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LeRoy C. Paddock  
*Pace Law School*

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# **THE NEED FOR A PRINCIPLED EXPANSION OF THE ROLE OF LOCAL GOVERNMENT IN ENVIRONMENTAL ENFORCEMENT**

**BEVERLY CONERTON†  
LEROY PADDOCK††**

## **INTRODUCTION**

Environmental programs over most of the past two decades have focused on a relatively small number of large facilities that discharge significant quantities of pollutants into the air or water, or that treat, store or dispose of hazardous waste. This relatively small universe of regulated facilities has allowed most enforcement efforts to be undertaken by state and federal governments.

Recently, though, the scope of environmental programs<sup>1</sup> has expanded dramatically. Environmental regulations now cover tens of thousands of facilities. Regulated facilities include dry cleaners, print shops, body shops and service stations. The large number of regulated facilities makes it difficult for state officials to enforce several of Minnesota's environmental laws.

One response to the geometric increase in the number of regulated facilities is to expand the role local governments play in environmental enforcement. However, simply transferring enforcement responsibility to local governments is unlikely to produce better enforcement since local governments vary significantly in size and, consequently, in capability to address environmental problems. For example, publicly-owned treatment works responsible for implementing and enforcing pre-

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† Special Assistant Attorney General with the Minnesota Attorney General's Office.

†† Assistant Attorney General with the Minnesota Attorney General's Office. The views expressed in this article are those of the authors and do not necessarily reflect the views of the Minnesota Attorney General's Office.

1. For purposes of this article, environmental programs include air pollution, solid waste management, hazardous waste, surface and groundwater pollution, pesticides, the Community Right-To-Know Act and the Minnesota Environmental Rights Act. The zoning and land use planning authorities of local governments is not addressed in this article.

treatment programs<sup>2</sup> are operated by entities that range in size from the Metropolitan Waste Control Commission, with a service area population of 2,030,000 people,<sup>3</sup> to the City of St. James with a population of 4,346.<sup>4</sup> Similarly, environmental programs range widely in the level of technical expertise needed to effectively enforce the laws. The expertise needed to issue an air emissions permit for a refinery is much different from that needed to inspect a retail outlet to ensure it is accepting used lead-acid batteries.<sup>5</sup>

As a result of these differences among local governments and among environmental programs, it is important to examine each environmental program to determine the role local governments could reasonably play in enforcing the law. Factors that should be considered in making these decisions include:

1. The number of regulated facilities;
2. The degree of expertise needed to effectively enforce the law;
3. The need for oversight of the local government's enforcement program;
4. The interest of the local governmental unit in participating in enforcing the law; and
5. The availability of adequate resources to enforce the law.

This article will explore local government's existing authority to enforce environmental laws in order to understand the basis from which local governments could assume an expanded enforcement role. Next, it will discuss the dramatic expansion in the enforcement workload that has occurred over the past five years and the corresponding need for an expanded local role in environmental enforcement. Finally, this

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2. Pretreatment programs require industrial users of sewer systems to treat certain of their wastes prior to discharging them into the sewer. This is required to prevent damage to the publicly-owned treatment works (POTW) or the pass-through of contaminants causing the POTW to violate its discharge permit. Typically, POTWs are required to develop a pretreatment program as a condition of their operating permit. See United States Environmental Protection Agency, a Primer on the Office of Water Enforcement and Permits and Its Programs 4-1 to 4-5 (Mar. 1989).

3. Interview with Peter Berglund, Metropolitan Waste Control Commission (Mar. 23, 1990).

4. See United States Department of Commerce, Bureau of the Census, 1980, part 25, Minnesota, at 25-11 (Table 14) (Aug. 1982).

5. See *infra* notes 125-28 and accompanying text.

article will suggest and analyze several factors for allocating additional enforcement authority to local governments.

## I. THE AUTHORITY OF LOCAL GOVERNMENTS TO ENFORCE ENVIRONMENTAL LAWS

Counties, cities, towns and special purpose units of government such as watershed districts,<sup>6</sup> sanitary districts<sup>7</sup> and the Metropolitan Waste Control Commission,<sup>8</sup> have significant authority to pursue enforcement actions to protect the environment. This authority is derived from three sources: public nuisance law, general statutory authority of local units of government, and provisions of state and, in some cases, federal environmental laws.

### A. Public Nuisance Law

Environmental enforcement by state and local governments has its roots in the law of public nuisance.<sup>9</sup> Professor Prosser has said that "[n]o better definition of a public nuisance has been suggested than that of an act or omission 'which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects.'"<sup>10</sup> Government, rather than individuals, is normally the appropriate entity to bring actions addressing a public nuisance.<sup>11</sup>

Minnesota courts have long recognized the power of local governments to initiate actions abating a public nuisance. In *Village of Pine City v. Munch*,<sup>12</sup> the issue was whether the Village of Pine City could obtain an injunction to stop the drainage of

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6. See MINN. STAT. §§ 112.34-.89 (1988 & Supp. 1989). Watershed districts are public corporations that may be established for a variety of water conservation purposes. MINN. STAT. § 112.36, subd. (2) (1988).

7. See MINN. STAT. §§ 115.18-.37 (1988 & Supp. 1989 & Supp. II 1989). A sanitary district may be established by two or more adjacent municipalities to collect and dispose of domestic sewage, garbage and industrial wastes. MINN. STAT. § 115.19 (1988).

8. See MINN. STAT. §§ 473.501-.549 (1988 & Supp. 1989).

9. See W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW §§ 2.1-2.2 (1977).

10. W. PROSSER, LAW OF TORTS 583 (1971) (citing *Mayor of Alpine v. Brewster*, 7 N.J. 42, 49, 80 A.2d 297, 300 (1951)) (discusses public nuisance law at common law and its history); SALMOND, THE LAW OF TORTS 233 (8th ed. 1934); J. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 105 (2d ed. 1890).

11. See RESTATEMENT (SECOND) OF TORTS § 821C (1979); W. RODGERS, ENVIRONMENTAL LAW § 2.2, at 34 (1986) (citing RESTATEMENT (SECOND) OF TORTS §§ 821B, 821C).

12. 42 Minn. 342, 44 N.W. 197 (1890).

a pond which allowed exposed vegetable matter to decay causing "widespread sickness and death among the inhabitants of the village."<sup>13</sup> In allowing the Village of Pine City to obtain an injunction against the drainage based on the theory of public nuisance, the supreme court observed that "a municipal corporation has no control over nuisances within its corporate limits, except such as is conferred upon it by its charter or general laws."<sup>14</sup> However, the court noted that: "To this village, as is usual in the case of municipal corporations of that class, is given the power, and intrusted the duty, of preserving and protecting the health of its inhabitants, by providing for the removal of all public nuisances of the kind here complained of. To this extent it is the agent of the state."<sup>15</sup> This early public nuisance authority of local governments is the antecedent of the general injunctive authority for the state, local governments and individuals to prevent pollution, impairment or destruction of the environment.<sup>16</sup>

*Village of Pine City* established the need for a nexus to a local government's general laws to permit a local government to abate a public nuisance. Cases decided subsequent to *Village of Pine City* demonstrate that grants of authority need not be specific but may be found in broad duties devolved upon local governments, such as protecting public health<sup>17</sup> or maintain-

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13. *Id.* at 343, 44 N.W. at 197.

14. *Id.*

15. *Id.* at 344, 44 N.W. at 197. See also *State ex rel. Goff v. O'Neil*, 205 Minn. 366, 286 N.W. 316 (1939) (court upheld temporary injunction against defendant for his usury business, since court found it to be a public nuisance); *City of Jordan v. Leonard*, 119 Minn. 162, 137 N.W. 740 (1912) (municipality had the power to abate a nuisance created by the defendant on the city's public streets); *City of Albert Lea v. Knatvold*, 89 Minn. 480, 95 N.W. 309 (1903) (court determined that the city had the right to abate the nuisance created by the defendants interference with public property within the city limits); *City of Red Wing v. Guptil*, 72 Minn. 259, 75 N.W. 234 (1898) (city had authority to abate the nuisance created by defendant in maintaining a slaughterhouse without the city's authority and in an offensive manner to the public); *Township of Hutchinson v. Filk*, 44 Minn. 536, 47 N.W. 255 (1890) (a town may bring a civil action in its own name to abate a nuisance in the form of an obstruction to a public highway).

16. See *W. RODGERS*, *supra* note 9, § 2.1, at 101. In Minnesota the injunctive relief may be sought under the Minnesota Environmental Rights Act. MINN. STAT. §§ 116B.03, 116B.07 (1988).

17. See, e.g., MINN. STAT. § 112.36 (1988) (watershed districts); MINN. STAT. §§ 145A.01-.14 (1988 & Supp. 1989 & Supp. II 1989) (local boards of health); MINN. STAT. § 368.01, subds. 14, 19 (1988 & Supp. II 1989) (towns); MINN. STAT. § 412.221, subds. 22, 32 (1988) (cities). Each of these entities has general authority to protect public health and welfare.

ing highways.<sup>18</sup> Local governments also have specific statutory authority to define and abate nuisances.<sup>19</sup> A public nuisance is also a criminal violation<sup>20</sup> which may be prosecuted by the state or a county attorney.

### *B. General Powers of Local Governments*

Counties, towns and cities are political subdivisions of the state.<sup>21</sup> Counties and towns have only those powers expressly granted by statute or those implied powers necessary to exercise the express powers granted.<sup>22</sup> Cities are classified depending on whether a city has adopted a home rule charter.<sup>23</sup> As of 1989, Minnesota had 747 statutory cities and 107 home rule cities.<sup>24</sup> For legislative purposes, cities are also divided by class based on population.<sup>25</sup> Statutory cities are municipal corporations that have the powers, rights and duties of municipal corporations at common law<sup>26</sup> as well as powers conferred on cities by statute.<sup>27</sup> In contrast, home rule charter cities are governed by a charter. Cities adopt a charter pursuant to the Minnesota Constitution and state law<sup>28</sup> and may exercise powers provided in their charters.<sup>29</sup> Regardless of a city's classification, by enactment of general laws, the Minnesota

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18. See cases cited *supra* note 15.

19. See, e.g., MINN. STAT. § 145A.04, subds. 8-10 and MINN. STAT. § 145A.05, subd. 7 (1988) (local boards of health); MINN. STAT. § 368.01, subd. 15 (1988) (towns); MINN. STAT. § 412.221, subd. 23 and MINN. STAT. § 412.231 (1988) (statutory cities); MINN. STAT. § 429.021, subd. 1(8) (1988) (municipalities).

20. MINN. STAT. §§ 609.74, 609.745 (1988).

21. See, e.g., *State ex rel. Anoka County Airport Protest Comm. v. Minneapolis-St. Paul Metro. Airports Comm'n*, 248 Minn. 134, 143, 78 N.W.2d 722, 728 (1956) (discussing power entrusted to municipalities citing *Monaghan v. Armatage*, 218 Minn. 108, 112, 15 N.W.2d 241, 243 (1944)); *Dosdall v. Olmsted County*, 30 Minn. 96, 14 N.W. 458 (1882) (discussing powers of counties and towns).

