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Annual Survey of Virginia Law: Environmental Law

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ENVIRONMENTAL LAW

*Theodore R. Kingsley**

I. INTRODUCTION

This article addresses significant developments in Virginia law pertaining to air and water pollution, solid and hazardous waste, and pesticide regulation which have occurred between the publication of last year's survey¹ and August 1, 1989. Not considered herein are the Chesapeake Bay Preservation Area Designation and Management Regulations promulgated by the Chesapeake Bay Local Assistance Board.²

II. AIR

A. Legislation

The 1989 General Assembly passed legislation providing that inspection waivers, available to motor vehicles which fail emissions inspections under the inspection and maintenance ("I & M") program applicable to Northern Virginia, are valid for a maximum of two years.³ Previously, such waivers were valid for two years, or until the vehicle was sold or traded, whichever period was longer.⁴

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1. Natural Resources Section, Office of the Attorney General, *Environmental Law: Annual Survey of Virginia Law*, 22 U. RICH. L. REV. 587 (1988) [hereinafter *Environmental Law*]. The author gratefully acknowledges the assistance of Natural Resources Section attorneys John R. Butcher, Deborah Love Feild and J. Steven Sheppard, III, who without benefit of reviewing the manuscript, discussed several aspects of this article with the author on August 17, 1989, and provided copies of unreported circuit court decisions.

2. 6:1 Va. Regs. Reg. 11 (1989).

3. VA. CODE ANN. § 46.2-1181 (Repl. Vol. 1989).

4. *Id.* § 46.1-326.7 (Cum. Supp. 1988).

B. *Administrative Proceedings*

1. Regulatory Changes

a. Stationary Sources

The State Air Pollution Control Board (the "Board"), pursuant to its delegated authority from the United States Environmental Protection Agency (EPA)⁵ to implement and enforce the Clean Air Act's New Source Performance Standards⁶ (NSPS) and National Emissions Standards for Hazardous Air Pollutants (NESHAPS) in Virginia,⁷ published Revision Six to its Regulations for the Control and Abatement of Air Pollution. Revision Six incorporated by reference the federal regulatory amendments updating both NSPS and NESHAPS.⁸ Further updates to the list of NSPS and NESHAPS were proposed by the Board on July 3, 1989.⁹

On July 17, 1989, the Board published notices of intended regulatory action which could have a significant impact on existing sources. The Board intends to consider amending its non-criteria pollutant regulations.¹⁰ Non-criteria pollutants are generally those pollutants for which no National Ambient Air Quality Standard ("NAAQS") has been set pursuant to the Clean Air Act.¹¹ Virginia has had a comprehensive non-criteria pollutant regulatory program in place since 1985.¹² The Board is also considering whether to require registered, but unpermitted, "grandfathered" sources to obtain operating permits.¹³

5. 46 Fed. Reg. 43,300 (1981).

6. 42 U.S.C. § 7411 (1982); 40 C.F.R. § 60 (1988).

7. 42 U.S.C. § 7412 (1982); 40 C.F.R. § 61 (1988).

8. 5:3 Va. Regs. Reg. 336 (1988).

9. 5:20 Va. Regs. Reg. 2785 (1989), corrected at 5:22 Va. Regs. Reg. 3356 (1989).

10. 5:21 Va. Regs. Reg. 3172 (1989).

11. STATE AIR POLLUTION CONTROL BOARD, COMMONWEALTH OF VIRGINIA, REGULATIONS FOR THE CONTROL AND ABATEMENT OF AIR POLLUTION, § 120-04-0300 (1986).

12. *See Id.* § 120-04-0303 (1986) (Full text of Regulations for the Control and Abatement of Air Pollution are available to the public through the offices of the Registrar of Regulations and the State Air Pollution Control Board).

13. 5:21 Va. Regs. Reg. 3173 (1989); 33 U.S.C. § 1251 (1982). Only new, modified, reconstructed or existing sources which emit hazardous air pollutants are required to obtain permits. However, owners of existing sources must register their facilities with the Board if the Board so requests.

b. Mobile Sources

Pursuant to the 1988 General Assembly's changes in Northern Virginia's I & M program,¹⁴ the Board promulgated its Regulation for the Control of Motor Vehicle Emissions,¹⁵ which is applicable to owners of motor vehicles registered in Northern Virginia.¹⁶ The rules set exhaust emission standards for carbon monoxide ("CO") and hydrocarbons ("HC") for model years between 1968-69, (8% CO; 800 ppm HC) and 1970-74 (6% CO; 600 ppm HC).¹⁷ The rules prohibit the operation of post-1973 motor vehicles, unless they are equipped with an emission control system or device.¹⁸ Further, the rules prohibit the operation of any motor vehicle if its emissions control system or device has been defeated or replaced by non-standard factory replacement parts or a part that is not certified by the EPA.¹⁹ The regulation also contains rules pertaining to emissions station licensing, operating procedures, and emissions inspection procedures.²⁰ Because the Board did not adopt rules pertaining to emissions mechanics and inspector licensing, the relevant state police regulations remain in effect.²¹ The Board also promulgated its Regulation for Vehicle Emission Control Program Analyzer Systems, which applies to all equipment and instruments used to measure exhaust emissions pursuant to the Vehicle Emissions Control Program.²²

In the spring of 1989, the EPA published its final regulations designed to achieve seasonal reductions in volatile organic compound ("VOC") emissions from evaporating gasoline in motor vehicles.²³ The new federal regulations provide that during the regulatory control period, only gasoline with a Reid Vapor Pressure ("RVP") of 10.5 pounds per square inch or less be sold.²⁴ The

14. VA. CODE ANN. § 46.1-326.2 to -326.14 (Cum. Supp. 1988) (repealed 1989). A current version of these sections was enacted by the 1989 General Assembly. *Id.* § 46.2-1181 to 1187 (Repl. Vol. 1989). The program is designed to bring Northern Virginia into compliance with the National Ambient Air Quality Standard ("NAAQS") for ozone. *See id.* § 46.2-1182.

15. 5:4 Va. Regs. Reg. 537 (1988).

16. The applicable counties are Arlington, Fairfax and Prince William. The applicable cities are Alexandria, Fairfax, Falls Church, Manassas and Manassas Park. *Id.* at 541, § 2.1.

