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Philip Weinberg

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Local Environmental Laws: Forging a New Weapon in Environmental Protection

PHILIP WEINBERG*

I. Introduction

In the beginning, all land use control was local. Municipal zoning, the earliest form of comprehensive land use regulation, appeared as early as 1915 when New York City's law, the model for many others, was enacted. The State's role was limited to adopting general legislation enabling localities to zone by delegating that portion of the police power to municipal governments.[1] But the tension between local and broader regional or statewide concerns was soon recognized. In *Village of Euclid v. Ambler Realty Co.*,[2] the landmark case upholding the constitutionality of municipal zoning, the Supreme Court noted, as long ago as 1926, that there might well be "cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."[3]

The balance began to swing toward the states in the last third of the century. State legislation protecting wetlands, coastal zones and other environmentally sensitive areas[4] began to be enacted in the 1970s, largely because so many local governments tended to favor development in their zoning and other land use decisions at the expense of safeguarding environmental resources. Similarly, states enacted laws governing the siting of power plants, hazardous waste facilities and other structures that some municipalities welcomed in order to augment their real property

* Professor, St John's Law School; J.D. Columbia Law School 1958. The author has written extensively about environmental law, including a casebook, ENVIRONMENTAL LAW: CASES AND MATERIALS, and ENVIRONMENTAL LAW AND REGULATION IN NEW YORK (2001) (co-editor). He is indebted to Joseph Lo Piccolo (St. John's Law School 2003) for research assistance in preparing this article.

1. *See, e.g.*, N.Y. GEN. CITY LAW § 19 (McKinney 2002); N.Y. TOWN LAW §§ 260-284 (McKinney 2002); N.Y. VILLAGE LAW §§ 7-700 to 7-742 (McKinney 2002).

2. 272 U.S. 365 (1926).

3. *Id.* at 390.

4. See N.Y. ENVTL. CONSERV. LAW arts. 24, 25 (McKinney 2002).

tax base, while others sought to repel them.[5] States legislated controls over large-scale development in regions found by their legislatures to be environmentally sensitive, such as New York's Adirondack Mountains, the San Francisco Bay Area and Chesapeake Bay.[6] Some states legislated to protect agriculture through the creation of agriculture districts, or required state permits for large-scale development.[7]

More recently, however, many local governments have begun to enact their own sophisticated land use and environmental controls, halting, and indeed to some extent reversing, the trend of earlier decades. Greater public recognition of the need to safeguard finite environmental resources—wetlands, forests, farms and the like—as well as culturally and architecturally significant structures has impelled more and more municipalities to act to further these goals. This trend, however, is far from uniform. Some local governments continue to neglect resource protection and instead favor development to the virtual exclusion of environmental values. But some efforts are beginning to bear fruit, particularly in suburban towns where the intensity of development is great and green space is dwindling.

This paper will examine the relationships between local and state governments, in New York and elsewhere, in implementing environmental statutes. First it will discuss federal laws that provide for state implementation and enforcement. Next, it will explore areas of state law where no comprehensive federal statute exists. In both situations, it will describe the various approaches taken by the states in dealing with the existence of local environmental laws, ranging from complete preemption to encouragement. Finally, it will offer some recommendations as to the most effective approaches.

The basic rules with regard to preemption are, as with so much in constitutional law, easy to state but not so easy to apply to specific cases. Federal law preempts state law in either of two situations: where Congress has occupied the entire field or where a conflict exists between the federal and state statutes.[8] In those

5. See, e.g., N.Y. PUB. SERV. LAW art. X (McKinney 2002); N.Y. ENVTL. CONSERV. LAW § 27-0101 (McKinney 2002).

6. N.Y. EXEC. LAW §§ 800-820 (McKinney 1996); CAL. GOV'T CODE §§ 66600-66661 (Deering 2001); MD. CODE ANN., NAT. RES. II § 8-1801 (2000).

7. See, e.g., Vt. Stat. Ann. tit. 10, §§ 6085, 6086 (1997).

8. *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983).

situations, the Constitution's Supremacy Clause[9] mandates that federal law trumps state law. The rules are essentially the same where the issue is whether a state statute preempts a local enactment. The courts once again ask whether the state intended to occupy the field, and if not, whether the state and local laws conflict. If either situation is met, the state law prevails.[10]

II. Local Laws Where States Implement Federal Statutes

Each of the three major federal regulatory statutes governing environmental concerns, the Clean Air Act,[11] the Clean Water Act[12] and the Resource Conservation and Recovery Act (RCRA),[13] contemplate a leading role for the states. The Clean Air Act requires each state to adopt an implementation plan for each of the major air pollutants identified by the U.S. Environmental Protection Agency (EPA). However, the plans themselves require EPA approval.[14] The Clean Water Act and RCRA authorize the states to take over implementation of those programs, and most, including New York, have done so. What functions, if any, do these statutes leave to localities?