22. *Op. Att'y Gen.* 218g-9 (Dec. 29, 1983) (towns); see also *Grannis v. Board of County Comm'rs*, 81 Minn. 55, 57, 83 N.W. 495, 496 (1900) (counties).

23. MINN. STAT. § 410.015 (1988).

24. MINN. STAT. §§ 428A.01-.10 (Supp. 1989).

25. MINN. STAT. § 410.01 (1988).

26. MINN. STAT. § 412.211 (1988). See also *City of Moorhead v. Murphy*, 94 Minn. 123, 102 N.W. 219 (1905). In *Murphy* the court determined that the city council had the power to employ attorneys and contract with them for their compensation since the charter did not prohibit this. *Id.*

27. MINN. STAT. § 412.211 (1988).

28. MINN. CONST. art. XII, § 4; MINN. STAT. § 410.04 (1988).

29. See *State ex rel. Town of Lowell v. City of Crookston*, 252 Minn. 526, 529, 91 N.W.2d 81, 84 (1958) ("[a] home rule charter . . . has all the force of a charter granted by legislative act . . .").

Legislature may modify or withdraw powers granted by statute or home rule charter.<sup>30</sup>

In addition to the general authority of local governments, state environmental laws, and federal environmental laws in the case of citizen suits,<sup>31</sup> have granted local governments environmental regulatory authority. At the state level, this grant of authority also includes a duty to enforce state environmental laws, orders, rules, standards and permits.<sup>32</sup> When violations of state laws carry criminal sanctions, city and county attorneys have authority to bring enforcement actions.<sup>33</sup> In some cases, though, state or federal environmental laws have also limited the authority of local governments.<sup>34</sup>

### C. Local Government's Role Under Environmental Statutes

#### 1. Pesticides and Fertilizers

Local governments have limited authority to regulate pesticides but may have considerable authority to enforce state law. Under the Minnesota Pesticide Control Act (Pesticide Act),<sup>35</sup> local governments are preempted from regulating the registration, labeling, distribution, sale, handling, use, application and disposal of pesticides, except where regulation is specifically allowed by the Pesticide Act.<sup>36</sup> However, local governments may take on the inspection, enforcement and regulatory duties

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30. *Rimarcik v. Johansen*, 310 F. Supp. 61, 70 (D. Minn. 1970), *vacated and remanded on other grounds*, 403 U.S. 915 (1971) (examining the validity of a state statute requiring a 55% affirmative vote in order to adopt the home rule charter); *State v. Swanson*, 85 Minn. 112, 113, 88 N.W. 416, 417 (1901) (village charter provisions, to the extent that they were inconsistent with the high license law, were repealed or modified by such a general law).

31. Political subdivisions, which are included within the definition of person or citizen, are authorized to initiate citizen suits under several of the principal federal environmental statutes. See Clean Water Act, 33 U.S.C. § 1365(a) (1988); Safe Drinking Water Act, 42 U.S.C. §§ 300j-8, 300h-2 (1982 & Supp. V 1987); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a) (1982 & Supp. V 1987); Clean Air Act, 42 U.S.C. § 7604(a) (1982). Direct access to federal court is also provided to persons under § 107 of the Comprehensive Environmental Response, Compensation & Liability Act, 42 U.S.C. § 9607(a)(4)(B) (1982 & Supp. V 1987). However, this section only enables persons, such as political subdivisions, to recover costs they have incurred in responding to releases of hazardous substances. See also *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1428 (S.D. Ohio 1984).

32. MINN. STAT. § 115.06, subd. 3 (1988); MINN. STAT. § 115.071, subd. 2 (1988).

33. MINN. STAT. § 487.25, subd. 10 (1988).

34. See, e.g., *infra* notes 35, 122, 145 and accompanying text.

35. MINN. STAT. §§ 18B.01-.39 (1988 & Supp. 1989).

36. MINN. STAT. § 18B.02 (1988).

under state law through a joint powers agreement with the Commissioner of Agriculture.<sup>37</sup> The Commissioner may also enter into regulatory agreements with local governments to take action necessary to prevent groundwater contamination from pesticides.<sup>38</sup>

In the area of pesticide application, statutory and home rule cities have authority to regulate the use of pesticide application warning signs when pesticides are applied to turf.<sup>39</sup> State law, however, establishes what information is required to be on the warning sign, the size and location of the sign and the time during which the sign must be posted.<sup>40</sup> Cities may not require more restrictive warning information than that required by state law.<sup>41</sup> Additionally, cities may license pesticide application and may enact penalty and enforcement provisions.<sup>42</sup>

In the area of fertilizer regulation, local governments may enforce state law if that authority is delegated. Under the Fertilizer, Soil Amendments and Plant Amendments Law,<sup>43</sup> local governments are authorized to inspect, enforce and regulate the storage, handling, distribution, use and disposal of fertilizers. However, this authority exists only if the Commissioner of Agriculture delegates it through a joint powers agreement.<sup>44</sup>

The Agricultural Chemical Liability, Incidents and Enforcement Act (Agricultural Liability Act),<sup>45</sup> modeled after the Minnesota Environmental Response and Liability Act<sup>46</sup> and the Petroleum Tank Release and Compensation Act,<sup>47</sup> is intended to cleanup releases of agricultural chemicals and define liability for cleanup costs. When the Commissioner of Agriculture orders a responsible person to take corrective action for the cleanup of a release, "[a] political subdivision may not request or order any person to take an action that conflicts with the corrective action ordered by the commissioner."<sup>48</sup> Enforce-

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37. MINN. STAT. § 18B.01, subd. 2 (1988); MINN. STAT. § 18B.03, subd. 3 (1988).

38. MINN. STAT. § 18B.10 (1988).

39. MINN. STAT. § 18B.09, subd. 2 (1988).

40. MINN. STAT. § 18B.09, subd. 3 (1988).

41. MINN. STAT. § 18B.09, subd. 2 (1988).

42. *Id.*

43. MINN. STAT. §§ 18C.001-.525 (Supp. 1989).

44. MINN. STAT. § 18C.111, subd. 3 (Supp. 1989).

45. MINN. STAT. §§ 18D.01-.331 (Supp. 1989).

46. MINN. STAT. §§ 115B.01-.37 (1988 & Supp. 1989).

47. MINN. STAT. §§ 115C.01-.10 (1988 & Supp. 1989).

48. MINN. STAT. § 18D.105, subd. 1(c) (Supp. 1989).



ment actions for violations of chapters 18B (pesticides), 18C (fertilizers) and 18D (agricultural chemical incidents) may be initiated by a county attorney at the request of the Commissioner of Agriculture and agreement by the Attorney General.<sup>49</sup> Actions to recover civil penalties may be initiated by county attorneys or the Attorney General.<sup>50</sup>

## 2. *Hazardous Waste*

### a. *Hazardous Waste Regulation*

Beginning in 1974 counties were granted authority to regulate hazardous waste.<sup>51</sup> Metropolitan counties are required to regulate hazardous waste by establishing regulations and standards for the identification, labeling, classification, collection, transportation, processing, disposal and storage of hazardous waste.<sup>52</sup> Metropolitan counties must require permits or licenses and registration for the generation, collection, processing and disposal of hazardous waste.<sup>53</sup> Non-metropolitan counties may regulate hazardous waste and may permit or license hazardous waste generation.<sup>54</sup> None of the eighty non-metropolitan counties in Minnesota have established hazardous waste management programs.<sup>55</sup>

At the state level, the Minnesota Pollution Control Agency (MPCA) has concurrent authority to enforce state hazardous waste laws even if a county has adopted a hazardous waste program.<sup>56</sup> A county's hazardous waste regulations must be consistent with the MPCA's hazardous waste rules.<sup>57</sup> Moreover, county hazardous waste ordinances must "embody and be consistent with" the MPCA's hazardous waste rules.<sup>58</sup> A county's hazardous waste ordinances, as well as all permits and licenses

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49. MINN. STAT. § 18D.301, subds. 1, 3 (Supp. 1989).

50. MINN. STAT. § 18D.325, subd. 5 (Supp. 1989).

51. MINN. STAT. § 400.161 (1988); MINN. STAT. § 473.811, subd. 5b (1988).

52. MINN. STAT. § 473.811, subd. 5b (1988).

53. *Id.*

54. MINN. STAT. § 400.161 (1988).

55. Interview with Roger Karn, Hazardous Waste Division, Minnesota Pollution Control Agency (Mar. 23, 1990).

56. MINN. STAT. §§ 116.07, subd. 9 and 116.072 (1988 & Supp. 1989).

57. MINN. STAT. § 116.07, subd. 2 (1988 & Supp. 1989).

58. MINN. STAT. § 400.161 (1988); MINN. STAT. § 473.811, subd. 5b (1988). *See also* MINN. R. 7045.1000-.1030 (1989) (outlines procedures for MPCA review of county hazardous waste programs).

issued by the county, must be reviewed by the MPCA.<sup>59</sup>

A county may enforce its ordinance by action in the district court.<sup>60</sup> A metropolitan county may make violation of its ordinance a misdemeanor.<sup>61</sup> All county attorneys and other officers with authority to enforce general criminal laws are specifically directed to enforce state environmental laws, rules, permits, orders, stipulation agreements, variances and standards.<sup>62</sup> Metropolitan counties are responsible for ensuring that hazardous waste generation and collection comply with county ordinances, state law and the Metropolitan Council's policy plan.<sup>63</sup> Under state criminal law, violation of certain state hazardous waste laws or permits relating to unlawful hazardous waste storage, treatments, transportation or disposal can be a felony or a gross misdemeanor enforceable under a county's criminal authority.<sup>64</sup>

*b. Minnesota Environmental Response and Liability Act*

The Minnesota Environmental Response and Liability Act (MERLA), the state superfund law, is a remedial and not a regulatory program. Its primary purpose<sup>65</sup> is to promote the cleanup of releases of hazardous substances or pollutants or contaminants. Parties responsible for releases may be liable for cleanup costs.<sup>66</sup> However, when responsible persons are unknown or do not conduct the cleanup, the MPCA is authorized to cleanup the releases with state funds.<sup>67</sup> The primary enforcement authority under MERLA is the MPCA. It has authority to investigate and plan response actions and to request a responsible person to cleanup a site. If the MPCA determines that known responsible persons will not take the action requested by the agency, the MPCA may cleanup or take en-

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59. MINN. STAT. § 400.161 (1988); MINN. STAT. § 473.811, subd. 5b (1988).

