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Annual Survey of Virginia Law: Environmental Law

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ENVIRONMENTAL LAW

*Natural Resources Section**

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I. INTRODUCTION

In the past two years Virginia has seen significant legislative changes in its laws protecting public health and the environment. This article addresses not only those changes, but also the implementation of these laws by the responsible state agencies and the court cases construing those laws.

II. AIR

A. *Legislation*

Since 1982, Virginia has had a program of annual emissions inspections of motor vehicles.¹ This inspection and maintenance (“I & M”) program is required to bring Northern Virginia into compliance with the National Ambient Air Quality Standard for ozone. A statute that would have authorized such a program in the greater Richmond area if it failed to attain the ozone standard, was repealed by the 1988 General Assembly.² The State Air Pollution Control Board (“SAPCB” or “Board”) has had authority to establish the emissions limits for motor vehicles since 1985,³ and the

* Members of the Natural Resources Section in the Office of the Attorney General who contributed to this article include Assistant Attorneys General John R. Butcher, Deborah Love Feild, Frederick S. Fisher, and J. Steven Sheppard, III and Senior Assistant Attorney General Patrick A. O’Hare. Any opinions expressed herein are those of the authors and not the Office.

1. VA. CODE ANN. §§ 46.1-326.2 to -326.14 (Repl. Vol. 1986).

2. *Id.* § 46.1-326.4(B) (repealed by Act of March 28, 1988, ch. 806, 1988 Va. Acts 1527).

3. VA. CODE ANN. § 10-17.18(a)(1) (Repl. Vol. 1985).

administration of the program was transferred from the Superintendent of the State Police to the Board this year.⁴

The 1988 General Assembly also changed the substance of the I & M program in several ways. Effective January 1, 1989, twenty-three model years of motor vehicles will be subject to biennial inspections;⁵ formerly, only nine model years were subject to annual inspections.⁶ The weight limit will be raised to 8500 pounds,⁷ from 6000 pounds.⁸ Under the old program, if an owner spent \$75 to maintain or repair his vehicle's engine and emission control system, the vehicle was exempted from inspection until the car was sold or traded.⁹ The new I & M program introduces a sliding scale of \$60-\$200 to obtain the waiver, which is good for two years or until the vehicle is sold or traded, whichever is longer.¹⁰

Radon is another air-related issue addressed recently by the legislature. In 1987, the Secretary of Human Resources was directed to "study the problems associated with radon in homes, the methods by which radon gas may be detected, and the means by which the hazards to the public can be reduced."¹¹ In the 1988 report to the General Assembly, the Secretary did not recommend that radon testing be required at the time of all real estate transactions or that radon testing firms be licensed.¹² Beginning July 1, 1988, however, the Department of Health will maintain and make available to the public, a list of persons who have been approved by the United States Environmental Protection Agency ("EPA") to conduct radon screening or testing.¹³ Additionally, it is now unlawful for any person to conduct radon screening or testing unless approved to do so by the EPA.¹⁴ Other changes to the air pollution control laws are addressed in the footnote.¹⁵

4. *Id.* § 46.1-326.6(A) (Repl. Vol. 1986) ("Superintendent" changed to State Air Pollution Control "Board" by Act of March 28, 1988, ch. 806, 1988 Va. Acts 1527).

5. Act of March 28, 1988, ch. 806, 1988 Va. Acts, 1527.

6. VA. CODE ANN. § 46.1-326.6(A)(3) (Repl. Vol. 1986).

7. Act of March 28, 1988, ch. 806, 1988 Va. Acts 1527.

8. VA. CODE ANN. § 46.1-326.2 (Repl. Vol. 1986).

9. *Id.* § 46.1-326.7(i).

10. Act of March 28, 1988, ch. 806, 1988 Va. Acts 1527.

11. H.J. Res. 229, 1987 Sess., 1987 Va. Acts 1712.

12. REPORT OF THE SECRETARY OF HUMAN RESOURCES' TASK FORCE ON RADON TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, H. DOC. NO. 11, 1988 Sess. ____ (1988).

13. VA. CODE ANN. § 32.1-229(A)7 (Cum. Supp. 1988).

14. *Id.* § 32.1-229.01.

15. Variances to regulations of the State Air Pollution Control Board and amendments to variances may be adopted only after a public hearing. Act of March 2, 1988, ch. 26, 1988 Va. Acts 31 (amending VA. CODE ANN. § 10-17.18 (Cum. Supp. 1988)). Chapter 891 of the

B. *Administrative Activities*

1. Regulatory Changes

a. Particulate Matter

Following the EPA's lead, the State Air Pollution Control Board amended its Regulations for the Control and Abatement of Air Pollution ("SAPCB Regulations") to establish an ambient air quality standard for particulate matter less than 10 micrometers in diameter.¹⁶ The new regulation is effective July 1, 1988. The EPA has determined that only one area in Virginia may fail to attain this standard.¹⁷ Accordingly, the agency must conduct a monitoring program to determine whether the area attains or fails to attain the standard.¹⁸ The impact of the new standard will be felt by major new sources and existing sources that undergo major modifications and are located in Prevention of Significant Deterioration areas, where the preconstruction review of projected emissions increases must now include data on these particulate emissions.¹⁹

b. Open Burning

In the other significant regulatory action taken during 1987, the State Air Pollution Control Board amended the open burning rule.²⁰ Some of the changes to the open burning rule were designed to facilitate enforcement of the rule; for example, there is no longer an exemption to the requirement of a minimum distance from occupied buildings where the occupants agree to permit a closer burning.²¹ Other changes addressed special incineration devices²² and clarified matters in which the Department of Waste Management has some responsibility.²³

1988 Acts, which recodifies title 10, distinguishes the State Air Pollution Control Board from the staff employed to assist the Executive Director, by designating the latter as the "Department of Air Pollution Control." Act of April 20, 1988, ch. 891, 1988 Va. Acts 2101.

16. 4:14 Va. Regs. Reg. 1438 (April 11, 1988) (Full text of Regulations for the Control and Abatement of Air Pollution available to the public through the offices of the Registrar of Regulations and the State Air Pollution Control Board); STATE AIR POLLUTION CONTROL BOARD, COMMONWEALTH OF VIRGINIA, REGULATIONS FOR THE CONTROL & ABATEMENT OF AIR POLLUTION, § 120-03-06 (1985) [hereinafter SAPCB REGS.].

17. STATE AIR POLLUTION CONTROL BOARD, MEETING BOOK, 7-2 (December 11, 1987).

18. *Id.*

19. SAPCB REGS., *supra* note 16, § 120-08-02.

20. *Id.* Rule 4-40.

21. *E.g., id.* § 120-04-4004.

22. *Id.* § 120-04-4005.

23. *See, e.g., id.* § 120-04-4003(J)8 (authorizing joint permits for the open burning of solid waste in landfills).

2. Administrative Hearings

In October, 1987, the State Air Pollution Control Board issued a permit to Mountain View Rendering Company ("Mountain View") to construct and operate a rendering plant in Shenandoah County.²⁴ The permit was challenged by area citizens under SAPCB Regulation section 120-02-09.A which provides that "[a]ny person aggrieved by a decision of the Board rendered without a formal hearing may demand a formal hearing."²⁵ The formal hearing was held before a hearing officer, and on October 3, 1988, the Board made its final decision. Although the Board issued a permit essentially identical to that of the year before, the decision involves several matters of first impression. For example, the Board recognized standing in those citizen petitioners who lived within three miles of the proposed facility and imposed the burden of proof in the de novo hearing upon the petitioners. Should the decision be appealed to circuit court, issues may include standing of the citizen petitioners and the appropriate scope of review of an agency decision in issuing a permit and fashioning its terms.²⁶

III. ENVIRONMENTAL HEALTH PROGRAMS

The Code of Virginia authorizes the State Board of Health and the State Health Commissioner, assisted by the Department of Health, to administer a "comprehensive program of preventive, curative, restorative and environmental health services" to the citizens of the Commonwealth.²⁷ The Department's environmental health programs fall largely under the aegis of its Division of Sani-

24. State Air Pollution Control Board Permit, Registration No. 21087 (October 5, 1987).

25. SAPCB REGS., *supra* note 16, § 120-02-09(A).

26. The administrative proceeding has been accompanied by judicial challenge as well. Local citizens sought to enjoin the Board from making a decision on the permit in October, 1987. *Stout v. Commonwealth*, No. N-5475-3 (Richmond Cir. 1988); *Fullerton v. Commonwealth*, No. N-5491-3 (Richmond Cir. 1988). In the *Stout* hearing, the court denied plaintiff's petition for a temporary injunction. After the Board issued its permit, the plaintiff in each case moved for a nonsuit. Citizens also sought to enjoin the effect of the permit once issued. To date, however, no hearing has been held and no injunction has been issued. *Fullerton*, No. 5680-3 (1988). After citizens demanded the formal hearing available under § 120-02-09.A of the State Air Pollution Control Board Regulations, Mountain View sought to enjoin the hearing. *Mountain View Rendering Co. v. Commonwealth*, No. 3924 (Shenandoah County Cir. 1988) Mountain View's petition for a temporary injunction was denied. *Id.*

27. VA. CODE ANN. § 32.1-2 (Repl. Vol. 1985).

tarian Services²⁸ and the Office of Water Programs.²⁹ The Division of Sanitarian Services oversees the processing of the approximately 40,000 permit applications filed annually for on-site sewage disposal systems.³⁰ The Office of Water Programs is responsible for enforcement of the safe drinking water standards applicable to the 1,877 community and 2,543 noncommunity water systems which have been issued permits by the Department of Health.³¹

The focus of these programs is on the quantity and quality of drinking water and on the environmentally sound handling and disposal of on-site sewage. The legislative enactments during the last biennium sharpen this focus via increased state regulation, as well as by granting specific authority to localities to implement their own groundwater and surface water protection measures.³² The 1987 session of the Virginia General Assembly enacted the following laws:

1. Requiring the Board of Health to develop a five-year plan for the handling and disposal of on-site sewage in the Commonwealth;³³

2. Requiring the State Health Commissioner simultaneously to notify the chief administrative officer of the appropriate county, city or town, when he issues a notice of violation of any waterworks regulation to the owner of a waterworks or water supply in that locality;³⁴

28. The Division of Sanitarian Services includes the Bureau of Food and General Environmental Services and the Bureau of Sewage and Water Services.