To implement these federal statutes, the states have enacted their own legislation, required, as noted, in the case of the Clean Air Act. But local governments have also enacted laws designed to meet local concerns on these subjects. In New York, these local laws are valid if consistent with the state legislation. Environmental Conservation Law (ECL) § 19-0709 provides that local laws "not inconsistent with this article" – ECL Article 19, dealing with air quality—or any regulation adopted pursuant to that article "shall not be superseded by it[.]"[15] Local laws are deemed consistent with the state law if they "comply with at least the minimum applicable requirements set forth in any code, rule, or regulation promulgated pursuant to" Article 19.[16]

The Court of Appeals in *Oriental Boulevard* Co. v. Heller sustained a New York City local law setting strict standards for apartment house trash incinerators as against, *inter alia,* a claim

9. U.S. CONST. art. VI, cl. 2.
10. *See* Oriental Boulevard Co. v. Heller, 27 N.Y.2d 212 (1970).
11. 42 U.S.C. §§ 7401-7671 (2000).
12. 33 U.S.C. §§ 1251-1387 (2000).
13. 42 U.S.C. §§ 6901-6992 (2000).
14. *Id.* § 7410.
15. N.Y. ENVTL. CONSERV. LAW § 19-0709 (McKinney 2002).
16. *Id.*

of state preemption.[17] The opinion did not refer to the predecessor statute to § 19-0709,[18] probably because New York's then rudimentary air quality measures did not deal with incinerators at all. Instead, the court relied on then ECL § 10, which set forth the state's "policy. . .to improve. . .environmental. . .programs. . .in cooperation with. . .local governments,"[19] and § 14(21), empowering the newly minted State Department of Environmental Conservation (DEC) to "[e]ncourage activities consistent with the purposes of this chapter [the ECL] by advising and assisting local governments[.]"[20] The court observed that "[t]hese provisions explicitly recognize that local units of government are intended to function in the air pollution area."[21]

As noted earlier, under the Clean Water Act, states may apply for EPA approval of their permit programs to implement the Act,[22] and New York has done so since the 1970s. The New York legislation, ECL Article 17, contains no explicit provision regarding local laws, but § 17-1101 states in general terms that the ECL provisions are "to provide additional and cumulative remedies" and do not "abridge or alter rights of action or remedies now. . . existing," nor should the ECL "be construed as estopping the state, persons or municipalities, as riparian owners or otherwise, in the exercise of their rights to suppress nuisances or to abate. . .pollution[.]"[23] This broad language, seemingly aimed primarily at protecting common-law remedies,[24] has been interpreted by the Attorney General as also continuing to authorize enforcement by localities.

In a 1964 Opinion of the Attorney General, identical language was construed (then in Public Health Law § 1260) to permit a local board of health to seek abatement of a public nuisance under Public Health Law § 1303.[25] It is worth noting, though, that suppressing a nuisance under § 1303 is not precisely the same as enforcing a local law. One court has sustained a city council decision, acting as a city board of health, closing a tannery as a

17. *Oriental Boulevard Co.*, 27 N.Y.2d 212.

18. N.Y. PUB. HEALTH LAW § 1297 (McKinney 2002) (repealed 1972).

19. N.Y. ENVTL. CONSERV. LAW § 1-0101(2) (McKinney 2002) (current version).

20. *Id.* § 3-0301(1)(u) (current version).

21. *Oriental Boulevard Co.*, 27 N.Y.2d at 221.

22. 33 U.S.C. § 1342(b) (2000).

23. N.Y. ENVTL. CONSERV. LAW § 17-1101 (McKinney 2002).

24. See, e.g., Leo v. Gen. Elec. Co., 538 N.Y.S.2d 844 (App. Div. 1989) (finding a nuisance action not preempted).

25. Op. Att'y. Gen. 124 (1964) (Inf.).

public nuisance.[26] The court rejected a constitutional claim that it was not an ordinance of general application on the sensible ground that it was not an ordinance at all.[27]

In addition, ECL § 17-1105 provides that the water quality and permit sections of Article 17 "shall not be construed as repealing any of the laws relating to the pollution of the waters of the state not expressly repealed, . . . except as the same may be in direct conflict herewith."[28] This statute could be read to refer only to other state laws, but its wording seems broad enough to allow municipal laws on the subject as well.

The third statute in the major federal regulatory trio, RCRA, controls both solid waste and hazardous waste. Its counterpart New York statutes are contained in ECL Article 27.[29] The solid waste provision allows local regulation of this activity if consistent with the ECL.[30] This makes particular sense in view of the traditional control of solid waste disposal at the municipal level. The New York Court of Appeals has ruled that Article 27 does not bar town ordinances regulating solid waste, noting that it "speaks specifically, not of the preclusion, but rather the inclusion of local government in the planning and control of problems endemic to waste management."[31] The court cited related sections of ECL Article 27—for example, requiring DEC to "[c]ooperate with appropriate local, state, interstate and federal agencies to promote the operation of solid waste management facilities in a safe, sanitary, efficient and environmentally sound manner."[32]

Interestingly, this 4-to-3 decision upheld a town ordinance barring all landfills, public and private, from accepting out-of-town waste.[33] This parochial practice was later found by the Supreme Court to unconstitutionally discriminate against commerce

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26. Guyle v. City of Auburn, 172 N.Y.S.2d 488 (Sup. Ct. 1957).

27. *Id.*

28. N.Y. ENVTL. CONSERV. LAW § 17-1105 (McKinney 2002).

29. *See* N.Y. ENVTL. CONSERV. LAW §§ 27-0701 to 27-0719 (McKinney 2002) (solid waste); N.Y. ENVTL. CONSERV. LAW §§ 27-0900 to 27-0925 (McKinney 2002) (hazardous waste).

30. N.Y. ENVTL. CONSERV. LAW § 27-0711 ("[L]ocal laws . . . not inconsistent with this title or with any rule or regulation . . . promulgated pursuant to this title shall not be superseded by it. . . .").

31. Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia, 51 N.Y.2d 679, 683-84 (1980).