60. MINN. STAT. § 400.161 (1988); MINN. STAT. § 473.811, subd. 5c (1988).

61. MINN. STAT. § 473.811, subd. 5c (1988).

62. MINN. STAT. § 115.071, subd. 2(b) (1988).

63. MINN. STAT. § 473.811, subd. 5c (1988).

64. MINN. STAT. § 609.671 (1988 & Supp. 1989).

65. For a discussion of the origins, purposes and legislative history of MERLA, see Williams, *A Legislative History of the Minnesota "Superfund" Act*, 10 WM. MITCHELL L. REV. 851 (1984).

66. MINN. STAT. § 115B.03 (1988) (defines a responsible person to include owners and operators of facilities, generators, transporters and certain owners of real property).

67. MINN. STAT. § 115B.20, subd. 2 (1988 & Supp. 1989).

forcement actions.<sup>68</sup> Additionally, the MPCA may recover its response costs from responsible persons.<sup>69</sup>

If the MPCA has requested or the Commissioner of the MPCA has ordered a responsible person to respond to a release, a political subdivision cannot request or order a person to take an action that conflicts with the actions of the MPCA or the Commissioner.<sup>70</sup>

A political subdivision is included within the definition of person<sup>71</sup> and, consequently, can sue any responsible person to recover its costs of responding to a release of hazardous substances.<sup>72</sup> However, if the release of hazardous substances occurred before April 1, 1982 and the money was spent by the political subdivision after July 1, 1983, a political subdivision cannot recover its costs of responding to the release unless the response action is authorized by the MPCA.<sup>73</sup> A political subdivision that is not a responsible person may also be reimbursed from the Environmental Response, Compensation and Compliance Account for emergency costs of responding to a release of hazardous substances or pollutants or contaminants.<sup>74</sup>

*c. Underground and Above Ground Storage Tanks*

The Minnesota Pollution Control Agency has authority to regulate underground and above ground storage tanks.<sup>75</sup> Local governments are specifically preempted from regulating the installation, removal and abandonment of underground

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68. MINN. STAT. § 115B.17, subd. 1 (1988); MINN. STAT. § 115B.18 (1988).

69. MINN. STAT. § 115B.04, subd. 1 (1988); MINN. STAT. § 115B.17, subds. 2, 6 (1988).

70. MINN. STAT. § 115B.17, subd. 11 (1988).

71. MINN. STAT. § 115B.02, subd. 12 (1988).

72. MINN. STAT. § 115B.04, subd. 1(a) (1988). However, there is no liability under Minnesota Statutes chapter 115B for response costs or damages that result from the release of a pollutant or contaminant, but such releases may be cleaned up using state funds. MINN. STAT. § 115B.04, subd. 2 (1988); MINN. STAT. § 115B.05, subd. 2 (1988). For threatened releases of hazardous substances, only the MPCA can recover response costs. MINN. STAT. § 115B.04, subd. 3 (1988).

73. MINN. STAT. § 115B.04, subd. 6 (1988); MINN. STAT. § 115B.17, subd. 12 (1988). These provisions apply not only to political subdivisions but also to private persons.

74. MINN. STAT. § 115B.20, subd. 2(12) (Supp. 1989).

75. MINN. STAT. § 116.46-.50 (1988 & Supp. 1989) (underground storage tanks); MINN. R. 7100.0010-.0090 (1989) (above ground storage tanks).

storage tanks.<sup>76</sup> MPCA requirements preempt conflicting local rules or ordinances that require notification or establish environmental protection requirements for underground storage tanks.<sup>77</sup>

If there is a release of petroleum from a tank, the Commissioner of the MPCA may order a responsible person to take corrective action under the Petroleum Tank Release Cleanup Act,<sup>78</sup> to respond to a release of petroleum from a tank.<sup>79</sup> If the Commissioner orders corrective action, "a political subdivision may not request or order the person to take an action that conflicts with the action ordered by the Commissioner."<sup>80</sup>

### 3. Solid Waste

#### a. Solid Waste Management

The responsibility for management of solid waste has traditionally been at the local level. Towns and cities have long had authority to regulate garbage, refuse, rubbish and solid waste<sup>81</sup> and impose fees on operators of waste facilities.<sup>82</sup>

However, in 1969, when the Metropolitan Solid Waste Disposal Act<sup>83</sup> was enacted and in 1971 when the County Solid Waste Management Act was enacted,<sup>84</sup> planning and management of solid waste were placed primarily at the county level. Although local governments have primary regulatory authority for solid waste, local regulation is now subject to considerable state requirements and oversight. All ordinances relating to waste management must include the minimum standards and

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76. MINN. STAT. § 116.50 (1988).

77. *Id.*

78. MINN. STAT. §§ 115C.01-.10 (1988 & Supp. 1989).

79. MINN. STAT. § 115C.04, subds. 1, 3 (1988).

80. MINN. STAT. § 115C.03, subd. 1 (1988).

81. For towns see MINN. STAT. § 368.01, subd. 14 (1988), *amended by* MINN. STAT. § 368.01, subds. 14(a)(2), 14(a)(3) (Supp. II 1989); Op. Att'y Gen. 441h (June 27, 1966) (authority to regulate junkyard). For cities see MINN. STAT. § 412.221, subd. 22 (1988), *amended by* MINN. STAT. § 412.221, subds. 22(a)(2), 22(a)(3) (Supp. II 1989); MINN. STAT. §§ 443.015-.35 (1988) (authority to regulate garbage collection and disposal). Sanitary districts may also be created for the disposal of garbage. MINN. STAT. § 115.19 (1988).

82. MINN. STAT. § 115A.921 (1988 & Supp. 1989).

83. 1969 Minn. Laws, ch. 847. This Act was subsequently amended and recodified as MINN. STAT. §§ 473.801-.840 (1988 & Supp. 1989 & Supp. II 1989).

84. 1971 Minn. Laws, ch. 403 recodified as MINN. STAT. §§ 400.01-.17 (1988 & Supp. 1989 & Supp. II 1989).

requirements established by the MPCA.<sup>85</sup> All counties and solid waste management districts<sup>86</sup> are required to prepare solid waste management plans for controlling the generation, storage, collection, transportation, processing and disposal of solid waste within their jurisdiction.<sup>87</sup>

Outside the metropolitan area,<sup>88</sup> counties have authority to regulate the location, operation and maintenance of solid waste facilities. Additionally, non-metropolitan counties may regulate sewage sludge disposal facilities, the collection, processing and disposal of solid waste and sewage sludge, the control of water, air or land pollution at facilities as well as the termination and abandonment of facilities.<sup>89</sup> Counties may also permit or license solid waste facilities,<sup>90</sup> impose fees on operators<sup>91</sup> and enforce their ordinances "by injunction, action to compel performance, or other appropriate action in the district court."<sup>92</sup> A county cannot, however, require that all solid waste within its borders be disposed in landfills within the county.<sup>93</sup> Counties are required to inspect facilities within the county for compliance with county and state regulations and to take action to assure future compliance.<sup>94</sup> Licensing of solid waste collection may be regulated by cities and towns consis-

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85. MINN. STAT. § 400.16 (1988); MINN. STAT. § 473.811, subd. 4a (1988). The MPCA solid waste standards are contained in MINN. R. ch. 7035 (1989).

86. Solid waste management districts may be formed to manage solid waste under MINN. STAT. §§ 115A.62-.72 (1988); MINN. R. 9215.0300-.0420 (1989).

87. MINN. STAT. §§ 115A.42-.46 (1988 & Supp. 1989 & Supp. II 1989); MINN. STAT. § 473.803, subd. 1 (1988 & Supp. II 1989) (metropolitan counties); MINN. R. 9215.0100-.0250 (non-metropolitan counties and districts).

88. The metropolitan area includes the counties of Anoka, Carver, Dakota (excluding the City of Northfield), Hennepin (excluding the City of Hanover), Ramsey, Scott (excluding the City of New Prague) and Washington. MINN. STAT. § 473.121, subd. 2 (1988).

89. MINN. STAT. § 400.16 (1988).

90. *Id.*

91. MINN. STAT. § 115A.919 (1988 & Supp. 1989).

92. MINN. STAT. § 400.16 (1988).

93. *Thompson v. County of Blue Earth*, 305 Minn. 438, 440, 233 N.W.2d 770, 771 (1975) (the statutory scheme created in the County Solid Waste Management Act does not explicitly grant counties power to prevent solid waste from leaving the territorial jurisdiction of their boundaries). Subsequent to this decision, the Legislature authorized a solid waste management district or county to designate resource recovery facilities to which all or a portion of the mixed municipal solid waste generated within the jurisdiction must be delivered. *See* MINN. STAT. §§ 115A.80-.893 (1988 & Supp. 1989). Resource recovery facilities include, for example, incinerators that are used for the production of energy. *See* MINN. STAT. § 115A.03, subds. 27, 28 (1988).

94. MINN. STAT. § 400.06 (1988).

tent with the county's solid waste policies, or by a county if a city or town fails to license collection.<sup>95</sup> Counties may require cities and towns to require the separation and separate collection of recyclable material.<sup>96</sup>

A county board may also by ordinance prohibit the unauthorized deposit of solid waste within the county, require owners or operators of property to remove unauthorized deposits of solid waste and, if it is not removed, remove the waste and place a lien on the property to cover the expense.<sup>97</sup> Additionally, counties may also require solid waste collectors to charge solid waste generators a rate based on volume and may provide financial incentives to generators who separate recyclable materials or reduce their waste.<sup>98</sup>

In the metropolitan area, county governments and the Metropolitan Council have primary authority for solid waste planning and regulation. Local governments<sup>99</sup> continue to have an active role in the regulation of collection and transportation of solid waste.<sup>100</sup> They also have an active role in areas not preempted by or in conflict with state law or regulation.<sup>101</sup>

Metropolitan counties are required to prepare a solid waste master plan describing the system for solid waste management by the county and municipalities within the county.<sup>102</sup> The county's plan must be consistent with the Metropolitan Council's policy plan.<sup>103</sup> The Metropolitan Council's plan regarding the criteria for solid waste facilities, including permitting and enforcement activities, must be consistent with MPCA rules and at least as stringent as EPA guidelines, regulations and standards.<sup>104</sup> The plan must also include a program to manage

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95. MINN. STAT. § 115A.93 (Supp. II 1989).

96. MINN. STAT. § 115A.94, subd. 5 (1988).

97. MINN. STAT. § 375.18, subd. 14 (Supp. II 1989).

98. MINN. STAT. § 400.08, subd. 5 (Supp. II 1989).

99. In the metropolitan area, for purposes of solid waste planning and regulation, a local government unit means a municipal corporation or governmental subdivision in the metropolitan area other than a metropolitan county. MINN. STAT. § 473.801, subd. 2 (1988).