29. The Office of Water Programs includes the Division of Water Supply Engineering, the Division of Sewage and Wastewater Engineering and the Division of Shellfish Sanitation.

30. Interview with Robert W. Hicks, Director of the Division of Sanitarian Services, Virginia Department of Health (June 20, 1988).

31. Interview with Evans H. Massie, Compliance Officer, Division of Water Supply Engineering, Office of Water Programs, Virginia Department of Health (June 20, 1988).

32. In addition to the legislative enactments discussed in this survey, the 1988 General Assembly adopted enabling legislation for localities to utilize their comprehensive plans and zoning ordinances to address groundwater protection. *See, e.g.*, Act of March 24, 1988, ch. 268, 1988 Va. Acts 547 (authorizing comprehensive plans to include the designation of areas for implementation of reasonable groundwater protection measures); Act of March 31, 1988, ch. 438, 1988 Va. Acts 543 (requiring local commissions to include surveys and studies of surface water, groundwater and geologic factors as part of their comprehensive plans); Act of March 31, 1988, ch. 439, 1988 Va. Acts 749 (enabling local zoning ordinances to include "reasonable provisions, not inconsistent with applicable state water quality standards, to protect surface water and groundwater").

33. VA. CODE ANN. § 32.1-163.2 (Cum. Supp. 1985).

34. *Id.* § 32.1-175.1(A); *cf.* Act of March 31, 1988, ch. 434, 1988 Va. Acts 539 (placing similar locality notification requirements on the Executive Directors of the State Air Pollu-

3. Establishing the Virginia Water Supply Revolving Fund³⁵ to be administered by the Virginia Resources Authority, and to be used, in consultation with the Board of Health, to make loans to local governments to finance or refinance the costs of water supply facility projects.³⁶

During its 1988 session, the General Assembly adopted the following environmental health programs legislation:

1. Authorizing the Board of Health to establish fees for applications for construction permits for on-site sewage disposal systems and for applications for construction of private wells.³⁷

2. Allowing certain localities to adopt ordinances requiring the testing of private wells to be utilized as the primary potable water source before building permits will be issued.³⁸

3. Prohibiting any company, otherwise excluded from the definition of public utility, furnishing water or sewer services to ten or more customers, from abandoning the water or sewer services unless and until approval is granted by the State Corporation Commission or all of the customers agree to accept ownership of the company.³⁹

4. Removing the obligation of the Department of Health to establish regulations governing the availability, operating conditions and cleanliness of toilet facilities at service stations.⁴⁰

Three programmatic enactments of the 1986 General Assembly merit consideration because of the subsequent passage or proposed passage of implementing regulations. The Small Water or Sewer Public Utility Act applies to all certificated water, sewer, or water and sewer utilities with gross annual operating revenues of less

tion Control Board, the Department of Waste Management and the State Water Control Board).

35. VA. CODE ANN. §§ 62.1-233 to -241 (Repl. Vol. 1987).

36. *Id.* § 62.1-238.

37. Act of March 21, 1988, ch. 203, 1988 Va. Acts 369. The Board of Health adopted an emergency regulation, effective July 1, 1988, establishing a fee of \$50 for sewage disposal system permits and \$25 for private well permits. 4:22 Va. Regs. Reg. 2399 (Aug. 1, 1988).

38. Act of March 31, 1988, ch. 441, 1988 Va. Acts 751. The localities affected are Prince William County, Fairfax County, Stafford County, Fauquier County, Loudoun County, Clarke County, Chesterfield County and the cities of Manassas and Manassas Park.

39. Act of March 31, 1988, ch. 440, 1988 Va. Acts 819.

40. Act of March 7, 1988, ch. 60, 1988 Va. Acts 101. The Department of Health will, however, continue to regulate the construction of public water supplies and sewage disposal facilities.

than one million dollars.⁴¹ This Act became effective July 1, 1986,⁴² and requires the utilities to furnish "reasonably adequate services and facilities,"⁴³ to charge "reasonable and just" rates,⁴⁴ and places a duty on the State Corporation Commission to assure such standards are met.⁴⁵

By order entered November 10, 1987, the State Corporation Commission adopted rules implementing the Small Water or Sewer Public Utility Act.⁴⁶ In addition to requiring the maintenance of books and records on an accrual basis⁴⁷ and addressing the accrual of working capital and depreciation,⁴⁸ the rules prescribe the minimum information a utility must file with the Commission when it changes its tariffs⁴⁹ and establishes the circumstances under which a hearing will be held by the Commission.⁵⁰

The Virginia "Private Well Construction Act,"⁵¹ enacted by the 1986 General Assembly, requires a permit to be obtained from the Department of Health prior to proceeding with the construction of a private well.⁵² The Act also requires the Board of Health to adopt regulations pertaining to the location and construction of private wells.⁵³ The Department of Health is currently drafting the implementing regulations, which include construction standards. The regulations are expected to be publicly noticed in late 1988. Regulations are already in place to govern the location and construction of private wells utilized in conjunction with on-site sewage disposal systems for new construction requiring a building permit.⁵⁴

41. VA. CODE ANN. §§ 56-265.13:1 to .13:3.

42. *Id.*

43. *Id.* § 56-265.13:4.

44. *Id.*

45. *Id.*; see also *id.* §§ 56-265.13:6, .13:7(B).

46. Commonwealth *ex rel.* State Corp. Comm'n, 4:5 Va. Regs. Reg. 444 (Dec. 7, 1987).

47. 4:5 Va. Regs. Reg. 447 (Dec. 7, 1987) (State Corp. Comm'n, Rules Implementing Small Water or Sewer Public Utility Act § 1).

48. *Id.* at 447-48 (§§ 2,3).

49. *Id.* at 448 (§ 4).

50. *Id.* at 448 (§ 7); see also VA. CODE ANN. § 56-265.13:6.

51. VA. CODE ANN. § 32.1-176.1 to 176.7 (Cum. Supp. 1988).

52. *Id.* § 32.1-176.5(A). A "private well" is "any water well constructed for a person on land which is owned or leased by that person and is usually intended for household, ground-water source heat pump, agricultural use, industrial use or other nonpublic water well." *Id.* § 32.1-176.3.

53. *Id.* § 32.1-176.4(A).

54. 4:14 Va. Regs. Reg. 1473 (May 11, 1988) (Full text of Sewage Handling and Disposal Regulations available for inspection at the offices of the Registrar of Regulations and the

The third program enacted during the 1986 legislative session was a prohibition on the land disposal of lime-stabilized septage and unstabilized septage.⁵⁵ An exception is allowed until July 1, 1991, for the land spreading of lime-stabilized septage and shallow injection of unstabilized septage in counties, if approval is obtained from the Board of Supervisors and a permit is obtained from the Department of Health.⁵⁶ The Board of Health amended its Sewage Handling and Disposal Regulations, effective May 11, 1988, to incorporate procedures relating to sewage handling and septage management, including standards for the land spreading of unstabilized septage.⁵⁷

In addition to the regulations relating to drinking water and groundwater protection, the Board of Health recently promulgated the revised Sanitary Regulations For Marinas And Boat Moorings.⁵⁸ The regulations, effective September 1, 1987, require all marinas and boat moorings to provide onshore sanitary facilities, sewage dump stations and boat sewage holding tank pump-out facilities.⁵⁹ These establishments are required to obtain a certificate to operate from the State Health Commissioner.⁶⁰

Marinas are exempt from providing separate sanitary facilities if they are operated as part of a residential development or an overnight lodging facility located within one thousand feet of the shore end of the pier, and the sanitary facilities at the residences or lodge are available to all users of the marina.⁶¹ All marinas and other places where boats are moored, are required to have facilities for pumping or removing sewage from boats. There is an exception, however, if these establishments do not provide services, including

Department of Health); STATE BOARD OF HEALTH, COMMONWEALTH OF VIRGINIA, SEWAGE HANDLING AND DISPOSAL REGULATIONS § 355-34-02 (art. 11, §§ 4.49, .50) (1988) [hereinafter SEWAGE HANDLING REGS].

55. VA. CODE ANN. § 32.1-164.4 (Cum. Supp. 1988).

56. *Id.*

57. SEWAGE HANDLING REGS., *supra* note 54, §§ 3.12-.15.

58. 3:21 Va. Regs. Reg. 2492 (Sept. 1, 1987) (Full text of the Sanitary Regulations for Marinas and Boat Moorings available for inspection at the offices of the Registrar of Regulations and the Department of Health); STATE BOARD OF HEALTH, COMMONWEALTH OF VIRGINIA, SANITARY REGULATIONS FOR MARINAS AND BOAT MOORINGS § 355-17-01 (1987) [hereinafter SANITARY REGS.].

59. *Id.* 3:21 Va. Regs. Reg. 2496-99, §§ 2.1, .7, .8.

60. *Id.* § 1.8(B), at 2495.

