own toxics task force endorsed the Act. News Release from Assemblywoman Sally Tanner (Aug. 29, 1986). On August 27, 1986, the bill passed the Assembly by a 38-0 vote. 2 CAL. LEGISLATURE, 1985-1986 REGULAR SESSION, ASSEMBLY FINAL HISTORY 1909. Two days later, it passed the Senate by a 79-0 vote. *Id.* Governor Dukemejian approved the Act on September 30, 1986. *Id.*

³³ Ch. 1509, § 1, 1986 Cal. Stat. 5447 (codified as amended at CAL. HEALTH & SAFETY CODE §§ 25179.1-12 (West Supp. 1990)).

³⁴ CAL. HEALTH & SAFETY CODE § 25179.6(a)(1) (West Supp. 1990). DHS can authorize limited time extensions in special circumstances. *Id.* The Tanner Planning Act originally provided for a date of January 1, 1987, but this was not to be operative if § 25179.6 was enacted. See *id.* § 25200.2 & historical note.

³⁵ *Id.* § 25179.6.

³⁶ Prior to the Tanner Planning Act, the legislature had passed the Hazardous Waste Control Act of 1972, ch. 1236, § 1, 1972 Cal. Stat. 2388 (codified as amended at

gress responded to national concern over uncontrolled hazardous waste.³⁷ In 1976 Congress passed the Resource Conservation and Re-

CAL. HEALTH & SAFETY CODE §§ 25100-25249 (West 1984 & Supp. 1990)), which created a hazardous waste control program involving various state agencies. The Hazardous Waste Control Act authorizes DHS, the State Water Resources Control Board, the nine Regional Water Quality Control Boards, and the California Air Resources Board to regulate hazardous waste management facilities. *See* S. TANNER & L. BROWN, *supra* note 8, at 71-72. The water boards protect water quality and require discharge permits if necessary. *Id.* at 71. The air boards regulate air quality at hazardous waste facilities. *Id.*

The Hazardous Waste Control Act designates DHS as the primary agency in managing hazardous wastes. *See* CAL. HEALTH & SAFETY CODE § 25101 (West 1984). The several amendments to the Hazardous Waste Control Act, including the Tanner Planning Act, have broadened DHS's regulatory authority. *See* S. TANNER & L. BROWN, *supra* note 8, at 71. DHS issues permits to hazardous waste treatment, storage, and disposal facilities; registers and certifies hazardous waste haulers; inspects hazardous waste management facilities; enforces laws through administrative and legal sanctions; administers the State's Superfund program; and participates in planning and researching of hazardous waste issues. *Id.*; *see also infra* notes 38-47 and accompanying text (describing requirements under federal hazardous waste laws that California law must satisfy).

³⁷ In 1976, Congress enacted the Toxics Substances Control Act (TSCA), Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified as amended at 15 U.S.C. §§ 2601-2654 (1982 & Supp. 1987)), and the Resource Conservation and Recovery Act (RCRA), Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6991; (1982 & Supp. V 1987)). Thus, EPA began comprehensive federal regulation programs of commercial chemical products and chemical wastes. *See* COUNCIL OF ENVTL. QUALITY REP., *supra* note 1, at 161-64. Congress also regulated chemical pesticide products under the Federal Insecticide, Fungicide, and Rodenticide Act, Pub. L. No. 92-516, 86 Stat. 973 (1972) (codified as amended at 7 U.S.C. §§ 136-136y (1988)). However, RCRA *directly* regulated hazardous waste. *See* 2 J. BATTLE, ENVIRONMENTAL LAW: WATER POLLUTION AND HAZARDOUS WASTES 301-02 (1986). Before RCRA's enactment industry usually disposed of hazardous wastes in unlined surface impoundments, allowing leaching of hazardous chemicals. Holznagel, *Negotiation and Mediation: The Newest Approach to Hazardous Waste Facility Siting*, 13 B. C. ENVTL. AFF. L. REV. 329, 333 (1986).

Love Canal became the classic tragedy describing the dangers from uncontrolled hazardous waste disposal. *See* A. LEVINE, LOVE CANAL: SCIENCE, POLITICS, AND PEOPLE (1982). In the 1940s, Hooker Chemical Company disposed of more than 21,000 tons of residue from the manufacture of chemical compounds in the abandoned Love Canal in New York. A decade later the company covered over the site and a local community later constructed an elementary school on the contaminated soil. *Id.* at 10-26. Eventually the chemicals leached through the soil, and poisonous fumes affected the health of over one thousand residents in the area. *Id.* at 57.

As a result of Love Canal, in 1980, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund Act), Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1982 & Supp. V 1987)). CERCLA provided a \$1.6 billion fund for cleanup opera-

covery Act (RCRA),³⁸ one of the most important laws affecting hazardous waste management.³⁹ RCRA regulates and monitors the disposal of hazardous wastes.⁴⁰ The Environmental Protection Agency authorizes DHS to administer the RCRA program in California.⁴¹ The State must maintain a hazardous waste management program consistent with federal law, but may adopt more stringent or extensive standards than the federal regulations.⁴² In 1984, Congress amended RCRA to bring small quantity generators⁴³ under RCRA regulations and to phase out land disposal of hazardous waste.⁴⁴ These amendments increase the need for hazardous waste management facilities in California.⁴⁵

tions of hazardous waste sites. *See* Davis, *supra* note 7, at 509.

³⁸ Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6991 (1982 & Supp. V 1987)).

³⁹ *See* S. TANNER & L. BROWN, *supra* note 8, at 68 (commenting on importance of RCRA for hazardous waste management).

⁴⁰ *Id.* Subtitle C of RCRA required EPA to develop comprehensive standards for controlling hazardous waste and to implement a national hazardous waste management program. *Id.* RCRA regulations govern the transportation, storage, and disposal of hazardous waste by requiring the owner, operator, or transporter to have a permit. *See* 42 U.S.C. § 6925 (1982 & Supp. V 1987).

RCRA establishes a "cradle to grave" tracking system by requiring a hazardous waste manifest to accompany the hazardous waste from the point of generation to final disposal or storage. *Id.* § 6922. The manifest system is important to hazardous waste facility siting because the paper trail allows the State and counties to map out hazardous waste streams. *See* DHS Technical Reference Manual, *supra* note 5, at A-11. DHS develops its waste stream data from the Uniform Manifest System, which may overestimate the quantity of waste in the hazardous waste stream. *Id.* Therefore, counties may rely on their own tracking data as long as DHS approves their data collection methods. *Id.* at E-1; *see also* TCP Policies on Source Reduction, *supra* note 8, at 18-19 (recommending that counties use their own tracking systems for improved accuracy).

Under RCRA, states must also undertake a continuing program to inventory hazardous waste facilities and to describe the site location, nature, and toxicity of the hazardous waste stored. 42 U.S.C. § 6933 (1982 & Supp. V 1987). The EPA has authority to grant funds to the state to carry out these inventories. *Id.* § 6933(b) (1982).

⁴¹ *See* 42 U.S.C. § 6926 (1982 & Supp. V 1987); CAL. HEALTH & SAFETY CODE § 25159 (West Supp. 1990).

⁴² CAL. HEALTH & SAFETY CODE § 25159.5 (West Supp. 1990).

⁴³ Small generators are businesses producing 100-1000 kilograms a month of hazardous waste. 42 U.S.C. § 6921(d)(1) (Supp. V 1987).

⁴⁴ *See* Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified at 42 U.S.C. §§ 6901-6991i (Supp. V 1987)). The 1984 RCRA amendments generally increased regulation of hazardous waste. The amendments required generators to certify that they minimized their waste before disposal, and required states to regulate underground tanks containing hazardous materials. *Id.* §§ 6922(b), 6991-6991g.

⁴⁵ Several other state and federal statutes increased the need for California hazard-

B. Major Provisions of the Tanner Planning Act

The Tanner Planning Act provides a comprehensive plan to manage hazardous waste within California.⁴⁶ In adopting the Act, the legislature intended to improve programs of waste source reduction while simultaneously discouraging siting of new land disposal facilities.⁴⁷ The legislature also intended to streamline the process for siting new haz-

ous waste management facilities. CERCLA provides procedures for cleaning up abandoned hazardous waste sites. *See* 42 U.S.C. §§ 9601-9657 (1982). The EPA has authorized DHS to administer CERCLA in California. *See* CAL. HEALTH & SAFETY CODE § 25159.7 (West Supp. 1990). DHS estimates that a county produces about 10% of its waste stream from cleanup of old disposal sites. DHS Technical Reference Manual, *supra* note 5, at A-16. California also has a separate state superfund authorized under the Hazardous Substance Account Act of 1981. *See* CAL. HEALTH & SAFETY CODE § 25360 (West Supp. 1990).

After November 1989, the Superfund Amendment and Reauthorization Act of 1986 (SARA), 42 U.S.C. §§ 9601-9675 (Supp. V 1987), requires each state to certify to the President that the state has adequate capacity for destruction, treatment, or disposition of all hazardous waste generated within the state for the following 20 years. *Id.* § 9604(c). States that do not comply will not receive Superfund money for remedial cleanups of hazardous waste sites. *Id.* This law will therefore influence the California Legislature's insistence on establishing hazardous waste management facilities.

The Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), 33 U.S.C. §§ 1251-1387 (1982 & Supp. V 1987), requires that any discharger of pollutants into United States waters must have a pollution discharge permit from EPA. *Id.* § 1342. Amendments enacted in 1987 will cause Publicly Owned Treatment Works to produce increased amounts of contaminated sludge. *See id.* § 1317 (Supp. V 1987). Counties must include this material in their projected quantities of new hazardous waste streams. DHS Technical Reference Manual, *supra* note 5, at E-7.

The Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2654 (1982 & Supp. V 1987), authorizes the EPA to regulate the manufacture, distribution in commerce, processing, use, or disposal of chemicals that may present an unreasonable risk to the public health or environment.

In addition, California and its counties must comply with the California Environmental Quality Act of 1970 (CEQA), CAL. PUB. RES. CODE §§ 21000-21177 (West 1986 & Supp. 1990), when preparing hazardous waste management plans. Whenever a state agency takes significant action that may adversely affect the quality of the physical environment, the agency must consider environmental consequences in its decisionmaking. *Id.* § 21000 (West 1986). Because the adoption of county hazardous waste management plans involves the exercise of governmental discretion, county agencies preparing the plans must comply with CEQA. DHS Technical Reference Manual, *supra* note 5, at L-1. At minimum, compliance requires a negative declaration (finding of no significant environmental impact from the proposed action). *Id.*

⁴⁶ *See* CAL. HEALTH & SAFETY CODE §§ 25135, 25199 (West Supp. 1990).

