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Annual Survey of Virginia Law: Environmental Law

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ENVIRONMENTAL LAW

Theodore R. Kingsley*
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I. INTRODUCTION

This article addresses significant developments in Virginia law pertaining to air quality, water quality and solid and hazardous waste which have occurred between the publication of the 1990 survey¹ and May 1, 1992.

II. AIR

A. Legislation

Comprehensive amendments to the Clean Air Act (CAA) were signed into law on November 15, 1990.² These amendments spurred increased activity on the part of Virginia's State Air Pollution Control Board (Air Board).

The 1991 General Assembly passed legislation authorizing the Air Board to issue special orders requiring owners to file closure plans to "abate, control, prevent, remove, or contain any substantial and imminent threat to public health or the environment that

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1. James R. Ryan, Jr., *Environmental Law: Annual Survey of Virginia Law*, 24 U. RICH. L. REV. 583 (1990). For a survey of developments in federal environmental law during the relevant time period, see ABA SECTION OF NATURAL RESOURCES, ENERGY AND ENVIRONMENTAL LAW & UNIVERSITY OF TULSA COLLEGE OF LAW, *Natural Resources, Energy and Environmental Law 1991: The Year in Review* (1992) [hereinafter 1991 Year in Review] and *Natural Resources, Energy and Environmental Law 1990: The Year in Review* (1991) [hereinafter 1990 Year in Review].

2. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified at 42 U.S.C. §§ 7401-7642 (Supp. II 1992)). For a summary of the Clean Air Act Amendments, see 1990 Year in Review, *supra* note 1, at 149-87.

is reasonably likely to occur if [the facility] ceases operations."³ The new statute imposes substantial penalties on any person who "knowingly and willfully fails to implement a closure plan or to provide adequate funds" to implement the plan.⁴ Penalties authorized under the amended statute include the costs of "abating, controlling, preventing, removing, or containing" any such threat. Criminal liability for a Class 4 felony can also attach.⁵

The 1992 General Assembly passed legislation establishing preliminary permit fees and a permit program fund to cover costs in processing permits.⁶ The Department of Air Pollution Control will base the annual permit program fee on the actual emissions of each regulated pollutant from the source. Fees will not exceed a base year amount of twenty-five dollars per ton using 1990 as the base year.⁷ There is a statutory cap of \$100,000 per source.⁸ The statute requires that the fees approximate the costs of administering and enforcing the permit program and the small business stationary source technical and environmental compliance assistance program.⁹

The small business stationary source technical and environmental compliance assistance program was created to assist small business stationary sources in complying with provisions of the federal CAA.¹⁰ A stationary source is eligible for the program if it:

- 1) is owned or operated by a person that employs 100 or fewer individuals;
- 2) is a small business concern as defined in the Federal Small Business Act;
- 3) is not a major stationary source;

3. Act of Apr. 3, 1991, ch. 702, 1991 Va. Acts 1340 (codified at VA. CODE ANN. § 10.1-1309.1 (Cum. Supp. 1992)).

4. VA. CODE ANN. § 10.1-1309.1 (Cum. Supp. 1992).

5. *Id.*

6. Act of Mar. 27, 1992, ch. 488, 1992 Va. Acts 619 (codified at VA. CODE ANN. §§ 10.1-1322 to -1322.2 (Cum. Supp. 1992)).

7. VA. CODE ANN. § 10.1-1322 (Cum. Supp. 1992).

8. *Id.* § 10.1-1322.2(C). The statutory cap applies only to preliminary program permit fees, which are those fees in use until a fee schedule is set up by the Air Board. *See id.* §§ 10.1-1322(A), (C).

9. *Id.* § 10.1-1322(B).

10. Act of Mar. 17, 1992, ch. 303, 1992 Va. Acts 374 (codified at VA. CODE ANN. §§ 10.1-1323 to -1326 (Cum. Supp. 1992)).

- 4) does not emit fifty tons or more per year of any regulated pollutant; and
- 5) emits less than seventy-five tons per year of all regulated pollutants.¹¹

The legislation allows owners of other sources not meeting the third, fourth, and fifth criteria to petition to be treated as small stationary sources if the sources do not emit more than 100 tons per year of all regulated pollutants.¹²

The 1992 General Assembly also established an alternative fuels revolving fund to be used to assist local governments with costs incurred in the conversion of fuel systems in public vehicles, including school buses, to use alternative fuels.¹³ The purpose of the fund is to improve air quality in Virginia, reduce dependence on imported fuels, and stimulate the economy.

B. *Administrative Proceedings*

The State Air Pollution Control Board promulgated regulations, effective July 1, 1991, amending the emissions standards for volatile organic compounds.¹⁴ The regulations contain amendments which affect the disposal of volatile organic compounds (VOC), the definition of VOC, exemption levels, compliance time frames, record keeping and reporting requirements, control technology requirements for major sources, and other matters.

The Air Board also amended its Prevention of Significant Deterioration (PSD) permit regulations effective August 1, 1991.¹⁵ The regulations contain revised definitions of "baseline area," "baseline concentration," "baseline date," "federally enforceable" and "net emissions increase."¹⁶ The amendments add nitrogen dioxide ambient air increments for Class I, II and III areas,¹⁷ and revise re-

11. VA. CODE ANN. § 10.1-1323(B) (Cum. Supp. 1992).

12. *Id.* § 10.1-1323(C).

13. Acts of Mar. 17 & Mar. 20, 1992, chs. 351 & 389, 1992 Va. Acts 441, 501 (codified at VA. CODE ANN. §§ 33.1-223.3 to -223.9 (Cum. Supp. 1992)). An alternative fuel is a motor fuel used as an alternative to gas and diesel such as ethanol, methanol or electricity.

14. 7:14 Va. Regs. Reg. 2121 (1991). Due to the length of the regulation, the *Virginia Register of Regulations* contains only a summary. The full text is available from the Registrar of Regulations or from the agency.

15. 7:20 Va. Regs. Reg. 3011 (1991).

16. *Id.* at 3012-16.

17. *See id.* at 3017.

quirements for approval of innovative control technology systems.¹⁸ The Board amended the noncriteria pollutant rules, effective October 15, 1991, to establish new significant ambient air concentrations (SAACs) relating to the chronic and acute health effect limits established by the American Conference of Governmental Industrial Hygienists handbook.¹⁹ The previous exemption tables have been replaced by exemption formulas listed in the handbook, which are based on assumptions that more accurately reflect operation of facilities emitting toxic pollutants. Amendments to the regulations clarify the standards section of the rules, expand the definition of control technology which might be required for existing facilities, and set compliance requirements for facilities which emit at levels that produce concentrations significantly above the SAAC.²⁰

Finally, three urban and one rural nonattainment areas were designated for ozone: Northern Virginia (serious); Richmond (moderate); Hampton Roads (marginal); and White Top Mountain and Smyth County (marginal — rural transport areas).²¹

C. *Judicial Activities*

1. Federal Courts

In *Natural Resources Defense Council v. EPA*,²² the court rejected the plaintiff's challenge to the EPA's May 16, 1990 approval of a revised State Implementation Plan for American Cyanamid, which was predicated on bubbling four discreet sources of VOC emissions from the company's Virginia facilities.²³ The court rejected NRDC's contention that such an approach did not comply with EPA's relevant Emissions Control Techniques Guidelines.²⁴ The court found that the agency's reliance on its interpretation of Reasonably Available Control Technology (RACT) was reasonable.²⁵ The interpretation was contained in an early guidance docu-

18. *See id.* at 3025-26.