17. *Id.* at 544, § 3.1.

18. *Id.* at 544, § 3.2(A).

19. *Id.* at 544, § 3.2(B).

20. *Id.* at 544-47, §§ 4.1 to .7.

21. *Id.* at 547, pt. V.

22. 5:4 Va. Regs. Reg. 557 (1988).

23. 54 Fed. Reg. 11,863 (1989).

24. *Id.* at 11,883. The regulatory control period begins as early as May 1, for facilities

Board published a notice of intent to reduce ozone producing evaporative VOC emissions by limiting gasoline RVP during the ozone season.²⁵ Although the Clean Air Act prohibits states from adopting more stringent fuel regulation controls than the EPA has prescribed,²⁶ a number of eastern states have either proposed or adopted RVP limits lower than the new federal standards.²⁷ The promulgation of these more stringent state standards must be consistent with the applicable plan, or pursuant to waiver.²⁸ It is likely that the Board will consider adopting a lower RVP standard.

2. Administrative Hearings

On June 9, 1989, the Board conducted a formal administrative hearing on a petition by Avtex Fibers Front Royal, Inc., that carbon disulfide ("CS₂") emissions at the Avtex plant in Front Royal, Virginia, produce no endangerment to human health.²⁹ Pursuant to section 313 of the Emergency Planning Community Right to Know Act of 1986,³⁰ Avtex reported nearly 25,000 tons of CS₂ air emissions for 1987. The effect of the report was to accelerate the facility's evaluation by the Board pursuant to the non-criteria pollutant regulations.³¹ Avtex sought to demonstrate that the significant ambient air concentration ("SAAC") for CS₂ was inappropriate, since its emissions at the Front Royal plant did not endanger human health.³² The Board determined that Virginia's SAAC for CS₂, when adjusted for variations in averaging time, was one of the highest allowed among those states regulating the substance, and was therefore an appropriate standard.³³

other than non-retail outlets or wholesale purchase consumer facilities, and ends on September 15. The purpose of the regulation is to mitigate ever increasing instances of ozone NAAQS being exceeded.

25. 5:21 Va. Regs. Reg. 3173 (1989).

26. 42 U.S.C. § 7545(4)(a)(ii) (1982).

27. For example, Connecticut, New Jersey, New York and Rhode Island adopted state implementation plans (SIP) limited RVP to nine pounds per square inch. 54 Fed. Reg. 26,030 (1989) (New York); 54 Fed. Reg. 25, 572 (1989) (New Jersey); 54 Fed. Reg. 23,650 (1989) (Connecticut and Rhode Island).

28. 42 U.S.C. § 7545(4)(b),(c) (1982).

29. *In re Avtex Fibers Front Royal, Inc.* (State Air Pollution Control Bd. June 9, 1989) (petition for appeal filed in the Circuit Court for the City of Richmond on July 7, 1989).

30. 42 U.S.C. § 11,023 (1982 & Supp. V 1987).

31. STATE AIR POLLUTION CONTROL BOARD, COMMONWEALTH OF VIRGINIA, REGULATIONS FOR THE CONTROL & ABATEMENT OF AIR POLLUTION, § 120-04-0300 (1986).

32. *In re Avtex Fibers Front Royal, Inc.*, slip. op. at 3.

33. *Id.* at 9.

III. SOLID AND HAZARDOUS WASTE

A. *Solid Waste*

1. Legislation

The 1989 General Assembly passed legislation altering the procedure for siting solid waste management facilities.³⁴ Previously, the director of the Department of Waste Management (the "Department"), was required to immediately notify the governing body of the county, city or town where any sanitary landfill or other facility for the disposal, treatment or storage of non-hazardous solid waste was to be located upon receipt of an application for a permit to operate a facility. The appropriate governing body was then required to notify the director within thirty days whether the proposed facility was consistent with all local ordinances. Failure to respond within thirty days constituted a waiver of the governing body's objections to the issuance of a permit based on council's local ordinances.³⁵ The new legislation requires the applicant to provide the director with certification from the appropriate governing body that the location and operation of the facility are consistent with all applicable local ordinances.³⁶ Upon receiving a request from an applicant, the governing body has 120 days to inform both the applicant and the Department of the facility's compliance or non-compliance.³⁷

Virginia localities are now authorized to enact ordinances regulating the siting of solid waste management facilities within their boundaries, even if the locality has not adopted a land use ordinance pursuant to Chapter 11 of Title 15.1.³⁸ Any person desiring to site a solid waste management facility within the boundaries of any such locality must file its application with the governing body of the locality.³⁹ Within 120 days from receipt of such application, the governing body must grant or deny the applicant's request for site approval. Failure of the governing body to act within this period constitutes a grant of site approval.⁴⁰ Judicial review of permit denials is provided in the circuit court of the jurisdiction denying

34. VA. CODE ANN. §§ 10.1-1408.1(B), 15.1-11.02 (Repl. Vol. 1989).

35. 1988 Va. Acts 696.

36. VA. CODE ANN. § 10.1-1408.1(B) (Repl. Vol. 1989).

37. *Id.*

38. *Id.* § 15.1-11.02(A).

39. *Id.*

40. *Id.*

approval of a proposed site.⁴¹

The new local government facility siting approval provisions exempt existing permittees as well as those who have received zoning or other land use approval from re-submitting an application for site approval to the appropriate locality.⁴² However, the new certification requirements of section 10.1-1408.1(B) of the Code of Virginia apply to all applications submitted to the Department prior to July 1, 1989, but still pending after that date.⁴³

The 1989 General Assembly also rewrote the section of the Virginia Waste Management Act dealing with regional solid waste management plans.⁴⁴ The legislation provides that Waste Management Board ("WMB") regulations must require that local and regional solid waste management plans to identify how minimum recycling rates for the years 1991 to 1995 are to be achieved.⁴⁵ After July 1, 1992, a permit for a solid waste management facility may not be issued until a local or regional applicant has a solid waste management plan approved by the WMB in accordance with such regulations.⁴⁶

The General Assembly also passed legislation requiring the Department to develop and implement a plan for the management and transportation of all waste tires in Virginia.⁴⁷ The cost of implementing the plan, as well as the cost of any programs created by the Department pursuant to the plan, are to be paid out of a Waste Tire Trust Fund (the "Fund").⁴⁸ The Fund is created by a tire tax of fifty cents on each new tire sold by retailers within the state.⁴⁹

41. *Id.* § 15.1-11.02(B).