32. N.Y. ENVTL. CONSERV. LAW § 27-0703(2)(c) (cited as §27-0703[3] in *Monroe-Livingston*, as it was then numbered).

33. *Monroe-Livingston*, 51 N.Y.2d 679.

from other states.[34] The fact that waste from elsewhere in New York was also excluded was no defense, just as the dissenters in the Court of Appeals had maintained.[35] The ordinance was a relic of the exact sort of narrow local self-interest the Constitution forbids and that enlightened municipalities have since eschewed. However, in contrast, a locality may constitutionally bar out-of-town waste from landfills or incinerators the local government itself operates. In this situation, the municipality has, the courts say, entered the marketplace, freeing it from strictures against discrimination against commerce.[36]

Other courts have sustained less controversial local laws regulating landfills as not inconsistent with and therefore not preempted by, the ECL. Such laws include laws requiring a town permit for excavating landfills with maximum slope limits and topsoil replacement provisions,[37] as well as a town ban on commercial solid waste transfer stations.[38]

New York has no comparable statute validating local laws regulating hazardous waste. The sole reported decision on this issue held "the Legislature has expressed its intention that it occupy the field of hazardous waste disposal," thereby invalidating a town law barring waste disposal except at the town-operated landfill.[39] The court distinguished a decision upholding a local law barring medical waste disposal,[40] noting that "[t]oxic wastes are not known to respect property boundary lines" and "often migrate off-site," mandating state rather than local regulation.[41] The court invoked basic principles of preemption, which, in the absence of a specific statute, provide for preemption of a local law where the state has occupied the field, as in this case, or where the

34. *See, e.g.,* Philadelphia v. New Jersey, 437 U.S. 617 (1978) (finding a state regulation prohibiting the importation of out-of-state waste violated the Commerce Clause).

35. Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353 (1992); *see also Monroe-Livingston*, 51 N.Y.2d at 685 (Fuchsberg, J., dissenting).

36. *See* Swin Res. Sys., Inc. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.3d 245 (2d Cir. 2001), *cert. denied*, 122 S.Ct. 815 (2002).

37. Town of Porter v. Chem-Trol Pollution Servs., 397 N.Y.S.2d 348 (Sup. Ct. 1977), *rev'd on other grounds*, 401 N.Y.S.2d 646 (App. Div. 1978) (reversing based solely on town's failure to show irreparable injury to justify preliminary injunction).

38. Town of LaGrange v. Giovenetti Enters., 507 N.Y.S.2d 54 (App. Div. 1986).

39. Town of Moreau v. N.Y. State Dep't of Envtl. Conservation, 678 N.Y.S.2d 241, 243 (Sup. Ct. 1998).

40. Drown v. Town Bd., 591 N.Y.S.2d 584 (App. Div. 1992).

41. *Town of Moreau*, 678 N.Y.S.2d at 243.

local law is inconsistent with state law.[42] But, as noted later, localities are likely free to enact laws imposing liability for damage to municipally-owned natural resources, not protected by federal or state law.[43] A noteworthy example of an effective municipal hazardous waste law is the ordinance of the Village of Sleepy Hollow, modeled on New Jersey's Industrial Site Recovery Act,[44] which required General Motors to clean up its abandoned assembly plant before selling the property.[45]

A separate title in ECL Article 27 that governs the siting of hazardous waste management facilities does contain provisions expressly limiting local laws.[46] The Legislature recognized that most localities would zone out any such land uses, a consummate NIMBY,[47] unless deprived of the right to do so. However, it took a dramatic series of events to drive that point home. In 1976, DEC settled an administrative proceeding against the General Electric Company by obtaining an agreement halting discharge of polychlorinated biphenyls (PCBs) into the Hudson River from that company's plants.[48] This left open the volatile issue of how, or indeed whether, to dispose of the prodigious amount of this toxic substance in the riverbed. In 1980, Congress appropriated funds for a demonstration project aimed at removing the PCBs from part of the river.[49] Since the PCBs constituted hazardous waste, their disposal on land became subject to ECL Article 27 and a siting board was appointed under ECL § 27-1105 to determine where to place the material.[50] The siting board chose a location in the Town of Fort Edward, near one of the General Electric plants that had discharged the PCBs.[51] However, the site had long been zoned agricultural and residential. The courts agreed that the siting board lacked authority to override the local zoning.[52]

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42. *See* Albany Area Builders Ass'n v. Town of Guilderland, 74 N.Y.2d 372, 377 (1989).

43. *See infra* notes 132-34 and accompanying text.

44. N.J. STAT. ANN. §§ 13:1K-6 to 13:1K-15 (West 2001).

45. *See* Donald W. Stever, *From Assembly Line to Sidewalk Café*, 20 PACE ENVTL. L. REV. (forthcoming Winter 2002).

46. N.Y. ENVTL. CONSERV. LAW § 27-1107 (McKinney 2002).

47. "Not in My Backyard."

48. In re Gen. Electric Company, 6 Envtl. L. Rep. (Envtl. L. Inst.) 30,007 (N.Y. Dec. 1976).

49. 33 U.S.C. § 1266 (2000).