100. MINN. STAT. § 473.811, subd. 5 (1988). However, a local unit of government is required to adopt the county ordinance governing collection, by reference, if one has been promulgated by the county in which it is located, or a stricter ordinance. *Id.*

101. Op. Att'y Gen. 477b-14 (Oct. 9, 1973).

102. MINN. STAT. § 473.803, subd. 1 (1988).

103. MINN. STAT. § 473.803, subd. 2 (1988).

104. MINN. STAT. § 473.149, subd. 1 (1988 & Supp. II 1989). See also MINN. STAT. § 115A.46, subd. 1 (1988).

household hazardous waste.<sup>105</sup> The Metropolitan Council is required to review solid waste management activities of local governmental units.<sup>106</sup>

Metropolitan counties are required to regulate the location, operation, inspection, monitoring, maintenance, termination and abandonment of solid waste facilities within the county and to require permitting and registration of facilities.<sup>107</sup> Counties and local units of government may impose conditions on the construction, operation, inspection, monitoring and maintenance of a solid waste facility of the Metropolitan Waste Control Commission if the Metropolitan Council and the MPCA determine that local regulation is consistent with the Council's plan and MPCA rules and permits.<sup>108</sup> Metropolitan counties have primary enforcement responsibility to ensure that regulated facilities comply with county ordinances, state regulations and the Metropolitan Council's policy plan.<sup>109</sup> A county may treat the violation of its ordinance as a misdemeanor.<sup>110</sup>

Counties may regulate and local governments are required to regulate the collection of solid waste in the metropolitan area.<sup>111</sup> Local government regulation may include licensing requirements consistent with the county's solid waste policies.<sup>112</sup> However, if a county enacts a collection ordinance, a local government must either adopt the county's ordinance by reference or impose more stringent requirements.<sup>113</sup> Both counties and local governments may regulate, but not prevent, the transportation of solid waste.<sup>114</sup> Counties and local governments may act jointly to carry out their responsibilities.<sup>115</sup>

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105. MINN. STAT. § 115A.96 (Supp. II 1989); MINN. STAT. § 473.804 (Supp. II 1989). This requirement also applies to non-metropolitan counties that are required to prepare solid waste management plans. MINN. STAT. § 115A.96 (Supp. II 1989).

106. MINN. STAT. § 473.181, subd. 4 (1988).

107. MINN. STAT. § 473.811, subd. 5a (1988).

108. MINN. STAT. § 473.516, subd. 3 (1988).

109. MINN. STAT. § 473.811, subd. 5c (1988); *see also* the enforcement authority in MINN. STAT. § 473.516, subd. 3 (1988).

110. MINN. STAT. § 473.811, subd. 5c (1988).

111. MINN. STAT. § 473.811, subd. 5 (1988).

112. MINN. STAT. § 115A.93 (Supp. II 1989).

113. MINN. STAT. § 473.811, subd. 5 (1988).

114. *Id.*

115. MINN. STAT. § 473.811, subd. 7 (1988).

*b. Waste Tire Management*

Counties are required to include the collection and processing of waste tires in their solid waste management plans.<sup>116</sup> Counties must also enact ordinances that include at a minimum the waste tire management rules of the Office of Waste Management.<sup>117</sup> The county's regulations may be more restrictive than state rules.<sup>118</sup>

A political subdivision, through its authority to control nuisances, may abate a waste tire nuisance.<sup>119</sup> The Office of Waste Management may contract with counties to abate waste tire nuisances and to reimburse a county for a portion of the cost. A county may also sue a tire collector for reimbursement of the county's abatement costs.<sup>120</sup>

*c. Infectious Waste*

In 1989, the legislature enacted the Infectious Waste Control Act which regulates the generation, treatment, storage, transportation and disposal of most infectious or pathological wastes.<sup>121</sup> The Act preempts local regulation of infectious or pathological waste and prohibits local governments from defining or requiring that infectious or pathological waste be defined in a manner different from state law.<sup>122</sup> A county may, however, enforce state law through a delegation of enforcement authorities from the Commissioner of Health and the MPCA.<sup>123</sup> The state and a county may not bring separate enforcement actions for the same violation.<sup>124</sup>

*d. Battery Collection and Disposal*

Disposal of lead-acid batteries in mixed municipal solid waste is prohibited.<sup>125</sup> Persons who transport used lead-acid batteries from retailers who collect them must deliver the bat-

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116. MINN. STAT. § 115A.914, subd. 3 (1988).

117. *Id.* The waste tire management rules are contained in MINN. R. 9220.0200-.0680 (1989).

118. MINN. STAT. § 115A.914, subd. 3 (1988).

119. MINN. STAT. § 115A.906, subd. 4 (1988).

120. MINN. STAT. § 115A.912, subd. 3 (1988).

121. MINN. STAT. §§ 116.75-.83 (Supp. 1989).

122. MINN. STAT. § 116.82, subd. 1 (Supp. 1989).

123. MINN. STAT. § 116.82, subd. 3 (Supp. 1989).

124. *Id.*

125. MINN. STAT. § 115A.915 (1988 & Supp. II 1989). It may be enforced by the agency under MINN. STAT. § 115.071 (1988).



teries to a recycling facility.<sup>126</sup> Retailers who sell lead-acid batteries are required to accept lead-acid batteries from customers.<sup>127</sup> Violations of the lead-acid battery provisions are misdemeanors and may be prosecuted by county attorneys.<sup>128</sup>

*e. Litter*

Under state law, it is a misdemeanor to deposit garbage or other litter on a public highway, water or land.<sup>129</sup> County attorneys, or other local government officials who have authority to prosecute misdemeanors, may enforce the statute.<sup>130</sup> In 1989, state agencies and political subdivisions were given expanded authority to control littering. State agencies and political subdivisions that incur costs to remove, process and dispose of the solid waste may sue to recover civil penalties, legal, administrative and court costs, and damages for injury to or pollution of the land, shoreland, roadways or waters owned or managed by the state or a political subdivision.<sup>131</sup> The civil penalty, which is deposited in the general fund of the government bringing the action, may be two to five times the cost of removal, processing and disposal of the waste.<sup>132</sup>

*f. Local Public Health Act*

Under the Local Public Health Act,<sup>133</sup> county boards are authorized to regulate garbage and other refuse that present an actual or potential threat to public health unless the ordinance is preempted by or conflicts with state standards.<sup>134</sup> A county board may impose penalties, consistent with a misdemeanor classification, for violation of its ordinances.<sup>135</sup> Local boards of health can also enforce certain state health regulations involving solid waste. Through a delegation agreement with the

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126. MINN. STAT. § 115A.9152 (Supp. II 1989).

127. MINN. STAT. § 325E.1151 (Supp. II 1989).

128. MINN. STAT. § 115A.915 (Supp. II 1989); MINN. STAT. § 115A.9152(b) (Supp. II 1989); MINN. STAT. § 325E.1151, subd. 2(c) (Supp. II 1989).

129. MINN. STAT. § 609.68 (1988).

130. *See supra* note 33 and accompanying text.

131. MINN. STAT. § 115A.99 (Supp. II 1989).

132. *Id.*

133. MINN. STAT. §§ 145A.01-.14 (1988 & Supp. 1989 & Supp. II 1989).

134. MINN. STAT. § 145A.05, subds. 1, 4 (1988); *see also* MINN. STAT. § 375.51 (1988).

135. MINN. STAT. §§ 375.53, 375.54 (1988).

Commissioner of Health,<sup>136</sup> local boards of health can regulate garbage and waste at tourist camps, summer hotels and resorts,<sup>137</sup> children's camps,<sup>138</sup> mass gatherings<sup>139</sup> and manufactured home parks and camping areas,<sup>140</sup> as well as hotels, resorts and restaurants.<sup>141</sup> Local governments may adopt ordinances to enforce the powers and duties delegated by the Commissioner.<sup>142</sup> City or town ordinances adopted to implement the delegation agreement may not conflict with or be less restrictive than county board ordinances.<sup>143</sup>

#### *g. Packaging*

Six Minnesota cities, including Minneapolis and St. Paul, have passed ordinances regulating packaging for environmental reasons.<sup>144</sup> The legislature prohibited these cities from enforcing these ordinances and preempted other cities from adopting similar labeling or packaging requirements that deviate from state law.<sup>145</sup> The prohibition will expire on June 30, 1990.<sup>146</sup> This preemption is intended to encourage uniform packaging and labeling regulation throughout the state.<sup>147</sup>

Local government officials authorized to prosecute misdemeanors may, however, enforce certain state packaging statutes prohibiting the sale of pull-tab beverage cans<sup>148</sup> and plastic beverage cans.<sup>149</sup>

#### *4. Water Quality*

Local governments may regulate to prevent water pollution<sup>150</sup> and may protect water quality in a variety of ways. For

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136. MINN. STAT. § 145A.07, subd. 1 (1988 & Supp. 1989).

137. MINN. STAT. § 144.12, subd. 1(13) (1988); MINN. R. ch. 4630 (1989).

138. MINN. STAT. §§ 144.71–.76 (1988); MINN. R. ch. 4630 (1989).

139. MINN. STAT. § 144.12, subd. 2 (1988).

140. MINN. STAT. §§ 327.14–.28 (1988); MINN. R. ch. 4630 (1989).

141. MINN. STAT. §§ 157.01–.14 (1988 & Supp. 1989); MINN. R. 4625 (1989).

142. MINN. STAT. § 145A.05, subds. 8, 9 (1988). The delegation of powers and duties are contained in MINN. STAT. § 145A.07 (1988).

143. MINN. STAT. § 145A.05, subd. 9 (1988).

144. See Governor's Select Committee on Packaging and the Environment, Progress Report 5 (Feb. 22, 1990).

145. MINN. STAT. § 325E.035 (Supp. II 1989).

146. *Id.*

147. *Id.*

148. MINN. STAT. § 325E.03 (1988).

149. MINN. STAT. § 325E.042, subd. 1 (1988).

150. See, e.g., MINN. STAT. § 145A.05, subd. 5 (1988) (county boards); MINN. STAT.

example, they may develop and enforce comprehensive water plans and regulate sewage, animal feedlots, wells and water supplies. Local governments may address water pollution problems by developing, implementing and enforcing comprehensive water plans.<sup>151</sup> Comprehensive local water plans must be consistent with state water and related land resource plans.<sup>152</sup> Additionally, if the county has adopted a comprehensive water plan, governments within the county must amend their water and land resource plans to conform to the county's plan.<sup>153</sup> Watershed districts also have authority to protect and enhance water quality, regulate groundwater use,<sup>154</sup> and regulate the use of streams, ditches or watercourses for the disposal of waste and prevention of pollution.<sup>155</sup> Watershed districts may enforce their rules, orders or permits by criminal prosecution, injunction, action to compel performance, restoration, abatement or other action.<sup>156</sup> Local boards of health, through delegation agreements with the Commissioner of Health,<sup>157</sup> may also control the pollution of streams,<sup>158</sup> and protect water supplies under the Safe Drinking Water Act.<sup>159</sup>

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§ 368.01, subd. 14(a)(4) (1988 & Supp. II 1989) (towns); MINN. STAT. § 412.221, subd. 22(a)(4) (1988 & Supp. II 1989) (cities); MINN. STAT. §§ 473.204, 473.206 (1988) (metropolitan area local governments).