42. *Id.* § 15.1-11.02(C).

43. Att'y Gen. Op. at 3 (Aug. 8, 1989). This Opinion was addressed to Ms. Cynthia V. Bailey, Executive Director of the Department of Waste Management concerning questions of whether a facility permit application was complete under two fact situations. The Attorney General concluded that the new statutory requirement for a certification from the locality on its face applies to pending applications. *Id.*

44. VA. CODE ANN. § 10.1-1411 (Cum. Supp. 1989).

45. *Id.* The recycling rate must be 10% by 1991, 15% by 1993 and 25% by 1995. *Id.*

46. *Id.*

47. *Id.* § 10.1-1422.1 (effective January 1, 1990).

48. *Id.* § 58.1-643 (Cum. Supp. 1989) (effective January 1, 1990).

49. *Id.* § 58.1-641 (effective January 1, 1990).

2. Administrative Proceedings

The Department's solid waste regulations became effective on December 21, 1988.⁵⁰ These regulations establish standards and procedures pertaining to the construction, operation, maintenance, closure and post-closure of solid waste management facilities; identify the open dumping of solid waste and provide means to prevent or eliminate such open dumping; and eliminate the requirements for undertaking corrective action at solid waste management facilities.⁵¹

The Department also published proposed regulations pertaining to infectious waste.⁵² Generally, infectious wastes are (1) solid wastes (non-exempt discarded material)⁵³ which are or may have been contaminated by pathogenic organisms⁵⁴ which are not "routinely and freely available in the community"⁵⁵ and which have a "significant probability of being present in sufficient quantities and with sufficient virulence to transmit disease" to humans;⁵⁶ (2) one of several listed controlled infectious wastes,⁵⁷ and (3) those materials identified as infectious waste by licensed physicians and registered nurses.⁵⁸ The regulations require permits for the treatment, storage and disposal of such waste. Facilities that are in compliance with the non-permit provisions of the regulations, generate more than seventy-five percent of all infectious waste handled on site, do not engage in transportation or land disposal of infectious wastes, and properly notify the Department qualify for a "permit by rule" and need not follow the regulations' lengthy permit issuance procedures.⁵⁹ The regulations provide that infectious waste

50. 5:4 Va. Regs. Reg. 598 (1988).

51. Due to their length, the solid waste management regulations were not published in the Virginia Register of Regulations, but are available for inspection at the Department of Waste Management. The applicable provision can be found in the regulations. For a summary, see 5:4 Va. Regs. Reg. 598 (1988).

52. 5:4 Va. Regs. Reg. 506 (1988).

53. *See id.* at 513, § 3.3(C). Exempt materials include infectious wastes which are used products for personal hygiene and certain absorbent material containing extremely small amounts of blood or body fluids. *Id.*

54. *Id.* at 513, § 3.3(B)(1).

55. *Id.* at 513, § 3.4(A).

56. *Id.*

57. *Id.* at 513-14, § 3.5. These include quarantine wastes, cultures and stock of microorganisms and biologicals, blood and blood products, pathological wastes, sharps, animal carcasses, body parts, bedding and related wastes, residue from cleanup of a spill of infectious waste, and any waste contaminated by or mixed with infectious waste. *Id.*

58. *Id.* at 513, § 3.4(B).

59. *Id.* at 514, § 4.1(B).

management facilities must meet the financial assurance regulations for solid waste facilities. The regulations also govern the packaging, labeling, spill containment and remediation, transportation, sterilization, documentation and disposal of infectious waste.⁶⁰ Facilities which do not qualify for a permit-by-rule must apply for a permit for the treatment, storage and disposal of such wastes following detailed disclosure, planning and record keeping requirements.⁶¹

3. Judicial Activities

In *Board of Supervisors v. King Land Corp.*,⁶² the Supreme Court of Virginia reversed a court of appeals holding that the State Board of Health's ("SBOH") failure to promulgate statutorily mandated financial responsibility regulations prior to the issuance of a permit to operate an industrial landfill did not invalidate those permits. The decision, as a practical matter, jeopardizes the validity of some seventy-three permits issued between October 1, 1981 and December 31, 1985.⁶³

Former section 32.1-182 of the Code of Virginia⁶⁴ required the SBOH to promulgate financial responsibility regulations after October 1, 1981.⁶⁵ Although the SBOH had complied with the statutory deadline for providing an initial draft of the financial accountability regulations,⁶⁶ the SBOH did not promulgate final regulations by the time King Land Corporation applied for a landfill permit on December 9, 1985. After the corporation began operating the landfill, the Board of Supervisors of King & Queen County brought suit in the local circuit court and succeeded in invalidating the permit on the grounds that the State Health Commissioner was not empowered to issue permits until the financial

60. *Id.* at 514-17, part IV.

61. *Id.* at 520-31, part IX.

62. 238 Va. 97, 380 S.E.2d 895 (1989).

63. *Id.* at 106 n.3, 380 S.E.2d at 899 n.3 (Lacy, J., dissenting).

64. VA. CODE ANN. § 32.1-182 (Repl. Vol. 1985) (repealed 1986).

65. Subsection (C) of VA. CODE ANN. § 32.1-182 required the Board to make available an initial draft of such regulations no sooner than October 1, 1980 and no later than March 1, 1981. Responsibility for administering the Commonwealth's solid and hazardous waste has since been transferred to the Department of Waste Management. *See id.* §§ 10.1-1400 to -1457 (Repl. Vol. 1989).

