

BOOK REVIEW: FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY (Jon M. Van Dyke, Durwood Zaelke, and Grant Hewison eds. 1993)

Last summer the Clinton administration added the signature of the United States to the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Although the United States Senate has not yet ratified the treaty, citing objections to provisions relating to mining of the seabed, UNCLOS entered into force on November 16, 1994. Many see this event as the culmination of decades of efforts to codify principles of international law governing the use of the oceans and their resources, and as the beginning of an era marked by a new attitude toward "the common heritage of mankind."

Freedom for the Seas in the 21st Century: Ocean Governance and Environmental Harmony (Van Dyke, Zaelke, and Hewison, eds.), however, portrays UNCLOS as modest step toward addressing the myriad threats to the world's ocean resources and so to the planet's environmental health. This insightful collection of essays argues that the international community must embrace a new rationale on which to base humankind's relationship to the ocean if this valuable resource is to be preserved for future generations. As the book's title suggests, legal principles governing ocean use must shift from our past laissez-faire attitude of "freedom of the seas" to an approach which recognizes the ecological integrity of the oceans as demanding protection for its own sake, or "freedom for the seas."

Lawyers and political scientists will be glad to learn *Freedom for the Seas* is free of Chicken Little-type environmental rhetoric of the sort which litters the pages of many collections of this genre. Rather, it is a well-reasoned, comprehensive work written by a diverse group of specialists in marine policy and international law. The editors have artfully chosen chapters, each written by a different author, to provide legal, historical, scientific and sociological perspectives of the shortcomings of the international legal regime presently governing use of the world's oceans. Common to each of the book's five sections—the history of ocean governance, marine pollution, fisheries, deep seabed mining and high seas military activity—is an urgent call to the world's governments to embrace a new legal regime better

equipped to confront the scientific realities of the twenty-first century.

Historically, the law of the sea has centered on the rights of nations to use freely that which could be claimed exclusively by none, thus guaranteeing unlimited freedom of navigation, fishery and commerce. But as Professor Anand points out in his chapter on the history of the concept of freedom of the seas, today's practice is essentially Eurocentric. Although grounded in the traditions of seafaring Asian peoples and the laws of Ancient Rome, freedom of the seas took on increased meaning and importance in the seventeenth century after Grotius' defense of European colonial conquest in his celebrated treatise *Mare Liberum*. Waiving Grotius' work as a battle standard, European powers extended their military and commercial reach throughout the globe, justifying the pursuit of national interests on the boundless liberties entailed in this notion of freedom of the seas. The doctrine has prevailed as law because it has served the interests of the European powers, and its repeated invocation established the principle of freedom of the seas as a customary norm of international law.

Freedom for the Seas contends this rule of law no longer serves the interests of the powerful or of the weak. Advancements in fishing technology have irreversibly depleted once abundant fisheries, over-population and mass industrialization have led disastrously increased pollution discharged into the oceans, and nuclear power has thrown a peculiarly modern risk into the delicate mix of the marine ecosystem. The political, economic and technological developments of the last century have rendered the doctrine not only obsolete, but a threat to the environmental health of the planet. The contributors to *Freedom for the Seas* suggest we look to the traditions of cultures which have recognized the integral relationship between humankind and the oceans for guidance in crafting an international legal framework for the future.

Recognition of this necessary link has been central to the lives of indigenous peoples of the South Pacific, and not surprisingly lies at the heart of the region's successful environmental protection programs. Regional environmental protection regimes in the South Pacific, including the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region and the South Pacific Forum Fisheries Agency, have jettisoned old legal principles and created regimes based on the

central philosophical principles of the region's indigenous peoples with a large degree of success.

Common among Pacific approaches to the ocean environment is the notion that life, health, spirituality and consciousness are all linked inextricably to the sea. This relationship, argues Poka Laenui in a chapter on Hawaiian perspectives on the ocean, requires the same kind of protection and respect we afford relations between humans. These anthropologic observations initially may strike the reader as idyllic visions impractical to the formation of law in a horizontal nation-state system, but a chapter by Phillip Allot reminds sceptics "[l]aw is the application of ideas to material reality, with a view to re-forming human consciousness To do law is, inevitably, to act philosophy."