50. Wash. County Cease, Inc. v. Persico, 473 N.Y.S.2d 610, 611-13 (App. Div. 1984), *aff'd*, 64 N.Y.2d 923 (1985).

51. *Id.*

52. *Id.*

The Legislature soon responded by amending § 27-1105 to repeal the language mandating that the siting board conform to local zoning.[53] The amended statute simply requires the board to "deny an application . . . if residential areas and contiguous populations will be endangered,"[54] a determination to be made by the siting board, not the locality. This issue is likely to recur with the current EPA decision directing General Electric to dredge far larger portions of the river,[55] likely requiring another siting board to be convened to deal with disposal.

III. Local Laws' Relationship to Other State Environmental Statutes

Numerous other state statutes dealing with environmental concerns have raised similar issues regarding preemption of municipal laws. In some cases a specific state law authorizes consistent local laws, yet other state statutes explicitly preempt local regulations, and still others are silent, requiring courts to divine the legislative intent.

A. State Statutes Expressly Allowing Local Laws

New York's wetland statutes explicitly authorize local laws to regulate development in wetlands, doubtless in recognition of the traditional authority of municipalities over land use. The Tidal Wetlands Act specifically notes that permits issued by DEC "shall be in addition to, and not in lieu of, such permit or permits as may be required by any municipality[.]"[56] The sole reported decision on this issue held that the Act did not preempt a town law requiring a permit for a bulkhead along the shoreline.[57]

The Freshwater Wetlands Act[58] similarly authorizes local laws, but its history is more complicated. Unlike the Tidal Wetlands Act, which applies to all wetlands meeting its statutory definition, the Freshwater Wetlands Act envisioned tandem state and local regulation. To that end, the Act only governs wetlands of 12.4 acres or more, or those of "unusual local importance."[59] The

53. N.Y. ENVTL. CONSERV. LAW § 27-1105(3)(f) (McKinney 2002).
54. *Id.*
55. *Mrs. Whitman Stays the Course*, N.Y. TIMES, Aug. 2, 2001, at A20.
56. N.Y. ENVTL. CONSERV. LAW § 25-0401(1) (McKinney 2002).
57. Town of Huntington v. Albicocco, 411 N.Y.S.2d 675 (App. Div. 1978).
58. N.Y. ENVTL. CONSERV. LAW art. 24 (McKinney 2002).
59. *Id.* § 24-0301(1). The Act also covers certain smaller wetlands within the Adirondack Park. *Id.* Section 24-0507 explicitly leaves all wetlands not covered by the Act to local control. *Id.* § 24-0507.

Legislature went on to expressly empower municipalities to implement the Act itself, as opposed to adopting local laws governing freshwater wetlands.[60] Finally, § 24-0509 states that the Act does not bar local regulation of freshwater wetlands.[61]

As originally worded, § 24-0509 stated that "[n]o provision of this article shall be deemed to remove from any local government any authority pertaining to the regulation of freshwater wetlands under the county, general city, general municipal, municipal home rule, town, village, or any other law. . .."[62] Despite this seemingly inclusive language, the Court of Appeals concluded in *Ardizzone v. Elliott* that a local wetland law was preempted unless enacted pursuant to the earlier provisions for local implementation of the Act.[63] It ruled that there was no "indication that the Legislature intended to provide for concurrent State and local jurisdiction over all freshwater wetlands."[64] The following year the Legislature amended § 24-0509 to expressly authorize local laws "whether [or not] such wetlands are under the jurisdiction of [DEC]," as long as the local law is "at least as protective of freshwater wetlands" as the Act.[65] So, in the end, municipal authority was restored.

The Mined Land Reclamation Law[66] requires a DEC mining permit that assures the Department that the land will be reclaimed for agricultural, forest or other productive use after the mining is complete.[67] As originally enacted, this law preempted all local laws governing mining except those mandating stricter reclamation measures.[68] Did this preempt local laws that banned mining completely? The Court of Appeals ruled the state Mined Land Reclamation Law did not bar local zoning that prevented mining,[69] and the Legislature thereafter amended the law to codify that holding.[70] In *Gernatt Asphalt Products v. Town of Sar-*

60. *Id.* §§ 24-0501 to 24-0505.

61. *Id.* § 24-0509.

62. N.Y. ENVTL. CONSERV. LAW § 24-0509 (McKinney 1989).

63. 75 N.Y.2d 150 (1989).

64. *Id.* at 156.

65. N.Y ENVTL. CONSERV. LAW § 24-0509 (McKinney 2002), *amended by* 1990 N.Y. Laws 679, § 1.

66. *Id.* §§ 23-2701 to 23-2723.

67. *Id.* § 23-2703(1).

68. *See id.* § 23-2703(2), *amended by* 1974 N.Y. Laws 1043, § 2.

69. Frew Run Gravel Prods., Inc. v. Town of Carroll, 71 N.Y.2d 126, 133 (1987).

70. N.Y. ENVTL. CONSERV. LAW § 23-2703(2) (McKinney 1990), *amended by* 1991 N.Y. Laws 166, § 228.

dinia,[71] the Court of Appeals made clear that this language supported local laws that zoned out mining altogether or restricted it to certain areas.[72] However, the amendment deleted the original language allowing localities to impose stricter reclamation requirements, depriving municipal governments of that authority.[73] So local governments may use their zoning power to bar mining but are preempted from regulating the process of mining or imposing reclamation criteria.[74]