66. *King Land Corp. v. Board of Supervisors*, 4 Va. App. 597, 603, 359 S.E.2d 823, 826 (1987), *rev'd*, 238 Va. 97, 380 S.E.2d 895 (1989).

responsibility regulations were promulgated and complied with.⁶⁷

On appeal, the court of appeals reversed the circuit court and held that the General Assembly did not intend to impose a time limitation upon the agency for promulgation of financial responsibility regulations, and that since the SBOH was expressly empowered to issue permits under previous rules and regulations, the SBOH had inherent authority to grant such permits.⁶⁸ Judge Benton, dissenting, argued that section 32.1-182 of the Code of Virginia required the SBOH to promulgate such regulations within a reasonable time, and that former section 32.1-182(A) specifically required all solid waste landfill permits to be issued subject to the operator's financial accountability for clean-up costs related to abandonment.⁶⁹

On appeal, the Supreme Court of Virginia adopted Judge Benton's view that where a public official is charged by statute to perform a duty, but the statute is silent as to the express time by which the duty must be performed, there is an implied requirement that its mandate be fulfilled in a reasonable time.⁷⁰ The majority concluded that after the earliest date upon which the State Health Commissioner could have promulgated final regulations passed, he lacked authority to issue any solid waste landfill permits until "the mandated regulations were in effect and complied with by the applicants."⁷¹

In a strong dissent, Justice Lacy argued that neither the express language of the statute nor its legislative history conditioned the authority of the State Health Commissioner to issue landfill permits on the adoption of financial accountability regulations. "As logical as it might be to have the requisite financial assurances incorporated in the initial licensing process," Justice Lacy wrote, "the General Assembly did not require this approach."⁷²

In a due process challenge to the Department's emergency revocation of a solid waste landfill permit, a commercial landfill opera-

67. Board of Supervisors v. King Land Corp., 238 Va. at 101-02, 380 S.E.2d at 897.

68. King Land Corp. v. Board of Supervisors, 4 Va. App. at 604-05, 359 S.E.2d at 826-27.

69. *Id.* at 609, 359 S.E.2d at 829 (Benton, J., dissenting).

70. Board of Supervisors v. King Land Corp., 238 Va. 104-05, 380 S.E.2d at 898.

71. *Id.* at 105, 380 S.E.2d at 898.

72. *Id.* at 107, 380 S.E.2d at 900 (Lacy, J., dissenting); *cf.* VA. CODE ANN. § 3.1-249.49 (Cum. Supp. 1989). (The Virginia Pesticide Control Act expressly prohibits The Pesticide Control Board from issuing annual pesticide business licenses until a business furnishes evidence of financial responsibility).

tor in Allegheny County obtained a federal temporary restraining order against enforcement of the emergency revocation.⁷³ A federal magistrate found that the landfill operator was not afforded constitutional due process, because the operator had been denied a hearing, and that no provision of the Code of Virginia authorized the procedure followed by the Department in revoking the permit.⁷⁴

B. *Hazardous Waste*

1. Legislation

No significant legislation was enacted by the 1989 General Assembly in this area.

2. Administrative Proceedings

Virginia's authority to administer the Resource Conservation and Recovery Act ("RCRA") Subtitle C Hazardous Waste Program⁷⁵ is conditioned upon continuous updating of state regulations to insure hazardous waste management standards are at least as stringent as federal requirements.⁷⁶ Accordingly, the Waste Management Board adopted Amendment Nine to its Hazardous Waste Management Regulations, which essentially parallels the EPA's amendments to the RCRA list of hazardous wastes.⁷⁷ In order to insure proper handling of solid wastes which are not regulated as hazardous wastes under either federal or Virginia regulations, but are regulated as hazardous by the generator's state, Amendment Nine adds a new rule making provision.⁷⁸ The provision allows a generator of such substances to petition the Department of Waste Management for an exclusion from a determination of hazardous characteristics in order to manage the solid wastes within Virginia.⁷⁹

The Board also adopted Amendment Seven to its Regulations Governing the Transportation of Hazardous Materials. Amend-

73. *Kim Stan, Inc. v. Department of Waste Management*, No. 89-00373-R (E.D. Va. June 19, 1989).

74. *Id.* at 2. The operator was required to post daily security in the amount of \$2,500 to protect the Department against the costs of surface water remediation during the effective period of the restraining order.

75. 42 U.S.C. § 6901 (1982 and Supp. III 1986).

76. *Id.* § 6929.

77. Va. Reg. 672-20-10, § 14.1(B)(5) (1988).

78. *Id.*

79. *Id.*

ment Seven incorporates by reference changes made by the United States Department of Transportation in Title 49 of the Code of Federal Regulations from January 1, 1982, to June 30, 1988.⁸⁰

3. Judicial Activities

In *United States v. Monsanto Co.*,⁸¹ the United States Court of Appeals for the Fourth Circuit joined a number of other federal courts in holding that the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")⁸² constitutionally imposes retroactive joint and several liability for governmental response costs where a release or threat of release of hazardous substances results in indivisible environmental harm.⁸³ In *Monsanto*, the land owners leased a four-acre tract, pursuant to an oral month-to-month lease, to a private chemical waste handler.⁸⁴ The site subsequently became the target of federal RCRA injunctive action.⁸⁵ During discovery, by which time the state of South Carolina had intervened as a plaintiff, the federal government identified a number of additional waste generators who had contracted with the private chemical waste handler for waste disposal. Many of these parties settled.⁸⁶ Two years after the passage of CERCLA, the government plaintiffs amended their RCRA complaint to add three non-settling generator defendants and one of the two site owners under section 9607(a).⁸⁷

On cross motions for summary judgment on the issue of the defendants' CERCLA liability for governmental response costs, the district court held that the government was not required to prove that the specific substances the waste generators created and sent to the site were present at the facility at the time of the release or threatened release which triggered the government response.⁸⁸ The

80. 5:14 Va. Regs. Reg. 1837-38 (1989). A summary of this amendment is available in the Virginia Register of Regulations. *Id.* However, because the amendment incorporates by reference 49 C.F.R. §§ 171-179, 390-397 it is not reprinted in the Register. Copies are available at the Department of Waste Management and in the office of the Registrar of Regulations. *Id.*

81. 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989).

82. 42 U.S.C. §§ 9601-9675 (1982 & Supp. V 1987).

83. *Monsanto*, 858 F.2d at 173-74.

84. *Id.* at 164. According to the owner's deposition, the sole purpose of the lease was to allow the lessee to store raw materials and finished product in the warehouse. *Id.* at 165.