⁴⁷ *See id.* § 25135 & historical note; *see also* S. TANNER & L. BROWN, *supra* note 8, at 161-215 (listing recommendations to legislature from Hazardous Waste Management Council).

ardous waste management facilities while simultaneously ensuring that the facilities satisfy public health, safety, and environmental requirements.⁴⁸

The Tanner Planning Act centers on five main provisions to accomplish these general objectives. First, the Act mandates procedures for creating county and state hazardous waste management plans,⁴⁹ with an emphasis on local involvement during creation and application of the plans.⁵⁰ Second, the Act streamlines the approval process for locating new, offsite, multi-user hazardous waste management facilities.⁵¹ For example, the Office of Permit Assistance now facilitates the application process by informing the involved agencies and arranging public meetings.⁵² Third, the Act provides an administrative appeal process for land-use decisions that involve new, offsite, multi-user facilities.⁵³ The legislature intended this appeal process to act as a limited veto of local decisionmaking when politics and parochialism obstructed siting of technically and environmentally acceptable facilities.⁵⁴ Fourth, the Act provides incentives and mitigation measures to encourage counties to accept a hazardous waste facility within their area.⁵⁵ And fifth, the Act requires phasing out disposal of untreated hazardous waste at

⁴⁸ See CAL. HEALTH & SAFETY CODE § 25135 & historical note (West Supp. 1990).

⁴⁹ See *id.* §§ 25135.1-4, .9. In addition, the legislature authorized a special hazardous waste subaccount containing \$5 million to fund the preparation of county or regional hazardous waste management plans. See *id.* § 25135.8.

⁵⁰ See *id.* §§ 25135.2, .6; see also S. TANNER & L. BROWN, *supra* note 8, at 198-202, 259-64 (stating that legislature intended that early local involvement would educate the community and thus avoid the not-in-my-backyard problem).

⁵¹ See CAL. HEALTH & SAFETY CODE §§ 25199.5-7 (West Supp. 1990).

⁵² See *id.* § 25199.7 A hazardous waste facility may require numerous permits for construction and operation. See *id.* § 25199(a). Various governmental agencies at both the state and local level require permits for land-use planning, zoning, hazardous waste, air quality, water quality, and solid waste management. *Id.* The Office of Permit Assistance helps expedite the facility siting process by coordinating the needs of all these agencies. See *id.*

⁵³ See *id.* §§ 25199.9-11; see also S. TANNER & L. BROWN, *supra* note 8, at 229-46 (explaining appeal process).

⁵⁴ See S. TANNER & L. BROWN, *supra* note 8, at 229-33; see also *infra* notes 101-06 and accompanying text.

⁵⁵ Local government has the authority to tax offsite, multi-user hazardous waste facilities within its jurisdiction at a rate not to exceed 10% of the facility's annual gross receipts. CAL. HEALTH & SAFETY CODE § 25173.5 (West Supp. 1990). Hazardous waste facility operators must have proof of adequate insurance to cover any damage claims arising out of operation of the facility. *Id.* § 25200.1.

landfills.⁵⁶

C. Requirements for Preparing a County Hazardous Waste Management Plan

1. Consistency Requirements

Under the Tanner Planning Act, the County Plan will serve as the primary planning document for hazardous waste management in a county.⁵⁷ The Act requires that counties and cities adopt land-use regulations that are consistent with their County Plans.⁵⁸ Also, California planning and zoning laws will require consistency between land-use regulations and County Plans.⁵⁹ Counties that do not prepare a County Plan, or that do not have an approved County Plan, may be vulnerable to the DHS interpretation of facility siting needs as provided in the State hazardous waste management plan.⁶⁰

⁵⁶ See *supra* note 27 & 34 and accompanying text.

⁵⁷ CAL. HEALTH & SAFETY CODE § 25135(c) (West Supp. 1990). The County Plan would replace any hazardous waste provisions of the county's general plan. *Id.* § 25135.1(b).

⁵⁸ *Id.* § 25135.7(b)-(c). After approval of the County Plans, counties and cities must enact ordinances that require consistency of zoning, conditional use permits, subdivisions, and variances with the County Plan. *Id.* These land-use regulations must be consistent with the County Plan areas that identify sites for hazardous waste management facilities. *Id.*

⁵⁹ The county must incorporate the County Plan by reference into the county's general plan, or enact an ordinance which requires consistency of applicable county zoning laws with the County Plan. *Id.* § 25135.7(b). California's planning and zoning laws require consistency between a county's general plan and its zoning regulations. See CAL. GOV'T CODE § 65860 (West 1983) (describing consistency requirement). Therefore, County Plans must meet California's planning and zoning laws in order to be incorporated into the county general plan. See Heskin & Garrett, *When Planning Fails: Protecting the Neighborhood in Vested Development Rights Disputes*, 6 UCLA J. ENVTL. L. & POL'Y 159, 173-201 (1987) (discussing consistency requirements for county planning in general).

⁶⁰ See DHS Guidelines, *supra* note 3, at 1-5 to 1-6, 2-1. The Guidelines state that: The purpose of this state plan is to coordinate and enhance the [County Plans] of all 58 counties and the four COGs to ensure that statewide hazardous waste management needs are met. The statewide plan will be based on [County Plans] approved by the Department, *the Department's determination of the facility needs and general areas for siting for counties and regions lacking approved [County Plans] and on overall statewide needs.* *Id.* at 1-6 (emphasis added); see also *infra* notes 113-17 and accompanying text (describing State's Hazardous Waste Management Planning Act); *supra* note 21 and accompanying text (discussing county vulnerability).

2. Requirements for Department of Health Services Approval

DHS administers the Tanner Planning Act and has authority to reject or approve County Plans based on compliance with the statute.⁶¹ DHS has provided Guidelines to assist counties in preparing the plans and in complying with DHS's acceptance criteria.⁶² A county advisory committee prepares a County Plan.⁶³ In the plan, the county must state its present and future goals for the siting of hazardous waste facilities.⁶⁴

⁶¹ See CAL. HEALTH & SAFETY CODE § 25135.7 (West Supp. 1990).

The Tanner Planning Act sets a schedule for review and approval of the County Plans. See *id.* § 25135.6. Originally the Act required counties to submit the County Plans to DHS on or before October 1, 1988. See ch. 1504, 1986 Cal. Stat. 5389, 5400. A subsequent amendment extended this deadline to February 1, 1989. See ch. 1167, 1987 Cal. Legis. Serv. 1007, 1010 (West). Later, the legislature again extended the deadline to June 1, or September 1, 1989, depending on the stage of review. See ch. 7, 1989 Cal. Adv. Legis. Serv. 18, 19 (Deering) (codified at CAL. HEALTH & SAFETY CODE § 25135.7 (West Supp. 1990)). If DHS has sent comments on a Draft County Plan back to the county after June 30, 1988, the extended due date for the final plan could be September 1, 1989. CAL. HEALTH & SAFETY CODE § 25135.7 (West Supp. 1990). The Council of Governments had an extended deadline of September 1, 1989. *Id.* § 25135.3(g).

DHS has 6 months from the due date to approve or disapprove the plans, *i.e.*, until either November 30, 1989, or February 28, 1990. *Id.* § 25135.7.

Only one county, Kern County, submitted a plan by the original due date of October 1, 1988. Frantz telephone interview (Mar. 20, 1989), *supra* note 15. DHS rejected the plan partially because the plan endorsed the fair-share concept, which fails to consider waste generated from outside the county. *Id.*

On November 30, 1989, DHS issued decisions on 18 plans, disapproving 16 and approving 2 (Tulare County and Los Angeles County). *Id.* (Feb. 23, 1990). Shortly thereafter, DHS additionally approved the Ventura County Plan. *Id.* DHS disapproved 16 of the plans because they contained "fair share" language and therefore did not follow DHS criteria. Telephone interview with Pam Milligan, CSAC Legislative Analyst (Dec. 18, 1989) (transcript available at U.C. Davis Law Review).

On February 28, 1990, DHS will issue decisions on the other County Plans that have been submitted. Frantz telephone interview (Feb. 23, 1990), *supra* note 15. Because some counties have not submitted plans, and other counties submitted plans after the due date, DHS will not have decisions on plans for all 58 counties by February 28. *Id.*

⁶² See *infra* notes 75-77 & 83 (explaining DHS criteria and guideline requirements).

⁶³ See CAL. HEALTH & SAFETY CODE § 25135.2 (West Supp. 1990). The functions of the advisory committee include advising county staff and holding informal public meetings and workshops. *Id.* The committee consists of at least seven members, including one each from industry and an environmental organization, and a public representative. *Id.*

⁶⁴ *Id.* § 25135.1(d)(7). The county shall project for hazardous waste management through the year 2000. *Id.*

The County Plan must describe the county's current hazardous waste management practices and determine the net amount of hazardous waste that requires treatment.⁶⁵ The County Plan also must identify specific locations, or site criteria, where a county could accommodate treatment facilities by appropriate zoning.⁶⁶ Finally, a majority of the cities that contain the majority of the county's population must approve the plan.⁶⁷ After fulfilling the above requirements, the county must seek DHS approval.⁶⁸

3. Regional Plans

Additionally, DHS will approve regional plans prepared by councils of governments (COGs).⁶⁹ The Act specifically recognizes four COGs that may prepare regional hazardous waste management plans.⁷⁰ The Act requires the COG to prepare its plan consistently with DHS Guidelines and to consult with other counties in the region during the plan's preparation.⁷¹ In addition, the COG must allow public participa-

⁶⁵ *Id.* § 25135.1(d)(1)-(2). This includes an analysis of hazardous waste streams generated in the county and a description of the existing hazardous waste facilities and their current capacity. *Id.* The Act also requires counties to evaluate potential for source reduction and to evaluate hazardous waste produced by small businesses and households. *Id.* § 25135.1(d)(3)-(4).