19. 7:25 Va. Regs. Reg. 4008 (1991).

20. *Id.*

21. Commonwealth of Virginia, State Air Pollution Control Board, Regulations for the Control and Abatement of Air Pollution, Appendix K (Jan. 1, 1992).

22. 941 F.2d 1207, No. 90-2447, 1991 U.S. App. LEXIS 19100 (4th Cir. Aug. 19, 1991) (per curiam) (unpublished decision).

23. *Id.* at *3.

24. *Id.* at *12.

25. *Id.* at *9.

ment which provided that a RACT determination may vary from source to source and may apply to "an individual source or group of sources."²⁶ The court also found EPA's refusal to employ the bubbling approach in other peculiar instances was not evidence of arbitrary or capricious decision-making.²⁷

In *Natural Resources Defense Council v. Reilly*,²⁸ plaintiff sought an order compelling the EPA Administrator to promulgate standards requiring light vehicles to be equipped with onboard refueling vapor recovery systems pursuant to section 202(a)(6), the light vehicle onboard vapor recovery provisions of the Clean Air Act Amendments of 1990.²⁹ The plaintiffs contended that this section created a nondiscretionary duty to promulgate standards, while the defendants contended that the section allowed the Administrator discretion to determine the desirability of promulgating such standards based on safety considerations.³⁰

Pursuant to section 202(a)(6) of the Clean Air Act, the EPA began consultation with the Department of Transportation and initiated a rulemaking that culminated, after the suit was filed, in a final action wherein the EPA concluded that onboard vapor recovery systems should not be required because they pose an unreasonable risk to public safety.³¹ The district court dismissed the complaint for lack of subject matter jurisdiction on the grounds that section 307(b)(1)³² vests exclusive jurisdiction for judicial review of a final action taken by the Administrator in the United States Court of Appeals for the District of Columbia.³³

In *United States v. Economy Muffler & Tire Center, Inc.*,³⁴ the court rejected defendant's argument that EPA was required to promulgate its catalytic converter tampering enforcement policy as a regulation under the Administrative Procedure Act's notice and comment rulemaking requirements.³⁵ The court went on to hold that replacing a three-way converter with a two-way converter is

26. *Id.* at *6-7.

27. *Id.* at *8-9.

28. 788 F. Supp. 268 (E.D. Va. 1992).

29. Pub. L. No. 101-549, 104 Stat. 2399, 2473 (codified at 42 U.S.C.A. § 7521(a)(6)(West Supp. 1992)).

30. *Reilly*, 788 F. Supp. at 271.

31. See 57 Fed. Reg. 13,046, 13,220-31 (Apr. 15, 1992).

32. 42 U.S.C. § 7607(b)(1) (1988).

33. *Reilly*, 788 F. Supp. at 272.

34. 762 F. Supp. 1242 (E.D. Va. 1991).

35. *Id.* at 1244; see 5 U.S.C. § 553 (1988).

subject to civil penalties under the Clean Air Act because it effectively removes, or renders inoperative, rhodium, without which a motor vehicle's exhaust system cannot reduce harmful nitrogen oxide emissions. The court further held that while the defendant's lack of intent to violate the tampering provision could be considered in mitigation of a civil penalty, the court's penalty assessment is not predicated upon a showing of willfulness or negligence.³⁶

2. State Courts

In *Citizens for Clean Air v. State Air Pollution Control Board*³⁷ an unincorporated association (CCA) appealed when the Circuit Court for Rockingham County sustained demurrers of the Air Board and Rockingham Poultry, Inc. The Air Board and Rockingham Poultry challenged plaintiffs' standing to appeal the Air Board's decision to deny CCA's petition for a formal hearing regarding issuance of an air permit to Rockingham Poultry.³⁸ Relying on *Environmental Defense Fund v. State Water Control Board*,³⁹ the court of appeals observed that a specific provision for standing in the agency's basic law controls.⁴⁰ The court went on to hold that CCA was not an "owner" within the meaning of the Air Pollution Control Law, that term being limited to the owner of a "source or potential source of pollution."⁴¹ Therefore CCA was not entitled to judicial review of a final decision of the Air Board.⁴²

III. SOLID AND HAZARDOUS WASTE

A. Legislation

The 1991 General Assembly passed legislation authorizing the Waste Management Board to enforce provisions of the Southeast Interstate Low-Level Radioactive Waste Management Compact and established a civil penalty of up to \$25,000 per day for a violation of the provisions of the Compact.⁴³

36. 762 F. Supp. at 1244-45.

37. 13 Va. App. 430, 412 S.E.2d 715 (1991).

38. *Id.* at 432, 412 S.E.2d at 716.

39. 12 Va. App. 456, 404 S.E.2d 728 (1991); *see infra* notes 185-89 and accompanying text.

40. 13 Va. App. at 435-36, 412 S.E.2d at 718-19.

41. *Id.* at 440, 412 S.E.2d at 721.

42. *Id.* at 432, 412 S.E.2d at 716.

43. Act of Mar. 5, 1991, ch. 83, 1991 Va. Acts 106 (codified at VA. CODE ANN. § 10.1 - 1504 (Cum. Supp. 1992)).

In 1991, the General Assembly also passed legislation requiring that all solid waste management facilities be operated under the direct supervision of a waste management facility operator certified by the Board for Waste Management Facility Operators by January 1, 1993.⁴⁴

In 1992, the General Assembly passed legislation allowing the Department of Waste Management to grant variances from the requirement that public sanitary landfills comply with leachate collection system regulations by January 1, 1994.⁴⁵ The General Assembly had passed legislation in 1991 which would allow public sanitary landfills not in compliance with the regulations to operate until January 1, 1994.⁴⁶ The 1992 legislation permits the Department of Waste Management to grant variances allowing landfills to operate beyond the deadline if it finds good cause.⁴⁷ The 1992 General Assembly also extended the deadline for certain private sanitary landfills to comply with the Department of Waste Management's regulations requiring liners and leachate collection systems. Under the new law, private sanitary landfills which were issued an operating permit prior to December 21, 1988, may be exempt from complying with the regulations until October 9, 1993, if written notice is given to the Department.⁴⁸

The 1992 General Assembly also expanded the authority of the Director of the Department of Waste Management to deny applications for hazardous waste permits and to revoke, suspend or amend permits.⁴⁹ Virginia Code section 10.1-1427(A) was revised to allow the director to consider whether the permit holder has committed a violation which

results in a release of harmful substances into the environment, . . . poses a threat of release of harmful substances into the environment, . . . presents a hazard to human health or . . . is representa-