151. See, e.g., MINN. STAT. §§ 110B.04 (1988 & Supp. 1989); MINN. STAT. § 110B.15 (1988 & Supp. II 1989); MINN. STAT. § 112.46 and MINN. STAT. § 473.878 (1988) (watershed districts and watershed management organizations); MINN. STAT. § 378.31, subd. 7 (1988) (counties); MINN. STAT. § 378.51, subd. 3(7) (1988) (lake improvement districts); MINN. STAT. § 459.20 (1988) (cities); MINN. STAT. § 473.8785 (1988) (metropolitan counties). A comprehensive water plan is a way for local units of government to address water problems within a watershed unit or groundwater system. A water plan includes a description and inventory of surface, groundwater and related land resources, their quality and use, objectives for development, use and conservation and a program for implementing the plan. See MINN. STAT. §§ 110B.04, 110B.08 (1988 & Supp. 1989). Counties may receive assistance from the Board of Water & Soil Resources for local government activities to plan and implement comprehensive local water plans. See MINN. STAT. § 103B.3369, subd. 2 (Supp. 1989).

152. See, e.g., MINN. STAT. § 110B.08, subd. 5 (1988 & Supp. 1989) and MINN. STAT. § 378.31, subd. 2 (counties); MINN. STAT. § 112.46 and MINN. STAT. § 473.878, subd. 7 (1988) (watershed districts and watershed management organizations); MINN. STAT. § 378.51, subd. 3 (1988) (lake improvement districts); MINN. STAT. § 459.20 (1988) (cities); MINN. STAT. § 473.8785, subd. 9 (1988) (metropolitan counties).

153. MINN. STAT. § 110B.12 (1988).

154. MINN. STAT. § 112.36, subds. 2(13), 2(14) (1988).

155. MINN. STAT. § 112.43, subd. 1(12) (1988).

156. MINN. STAT. §§ 112.43, subd. 2, 112.89 (1988).

157. MINN. STAT. § 145A.07, subd. 1 (1988 & Supp. 1989).

158. MINN. STAT. § 144.12, subd. 1(5) (1988).

159. MINN. STAT. §§ 144.381-.387 (1988); MINN. R. ch. 4720 (1989).

Although local governments have general authority to regulate water pollution,<sup>160</sup> their ability to establish and enforce water quality standards as well as regulate point and nonpoint source discharges<sup>161</sup> depends upon whether local regulation conflicts with or is preempted by state law. If a local regulation conflicts with or is preempted by state law, it is invalid.<sup>162</sup> A local regulation conflicts with state law if the ordinance and the statute contain express or implied terms that are irreconcilable, or the ordinance permits what the statute forbids, or the ordinance forbids what the statute expressly permits.<sup>163</sup> No conflict exists if the ordinance merely adds to or complements the statute.<sup>164</sup>

A local regulation is also invalid if it is preempted by state law. The preemption doctrine is based on the concept that state law has fully occupied the field on the subject matter so there is no room for local regulation.<sup>165</sup> Whether a state law preempts local regulation depends upon the facts and circumstances surrounding each case.<sup>166</sup> The extent to which local governments can establish water quality standards and regulate point source discharges would have to be reviewed on a

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160. See statutes cited *supra* note 151.

161. A point source is a discernible, confined, discrete conveyance, such as a pipe, ditch, well, feedlot operation or vessel from which a pollutant may be discharged. See MINN. STAT. § 115.01, subd. 15 (1988). A nonpoint source is a land management or land use activity that may contribute to ground and surface water pollution because of runoff, seepage or percolation. See MINN. R. 7050.0130 (1989).

162. See *Mangold Midwest Co. v. Village of Richfield*, 274 Minn. 347, 350-51, 143 N.W.2d 813, 816 (1966) (court held Sunday closing ordinance did not conflict with state law, and state Sunday closing law did not preempt field so as to prohibit supplementary ordinances).

163. *Id.* at 351, 143 N.W.2d at 816.

164. *Id.* at 352, 143 N.W.2d at 817.

165. See *id.* at 358, 143 N.W.2d at 820. Four factors are considered in determining whether state law has preempted the field of regulation:

- (1) What is the "subject matter" which is to be regulated?
- (2) Has the subject matter been so fully covered by state law as to have become solely a matter of state concern?
- (3) Has the legislature in partially regulating the subject matter indicated that it is a matter solely of state concern?
- (4) Is the subject matter itself of such a nature that local regulation would have unreasonably adverse effects upon the general populace of the state?

*Id.*

166. *In re Hubbard*, 62 Cal.2d 119, 128, 396 P.2d 809, 814, 41 Cal. Rptr. 393, 398 (1964) (court held that ordinance prohibiting games of chance for value did not conflict with general laws which did not mention forms of gaming in regulating gambling), cited in *Mangold Midwest Co. v. Village of Richfield*, 274 Minn. 347, 356-57, 143 N.W.2d 813, 819 (1966).

case-by-case basis. However, the state has established extensive water quality standards<sup>167</sup> and permitting requirements for point source discharges.<sup>168</sup> Any local regulation must not, at a minimum, conflict with state requirements.

Nonpoint source pollution, however, is an area subject to considerable local involvement. A local government may address nonpoint source pollution through comprehensive local water plans,<sup>169</sup> and cost-share contracts for erosion control and water management.<sup>170</sup> Although these tools may not involve regulation, they lay the foundation for future local involvement in nonpoint source regulation as greater attention is directed to the effects of nonpoint source pollution on surface and groundwater quality. For example, the state development of voluntary best management practices<sup>171</sup> and water resource protection requirements<sup>172</sup> may raise the need for local enforcement in the future.

*a. Sewage and Sewage Sludge*

Regulation of sewage disposal is a fundamental authority of local governments. Local governments have authority to es-

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167. See MINN. R. chs. 7050, 7056, 7060 and 7065 (1989).

168. See MINN. R. 7001.1000-.1100 (1989 & Supp. 1990) (National Pollutant Discharge Elimination System permit); MINN. R. 7001.0020E (1989) (State Disposal System permit).

169. See statutes cited *supra* notes 153-54.

170. A soil and water conservation district may receive funds from the State Board of Water and Soil Resources to implement erosion or sediment control practices and improve water quality under a state-approved comprehensive plan. See MINN. STAT. § 40.036 (1988).

171. The Commissioner of Agriculture, in consultation with local water planning authorities, is required to develop best management practices for agricultural chemicals and practices. The MPCA must also develop best management practices with local consultation for other specific activities to prevent groundwater degradation. MINN. STAT. § 103H.151 (Supp. 1989). Best management practices are voluntary practices that are capable of preventing and minimizing groundwater degradation in light of economic factors, availability, technical feasibility, implementability, effectiveness and environmental protection. MINN. STAT. § 103H.005, subd. 4 (Supp. 1989).

172. The Commissioner of Agriculture, for agricultural chemicals and practices, and the MPCA, for other activities, are required to adopt water source protection requirements to prevent and minimize pollution to the extent practicable. MINN. STAT. § 103H.275, subd. 2 (Supp. 1989). Water resource protection requirements are requirements for pollutants established to prevent and minimize groundwater pollution and may include design criteria, practices to prevent pollution and treatment requirements. MINN. STAT. § 103H.005, subd. 15 (Supp. 1989).

tablish sewers,<sup>173</sup> regulate the disposal of sewage<sup>174</sup> and construct and install disposal systems.<sup>175</sup> Sanitary sewer districts may also be formed to carry out these functions.<sup>176</sup> In the metropolitan area, the Metropolitan Waste Control Commission has the authority to construct and operate treatment works for the disposal of sewage.<sup>177</sup> The Commission may require local governments in the metropolitan area to connect with the Commission's disposal system and provide for pretreatment of sewage.<sup>178</sup>

Local boards of health may also play a role in the regulation of sewage disposal and protection of water supplies. Through a delegation agreement with the Commissioner of Health,<sup>179</sup> a local government may enforce the Department of Health's requirements for sewage disposal and water supplies for camps, summer hotels and resorts,<sup>180</sup> manufactured home parks and camping areas,<sup>181</sup> as well as the sanitary conditions in lumber camps, migrant labor camps and industrial camps.<sup>182</sup>

Local governments operating publicly-owned treatment works (POTWs) may also be required, as a condition of their discharge permit, to mandate that industrial users pretreat their wastes prior to discharging them into the sewer.<sup>183</sup> Pretreatment requirements are intended to prevent introduction of pollutants that would interfere with the operation of the POTW, cause the POTW to violate its permit or contaminate sewage sludge.<sup>184</sup> POTWs receiving large volumes of industrial waste that can interfere with their operation, or wastes that are subject to pretreatment standards, must develop an

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173. MINN. STAT. § 368.01, subd. 3 (1988) (towns); MINN. STAT. § 412.221, subd. 6 (1988) (cities).

174. MINN. STAT. § 145A.05, subd. 4 (1988) (counties); MINN. STAT. § 368.01, subd. 14 (1988) (towns); MINN. STAT. § 412.221, subd. 22 (1988 & Supp. II 1989) (cities).

175. MINN. STAT. § 115.50 (1988) (towns); MINN. STAT. § 444.075 (1988 & Supp. II 1989).

176. MINN. STAT. §§ 115.18-.37 (1988 & Supp. II 1989); MINN. STAT. §§ 115.61-.67 (1988).

177. MINN. STAT. § 473.504, subds. 4, 9 (1988).

178. MINN. STAT. § 473.515, subd. 3 (1988).

179. MINN. STAT. § 145A.07, subd. 1 (1988 & Supp. 1989).

180. MINN. STAT. § 144.12, subd. 1(13) (1988); MINN. R. ch. 4630 (1989).

181. MINN. STAT. §§ 327.14-.28 (1988); MINN. R. ch. 4630 (1989).

182. MINN. STAT. § 144.12, subd. 1(12) (1988); MINN. R. ch. 4630 (1989).

183. See MINN. STAT. § 115.03, subd. 1(e)(6), (k) (1988 & Supp. 1989); MINN. R. 7001.1050, subp. 1, 1 and MINN. R. 7001.1080, subp. 6 (1989).