Unfortunately, Professor Allot and some other contributors to *Freedom for the Seas* fail to account fully for the fact that nation-states are not humans, thus national consciousness is not so easily re-formed. The belief that economically and politically motivated states will discard a system whose links to self-interest are equally as powerful (if not more so) to those between humankind and the oceans is far-fetched to even the most optimistic observer of world events. Acutely aware of this reality, the collection's editors do not propose this philosophical transformation as the sole solution to environmental ills. Rather, their selection of articles implies this change in philosophy merely constitutes a springboard for the achievement of solutions merging theory with realism. After laying this theoretical groundwork *Freedom for the Seas* presents several practical proposals which, although grounded in a non-European philosophical approach to the ocean's resources, work within the bounds of existing international law. One such approach is taken by William Burke in a chapter analyzing the plight of high seas fisheries.

One of the many unfortunate consequences of the principle of freedom of the seas has been a total lack of high seas fishery regulation. UNCLOS has ameliorated the dangerous situation overfishing has caused by enlarging Exclusive Economic Zones. However, as is the case with all diplomatic compromises, the Convention includes ambiguities which fail effectively to protect fisheries teetering on the brink of depletion, particularly straddling stocks and highly migratory species. Professor Burke looks at the provisions of UNCLOS which address the precarious position of these fisheries and concludes the solution lies not in general principles applicable throughout the high seas, but rather in

regional management regimes, international cooperation and most importantly, overall reduction of high seas fishing activity.

Burke's analysis is particularly noteworthy because he argues the future depletion of these fisheries will not be due to the failings of international law or existing management regimes; it will be the fault of states unwilling to recognize existing opportunities. Present global fisheries management regimes include numerous provisions through which the above cooperative measures (as well as some coercive measures) may be taken to protect these valuable resources. States have simply been unwilling to interpret and utilize these principles to prevent the destruction of valuable fish stocks.

Another practical solution beyond the realm of the theoretical is presented in an article about ocean pollution by Christopher D. Stone. "Mending the Seas through a Global Commons Trust Fund" presents an intriguing means of improving the effectiveness of international organizations presently shouldered with the Sisyphean task of protecting the world's oceans. Professor Stone makes two related propositions: First is the institutionalization of a system of "Ocean Guardians" to act as trustees of the marine environment; second is a Global Commons Trust Fund to help underwrite the expenses of financially strapped organizations presently leading the worldwide environmental effort.

Expanding upon ideas first articulated several years ago in his influential work, *Do Trees Have Standing?*,¹ Professor Stone advocates the global commons be represented much as a sovereign would be represented by counsel before international tribunals. Guardians would be authorized to monitor ocean conditions, appear before state agencies, legislatures and initiate legal and diplomatic action on behalf of the commons in appropriate situations. Because principles of customary international law revolve around the sovereignty of nation-states, putting the global commons in the same position as a sovereign creates a voice for interests heretofore unrepresented before international organizations and judicial bodies.

As the source of funding for Stone's guardians, as well as the operations of organizations presently battling global environmental degradation, he proposes the global commons areas themselves. Today, these areas are universally used and abused

1. Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

at virtually no cost; the value of a usage tax is undeniable. Stone estimates minimal taxes on high seas fisheries, off-shore oil and gas production, ocean dumpings, and atmospheric carbon production could yield close to \$1.5 billion. This figure does not even include taxes on chlorofluorocarbons, halons, the incineration of toxins at sea, or the trillions of gallons of liquid wastes discharged into the oceans as runoff. Stone concedes the unlikelihood of universal acceptance of such a program, but states the trust fund could reach \$1 billion with the participation of only a handful of industrial states whose use of the oceans is most prolific.

But could we expect even a handful of states to acquiesce to a program so manifestly opposed to national interests? As mentioned earlier, all regimes based on international cooperation produce benefits only if states see their participation as a means to further national interests. This difficulty becomes more pronounced in the context of environmental treaties simply because the benefits of participation seldom accrue to individual nations in the short term. The success of these regimes is measured in terms of general environmental health over a period of several decades. Thus, the temptation to sit back and allow the status quo to continue is overwhelmingly powerful, both politically and economically.