⁶⁶ *Id.* § 25135.1(d)(6) (stating that County Plan must identify current hazardous waste sites that could accommodate projected needs by expansion, identify general areas for new facilities, or provide siting criteria and designate general locations where the criteria apply); *see also supra* notes 58-59 and accompanying text.

⁶⁷ *Id.* § 25135.6(f).

⁶⁸ *Id.* § 25135.7.

⁶⁹ *Id.* § 25135.3.

⁷⁰ The Act describes procedures for establishing regional hazardous waste management plans by the Association of Bay Area Governments, the Southern California Association of Governments, the Sacramento Area Council of Governments, and the Association of Monterey Bay Area Governments. *See id.* If the counties in the Southern California Association create a Southern California Hazardous Waste Management Authority under a joint powers agreement, the Southern California Association shall transfer its responsibilities and funding to the Authority. *Id.* § 25135.3(i). Despite five years of effort, the Southern California counties have not established a joint powers agreement, indicating the difficulty counties have in voluntarily creating such agreements. Frantz telephone interview, (Mar. 20, 1989), *supra* note 15; *see also* S. TANNER & L. BROWN, *supra* note 8, at 104-07 (describing council of governments efforts to address regional hazardous waste issues); *infra* note 178 and accompanying text (discussing joint powers agreement).

⁷¹ CAL. HEALTH & SAFETY CODE § 25135.3(g) (West Supp. 1990); *see also* DHS Guidelines, *supra* note 3, at 2-1 to 2-2.

tion.⁷² The regional plan's general purpose is to encourage and coordinate intercounty agreements that will identify locations for regionally sized hazardous waste facilities.⁷³ Specifically, a regional plan serves as a resource document to help identify hazardous waste management issues and needs at the regional level.⁷⁴

4. DHS Guidelines

Under the Tanner Planning Act, DHS must assist counties and regional councils by providing direction and technical data.⁷⁵ To this end, in 1987 DHS issued Guidelines for the Preparation of Hazardous Waste Management Plans (Guidelines) to counties and regional councils.⁷⁶ Although DHS describes the Guidelines as advisory, DHS will approve the County Plans based on compliance with specific criteria in the Guidelines.⁷⁷ The DHS criteria expressly provide that waste stream management planning includes planning for waste imported into the county.⁷⁸

II. STATUTORY CONSTRUCTION OF THE TANNER PLANNING ACT AND WASTE-STREAM MANAGEMENT

Because the Tanner Planning Act does not specifically define the scope of waste-stream management, DHS and California counties have

⁷² CAL. HEALTH & SAFETY CODE § 25135.3(b) (West Supp. 1990).

⁷³ See DHS Guidelines, *supra* note 3, at 2-2.

⁷⁴ CAL. HEALTH & SAFETY CODE § 25135.3 (West Supp. 1990).

⁷⁵ *Id.* § 25135.5(a).

⁷⁶ See DHS Guidelines, *supra* note 3. The Tanner Planning Act requires DHS to provide guidelines to help counties and regional governments prepare and adopt their hazardous waste management plans. CAL. HEALTH & SAFETY CODE § 25135.5(b) (West Supp. 1990). DHS was required to conduct workshops with county and city government officials, industry, and environmental representatives before preparing Guidelines. See *id.* The Act exempts the guidelines from compliance with the California Administrative Procedure Act (APA). *Id.* Therefore, DHS did not have to consider the guidelines as regulations and did not have to satisfy hearing and notice provisions of the APA. DHS provided Guidelines by June 30, 1987, as the Act required. See *id.*

In addition, DHS wrote the Technical Reference Manual to supplement the DHS Guidelines. See DHS Technical Reference Manual, *supra* note 5. The Guidelines manifest DHS's interpretation of the Act and indicate how DHS construed the Act to define hazardous waste stream analysis. Therefore, this Comment refers to the Guidelines as DHS's interpretation of the Act.

⁷⁷ See DHS Guidelines, *supra* note 3, at 1-4, 2-11 to 2-14; see also *infra* note 83 (discussing DHS criteria).

⁷⁸ See *infra* note 83 and accompanying text.

been free to create contradictory interpretations.⁷⁹ The Act creates ambiguity by requiring counties to manage hazardous waste generated within the county, while also stating that the legislature intended to implement a comprehensive hazardous waste management plan.⁸⁰ Comprehensive planning necessarily implies that counties should consider regional waste streams.⁸¹ This Section applies rules of statutory construction to determine whether the DHS's or the counties' interpretation is more reasonable and more consistent with the language of the statute and legislative intent.⁸²

A. *DHS's Interpretation of Regional Waste-Stream Management*

A key DHS guideline states that counties must consider imported hazardous waste in waste-stream analysis.⁸³ The Tanner Planning Act, however, does not expressly require counties to calculate waste streams

⁷⁹ DHS does define the content of waste streams, but this does not indicate the scope of meaning or responsibility for management. *See supra* note 11. The controversy centers on the Act's wording and intention as to waste-stream management responsibilities. In the absence of express definition of this responsibility, inquiry into the Act's plain meaning may reveal the legislature's intent. *See* 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45.05 (4th ed. 1984). The plain meaning rule allows reference to custom, usage, convention, and the intent of the legislature to resolve conflicts where words are ambiguous. *Id.* § 45.02.

⁸⁰ *See* CAL. HEALTH & SAFETY CODE § 25135(b), (d) (West Supp. 1990).

⁸¹ *See infra* notes 89-97.

⁸² *See* 2A N. SINGER, *supra* note 82, § 45.12. The law favors statutory construction that is rational and consistent with the legislature's purposes over interpretations that produce unreasonable results. Therefore, courts will interpret statutes based on a presumption that the legislature acted reasonably. *Id.*; *see also id.* § 57.03, at 644, § 57.04, at 650 (explaining that courts will apply construction that best effects purpose of the statute, thus courts may inquire into the purpose behind the enactment or, based on grounds of policy and reasonableness, or the language used, courts may imply legislative intent).

DHS does not have to comply with the APA's standards of construction when writing the DHS guidelines. *See supra* note 76. However, DHS must satisfy judicial rules of statutory construction when construing the Act to interpret the Act's language.

⁸³ *See* DHS Guidelines, *supra* note 3, at 2-12, 3-5. The DHS Guidelines list 24 criteria that a county must comply with to receive DHS approval of a County Plan. *See id.* at 2-11 to 2-14. Criterion number 13 requires that the County Plan contain "a clear tabulation of all wastes that are imported . . . from other counties and states." *Id.* at 2-12. Additionally, the DHS Technical Reference Manual requires that counties calculate the quantity of hazardous waste imported into the county. *See* DHS Technical Reference Manual, *supra* note 5, at E-3 to E-4; *see also id.* at E1 to E7 (describing methodology to site new facilities or expand existing facilities, including quantification of imported hazardous waste); *supra* note 11 (explaining method of calculating hazardous waste capacity need).

according to the DHS definition.⁸⁴ This conflict justifies an inquiry into whether the DHS's interpretation reasonably effects the Act's purpose.

1. Express Language Suggesting Regional Facility Siting

The Tanner Planning Act requires DHS to provide hazardous waste information to counties so that they may characterize the hazardous waste in their own jurisdictions or regions.⁸⁵ In addition, when a county denies a land-use permit for a waste facility, an appeals board may not reverse the decision unless the facility proponent has met all statewide, regional, and county hazardous waste management policies and objectives.⁸⁶ From this language, DHS could reasonably construe the statute as requiring counties to account for siting of regional hazardous waste facilities.⁸⁷ This suggests that DHS reasonably followed the Act when writing its Guidelines.⁸⁸

2. Legislative Intent and History Indicating Regional Planning

Legislative intent described in the Tanner Planning Act also implies that counties should provide for regional hazardous waste when pre-

⁸⁴ See *supra* notes 79-80 and accompanying text. The Act allows DHS discretion in establishing the guidelines. See CAL. HEALTH & SAFETY CODE § 25135.5 (West Supp. 1990). This section states that the guidelines "shall include, but are not limited to, all of the following." *Id.* The section lists the minimum guideline requirements, but because the list is not exhaustive, DHS has some administrative discretion in adding further conditions. County Plans must comply substantially with the Guidelines. *Id.* § 25135.7(a)(1).

⁸⁵ *Id.* § 25135.5(b). DHS must provide methods to counties and COGs so that they can determine current hazardous waste management capacity and can assess the need for new capacity in each county or region. *Id.* § 25135.5(b)(1)(B)-(C). DHS must also furnish counties with an "assessment of overall needed capacities for treating and disposing of hazardous wastes at the state and regional levels." *Id.* § 25135.5(b)(2)(D).

⁸⁶ *Id.* § 25199.11(f)(5).

⁸⁷ See DHS Guidelines, *supra* note 3, at 3-1 to 3-2. DHS states that County Plans should refer to the Act's directive to develop siting capacity to meet multicounty hazardous waste management needs. *Id.* at 3-1. The Act directs counties to acknowledge responsibility in meeting "a portion of overall statewide capacity needs." *Id.* Also, DHS states that under § 25135.5, § 25135.7, and § 25199.11(f)(5) of the CAL. HEALTH & SAFETY CODE, counties' management goals must be consistent with statewide and regional hazardous waste management goals concerning type, need, and location of hazardous waste facilities. DHS Guidelines, *supra* note 3, at 3-2. Therefore, County Plans should address a wide range of types and sizes of hazardous waste management facilities. *Id.*

⁸⁸ See *supra* notes 75-76.

paring their County Plans.⁸⁹ The legislature declared that it intended the Act to establish a comprehensive planning process for developing safe and effective solutions to the problems of hazardous waste management.⁹⁰ The legislature recognized that the public health, the environment, and the economic growth of California all depend on the immediate and responsible management of hazardous wastes.⁹¹ To achieve these objectives, the legislature intended that counties integrate the County Plans with other land-use planning programs to ensure suitable locations for needed hazardous waste facilities.⁹² DHS reasonably inferred that needed facilities included regional facilities because safe, effective solutions include resolving statewide and regional waste management problems.⁹³

Legislative history derived from the Hazardous Waste Management Council's recommendations further supports the DHS interpretation and Guidelines.⁹⁴ The Council recommended that counties should address the siting of hazardous waste management facilities that serve multicounty regions.⁹⁵ In addition, a 1986 assembly report indicated that the Act would help to ensure adequate treatment and disposal capacity for hazardous wastes generated throughout California.⁹⁶ These legislative recommendations suggest that counties should consider imported hazardous wastes when assessing the need for new, offsite facilities.⁹⁷

⁸⁹ See, e.g., CAL. HEALTH & SAFETY CODE § 25135 historical note (West Supp. 1990) (stating that "local facility siting decisions may not adequately consider the waste management needs of the region or of the state").