New York's coastal erosion law, the Shoreowner's Protection Act,[75] also contemplates local legislation. Although the Act sets forth the State's policy of reducing the erosion of its coastline and requires DEC to identify areas in need of particular protection,[76] the actual responsibility of enacting laws limiting development that threatens to exacerbate erosion is left to local governments.[77] Local laws and their amendments are still subject to DEC approval.[78] However, if localities fail to enact or enforce such laws, the counties may.[79] Only if neither the locality nor the county does so may DEC issue regulations to control coastal erosion in that venue.[80] The Department may also revoke its earlier approval of a local law not being enforced.[81] Even then, the statute is not to "be construed to prohibit any local government from adopting and enforcing any ordinances or local laws"[82] on coastal erosion, except that "to the extent of any inconsistency, [the State regulations] shall apply."[83]

An instance of a locality's failure to enforce its own ordinance arose in *Katz* v. *Village of Southampton*, where a village had not enforced a local law restricting vehicles from driving on its beaches.[84] The court ruled DEC's power to revoke its approval precluded a resident's suit for mandamus to compel the village to

71. 87 N.Y.2d 668 (1996); *see also* O'Brien v. Town of Fenton, 653 N.Y.S.2d 204 (App. Div. 1997) (holding that a town may limit mining to areas so zoned).

72. *Gernatt Asphalt*, 87 N.Y.2d at 680-81.

73. *See* Philipstown Indus. Park, Inc. v. Philipstown Town Bd., 669 N.Y.S.2d 340 (App. Div. 1998).

74. Town of Riverhead v. T.S. Haulers, Inc., 713 N.Y.S.2d 740 (App. Div. 2000).

75. N.Y. ENVTL. CONSERV. LAW art. 34 (McKinney 2002).

76. *Id.* §§ 34-0102, 34-0104.

77. *Id.* § 34-0105.

78. *Id.*

79. *Id.* § 34-0106.

80. *Id.* § 34-0107.

81. N.Y. ENVTL. CONSERV. LAW §§ 34-0106, 34-0107 (McKinney 2002).

82. *Id.* § 34-0107(4).

83. *Id.*

84. 664 N.Y.S.2d 457 (App. Div. 1997)

enforce its local law, since the Legislature had given the Department "primary responsibility" in that situation.[85]

Similarly, the Waterfront Revitalization Act,[86] adopted to implement the federal Coastal Zone Management Act (CZMA),[87] envisions local, rather than State, enactment of controls on coastal zone development. Just as states with federally-approved coastal zone management plans receive federal funding and the right to limit federally-licensed activities under the CZMA,[88] the New York statute authorizes localities with State-approved plans to obtain State funding (actually CZMA funds funded through the State government) and the right to limit State-approved activities.[89] The actual land use controls, though, are to be local, not State-enacted.[90] These local laws can impact greatly on how State authorities such as DEC clean up hazardous waste along local waterfronts.

A final area where state legislation explicitly authorizes local laws if consistent relates to the bulk storage of petroleum, which is regulated by DEC under ECL Article 17.[91] Section 17-1017 of that article specifies that inconsistent local laws are preempted, but goes on to allow county and New York City laws, even if inconsistent, if they provide "environmental protection equal to or greater than the provisions of this title"[92] and are approved by DEC.[93] A town law regulating fuel tanks was preempted by this section both because it was inconsistent with the ECL and because even "[i]f the State Legislature had not expressly preempted the field, its enactment of a comprehensive and detailed regulatory scheme. . .would permit the finding that local laws in the same field were impliedly preempted."[94] This seems overstated, since the statute explicitly preempts only inconsistent local laws.

A more recent and better reasoned decision by the same court sustained a town zoning law permitting warehouses, defined as a "building or structure used for the storage of nonpolluting and

85. *Id.* at 459.

86. N.Y. EXEC. LAW §§ 910-923 (McKinney 2002) (entitled Waterfront Revitalization of Coastal Areas and Inland Waterways).

87. 16 U.S.C. §§ 1451-1465 (2000).

88. *Id.* § 1455.

89. N.Y. EXEC. LAW §§ 916, 918.

90. *Id.* § 915.

91. N.Y. ENVTL. CONSERV. LAW §§ 17-1001 to 17-1017 (McKinney 2002).

92. *Id.* § 17-1017(2).

93. *Id.*

94. Oil Heat Inst. of Long Island, Inc. v. Town of Babylon, 548 N.Y.S.2d 305, 306 (App. Div. 1989).

nonhazardous manufactured goods."[95] The court rebuffed the claim that, as construed by the town to ban oil storage, it was preempted.[96] As this court noted, the "zoning ordinance. . .did not pertain to the installation, maintenance and abandonment, or storage of petroleum. Rather, [it] categorically prohibited the use sought[.]"[97] Just as the zoning out of mining is not preempted by the State laws regulating reclamation,[98] this zoning law is not a preempted attempt to regulate oil storage.

Similarly, the Stream Protection Act,[99] which requires a permit from DEC to alter the course of a stream or build a dock or dam,[100] allows local laws relating to docks or related structures.[101] Local laws must be submitted to DEC and are valid only if the Commissioner finds they provide "environmental protection comparable to, or greater than," the state statute.[102] If so, DEC may delegate its dock permit program to that locality.[103] These provisions were added in 1992 as part of an amendment restoring DEC's authority over docks, which had been excised in 1983.[104] In contrast, the provisions of the Stream Protection Act regulating dams, altering watercourses, and filling in streams and other waterways have no language authorizing local laws. The courts have therefore held these statutes preempt localities from enacting local laws in these areas.[105]

B. State Statutes Expressly Preempting Local Laws

Unlike those statutes discussed earlier, some New York laws explicitly bar local regulation. A prime example is the power plant siting law, Public Service Law article X, which was drafted largely to preclude municipalities from zoning out power plants.[106] The Act establishes a state siting board to determine