61. *Id.* § 2.1, at 2496. The exception does not apply to certain marinas associated with restaurants or commercial establishments which allow overnight occupancy of boats. *Id.* § 2.1(B).

moorage, to boats equipped with installed toilets that either discharge overboard or have sewage holding tanks.⁶²

In the federal forum, the EPA has been very active in rulemaking proceedings to establish maximum contaminant level goals and primary drinking water regulations in order to comply with the Safe Drinking Water Act of 1986.⁶³ The EPA set a four milligrams per liter (mg/L) Recommended Maximum Contaminant Level (RMCL) for fluoride in drinking water, effective December 16, 1985.⁶⁴ The EPA also proposed a Maximum Contaminant Level for fluoride of 4 mg/L on the same day it published its final RMCL rule.⁶⁵ The MCL became effective on October 2, 1987.

The South Carolina Department of Health and Environmental Control filed a petition for review challenging the RMCL regulation in the United States Court of Appeals for the District of Columbia Circuit. The Department argued that there was not substantial evidence to conclude that fluoride in drinking water has any adverse effects on human health and that communities should not be subjected to the increased costs of removing naturally occurring fluoride from their drinking water.⁶⁶ The court, consolidating South Carolina's challenge with that of the Natural Resources Defense Council, Inc., upheld the EPA's RMCL regulation as reasonable and within the scope of the agency's permissible discretion.⁶⁷

The cost of complying with the 4 mg/L standard will have an impact on Virginia water supplies. According to records of the Virginia State Department of Health, in 1987 there were sixty-two small water supplies in the Commonwealth with a fluoride level in excess of 4 mg/L.⁶⁸ The Department of Health estimated that

62. *Id.* § 2.7, at 2497-99.

63. Safe Drinking Water Act, 42 U.S.C. § 300f (1987).

64. 40 C.F.R. § 141 (1987).

65. 40 C.F.R. §§ 141-43 (1987).

66. *Natural Resources Defense Council, Inc. v. United States Env'tl. Protection Agency*, 812 F.2d 721 (D.C. Cir. 1987).

67. *Id.* at 723. In May 1986, the South Carolina Department of Health and Environmental Control filed a petition for review of the 4 mg/L MCL for fluoride. This case was consolidated with a challenge filed by the Natural Resources Defense Council, Inc. and held in abeyance pending disposition of the case challenging the RMCL regulation. Based on the court's ruling upholding the RMCL, both petitioners voluntarily dismissed their MCL challenges. *Natural Resources Defense Council, Inc. v. United States Env'tl. Protection Agency*, Nos. 85-1280, 86-1283 (D.C. Cir. 1987).

68. Records maintained by the Division of Water Supply Engineering, Office of Water Programs, Virginia Department of Health (Richmond, Va.). The 62 systems in Virginia con-

these systems would face an average cost of \$3.31 per thousand gallons to attain the 4 mg/L fluoride standard, exclusive of operator costs.⁶⁹ It was also estimated that these additional costs would result in rate increases from 40% to 1,500%.⁷⁰

The last biennium has also been marked by an increase in enforcement actions initiated by the Office of Water Programs of the Department of Health. Since October 1986, the Department of Health has initiated at least eighteen enforcement actions against owners or operators of waterworks or water supplies for violations of the Waterworks Regulations or compliance orders of the State Health Commissioner.⁷¹ Such violations are punishable by civil and criminal sanctions.⁷²

Three recent cases referred to the Office of the Attorney General have resulted in the imposition of civil penalties against the owners of the waterworks and/or the court-ordered appointment of receivers. For example, in *Commonwealth ex rel. State Board of Health v. Heikens*,⁷³ the owner of the Nottoway Shores Waterworks in Southampton County, Virginia, had failed repeatedly since 1982 to collect water samples for bacteriological, chemical and radiological examinations; to install a water meter to measure total water production; and to establish a program for cross-connection control.⁷⁴ By decree entered February 2, 1988, the Circuit Court of Southampton County enjoined the owner to comply with the requirements of the Board of Health's Waterworks Regulations.⁷⁵ The court also established a compliance schedule⁷⁶ and imposed a civil penalty in the amount of \$2,500 against the owner for the violations.⁷⁷

In *Commonwealth ex rel. State Board of Health v. Herr*,⁷⁸ the Health Department also obtained a temporary injunction in the

stituted approximately 20% of all the systems exceeding the RMCL in the country. *Id.*

69. *Id.*

70. *Id.*

71. Interview with Evans H. Massie, Compliance Officer, Division of Water Supply Engineering, Office of Water Programs, Virginia Department of Health (June 20, 1988).

72. VA. CODE ANN. §§ 32.1-27 (Repl. Vol. 1985). Pursuant to § 32.1-176, an owner may be assessed a civil penalty of not more than \$5,000 for each day of violation. *Id.*

73. No. C-136-87 (Southampton County Cir. Feb. 2, 1988).

74. *Id.* Slip op. at 1.

75. *Id.*

76. *Id.* Slip op. at 1-3.

77. *Id.* slip op. at 3.

78. No. 8-C-88 (Culpeper County Cir. May 10, 1988).

Circuit Court of Culpeper County against the owner of the Randle Ridge Estates Waterworks.⁷⁹ The defendant-owner had operated three wells without a permit and had failed to comply with an emergency order of the State Health Commissioner to restore full water service to the ten homes being served by one of the wells. The owner had also failed to conduct the required water sampling and to install water meters. When the owner failed to meet the compliance schedule of the injunction, the Department of Health filed a petition for rule to show cause. Following an evidentiary hearing and two subsequent hearings, the owner was found to be in civil contempt of the court and ordered to serve ten days in jail and to pay a civil penalty of \$500 to the Commonwealth.⁸⁰ A receiver was also appointed by the court to operate and manage the waterworks.⁸¹

In addition to the general powers of courts to appoint special receivers,⁸² section 32.1-174.1 of the Virginia Code authorizes a circuit court to place a waterworks in receivership and, with the consent of the political subdivision, name the county, city or town, or any public service authority created by the locality, as receiver.⁸³ Thus when the owner of Bull Run Waterworks failed to restore full water service to the consumers within a forty-eight hour period, the Circuit Court of Prince William County, by an order entered July 27, 1987, invoked the statute to appoint the Board of Supervisors of Prince William County as receiver for the Bull Run Waterworks system.⁸⁴

Balancing appropriate land use interests with the protection of public health and the environment is also the responsibility of two citizen boards established by the General Assembly: the Sewage Handling and Disposal Appeal Review Board and the Board for Professional Soil Scientists. The Sewage Handling and Disposal Appeal Review Board, established in the Department of Health,⁸⁵ is a seven-member citizen board that hears all administrative appeals of denials of permits for on-site sewage disposal systems.⁸⁶

79. *Id.*

80. *Id.* slip op. at 2.

81. *Id.*

82. VA. CODE ANN. §§ 8.01-591 to -599 (Repl. Vol. 1984 & Cum. Supp. 1988).

83. *Id.* § 32.1-174.1(C).

84. Commonwealth *ex rel.* State Health Comm'r v. Bull Run Waterworks, Inc., No. 24367 (Prince William County Cir. July 27, 1987).

85. VA. CODE ANN. § 32.1-166.1 (Cum. Supp. 1988).

86. *Id.* § 32.1-166.6.

The Sewage and Handling Disposal Appeal Review Board is also authorized to develop recommendations for alternative solutions to permit denials and to remand the case to the Department of Health for reconsideration.⁸⁷ Established on January 31, 1985, the Sewage Handling and Disposal Appeal Review Board has witnessed an increase in administrative appeals during the 1987-88 biennium and has heard approximately 20 cases since its inception.⁸⁸

The other citizen board, the Board for Professional Soil Scientists, was established by the 1987 General Assembly in the Department of Commerce.⁸⁹ The Board for Professional Soil Scientists has the responsibility of administering and enforcing the voluntary certification program for soil scientists⁹⁰ and is drafting regulations to establish the educational and experiential requirements for eligibility to sit for the certification examination. The regulations should be publicly noticed in the fall of 1988.

IV. SOLID AND HAZARDOUS WASTE

In 1986, the General Assembly established the Department of Waste Management and the Virginia Waste Management Board (DWM) to regulate the management of solid, hazardous and radioactive waste.⁹¹ DWM assumed the responsibilities not only of the Department of Health but also the Solid Waste Commission and the Hazardous Waste Facility Sitting Council as of the date it was established. In 1987, responsibility for litter control also was transferred to DWM from the Division of Litter Control in the Department of Conservation and Historic Resources.⁹²

A. *Solid Waste*

1. Legislation

In 1987, the Virginia Waste Management Board was given the authority "[t]o abate hazards and nuisances dangerous to public

87. *Id.*

88. Records maintained by the Secretary to the Sewage Handling and Disposal Appeal Review Board (Richmond, Va.).

89. Va. Code Ann. §§ 54-969 to -977 (Cum. Supp. 1988).

90. *Id.* § 54-972. A "soil scientist" is a "person having special knowledge of soil science and the methods and principles of soil evaluation as acquired by education and experience in the formation, description and mapping of soils." *Id.* § 54-969.

91. Act of April 7, 1986, ch. 492, 1986 Va. Acts 927.

92. Act of March 22, 1987, ch. 234, 1987 Va. Acts 310.

health, safety or the environment, both emergency and otherwise, created by the improper disposal, treatment, storage, transportation or management of substances within the jurisdiction of the Board."⁹³

The state's solid waste program was further amended in 1988. Prior to the 1988 legislative changes, persons disposing solid waste were required to have permits.⁹⁴ Effective July 1, 1988, section 10.1-1408.1 of the Virginia Code requires that "[n]o person shall operate any sanitary landfill or other facility for the disposal, treatment or storage of nonhazardous solid waste without a permit from the Director."⁹⁵ This requirement is not applicable to "recycling or for temporary storage incidental to recycling."⁹⁶ This legislation clarifies DWM's authority over facilities such as tire dumps, where tires are being held in anticipation of technology transforming tires into a valuable energy resource.