85. *Id.* This was filed before the effective date of CERCLA. *Id.*

86. *Id.*

87. *Id.*

88. *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 992-93

Fourth Circuit affirmed, stating that where there is no proof that a generator defendant's specific waste was present in a facility at the time of release, a showing of a chemical similarity between the hazardous substances discovered on site and the generator defendant's waste is sufficient to impose liability.⁸⁹ The court noted that the generator defendants presented no evidence showing a relationship between the waste volume, the release of hazardous substances, and the harm at the site.⁹⁰ Finally, the court, over a vigorous dissent by Judge Widener,⁹¹ affirmed the trial court's refusal to treat the issue of allocation of clean-up costs among the various defendants during the government's cost recovery action.⁹² The Fourth Circuit remanded the case to the district court for reconsideration of its denial of prejudgment interest to the government.⁹³

In *United States v. Dart Industries, Inc.*,⁹⁴ the Fourth Circuit held that the South Carolina Department of Health and Environmental Control (DHEC) was not a responsible party under CERCLA as an owner or operator of a hazardous waste facility.⁹⁵ Several generator defendants, in a government cost recovery action, alleged that the DHEC controlled the activities of a hazardous waste site prior to its abandonment by its last owner. The DHEC approved or disapproved applications to store waste at the site and regulated transportation of waste to the site. The generator defendants argued that DHEC caused or contributed to hazardous waste being released at the site following bankruptcy of one of the generators. The court held that even though a state agency may have inadequately enforced state regulations, such deficiencies alone do not constitute ownership or control as defined in the Act.⁹⁶

(D.S.C. 1986), *aff'd sub nom.*, *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989).

89. *Monsanto*, 858 F.2d at 169.

90. *Id.* at 172.

91. *Id.* at 176-77 (Widener, J., dissenting).

92. The generator defendant's subsequent petition for a writ of certiorari to the United States Supreme Court on this issue was denied. See Light, *United States v. Monsanto, Inconsistency in the Government's Position on the Timing of CERCLA Contribution Claims*, 19 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10163 (1989).

93. The district court's decision on this point was made prior to the passage of the Superfund Amendments and Reauthorization Act of 1986, which expressly authorize such awards. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended in scattered sections of 10, 15, 26, 29, 33 and 42 U.S.C.).

94. 847 F.2d 144 (4th Cir. 1988).

95. *Id.* at 146.

96. *Id.*

In *Cincinnati Insurance Co. v. Milliken & Co.*,⁹⁷ the Fourth Circuit again held that a comprehensive general liability ("CGL") insurer is not obligated to reimburse its insured for government response or remediation costs incurred under section 9607(a)(1)-(4)(A) of CERCLA,⁹⁸ pursuant to the standard CGL property damage use.⁹⁹ The Fourth Circuit also affirmed the unconditional abandonment by a trustee in bankruptcy of property where violations of state environmental laws existed, but did not pose a serious risk to public health and safety.¹⁰⁰ The facility, a former fertilizer plant located in the state of Illinois, along with two creditors opposed the trustee's unconditional abandonment. They further argued that the debtor should be required to remediate the environmental hazards, which included hazardous waste violations. The bankruptcy court concluded that there was no imminent harm or danger to the public, and since the debtor had no unencumbered assets, the court authorized abandonment pursuant to section 554(a) of the Bankruptcy Code.¹⁰¹ The district court affirmed, but held that consideration of the debtor's financial condition was irrelevant.¹⁰² Although the Fourth Circuit affirmed, the court stated that where an estate has unencumbered assets, "stricter compliance" with state environmental laws should be required prior to abandonment.¹⁰³

Federal district courts in Virginia had occasion to determine procedural matters in CERCLA litigation. In *United States v. Moore*,¹⁰⁴ the court held that the SARA statute of limitations¹⁰⁵ did not apply retroactively to actions for response costs incurred

97. 857 F.2d 979 (4th Cir. 1988).

98. 42 U.S.C. § 9607(a)(1)-(4)(A) (1982 & Supp. V 1987).

99. *Milliken*, 857 F.2d at 980-81 (following *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987) and *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986)). Both *Maryland* and *Mraz* were decided under Maryland law, while in *Milliken*, the court applied the law of South Carolina to construe the term "damages" in the insurance context to mean legal damages; not CERCLA response costs. See Hapke, *Federal Circuit Court Insurance Decisions Contaminate Superfund Policy*, 19 *Envtl. L. Rep. (Envtl. L. Inst.)* 10393, 10398 n.53 (1989).

100. *Smith-Douglass, Inc. v. Wells-Fargo Business Credit*, 856 F.2d 12, 16-17 (4th Cir. 1988).

101. 11 U.S.C. § 554(a) (1982).

102. *In re Smith-Douglass, Inc.*, 75 *Bankr.* 994, 998 (E.D.N.C. 1987).

103. *Smith-Douglass*, 856 F.2d. at 17. The court cautioned that it was not making a determination of liability for cleanup costs, but also acknowledged that, as a practical matter, the state's likelihood of bearing at least some cost was increased by the decision. *Id.* at 15 n.4.

104. 18 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 21272 (E.D. Va. Mar. 10, 1988).

105. 42 U.S.C. § 9613(g) (Supp. IV 1986).

prior to October 17, 1986. The court also held that a dissolved Virginia corporation may be sued under CERCLA for acts committed prior to its dissolution.¹⁰⁶ Finally, in a private cost recovery action under CERCLA, the district court held that failure to allege a release or threatened release of a hazardous substance is jurisdictionally defective.¹⁰⁷

IV. WATER

A. *Legislation*

The 1989 General Assembly enacted significant new legislation dealing with water resource conservation and authorizing the State Water Control Board ("SWCB") to initiate surface water management proceedings.¹⁰⁸ If, after a public hearing, the SWCB finds that:

- (1) A stream has substantial instream values as indicated by evidence of fishery, recreation, habitat, cultural or aesthetic properties; and
- (2) Historical records or current conditions indicate that a low flow condition could occur which would threaten important instream uses; and
- (3) Current or potential offstream uses contribute to or are likely to exacerbate natural low flow conditions to the detriment of instream values¹⁰⁹

and it is in the interest of the public welfare to do so, then the SWCB must declare the area in question a "surface water management area."¹¹⁰ Once the resource has been so designated, water cannot be drawn without a SWCB-issued surface water withdrawal permit.¹¹¹ Such permits must set flow requirements appropriate for the protection of beneficial instream users.¹¹²

Existing beneficial consumptive users are not required to obtain a service water withdrawal permit for any withdrawal in existence on July 1, 1989; however, a permit is required in declared surface water management areas before increasing daily consumption be-

106. *Moore*, 18 *Envtl. L. Rep. (Envtl. L. Inst.)* at 21272.