44. Act of Mar. 25, 1991, ch. 551, 1991 Va. Acts 947 (codified at VA. CODE ANN. § 10.1-1408.2 (Cum. Supp. 1992)).

45. Act of Mar. 27, 1992, ch. 505, 1992 Va. Acts 642.

46. Act of Apr. 3, 1991, ch. 658, 1991 Va. Acts 1217.

47. See Act of Mar. 27, 1992, ch. 505, 1992 Va. Acts 642.

48. Act of Apr. 5, 1992, ch. 730, 1992 Va. Acts 1109. A private sanitary landfill is defined in the act as "any sanitary landfill as defined in . . . § 10.1-1400, including, without limitation, all nonhazardous solid waste landfills holding permits from the Department of Waste Management, other than a sanitary landfill owned or operated by a local government, combination of local governments or public service authority." *Id.*

49. Act of Mar. 26, 1992, ch. 463, 1992 Va. Acts 595 (codified at VA. CODE ANN. §§ 10.1-1426, -1427 (Cum. Supp. 1992)).

tive of a pattern of serious or repeated violations which . . . demonstrates the permittee's disregard for or inability to comply with applicable laws, regulations or requirements⁵⁰

In considering whether to deny an application or revoke, suspend or amend a permit, the director may also take into account whether any key personnel have been convicted of certain crimes punishable as felonies.⁵¹

The 1992 General Assembly amended section 10.1-1408.1 of the Virginia Code to require public hearings in the affected political subdivision before the Department of Waste Management may issue a permit for the operation of a new sanitary landfill or other facility for the treatment or storage of nonhazardous solid waste.⁵² The prior statute required a public hearing by the Department only when requested by the local governing body.⁵³

Other legislation passed by the 1992 General Assembly authorizes counties, cities and towns to prohibit the disposal of leaves and grass clippings in any public landfill which it operates if the locality has implemented a composting program.⁵⁴ Another amendment enables counties, cities or towns to provide for removal of trash and garbage from unkempt property, charge the property owner for the removal, and, in certain circumstances, place a lien on the property for any unpaid charges.⁵⁵

The 1992 General Assembly imposed a moratorium on the issuance of permits for certain infectious waste facilities.⁵⁶ The legislation prohibits any person from constructing or expanding a commercial infectious waste facility without first obtaining permits from the Air and Waste Management Boards. The Air Board and the Waste Management Board may not issue, review, or approve

50. VA. CODE ANN. § 10.1-1427(A) (Cum. Supp. 1992).

51. *Id.* § 10.1-1427(A)(5). The director must consider the nature of the act committed by key personnel; culpability, if any, of the applicant, the applicant's discipline of key personnel; the applicant's compliance with rules, regulations, and permits; the applicant's implementation of management control to minimize and prevent occurrence of violations; and mitigation by the applicant. *Id.*

52. Act of Mar. 16, 1992, ch. 286, 1992 Va. Acts 358 (codified at VA. CODE ANN. § 10.1-1408.1(D) (Cum. Supp. 1992)).

53. VA. CODE ANN. § 10.1-1408.1(D) (Cum. Supp. 1992).

54. Act of Apr. 3, 1992, ch. 638, 1992 Va. Acts 934 (codified at VA. CODE ANN. § 15.1-11.5:1 (Cum. Supp. 1992)).

55. Act of Apr. 3, 1992, ch. 649, 1992 Va. Acts 956 (codified at VA. CODE ANN. § 15.1-11 (Cum. Supp. 1992)).

56. Acts of Apr. 5, 1992, chs. 751, 773-74, 1992 Va. Acts 1151, 1206, 1208.

permits for the construction or expansion of commercial infectious waste facilities until the effective date of regulations these boards are required to promulgate or September 1, 1993, whichever is earlier.

The General Assembly also created the Virginia Solid Waste or Recycling Revolving Fund.⁵⁷ The fund is to be established from "sums appropriated to the fund by the General Assembly" and used to make loans or grants to local governments to finance or refinance the cost of any solid waste management facility or recycling facility. Preference will be given to those programs which involve private industry or serve more than one locality.⁵⁸

B. *Administrative Proceedings*

The Department of Waste Management updated the Virginia Hazardous Waste Management Regulations in accordance with changes made by the Environmental Protection Agency between January of 1989 and July of 1990.⁵⁹ The amendments, which were effective July 1, 1991, incorporate by reference federal regulations which include restrictions on land disposal of certain wastes, changes in the descriptions of certain listed wastes, revision of the toxicity characteristic, and adoption of standards limiting air emissions at permitted hazardous waste treatment, storage and disposal facilities.⁶⁰

The Department of Waste Management issued Yard Waste Composting Facility Regulations which became effective January 29, 1992.⁶¹ The regulations exempt yard waste composting facilities from the permitting requirements of Part VII of the Solid Waste Management Regulations.⁶² The goal of the regulations is to encourage the development of yard waste composting facilities by

57. Act of Mar. 19, 1992, ch. 378, 1992 Va. Acts 485 (codified at VA. CODE ANN. §§ 62.1-230.1, -239.1, -241.1 to -241.10 (Repl. Vol. 1992)).

58. VA. CODE ANN. §§ 62.1-230.1, -239.1 (Repl. Vol. 1992).

59. 7:16 Va. Regs. Reg. 2363 (1991). Due to the length of the regulation, only a summary is published in the Register. The full text is available from the agency.

60. *Id.* at 2363-64.

61. 8:7 Va. Regs. Reg. 1139 (1992). The regulation defines "yard waste" as "that fraction of municipal solid waste that consists of grass clippings, leaves, brush and tree prunings arising from general landscape maintenance." *Id.* at 1141.

62. *Id.* at 1140. The Department of Waste Management had promulgated an emergency regulation exempting yard waste composting facilities from the permitting requirements of Part VII of the Solid Waste Management Regulations which were effective from September 10, 1990 to September 10, 1991. 7:1 Va. Regs. Reg. 111 (1990).

“establishing technical standards and permitting procedures more consistent with the environmental risks posed by such facilities.”⁶³ The regulations provide standards for siting, design, construction, and closure and provide for permits by rule to operators of yard waste composting facilities.⁶⁴

C. *Judicial Activities*

1. Federal Courts

*Sugarloaf Citizens Ass'n v. Federal Energy Regulatory Commission*⁶⁵ arose out of Montgomery County, Maryland's attempt to design a solid waste incinerator whose heat would generate electricity, which would, in turn, be sold to defray the costs of municipal waste disposal. Petitioner argued that the Federal Energy Regulatory Commission (FERC) should have conducted a review of the environmental impact of the facility under the National Environmental Policy Act of 1969 (NEPA)⁶⁶ and the impact of the facility on historic structures under the National Historic Preservation Act (NHPA)⁶⁷ before granting the incinerator certification as a qualifying small power production facility under section 210 of the Public Utility Regulatory Policies Act (PURPA).⁶⁸ FERC denied these requests in its certification, ruling that certification under PURPA was neither a “major federal action” under NEPA nor a “federal undertaking” under NHPA.⁶⁹ The Fourth Circuit affirmed, reasoning that a review of whether the applicability of NEPA is reasonable under the circumstances is implicit in an agency's determination that its actions do not constitute “major federal action.”⁷⁰ The court found that: (1) FERC did not have discretion to deny certification to any facility which meets the enumerated criteria under PURPA, (2) FERC certification was merely ministerial, and (3) the facility could have opted for self-certification.⁷¹ Therefore, the court concluded, FERC's determination that certification of the fa-

63. 8:7 Va. Regs. Reg. at 1141.