⁹⁰ *Id.* § 25135(d).

⁹¹ *Id.* § 25135(a)(5) & historical note.

⁹² *Id.* § 25135(c).

⁹³ See text accompanying notes 90-92.

⁹⁴ For discussion of the Hazardous Waste Management Council, see *supra* notes 30-32 and accompanying text. Courts may refer to reports of a special investigative committee when construing statutes enacted in accord with the committee's recommendations. 2A N. SINGER, *supra* note 82, § 48.07.

⁹⁵ See S. TANNER & L. BROWN, *supra* note 8, at 189-90. Recommendation 32 suggests that counties consider the siting of facilities based on statewide and regional assessments of overall needed capacities for treatment and disposal. *Id.* at 189. Recommendation 33 suggests that counties plan for regional treatment or disposal facilities. *Id.* at 190. The Council commented that counties should voluntarily plan for regional facilities. *Id.*

⁹⁶ See TURNING OFF TOXICS, *supra* note 24, at 14.

⁹⁷ See *supra* note 83 and accompanying text (indicating that DHS adopted this view).

3. Overall Construction of the Act Supporting Regional Siting

In general, the California Legislature enacted the Tanner Planning Act to prevent a hazardous waste crisis.⁹⁸ The legislature sought to achieve this goal by eliminating “not in my backyard” attitudes and other problematic public opposition by increasing public awareness of California’s hazardous waste problems.⁹⁹ Arguably, the DHS Guidelines further the public’s appreciation of the waste problem by requiring counties to plan for regional facilities. Planning for regional facilities is a high-profile intergovernmental process. Moreover, the Act specifically requires public hearings.¹⁰⁰ Consequently, a regional approach will inform the public about the problems of imported waste and the statewide needs for improved waste management.

Because local communities may unreasonably oppose a technically safe hazardous waste facility, the legislature included only a limited appeal process in the Tanner Planning Act.¹⁰¹ The composition of the appeals board suggests that the legislature anticipated the counties’ opposition to regional hazardous waste management facilities.¹⁰² The in-

⁹⁸ See CAL. HEALTH & SAFETY CODE § 25135 & historical note (West Supp. 1990); TURNING OFF TOXICS, *supra* note 24, at 7-10. When genuine uncertainty exists as to a statute’s application, statutory analysis should include a consideration of the problem in society to which the legislature addressed itself. 2A N. SINGER, *supra* note 82, § 45.02, at 5.

⁹⁹ The Act requires public involvement during the planning of County Plans and during the siting process of new hazardous waste facilities. See CAL. HEALTH & SAFETY CODE §§ 25135.2, 25199.7 (West Supp. 1990). Local citizens participate in the facility siting process through hearings and notices to instill public confidence in the project. See *id.* § 25135(a)(4), (b); see also S. TANNER & L. BROWN, *supra* note 8, at 67 (stating that public’s trust in government and industry would improve if information to the public increased, thereby enabling successful siting of hazardous waste facilities); *id.* at 198-202 (discussing public education on hazardous waste management); Tarlock, *Siting New or Expanded Treatment, Storage, or Disposal Facilities: The Pigs in the Parlors of the 1980s*, 17 NAT. RESOURCES LAW. 429, 452-56 (1984) (discussing public participation in siting decisions).

¹⁰⁰ See *supra* note 99.

¹⁰¹ See CAL. HEALTH & SAFETY CODE §§ 25199.9-.11 (West Supp. 1990); see also *id.* § 25135 historical note (expressing need to establish procedures to appeal local rejection of needed, technically and environmentally sound hazardous waste facilities). A developer may appeal to the Governor when an unfavorable land-use decision prohibits the siting of new, offsite, multi-user facilities. *Id.* §§ 25199.9-.10. The appeal process applies to new, multi-user, offsite facilities or significant expansions of existing offsite, multi-user facilities. See *id.* § 25199.1(b), (m) (providing definitions of these terms).

¹⁰² See § 25199.10. The appeal board consists of seven members, including: the State Director of DHS, the Chairperson of the Air Resources Board, the Chairperson of the

clusion of statewide representation on the board implies that the legislature intended counties to accept waste regionally, as DHS contends.¹⁰³

Although the appeal process helps an applicant to protest a denied permit, the process presumptively favors the county.¹⁰⁴ The applicant has the burden to show that the proposed project satisfies requirements for siting of new facilities.¹⁰⁵ Because the appeal process protects the county from unsafe and unnecessary facilities,¹⁰⁶ DHS's construction of the Act does not create an unjust or unworkable result.

Other reasonable inferences derived from the Tanner Planning Act involve the economics of operating hazardous waste facilities and the realistic expectation that counties will export or import waste.¹⁰⁷ The Act assumes that private industry will develop the necessary management facilities.¹⁰⁸ Developers will not find it economical to construct facilities in remote counties that produce limited amounts of waste.¹⁰⁹ Furthermore, construction of facilities in every county increases cost and the risk of an accident.¹¹⁰ The DHS interpretation recognizes that some counties will not have certain types of treatment facilities available and will export waste to other counties.¹¹¹ Therefore, other counties

Water Resources Control Board, two members of county boards of supervisors (one from the county locating the new facility), and two members of city councils (one from the city locating the new facility). *Id.*

¹⁰³ See Lennard & Labadie, *supra* note 19, at 27 (stating that composition of appeal board suggests legislature believed facility siting constituted more than a local land-use issue).

¹⁰⁴ See CAL. HEALTH & SAFETY CODE § 25199.11(d) (West Supp. 1990) (mandating that appeal board adopt rebuttable presumption that local agency has supported its land use decision with substantial reasons and allotting to proponent the burden to rebut with compelling reasons).

¹⁰⁵ *Id.*; see also S. TANNER & L. BROWN, *supra* note 8, at 237 (recommending that proponents of facilities have burden of persuading appeal board that state interests outweigh local reasons for rejection). For a list of findings the appeal board must reach to reverse a local agency's land use decision, see CAL. HEALTH & SAFETY CODE § 25199.11(f) (West Supp. 1990).

¹⁰⁶ See CAL. HEALTH & SAFETY CODE § 25199.11(f)(5) (West Supp. 1990). The proponent of the facility must demonstrate a need for the new, offsite, multi-user facility and that the facility project conforms to state, regional, and county hazardous waste management policies, while using the best feasible technology. *Id.*

¹⁰⁷ See *NIMBY Squared*, *supra* note 7 (stating that unlike conventional garbage dumps, construction and operation of hazardous waste facilities is not paid for by counties).

¹⁰⁸ See *id.* (stating that Tanner Planning Act assumes private industry will pay for development and operation of hazardous waste facilities as profit making enterprises).

¹⁰⁹ See *id.*

¹¹⁰ *Id.*

¹¹¹ See DHS Guidelines, *supra* note 3, at 3-5; see also S. TANNER & L. BROWN,

will be importing waste and operating regional facilities. DHS's view of waste-stream analysis accommodates this result.

4. Reference to Related Statutes Concerning Hazardous Waste Management

Related statutes of similar legislative history and substance furnish relevant information for interpreting an act.¹¹² As noted above, the State Hazardous Waste Plan (State Plan)¹¹³ directly relates to the Tanner

supra note 8, at 79-85; SACRAMENTO COUNTY ENVTL. MANAGEMENT DEP'T & SACRAMENTO COUNTY PLANNING AND COMMUNITY DEV. DEP'T, SACRAMENTO COUNTY HAZARDOUS WASTE MANAGEMENT PLAN 5-36 to 5-47 (1989). Sacramento County's current exports and imports of hazardous waste involve Sacramento, Alameda, Contra Costa, Fresno, Kings, Los Angeles, San Mateo, Sonoma, Stanislaus, and Yuba Counties. *Id.*

¹¹² See 2A N. SINGER, *supra* note 82, chs. 51-53. Courts should construe statutes involving the same subject matter together. *Id.* § 51.02, at 453. Also, courts find great interpretative value in considering together similar statutes that have been enacted on the same day. *See id.* § 51.03, at 469.

Additionally, when a court interprets state law, it may refer to related federal laws. *See id.* § 51.06, at 510-11. Presuming that state legislatures consider existing federal statutes when enacting laws, courts may construe together state and federal statutes that contain similar objectives and subject matter. *Id.*; *see also* CAL. HEALTH & SAFETY CODE § 25159.5 (West Supp. 1990) (requiring coordination of state regulations with federal regulations).

RCRA and SARA impact state hazardous waste management, and DHS refers to these federal laws in its Guidelines. *See* DHS Guidelines, *supra* note 3, at 1-1 to 1-2. DHS recognizes that RCRA insists on improvements in hazardous waste management and creates a need for new types of waste management facilities. *Id.* However, other than requiring data on the waste generated, RCRA does not regulate siting locations for hazardous waste facilities. *See* 2 J. BATTLE, *supra* note 37, at 310-11; Tarlock, *supra* note 99, at 431-32; *see also* M. GREENBERG & R. ANDERSON, *supra* note 6, at 186-87 (recognizing that burden of finding sites has shifted to states).

Courts will not presume the state knows of "pending" congressional intent. *See* 2A N. SINGER, *supra* note 82, § 51.06. Therefore, courts will not base state law interpretation on subsequently enacted federal statutes. *Id.* Since the Tanner Planning Act was passed before SARA, courts should not interpret the Act by analyzing SARA. However, courts would prefer an interpretation that produces a result consistent with SARA. *See id.*

¹¹³ *See* CAL. HEALTH & SAFETY CODE § 25135.9 (West Supp. 1990) (requiring DHS to adopt plan). The State Plan serves as a comprehensive planning document for the State and as an informational source for the public, local governments, and regional COGs. *Id.* § 25135.9(a). The Plan must include an assessment of the present and future hazardous waste management needs and facilities in the state. *Id.* § 25135.9(d). DHS shall identify areas or regions of the state that need additional facilities to manage hazardous wastes. *Id.* § 25135.9(d)(4).