107. *Bryant v. Colonial Pipeline Co.*, 699 F. Supp. 546, 547 (W.D. Va. 1987).

108. *See* VA. CODE ANN. §§ 62.1-242 to -253 (Cum. Supp. 1989).

109. *Id.* § 62.1-246(1)-(3).

110. *Id.* § 62.1-246 (B).

111. *See id.* § 62.1-243.

112. *Id.* § 62.1-248 (A).

yond the maximum daily withdrawal made before July 1, 1989.¹¹³ In order to qualify for the exemption from the permitting requirements, the beneficial consumptive user must institute a water management program approved by the SWCB.¹¹⁴ Certificates of Exemption which include the conservation or management programs as conditions will then be issued to the user.¹¹⁵

The new legislation provides for daily penalties of up to \$1,000 each for violation of the surface water management area provisions.¹¹⁶ Further, the new provisions are not to be construed as altering, or authorizing any alteration of, any existing riparian rights, except as set forth in the new permits. The conditions in the permits will be enforced only when low stream flows, or the potential thereof, result in a SWCB declaration of a surface water management area.¹¹⁷

In related legislation, the General Assembly rewrote the definition of "beneficial use" in section 62.1-10(b)¹¹⁸ of the Code of Virginia to conform with that in new section 62.1-242,¹¹⁹ except that public water supply uses for human consumption are designated as the highest priority.¹²⁰ The General Assembly declared that the quality of state waters is affected by the quantity of water and that the intent of the Commonwealth is to maintain flow conditions to protect instream beneficial uses in public water supplies for human consumption.¹²¹ The SWCB has the authority and standing to intervene as an interested party in any civil action, both in and outside the Commonwealth, pertaining to the withdrawal of any of

113. *Id.* § 62.1-243(C)(1).

114. *Id.* § 62.1-243(C)(2). This water management program will include: (i) use of water-saving plumbing; (ii) a water loss reduction program; (iii) a water use education program; and (iv) mandatory reductions during water shortage emergencies. *Id.*

115. *Id.* § 62.1-243(D).

116. *Id.* § 62.1-252(A).

117. *Id.* § 62.1-253.

118. *Id.* § 62.1-10(b).

119. *Id.* § 62.1-242 (definitions of the Surface Water Management Areas).

120. *Id.* § 62.1-10(b). This term means:

both instream and offstream uses. Instream beneficial uses include, but are not limited to the protection of fish and wild life habitat, maintenance of waste assimilation, recreation, navigation and cultural and aesthetic values. Offstream beneficial uses include, but are not limited to, domestic (including public water supply), agricultural, electric power generation, commercial and industrial uses. Public water supply uses for consumption shall be considered the highest priority.

Id.

121. *Id.* § 62.1-11(F).

the surface waters of the Commonwealth.¹²²

In legislation affecting underground storage tanks, the 1989 General Assembly expanded the definition of "person" to include a trust, firm, joint stock company, government corporation, or political subdivision of a state.¹²³ The SWCB may seek recovery of costs incurred for corrective or enforcement action, taken in response to the release of regulated substances from underground storage tanks,¹²⁴ except where such costs were expended from the Virginia Underground Petroleum Storage Tank Fund.¹²⁵ The General Assembly rewrote the financial responsibility provisions of Article 10. Owners, operators, and petroleum storage tank vendors are now required to maintain evidence of financial responsibility in an amount of not less than \$150,000 per occurrence for compensating third parties for bodily injury and property damage.¹²⁶

The 1989 General Assembly also passed legislation clarifying the type of hearing to be held in connection with the triennial review of water quality standards.¹²⁷ The amended legislation generally requires that public hearings to be held pursuant to the Virginia Administrative Process Act's ("VAPA")¹²⁸ informal hearing guidelines.¹²⁹ Moreover, upon the request of an affected person or upon its own motion, the SWCB must hold formal evidential hearings pursuant to section 9-6.14:8 of VAPA.¹³⁰

B. *Administrative Proceedings*

The SWCB adopted revisions to the Virginia Pollutant Discharge Elimination System and Virginia Pollutant Abatement Permit Program¹³¹ effective June 21, 1989, which conformed to the changes in the Federal National Pollutant Discharge Elimination

122. *Id.* § 62.1-44.23:1.

123. *Id.* §§ 62.1-44.34:8, :10.

124. *Id.* § 62.1-44.34:9(10).

125. *Id.* (moneys expended from the Virginia Underground Petroleum Storage Tank Fund are governed by *Id.* § 62.1-44.34:11).

126. *Id.* § 62.1-44.34:12(A).

127. *Id.* § 62.1-44.15(3a).

128. *Id.* § 9-6.14:1 (Repl. Vol. 1989).

129. *Id.* § 9-6.14:7.1(B). This section states, "In formulating any regulation, including but not limited to those in public assistance programs, the agency pursuant to its public participation guidelines shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency or its specially designated subordinate." *Id.*

130. *Id.* § 62.1-44.15(3a).

131. 5:14 Va. Regs. Reg. 1779 (1989).

System (NPDES) Program.¹³² The SWCB issued its final technical standards and corrective action requirements for underground storage tanks which became effective on October 25, 1989.¹³³ Virginia limits the federal exemption for tanks storing heating oil for consumption for use on the premises to those tanks having a capacity of less than 5,000 gallons.¹³⁴ The proposed regulations insure that inspection and upgrading will be done in accordance with Virginia building codes.¹³⁵ The regulations otherwise track the federal technical requirements promulgated last year.¹³⁶ Finally, the SWCB issued proposed Petroleum Underground Storage Tank Financial Requirements which, for the most part, track the federal regulations.¹³⁷

On August 14, 1989, the SWCB published final water quality standards applicable to chlorine and the designation of certain state waters as outstanding resource waters.¹³⁸ An earlier form of the final regulations had been previously adopted by the SWCB on September 27, 1988, as emergency regulations following the invalidation of the original regulations by the Circuit Court of the City of Roanoke.¹³⁹ The new regulations, like the emergency regulations and the vacated original regulations before them, establish a state-wide chlorine restriction standard and prohibit or restrict the use of chlorine or other halogen compounds¹⁴⁰ for disinfection where the treatment facility discharges permitted flows exceeding 20,000 gallons per day into waters containing endangered or threatened species, or natural trout waters.¹⁴¹ The regulation further designates a number of water resources as scenic rivers, thus subjecting them to the state's antidegradation policy.¹⁴² The SWCB

132. 33 U.S.C. § 1342 (1982).