95. JIJ Realty Corp. v. Costello, 658 N.Y.S.2d 92, 93 (App. Div. 1997).
96. *Id.*
97. *Id.* at 94.
98. *See* Frew Run Gravel Prods., Inc. v. Town of Carroll, 71 N.Y.2d 126 (1987).
99. N.Y. ENVTL. CONSERV. LAW §§ 15-0501 to 15-0515 (McKinney 2002).
100. *Id.* § 15-0503.
101. *Id.* § 15-0503(1)(c).
102. *Id.*
103. *Id.*
104. 1992 N.Y. Laws 791, § 5.
105. *See* Vill. of Fleischmanns v. Hyman, 298 N.Y.S. 564 (Sup. Ct. 1937) (finding local law regulating dams preempted); People v. Poveromo, 359 N.Y.S.2d 848 (App. Term. 1973) (finding local law regulating dumping of fill preempted); *see also* 69 Op. State Compt. 112 (1969) (same).
106. *See generally* N.Y. PUB. SERV. LAW art. X (McKinney 2002).

the environmental issues raised by new power plants of a threshold capacity of 80 megawatts or more.[107] It specifically states that no municipality "may, except as expressly authorized under this article by the board, require any approval, consent, permit, certificate or other condition" for such facilities, as long as the municipality has received notice of the application to construct it.[108] Municipalities may become parties to siting board proceedings, though, and are free to oppose a power plant in that venue.[109]

C. State Statutes that are Silent

The State Environmental Quality Review Act (SEQRA)[110] requires both state and local government agencies to weigh the environmental impacts of their actions; however, it says nothing about local laws. Nevertheless, many localities have adopted local laws modeled on and implementing SEQRA. Notable among these is the City of New York's City Environmental Quality Review (CEQR) regulations, in effect since 1973.[111] Other localities have also adopted SEQRA–like review procedures, and, in one intriguing case, sought to apply them to projects outside a town's borders that would arguably create environmental impacts, such as increased traffic, within the town.[112] The court ruled that the town law had been enacted in violation of SEQRA, since it claimed authority over every adjacent locality without weighing the impacts of the local law on environmental and socio-economic concerns in those neighboring communities.[113]

Similarly, New York's pesticide statute[114] does not discuss preemption. However, two courts have ruled it nonetheless preempts local laws on the subject.[115] One court found the statute and DEC's regulations "clearly evidence the State's intention to

107. *Id.* §§ 160(2), 161.
108. *Id.* § 172(1).
109. *Id.* § 166(1)(h).
110. N.Y. ENVTL. CONSERV. LAW art. VIII.
111. *See* City of New York Exec. Order No. 87, Environmental Review of Major Projects (Oct. 18, 1973) (the ancestor of Exec. Order No. 91, CEQR (Aug. 24, 1977), and the current CEQR rules, RULES OF THE CITY OF NEW YORK tit. 62, ch. 5 (June 25, 1991)).
112. *See* City of New Rochelle v. Town of Mamaroneck, No. 6125/00, No. 11991/00 (N.Y. Sup. Ct. Oct. 12, 2001).
113. *Id.*
114. N.Y. ENVTL. CONSERV. LAW art. 33 (McKinney 2002).
115. *See* Ames v. Smoot, 471 N.Y.S.2d 128, 131 (App. Div. 1983); Long Island Pest Control Ass'n v. Town of Huntington, 341 N.Y.S. 2d 93 (Sup. Ct. 1973), *aff'd*, 351 N.Y.S. 2d 945 (App. Div. 1974).

preempt local regulation of pesticide use,"[116] noting that the statute provides "[j]urisdiction in all matters pertaining to the distribution, sale, use and transportation of pesticides, is by this article vested exclusively in the [C]ommissioner [of Environmental Conservation]."[117]

The sole area of pesticide control where the statute refers to localities relates to notice to residents that pesticides have been applied commercially on lawns.[118] This provision, enacted in 2000, empowers counties, as well as the City of New York, to adopt local laws mandating written notice to neighboring occupants.[119] Several counties have done so and the courts have ruled they need not comply with SEQRA before adopting such laws.[120]

Another State statute silent regarding preemption is the ECL provision regulating sewage system cleaners in Nassau and Suffolk counties.[121] However, this provision has been held by the Court of Appeals not to preempt a county law that bans the sale of cesspool additives, designed to unclog sewage disposal systems but found by Suffolk County to likely pollute its groundwater.[122] In *Jancyn Manufacturing Corp. v. County of Suffolk*, the court found no conflict between the State law, which empowers DEC to ban certain sewage system cleaners, and the county law, which simply went further.[123] Nor did the State Legislature intend to occupy the entire field, even though the goal of both laws was similar.[124]

In contrast, a town law requiring developers of parcels expected to generate added traffic to pay a "transportation impact fee" was ruled preempted by both state Highway Law and Town Law limits on the amounts towns may obtain through taxation for highway purposes and the way those funds may be spent.[125] The

116. *Ames,* 471 N.Y.S.2d at 131.

117. *Id.* (quoting N.Y. ENVTL. CONSERV. LAW § 33-0303(1) (McKinney 2002)); *see also Long Island Pest Control Ass'n,* 341 N.Y.S. 2d 93.

