

1995

Book Review of Whose Backyard, Whose Risk, by Michael B. Gerrard

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Recommended Citation

Sandler, Ross, "Book Review of Whose Backyard, Whose Risk, by Michael B. Gerrard" (1995). *Other Publications*. 449.
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WHOSE BACKYARD, WHOSE RISK; The Lawyer's Bookshelf

New York Law Journal
February 21, 1995 Tuesday

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New York Law Journal

Section: Pg. 1, (col. 1); Vol. 213

Length: 1256 words

Byline: Reviewed by Ross *Sandler*

Body

The Lawyer's Bookshelf

By Michael B. Gerrard. The MIT Press, Cambridge, Mass. 335 pages. \$39.95.

Where should government allow owners to build facilities for processing hazardous or radioactive wastes? The answer often given is any place but near me. Battles over siting can go on for years. For example, the City's proposed incinerator for the Brooklyn Navy Yard, after nearly 15 years, remains a mere possibility; no one has suggested a middle ground solution. It is that pattern of unresolved warfare that motivated Michael B. Gerrard, a veteran of such battles, to write a major new book on the problem.

Gerrard subtitles his book, *Fear and Fairness in Toxic and Nuclear Waste Siting*, a phrase that aptly sets out the problem. Such facilities cause fear - fear of personal and family health, fear of loss of property values and fear of unknowns. The word fear sounds emotional and irrational, and suggests that with proper education and maturity such fears can be dispelled. But of course that has not been the pattern. Twenty-five years after a few hundred unlucky Niagara Falls residents discovered they owned a piece of Love Canal, scientists still cannot answer with certainty whether they and their children will experience increased health risks.

Fairness too sounds simple, but as a concept to resolve siting problems it lacks persuasive power. Various formulations can be stated - those who benefit from industries producing wastes should suffer the disadvantages as well; the government should scatter unwanted facilities evenly over the countryside; and the poor and politically less powerful should not be compelled to accept a disproportionate share of the unwanted sites. But these undeniably important goals are not robust. They rarely suffice to make a community accept something it does not want. They are slogans to be uttered and then abandoned when the real discussion begins.

Gerrard proposes a new siting scenario. A brief description, which can not give the full sophistication of his proposal, involves five related concepts:

- (1) Adopt policies that reduce the amount of wastes generated and lessen reliance on interim waste sites. Benefits from such policies include less wastes that have to be transported and treated, and less reliance on risky sites closest to populations.
- (2) Establish a federal process to allocate the number of sites, region by region and state by state. This meets basic fairness tests and reinforces waste minimization efforts.
- (3) Within each region or state, seek communities willing to accept waste facilities. Gerrard argues that local choice will produce volunteer communities willing to accept risks in return for the economic benefits associated with the site.
- (4) Use old contaminated sites for new waste facilities. This avoids spending huge sums in futile clean-up efforts and acknowledges that the past cannot be wholly undone.
- (5) Apply technical standards to weed out unsuitable volunteer sites. This avoids wasting time locating perfect sites that, even when found, collapse before political forces.

One is tempted to poke holes in Gerrard's proposal, especially since history wildly favors the pessimist. Every environmental statute since 1970 has embraced the value of individual rights; a single person adversely affected by a decision has standing to sue. That means that even where a local community

voted 10,000 to one in favor, the lone dissenter could still litigate, a scenario that usually demolishes any solution based upon a majoritarian definition of fairness.

Nevertheless, Gerrard's proposal has much to commend it, primarily because it starts with the politics of siting rather than the technical issues. The technical approach has proven to be a dead end. Gerrard in fact fills most of the pages of his book with tales of failed technical attempts to site facilities. He recounts the woeful tale of New York State's attempt to override local zoning to locate a PCB landfill in upstate New York. Even though New York recommends against eating Hudson River fish, upstate communities have prevented PCB dredging for 20 years by denying the State a PCB landfill location. Likewise, Nevada for the past 10 years has denied the federal government a site for high-level radioactive wastes at Yucca Mountain, Nev., the nearest neighbor of which was a brothel 18 miles away.

Gerrard does not set off to rewrite environmental laws. He endorses the public health and natural resources values they embrace. Nonetheless, his book is subversive of environmental law. At the heart of modern environmental law are rights, individual rights, supported by twin concepts - protection of the health of every individual from unwanted and unnecessary risk and a belief that science can quantify and minimize risks. Federal statutes rarely state these values in absolute terms, usually adding economic realities and democratic decision-making to the balance. But that balance in practice has, at least when it came to siting decisions, proved illusory, which is another way of stating the problem addressed by Gerrard's book.

Gerrard would redo the balance. He would establish a process that could result in a community voluntarily accepting a hazardous waste facility even if it meant that not all questions were perfectly answered, that not all fears were assuaged, and that the location was not altogether technically perfect. This is a brave proposal, the implications of which are apparent. Gerrard does not shy away from the most obvious implication, pointing out, for example, that in past years other major projects have had significant, controversial consequences. Lake Mead permanently flooded 175 square miles of desert, a precedent in Gerrard's view for making choices even where there is controversy.

Gerrard's thesis depends on new laws at least as to allocating hazardous waste sites, a point he readily addresses along with suggestions on how such laws might be formulated. Readers will still be profoundly

skeptical that a Congressional consensus could emerge sufficient to result in legislation. I suggest two scenarios that might work.

First, wait for the traditional legislative motivator, an unambiguous catastrophe, of which the discovery of Love Canal is a prime example. It directly led to the passage of Superfund in 1980. The problem is that while we wait for the perfect catastrophe, the slowly developing hazards of hazardous and radioactive waste sites continue.

More proactively, national environmental organizations might themselves initiate the type of solution proposed by Gerrard. The national groups, which have staked out positions and lobbied for them, will have to reassess (much as Gerrard has done) their current positions. Perhaps several national organizations might undertake fact-finding missions or hold a series of public hearings or conferences across the country as a means of building a consensus among themselves and their members. Just as Gerrard suggests that there may be greater range in local risk acceptance than might be supposed, there may also be greater range in options once a process begins.

Gerrard's book, *Whose Backyard, Whose Risk*, opens the door on this debate. He should be taken seriously. Gerrard starts from an environmental commitment and finds that the present system is not serving those values. This is not a book attacking what has been accomplished, but one that offers a new formula. Coming from the environmental side of the aisle, it deserves to be read and debated.

Load-Date: August 4, 2011