133. 5:14 Va. Regs. Reg. 4103 (1989).

134. *Id.* at 4106.

135. *Id.* at 4107.

136. 53 Fed. Reg. 37,082 (1988) (to be codified at 40 C.F.R. § 280).

137. 53 Fed. Reg. 43,322 (1988).

138. 5:23 Va. Regs. Reg. 3535 (1989).

139. *Appalachian Power Co. v. State Water Control Bd.*, No. CH87-000733 (Roanoke Aug. 17, 1988). The emergency regulations are the subject of a current petition for appeal. *Appalachian Power Co. v. State Water Control Bd.*, No. CH88-000698W (Roanoke Oct. 27, 1988).

140. Other halogen compounds include bromine, bromine chloride, hypochloride and chlorine dioxide. 5:23 Va. Regs. Reg. 3536.

141. *Id.* at 3536.

142. *Id.* at 3536-37. In addition, portions of the Clinch, Powell, North Fork, Holston and Middle Fork Holston Rivers and Copper Creek in Southwestern Virginia were designated as critical habitat for nine endangered species of freshwater mussel and for three threatened species of fish.

published proposed regulations expanding the existing ground water management area in Southeastern Virginia.¹⁴³ The SWCB also published proposed amendments to its water quality standards relating to surface water,¹⁴⁴ stream flow¹⁴⁵ and mercury in fresh water.¹⁴⁶

C. *Judicial Activities*

In *Champion International Corp. v. EPA*,¹⁴⁷ the Fourth Circuit held that judicial review of the EPA's objections to a state proposed NPDES permit was premature, since such objections constituted neither a grant nor a denial of an NPDES permit.¹⁴⁸

In *National Wildlife Federation v. Hanson*,¹⁴⁹ the Fourth Circuit found that since the Army Corps of Engineers ("Corps") has a non-discretionary duty to regulate dredged or fill material under the Clean Water Act (CWA), a citizen's suit against the EPA for failure to adequately protect wetlands may properly join the Corps as a party for its failure to make a reasonable wetlands determination. In addressing the issue of awarding attorneys' fees, the court distinguished environmental litigation from traditional civil cases, and added that it was important to interpret the term "prevailing"¹⁵⁰ in a manner consistent with the goals of the CWA in determining whether or not a party is entitled to attorneys' fees.¹⁵¹ Because the plaintiff successfully demonstrated that the Corps had not undertaken the necessary investigations in making the wetlands determination, the court held that the plaintiff was entitled to an award of attorneys' fees regarding the ultimate wetland determination.¹⁵²

143. 5:21 Va. Regs. Reg. 3023 (1989).

144. *Id.* at 3024-25.

145. *Id.* at 3025.

146. *Id.* at 3025-26.

147. 850 F.2d 182 (4th Cir. 1988).

148. *Id.* at 190.

149. 859 F.2d 313 (4th Cir. 1988), *reh'g denied*, No. 82-3183 (4th Cir. Dec. 14, 1988).

150. Section 505(d) of the Clean Water Act provides, "The court in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d) (1982).

151. *Id.*

152. *Id.* at 317. Though the action was heard in Raleigh, the court's award of attorneys' fees was based on rates charged by attorneys in Washington, D.C., where plaintiff was headquartered.

A company seeking certification under the CWA in Virginia must file a formal application with the SWCB.¹⁵³ In *Fredericksburg v. FERC*,¹⁵⁴ a hydroelectric company failed to submit a joint permit application provided by the SWCB in response to the company's letter requesting section 401(c)(1) certification.¹⁵⁵ The court held that the company's failure to submit this application did not constitute a request for certification within the meaning of FERC regulations, and therefore FERC improperly waived the CWA certification requirements.¹⁵⁶

In *Tabb Lakes, Ltd. v. United States*,¹⁵⁷ a developer sought a section 404 permit in order to fill a wetland for development purposes. The developer subsequently withdrew its permit application and filed a declaratory judgment action, seeking a judicial determination that the property did not fall within the Corps' jurisdiction.¹⁵⁸ The Corps asserted jurisdiction over the property on the ground that it was an isolated water area which was used or could be used as habitat by migratory birds crossing state lines. The determination was based on an initial Corps memorandum that listed seven standards, which indicated that a sufficient nexus to interstate commerce existed to warrant Corps jurisdiction over isolated waters pursuant to section 404 implementing regulations.¹⁵⁹ The United States District Court for the Eastern District of Virginia determined that the memorandum did not fall within the interpretive exemption to the notice and comment provisions of the Administrative Procedure Act.¹⁶⁰ Instead, the court determined the memorandum affected a change in Corps' policy which was intended to have the full force and effect of a substantive rule and which allowed no discretion in making jurisdictional determinations.¹⁶¹

On March 27, 1989, the Court of Appeals of Virginia heard oral argument in *Appalachian Power Co. v. Commonwealth*.¹⁶² The appeal resulted from the trial court's invalidation of the SWCB's

153. See *Fredericksburg v. FERC*, 876 F.2d 1109 (4th Cir. 1989).

154. *Id.*

155. *Id.* at 1111.

156. *Id.* at 1111-12.

157. 19 *Envtl. L. Rep. (Envtl. L. Inst.)* 20672 (E.D. Va. Nov. 7, 1988).

158. *Id.*

159. *Id.*

160. 5 U.S.C. § 553(b)(3)(A) (1982).

161. *Tabb Lakes*, 19 *Envtl. L. Rep. (Envtl. L. Inst.)* at 20673.