Whether intended or not, the editors of *Freedom for the Seas* have illustrated this point well by juxtaposing an article outlining the devastation caused by driftnet fishing with an essay by Kazuo Sumi, a Japanese law professor. Sumi's article is puzzling because it is a drastic departure from the values and ideals advocated by every other contributor to this collection. He argues the proper response to widespread objections to driftnet fishing in the Pacific Ocean is not a moratorium, but rather conducting environmental impact studies and further research on the effects of driftnets. His argument is based essentially on the consequences a moratorium holds for the people of his nation, a primarily fish-eating culture. Through the obvious political and self-interest underlying Japan's unwillingness to participate in a driftnet moratorium, the collection's editors have withdrawn the fog obscuring the jagged rocks and revealed the Sirens of political and socio-economic reality. However, because Professor Sumi's article provides only a momentary glance of these dangerous crags, its inclusion also exposes the book's essential weakness: *Freedom of the Seas* preaches to the converted.

The majority of this book's audience will be concerned enough about environmental issues to read its essays and, for the most part, will be sympathetic to its general thesis. While there is nothing wrong with compiling a collection of essays advocating a particular point of view, the editor's inclusion of Professor Sumi's work is puzzling. Instead of presenting an argument which presents objections for the reader to consider seriously, the editors have made a token gesture toward an opposing viewpoint, the purpose of which is woefully transparent—to provoke the reader's emotions and thereby strengthen the book's theoretical appeal. However, this unsubtle tactic is unnecessary; the editors likely have the support of their reader. Unfortunately, *Freedom of the Seas* denies its audience the opportunity to consider more formidable objections to the book's theses than those posed by Professor Sumi.

Overall, *Freedom for the Seas* should provide an educational read for lawyers and surfers alike. Whether one agrees with the feasibility and propriety of the collection's thesis, *Freedom for the Seas* fulfills its crucial goal. It leaves the reader with a sense of the urgency with which humankind must respond to the dire circumstances in which we have placed our oceans through decades of systematic abuse.

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BOOK REVIEW: BARRY G. RABE, *BEYOND NIMBY: Hazardous Waste Siting in Canada and the United States*, (The Brookings Institution, Wash., D.C., 1994), 194 pp.

I.
OVERVIEW

Two decades ago scientists assured the public that a fist-sized disk of fused glass could contain nuclear waste and cause no pollution problem if stored in a salt cave for hundreds of years.¹ Yet, each year the average American generates at least a ton of hazardous waste, and although some jurisdictions have pursued active programs to reduce the production of toxic waste, the number of products recognized as harmful when discarded has also escalated.²

As a political reality, few local communities have been willing to provide a site for storage of hazardous waste, even those less alarming than nuclear by-products. Public fear mobilizes rapidly against locating treatment or long-term storage facilities near population centers. Thus, the NIMBY Syndrome—"not in my backyard"—has been the primary response to proposed facilities to treat, store or dispose of hazardous waste.

Professor Barry Rabe's³ book *Beyond Nimby—Hazardous Waste Siting in Canada and the United States* summarizes fifteen years of the attempts by governments and private waste management firms to establish waste disposal sites. Rabe's discussion of waste siting in these North American neighbors reveals similarities in hazardous waste production, shared environmental space, and community responses to proposed local siting. Not surprisingly, the NIMBY syndrome is alive and well on both sides of the border.

1. See J.R. GRONOW, ET. AL., "LAND DISPOSAL OF HAZARDOUS WASTE: ENGINEERING AND ENVIRONMENTAL ISSUES, 291-95 (1988) (discussing the problems with this type of disposal).

2. Minnesota, which experienced a failed extensive siting effort, substituted an intensive waste reduction program for treatment and disposal facilities. However, the success of the reduction program was minimized by the addition of motor oil, oil filters, brake fluid, power-steering fluid, transmission fluid, anti-freeze, and fluorescent lamps to the list of wastes that must be treated as hazardous. BARRY G. RABE, *BEYOND NIMBY: WASTE SITING IN CANADA AND THE UNITED STATES*, 11 (1994).

3. Barry G. Rabe is an associate professor of health politics in the School of Public Health and an adjunct associate professor in the Department of Political Science at the University of Michigan, Ann Arbor.