Section 10.1-1408.1 further requires that the Executive Director of DWM determine that a proposed facility "poses no substantial present or potential danger to human health or the environment" before a permit may be issued.⁹⁷ While presumably the Executive Director has never issued a permit for a facility that posed a "substantial present or potential danger to human health or the environment," this determination is now an affirmative obligation.⁹⁸

The last major provision of section 10.1-1408.1 of the Virginia Code forbids any person to "own, operate or allow to be operated on his property an open dump."⁹⁹ This provision restores language

93. Act of March 18, 1987, ch. 121, 1987 Va. Acts 181, 183.

94. See, e.g., VA. CODE ANN. § 32.1-180 (repealed by Acts 1986, ch. 492).

95. VA. CODE ANN. § 10.1-1408.1(A) (Cum. Supp. 1988) (emphasis added).

96. *Id.* § 10.1-1408(H). The section defines "recycling" as "any process whereby material which would otherwise be solid waste is used or reused, or prepared for use or reuse, as an ingredient in an industrial process to make a product, or as effective substitute for a commercial product." *Id.*

97. *Id.* § 10.1-1408.1(C). Section 10.1-1408(c) also requires a public hearing on a proposed permit if requested by the local governing body. *Id.*

98. *Id.*

99. *Id.* § 10.1-1408.1(F). This language is derived from former VA. CODE ANN. § 32.1-180.A.3 (repealed by Acts 1986, ch. 492). The language makes clear the legislative intent to hold landowners responsible for illegal disposal of solid waste on their property even where the landowner is unaware of the disposal. *Id.*

Chapter 696 makes other changes and additions to the statutes governing solid waste permit requirements. Act of April 10, 1988, ch. 696, 1988 Va. Acts 1423. The reader interested in knowing of every change should compare new Virginia Code § 10.1-1408.1 with repealed §§ 10-270.1 and 10-271. Less significant changes to the solid waste management laws are found in chapter 569 of the 1988 Acts of Assembly (adding permit violations to the causes

that was dropped when the solid waste management program changed hands.

During both the 1987 and 1988 sessions, the General Assembly amended the powers and responsibilities of local governments in dealing with solid waste. The regional solid waste management plans required by section 10-274 of the Code of Virginia now must "include adequate provisions for the disposal of construction waste and land-clearing debris generated within the county, city, or town."¹⁰⁰ The statute does not require that the waste be disposed of within the locality. To encourage and facilitate recycling, the legislature further gave localities the authority to enact ordinances requiring the separation of solid waste by type.¹⁰¹

In 1987, the General Assembly established a joint subcommittee to study waste reduction.¹⁰² In its report to the 1988 General Assembly, the subcommittee described present efforts in the areas of recycling and waste reduction and the public comment received in several hearings on those areas.¹⁰³ Additionally, the subcommittee identified four hard-to-recycle products: used oil, lead batteries, used tires, and farm chemicals.¹⁰⁴ Lastly, the subcommittee made

for revoking permits and including storage or treatment facilities in the facilities whose permits may be revoked) and chapter 332 (requiring the Director to respond within ninety days to a proposed final closure plan for a sanitary landfill). See Act of April 5, 1988, ch. 569, 1988 Va. Acts 965; Act of March 29, 1988, ch. 332, 1988 Va. Acts 567.

100. Act of March 22, 1987, ch. 249, 1987 Va. Acts 329. "Construction waste and land-clearing debris" are further defined as "solid waste generated attendant to construction of structures, demolition of structures, or clearing of trees, brush and other vegetation from land." *Id.*

101. Act of March 30, 1988, ch. 373, 1988 Va. Acts 879 (adding § 15.1- 11.5).

102. H.J. Res. 292, 1987 Sess., 1987 Va. Acts 1743; S.J. Res. 132, 1987 Sess., 1987 Va. Acts 812. The committee was directed to:

(a) review existing public and private work reduction programs and capabilities in Virginia; (b) review governmental and private sector recycling programs; (c) review waste volume reduction potential in the context of overall Virginia solid waste management initiatives; (d) consider methods of assisting local governments in developing waste reduction programs, as well as methods of acquiring the cooperation of the general public; (e) make recommendations to improve waste volume reduction and recycling in Virginia and to promote coordination between state agencies, private and public organizations, private industries, and local governments in this regard; (f) make recommendations for incentives to promote waste volume reduction; and (g) coordinate with and develop recommendations for the Department of Waste Management.

H.J. Res. 292, 1987 Sess., 1987 Va. Acts 1723-24.

103. REPORT OF THE JOINT SUBCOMMITTEE STUDYING ALTERNATIVES FOR IMPROVING WASTE VOLUME REDUCTION AND RECYCLING EFFORTS TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, S. Doc. No. 22, 1988.

104. *Id.* at 12-13.

several legislative proposals which were adopted by the General Assembly. The legislature directed DWM, together with the Department of Transportation and the Department of Conservation and Historic Resources, to estimate the cost of establishing and maintaining glass and aluminum recycling containers at state parks, waysides, and rest areas;¹⁰⁵ and authorized localities to develop recycling facilities.¹⁰⁶ Further, by joint resolution, the General Assembly directed DWM to consider establishing a statewide solid waste management program emphasizing waste reduction, recycling, and energy recovery.¹⁰⁷ Lastly, the subcommittee was continued and directed "to determine what, if any, financial or tax incentives would be appropriate to promote a successful overall solid waste management program in the Commonwealth."¹⁰⁸

2. Administrative Activities

The legislation creating the Department of Waste Management carried over the regulations of the Department of Health.¹⁰⁹ As of this writing, the Regulations of the Department of Health Governing Solid Waste are still employed by DWM. The Waste Management Board has begun the process of promulgating its own regulations in two areas: solid and infectious wastes.

In its first meeting on July 25, 1986, the Waste Management Board adopted, under the emergency provisions of the Administrative Process Act, the Financial Assurance Regulations for Solid Waste Facilities.¹¹⁰ These were adopted as emergency regulations because of a decision by the circuit court for King and Queen County, which was subsequently reversed by the Virginia Court of Appeals.¹¹¹ The Financial Assurance Regulations were subsequently repromulgated after considerable public participation¹¹² and require an applicant for a solid waste disposal permit to obtain

105. Act of March 30, 1988, ch. 380, 1988 Va. Acts 461.

106. Act of April 5, 1988, ch. 590, 1988 Va. Acts 756. The plans must be approved by DWM, and may not be submitted to that agency later than January 1, 1990. *Id.*

107. H.J. Res. 81, 1988 Sess., 1988 Va. Acts 321.

108. H.J. Res. 80, 1988 Sess., 1988 Va. Acts 1807. In doing so, the subcommittee was directed to focus on three areas: (1) incentives to promote volume reduction and recycling; (2) regionalization approaches to solid waste management; (3) methods for the disposal of hard to recycle products such as oil, lead batteries, tires and farm chemicals. *Id.*

109. Act of April 7, 1986, ch. 492, 1986 Va. Acts 927.

110. 2:24 Va. Regs. Reg. 2378-2400 (Sept. 1, 1986) (Waste Management Bd.)

111. For a discussion of this case, see *infra* notes 122-125 and accompanying text.

112. 3:19 Va. Regs. Reg. 2142-63 (June 22, 1987) (Waste Management Bd.).

liability insurance for the operation of the facility and to provide financial assurance that the applicant will be able to conduct the closure and post-closure activities required by the permit.¹¹³ The applicant can satisfy these requirements through the use of a trust fund, a surety bond, letter of credit, deposit of collateral, a financial test and corporate guarantee, or a combination of mechanisms.¹¹⁴ The financial assurance regulations do not apply to facilities owned and operated by counties, cities and towns, or federal and state agencies.¹¹⁵

At its meeting on June 10, 1988, the Waste Management Board proposed solid waste management regulations which addressed the siting, permitting, operation, and closure of solid waste management facilities in a comprehensive fashion. After the regulations undergo a public comment period, the regulations will be adopted in final form.

At the direction of the Waste Management Board, the staff of the DWM has begun developing regulations governing infectious waste.¹¹⁶ A draft of these regulations has been the subject of several public meetings at which significant public comment was received. These regulations have not yet been formally proposed by the Waste Management Board.

3. Judicial Activities

In the first case of its kind in the Commonwealth, the Circuit Court of Warren County was asked to determine whether tree limbs, tree stumps, and brush were "solid waste" within the meaning of the statutes and regulations governing solid waste.¹¹⁷ The statute in question defined "solid waste" as:

[A]ny garbage, refuse, sludge and other discarded material, including solid . . . material, resulting from industrial, commercial, mining and agricultural operations and from community activities but does not include (i) solid or dissolved material in domestic sewage, (ii) solid or dissolved material in irrigation return flows or in industrial

113. *Id.* at 2145.

114. *Id.* at 2147.