Planning Act.¹¹⁴ The State Plan identifies areas of the State that need additional hazardous waste management facilities based on a statewide hazardous waste stream analysis.¹¹⁵ DHS prepares the State Plan and must coordinate it with the County Plans.¹¹⁶ DHS could reasonably infer that the legislature intended that counties plan for regional hazardous waste facilities, because such planning would facilitate preparation of the State Plan.¹¹⁷

Finally, rules of statutory construction allow consideration of other related state laws that the legislature referred to when enacting a statute.¹¹⁸ Before recommending a California hazardous waste management plan to the legislature, the Hazardous Waste Management Council investigated other states that initiated hazardous waste management programs.¹¹⁹ This study revealed that no states required local hazardous

¹¹⁴ The Tanner Planning Act and the State Hazardous Waste Planning Act both contain the same subject matter, *i.e.*, planning hazardous waste management. Compare CAL. HEALTH & SAFETY CODE § 25135-25135.8 (West Supp. 1990) with *id.* § 25135.9. Also, the legislature enacted both acts within the same article and on the same day, inferring that the two plans relate to each other. See *supra* note 112 and accompanying text.

¹¹⁵ CAL. HEALTH & SAFETY CODE § 25135.9(d) (West Supp. 1990).

¹¹⁶ *Id.* § 25135.9(a). DHS will base statewide planning on the approved County Plans. DHS Guidelines, *supra* note 3, at 1-6, 2-1. DHS also will determine statewide facility siting based on overall state needs, especially in areas lacking County Plans. *Id.*

¹¹⁷ See DHS Guidelines, *supra* note 3, at 1-5 (noting that coordination of County Plans will help prepare State Plan). DHS states in the Guidelines that counties within regions should work together to develop coordinated, mutually supportive, and consistent County Plans to facilitate preparation of the State Plan. *Id.* Counties could avoid potential state preemption of local land use control by including regional capacity needs in their County Plans with which DHS could coordinate the State Plan.

¹¹⁸ See 2A N. SINGER, *supra* note 82, §§ 52.01-.05.

¹¹⁹ See S. TANNER & L. BROWN, *supra* note 8, at 139-55. The Council studied seven state statutes and experiences to learn the best management methods. *Id.* at 139. The Council classified the seven state models into four siting categories: 1) state preemption of local decisionmaking authority (Arizona, Minnesota, New York); 2) state override of local decisions — appeal processes (Connecticut, Florida); 3) decisionmaking authority shared by local and state government (Illinois and prior California process); and 4) negotiated settlement between the developer and the local community (Massachusetts). *Id.* at 139-42.

Minnesota exemplifies the preemptive process. *Id.* at 140. The Minnesota Legislature mandated its hazardous waste siting board to locate six suitable sites within the state. *Id.* at 146. The site selection process involves intensive public participation, but the board makes the siting decision. *Id.* at 147. The board does not need local approval. *Id.*

Connecticut uses a state override method. *Id.* at 140. Connecticut developed a quasi-public statewide board that surveys statewide waste streams and inventories sites. *Id.* at 148. The legislature mandated the board to locate a site that the State can either lease

waste management plans.¹²⁰ The Council drew inferences from this study and suggested a unique solution to hazardous waste management that centered on statewide county planning.¹²¹

The Council's study and resulting recommendations informed the legislature of the importance of public participation in the siting process.¹²² The study also pointed out the difficulties states had in siting large hazardous waste facilities.¹²³ From the study, the Council concluded that an appeal process seemed preferable over State preemption, even though the majority of states used preemption.¹²⁴ Finally, the Council recommended that local governments should have the major responsibility for future hazardous waste management.¹²⁵ This implies

to a developer or operate itself. *Id.* The Council commented that Connecticut exemplified a trend of more aggressive state role in site selection, facility ownership, and operation because the private sector had not participated in these activities. *Id.* In Florida the Governor now decides land use appeals. *Id.* at 147. Florida developers were not applying for construction permits because they doubted that regional planning councils would override local land use decisions. *Id.* Florida law changed to encourage developers to build facilities. *See id.* at 147-48.

Illinois has a two-part siting process that shares siting authority. *Id.* at 149. The local jurisdiction reviews the proposed location, and the Illinois EPA directs technical review of the proposal. *Id.*

¹²⁰ *See id.* at 139-55. Apparently the states did not confront a waste stream management controversy, because their statutes did not provide for state regions to prepare facility needs assessments or potential site locations. *See id.*

¹²¹ *See id.* at 161-246 (presenting Council's 79 recommendations to legislature for state hazardous waste management plan).

¹²² *See id.* at 67 & 154. The Council recognized that no matter what the type of siting mechanism, the public's complaints and concerns remained substantially unchanged as to hazardous waste facility siting in their neighborhoods. *Id.* at 152. Massachusetts encouraged developers and communities to settle on facility siting agreements through open negotiation. *See id.* at 142-43. A local assessment committee represented the jurisdiction in the negotiations. *Id.* at 143. If the parties reached an impasse, the Hazardous Waste Facility Siting Council appointed an Arbitration Board to act as arbitrator. *Id.* At the time of the Council's investigation, four developers had entered proposals, but three developers withdrew because of public opposition. *Id.* This indicated that public opposition remained an effective obstacle to siting. *See id.* at 143-44.

¹²³ *See id.* at 144, 146 & 155. New York State officials chose a site for a large, advanced treatment facility, but met intense public opposition which defeated the proposal. *Id.* at 145. The Council noted that New York failed to include the public in the selection process and that citizens later focused on this during the opposition campaign. *Id.*

¹²⁴ *See id.* at 7-8 & 15-16. Of the 28 states that had siting laws in 1984, 19 used preemption to resolve siting impasses. *See id.* at 150-51. The Council commented that several states using preemption methods were changing to state-owned hazardous waste management facilities. *Id.* at 152.

¹²⁵ *See id.* at 17-24 (recommending that in creating comprehensive planning process,

that the Council intended counties to assume responsibility for siting regional hazardous waste facilities.

In summary, as long as DHS has reasonably interpreted its duties under the Tanner Planning Act, courts will probably uphold the DHS view.¹²⁶ DHS's interpretation appears reasonable since it promotes a comprehensive hazardous waste management plan,¹²⁷ encourages consistency between the County Plans and the State Plan,¹²⁸ and furthers compliance with current federal hazardous waste management laws.¹²⁹ The DHS interpretation, however, may stir local opposition if a community perceives the DHS Guidelines as preempting local authority and forcing unwanted facilities.¹³⁰ The following analysis of the counties' interpretation of the Act will discuss why counties disagree with DHS.

B. Counties' Interpretation of Waste Streams and Fair-Share Management

Counties interpret the Tanner Planning Act as requiring a "fair-share"¹³¹ concept for management of hazardous waste. Counties claim

local governments have major responsibilities to plan sites for future hazardous waste management facilities, via County Plans).

¹²⁶ See *supra* notes 79, 82 & 112 (describing judicial requirements for statutory construction); see also *Lockard v. City of Los Angeles*, 33 Cal. 2d 453, 462, 202 P.2d 38, 43 (1949) (holding that courts will defer to statutorily authorized agency that acts like or for legislature).

¹²⁷ See *supra* notes 90-93 and accompanying text.

¹²⁸ See *supra* notes 114-17 and accompanying text.

¹²⁹ See *supra* note 112 and accompanying text.

¹³⁰ See *supra* note 19 and accompanying text.

¹³¹ See CSAC, Press Release, *supra* note 23, attachment C, attachment 1. According to CSAC, "fair share" means "that each county is responsible for the disposition of its own waste. . . . A county cannot be required to accept a facility with a capacity that exceeds the county's own needs, except as provided by an inter-jurisdictional agreement." *Id.*; see also *infra* notes 134-36 and accompanying text (defining fair-share language in Act).

By January 11, 1989, 41 counties had adopted CSAC's fair-share policy. CSAC, Press Release, *supra* note 23, attachment D. San Francisco and Los Angeles counties do not necessarily support the other counties in the fair-share concept. Telephone interview with DeAnn Baker, CSAC Legislative Analyst [hereafter Baker telephone interview] (Jan. 12, 1989) (transcript available at U.C. Davis Law Review). San Francisco and Los Angeles Counties may not want to adopt a fair-share concept because of difficulties inherent in treating all of the waste within their counties. *Id.* These two counties produce large quantities of hazardous waste, which they mostly export. *Id.* Baker emphasized that the other counties' main objections to the DHS Guidelines involve the fair-share concept and siting criteria. *Id.*

that DHS criteria contradict the fair-share principle and go beyond the authority of the Act by including imported waste in the waste stream management requirements.¹³²

1. Express Language and the Fair-Share Concept

The language in several sections of the Tanner Planning Act supports the counties' interpretation of hazardous waste stream management and the fair-share concept. These sections provide that each county shall analyze and manage hazardous waste produced within its jurisdiction.¹³³ The counties' may reasonably conclude that each County

¹³² See TCP Policies on Source Reduction, *supra* note 8, at 12-13 (stating that CSAC and Local Government Commission both believe that DHS Guidelines violate fair-share principle); CSAC Press Release, *supra* note 23 (announcing that DHS Guidelines prohibit counties from limiting size or type of facilities counties can site in their areas); CSAC, Tanner Background Paper, *supra* note 17 (stating that DHS Guidelines for County Plans go beyond intent of Act and strip local governments of basic land use authority).

TCP recommends toxic waste reduction and provides assistance to communities developing County Plans. See TCP Policies on Source Reduction, *supra* note 8, at 1-11. TCP published its own guidelines to help counties prepare County Plans pursuant to the Act and in accord with CSAC's fair-share concept. See *id.* at 1. Recognizing that DHS will probably disapprove the County Plans if counties ignore the DHS Guidelines, CSAC and TCP advocate that counties and cities band together against DHS. *Id.* at 13; see also CSAC, Tanner Background Paper, *supra* note 17, attachments B & C (summarizing CSAC and taskforce meetings on hazardous waste plans).