64. *Id.*

65. 959 F.2d 508 (4th Cir. 1992).

66. 42 U.S.C. § 4332 (1988).

67. 16 U.S.C. § 470(f) (1988).

68. 16 U.S.C. § 824a-3 (1988).

69. *Sugarloaf Citizens*, 959 F.2d at 511-12.

70. *Id.* at 512 (citing *Goos v. ICC*, 911 F.2d 1283, 1291-92 (8th Cir. 1990); *Winnebago Tribe v. Ray*, 621 F.2d 269 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980); *Minnesota Pub. Interest Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974)).

71. *Sugarloaf Citizens*, 959 F.2d at 512-13.

cility was not a "major federal action" under NEPA was reasonable.⁷² Similarly, since NHPA, "by its terms, has a narrow reach and is triggered only if a federal agency has the authority to license a project or approve expenditures for it," the court agreed with FERC's finding that its certification of the facility was not a federal "undertaking" within the meaning of NHPA.⁷³

In *Hazardous Waste Treatment Council v. South Carolina*,⁷⁴ a national association of licensed commercial hazardous waste treatment, sludge and disposal (TSD) firms sought a preliminary injunction of a number of state executive orders, statutes and regulations which would (1) require South Carolina TSD facilities to give preference to accepting hazardous wastes generated in that state and (2) prohibit the in-state treatment of waste generated in states that had not entered into an interstate or regional agreement pursuant to CERCLA.⁷⁵ The district court granted a preliminary injunction, and the Fourth Circuit affirmed in part, agreeing that the laws constituted an unlawful economic barrier in violation of the commerce clause,⁷⁶ and remanded the case for modification of the order of relief.⁷⁷

In a related matter, the Sierra Club sought to intervene in the litigation in support of the validity of the South Carolina laws. In *In Re Sierra Club*,⁷⁸ the court observed that South Carolina, "concerned with the overall constitutionality of various aspects of its hazardous waste program, cannot be an adequate representative of environmental groups concerned with a regulation's use in the permitting process."⁷⁹ The court remanded the Sierra Club's motion to intervene to the district court.⁸⁰

In *United States v. Dee*,⁸¹ U.S. Army civilian employees involved in the development of chemical warfare systems at Aberdeen Proving Ground appealed from their convictions of multiple violations of the Resource Conservation and Recovery Act's

72. *Id.* at 514.

73. *Id.* (quoting *Lee v. Thornburgh*, 877 F.2d 1053, 1055 (D.C. Cir. 1989)).

74. 945 F.2d 781 (4th Cir. 1991).

75. *Id.* at 785-86.

76. *Id.* at 787.

77. *Id.* at 795.

78. 945 F.2d 776 (4th Cir. 1991).

79. *Id.* at 780.

80. *Id.* at 781.

81. 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991).

(RCRA) criminal provisions.⁸² The defendants were responsible for assuring that the facility was in compliance with both RCRA and the facility's own internally promulgated policies and operating procedures relating to hazardous waste management.⁸³ At trial, the jury found that the individual in charge of operations at Aberdeen: (1) ordered placement of hazardous chemicals in a storage shed, (2) repeatedly ignored warnings about the hazardous conditions of the chemicals that were improperly stored, and (3) undertook no actions to comply with RCRA in storage and disposal of chemicals. The jury further found that the defendants engaged in unpermitted dumping and incineration of hazardous wastes.⁸⁴

The Fourth Circuit affirmed the convictions, holding that federal employees working at a federal facility are "persons" subject to RCRA's criminal provisions. The employees were charged with criminal liability in their individual capacities, rather than as agents of the government, and sovereign immunity does not attach to individual government employees so as to immunize them from prosecution for their criminal acts.⁸⁵ The court further held that the defendants "knowingly" violated criminal provisions of RCRA, even if they did not know that violation of RCRA was a crime or that regulations existed listing and identifying chemical wastes as hazardous wastes under RCRA, where there was evidence that the defendants were aware that they were dealing with hazardous chemicals, and evidence that materials handled by defendants were "wastes" within the meaning of RCRA.⁸⁶

In *United States v. Jude*,⁸⁷ the Fourth Circuit affirmed the district court's refusal to reduce a \$75,000 civil and \$500 criminal penalty imposed under RCRA upon the chief executive officer of a company for allowing a tank containing hazardous waste to be transported without a permit. Because the sentence was within the statutory guidelines and no exceptional circumstances or abuse of discretion had been shown, the appellate court had no authority to reduce the sentence.⁸⁸

82. *Id.* at 743.

83. *Id.* at 744.

84. *Id.* at 746-48.

85. *Id.* at 744.

86. *Id.* at 746-47; see Solid Waste Disposal Act § 3008(d), 42 U.S.C.A. § 6928(d) (West Supp. 1992).

87. 914 F.2d 249 (unpublished opinion), 21 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,373 (4th Cir. Sept. 12, 1990).

88. *Id.* at 20,374.

In *Aliff v. Joy Manufacturing Co.*,⁸⁹ the Fourth Circuit affirmed the district court's determination that the doctrine of res judicata barred a response cost recovery action under CERCLA. The plaintiff had previously brought an action against the defendant for fraud and misrepresentation in connection with the sale of a building contaminated with PCBs, and the purchaser plaintiff apparently possessed sufficient information to construct a theory of recovery under CERCLA in the previous action.⁹⁰

In *Richland-Lexington Airport District v. Atlas Properties, Inc.*,⁹¹ the plaintiff contracted with the defendant to dump waste on the plaintiff's property. The court held that this did not preclude the plaintiff from asserting a cost recovery action against the defendant under CERCLA, and, reversing the lower court's dismissal of the cost recovery claim, held that consistency with the National Contingency Plan does not require prior government approval.⁹²

In *Richmond, Fredericksburg & Potomac Railroad Co. v. Davis Industries, Inc.*,⁹³ a defendant in a CERCLA cost recovery action filed a third party claim against the manufacturer of air conditioners which the defendant allegedly sent to the plaintiff's scrap recycling and disposal site, claiming contribution and indemnity under state law theories of negligence and strict liability. The court partially granted the third party defendant's motion for summary judgment, dismissing the strict liability claim.⁹⁴ The court held, however, that while the destruction of the manufacturer's air conditioners for recycling purposes could not have been reasonably foreseen, a jury could find that it was reasonably foreseeable that the air conditioners would normally be handled and stored after their serviceable lives and therefore the manufacturer had a duty to warn of the possible release of hazardous substances during such handling and storage.⁹⁵

In *Richmond, Fredericksburg & Potomac Railroad Co. v. Clarke*,⁹⁶ the plaintiff, seeking recovery of CERCLA response costs,

89. 914 F.2d 39 (4th Cir. 1990).

90. *Id.* at 43-44.

91. 901 F.2d 1206 (4th Cir. 1990).

92. *Id.* at 1208-09.

93. 787 F. Supp. 572 (E.D. Va. 1992).

94. *Id.* at 576.

