Finessing the Siting Conundrum

Michael B. Gerrard
Columbia Law School, michael.gerrard@law.columbia.edu

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BOOK REVIEW

FINESSING THE SITING CONUNDRUM


Reviewed by Michael B. Gerrard*

There is a place that today's industrial society desperately wishes to find. In prior eras, people sought Nirvana or the Fountain of Youth or Shangri-La—states of mind (or nothingness) as much as places, really. The object of today's quest has no neighbors, no endangered or threatened species, no hydraulic link to precious groundwater; ideally, it has no connection to the biosphere at all.

That place is called "away," as in, "Let's dig up this contamination and haul it away," or, "We need to take this waste away." The public and private sectors in the United States have spent billions of dollars looking for "away," but when they have found it—usually in some western desert—a pesky geologist or biologist spots a seismic fault or a rare moss that shatters the illusion of ecological nothingness.

The exploration for "away" continues, but until the expedition returns, imperfect sites will have to be picked for the disposal of hazardous waste. The necessary compromise that characterizes this unenviable task has proven maddeningly difficult. Since the enactment of the Resource Conservation and Recovery Act in 1976,¹ only one new hazardous waste landfill has opened (and stayed open) in the United States on a site not previously used for waste management. It is in Last Chance,

* Member, Berle, Kass & Case, New York. B.A., 1972, Columbia University; J.D., 1978, New York University School of Law; Adjunct Professor of Law, N.Y.U. School of Law; Lecturer in Law, Columbia University School of Law. Mr. Gerrard is General Editor of the six-volume ENVIRONMENTAL LAW PRACTICE GUIDE (Matthew Bender 1992); coauthor of ENVIRONMENTAL IMPACT REVIEW IN NEW YORK (Matthew Bender 1990); Editor of the ENVIRONMENTAL LAW IN NEW YORK newsletter; and coauthor of the monthly environmental law column in the NEW YORK LAW JOURNAL.

¹ 42 U.S.C. § 6901.
Colorado.

This poor record is not for lack of trying. Scores of attempts have been made to site new hazardous waste facilities. Nor is it for lack of academic attention to the siting problem. Hundreds of articles about siting have been written. Until now, there were two leading books on the subject: Siting Hazardous Waste Facilities: Local Opposition and the Myth of Preemption, by David Morell and Christopher Magorian (1982), and Facility Siting and Public Opposition, by Michael O'Hare, Laurence Bacow, and Debra Sanderson (1983). Both of these books recognized that, try as they might, the federal and state governments could not force a hazardous waste facility upon an adamantly opposed local community. Both books (and dozens of articles) theorized that localities only could be persuaded to accept these facilities if they received compensation that redressed the inequity of making them bear the burdens of the entire region's hazardous waste generation.

This theory was given an unusual chance to prove itself. The authors of Facility Siting and Public Opposition used the idea (which they had formulated years before their joint book) to draft a statute which was enacted by the Massachusetts General Assembly, and later adopted by the states of Rhode Island, Connecticut, Wisconsin, and Virginia. The basic idea was that communities targeted for waste facilities would negotiate a compensation package with facility developers; if no negotiated agreement could be reached, the state would step in and decree the terms. Unfortunately, this effort has proven an utter failure; after more than a decade of attempts, not a single new hazardous waste facility has been sited in any of these states (except for one small treatment facility in Rhode Island).

Now a new book has appeared that includes an explanation for these failures and a proposed remedy. Unlike its predecessors, Siting Hazardous Waste Treatment Facilities: The NIMBY Syndrome focuses on the nature of public opinion about waste facilities. Its author, Kent E. Portney, is Associate Professor of Political Science and Director of the Citizen Survey Program at

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Tufts University. Much of the book is based on a series of telephone surveys conducted under Portney's direction. One survey reached residents of five (more or less randomly selected) cities and towns in Massachusetts; the other was nationwide, covering the forty-eight contiguous states and the District of Columbia.

Portney finds that "virtually none of the policy alternatives pursued to date has been informed by any reliable understanding of what causes people to oppose the siting of treatment facilities." He believes that it "makes little sense to ignore the underlying perceptual roots of ... local opposition. Solutions to the problems of siting noxious facilities must account for and incorporate rather than circumvent the political realities that will inevitably be faced." The overriding reason for public opposition, he unsurprisingly finds, is fear of health risks. He also concludes that little can be done to reduce this fear. Efforts at "risk communication" (which largely, in practice, consist of experts lecturing concerned citizens that public apprehensions are baseless or disproportionate) bear little fruit, and can be counterproductive. Portney's surveys establish that public opposition is eased a bit by measures to reduce (rather than downplay) risks, but existing siting programs have not successfully used this fact.