118. N.Y. ENVTL. CONSERV. LAW § 33-1004 (McKinney 2002).

119. *Id.*

120. *See* Nature's Trees, Inc. v. County of Nassau, 740 N.Y.S.2d 417 (App. Div.), *appeal denied,* 774 N.E.2d 756 (2002).

121. N.Y. ENVTL. CONSERV. LAW art. 39.

122. Jancyn Mfg., Corp. v. County of Suffolk, 71 N.Y.2d 91 (1987) (regarding a county law that exempted additives found by the county health commissioner not to adversely affect groundwater).

123. *Id.*

124. *Id.*

125. Albany Area Builders Ass'n. v. Town of Guilderland, 74 N.Y.2d 372, 377-78 (1989) (citing N.Y. HIGH. LAW §§ 271, 284 (McKinney 2002) & N.Y. TOWN LAW §§ 104, 107(3) (McKinney 2002)).

Highway Law provisions did not expressly preempt, but the Court of Appeals found they showed a legislative intent to create a uniform scheme, which allowing local impact fees would subvert.[126]

Finally, the Court of Appeals has held that local zoning laws are not preempted by state statutes regulating drug treatment facilities[127] or licensing the sale of alcoholic beverages.[128] In both of these situations the state laws, again silent regarding preemption, were ruled not to preclude the local power to control land use, for example, in the alcoholic beverage context, New York City's local law zoning adult establishments away from residences and schools.[129]

D. Preemption in other States

New York's pattern of preemption when the Legislature has dictated it or uniformity demands it, but not otherwise, is, not surprisingly, found in other states as well. A Maryland court has ruled that a county law mandating piers to be distant from shellfish beds was not preempted by the state's Wetlands Act, which requires a permit for piers, or by the state's shellfish regulations.[130] The court noted that these laws have quite different purposes: protecting wetlands and restricting the taking of shellfish that might be contaminated, as opposed to limiting the location of marinas that might pollute shellfish beds.[131]

The Ninth Circuit Court of Appeals recently found a city ordinance imposing liability for hazardous waste cleanup not preempted by California's statute on the subject[132] (or by CERCLA, the parallel federal statute).[133] As that court pointed out, nothing in the state law (or in CERCLA) preempted local laws relating to liability for damage to municipal natural resources, which are essentially not covered by either the California statute or CER-

126. *Id.*

127. Vill. of Nyack v. Daytop Vill., Inc., 78 N.Y.2d 500 (1991).

128. DJL Rest. Corp. v. City of New York, 96 N.Y.2d 91 (2001).

129. *See* City of New York v. Stringfellow's of New York, Ltd., 684 N.Y.S.2d 544 (App. Div. 1999).

130. Holiday Point Marina Partners v. Anne Arundel County, 707 A.2d 829 (Md. 1998).

131. *Id.* at 840.

132. CAL. HEALTH & SAFETY CODE §§ 25300-25395.15 (West 2001).

133. Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928 (9th Cir. 2002); *see also* Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (2000).

CLA.[134] This eminently sensible decision may yet lead to localities enacting more laws protecting their natural resources–reservoirs, parks, and the like–from hazardous waste contamination.

On the other hand, a county law regulating the disposal of sewage sludge on land has been held to be preempted by Georgia's water quality statute, which explicitly controls sludge land application.[135] Although the state law was silent as to preemption, the court found implied preemption, particularly since the state statute does expressly allow municipalities to impose reasonable fees for monitoring sludge disposal, which "by implication precludes counties from exercising broader powers."[136]

Two courts have reached opposite results concerning local regulations of large-scale animal feedlots, frequently producers of large-scale air and water pollution.[137] Iowa's Supreme Court found a county law controlling large livestock feeding facilities through a permit program and related air and water protection measures was preempted by state law.[138] Though the state statute did not expressly preempt, the county law allowed suits to abate violations of state law without the state agency's approval, which was a precondition to such suits under state law.[139] In addition, the court found the state intended to occupy the field through its criteria for feedlots, precluding additional county law requirements.[140] However, the court went on to conclude that, aside from the state law occupying the field, there was a conflict between the state and county laws since the county imposed added requirements,[141] a conclusion that seems completely wrong. New York's Court of Appeals in *Jancyn* sensibly found that a local law that adds requirements does not conflict with state law.[142] This conforms with decisions like *A. E. Nettleton Co.* v. *Dia-*

134. *Fireman's Fund,* 302 F.3d at 944-45 (except where city is itself a responsible party under CERCLA).

135. Franklin County v. Fieldale Farms Corp., 507 S.E.2d 460 (Ga. 1998).

136. *Id.* at 464.

137. *See* Goodell v. Humboldt County, 575 N.W.2d 486 (Iowa 1998); Bd. of Supervisors v. ValAdCo, 504 N.W.2d 267, 272 (Minn. Ct. App. 1993).

138. *Goodell*, 575 N.W.2d 486.

139. *Id.* at 502.