However, Rabe focuses on the few circumstances which resulted in establishing waste treatment facilities with community support: Alberta and Manitoba in Canada, and Greensboro, North Carolina, in the United States. The author isolates those elements of each decision-making process that he feels contributed to success in order to create a template for garnering future sites. Rabe advocates that this political process ought to be applied to the siting of other public facilities which elicit similar NIMBY responses—prisons, half-way houses, substance abuse treatment centers, and homes for mentally or physically challenged people.

The Canadian successes add a counterpoint to the United States experience because these projects utilized a crown corporation to execute the functions performed by both government and private industry in other scenarios. A strong informational component is a commonly used theme for selling the need for hazardous waste treatment, helping the community accept its responsibility for creating a local solution to waste disposal, and educating citizens on the technical information needed to choose processes and providers.⁴ Rabe does not define the degree to which the crown corporation was integral to the Canadian successes, nor does he predict whether the United States could develop a similar institution for the same purpose.

According to Rabe, neither governmental power nor market inducements alone will successfully create community support; even inviting community "input" following scientific identification of potential sites allows time for NIMBY backlash. Local citizens show no enthusiasm for accepting a local hazardous waste facility which is dumped on them by professionals and technicians. They need to participate from the very beginning of the selection process and have ample time to prepare and digest sophisticated environmental impact reports.

Nonetheless, some argue that because the NIMBY response is universal, only an authoritarian decision can succeed. Others propose a market solution through which a community is offered monetary incentives such as services, tax rebates, or direct grants. Where the public can infer unknown, long-term health risks, however, this approach also seems to fall short of success.

4. See also GRONOW, *supra* note 2, at 260-67, 289-90 (discussing similar siting issues in Great Britain and in Germany); GARY F. LINDGREN, *MANAGING INDUSTRIAL HAZARDOUS WASTE: A PRACTICAL HANDBOOK*, 267-95 (1989) (providing an accessible survey of these issues).

Rather, Rabe suggests, a community must be convinced that it is in its best interest to take responsibility for the dangerously increasing volume of hazardous waste. Proponents can then increase enthusiasm with economic incentives like new jobs, increased tax revenues, or investments in public facilities to meet other community needs like a new library or school facility.

In a prior study of the siting problem, Kent Portney suggested a risk substitution strategy as an alternate response to the NIMBY Syndrome.⁵ Also a political scientist, Portney takes a psychological look at what motivates people to rise up in horror at the proposed location of a waste treatment facility in their town. People react in fear to the perceived dangers of the presence, transportation, or treatment of hazardous substances. Seldom will a community take that risk based on the scientific conclusion that a process is safe. Portney suggests, instead, that the community should identify alternate risks in the community and make efforts to alleviate these risks as a part of the package of locating a waste treatment plant.⁶ One type of risk substitution would trade the dangers inherent in transporting toxic waste out of the community for the lesser risk of treating it where it is produced.

However, both Rabe and Portney agree that communities being enticed through the siting process are likely to balk at risk-taking if hazardous wastes from other areas—especially other states, provinces, or countries—are to be imported for treatment. Yet, the economic feasibility of investing in a treatment plant requires a volume sufficient to make the per unit cost profitable. It may even be more efficient for a given plant to provide only some treatment processes.

Nevertheless, both authors reach the conclusion that the siting process is so politically sensitive that any community considering siting a plant must be given a veto over the importation of wastes. Rabe contends that siting by fiat will invariably provoke a NIMBY response and halt the process. Similarly, a market approach alone is unlikely to mitigate fear.

5. KENT E. PORTNEY, *SITING HAZARDOUS WASTE TREATMENT FACILITIES: THE NIMBY SYNDROME*, (1991). Portney bases his work on public opinion surveys of various aspects of the topic and finds no clear evidence that the public relations and education components can be changed successfully to eliminate the Nimby syndrome. From these results, he has developed his alternative risk theory.

6. *Id.* at 137-59.