95. *Id.* at 578. The indemnity claim was dismissed for defendant/third party plaintiff's failure to identify a contractual basis for indemnification. *Id.*

96. No. 90-00336, 1991 U.S. Dist. LEXIS 15829 (E.D. Va. Jan. 22, 1991).

moved to strike the jury demand⁹⁷ and affirmative defenses (contributory negligence, assumption of risk, estoppel, unclean hands, waiver, laches, failure to mitigate, unjust enrichment, no joint and several liability, offset, release, and apportionment)⁹⁸ filed by defendant Clarke. The district court held that because the plaintiff sought essentially equitable relief on its response cost recovery claim under CERCLA, the defendant was not entitled to a jury trial on that claim. The court observed that section 113 of CERCLA, which explicitly provides that the court must resolve such a claim based on equitable factors, governed the plaintiff's claim for contribution.⁹⁹ The court further ruled that defenses to CERCLA actions are limited to those defenses that the statute itself specifies.¹⁰⁰

In *Disston Co. v. Sandvik, Inc.*,¹⁰¹ the court held that the plaintiff's CERCLA cost recovery claims were subject to mandatory arbitration pursuant to an arbitration clause in the purchase agreement.¹⁰² The court further held that purchaser had no right to withhold payment on a note to the seller in light of the environmental contamination on the property.¹⁰³

In *City of Chesapeake v. Sutton Enterprises, Inc.*,¹⁰⁴ an action removed from the Circuit Court for the City of Chesapeake, the district court, adopting the U.S. magistrate's findings, held that neither the Toxic Substances Control Act (TSCA) or CERCLA preempted the city's state court enforcement action ordering cleanup of PCB contaminated property pursuant to city ordinance and the state fire code.

Finally, in a significant bankruptcy decision, *In re Doyle Lumber, Inc.*,¹⁰⁵ the chapter seven trustee filed a notice stating his intention to abandon the bankruptcy estate's interest in a sawmill and wood treating facility because due to "the use of the chemical compound chromated copper arsenate in the wood treating process at the plant for many years, there may be environmental damage

97. *Id.* at *7.

98. *Id.* at *11.

99. *Id.* at *9-*10.

100. *Id.* at *11-*12.

101. 750 F. Supp. 745 (W.D. Va. 1990).

102. *Id.* at 748-49.

103. *Id.* at 749-50.

104. 138 F.R.D. 468 (E.D. Va. 1990).

105. 137 B.R. 197 (Bankr. W.D. Va. 1992).

to the property where the plant was located"¹⁰⁶ The proposed abandonment was objected to by the first lien holder, by the Virginia Department of Waste Management, and by the State Water Control Board. The bankruptcy court determined that the facts did not reveal an immediate threat to the health and safety of the public and allowed abandonment.¹⁰⁷

2. State Courts

In *Ticonderoga Farms v. County of Loudoun*,¹⁰⁸ the Virginia Supreme Court held that Loudoun County's regulation of solid waste was not specifically preempted by state regulations in the area and was not in conflict with existing state law.¹⁰⁹ The court further held that organic materials such as tree prunings, stumps, brush and the like, which were accepted by the plaintiff for a fee, constituted "discarded material" and thus a "solid waste" as defined in the Virginia Waste Management Act.¹¹⁰ The material was not exempt from regulation under the recycling exception¹¹¹ because the material lay above the ground indefinitely and had no immediate use.¹¹²

D. Attorney General Opinions

The Attorney General opined that the definition of "solid waste" in the Virginia Waste Management Act¹¹³ does not include "hazardous waste," and that therefore the provision of the Virginia

106. *Id.* at 199.

107. *Id.* at 202-03. The court noted that in *Midlantic National Bank v. New Jersey Dept. of Env'tl. Protection*, the United States Supreme Court held that, despite the literal language of the bankruptcy code, when Congress enacted § 554(a) it did not grant the trustee the right to "abandon property in contravention of a state statute or regulation that is reasonably designed to protect public health or safety from identified hazards." *Doyle Lumber*, 137 B.R. at 201 (quoting *Midlantic Nat'l Bank*, 474 U.S. 494, 507 (1986)). Reasoning that the Fourth Circuit had interpreted this exception narrowly, applying the exception only "where there is a serious health risk, not where the hazards are speculative" and that the financial condition of the debtor is relevant to the *Midlantic* analysis, the bankruptcy court determined that the unique facts of the case did not reveal an immediate danger to the public and that the costs of the soil and water testing requested by the state agencies would exceed any funds in the bankruptcy estate. *Id.* at 201-03.

108. 242 Va. 170, 409 S.E.2d 446 (1991).

109. *Id.* at 175, 409 S.E.2d at 449.

110. *Id.*; see VA. CODE ANN. § 10.1-1400 (Repl. Vol. 1989).

111. VA. CODE ANN. § 10.1-1408.1(J) (Repl. Vol. 1989).

112. *Ticonderoga Farms*, 242 Va. at 176, 409 S.E.2d at 449.

113. VA. CODE ANN. § 10.1-1410 (Repl. Vol. 1989).

Code authorizing any county, city or town to enact ordinances regulating the siting of solid waste management facilities within its boundaries¹¹⁴ does not grant a local government authority to pass an ordinance to regulate the burning of hazardous waste at an existing facility.¹¹⁵

IV. WATER

A. Legislation

The 1991 General Assembly passed legislation authorizing the State Water Control Board to issue special orders requiring owners to file closure plans "to abate, control, prevent, remove, or contain any substantial and imminent threat to public health or the environment that is reasonably likely to occur if the facility ceases operations."¹¹⁶ The new statute imposes substantial penalties on any person who knowingly and willfully fails to implement a closure plan or who fails to provide adequate funds to implement the plan. Penalties authorized under the new statute include the costs of abating, controlling, preventing, removing or containing any such threat. Criminal liability for a Class 4 felony can also attach.

The 1991 General Assembly passed legislation enabling the State Department of Health to authorize the construction and operation of sewerage systems and sewage treatment works.¹¹⁷ However, if the system or treatment works will have a potential or actual discharge to state waters, the owner must first apply for a certificate from the State Water Control Board. Once a certificate has been issued by the Board, the owner must obtain authorization from the State Department of Health to erect, construct, open, expand or operate a sewerage system or sewage treatment works.

Legislation allowing localities to adopt stormwater control programs by establishing a utility or enacting a system of service charges took effect on July 1, 1991.¹¹⁸ The statute permits a locality administering a stormwater control program to recover the costs associated with planning, design, land acquisition, construc-

114. *Id.* § 15.1-11.02(A).

115. Op. to Hon. William L. Heartwell (Jan. 27, 1992).

116. Act of Apr. 3, 1991, ch. 702, 1991 Va. Acts 1340 (codified at VA. CODE ANN. § 62.1-44.15:1.1 (Repl. Vol. 1992)).

117. Act of Mar. 13, 1991, ch. 194, 1991 Va. Acts 263 (codified at VA. CODE ANN. § 62.1-44.19 (Repl. Vol. 1992)).

118. VA. CODE ANN. § 15.1-292.4 (Cum. Supp. 1992).

tion, operation and maintenance activities. Costs for the program may be recovered from property owners based upon their contributions to stormwater runoff.