115. *Id.*

116. As of this writing, these regulations have not been published in the Virginia Register of Regulations.

117. Commonwealth *ex rel.* Virginia Waste Management Bd. v. Frame, No. H86005017 (Warren County Cir. Aug. 6, 1986).

discharges which are sources subject to a permit from the State Water Control Board, or (iii) source, special nuclear, or by product material as defined by the Federal Atomic Energy Act of 1954, as amended.¹¹⁸

The court considered the rules of statutory construction and determined that:

[R]eading all of the Virginia Waste Management Act and recognizing its purpose to protect the public health, safety and welfare of the citizens of Virginia, coupled with the obvious danger to the public health, safety and welfare shown in this evidence, compels the conclusion that 'stump dumps' are covered both within the statute and the regulation as 'commercial waste.'¹¹⁹

In so ruling, the court noted that the tree stumps and limbs emanated from "establishments engaged in business" within the definition of "commercial waste."¹²⁰

*Board of Supervisors v. Board of Health*¹²¹ prompted the adoption of emergency financial assurance regulations. In that case, the Board of Supervisors of King and Queen County challenged a permit issued by the State Health Commissioner to King Land Corporation to operate an asbestos and ash landfill in King and Queen County. The county stated several claims in its petition, but the circuit court granted the county summary judgment on the

118. VA. CODE ANN. § 10-264 (repealed by Act of April 20, 1988, Ch. 891, 1988 Va. Acts 1874). The present regulations define various classes of waste as follows:

"Solid Waste" means any discarded material, garbage, refuse, sludge from a waste treatment plant, water spray treatment plant, or air pollution control facility and other discarded material, including but not limited to solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved materials in domestic sewage, or solid or dissolved materials in irrigating return flow or industrial discharges . . . or source, special nuclear or by-product material . . . solid waste can include construction waste, commercial waste, debris waste, and industrial waste, [infectious waste], and institutional waste except where excluded as a hazardous waste.

3:19 Va. Regs. Reg. 2144 (June 22, 1989).

"Commercial Waste" means all solid waste generated by establishments engaged in business operations other than manufacturing. This category includes, but is not limited to, solid waste resulting from the operation of stores, markets, office buildings, restaurants, shopping centers, and similar commercial facilities.

Id. at 2142.

119. *Frame*, No. H86005017 (Warren County Cir. Aug. 6, 1986).

120. *Id.*

121. No. 86-4 (King and Queen County Cir. June 23, 1986).

grounds that the permit was void because the Board of Health had failed to promulgate the financial responsibility regulations required by Virginia Code section 32.1-182.¹²² On appeal by King Land, the court of appeals vacated the award of summary judgment and remanded the case to the circuit court.¹²³ After carefully examining the legislative history of section 32.1-182 and the permitting practices of the Department of Health, the court of appeals concluded that there was no deadline by which the regulations had to be promulgated.¹²⁴ The county has filed a petition for appeal to the Virginia Supreme Court.

B. Hazardous Waste

1. Legislation

When DWM and the Waste Management Board were created, the General Assembly gave them at least one power that none of their predecessors possessed. Section 10-266(18) of the Virginia Code gives the Waste Management Board the authority to "[t]ake actions to contain or clean up sites where solid or hazardous waste has been improperly managed and to institute legal proceedings to recover the costs of the containment or clean-up activities from the responsible parties."¹²⁵ Thus, the Board now has an independent statutory basis to conduct the same type of removal and remedial activities authorized by CERCLA.¹²⁶

To assist the DWM in conducting such activities, the General Assembly created the Virginia Solid and Hazardous Waste Contingency Fund (the "Fund").¹²⁷ The Fund consists of civil penalties awarded by courts for violations of the solid and hazardous waste laws and regulations, and civil charges in lieu of civil penalties that are paid pursuant to administrative order.¹²⁸ Moreover, in 1988 the General Assembly established a lien in favor of the DWM for the amount expended from the Fund for clean-up or stabilization.¹²⁹

122. *Id.*

123. *King Land Corp. v. Board of Supervisors*, 4 Va. App. 597, 359 S.E.2d 823 (1987).

124. *Id.* at 605, 359 S.E.2d at 827.

125. VA. CODE ANN. § 10-266(18) (repealed by 1988 Acts, ch. 891). When title 10.1 was codified in 1988 the General Assembly retained language from the prior title. *See id.* § 10.1-1402(18) (Cum. Supp. 1988).

126. Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9657 (1983 and Supp. III 1986).

127. VA. CODE ANN. § 10.1-1406 (Cum. Supp. 1988).

128. *Id.*

129. *Id.* § 10.1-1406(C).

The lien is on the real property which was the subject of the DWM clean-up and must be filed within one year of the completion of DWM activities and is subject to judicial review to determine both the validity of the lien and the reasonableness of the amount.¹³⁰

This new authority, coupled with increased funding and manpower provided by the 1988 Appropriations Act,¹³¹ will enable the DWM to initiate enforcement or remedial actions at sites that are not eligible for funding under CERCLA.¹³² DWM is also increasing its participation in the remedial action portion of the CERCLA program.¹³³

2. Administrative Activities

As an authorized state under RCRA,¹³⁴ Virginia is required to update its regulations to keep pace with the federal program. Accordingly, the Waste Management Board adopted Amendment 8¹³⁵ to its Hazardous Waste Management Regulations, effective January 1, 1988, and Amendment 9 was proposed on June 10, 1988.¹³⁶ Both amendments reflect changes required either by the Hazardous and Solid Waste Amendments of 1984 or changes in EPA regulations.

3. Judicial Activities

The major development in the past year has been a resurgence in criminal enforcement. After several years of no criminal prosecutions, two successful prosecutions for violations of the hazardous waste laws occurred in 1988.

In the first case,¹³⁷ which arose in Washington County, the manager of the Sterling Casket Hardware Company dumped plating waste containing cyanide down a storm drain. The manager pleaded no contest to a felony charge of knowingly disposing of a hazardous waste without a permit in violation of section 10-310B

130. *Id.*

131. Act of April 11, 1988, ch. 800, 1988 Va. Acts 1280.

132. *Id.*

133. *Id.*

134. Resource Conservation and Recovery Act, 42 U.S.C. § 6901-6991 (1983 and Supp. III 1986).

135. 4:4 Va. Regs. Reg. 332-37 (Nov. 23, 1987) (Waste Management Bd.).

136. As of this writing, final regulations have not been published in the Virginia Register.

137. *Commonwealth v. Dohman*, Nos. 88-8, 88-9 (Washington County Cir. Apr. 7, 1988).

of the Virginia Code and to a misdemeanor charge of treating hazardous waste without a permit in violation of section 10-310D of the Virginia Code. The manager was sentenced to six months in jail and a fine of \$3,000 for the felony, and to six months in jail and a fine of \$1,000 for the misdemeanor. Both sentences were suspended. Civil enforcement action is pending against the company.

The second case, which arose in Colonial Heights, involved Emergency Special Services, Inc. and its president.¹³⁸ The company, a hazardous waste transporter with a permit, contracted to deliver twenty drums of waste malathion, a pesticide hazardous because of its ignitability, to a disposal facility. Ten of those drums were diverted to the home of the owner, where they were discharged into the Appomattox River. The company pleaded guilty to two felonies, unlawful transportation and unlawful disposal, and was sentenced to a fine of \$20,000. The president pleaded guilty to two misdemeanors, failure to notify the authorities of a spill and failure to clean up a spill, and was sentenced to twenty-four months in jail, twenty-one of which were suspended. The president was the first person to serve time for violation of the hazardous waste laws. The president and the company paid an additional \$150,000 to the Commonwealth for replacement of fish killed as a result of the discharge, for reimbursement of response costs, and for civil penalties.

V. WATER

A. *Legislative Changes*

1. Clean Water Act Amendments

The Water Quality Act of 1987¹³⁹ brought a number of important amendments and additions to the Clean Water Act. Among these, the Act:

1. Established and funded the Chesapeake Bay Program;¹⁴⁰
2. Provided new liability and a new scale of criminal penalties for negligent and knowing violations of the Act and for introduc-

138. *Commonwealth v. Emergency Special Services, Inc.*, No. 640 (H2) (Colonial Heights Cir. Apr. 26, 1988); *Commonwealth v. Birdsong* (Colonial Heights Cir. Apr. 26, 1988).

139. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987).

140. 33 U.S.C.A. § 1267 (West Supp. 1988).

tion of hazardous materials into a sewer or for "knowing endangerment;"¹⁴¹

3. Increased the daily maximum civil penalty to \$25,000 per day, codified the EPA civil penalty policy, established the "single operational upset" defense, and gave the EPA the authority to impose civil penalties administratively;¹⁴²

4. Codified the anti-backsliding provisions of the EPA's regulation;¹⁴³

5. Enacted requirements for disposal of sewage sludge;¹⁴⁴ and

6. Established grants to support state revolving loan funds for sewage treatment works.¹⁴⁵

2. Underground Storage Tanks

The 1987 General Assembly enacted two laws¹⁴⁶ which establish a state regulatory program for underground storage tanks¹⁴⁷ and the Virginia Underground Petroleum Storage Tank Fund¹⁴⁸ ("Fund") which is to be utilized for costs incurred in taking certain types of corrective action for releases of petroleum from underground storage tanks, third party compensation costs and administrative costs incurred by the State Water Control Board. This new state regulatory program is separate and distinct from the federal underground storage tank program and financial responsibility laws.¹⁴⁹

141. *Id.* § 1319(c)(3) (West 1986 and Supp. 1988).

142. *Id.* § 1319(d).

143. *Id.* § 1342(o).

144. *Id.* § 1345.

145. *Id.* §§ 1381-1387.

146. Act of April 8, 1987, ch. 677, 1987 Va. Acts 1160; Act of March 27, 1987, ch. 528, 1987 Va. Acts 799.

147. VA. CODE ANN. §§ 62.1-44.34:8 to :9 (Repl. Vol. 1987).

148. *Id.* §§ 62.1-44.34:10 to :12.