184. See 40 C.F.R. § 403.2 (1989).

approved pretreatment program.<sup>185</sup> Under an approved pretreatment program, a local government may issue permits, inspect and monitor industrial discharges, enforce pretreatment standards and seek remedies for non-compliance.<sup>186</sup>

If sewage sludge results from sewage treatment, local units of government have some limited authority to regulate the land application of sewage sludge. Non-metropolitan counties have authority to regulate the location, operation and maintenance of sewage sludge disposal facilities, as well as the collection, processing and disposal of sewage sludge.<sup>187</sup> A county regulation must include the MPCA's minimum standards and requirements.<sup>188</sup> If the MPCA has issued a permit or letter of approval<sup>189</sup> for landspreading of sewage sludge and a political subdivision refuses to allow the landspreading, the Office of Waste Management<sup>190</sup> may be requested to provide supplemental review.<sup>191</sup>

The Office of Waste Management determines whether the facility should be approved or disapproved and the terms and conditions of the permit.<sup>192</sup> The decision of the Office of Waste Management preempts requirements of state agencies and political subdivisions. However, a political subdivision may impose reasonable requirements on the facility that are

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185. 40 C.F.R. § 403.8 (1989). The approval process is described in 40 C.F.R. §§ 403.9-.11 (1989). In Minnesota, the MPCA has authorized the cities to operate pretreatment programs. Interview with Doug Hall, Permits Unit Supervisor, Regulatory Compliance Section, Water Quality Division, Minnesota Pollution Control Agency (Mar. 16, 1990).

186. See 40 C.F.R. § 403.8(f) (1989).

187. MINN. STAT. § 400.16 (1988).

188. *Id.*

189. MINN. R. 7040.0400 (1989).

190. The Office of Waste Management was formerly the Waste Management Board. Originally, supplementary review was administered by the Waste Management Board. See MINN. STAT. §§ 115A.32-.39 (1988). On October 7, 1988, the Governor issued Reorganization Order No. 155 which transferred the powers and duties of the Waste Management Board to the Minnesota Pollution Control Agency and the Environmental Quality Board. Under the Reorganization Order, the supplementary review in MINN. STAT. §§ 115A.32-.39 was transferred to the MPCA. In 1989, the legislature abolished the Waste Management Board and created an Office of Waste Management. 1989 Minn. Laws, ch. 335, art. 1, §§ 269-70, 128-31. The powers previously transferred under the Governor's Reorganization Order, including supplementary review, were transferred to the Office of Waste Management. 1989 Minn. Laws, ch. 335, art. 1, § 131.

191. MINN. STAT. § 115A.33 (1988). The supplemental review provisions are contained in MINN. STAT. §§ 115A.32-.39 (1988); MINN. R. 9200.3600-.5300 (1989).

192. MINN. STAT. § 115A.37, subd. 1 (1988); MINN. R. 9200.5100 (1989).

consistent with the decision of the Office of Waste Management regarding the construction, inspection, operation, monitoring and maintenance of the facility.<sup>193</sup> The MPCA makes the final determination of whether the political subdivision's requirements are reasonable and consistent with the Office's decision.<sup>194</sup>

In the metropolitan area, a local government's regulation of waste facilities and sewage sludge disposal is addressed differently. Local governments may regulate the construction, operation, inspection, monitoring and maintenance of a waste facility as well as the delivery, storage, use and disposal of sewage sludge. The local government's requirements must be consistent with the Metropolitan Council's plan and the MPCA permits and rules.<sup>195</sup>

#### *b. Animal Feedlots*

To control water pollution problems, the MPCA regulates<sup>196</sup> livestock feedlots, poultry lots or other animal lots.<sup>197</sup> County boards, with the approval of the MPCA, may permit animal feedlots, but county permit decisions are subject to MPCA review and reversal.<sup>198</sup> Twenty-four counties have been approved<sup>199</sup> to operate the MPCA's feedlot permit program.<sup>200</sup>

#### *c. Groundwater Protection*

Towns and statutory cities have long had authority to regulate the use of wells, cisterns, reservoirs, waterworks and other

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193. MINN. STAT. § 115A.37, subd. 2 (1988).

194. MINN. STAT. § 115A.37, subd. 3 (1988).

195. MINN. STAT. § 473.516, subd. 3 (1988) (local restrictions).

196. MINN. STAT. § 116.07, subd. 7 (1988); MINN. R. ch. 7020 (1989); MINN. R. 7050.0215 (1989).

197. Animal feedlots are buildings or lots used for confined feeding, breeding, raising and holding of animals where manure may accumulate and where vegetative cover cannot be maintained. Pastures are not considered animal feedlots. MINN. R. 7020.0300, subp. 3 (1989). See also Gelpe, *Animal Feedlot Regulation in Minnesota*, 7 WM. MITCHELL L. REV. 399, 428-29 (1981) (the feedlot regulations were designed to protect against pollution of ground and surface water).

198. MINN. STAT. § 116.07, subd. 7 (1988).

199. The approval process as well as the procedures for county processing of animal feedlot permit applications are contained in MINN. R. 7020.1600 (1989).

200. Interview with Douglas Hall, Permits Unit Supervisor, Regulatory Compliance Section, Division of Water Quality, Minnesota Pollution Control Agency (Mar. 16, 1989).



means of water supply.<sup>201</sup> Counties, cities and towns additionally have authority to regulate the maintenance and abandonment of open wells, cesspools, cisterns, recharging basins and catch basins.<sup>202</sup> A local government may enforce its regulations through criminal penalties and through a public nuisance abatement action.<sup>203</sup>

Enactment of the groundwater protection bill in 1989,<sup>204</sup> reaffirmed the authority of a county, municipality and statutory, home rule city or town to regulate open wells and recharging basins.<sup>205</sup> In addition, a local government is authorized to regulate the permitting, construction, repair and sealing of wells or elevator shafts if the Commissioner of Health delegates its authority to a local board of health.<sup>206</sup> Unless such activities are delegated, however, local government regulation of permitting, construction, repair and sealing of wells is preempted.<sup>207</sup> Violation of the statute is a misdemeanor, or a gross misdemeanor if the drilling is done without a license or if the violation is willful, and requires prosecution by county attorneys.<sup>208</sup>

### 5. *Air Quality*

Local governments cannot establish ambient air quality standards that are more stringent than MPCA standards.<sup>209</sup> A local government's air pollution ordinance is invalid if it fails to establish a quantifiable measurement to determine whether it is more stringent than MPCA ambient air quality standards.<sup>210</sup>

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201. MINN. STAT. § 368.01, subd. 6 (1988) (towns); MINN. STAT. § 412.221, subd. 11 (1988) (cities).

202. MINN. STAT. § 471.92, subd. 1 (1988).

203. MINN. STAT. § 471.92, subd. 2 (1988) (counties); MINN. STAT. § 368.01, subds. 15, 22 (1988) (towns); MINN. STAT. § 412.221, subd. 23 and MINN. STAT. § 412.231 (1988) (cities).

204. 1989 Minn. Laws, ch. 326.

205. MINN. STAT. § 103I.111, subds. 5, 6 (Supp. 1989).

206. MINN. STAT. § 103I.111, subds. 1-3 (Supp. 1989). The state water well construction rules are contained in MINN. STAT. § 103I.205 (Supp. 1989).

207. MINN. STAT. § 103I.111, subd. 3 (Supp. 1989).

208. MINN. STAT. § 103I.715 (Supp. 1989).

209. MINN. STAT. § 116.07, subd. 2 (Supp. 1989). Ambient air quality standards are contained in MINN. R. 7005.0010-.0080 (1989).

210. *State v. Apple Valley Redi-Mix, Inc.*, 379 N.W.2d 136 (Minn. Ct. App. 1985) (charges dismissed on the grounds that the ordinances conflict with the Minnesota Pollution Control Act, MINN. STAT. §§ 116.01-.45).

Regarding emissions from stationary sources,<sup>211</sup> however, local governments may establish and enforce more stringent emission regulations than emission standards set by the MPCA.<sup>212</sup> A local government may also use nuisance abatement authority to control air emissions.<sup>213</sup>

Ramsey County has legislative authority to enact and enforce ordinances controlling air quality within its jurisdiction. Ramsey County's air quality regulations may be applied outside its jurisdiction if the governmental unit within which it is to be applied ratifies the county's ordinance.<sup>214</sup>

When enforcing state law, a local government may, by delegation, exercise the administrative powers of the MPCA to regulate air quality within the local government's jurisdiction in designated air quality control regions.<sup>215</sup> When exercising delegated powers, local governments are authorized to adopt ordinances, establish permit and license requirements and grant variances.<sup>216</sup> A local board of health may also be delegated the Commissioner of Health's authority to control atmospheric pollution which is injurious or detrimental to public health. The delegation may include authority for licensing, inspection, reporting and enforcement.<sup>217</sup> A local government with misdemeanor enforcement authority may enforce the statute that prohibits tampering with a motor vehicle air pollution control system.<sup>218</sup>

Although open burning is generally prohibited without a state permit,<sup>219</sup> open burning of leaves may be allowed by towns and statutory and home rule cities outside the metropol-

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211. Stationary sources are contiguous activities or facilities in the same industrial classification under the control of the same person. MINN. R. 7005.0100, subp. 42c (1989). A factory is an example of a stationary source.

212. MINN. STAT. § 116.07, subd. 4 (1988 & Supp. 1989). MPCA emission standards are contained in MINN. R. ch. 7005 (1989).

213. *See State v. Lloyd A. Fry Roofing Co.*, 310 Minn. 535, 539, 246 N.W.2d 692, 695 (1976) (conviction upheld for violation of city ordinance prohibiting emissions that created a nuisance).

214. MINN. STAT. § 383A.14, subd. 3 (1988).

215. MINN. STAT. § 116.05, subd. 3 (1988).

216. *Id.*

217. MINN. STAT. § 145A.07, subd. 1 (1988 & Supp. 1989); MINN. STAT. § 144.12, subd. 1(14) (1988).

218. MINN. STAT. § 325E.0951 (Supp. II 1989).

219. MINN. STAT. § 88.16 (1988) (DNR permit); MINN. R. 7005.0710-.0740 (1989) (MPCA permit).

itan area.<sup>220</sup> By ordinance, a city or town may allow open burning of leaves within its jurisdiction between September 15 and December 1 as long as the ordinance sets forth limits and conditions on burning that minimize air pollution and prevent fire danger.<sup>221</sup> For other types of open burning permitted by law,<sup>222</sup> local governments may issue and revoke burning permits.<sup>223</sup> In cities where refuse collection is unavailable, the local unit of government may request permission from the Commissioner of the MPCA to allow open burning of rubbish from single-family homes in approved waste burners.<sup>224</sup>

## 6. *Other Environmental Authority*

### a. *Minnesota Environmental Rights Act*

Under the Minnesota Environmental Rights Act (MERA),<sup>225</sup> political subdivisions, as well as other enumerated persons, may sue any person in the name of the State of Minnesota to protect air, water, land or other natural resources<sup>226</sup> from pollution, impairment or destruction.<sup>227</sup> Political subdivisions may also, by court permission, intervene in actions brought by others.<sup>228</sup> A political subdivision may also challenge the adequacy of a state environmental standard, limitation, rule, order, license, stipulation agreement or permit through a

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220. MINN. STAT. § 116.082 (1988).