The 1992 General Assembly enacted the Groundwater Management Act,¹¹⁹ authorizing the State Water Control Board to issue groundwater withdrawal permits in accordance with regulations to be developed and adopted by the Board.¹²⁰ The new statute permits the Board to initiate study proceedings of groundwater management areas when the Board may have reason to believe that:

- (1) groundwater levels in an area are declining or are expected to decline excessively;
- (2) the wells of two or more groundwater users within the area are interfering or may reasonably be expected to interfere substantially with one another;
- (3) the available groundwater supply has been or may be overdrawn; or
- (4) groundwater in the area has been or may become polluted.¹²¹

If any of these conditions are found to exist and the public welfare, safety and health require that regulatory efforts be initiated, the Board must designate the area as a groundwater management area.¹²² Permits are required for the withdrawal of groundwater in a management area.¹²³ The issuance of permits must be based on actual and historical withdrawals by the user¹²⁴ and each permit will have a ten-year term.¹²⁵

Local governments may now authorize fire marshals to investigate contamination of groundwater, surface water, or subsurface soil caused by a release, or upon reasonable suspicion of a release,

119. Act of Apr. 6, 1992, ch. 812, 1992 Va. Acts 1295 (codified at VA. CODE ANN. §§ 62.1-254 to -270 (Repl. Vol. 1992)).

120. VA. CODE ANN. § 62.1-256 (Repl. Vol. 1992).

121. *Id.* "Such pollution includes any alteration of the physical, chemical or biological properties of groundwater which has a harmful or detrimental effect on the quality or quantity of the water." *Id.* § 62.1-257(A)(4).

122. *Id.* § 62.1-257(B).

123. *Id.* § 62.1-258.

124. *Id.* § 62.1-260.

125. *Id.* § 62.1-266(C).

of hazardous material or regulated substances and to determine the origin and source of the release.¹²⁶

Any person who owns or operates an injection well in a manner that causes contamination or diminution of groundwater used for a beneficial use by any person within a one-quarter mile radius of the injection well may now be required to provide a replacement water supply of the same quality and quantity.¹²⁷

The 1992 General Assembly also passed legislation requiring the Water Board to promulgate regulations to prevent pollution of state waters from aboveground storage tanks.¹²⁸ The regulations developed by the Board are to be aimed at preventing leaks and overfills.¹²⁹ Documentation of monitoring and testing for leaks will be required.¹³⁰ For aboveground tanks with an aggregate capacity of one million gallons or greater, formal tank inspections will be required every five years.¹³¹ The Board is to compile an inventory of facilities with aboveground storage capacity of more than 1320 gallons of oil or individual aboveground storage tanks with a storage capacity of more than 660 gallons of oil.¹³² After the regulations are effective, operators will have ninety days to register their facility with the Board and local coordinator of emergency services.¹³³

Also relating to oil discharge, the General Assembly passed legislation which permits political subdivisions to recover costs and expenses incurred to investigate, contain, and clean up a discharge of oil from an underground storage tank into state waters, lands, or storm drain systems.¹³⁴

126. Act of Apr. 4, 1992, ch. 712, 1992 Va. Acts 1082 (codified at VA. CODE ANN. § 27-37.1 (Repl. Vol. 1992)).

127. Act of Mar. 17, 1992, ch. 324, 1992 Va. Acts 410 (codified at VA. CODE ANN. § 45.1-361.41 (Cum. Supp. 1992)).

128. Act of Mar. 24, 1992, ch. 456, 1992 Va. Acts 583 (codified at VA. CODE ANN. §§ 62.1-44.34:14.1, :15.1, :19.1, :19.2 (Repl. Vol. 1992)). The bill defines "aboveground storage tank" as "any one tank or combination of tanks, including pipes, used to contain an accumulation of oil at atmospheric pressure, and the volume of which . . . is more than ninety percent above the surface of the ground." VA. CODE ANN. § 62.1-44.34:14 (Repl. Vol. 1992).

129. VA. CODE ANN. § 62.1-44.34:15.1 (Repl. Vol. 1992).

130. *Id.* § 62.1-44.34:19(B).

131. *Id.* § 62.1-44.34:15.1.

132. *Id.* § 62.1-44.34:19.1(A).

133. *Id.* § 62.1-44.34:19(B).

134. Act of Mar. 24, 1992, ch. 456, 1992 Va. Acts 538 (codified at VA. CODE ANN. § 62.1-44.34:18 (Repl. Vol. 1992)). Recovery is allowed for costs and expenses directly incurred for preventing or alleviating actual or threatened damages. VA. CODE ANN. § 62.1-44.34:18(C)(1) (Repl. Vol. 1992).

B. *Administrative Proceedings*

The State Water Control Board issued a final regulation effective July 18, 1990,¹³⁵ and an emergency regulation in 1992,¹³⁶ to comply with section 303(c)(2)(B) of the federal Clean Water Act, which requires water quality standards to be adopted for section 307(a) toxic pollutants. The 1990 regulation sets numerical limits for specific physical, chemical and biological characteristics of water. The regulation also adds numerical limits on dioxin to protect against consumption of contaminated water and aquatic organisms.¹³⁷ The emergency regulation, effective February 7, 1992, to February 6, 1993, sets standards for surface water to control toxic pollutants and includes numerical standards for the protection of aquatic life and human health. The regulation also amends the anti-degradation policy section to conform with federal regulations regarding water quality standards.¹³⁸

The Water Board has also promulgated regulations establishing the procedures to be followed in order to obtain a Virginia Water Protection Permit (VWPP) issued pursuant to section 62.1-44.2 of the Virginia Code and section 401 of the federal Clean Water Act.¹³⁹ The regulations require a VWPP "to be issued for activities that result in a discharge to surface waters, that require a federal permit or license, and are not permitted under the Virginia Pollutant Discharge Elimination System"¹⁴⁰ Conditions imposed on a VWPP relate to dredge and fill material and restrictions on the amount and times of water withdrawals by stream intakes, reservoirs, and hydroelectric facilities, and are designed to protect the beneficial uses of state waters.

The Water Board also promulgated regulations requiring the submission and approval of oil discharge contingency plans. The final regulations, effective January 29, 1992, apply to all facilities in Virginia which have an aggregate aboveground maximum storage or handling capacity equal to or greater than 25,000 gallons, and to all tank vessels which have a maximum capacity equal to or

135. 6:19 Va. Regs. Reg. 3085 (1990).

136. 8:12 Va. Regs. Reg. 2034 (1992).

137. 6:19 Va. Regs. Reg. at 3085.

138. 8:12 Va. Regs. Reg. at 2034.

139. 8:15 Va. Regs. Reg. 2454 (1992).

140. *Id.*

greater than 15,000 gallons and which transport or transfer oil upon state waters.¹⁴¹

The Water Board also adopted regulations, effective January 29, 1992, which require operators of tank vessels transporting or transferring oil upon state waters having maximum storage, handling or transporting capacity equal to or greater than 15,000 gallons of oil to establish their financial responsibility.¹⁴² The regulations are intended to assure that the operator has the necessary financial resources to conduct the proper response to a discharge of oil.