149. A major component of the Hazardous and Solid Waste Amendments of 1984 was Subtitle I which provides for the development and implementation of a comprehensive regulatory program for underground storage tank systems. Subtitle I contains tank specification and performance standards, notification requirements and financial assurance requirements. Subtitle I was amended by the Superfund Amendments Reauthorization Act of 1986 ("SARA"). Section 205 established the federal underground storage trust fund and required the EPA to promulgate regulations requiring owners to demonstrate and maintain evidence of financial responsibility. The EPA has not yet adopted its final rules for financial responsibility requirements for owners of petroleum tanks. Virginia Underground Petroleum Storage Tank Fund, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

Under the state program, the Water Control Board is authorized to "[e]xercise general supervision and control over underground storage tank activities in this Commonwealth."¹⁵⁰ Additionally, the Water Control Board is empowered to require owners and operators of underground storage tanks to undertake corrective action for any release of petroleum or any other regulated substance under specified conditions, including circumstances where, in the judgment of the Board, it is necessary to take such action to protect human health and the environment.¹⁵¹

As a result of the legislation establishing the Virginia Underground Petroleum Storage Tank Fund, the Water Control Board cannot resort to the Oil Spill Contingency Fund for UST discharges of petroleum, effective July 1, 1987.¹⁵² The Water Control Board must, therefore, use the State Fund for emergency cleanups or for unknown/incapable owner cleanups.¹⁵³ However, the Water Control Board can recover for monies expended from the Fund for corrective actions if the owner or operator has violated substantive environmental protection regulations promulgated by the Board.¹⁵⁴

The State Fund legislation also directs the Water Control Board to adopt requirements for maintaining evidence of final financial responsibility for the corrective action and for compensatory third parties and establishes the mechanisms for demonstrating such financial responsibility.¹⁵⁵ The Water Control Board has not yet adopted either the substantive environmental regulations or the financial responsibility regulations required by the legislation.¹⁵⁶

3. Local Veto of Water Permits

The 1987 General Assembly enacted a statute that provides for a local governmental veto of state discharge permits that are inconsistent with the zoning or subdivision ordinances.¹⁵⁷ The statute states that:

150. VA. CODE ANN. § 62.1-44.34:9(2) (Repl. Vol. 1987).

151. *Id.* § 62.1-44.34:9(9).

152. *Id.* § 62.1-44.34:5(v).

153. *Id.* § 62.1-44.34:11(A)(2).

154. *Id.* § 62.1-44.34:11(B).

155. *Id.* §§ 62.1-44.34:11, :12.

156. In 1988, the Commonwealth of Virginia received a grant from the Environmental Protection Agency under the Federal Underground Storage Tank Fund in the amount of approximately \$380,000.

157. VA. CODE ANN. § 62.1-44.15:3 (Repl. Vol. 1987).

[N]o application for a certificate to discharge sewage, industrial waste and other waste into or adjacent to state waters shall be considered complete until the applicant has provided the Executive Director [of the State Water Control Board] with notification from the governing body of the county, city or town in which the discharge is to take place that the location and operation of the discharging facility is consistent with all ordinances pursuant to Chapter 11 of Title 15.1.¹⁵⁸

Several questions regarding the interpretation of the statute are as yet unanswered:

1. The maximum term of National Pollution Discharge Elimination System (NPDES) permits is five years;¹⁵⁹ the owner must reapply 180 days before the end of that period.¹⁶⁰ Does the statute contemplate a new local approval for each reissuance of an NPDES permit?

2. Does the statute require local approval for, e.g., a complete recycle operation from which no discharge is authorized, although the facility is regulated by an NPDES permit or other state certificate?¹⁶¹

3. May the Water Control Board process an application if the local government wrongfully delays giving the required notification?

4. Is the local notification required for all amendments, whether major or minor, to existing discharge permits?

The recently amended NPDES regulation¹⁶² fails to construe the statute to answer these questions.

4. Administrative Penalties

The 1988 General Assembly gave the Water Control Board the authority to impose civil penalties by administrative order, upon

158. *Id.*

159. 33 U.S.C. § 1342(b)(1)(B) (1983); STATE WATER CONTROL BOARD, COMMONWEALTH OF VIRGINIA, PERMIT REGULATIONS, § 680-14-01, § 2.5(F) (1988) (Under the Virginia regulations, the NPDES permits issued by the State Water Control Board are called VPDES permits) [hereinafter PERMIT REG].

160. See PERMIT REGS. *supra* note 160, § 2.1(B).

161. *Id.* § 1.5.

162. 4:17 Va. Regs. Reg. 1833 (May 23, 1988) (State Water Control Bd.).

consent of the owner.¹⁶³ This statute mirrors existing authority of the State Air Pollution Control Board,¹⁶⁴ the Department of Health,¹⁶⁵ and the Department of Waste Management¹⁶⁶ to impose such penalties upon consent.

5. Pretreatment Enforcement

The 1988 General Assembly granted the Water Control Board the authority to enforce both state and municipal pretreatment requirements directly against an industrial discharger to a publicly owned treatment works.¹⁶⁷

6. Local Authority

Finally, the 1988 General Assembly authorized local comprehensive plans to consider "ground water, surface water, and geologic factors"¹⁶⁸ and authorized local governments to adopt "reasonable provisions, not inconsistent with applicable state water quality standards, to protect surface water and ground water."¹⁶⁹

B. *Administrative Developments*

1. Water Quality Standards Amendments

The State Water Control Board adopted several amendments to its water quality standards as part of the triennial review.¹⁷⁰ The major amendments prohibit the use of chlorine disinfection by dischargers to waters containing endangered, threatened or rare species, or trout, except for discharges under 20,000 gallons per day.¹⁷¹

163. Act of March 29, 1988, ch. 328, 1988 Va. Acts 549.

164. VA. CODE ANN. § 10.1-1316 (Cum. Supp. 1988).

165. *Id.* § 32.1-27(D) (Repl. Vol. 1985).

166. *Id.* § 10.1-1455(F) (Cum. Supp. 1988).

167. Act of March 20, 1988, ch. 167, 1988 Va. Acts 345.

168. Act of March 31, 1988, ch. 438, 1988 Va. Acts 543 (relating to preparation of a comprehensive plan).

169. Act of March 31, 1988, ch. 439, 1988 Va. Acts 749.

170. 4:2 Va. Regs. Reg. 122 (Oct. 26, 1987) (Full text of Water Quality Standards available for inspection at the offices of the Registrar of Regulations and the State Water Control Board); STATE WATER CONTROL BOARD, COMMONWEALTH OF VIRGINIA, WATER QUALITY STANDARDS (1987) [hereinafter WATER QUALITY STDS.].

171. WATER QUALITY STDS., *supra* note 171, § 680-21-01.11(B)5. This portion of the regulation has been vacated and remanded. *Appalachian Power Co. v. State Water Control Bd.*, No. CH87-000733 (City of Roanoke Cir. Ct., Aug. 17, 1988) (appeal pending).

The amendments revised the radiological¹⁷² and fecal coliform¹⁷³ standards, expanded the water quality criteria¹⁷⁴ and made their use mandatory in discharge permits “when . . . necessary to ensure the protection of . . . beneficial uses.”¹⁷⁵ Additionally, the amendments expanded the list of “outstanding state resource waters” to include new scenic river sections and to designate waters containing endangered or threatened species.¹⁷⁶ The chlorine ban and the endangered species designation of the Clinch River¹⁷⁷ are under appeal.

2. Toxic Monitoring

The Water Control Board adopted an extensive regulation governing toxic monitoring requirements in the NPDES permits for discharges to surface waters.¹⁷⁸ The regulation applies to discharges that demonstrate actual toxicity or contain a toxic pollutant, to any industry in certain Standard Industrial Classification Codes, to any industry discharging more than 50,000 gallons a day, to any publicly owned treatment works discharging more than 1,000,000 gallons per day or with a pretreatment program, and to any other discharge that the Water Control Board deems to have a potential for toxicity or instream impact.¹⁷⁹ Affected dischargers are to be required in their NPDES permits to conduct toxic monitoring, and if the monitoring discloses toxicity as defined in the regulation, to undertake a toxicity reduction program to eliminate toxic impact on the receiving waters.¹⁸⁰

In response to public comments, the Governor has suspended the regulatory process for solicitation of additional public comment.¹⁸¹

172. *Id.* § 680-21-01.12.

173. *Id.* § 680-21-02.2.

174. *Id.* § 680-21-03.

175. *Id.* § 680-21-03.1.

176. *Id.* § 680-21-07.2.

177. *Appalachian Power Co. v. State Water Control Bd.*, No. CH87-000733 (Roanoke Cir. Aug. 17, 1988).

178. 4:16 Va. Regs. Reg. 1707 (May 9, 1988) (Water Control Bd.).

179. *Id.* § 2.

180. *Id.* §§ 2, 4, 6.

181. 4:19 Va. Regs. Reg. 1986 (June 20, 1988). The Board readopted the regulation, with minor changes, on Aug. 8, 1988.

3. Nutrients

Finally, in conjunction with the Governor's commitment in the Chesapeake Bay Agreement to reduce Virginia's discharge of nutrients to the Bay by forty percent by the end of the century,¹⁸² the Water Control Board has adopted nutrient regulations.¹⁸³ The regulations designate the Bay, most of its tributaries, and certain other waters as "nutrient enriched" and impose limitations upon phosphorous discharges to those waters. These regulations are under appeal.¹⁸⁴

C. *Judicial Decisions*

1. Federal Courts

The United States Supreme Court has provided for jury trials in enforcement actions under the Clean Water Act and has limited citizen suits under that Act to instances where the citizen can allege ongoing violations of the Act.