At a CSAC Summit Meeting on June 15, 1988, CSAC established the Tanner/Hazardous Waste Task Force. See *id.*, attachment B. The Task Force, a coalition of county representatives most affected by the DHS Guidelines, will address matters concerning DHS's legal authority, resolutions requesting DHS to clarify the intent of its Guidelines, and coordination strategy. *Id.*

¹³³ CAL. HEALTH & SAFETY CODE §§ 25135.1(d)-(e), 25135.5(a), 25135.7(a) (West Supp. 1990). The County Plan shall include:

- (1) An analysis of the hazardous waste stream generated in the county, including an accounting of the volumes of hazardous wastes produced in the county. . . .
- (2) A description of the existing hazardous waste facilities which treat, handle, recycle, and dispose of the hazardous wastes produced in the county. . . .
- (3) An analysis of the potential in the county for recycling hazardous waste and for reducing the volume and hazard of hazardous waste at the source of generation.

Id. § 25135.1(d). Further, "a county may include a description of any additional local programs which the county determines to be necessary to provide for the proper management of hazardous waste produced in the county." *Id.* § 25135.1(e). Also, DHS shall assist counties in preparing for "the management of hazardous wastes produced within their jurisdictions." *Id.* § 25135.5(a). Finally, the Act requires that the County

Plan must only describe planning for waste generated within that county.

2. Legislative Intent and History Describing Fair-Share Principles

The legislature expressly described the fair-share principle within the Tanner Planning Act and declared that local management planning should accommodate hazardous waste generated within the local government's jurisdiction.¹³⁴ Moreover, the legislature intended all local communities to share the burden of hazardous waste management.¹³⁵ For example, the Hazardous Waste Management Council's recommendations suggest that a fair-share principle be applied to hazardous waste management.¹³⁶ Consequently, counties reasonably inferred that the legislature intended local-level planning to include only locally generated hazardous waste.

Plan "appl[y] the methods, techniques, and policies established by the department to analyze the waste stream and to determine whether there is a need for additional or expanded hazardous waste facilities to safely manage and properly dispose of the hazardous waste generated within the county." *Id.* § 25135.7(a)(2).

¹³⁴ *See id.* § 25135(b)-(c) & historical note. The legislature declared that local level hazardous waste management planning "is consistent with the responsibility of local governments to assure that adequate treatment and disposal capacity is available to manage hazardous wastes generated within their jurisdictions." *Id.* § 25135(b). The legislature intended that the hazardous waste management plans prepared pursuant to the Act would serve as the primary planning document for hazardous waste management at the local level. *Id.* § 25135(c).

¹³⁵ *See* ch. 1540, 1986 Cal. Stat. 5389, 5391. The legislature implicitly adopts the fair-share principle by stating that:

[A]ll Californians must share in the responsibility for finding safe and effective solutions to the management and disposal of hazardous wastes.

. . . .

Even though suitable sites for treatment and disposal facilities may be limited, it is necessary that all local communities in the state be willing to share the burden of hazardous waste management.

Id. Siting of hazardous waste management facilities creates intense controversy because the host community bears proportionately larger environmental and health costs than the overall community. *See* Lewis, *supra* note 7, at 24-25. The counties' fair-share concept results from this high-cost, low-benefit aspect of hazardous waste facilities. *See id.* at 25. Communities realize the importance of hazardous waste management, but will only accept the responsibility when everyone shares the burden. *See id.*

¹³⁶ *See* S. TANNER & L. BROWN, *supra* note 8, at 182. The Council's policy statement asserts that the local governments shall have the responsibility to assure adequate hazardous waste management within their jurisdictions. *Id.* Recommendation 16 requires the County Plans to address all local hazardous waste management concerns and programs. *Id.* at 183.

3. Overall Construction of the Act and the Counties' Management Role

The Tanner Planning Act's overall construction suggests that the legislature intended counties to possess a dominant role in the siting process.¹³⁷ The Council's report supports this proposition because the report recommendations emphasized the importance of local government participation in hazardous waste management.¹³⁸

Additionally, the Council rejected a state preemption approach to facility siting.¹³⁹ This upholds the counties' argument that the DHS view contradicts legislative intent because the DHS Guidelines could arguably cause state preemption.¹⁴⁰ Preemption could result when a County

¹³⁷ See CAL. HEALTH & SAFETY CODE §§ 25135(c), (d), (b)-(c), 25199.5, .7 (West Supp. 1990). The Act gives counties or local agencies the duties of preparing and implementing the County Plans and of negotiating siting agreements with developers. See *id.* Counties have the responsibility to determine site location because the County Plan will serve as the primary planning document for hazardous waste management. *Id.* §§ 25135(c), (d). The County Plans must identify general areas for locating the necessary offsite, multi-user hazardous waste facilities, as determined from the county's waste stream analysis and capacity assessment. *Id.* § 25135.1(d). Finally, counties and cities must make the County Plan consistent with their general plans, zoning, and land use laws. *Id.* § 25135.7(b)-(c).

During the pre-application phase of the siting process, a local agency determines consistency of the proposed hazardous waste facility project with the County Plan, the general plan, and local zoning. *Id.* § 25199.5. The local agency's decision binds the county or city unless new information arises to change the decision. *Id.* § 25199.5(c); Lennard & Labadie, *supra* note 19, at 24. During the actual siting agreement, a local assessment committee negotiates with the project proponent to determine terms and conditions for the project's approval. See CAL. HEALTH & SAFETY CODE § 25199.7 (West Supp. 1990). The local assessment committee represents local government and community interest and advises the local legislative body on the project's consideration for approval. *Id.* After the project is approved by the local legislative body, DHS and other affected state agencies may issue permits. See *supra* note 36 and accompanying text. The above process suggests that the legislature intended a siting process very dependent on local decisionmaking.

¹³⁸ See S. TANNER & L. BROWN, *supra* note 8, at 67, 154, 161-85 & 198-202; see also *supra* notes 119-24 and accompanying text (discussing Council's investigation of other state statutes).

¹³⁹ See S. TANNER & L. BROWN, *supra* note 8, at 7-8.

¹⁴⁰ See CSAC Press Release, *supra* note 23 (suggesting DHS is overstepping its regulatory authority); CSAC Tanner Background Paper, *supra* note 17 (suggesting DHS Guidelines could strip local governments of their basic land use authority); TCP Policies on Source Reduction; *supra* note 8, at 12-13 (stating DHS Guidelines force counties to include in County Plans larger and different types of facilities than locally necessary); DHS Guidelines, *supra* note 3, at 3-5 (describing method for waste stream analysis which includes accounting for imported waste).

Plan first establishes siting locations for regional facilities, but the county itself, for whatever reasons, later denies a developer's application for a permit to build a facility on one of those sites. If the developer appeals that local permit denial under the Act, the State could override the local decision.¹⁴¹ Counties claim this override power equals preemption because it is the DHS Guidelines that force the initial siting specifications on which the developer might base a successful appeal.¹⁴²

Counties contend that rather than forcing inclusion of larger, regional facilities in the County Plans and thus potentially forcing preemption, the statute actually only encourages voluntary intercounty agreements that provide for regional facilities.¹⁴³ Counties suggest that

¹⁴¹ The developer may appeal the permit denial, and if the developer proves the project satisfies the County Plan, the state may override the county's land use decision. See CAL. HEALTH & SAFETY CODE §§ 25199.9-.14 (West Supp. 1990).

¹⁴² The Hazardous Waste Management Council commented on the apparently superficial distinction between preemption and the appeal process. See S. TANNER & L. BROWN, *supra* note 8, at 140. A state with preemptive siting legislation does not include any local decisionmaking in the siting process, although land use compatibility may be considered. *Id.* States utilizing the appeal process allow local authorities to decide siting issues, but an appeal board may overturn these decisions based on certain criteria. *Id.*

Despite county opposition to preemption, the state has the power to preempt local government authority in hazardous waste issues. See Bacow & Milkey, *supra* note 7, at 286-88. Municipalities possess no inherent rights, but derive their powers of self-government from state grants in home rule provisions. *Id.* at 286. Furthermore, a state's general laws (like the Tanner Planning Act) that affect all cities and counties alike will preempt any local powers inconsistent with the laws. *Id.* at 287; Tarlock, *supra* note 99, at 438. Even in states with grants of home rule, this power will not extend where the city or county must share a regulation with the state, such as in hazardous waste facility siting. See Bacow & Milkey, *supra* note 7, at 286-88; Tarlock, *supra* note 99, at 438.

California has home rule, pursuant to CAL. CONST. art. XI, § 7, that grants police power to the local legislative body and serves as the legal basis for local land use regulation. See Heskin & Garrett, *supra* note 59, at 162 n.10. However, the state legislature can preempt this power in issues of hazardous waste. See Bacow & Milkey, *supra* note 7, at 286-88; Tarlock, *supra* note 99, at 438-48.

¹⁴³ See CSAC, Press Release, *supra* note 23 (announcing that Tanner/Hazardous Waste Task Force is supporting use of interjurisdictional agreements and is developing a model agreement); *id.* attachment B (proclaiming in model resolution that counties should use "voluntary intercounty agreements to structure mutual land use siting commitments"); TCP Policies on Source Reduction, *supra* note 8, at 12 (stating that regional needs should be negotiated through intercounty agreements).

The Act requires counties that form intercounty agreements to document the agreement. CAL. HEALTH & SAFETY CODE § 25135.7(a)(4) (West Supp. 1990). As of March 20, 1989, no county had documented an intercounty agreement. Frantz tele-

equity requires managing the county's fair-share of hazardous waste through local siting approvals and through voluntary intercounty agreements.¹⁴⁴ The Council's report also supports the counties' interpretation because the report recommended that counties voluntarily initiate regional efforts to plan for regional facilities.¹⁴⁵

4. Reference to Related Statutes to Interpret County Responsibility

As described above, other statutes involving the same subject matter and history may provide useful information for interpreting these statutes.¹⁴⁶ Counties may infer that the State Planning Act is merely an informational source that does not necessitate that counties include regional site locations in their County Plans.¹⁴⁷ This interpretation supports the counties' argument for voluntary intercounty agreements.¹⁴⁸ Arguably, the counties' failure to provide regional facilities could force DHS to determine the locations pursuant to the State Plan, thus creating another preemption problem.¹⁴⁹

Finally, in their investigation of other state statutes, the Council found that local involvement was very important to facility siting.¹⁵⁰ The Council noted that many states experienced local opposition to

phone interview (Mar. 20, 1989), *supra* note 15.