Following the lessons learned from the surveys, Portney fashions a new approach to hazardous waste siting. Portney calls his solution "risk substitution." He writes:

Perhaps the most compelling aspect of this type of strategy is that it does not require that anyone change in attitude, opinion, perception, or behavior to make it work. The strategy builds on current knowledge about why people oppose facilities, but does not seek to use that knowledge for the purpose of changing people's perceptions. Indeed, we have suggested that any framework for siting which requires people to change is likely to be unworkable simply because people's perceptions do not change very much. Instead, the proposed strategy works with the existing knowledge, creating a framework for siting processes which can potentially avoid the sometimes rancorous debate and conflict over siting of specific facilities.

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6 Id. at 18.
7 Id. at 89.
8 Id. at 39.
9 Id. at 36.
10 Id. at 158.
Portney's proposal is to persuade a community to accept a new noxious facility in exchange for shutting down an old one. If there is already a chemical plant or a nuclear power plant in the neighborhood, and the nearby residents fear it, then buy out the old plant, shut it down, and build the new hazardous waste facility in its place (or nearby). The neighbors will not perceive themselves as being any worse off, and the new facility will be successfully sited, without any futile attempts to alter existing risk perceptions.11

I believe that Portney's proposal, though innovative, misses two important psychological dynamics. First, people react differently to old risks than to new ones.12 An existing facility next to which a person has been living for many years may appear less threatening than a new one, even if objectively the latter poses far less risk. Second, if neighbors are really exercised over an existing risk, they may demand that it be abated regardless of any plans for new facilities; people may consider it unjust to have to accept a new risk just to eliminate an old one, especially since, once they have the new facility, they will never be rid of it.

The proposal also has serious economic drawbacks. The cost of buying out an operating factory—even assuming that existing contracts with suppliers, labor, and customers allowed it—would likely be in the tens or hundreds of millions of dollars. This is a very large cost to bear in acquiring a site to conduct a financially risky business; regulatory or political vagaries may shut down the waste disposal operation prematurely, preventing full amortization of the site acquisition costs. Additionally, the proposal would foster considerable opposition if it costs jobs in the community, especially because new hazardous waste disposal facilities create relatively few jobs.

Nonetheless, two events in 1992 showed that risk substitution

11 At about the time that Portney's book appeared, another commentator made a similar proposal, but focused on just one type of old facility—contaminated sites such as orphaned hazardous waste disposal sites or municipal solid waste landfills. Bradford C. Mank, The Two-Headed Dragon of Siting and Cleaning Up Hazardous Waste Dumps: Can Economic Incentives or Mediation Slay the Monster?, 19 B.C. ENVTL. AFF. L. REV. 239 (1991). Mank proposed that waste disposal companies be allowed to build new facilities in exchange for cleaning up someone else's abandoned site. It was reported in 1990 that the New Jersey legislature was considering a bill with similar features to Mank's proposal. W. B. Clapham Jr., Some Approaches to Assessing Environmental Risk in Siting Hazardous Waste Facilities, 12 ENVTL. PROF. 32, 37 (1990).

12 See Peter Huber, The Old-New Division in Risk Regulation, 69 VA. L. REV. 1025 (1983).
does have some application in the real world. The New York City Council approved a comprehensive solid waste plan that included a major new incinerator, but only after the Mayor had agreed to shut down two old incinerators. This scheme allowed the Speaker of the City Council to say the plan would, on a net basis, improve air quality in the city. And in New Mexico, the Mescalero Apache tribe announced it would be willing to spend as much as $150 million to clean up contaminated uranium mining sites in the state in exchange for hosting (with handsome compensation from the federal government) a monitored retrievable storage facility for high-level radioactive waste.

Portney's book falls short of being a comprehensive solution because he deals only with facilities for treatment or disposal of hazardous waste, and not with facilities for radioactive waste or the many other types of noxious waste streams. He also does not grapple with such vexing issues as the disproportionate location of these facilities in low-income and minority communities, and whether such facilities are needed at all. These are not criticisms, for they were beyond the task that Portney set for himself. Portney has made a valuable contribution by highlighting how important it is to understand the complexities of public opinion in designing and implementing facility siting statutes, and by identifying what aspects of public opinion can and cannot be altered. Perhaps most importantly, he has effectively set the stage for further enlightened debate.