The first case, *United States v. Tull*,¹⁸⁵ arose from an unauthorized filling of wetlands on Chincoteague Island by a developer. The district court imposed civil penalties of \$75,000 and a further \$250,000 to be suspended on the condition that the developer restore a waterway to navigability. The district court further enjoined the restoration of other wetlands that had been filled by the developer.¹⁸⁶ The United States Supreme Court reasoned that the action for civil penalties is analogous to the eighteenth century action in debt, and that the seventh amendment requires a jury trial; at the same time, the Court held that Congress could fix civil penalties by statute and could delegate that activity to judges so that the seventh amendment does not require a jury to set the size of the civil penalty.¹⁸⁷

This result probably will be limited in its impact. *Tull* was a dredge and fill case; the more common enforcement actions for NPDES violations usually are based on discharge monitoring re-

182. Chesapeake Bay Agreement, Dec. 15, 1987.

183. 4:15 Va. Regs. Reg. 1649 (April 25, 1988); 4:15 Va. Regs. Reg. 1648 (April 25, 1988).

184. *Smithfield Foods, Inc. v. Commonwealth*, No. 3912 (Isle of Wight County Cir. 1988) (Petition for appeal filed June 6, 1988).

185. 615 F. Supp. 610 (D.C. Va. 1983).

186. *Id.* at 626-27.

187. *Tull v. United States*, 107 S. Ct. 1831, 1840 (1987).

ports filed by the discharger itself, and liability for such self-reported violations frequently has been a matter of summary judgment.¹⁸⁸

The citizen suit case was an appeal brought by Gwaltney of Smithfield, Ltd.¹⁸⁹ Gwaltney had a three-year history of NPDES violations at its meat packing plant in Smithfield, Virginia. Gwaltney's last report of a permit violation occurred in May, 1984; the Chesapeake Bay Foundation and the Natural Resources Defense Council filed a citizen suit action in June, 1984. Based upon the company's own discharge monitoring reports, the district court granted summary judgment on the issue of liability. Following a bench trial on the penalty issues, the court held that the maximum penalty liability was \$6,660,000 and imposed a penalty of \$1,285,322.¹⁹⁰

On appeal, the United States Supreme Court held that the citizen suit provisions of the Clean Water Act do not confer federal jurisdiction over past violations, but do confer jurisdiction when the plaintiff makes a good-faith allegation of continuing or intermittent violation. The Court remanded for consideration whether the plaintiffs in *Gwaltney* had met this requirement.¹⁹¹

Largely overlooked in the discussion of the Supreme Court's decision was the Fourth Circuit's view on the question of penalties for "monthly average" violations. Under its permit, Gwaltney had been required to report total Kjeldahl nitrogen ("TKN") discharges three days a week; the permit imposed a maximum on each daily TKN value as well as a limitation on the average of all such values in a given month. Gwaltney had violated, among others, both the daily maximum and monthly average limitations on TKN. The district court held that the violation of a monthly average limitation exposed the company to liability for the maximum \$10,000 civil penalty (now \$25,000) for each day of the

188. See, e.g., *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542 (E.D. Va. 1985), *aff'd.*, 791 F.2d 304 (4th Cir. 1986), *rev'd on other grounds and remanded*, 108 S. Ct. 376 (1988); *United States v. Amoco Oil Co.*, 580 F. Supp. 1042 (W.D. Mo. 1984); *United States v. Bradshaw*, 541 F. Supp. 884 (D. Md. 1982); *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945 (W.D. Tenn. 1976).

189. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 108 S. Ct. 376 (1987).

190. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1565 (E.D. Va. 1985).

191. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 108 S. Ct. at 386.

month.¹⁹² The Fourth Circuit affirmed this reading.¹⁹³ Similarly, the circuit court affirmed the imposition of liability for every reported violation of the daily maximum, despite the possibility that several of the violations could have occurred on the same day. The court reasoned that the company's discharge monitoring reports established a prima facie case of violation and the information to show that multiple violations occurred on a single day was uniquely available to the company.¹⁹⁴

The district court had characterized Gwaltney's conduct as lackadaisical and "bordering on benign neglect," and assessed the largest civil penalty ever imposed by a federal district court.¹⁹⁵ *Gwaltney* is but one of a series of recently-filed citizen's suits to succeed in the Fourth Circuit. Thus, in addition to affirming *Gwaltney*, the Fourth Circuit recently held that, once a district court determines that a defendant has violated its permit "pervasively," it is an abuse of discretion not to impose a penalty.¹⁹⁶ The Fourth Circuit has just affirmed a civil penalty of \$1,000 per day imposed upon an industry for 977 consecutive days of failure to file reports required under the Clean Water Act.¹⁹⁷

2. Virginia's Circuit Courts

During the period covered by this article, Virginia Circuit Courts clarified the jurisdictional requirements of Supreme Court Rules 2A:2 and 2A:4 and applied the EPA penalty policy in state civil penalty cases.

In the first case, the Environmental Defense Fund ("EDF") attempted to appeal the NPDES permit issued to the Newport News Ship Building and Dry-dock Company.¹⁹⁸ EDF did not name the shipyard in the notice of appeal, did not include the shipyard in the certificate on the notice of appeal, and did not serve the shipyard, pursuant to Rules 2A:2 and 2A:4. The court held that these

192. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. at 1555.

193. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 314-15 (4th Cir. 1985), *rev'd on other grounds and remanded*, 108 S. Ct. 376 (1987).

194. *Id.* at 315.

195. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. at 1561-62.

196. *Stoddard v. Western Carolina Regional Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986).

197. *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109 (4th Cir. 1988).

198. *Environmental Defense Fund v. State Water Control Bd.*, No. 15959-S (City of Newport News Cir., Feb. 12, 1987).

notice requirements were mandatory and jurisdictional, and dismissed the petition for appeal.¹⁹⁹ The court of appeals reached an analogous result as to the time for filing a petition for appeal under Rule 2A:4.²⁰⁰

In a joint Water Control Board and Health Department case, the Circuit Court of Henry County awarded civil penalties against the owner of a sewage lagoon serving an apartment complex.²⁰¹ Two workers hired by the owner to repair a clogged pipe in the lagoon, breached the berm, discharging over 1.5 million gallons of partially treated sewage into a tributary of the Smith River. Holding the owner strictly liable, the court assessed a civil penalty of \$4,000 for the berm breach and \$500 per day for four days when sewage had overflowed the lagoon.²⁰² The \$6,000 total was very nearly equal to the avoided cost of pumping the contents of the lagoon to the local sewer.

In a State Water Control Board enforcement case, the Circuit Court of Scott County, ruling from the bench, analyzed the Water Control Board's civil penalty case against a motel that had failed to obtain an NPDES permit in terms of harm to the environment and the violator's economic saving.²⁰³ The court did not discuss the violator's recalcitrance or indifference to state law. The court imposed a civil penalty of \$7,500, which was the economic saving shown by the Board's evidence.²⁰⁴

VI. CONSERVATION

The most significant legislative development in this area concerned conservation easements.²⁰⁵ At common law, easements in

199. *Id.*

200. See *Mayo v. Department of Commerce*, 4 Va. App. 520, 358 S.E.2d 759 (1987).

201. *Commonwealth ex rel. State Water Control Bd. v. Anthony*, No. 84C-159 (Henry County Cir. June 1, 1987).

202. *Id.*

203. *Commonwealth ex rel. State Water Control Bd. v. Scott Motel, Inc.*, No. 2706 (Scott County Cir.) (order pending).

204. *Id.*

205. Other legislative action included the creation of the Open Space Recreation and Conservation Fund (the "Fund"). Act of April 20, 1988, ch. 817, 1988 Va. Acts. 1861 (adding VA. CODE ANN. § 58.1-3445). During the period January 1, 1988 through December 31, 1993, persons who are eligible to receive income tax refunds may specify a portion of the refund to be deposited in the Fund. The Fund will be shared by the Department of Conservation and Historic Resources and local public bodies and will be used for the acquisition of land for recreational purposes, the acquisition and preservation of natural areas, and the development, maintenance and improvement of state parks, and local outdoor recreation programs.

gross were personal to the holder and could not be transferred.²⁰⁶ For several years state agencies such as the Virginia Historic Landmarks Board and other entities, such as the Virginia Outdoors Foundation, have taken perpetual easements in gross under the Open Space Land Act²⁰⁷ and the laws governing the Virginia Historic Landmarks Board.²⁰⁸ In general, the purpose of such easements is the protection of the recreational, historic or scenic qualities of the properties, the conservation of land and natural resources, and the protection of wetlands.²⁰⁹ State agencies authorized to acquire land for public purposes, localities, and park and recreation authorities could acquire land and interests in land under the Open Space Land Act.²¹⁰

The 1988 General Assembly expanded the pool of entities that may hold conservation easements. The Conservation Easement Act authorizes tax-exempt charitable organizations having powers or purposes related to conservation to acquire conservation easements.²¹¹ Where the easement is to be perpetual, the Conservation Easement Act requires the holder to have had a "principal office" in the Commonwealth for at least five years.²¹² The easement is not enforceable unless its terms conform to the local comprehensive

Id.

In 1988, portions of three rivers were added to the scenic river system under Virginia Code §§ 10-167 to -175: the Rivanna River, the Moormans River, and the North Landing River. See Act of March 2, 1988, ch. 20, 1988 Va. Acts 17; Act of March 26, 1988, ch. 299, 1988 Va. Acts 365; Act of March 2, 1988, ch. 21, 1988 Va. Acts 18; Act of March 26, 1988 ch. 300, 1988 Va. Acts 366 (H.B. 211); Act of April 3, 1988, ch. 490, 1988 Va. Acts 607. In addition, the Lower James River was designated a state historic river. Act of April 10, 1988, ch. 721, 1988 Va. Acts 951.