Through these dismal alternatives, however, shines a thin ray of hope. Rabe's volume points out processes which appear to have succeeded in a few communities. The case of a small town in rural Alberta was closely replicated in Manitoba. Greensboro, North Carolina, contrasts a successful siting in a medium-sized city. Rabe rounds out his discussion by analyzing some near-misses in Minnesota, California, and Quebec and derailed attempts in Massachusetts and British Columbia. He writes a separate chapter on the history of low-level radioactive waste treatment in the two countries and concludes with a projection for resolving these issues in the future.

II.

SUCCESSFUL CASE STUDIES

A. *Alberta*

As a province previously known to support unfettered development, Alberta generated a large quantity of hazardous waste but lacked any advanced system for storage, treatment, or disposal until it opened the Swan Hills facility in 1987. Previously having used a market-oriented approach, Alberta changed course in the early 80's and encouraged innovation to seek public support. To effect this change, the government established a six-member committee including two environmental ministers, a farmer, the chief of the Calgary fire department and a chemistry professor with expertise in hazardous materials. They recommended a Hazardous Waste Task Force to implement the process. The province committed itself to a burden-sharing strategy that increased public awareness of widespread generation of hazardous waste, stressed communal responsibility for safe disposal and recycling, and presented alternative remedies for waste production.

Local political leaders of the 500 residents of Swan Hills found that numerous small group meetings and the continual availability of a spokesperson to answer questions and give information was far more effective in increasing public support than were town-hall meetings. In contrast to previous attempts, every effort was made to keep the process as open and available as possible, a tactic which developed trust. Indeed, the public continues to support a community liaison committee of citizens, not employed by the facility, who serve as ombudsmen and trouble-shooters.

In a more traditional fashion, the provincial government developed siting criteria and made the final site selection decision. However, it only considered communities who volunteered to host a site. As Rabe acknowledges, critics challenge that the Swan Hills success story arose from a unique combination of economic need and isolated location, but Rabe counters by noting the stiff competition for the site.

Additionally, Rabe credits the crown corporation with some contribution to the outcome. The crown corporation both oversees the plant operation and makes public financial and technical assistance available to the private corporations responsible for site development and management. The crown corporation receives greater trust and has clearer jurisdictional power than would either the provincial government or a private facility operating the plant alone.

B. *Manitoba*

Drawing heavily from the successful policy innovation developed in Alberta, Manitoba also built a province-wide facility. After lengthy public deliberation, over forty communities initially volunteered to host a comprehensive facility. Following the government's review of the suitability of each locale and additional local political consideration, three communities actively competed for the final selection.

Once again, a crown corporation was responsible for the entire public participation program, organizing more than 500 committee and public meetings, open houses, and presentations. As in Alberta, the most effective meetings were those that were small enough to allow everyone present to participate. Rabe notes the importance of having one entity coordinate the processes of seeking opinions, holding referenda, and countering negative opinion. Manitoba takes the extra step and supports ongoing public involvement in monitoring the process. Locally elected officials in Montcalm, a rural municipality, appointed a Community Liaison Committee to provide general oversight of the plant and conduct investigations regarding environmental performance. Using only land that it could purchase, the crown corporation managed the facility separately from the government. This political independence allowed the planning to remain stable through several political party power shifts and avoided any conflict of interest.

Unlike the Alberta facility, the Manitoba plant was designed to meet reliable estimates of provincial needs and to focus on treatment rather than on disposal. Thus, the plant's smaller size and lack of an organic waste incinerator, minimized opposition.

Both short and long-term job creation and modest tax revenues pleased the residents of Montcalm, and the crown corporation built good will by supporting local projects, such as a program preserving an historic building. Most uniquely, an agreement to compensate nearby property owners if the existence of the plant created a drop in property values or crop prices facilitated local acceptance of the plant.

Another factor for public approval was the plant's assurance to local residents that waste would not be imported from outside the province. However, Manitoba may have to import waste from its neighbors in exchange for exporting waste that the Manitoba facility could not handle because it lacks an incinerator.

C. Greensboro

North Carolina was exporting 81% of its total waste in 1990. Yet in 1985, Greensboro, a town of 184,000 people, defied all odds by voluntarily siting a waste treatment and disposal plant. However, the waste treatment plant did not incinerate hazardous waste, nor did it accept PCB's, dioxins, or cyanide, thus avoiding some of society's more frightening substances.