140. *Id.*

141. *Id.* at 502-03; *see also ValAdCo*, 504 N.W.2d at 272 (holding the same and relied on in *Goodell).*

142. *Jancyn,* 71 N.Y.2d at 905.

mond[143] where the Court of Appeals held a state statute banning the sale of articles made from endangered species does not conflict with a federal law simply because the state law bans additional articles.[144]

A result more consistent with the better–reasoned cases was reached by a Missouri court that sustained a county law mandating a permit for a large animal feedlot and rebuffing a preemption claim.[145] The court expressly rejected the contention that imposing added requirements creates a conflict with the state law.[146] Similarly, a Minnesota court upheld a town law requiring a conditional use permit for a feedlot, noting that the town zoning law and the state law regulating feedlots "address separate and distinct aspects of feedlot odor. . .and can be reconciled."[147]

A California court sustained a city ordinance barring the dumping of bait in the city's harbor, rejecting a claim that the State Fish and Game Code precluded the local law.[148] As the court noted, the state law regulated fishing, while the ordinance was an anti-water pollution measure.[149] Likewise, state laws controlling electric utilities' rates and service do not preempt a local law regulating air emissions from a power plant.[150]

Local laws designed to regulate solid and hazardous waste facilities have been upheld against state law preemption in several cases.[151] One notable decision, *Sharon Steel Corp. v. City of Fairmont*,[152] found a city ordinance that banned disposal of hazardous waste was not preempted by state law or RCRA,[153] since it was "directed at abating a public nuisance condition" and not "de-

143. 27 N.Y.2d 182 (1971), *appeal dismissed sub nom.* Reptile Prods. Ass'n v. Diamond, 401 U.S. 969 (1971).

144. *Id.*

145. Borron v. Farrenkopf, 5 S.W.3d 618 (Mo. Ct. App. 1999).

146. *Id.* at 624.

147. Canadian Connection v. New Prairie Township, 581 N.W.2d 391, 396 (Minn. Ct. App. 1998).

148. People v. Mueller, 88 Cal. Rptr. 157 (Ct. App. 1970).

149. *Id.* at 160.

150. Orange County Air Pollution Control Dist. v. Pub. Util. Comm'n, 484 P.2d 1361 (Cal. 1971). These cases are well catalogued in SELMI AND MANASTER, STATE ENVIRONMENTAL LAW § 5.31 (West 2001).

151. River Springs Ltd. Liab. Co. v. Bd. of County Comm'rs, 899 P.2d 1329 (Wyo. 1995); IT Corp. v. Solano County Bd. of Supervisors, 820 P.2d 1023 (Cal. 1991).

152. 334 S.E.2d 616 (W.Va. 1985), *appeal dismissed*, 474 U.S. 1098 (1985).

153. *See* 42 U.S.C. §§ 6901-6992 (2000).

signed to deal with the management and control over the disposal of hazardous wastes."[154]

On the other hand, several courts have found local laws dealing with solid and hazardous waste preempted by state statutes.[155] This is particularly so, as might be expected, where localities attempt to totally exclude hazardous waste landfills and similar politically unpalatable uses.[156] In one dramatic instance, a town's challenge to a state agency's authority to establish a regional landfill was found to be preempted since the very purpose of the state law was to "adequately balance the competing concerns of various localities."[157]

IV. Conclusion

Municipal environmental regulation is welcome and is here to stay. Just as the states have often stepped in where federal controls were ineffective, providing enforcement that Congress or federal agencies failed to provide, local laws often furnish environmental protection where state statutes do not.

State laws filling gaps in federal protection are legion. For example, New York's Mason Law,[158] enacted in 1970, protected many endangered species that federal law at the time simply did not protect. The state statute was upheld against claims of federal preemption in the *Nettleton* case, discussed earlier.[159] The same is true with California's moratorium on new nuclear power plants, sustained by the Supreme Court, based on the federal government's inability to deal effectively with the soaring costs of storing nuclear waste.[160] Even some state laws found to be preempted by federal statutes were clearly enacted to meet genuine environmental concerns such as oil spills from tankers, at the time not effectively regulated by the Coast Guard.[161]

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154. *Sharon Steel Corp.*, 334 S.E.2d at 622; *see also* Fondessy Enters., Inc. v. City of Oregon, 492 N.E.2d 797 (Ohio 1986).

155. *See* City of Shelton v. Comm'r, 479 A.2d 208 (Conn. 1984); Envirosafe Servs. of Idaho, Inc. v. County of Owyhee, 735 P.2d 998 (Idaho 1987).

156. *See* Stablex Corp. v. Town of Hooksett, 456 A.2d 94 (N.H. 1982); Midcoast Disposal, Inc. v. Town of Union, 537 A.2d 1149 (Me. 1988); East v. Gilchrist, 463 A.2d 285 (Md. 1983).

157. *City of Shelton,* 479 A.2d at 215.

158. N.Y. ENVTL. CONSERV. LAW § 11-0536 (McKinney 1970).

159. *See* 27 N.Y.2d 182 (1971), *appeal dismissed sub nom.* Reptile Prods. Ass'n v. Diamond, 401 U.S. 969 (1971).

160. *Pac. Gas & Elec.,* 461 U.S. 190 (1983).

161. *See* Ray v. Atl. Richfield Co., 435 U.S. 151 (1978).

Similarly, local environmental controls are needed to fill gaps in effective state and federal environmental regulation. In cases where well-heeled and politically weighty private interests succeed in thwarting federal and state controls, local government regulations will likely play an increasingly major role. Municipalities and their voters have gained in both political sophistication and environmental awareness. In addition their legislation has greatly progressed from the development-oriented land use measures that spurred state controls a generation ago[162] to the variety of enactments examined in this paper, many of them well-drafted and fine-tuned. Moreover, as regional land use planning occurs in more and more states, the role of local governments in safeguarding the environment will be augmented. Perhaps, just as Clemenceau suggested war is too important to leave to the generals, so too is environmental protection too important to leave solely to Congress and the states.

162. *See supra* text accompanying notes 4-7.