206. *Lester Coal Corp. v. Lester*, 203 Va. 93, 97, 122 S.E.2d 901, 904 (1961) (citing *Stokes, Jr., Inc. v. Matney*, 194 Va. 339, 344, 73 S.E.2d 269, 271 (1952)).

207. VA. CODE ANN. §§ 10.1-1700 to -1705 (Cum. Supp. 1988).

208. *Id.* § 10.1-801 to -805.

209. *Id.* § 10.1-1700.

210. Act of April 10, 1988, ch. 720, 1988 Va. Acts 1321 (adding VA. CODE ANN. §§ 10.1-1009 to -1016 (Cum. Supp. 1988)).

211. VA. CODE ANN. § 10.1-1009 (Cum. Supp. 1988). An authorized "holder" of such easements is defined as:

[A] charitable corporation, charitable association, or charitable trust which has been declared exempt from taxation pursuant to 26 U.S.C.A. § 501(c)(3) and the primary purposes or powers of which include: (i) retaining or protecting the natural or open-space values of real property; (ii) assuring the availability of real property for agricultural, forestall, recreational, or open-space use; (iii) protecting natural resources; (iv) maintaining or enhancing air or water quality; or (v) preserving the historic, architectural or archaeological aspects of real property.

Id.

212. *Id.* § 10.1-1010(C).

plan²¹³ and until it is accepted by the holder and such acceptance is recorded.²¹⁴ After recording, certified copies of the instruments creating or transferring such easements must be sent to the local government, the Attorney General, the Virginia Outdoors Foundation, any public body named in the instrument, and, if the property is a certified historic landmark, to the Virginia Historic Landmarks Board.²¹⁵ The Conservation Easement Act gives several parties standing to bring an action affecting an easement: the owner of the burdened fee, any person holding an express third-party right of enforcement, the Attorney General, the Virginia Outdoors Foundation, the Virginia Historic Landmarks Board, the local government in which the property is located, and any governmental agency or other person having standing under another statute or the common law.²¹⁶

VII. CHESAPEAKE BAY PRESERVATION ACT

The Chesapeake Bay Preservation Act²¹⁷ is one of the most significant environmental developments in recent years. The Preservation Act resulted from the Findings and Recommendations of the Chesapeake Bay Land Use Roundtable,²¹⁸ a group which met for eighteen months to explore the connection between land use and water quality in the Chesapeake Bay Region. The Roundtable, whose members included legislators, farmers, industrialists, developers, local government officials, environmentalists and citizens from many parts of Tidewater Virginia, concluded that land is a natural resource as well as an economic resource, and that the Virginia Constitution establishes the state's responsibility to protect it.²¹⁹

Like the Wetlands Act²²⁰ and the Coastal Primary Sand Dune Protection Act,²²¹ the Chesapeake Bay Preservation Act provides for local administration of state standards for the use of designated lands in Tidewater Virginia. It defines Tidewater Virginia to in-

213. *Id.* § 10.1-1010(E).

214. *Id.* § 10.1-1010(B).

215. *Id.* at § 10.1-1012.

216. *Id.* § 10.1-1013.

217. Act of April 9, 1988, ch. 608, 1988 Va. Acts 1355 (codified as Va. Code Ann. §§ 10.1-2100 to 2115 (Cum. Supp. 1988)).

218. See REPORT OF THE LAND USE ROUNDTABLE, S. DOC. NO. 6, 1988.

219. *Id.* at 5.

220. VA. CODE ANN. § 62.1-13.1 (Repl. Vol. 1987).

221. *Id.* § 62.1-13.21 (Repl. Vol. 1987).

clude the same jurisdictions defined as such in the Wetlands Act.²²² But where the Wetlands Act and the Coastal Primary Sand Dune Protection Act provided for the creation of a new local agency, the wetlands board to administer statutory standards, with oversight placed in an existing state agency, the Marine Resources Commission, the Preservation Act uses existing local governments but creates a new state policy board, the Chesapeake Bay Local Assistance Board,²²³ to set standards and oversee local administration. A new administrative agency was also created in the Office of the Secretary of Natural Resources, the Chesapeake Bay Local Assistance Department.²²⁴ The Department is headed by a Director who has all of the authority of the Chesapeake Bay Local Assistance Board when it is not in session, subject to any regulations the Board may establish, but the Director does not have the authority to promulgate final regulations,²²⁵ or to institute legal actions to ensure compliance by local governing bodies.²²⁶

The Chesapeake Bay Preservation Act creates the term "Chesapeake Bay Preservation Area" for those areas which need special land use controls to protect the Chesapeake Bay.²²⁷ The Chesapeake Bay Local Assistance Board is to promulgate regulations which establish state criteria for local governments to use in determining the ecological and geographic extent of the "Chesapeake Bay Preservation Areas" within their jurisdictions.²²⁸ The Board must adopt its criteria by July 1, 1989,²²⁹ and the localities have one year from the date of adoption to complete the designation of Chesapeake Bay Preservation Areas within their jurisdiction.²³⁰ The Chesapeake Bay Preservation Act does not affect vested rights of any landowner under existing law.²³¹

The Chesapeake Bay Local Assistance Board is also to promulgate regulations which establish criteria for use by local governments in granting, denying, or modifying requests to rezone, subdi-

222. Compare VA. CODE ANN. § 10.1-2101 (Cum. Supp. 1988) with VA. CODE ANN. § 62.1-13.2 (Repl. Vol. 1987).

223. VA. CODE ANN. § 10.1-2102 (Cum. Supp. 1988); see VA. CODE ANN. § 9-6.25:2 (Cum. Supp. 1988).

224. VA. CODE ANN. § 10.1-2105 (Cum. Supp. 1988).

225. *Id.* § 10.1-2106.

226. *Id.* § 10.1-2104.

227. See *id.* §§ 10.1-2100, -2101, -2107.

228. *Id.* § 10.1-2107.

229. *Id.*

230. *Id.* § 10.1-2109.

231. *Id.* § 10.1-2115.

vide, or use and develop land in Preservation Areas.²³² Local governments in Tidewater must use the Board's criteria to ensure that the use and development of land in Chesapeake Bay Preservation Areas is done in a manner that protects the quality of state waters consistent with the provisions of the Chesapeake Bay Preservation Act.²³³ Thus, local governments must incorporate provisions into their comprehensive plans consistent with the Preservation Act to insure protection of state waters for their entire jurisdiction.²³⁴ Similar provisions must be incorporated into local subdivision ordinances and zoning ordinances, but only to the extent required to protect the quality of state waters in Chesapeake Bay Preservation Areas.²³⁵ Local governments must ensure, however, that all subdivisions developed under their subdivision ordinances comply with all the criteria developed by the Chesapeake Bay Local Assistance Board.²³⁶ If a local government has no zoning ordinance, one must be adopted.²³⁷

Thus the responsibility of local governments will be (1) to determine the extent of the Chesapeake Bay Preservation Areas in their jurisdictions, (2) to adopt a zoning ordinance if none exists, (3) to conform their comprehensive plans, and zoning and subdivision ordinances, to include the state criteria, and (4) to enforce these criteria in all their land use decisions in the designated Chesapeake Bay Preservation Areas and in all subdivisions developed under their subdivision ordinances.

The Chesapeake Bay Local Assistance Board is empowered to provide financial and technical assistance and advice concerning land use and development and water quality protection. The Board also assists in the development, adoption, and implementation of local comprehensive plans, zoning ordinances, subdivision ordinances and other land use and development and water quality protection measures.²³⁸

Additionally, the Chesapeake Bay Local Assistance Board has an oversight and enforcement authority to assure compliance with the

232. *Id.* § 10.1-2107.

233. *Id.* § 10.1-2111.

234. *Id.* § 10.1-2109(B).

235. *Id.* § 10.1-2109(C), (D).

236. *Id.* § 10.1-2109(D).

237. Compare VA. CODE ANN. § 10.1-2109(C) (Cum. Supp. 1988) with VA. CODE ANN. 15.1-486 (Repl. Vol. 1981 & Cum. Supp. 1988).

238. VA. CODE ANN. § 10.1-2103 (Cum. Supp. 1988).

state policy on land use affecting the Chesapeake Bay. It must ensure that the plans, zoning ordinances and subdivision ordinances of Tidewater localities comply with the Chesapeake Bay Preservation Act. The determination of such compliance must be in accordance with the provisions of the Administrative Process Act and the Board is to take administrative and legal action to ensure that counties, cities and towns comply.²³⁹

The Chesapeake Bay Preservation Act does not impose requirements on jurisdictions outside of Tidewater Virginia, but it does offer additional powers to non-Tidewater local governments. It permits local governments that are not required to use the criteria to incorporate them in their comprehensive plans, zoning ordinances and subdivision ordinances in order to protect state waters.²⁴⁰

The Chesapeake Bay Preservation Act also authorizes local governments to exercise their police and zoning powers to protect the quality of state waters consistent with the provisions of the Chesapeake Bay Preservation Act.²⁴¹ This enables a local government to use its police power to protect the quality of state waters even when such action does not directly benefit its own jurisdiction. An additional provision insures state agency consistency. It requires state agencies to comply with state policies to protect the Chesapeake Bay even though they are reflected in local plans and ordinances if such plans and ordinances comply with sections 10.1-2109 and 10.1-2110 of the Chesapeake Bay Preservation Act.²⁴²

239. *Id.*

240. *Id.* § 10.1-2110.

241. *Id.* § 10.1-2108.

242. *Id.* § 10.1-2114.