162. *Appalachian Power Co. v. Commonwealth*, No. CH 87-000733 (Roanoke Aug. 17, 1988).

chlorine water quality standard and new designation of outstanding resource waters.¹⁶³ The issue argued on appeal was whether former section 62.1-44.15(3a) of the Code of Virginia,¹⁶⁴ in effect when the regulations were adopted in the last part of the 1987 triennial water quality standard review, required an evidential hearing.

V. PESTICIDES

A. Legislation

The 1989 Virginia General Assembly passed legislation amending the Virginia Pesticide Law by creating the Virginia Pesticide Control Act.¹⁶⁵ Central to the Act, is the creation of an eleven member Pesticide Control Board,¹⁶⁶ which is empowered to promulgate regulations related to the licensing of pesticide applicators, registration of pesticides, record keeping, equipment relating to licensing and registration, establishing certification training and testing standards for applicators and technicians, as well as a number of other duties.¹⁶⁷ The Commissioner of Agriculture and Consumer Services maintains his registration authority, as well as his authority to receive, concurrent with the Pesticide Control Board, citizen complaints relating to the sale, use, handling or disposal of any pesticide.¹⁶⁸ A special fund is designated by the new statute in which fees and penalties collected are to be deposited and used to carry out the provisions of the chapter.¹⁶⁹ Virtually all provisions of the former Virginia Pesticide Law pertaining to registration have been carried forward except for the provisions relating to expiration of registration.¹⁷⁰ The new act also requires a business license to be issued upon payment of a Board established fee prior to any sale, distribution or storage of any pesticide in Virginia.¹⁷¹ Retailers of limited quantities of non-restricted use pesticides including grocery stores, convenience stores, drug stores, veterinarians, and businesses who sell pesticides primarily for limited household use, are to be exempt from the annual business license

163. *Id.*

164. VA. CODE ANN. § 62.1-44.15(3a) (Repl. Vol. 1987).

165. VA. CODE ANN. §§ 3.1-249.27 to -249.78 (Cum. Supp. 1989).

166. *Id.* § 3.1-249.28.

167. *Id.* § 3.1-249.29.

168. *Id.* §§ 3.1-249.32 to -249.45.

169. *Id.* § 3.1-249.34.

170. *Id.* § 3.1-223 (Repl. Vol. 1983).

171. *Id.* § 3.1-249.46 (Cum. Supp. 1989).

requirement pursuant to regulations that will be promulgated by the Pesticide Control Board.¹⁷² Such licenses are expressly conditioned upon evidence of financial responsibility¹⁷³ which, under the former act, was only required of holders of commercial applicators licenses. Provisions relating to pesticide application and certification, and to marine anti-foulent paints, have been carried forward.¹⁷⁴ The act contains a trade secret provision based largely on relevant provisions in the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").¹⁷⁵

Penalties attendant upon violations of the pesticide laws have been significantly increased. Any knowing violation of the act or its regulations constitutes a class 1 misdemeanor with an additional fine of up to \$500,000 if death or serious physical harm to any person is caused by the violation.¹⁷⁶ Other violations are classified as "less than serious" (\$1,000 fine)¹⁷⁷ to "serious" (\$5,000 fine)¹⁷⁸ and a "repeat" or "knowing" (\$20,000 fine).¹⁷⁹ Up to \$100,000 may be added to any violation which causes serious damage to the environment, serious injury to property, or serious injury to or death of any person.¹⁸⁰ Prior to the 1989 legislation, persons convicted of violating any provisions of the Virginia Pesticide Law or its regulations were punished at the discretion of the court, and violations of commercial application, certification and restricted use prohibitions, resulted only in a class 2 misdemeanor.¹⁸¹

B. *Administrative Proceedings*

Until repealed by the Pesticide Control Board, the Department of Agriculture and Consumer Services' Rules and Regulations for Enforcement of the Virginia Pesticide Law¹⁸² remain in effect.¹⁸³

172. *Id.*

173. *Id.* § 3.1-249.49.

174. *Id.* §§ 3.1-249.51 to -249.62.

175. 7 U.S.C. § 136(h) (1982).

176. VA. CODE ANN. § 3.1-249.70(A) (Cum. Supp. 1989). Class 1 misdemeanors are punishable by confinement in jail for not more than a year and a fine of not more than \$1,000, either or both. *Id.* § 18.2-11 (Repl. Vol. 1988).

177. *Id.* § 3.1-249.70(D) (cum. Supp. 1989).

178. *Id.*

179. *Id.*

180. *Id.*

181. Class 2 misdemeanors may result in a jail term of up to six months and a fine of up to \$500. *Id.* § 18.2-11 (Repl. Vol. 1988).

182. 2:2 Va. Regs. Reg. 1504 (1986).

183. See VA. CODE ANN. § 3.1-249.30 (Cum. Supp. 1989) (editor's note).

C. *Judicial Activities*

In *United States v. Orkin Exterminating Co.*,¹⁸⁴ the court decided whether the delegation of primary enforcement authority to the states under the FIFRA divests the U.S. Attorney General of his enforcement authority. In *Orkin*, employees of Orkin used the Pesticide Vikane to exterminate the home of a Galax, Virginia couple. The couple later died of Vikane poisoning.¹⁸⁵ The Commonwealth's Attorney for Grayson County, Virginia, brought a three count indictment against pesticide applicators, including two counts of involuntary manslaughter and one count of misapplication of pesticide. The Grayson County Circuit Court subsequently dismissed the involuntary manslaughter indictments on the grounds that corporations could not be convicted of those charges.¹⁸⁶ The Commonwealth's Attorney chose to *nolle prosequi* the remaining criminal charges and turned the matter over to the U.S. Attorney's office. When a federal grand jury returned a five count criminal indictment against Orkin, Orkin challenged the Attorney General's power to enforce FIFRA.¹⁸⁷ Orkin argued that primary enforcement authority had been delegated to Virginia and that the state had initiated an "appropriate enforcement action" which precluded federal action.¹⁸⁸ The court rejected Orkin's argument and reasoned that "primary" enforcement authority was not the same as "exclusive" enforcement authority and that the Attorney General, therefore, had plenary enforcement powers.¹⁸⁹

184. 688 F. Supp. 223 (W.D. Va. 1988).

185. *Id.* at 223.

186. *Id.* at 224.

187. *Id.*

188. See 7 U.S.C. § 136w-2 (1982).

189. *Orkin*, 688 F.Supp. at 225.