Counties acknowledge that a need for regional facilities and economic and environmental concerns dictate that some counties must plan for these facilities. *See* CSAC, Press Release, *supra* note 23, attachment C, attachment 1. The CSAC Policy Statement recognizes that certain waste streams generated within a county may not support an economically efficient hazardous waste facility of each type needed to handle the county's waste. *Id.*

¹⁴⁴ *See* CSAC, Press Release, *supra* note 23, attachment B. The Act allows councils of governments to prepare voluntary regional plans to advise counties on regional needs. CAL. HEALTH & SAFETY CODE § 25135.3 (West Supp. 1990).

Grantland Johnson, Sacramento County Supervisor, stated that the State (DHS) undercuts the Tanner process by not allowing counties to limit the size of treatment facilities. Asmus, *A Big Toxics Mess Here*, Sacramento Bee, Aug. 28, 1988, at Forum 1, col. 1, Forum 2, col. 1. He alleges that this goes against the spirit and letter of the law because the Act proposed county involvement to enable a final county land use decision based on facility location and size. *Id.*

¹⁴⁵ *See* S. TANNER & L. BROWN, *supra* note 8, at 190.

¹⁴⁶ *See supra* note 112 and accompanying text.

¹⁴⁷ *See supra* note 113 and accompanying text.

¹⁴⁸ *See supra* notes 143-45 and accompanying text.

¹⁴⁹ *See supra* notes 113-17 and accompanying text (describing DHS's duties under State Plan).

¹⁵⁰ *See* S. TANNER & L. BROWN, *supra* note 8, at 142-49, 152-54; *see also supra* notes 124-29 and accompanying text (discussing Council's investigation of other state statutes).

large comprehensive facilities.¹⁵¹ This occurred because local communities felt responsible only for waste that industries in their areas generated.¹⁵² In recognition of this strong public sentiment, the Council recommended local decisionmaking for siting of hazardous waste facilities.¹⁵³ This recommendation supports the counties' interpretation of the fair-share principle in the Tanner Planning Act.

Overall, counties have support for a construction of the Tanner Planning Act that finds preference for local control and voluntary intercounty agreements.¹⁵⁴ Furthermore, applying the fair-share concept reduces siting opposition because communities may more readily accept a nearby facility that treats only local hazardous waste.¹⁵⁵ Yet the fair-share principle is not without problems. The counties may never form voluntary intercounty agreements to site regional facilities.¹⁵⁶ If the County Plans do not establish areas for siting, and no agreements exist, then developers may face uncertainty in proposing large management facilities. As a result, developers may never propose constructing the regional facilities necessary for a comprehensive statewide management plan.¹⁵⁷

III. PROPOSAL FOR AMENDMENT REQUIRING INTERCOUNTY AGREEMENTS

This Comment proposes an amendment to resolve the contradictory interpretations of the Tanner Planning Act by requiring intercounty agreements. The following two subsections explain the need for regional facilities and the State's role in hazardous waste management. The last subsection presents the amendment.

¹⁵¹ See S. TANNER & L. BROWN, *supra* note 8, at 142-49, 155.

¹⁵² *Id.* at 155.

¹⁵³ *Id.* at 19.

¹⁵⁴ See *supra* notes 134-45 and accompanying text.

¹⁵⁵ See Lewis, *supra* note 7, at 25 (stating that facing prospect of accepting other communities' waste makes residents "less receptive to appeals to do their fair-share").

In addition, siting local facilities may receive more support from locally elected officials, because the officials avoid potential voter recalls. Baker telephone interview, *supra* note 131. Local residents may threaten their supervisors with recall if supervisors support the DHS view of waste stream management and regional facility siting. *Id.*

¹⁵⁶ See *supra* note 143 (noting absence of documented intercounty agreements).

¹⁵⁷ Florida had siting problems when developers failed to propose hazardous waste facilities because of their disbelief that regional planning councils would override local land use decisions. See S. TANNER & L. BROWN, *supra* note 8, at 147-48; see also *supra* note 119 and accompanying text.

A. *The Necessity for Regional Facilities*

Both the counties and DHS acknowledge the need for regional facilities.¹⁵⁸ Because the 1984 RCRA amendments both increased the amount of toxic wastes sent to hazardous waste facilities and required the closure of some existing land disposal facilities, the need for new facilities recently has grown significantly.¹⁵⁹ Technology, economics, health, and safety requirements, however, limit the types and locations of facilities able to dispose of hazardous wastes.¹⁶⁰ Safe management of hazardous wastes requires a variety of appropriate facilities, and the options available must include regional facilities whenever environmental and public welfare considerations dictate their use.¹⁶¹

¹⁵⁸ See *NIMBY Squared*, *supra* note 7, at col. 2.

¹⁵⁹ See *supra* notes 34 & 45 and accompanying text; see also 2 J. BATTLE, *supra* note 37, at 309-14 (discussing effect of RCRA amendments). The 1984 RCRA amendments increase the problem of hazardous waste management because they require closing land fills and increasing the number of generators that must send toxic waste to management facilities. See *id.* at 310-11. The amendments require more than 130,000 new small generators to send toxic material to treatment sites, more than double the 60,000 generators under the law in 1980. *Id.* at 310.

¹⁶⁰ See *id.* at 310-11. For example, incinerators are only effective in destroying organic hazardous waste. *Id.* at 310. Inorganic wastes must be managed by other methods. *Id.*

¹⁶¹ See DHS Technical Reference Manual, *supra* note 5, at J-1 to J-11. Hazardous waste management facilities that must consider varying environmental and public welfare factors include: aqueous treatment, incinerators, recycling, repositories for treated residues, solidification, and transfer facilities. *Id.* at J-1. Solidification (or stabilization) facilities take wastes that cannot be recycled, treated, or destroyed and stabilize them for storage at a residual repository. *Id.* at J-4. The stabilization process includes adding solidifiers or fixers or encapsulating the waste. *Id.* Health and air pollution concerns require monitoring for leakage. *Id.* Solidification facilities operate in large industrial buildings, cover 1 to 10 acres, and can handle from 5 to 10 thousand tons of material per year. *Id.*

An aqueous hazardous waste treatment facility resembles a municipal sewage treatment plant, but it handles water contaminated with hazardous wastes. *Id.* at J-3. The facility processes the water to remove heavy metals, reactive ions, and organic matter. *Id.* The process includes segregation and neutralization to form nonhazardous waste. *Id.* Treated nonhazardous waste water is discharged while a remaining hazardous sludge is sent to either an incinerator, a biological waste converter, or a stabilization facility. *Id.* Environmental and health concerns require monitoring the air and water for contaminants. *Id.* The facility may encompass 3 to 30 acres, employ 15 to 40 people, and treat up to 200,000 tons of liquid waste annually. *Id.*

Repositories for treated wastes must meet special geologic conditions that insure safe disposal. *Id.* at J-5. The facility does not accept free liquid, and the material should be a nonorganic, insoluble toxic solid. *Id.* at J-6. The facility differs from a Class I disposal site because it is more contained and presents very low environmental risks. *Id.*

B. *The State Role in Hazardous Waste Management*

State governments may participate in hazardous waste management in three different contexts — state-national government, state-local government, and state-private sector.¹⁶² The type of leadership a state performs in hazardous waste management may vary from passive to active, depending on the severity of the state's hazardous waste problem.¹⁶³ By 1983, twenty-six states had established procedures for hazardous waste facility siting.¹⁶⁴ A 1984 report indicated that although demand existed for new hazardous waste facilities, only eight facilities had been approved throughout the United States.¹⁶⁵ Despite the state approaches to siting facilities, success appeared most dependent on public understanding of the process and involvement in the decisionmaking.¹⁶⁶

The Massachusetts experience in this area provides an example of increased public participation, but ultimately unsuccessful siting. In 1980, Massachusetts implemented an innovative approach to hazardous

Repositories take large areas of land, 50 to 300 acres, and generally will be located further away from generators than other types of facilities. *Id.*; see also DHS Guidelines, *supra* note 3, at 3-15 to 3-16 (discussing siting criteria to protect public safety).

DHS Guidelines impose specific siting criteria that limit where hazardous waste management facilities may be located. The criteria include: seismic considerations; no siting on wetlands; no siting on floodplains except under special conditions; no siting in endangered species habitats; soil type considerations; aquifer considerations; minimum distance requirements from populations; and requirements for safe and close proximities to transportation routes. *Id.* at 3-14 to 3-16.

¹⁶² Bowman & Lester, *Hazardous Waste Management: State Government Activity or Passivity?*, 17 STATE & LOC. GOV'T REV. 155, 156 (1985). The state-national relationship is based on RCRA. *Id.* The state-local relationship focuses on the hazardous waste facility siting issue. *Id.* The state-private-sector relationship involves the state's use of conventional regulations versus incentive-based approaches to obtain industry compliance. *Id.*

¹⁶³ See *id.* at 160-61. States active in waste management obtained authority to manage the federal RCRA program and also imposed more stringent state standards on waste regulation. See *id.* at 157-58. In 1983, Arizona, Connecticut, Kansas, Maine, New Hampshire, and New Jersey exemplified an aggressive state hazardous waste management style. *Id.* at 158. Bowman and Lester commented that because problem severity appeared to indicate state participation, the state's style of management would probably change as hazardous waste conditions changed. See *id.* at 160-61.

¹⁶⁴ *Id.* at 158. Nineteen states utilized the preemption process. *Id.* Three states (Massachusetts, Rhode Island, and Wisconsin) employed a mediation-arbitration procedure. *Id.*

¹⁶⁵ Holznagel, *supra* note 37, at 336. As of 1984, there were 32 attempted hazardous waste management facility sitings. *Id.*

¹⁶⁶ Bowman & Lester, *supra* note 162, at 159 (quoting OFFICE OF TECHNOLOGY ASSESSMENT, TECHNOLOGIES AND MANAGEMENT STRATEGIES FOR HAZARDOUS WASTE CONTROL 256 (1983)).

waste management that combined preemption and negotiation.¹⁶⁷ The Massachusetts negotiation approach forced the developer, the host community, and the abutting community to determine what compensation the developer would give the communities to reduce local opposition.¹⁶⁸ By 1986, developers had attempted five projects, but not one of the applications for siting had even passed the initial screening committee.¹⁶⁹ As a result, in 1986 the Massachusetts Legislature proposed amending its siting act to add statewide hazardous waste management planning.¹⁷⁰

The Massachusetts waste management statutory experience implies that both the public's and the government's attitudes concerning hazardous waste management may have shifted.¹⁷¹ One commentator finds that the public has increased its interest in the safe management of hazardous wastes, while the state has increased its role as initiator (augmenting its role as regulator).¹⁷² The Massachusetts study suggests that states may appropriately take a stronger role in the management of hazardous wastes and facility siting.¹⁷³

¹⁶⁷ See English, *supra* note 7, at 40 (citing the 1980 Massachusetts Hazardous Waste Facility Siting Act, MASS. GEN. L. ch. 21D (1986)).