221. *Id.*

222. MINN. STAT. §§ 88.16, 88.17 (1988); MINN. R. 7005.0700-.0820 (1989).

223. MINN. STAT. §§ 88.17, 88.18 (1988) (DNR permits); MINN. R. 7005.0760-.0780 (1989) (MPCA permits).

224. MINN. R. 7005.0720, subp. 2 (1989). In unincorporated areas where refuse collection is unavailable, open burning of rubbish from single-family homes is allowed in approved waste burners without a request for permission from the Commissioner. MINN. R. 7005.7020, subp. 1 (1989). Refuse collection is considered to be available if it is provided for in the approved county solid waste management plan. MINN. R. 7005.7020, subp. 3 (1989). A state permit is also not required, other than a Minnesota Department of Natural Resources' burning permit, to burn and bury solid waste generated by a farmer from the farm household or as part of the farming operation as long as the burying is done in a nuisance free, pollution free and aesthetic manner on the farm land. This exception does not apply if regularly scheduled solid waste pickup is available at the farm. MINN. STAT. § 17.135 (Supp. 1989).

225. MINN. STAT. §§ 116B.01-.13 (1988).

226. MINN. STAT. § 116B.03, subd. 1 (1988).

227. Pollution, impairment or destruction is any conduct that violates or is likely to violate a state or political subdivision's environmental quality standard, limitation, rule, order, license, stipulation agreement or permit, or conduct that materially adversely affects or is likely to materially adversely affect the environment. It cannot be based solely on odor emissions. MINN. STAT. § 116B.02, subd. 5 (1988).

228. MINN. STAT. § 116B.03, subd. 3 (1988).

declaratory judgment or equitable action.<sup>229</sup> Political subdivisions, as well as other persons, may intervene in actions brought by others under this section.<sup>230</sup> Since political subdivisions are persons, they may also be sued under MERA in matters within their jurisdictional authority.<sup>231</sup>

*b. Community Right-to-Know Act*

Minnesota's Emergency Planning and Community Right-to-Know Act (State Emergency Planning Act)<sup>232</sup> was enacted to implement the Federal Emergency Planning and Community Right-to-Know Act (Federal Emergency Planning Act).<sup>233</sup> The Federal Emergency Planning Act is designed for chemical emergencies<sup>234</sup> and requires the filing of reports concerning the presence, release and inventory of hazardous materials<sup>235</sup> with the State Emergency Response Commission,<sup>236</sup> Local Emergency Planning Committees<sup>237</sup> and local fire departments. The Federal Emergency Planning Act requires states to prepare emergency response plans for responding to the release of hazardous material.<sup>238</sup>

The emergency planning provisions of the State Emergency Planning Act are carried out primarily by political subdivisions. A political subdivision, alone or jointly with other political subdivisions, must prepare emergency plans to address the requirements of the federal act.<sup>239</sup>

The State Emergency Planning Act establishes an Emergency Response Commission to administer the Federal Emergency Planning Act.<sup>240</sup> The Commission has enforcement authority to issue, enter into and enforce orders, conduct investigations, issue notices and hold hearings, have access to in-

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229. MINN. STAT. § 116B.10, subd. 1 (1988).

230. MINN. STAT. § 116B.10, subd. 4 (1988).

231. The definition of pollution, impairment or destruction also includes any conduct by a person which violates or is likely to violate an environmental standard, limitation, rule, order, license, stipulation agreement or permit established by a political subdivision. MINN. STAT. § 116B.02, subd. 5 (1988).

232. MINN. STAT. §§ 299K.01-.10 (Supp. 1989).

233. 42 U.S.C.A. § 11001-50 (1989).

234. *Id.* § 11003.

235. *Id.* §§ 11002, 11004, 11021-23.

236. *Id.* § 11001(a).

237. *Id.* § 11001(c).

238. *Id.* § 11003.

239. MINN. STAT. § 299K.05 (Supp. 1989).

240. MINN. STAT. § 299K.02 (Supp. 1989).

formation, enter property and issue subpoenas.<sup>241</sup> The Commission may delegate, to state or local governmental agencies or organizations, its authority to conduct investigations, examine and copy records and to enter property.<sup>242</sup> Additionally, the Commission may enter into agreements with state, federal or local governments to perform its duties.<sup>243</sup>

Regional Review Committees<sup>244</sup> and Local Emergency Planning Committees,<sup>245</sup> which may be political subdivisions,<sup>246</sup> may sue an owner or operator of a facility in state district court for violation of the Federal Emergency Planning Act.<sup>247</sup> If the Committee prevails in the action, it may be awarded costs, disbursements along with reasonable attorney and witness fees.<sup>248</sup> In addition, local governments may commence a civil action in federal court against an owner or operator of a facility that fails: to provide proper notification to the state, to submit a material safety data sheet for each chemical stored at a facility, to provide a list of chemicals stored at a facility, to disclose information required to be made available under the law, or to submit a chemical inventory form for the facility.<sup>249</sup>

## II. THE EXPANSION OF THE ENVIRONMENTAL ENFORCEMENT WORKLOAD

The preceding section demonstrates that local governments have substantial general and specific authority to deal with environmental problems. This authority is likely to prove to be very important as state and local governments attempt to address the rapidly increasing number of environmental problems.

The beginning of the modern environmental regulatory era is usually marked by the passage of the Clean Air Act of 1970.<sup>250</sup> The Clean Air Act was followed by the Federal Water

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241. MINN. STAT. § 299K.10, subd. 1 (Supp. 1989).

242. MINN. STAT. § 299K.10, subd. 1(c) (Supp. 1989).

243. MINN. STAT. § 299K.03, subd. 6 (Supp. 1989).

244. MINN. STAT. § 299K.04 (Supp. 1989).

245. MINN. STAT. § 299K.05, subd. 2 (Supp. 1989).

246. MINN. STAT. § 299K.05, subds. 2, 3 (Supp. 1989).

247. MINN. STAT. § 299K.10, subd. 4 (Supp. 1989).

248. MINN. STAT. § 299K.10, subd. 7 (Supp. 1989).

249. 42 U.S.C.A. § 11046(a)(2)(A) (1989).

250. Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7642 (1982)).

Pollution Control Act Amendments of 1972,<sup>251</sup> and the Resource Conservation and Recovery Act (RCRA) of 1976.<sup>252</sup> The principal focus of enforcement efforts under these laws was on large air emission sources, major point source discharges of water pollutants, and hazardous waste treatment and disposal facilities. A few thousand such facilities existed in Minnesota. While the number of facilities was significant, it was still small enough to allow most enforcement efforts to be centralized at the state level.

Beginning in the early 1980s, with the adoption of state hazardous waste management rules, and accelerating after 1985, the number of facilities subject to environmental regulation has rapidly expanded. Today, over 15,000 hazardous waste generators are subject to state regulation.<sup>253</sup> Many of these are small quantity generators<sup>254</sup> such as print shops, body shops and dry cleaners. There are more than 33,000 regulated underground storage tanks in the state.<sup>255</sup> Over 10,000 facilities<sup>256</sup> are covered by the reporting requirements of the Minnesota Emergency Planning and Community Right-to-Know Act.<sup>257</sup> Another 6,000 facilities<sup>258</sup> are regulated under the Minnesota Infectious Waste Control Act.<sup>259</sup> The statute covers almost every doctor's, dentist's and veterinarian's office in the state, as well as every hospital and nursing home.

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251. Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1988)).

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

253. Interview with Gordon Wegwart, Assistant Director, Hazardous Waste Division, Minnesota Pollution Control Agency (Sept. 11, 1989).

254. A small quantity generator is a facility that generates between 100 kilograms (220 pounds or the equivalent of one-half of a 55-gallon drum) and 1,000 kilograms of hazardous waste in a month. *See* Pub. L. No. 98-616, § 221, 98 Stat. 3221, 3248 (codified as amended at 42 U.S.C. § 6921(d) (Supp. V 1987)).

255. Interview with Michael Kanner, Chief, Tanks and Spills Section, Minnesota Pollution Control Agency (Sept. 17, 1989).

256. Interview with Lee Tischler, Director, Minnesota Emergency Response Commission (Apr. 17, 1989).

257. MINN. STAT. §§ 299K.01-.10 (Supp. 1989).

258. Interview with Pauline Bouchard, Division Director, Division of Environmental Health, Minnesota Department of Health (Mar. 2, 1989).

259. MINN. STAT. §§ 116.75-.83 (Supp. 1989). Infectious waste typically includes certain wastes from medical laboratories, blood and some other body fluids, hypodermic needles and syringes and waste from research animals intentionally exposed to agents that are infectious to humans. *See* Office of the Attorney General, State of Minnesota, Report and Recommendations on the Regulation of Infectious Waste III-9 to -22 (Aug. 1988). *See also* MINN. STAT. § 116.76 (Supp. 1989).

Thousands of additional facilities, mostly retailers, are subject to used oil<sup>260</sup> and used lead-acid battery<sup>261</sup> collection and recycling requirements.

Even though a facility may be relatively small, the consequences of not complying with environmental laws may be severe. For example, disposal of a small quantity of the dry cleaning solvent perchloroethylene in a buried barrel behind a dry cleaning facility in a central Minnesota town resulted in groundwater contamination that forced the closure of a city well and dozens of private wells. The total remedial costs in this case have exceeded one million dollars.<sup>262</sup> Similarly, leaking underground gasoline storage tanks have required the closure of wells in Minnesota cities.<sup>263</sup>

The greatly expanded enforcement workload has placed significant new stress on an already heavy state enforcement agenda. To respond to these new demands, state enforcement officials can utilize techniques that are designed to provide general deterrence<sup>264</sup> rather than simply correcting individual violations. General deterrence tools include criminal enforcement, industry or geographic targeting of enforcement actions, and publicizing of enforcement proceedings. These techniques may help in maximizing the effectiveness of limited state enforcement resources. They do not fully substitute for inspections of individual facilities. Thus, it is important to consider how additional resources can be brought to bear on the immense universe of regulated facilities.

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260. See MINN. STAT. §§ 325E.10-.11 (1988).

261. See MINN. STAT. § 325E.1151 (Supp. II 1989).

262. Interview with Gary Pulford, Site Response Section, Groundwater and Solid Waste Division, Minnesota Pollution Control Agency (Sept. 5, 1989).

263. See Freshwater Foundation, *Economic Implications of Groundwater Contamination to Companies and Cities* 78 (1989).

264. In its analysis of hazardous waste enforcement under RCRA, the Environmental Law Institute noted that:

Because it is impossible ordinarily to achieve *specific* deterrence (site-by-site detection and citation of every violation ever committed) [in the RCRA program], credible enforcement programs must also rely on *general* deterrence (voluntary compliance induced by awareness of the risk of detection and the net effect of the likely sanction as compared with the benefit of noncompliance). Credible general deterrence efforts generally require (1) public awareness of active enforcement personnel, (2) public awareness that there is a hidden enforcement presence (*i.e.*, investigators), (3) credible sanctions timely imposed upon a cross-section of the regulated community, and (4) some number of severe sanctions that have been imposed.

Environmental Law Institute, *State Hazardous Waste Study* 5-6 (1987) (emphasis in original).