In Greensboro, enthusiasm was generated by a single entrepreneur, Tom Barbee. Barbee was a waste transporter, who used early and extensive public participation to develop support and cooperation. Moreover, he was a hometown leader, eager to persuade his neighbors of their responsibility to the environment and of the plant's benefits to local industry. He was not an outsider imposing government values on Greensboro. A small grant from the EPA Office of Public Participation funded the early stages of consensus-building through a community-based Task Force.⁷ Barbee's commitment to keeping lines of communication open and his willingness to incorporate local concerns about transportation, fire protection, and selection of technologies built trust in the community. He also made a commitment to treat locally-generated waste rather than imports.

7. The office has subsequently been terminated.

III.

THE NEAR-MISSES

Rabe also attempts to identify the elements which contribute to successful siting by examining "near-misses."

A. *Minnesota*

Although Minnesota wisely chose not to site a treatment plant by fiat, it did not take the extra step to conduct a major education and public information program before seeking volunteer communities. The State did offer funds to support the consideration process, but the funds were only available after a potential community passed a resolution of interest. Because the government did not spend enough time building trust in the advanced stages of the voluntary siting process, the remaining communities succumbed to doubts about the viability of proposals. Minnesota also failed to provide a clear commitment to treat only local waste. However, the Minnesota failure did have one positive effect: it generated a massive public campaign to reduce production of hazardous wastes.

B. *California*

California began with a program based on "fair share" provisions requiring planning by all counties and encouraging small counties to do joint planning. However, the positive start was gutted by a Department of Health Services ruling which required all counties to prepare plans to treat all types of wastes. This undercut the commitment to find local solutions for local problems. As a result, California continues to export much of its hazardous waste.

C. *Quebec*

In the early 1980's Quebec opened a facility in Blainville, near Montreal. Strong local approval blossomed through the use of unique market incentives, such as building a much-needed cloverleaf access to the highway to Montreal and by deeding an unused military base to the town for use as the site for the facility and for an industrial park. However, because a crown corporation was not used, no strong trouble-shooting body exists. Nor has the commitment to treat mostly local waste been honored. Indeed, the plant was sold to an American firm and now treats a large amount of waste imported from the United States. This

failure to adhere to initial commitments has predictably weakened public support.

D. *Massachusetts*

In 1980 the Massachusetts state legislature passed the Massachusetts Hazardous Waste Facility Siting Act in an attempt to counter the Nimby problem. However, the government failed to build consensus and to generate public support.⁸ As a result, the government reached site selection too early and did so with an authoritarian ring. Even offering a full range of market incentives failed to create public support. Ultimately, the state government forced local governments to accept sites. Consequently, each of five attempts resulted in a classic Nimby battle.

E. *British Columbia*

In British Columbia the decision to use private waste disposal firms bypassed the consensus-building stage altogether. Because private companies operate on profit, communities were concerned that private owners would continue importing wastes to keep the plants operating at full capacity. Again, public education about the need for waste treatment was lacking. Local waste-producers who previously had junked their wastes for free were unlikely to be persuaded to pay for disposal, treatment or storage.

IV.

CONCLUSION

Rabe identifies the critical components of both the Canadian and North Carolina success stories: (1) commitment to open and extensive public participation, (2) institutional reform to foster dialogue and build trust, and (3) commitment to safety and to treatment of primarily local wastes.

Although the roles of local leaders impacted various community experiences, the importance of individual leadership does not appear in Rabe's prototype for successful siting. One won-

8. A greater awareness of the nature and prevalence of industrial and hazardous wastes ought to be part of any comprehensive community education plan. Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), entitled the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. §§ 1101-11005, 11021-11023, 11041-11050, may provide a useful component of this education. See generally LINDGREN, *supra* note 4, at 251-63 (providing a survey of the Act).

ders if the difference between success in Alberta and failure in British Columbia was just a leader's more artful timing in moving from consensus-building to waving the seductive carrot. Would Greensboro have been a success with less patient leadership? Is there a recipe for developing trust? If timing is everything, is this not an intuitive skill like delivering comedy lines? Or is it a science that can be packaged and replicated? While these questions might have been more fully probed, Professor Rabe identifies the skills and steps needed for successful hazardous waste siting in the context of the NIMBY problem.

Donna Smith