¹⁶⁸ See Holznagel, *supra* note 37, at 355.

¹⁶⁹ See English, *supra* note 7, at 41.

¹⁷⁰ *Id.* at 42-43 & nn.16-17. English spoke with a senate staff member who indicated that government, industry, and public interest groups have all proposed modifications to the state siting act. *Id.* at 42 & n.16. All call for a stronger state role. *Id.* at 42 n.16. Senator Amick's proposed amendments add statewide hazardous waste management planning to the Hazardous Waste Facility Site Safety Council's responsibilities. *Id.* at 42-43. Additionally, the proposals improve the host's negotiating position by providing increased funds for technical assistance. *Id.* at 43. Governor Dukakis suggested that the state take an even stronger role in identifying the location, size, number, and types of hazardous waste facilities to site. *Id.*

¹⁷¹ See *id.* at 51 (finding shift in attitudes).

¹⁷² *Id.* English notes that the traditional market-initiated, private responsibility approach to hazardous waste management has shifted to a public responsibility approach, similar to the management of low-level radioactive waste. *Id.* at 50-51. With the passage of SARA, hazardous waste management attitudes should become even more similar to the low-level radioactive waste management. See *id.* The public now perceives similar risks from radioactive waste and hazardous waste. *Id.* English suggests an adoption of bureaucratic principles as a fall-back position while maintaining a market, egalitarian process as the primary management principle. *Id.*

¹⁷³ See Bacow & Milkey, *supra* note 7, at 274-79 (suggesting preemption alone will not produce successful siting, but state must provide incentives to host community to encourage facility acceptance); see also *supra* note 124 and accompanying text. For articles containing cites to other state hazardous waste management statutes, see M. GREENBERG & R. ANDERSON, *supra* note 6, at 179-90; Bacow & Milkey, *supra* note 7, at 270 nn.37-49; Holznagel, *supra* note 37, at 343-77.

C. Proposed Amendment Requiring Intercounty Agreements

The following amendment to the Tanner Planning Act proposes that counties should form their own voluntary intercounty agreements. However, the amendment authorizes the State, through DHS, to intervene if the counties fail to act. The amendment uses a hammer clause that allows DHS to intervene and to propose regional sites.¹⁷⁴ This threat of intervention will encourage counties to expedite their own siting of regional facilities. This proposed amendment thus fulfills the legislative objective for a comprehensive management plan achieved through local planning.¹⁷⁵

1. Proposed Tanner Planning Act Amendment to Establish Intercounty Agreements

Section 1-Purpose

This amendment prescribes a moderate change in the Tanner Planning Act. This Section proposes that counties identify areas for locating regional hazardous waste facilities by intercounty agreements and that counties incorporate these agreements into their County Hazardous Waste Management Plans. Also, this Section maintains the strong local involvement recognized in the Act while increasing the State's role.¹⁷⁶ Specific procedures provided here enable the Department of Health Services to locate regional facilities in the event that counties do not enter into reasonable intercounty agreements within two years of this Section's adoption.¹⁷⁷

Section 1.1-Intercounty Agreement Procedures

(a) Counties shall enter into intercounty (interjurisdictional) agreements pursuant to the joint powers agreement in CAL. GOV'T CODE § 6502.7

¹⁷⁴ A legislature can motivate an agency to comply with the provisions of a law through a hammer clause, which subjects the agency to specific statutory requirements after a specific date. *See* 2 J. BATTLE, *supra* note 37, at 310. The statutory requirements apply only in the event of noncompliance and remain in effect until the agencies have complied. *See id.* Congress included a hammer clause in the 1984 RCRA amendments because of the EPA's continued delay in promulgating regulations against small quantity hazardous waste generators. *Id.* Congress wrote into the amendments specific hazardous waste disposal standards that applied to small quantity generators. *Id.* These standards were essentially regulations that would apply after a certain date and would remain in effect until the EPA promulgated the required administrative regulations. *Id.* This amendment proposes the same technique by requiring county governments to enter into intercounty agreements.

¹⁷⁵ *See supra* note 46 and accompanying text.

¹⁷⁶ The public accepts a stronger government role when it is coupled with community involvement. *See* English, *supra* note 7, at 43-51. English describes how states must attain political authority under a principle of implied trust and consent. *Id.* at 43-45; *see also supra* notes 170-73 and accompanying text.

¹⁷⁷ *See supra* note 143 and accompanying text.

(West Supp. 1990).¹⁷⁸

(b) The agreement must demonstrate at least one area within the joint regions that may accommodate regional facilities for treatment, incineration, recycling, solidification, or repository for treated residues. If the counties demonstrate in their agreement that they do not generate waste appropriate for these types of facilities, the requirement shall not apply. The determination of need shall be based on an intercounty hazardous waste stream analysis as prescribed by the Department of Health Services Guidelines.

(c) Counties shall form agreements consistent with the County Plans of the affected counties.¹⁷⁹

(d) The four regional councils of governments authorized to prepare regional hazardous waste management plans pursuant to CAL. HEALTH & SAFETY CODE § 25135.3¹⁸⁰ shall assist in arrangements of intercounty agreements within their regions. Department of Health Services will presume that these counties will form intercounty agreements unless the counties demonstrate other agreements that satisfy needs for regional facility siting.

(e) Because the intercounty agreements shall fulfill regional siting needs, counties may use an intracounty waste-stream analysis to identify locations, size, and type of other nonregional facilities described in the County Plans.¹⁸¹

(f) The State shall provide funding for technical expertise to assist counties in determining the types of necessary regional facilities and their locations.¹⁸²

Section 1.2-Deadline for Documenting Intercounty Agreements

(a) Counties shall enter into intercounty (interjurisdictional) agreements within two years from the adoption of this Section. Counties shall document the agreements with the Department of Health Services.

(b) Department of Health Services shall review and approve the in-

¹⁷⁸ This provision within the California Joint Exercise of Powers Act, CAL. GOV'T CODE §§ 6500-6520 (West 1980 & Supp. 1990), authorizes public agencies that have authority from their governing body to jointly exercise powers "to identify, plan for, monitor, regulate, dispose of, or abate liquid, toxic, or hazardous wastes . . . by agreement." *Id.* § 6502.7 (West Supp. 1990).

¹⁷⁹ See *supra* notes 57-59 and accompanying text (explaining consistency requirement in land use planning).

¹⁸⁰ See CAL. HEALTH & SAFETY CODE § 25135.3 (West Supp. 1990).

¹⁸¹ An intracounty waste stream analysis allows counties to use a local fair-share concept, although counties may also determine fair-share of hazardous waste management on a regional level. See *supra* note 133.

¹⁸² The legislature may establish a special subaccount as provided in the Tanner Planning Act. See CAL. HEALTH & SAFETY CODE § 25135.8 (West Supp. 1990); see also Asmus, *supra* note 144, at Forum 1, col. 1 (suggesting that state passed "the megabuck" to counties in requiring hazardous waste management plans because counties lack expertise and funds to accomplish Act's goals); *supra* note 170 (describing Massachusetts' proposed amendment to provide increased funding for technical assistance).

tercounty agreements for compliance with the goals and objectives of this Section.

(c) If the Department of Health Services determines that the intercounty agreements do not sufficiently comply with this Section, then the Department shall identify areas within the regions that are suitable for siting the necessary types of hazardous waste management facilities noted in Section 1.1 (b).

Section 1.3-Procedures for Department of Health Services's Regional Site Selection

(a) Department of Health Services shall identify areas for locating regional hazardous waste facilities based on information obtained from the State Planning Act, CAL. HEALTH & SAFETY CODE § 25135.9. This includes assessing the need, type, and size of a facility determined by the intercounty hazardous waste stream analysis.

(b) Department of Health Services shall hold public meetings and encourage public participation in the site selection. All affected agencies and abutting counties shall be informed of the site selection.

(c) Interested hazardous waste management facility developers shall be notified of, and have access to, information concerning the regional site locations.

(d) These state statutory requirements shall remain in effect until counties enter into their own agreements that provide for necessary regional hazardous waste management facilities.

2. Effect of the Amendment

DHS and California's counties currently dispute the responsibility for intercounty waste-stream management because of ambiguity in the Tanner Planning Act's siting requirements.¹⁸³ This proposed amendment resolves the issue by specifying that counties shall identify regional facility site locations by a specific date. The amendment provides counties with two years notice to comply; after that time they risk DHS preemption.¹⁸⁴ If counties have not made agreements by the deadline, DHS has authority to identify site locations.¹⁸⁵ This hammer provision may push hesitant counties into forming agreements and thus help to accomplish the Act's purpose of expeditious statewide planning at the local level.¹⁸⁶ These procedures resolve the conflict over selecting site locations for regional facilities and further the legislative goal for a

¹⁸³ See *supra* notes 79-80 and accompanying text.

¹⁸⁴ Proposed Amendment § 1.2 establishes a two-year deadline from the date the legislature adopts the amendment.

¹⁸⁵ Proposed Amendment § 1.2(c) requires that DHS identify suitable areas for regional facilities if the counties have not complied with the amendment.

¹⁸⁶ See *supra* notes 48 & 134 and accompanying text.

comprehensive management plan.¹⁸⁷

CONCLUSION

The legislature enacted the Tanner Planning Act to provide California with necessary hazardous waste management facilities. Because of the variety of hazardous wastes that California generates, the future management of hazardous wastes must include local as well as regional facilities. Ideally, counties should arrange their own intercounty agreements for siting regional hazardous waste facilities. However, because of the importance of these facilities to California's environmental and economic welfare, the State should intervene and identify siting locations if counties do not plan for regional facilities.

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¹⁸⁷ See *supra* notes 46-47 and accompanying text.