As the discussion in part I of the article points out, local governments have long played a substantial role in some areas of environmental enforcement. Regulation of solid waste and of septic systems are two examples where the primary enforcement role has been at the local level. Further, the seven metropolitan Twin Cities counties have managed the hazardous waste program for several years.

These examples indicate that local governments could play a bigger role in environmental enforcement. However, simply transferring responsibility for enforcement programs to local governments is unlikely to produce better protection of the environment. Instead, each program should be examined utilizing a set of factors that will assist in determining at which level of government enforcement is likely to be most effective. These factors are discussed below.

### III. FACTORS FOR ALLOCATING ENFORCEMENT RESPONSIBILITY

Several factors can be identified that should be utilized in determining whether local governments should assume a greater enforcement role for particular environmental programs. No one factor by itself is determinative of whether a program could be operated by a local unit of government. Rather, the factors must be considered cumulatively. Further, it is important to think of local units of government individually. Distinctions should be made between large entities such as Hennepin County, with a population of approximately one million,<sup>265</sup> and small cities or towns that may have populations of a few hundred people.

#### A. *The Number of Regulated Facilities*

As noted earlier in this article, the number of facilities regulated under environmental programs has expanded geometrically over the past few years. Programs that regulate large numbers of small facilities are difficult to administer on the state level.

For example, Minnesota has only fourteen state hazardous waste inspectors.<sup>266</sup> The United States Environmental Protec-

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265. See United States Department of Commerce, *supra* note 4, at 25-12 (Table 14).

266. Interview with Roger Karn, Hazardous Waste Division, Minnesota Pollution Control Agency (Mar. 23, 1990).



tion Agency's Enforcement Response Policy<sup>267</sup> under RCRA directs much of the state's enforcement efforts to treatment, storage and disposal facilities and to what are known as "significant non-compliers."<sup>268</sup> The combined result of the small number of inspectors and the limited discretion available under the United States Environmental Protection Agency's Enforcement Response Policy means that, absent a complaint, most Minnesota small quantity generators will rarely be inspected. Thus, the only way to provide a regular enforcement presence for small quantity generators may be through the assistance of local government.

The lack of state resources to effectively police small quantity hazardous waste generators illustrates that the number of regulated facilities must be considered in allocating enforcement responsibilities.

*B. The Degree of Expertise Needed to Effectively Enforce the Law*

The degree of expertise required to address an enforcement problem also must be considered in deciding which level of government should be responsible for enforcement. For example, under the Clean Water Act, industrial users that discharge certain chemicals into a sewer system must meet pretreatment requirements prior to discharging the chemicals.<sup>269</sup> Enforcement of these requirements may require significant technical and legal expertise, and sophisticated monitoring and testing equipment. A large metropolitan publicly-owned treatment works may reasonably be expected to have this kind of expertise and equipment available to it. However, cities of a few thousand, employing a contract waste water treatment operator and a part-time city attorney, may not have the expertise or budget to initiate an enforcement action involving a complex pretreatment violation.

The pretreatment example not only points out the need for expertise, but also indicates that not all local governmental units should be treated the same way. Similarly, parts of environmental programs may need to be treated differently. For example, the underground storage tank program provides for

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267. United States Environmental Protection Agency, Office of Solid Waste and Emergency Response, Enforcement Response Policy (Dec. 1987).

268. *Id.* at 15.

269. *See supra* notes 173-95 and accompanying text.

both cleanup of old leaking tanks and design standards for new facilities. The level of expertise needed to manage a complex groundwater cleanup may be substantially different from that required to inspect a corrosion protection system at a new facility. In the RCRA program, a distinction might likewise be made between the expertise needed to inspect a large hazardous waste treatment facility or a major generator such as a refinery, and the expertise needed to determine whether hazardous waste is stored in the proper location and is appropriately labeled.

A corollary to the level of expertise required to effectively enforce a law is the relative ease or difficulty in training local enforcement staff. If training is straightforward and can be accomplished in a reasonably short time period, it is more likely that the program can be adequately enforced at the local governmental level.

These examples point out that the level of expertise needed to carry out an enforcement action must be considered in deciding what level of government could reasonably pursue enforcement actions under a particular program.

*C. The Need for Oversight of the Local Government's Enforcement Program*

Oversight of state enforcement by the federal government has been a source of significant disputes in many cases. Under RCRA, United States EPA regional offices have conducted detailed annual reviews of state enforcement programs to ensure that the programs meet federal objectives. Unfortunately, this oversight effort has often been focused on micro-managing the state program rather than looking for ways in which the federal government can provide technical or other assistance to help improve state programs.<sup>270</sup> This has resulted in the diversion of valuable enforcement resources to paperwork efforts needed to satisfy EPA oversight requirements.<sup>271</sup>

Experience under the Clean Water Act has also demonstrated the problems that result when one level of government intervenes in the enforcement activities conducted by another level of government. Under the Clean Water Act, United States EPA retains the authority to initiate an independent en-

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270. See Environmental Law Institute, *supra* note 264, at 87.

271. *Id.*

forcement action if EPA determines that a state enforcement action is inadequate.<sup>272</sup> This practice, known as overfiling, has proven to be very disruptive for a number of reasons.<sup>273</sup> First, overfiling may be costly in terms of the time and money involved in dealing with the separate enforcement actions.<sup>274</sup> Second, overfiling can increase the reluctance of a regulated entity to settle a case with only one of the units of government involved.<sup>275</sup> Finally, the practice can disrupt the working relationship between the two governmental entities.<sup>276</sup>

The lesson from the federal-state experience is that programs managed by a local unit of government should require as little informal or formal ongoing state oversight as possible. Instead, the state government or the legislature should establish clear criteria for a local unit of government to be authorized to manage an enforcement program. Some periodic reporting may be needed to inform the state agencies and the legislature of progress in the program and to demonstrate that any state funds are being properly utilized. However, this process should not involve microscopic scrutiny of the enforcement program. Any state review of local enforcement programs primarily should be directed at identifying technical assistance needed to improve the local program. Finally, the state should retain the authority to withdraw local enforcement authority if it is clear that there is a long-term pattern of inadequate enforcement.<sup>277</sup>

#### *D. The Interest of the Local Governmental Unit*

Public support for environmental protection has grown rapidly. Recent polls have revealed that a majority of Americans believe the country needs tougher environmental laws, and that they would support an increase in spending aimed at protecting and improving the environment.<sup>278</sup> This grassroots interest has initiated an increase in the number of local

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272. See Humphrey & Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal for a More Effective and More Efficient Relationship*, 14 HARV. ENVTL. L. REV. 7, 18 (1990).

273. *Id.* at 13.

274. *Id.* at 14.

275. *Id.*

276. *Id.*

277. *Id.* at 43.

278. See Americans for the Environment, *The Rising Tide: Public Opinion, Policy & Politics* 2-3 to 3-3 (Apr. 20, 1989) (An Environmental Impact Statement).

environmental protection programs. Recycling programs, plastic packaging ordinances,<sup>279</sup> and pesticide application notification requirements<sup>280</sup> are indicative of this expanding local role in environmental issues.

This interest also has expanded into the enforcement arena. For example, concern about the storage of hazardous chemicals has led some fire departments and local emergency planning departments to explore how they can help enforce the reporting requirements under the Emergency Planning and Community Right-to-Know Act.<sup>281</sup> The local interest in environmental enforcement is further demonstrated by the efforts of several counties to use their criminal enforcement authority to deal with a number of significant cases of illegal storage and disposal of hazardous waste.<sup>282</sup>

As citizens increasingly go to their city councils and county boards seeking involvement in environmental cases, governmental participation in enforcement at the local level will continue to grow. However, not all local units of government will have the interest necessary to ensure that effective enforcement will occur. Without strong interest in an enforcement program, the chances of the program being successful are considerably diminished. As a result, some method should exist to permit differentiation between local units that have an interest

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279. See MINNEAPOLIS, MINN., ORDINANCE 204 (1989). The ordinance provides in part that:

[N]o person owning, operating or conducting a food establishment within the City of Minneapolis shall do or allow to be done any of the following within the city: Sell or convey at retail or possess with the intent to sell or convey at retail any food or beverage that is placed, wrapped or packaged, at any time at or before the time or point of sale, in or on packaging which is not environmentally acceptable packaging. The presence on the premises of the food establishment of packaging which is not environmentally acceptable packaging shall constitute a rebuttable presumption of intent to sell or convey at retail, or to provide to retail customers packaging which is not environmentally acceptable packaging; provided, however, that this subparagraph shall not apply to manufacturers, brokers or warehouse operators, who conduct or transact no retail food or beverage business.

*Id.* § 204.30. See also ST. PAUL, MINN., ORDINANCES ch. 236 (1989).

280. See ST. PAUL, MINN., ORDINANCE ch. 377.07 (1989).

281. Interview with Lee Tischler, Director, Minnesota Emergency Response Commission (Mar. 26, 1990).

282. In Minnesota, Aitkin, Anoka, Dakota, Hennepin, Ramsey and Scott Counties have filed felony or gross misdemeanor environmental crimes cases. Interview with Lori Mittag, Special Assistant Attorney General, Minnesota Attorney General's Office (Mar. 26, 1990).

in managing an enforcement program and those that have no interest in the program.

### *E. The Availability of Resources*

The availability of adequate personnel and other resources to enforce environmental programs is critical to the success of any program. With increasing citizen pressure for local governments to assume a greater role in environmental protection, it is reasonable to expect some additional resources will be appropriated at the local level. Still, given the competing demands from a wide variety of programs, new local resources cannot be counted upon exclusively to fund a significant expansion of local environmental enforcement programs.

If local environmental enforcement programs are to be expanded, several steps must be taken. First, new local environmental programs should utilize existing structures to avoid the cost of constructing new bureaucracies. Fire marshals, building inspectors, local police agencies, fire departments, health agencies and other agencies may be able to assume environmental enforcement responsibilities for some programs. Second, programs that are expensive to enforce, such as those requiring significant laboratory testing, should be retained at the state level or, alternatively, state laboratory facilities should be available for the local units of government to utilize. Finally, additional state funding in the form of fee authority or direct funding may be necessary to ensure that local governments have the personnel and other resources necessary to effectively enforce the programs operated by the local units.

### CONCLUSION

The rapid expansion of environmental programs over the past few years has required a new look at the role local government can play in environmental enforcement. A review of the authority of local government in the environmental area indicates that the legal basis for undertaking a larger enforcement role in most environmental programs already exists. Further, local governments have had extensive experience in enforcing several environmental laws. Given the combination of legal authority and experience, it is appropriate to consider an expanded local government role in environmental enforcement. In examining which additional programs should be enforced at

the local level, it is important to distinguish between local governments of various sizes and to carefully review which parts of a program could be effectively enforced at a local level. Utilizing the factors suggested in this article should permit a principled expansion of the role of local governments that will provide a higher level of protection for the state's environment.