Water Board regulations effective July 1, 1992, provide for the issuance of a general permit for domestic sewage discharges of less than or equal to 1000 gallons per day.¹⁴³ The regulation "establishes standard limitations and monitoring requirements for effluents discharged by all facilities covered by the VPDES General Permit."¹⁴⁴

Finally, the Water Board issued regulations, effective June 3, 1992, that delineate the procedures to be followed to establish Surface Water Management Areas and to issue surface water withdrawal permits and surface water withdrawal certificates.¹⁴⁵ The regulations do not apply to nonconsumptive users, withdrawals of less than 300,000 gallons of water per month, or withdrawals from wastewater treatment systems. Surface Water Management Areas will be established by separate regulations. In those areas, water users in existence as of July 1, 1989, are required to apply for a withdrawal certificate containing a Board-approved water conservation or management plan. Water users in existence after July 1989 must apply for a withdrawal permit containing withdrawal limits, instream flow conditions, and a conservation and management plan.

C. *Judicial Activities*

1. Federal Courts

In *James City County v. EPA*,¹⁴⁶ the Fourth Circuit considered the district court's rejection of EPA's request for a remand to the

141. 8:7 Va. Regs. Reg. 1147 (1992).

142. 8:7 Va. Regs. Reg. 1160 (1992).

143. 8:17 Va. Regs. Reg. 2861 (1992).

144. *Id.*

145. 8:16 Va. Regs. Reg. 2641 (1992).

146. 955 F.2d 254 (4th Cir. 1992).

agency. EPA requested a remand after James City County appealed EPA's veto of the Army Corps of Engineer's decision to issue the county a permit to construct a reservoir under section 404(a) of the Clean Water Act.¹⁴⁷ The EPA vetoed the Corps' decision under section 404(c)¹⁴⁸ based on a finding that there were alternatives to the proposed reservoir which would create less adverse impact on the ecosystem.¹⁴⁹ After holding that the EPA's veto was improper, the district court ordered the Corps to issue the permit. On appeal, the Fourth Circuit held that the "substantial evidence" standard of review applied to the EPA's section 404(c) determination,¹⁵⁰ and ruled that the EPA's finding that the County had practicable alternative water sources was not supported by substantial evidence.¹⁵¹ Partially affirming the district court's judgment on this issue, the Fourth Circuit nevertheless remanded the case to the district court for further remand to EPA for the agency's consideration of a veto based on adverse environmental effects alone, an issue upon which the agency had yet to rule.¹⁵²

In *United States v. Ellen*,¹⁵³ the Fourth Circuit affirmed a criminal conviction and sentence under the Clean Water Act for improperly filling wetlands. The defendant unsuccessfully argued at trial that his conviction was unconstitutional because some government witnesses based their conclusions that the areas filled were wetlands on the 1989 federal wetlands identification manual,¹⁵⁴ while the conduct for which he was convicted occurred in 1987 and 1988.¹⁵⁵ Because the 1989 manual was an interpretive guide rather than a legislative rule, and because the regulatory definition of wetlands had not changed since 1977 and was the definition used

147. 33 U.S.C.A. § 1344(a)(West 1986). The district court's opinion was published at 758 F. Supp. 348 (E.D. Va. 1990).

148. 33 U.S.C.A. § 1344(c)(West 1986).

149. *James City County*, 955 F.2d at 258.

150. *Id.* at 259. *But see* *Bersani v. Robichaud*, 850 F.2d 36, 46 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989) (reviewing a § 404(c) veto decision by the EPA under the arbitrary and capricious standard). The Fourth Circuit noted, however, that the same conclusion would be reached under either standard. *James City County*, 955 F.2d at 259 n.5.

151. *James City County*, 955 F.2d at 259-60.

152. *Id.* at 260. The court was "heavily influenced" by EPA's "unequivocal representation" at oral argument that the agency would complete its determination on remand within 60 days of the court's decision and admonished that it would "view seriously any failure to comply with that representation." *Id.*

153. 961 F.2d 462 (4th Cir. 1992).

154. FEDERAL INTERAGENCY COMM. FOR WETLAND DELINEATION, FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS 1 (1989).

155. *Ellen*, 961 F.2d at 465.

in the jury instructions, the Fourth Circuit held that the manual was not a "law" within the meaning of the ex post facto clause.¹⁵⁶

In *Natural Resources Defense Council v. Watkins*,¹⁵⁷ a case involving the adequacy of plaintiff association's allegation of representational standing, the Fourth Circuit rejected the district court's determination that affidavits submitted by individual members of the association did not allege with sufficient specificity that the affiants utilized portions of the Savannah River affected by a proposed discharge from a nuclear reactor.¹⁵⁸

Distinguishing the facts of the case from those in *Lujan v. National Wildlife Federation*,¹⁵⁹ the Fourth Circuit held that the district court was not required to assume any particularized geographical usage by the affiants in order to establish the injury necessary to confer standing.¹⁶⁰ The Fourth Circuit also rejected the district court's reasoning that the defendant was entitled to summary judgment on the issue of standing because, while the proposed discharge would exceed its National Pollutant Discharge Elimination System (NPDES) permit thermal effluent limitations at the point of discharge, water temperature would be within the permit limitation at the point the effluent ultimately leaves the federal facility and enters the publicly accessible portion of the Savannah River.¹⁶¹ The court held that the allegations of adverse derivative consequences of on-site wetlands destruction created a material issue of fact regarding the potential for cognizable harm to the Savannah River.¹⁶²

156. *Id.* at 464-65. The defendant's due process challenge to his conviction for knowingly filling in wetlands was rejected on the grounds that there was substantial evidence for the jury to conclude that he possessed actual knowledge that he was filling in wetlands and thus defendant had "fair warning" that he was subject to the Clean Water Act's criminal penalties. *Id.* at 466-67.

In an earlier unpublished opinion, wherein the Fourth Circuit found that the Clean Water Act confers upon EPA independent enforcement authority over § 404 violations, the court held that the EPA's wetlands delineation manuals were created to provide interpretive guidance, not to expand federal jurisdiction. *Hobbs v. United States*, 947 F.2d 941 (unpublished decision), 22 *Env'tl. L. Rep.* 20,331, 20,333 (4th Cir. Nov. 8, 1991).

157. 954 F.2d 974 (4th Cir. 1992).

158. *Id.* at 979.

159. 497 U.S. 871 (1990).

160. *Watkins*, 954 F.2d at 979.

161. *Id.*

162. *Id.* at 980. The appellate court reversed the district court's imposition of summary judgment and remanded the case for a factual hearing on the issue of standing. The Fourth Circuit further affirmed the district court's refusal to issue a preliminary injunction and refused to issue declaratory judgment until the standing issue is resolved. *Id.* at 984.

Two cases arose out of the continuing efforts of Virginia Beach to effect a sixty million-gallon-per-day interbasin transfer of water from the Roanoke River basin. The city proposes to construct an eighty-five mile, 240 million-gallons-per-day pipeline from Lake Gaston in Brunswick County, Virginia.¹⁶³ The Fourth Circuit considered the scope of involvement by the Army Corps of Engineers and Federal Energy Regulatory Commission in the project in both cases.

In *Roanoke River Basin Ass'n v. Hudson*,¹⁶⁴ the Court upheld the Corps' modification of the project permit to require maintenance of preconstruction flows during bass spawning season.¹⁶⁵ The court found that the Corps was not arbitrary and capricious in finding (1) the project posed no significant impact on water quality, (2) no cumulative adverse environmental impact, and (3) no reasonably foreseeable increased need for water consumption in North Carolina.¹⁶⁶ Therefore, an environmental impact statement was not required under the National Environmental Policy Act.¹⁶⁷ In *North Carolina v. Virginia Beach*,¹⁶⁸ the Fourth Circuit held that where the Corps has completed an environmental review of a project and construction has already begun, further construction on portions of the project outside FERC jurisdiction may not be delayed until FERC completes its review of the environmental impact of the project as a whole.¹⁶⁹

In a case dealing with issues of ripeness and the EPA's authority under the Clean Water Act, the Fourth Circuit held in *West Virginia Coal Ass'n v. Reilly*¹⁷⁰ that EPA could use an internal policy as a basis for objecting to draft NPDES permits which utilized surface coal mine related fills and in-stream treatment ponds.¹⁷¹

163. See Ryan, *supra* note 1, at 599-601; Ron Brown, *Payne's Water Fight No Joke: Southside Fears Pipeline to Virginia Beach*, ROANOKE TIMES & WORLD-NEWS, June 11, 1992 at 1.

164. 940 F.2d 58 (4th Cir. 1991).

165. *Id.* at 61-62.

166. *Id.* at 64-66.

167. *Id.*

168. 951 F.2d 596 (4th Cir. 1991).

169. *Id.* at 605.

170. 932 F.2d 964 (unpublished opinion), 22 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,092 (4th Cir. May 13, 1991).

171. 22 *Envtl. L. Rep.* at 20,094.

In *Southern Pines Associates v. United States*,¹⁷² the Fourth Circuit held that judicial review of a compliance order under section 301 of the CWA for illegally discharging into wetlands was precluded prior to enforcement action or imposition of penalties.¹⁷³

In *P.H. Glatfelter Co. v. EPA*,¹⁷⁴ the Fourth Circuit reviewed the EPA's placement of (1) a North Carolina pulp and paper mill on a list of point sources discharging toxic pollutants believed to be impairing attainment of state standards and (2) a portion of the French Board River located downstream from the mill on a list of waters not likely to meet North Carolina's water quality standards.¹⁷⁵ The court found EPA's action to be a preliminary step which preceded permanent modification proceedings and not the promulgation of an individual control strategy for which judicial review was available.¹⁷⁶

In *Natural Resources Defense Council v. EPA*,¹⁷⁷ plaintiffs claimed that the EPA Administrator capriciously approved Maryland's ambient water quality standard for benzene and that the Administrator violated his nondiscretionary duty under the CWA to develop and revise fully EPA's water quality criteria for dioxin to reflect the latest scientific knowledge about dioxin. Following earlier litigation between the parties, EPA developed dioxin water quality criteria documents and found insufficient data to develop a national criteria for the effects of dioxin on aquatic toxicity. In 1989, Maryland adopted a 1.2 parts per quadrillion standard for dioxin, which was approved by EPA.¹⁷⁸ In April of 1990, EPA published regulations indicating that it would continue to adopt a 0.013 parts per quadrillion dioxin water quality standard when it was responsible for adopting quality standards.¹⁷⁹ The court held that section 1313(c)(2)(B)¹⁸⁰ explicitly contemplates EPA adoption of non-numerical criteria for toxics and authorizes states to adopt

172. 912 F.2d 713 (4th Cir. 1990).

173. *Id.* at 716. In *Hampton Venture No. One v. United States*, 768 F. Supp. 174 (E.D. Va. 1991), the district court reviewed a line of decisions by the Fourth and Seventh Circuits and the District Court of Delaware before holding that pre-enforcement compliance or cease and desist orders issued by EPA or the Corps under the Clean Water Act are not judicially reviewable. *Id.* at 175.

174. 921 F.2d 516 (4th Cir. 1990).

175. *Id.* at 516-17.

176. *Id.* at 517-18.

177. 770 F. Supp. 1093 (E.D. Va. 1991).

178. *See id.* at 1095.

179. *Id.* at 1094.

180. 33 U.S.C. § 1313(c)(2)(B) (1988).

criteria based on other methods consistent with EPA published guidelines.¹⁸¹

In *Arlington Forest Associates v. Exxon Corp.*,¹⁸² the district court determined that the Virginia Supreme Court, if presented with the issue, would hold that the storage and removal of gasoline in underground tanks is not an abnormally dangerous activity for which common law strict liability should be imposed.¹⁸³

2. Virginia State Courts

Several cases arose in the context of the State Water Control Law dealing with the issue of standing.¹⁸⁴ In *Environmental Defense Fund v. Water Control Board*,¹⁸⁵ the court of appeals held that where the basic law contains a specific standing requirement, this requirement controls over the standardized court review procedures set forth in the Virginia Administrative Process Act (VAPA).¹⁸⁶ The Environmental Defense Fund (EDF) had unsuccessfully challenged in the Circuit Court for the City of Richmond both (1) the Board's use of an internal memorandum authorizing regional offices to issue flow-tiered permits when issuing an amended permit and (2) the Board's denial of EDF's request for a formal hearing following the Board's grant of such an amended permit to a poultry processing plant.¹⁸⁷

The court of appeals reasoned that under the State Water Control Law¹⁸⁸ only an "owner aggrieved" has standing, and "owner" is defined to mean the individuals or groups that control an actual or potential discharge.¹⁸⁹ Although the VAPA allows a "party aggrieved" to appeal a case decision, the court of appeals held that

181. *NRDC*, 770 F. Supp. at 1100.

182. 774 F. Supp. 387 (E.D. Va. 1991).

183. *Id.* at 391.

184. For a comprehensive discussion on the law of standing as applied to appeals from Virginia administrative agencies, see Brian L. Buniva, Recent Developments in Virginia Administrative Law, Address Before the Winter Meeting of the Virginia Bar Association (Jan. 18, 1992) (on file with the U. RICH. L. REV.). For a Note urging enactment of a legislative standing provision in Virginia, see W. Scott Magargee, Note, *Protecting the Environment: Creating a Citizen Standing-to-Sue Statute in Virginia*, 26 U. RICH. L. REV. 235 (1991).

185. 12 Va. App. 456, 404 S.E.2d 728 (1991).

186. *Id.* at 462, 404 S.E.2d at 732.

187. *Id.* at 459, 404 S.E.2d at 730.

188. VA. CODE ANN. § 62.1-44.29 (Repl. Vol. 1992).

189. *EDF*, 12 Va. App. at 465, 404 S.E.2d at 733.

“case decision” is not defined to include a denial of a request for a formal hearing.¹⁹⁰

Similarly, in *Town of Fries v. State Water Control Board*,¹⁹¹ various individuals and organizations challenged the State Water Control Board’s issuance of an amended VPDES permit to the City of Galax to build an enlarged sewage treatment plant upstream from petitioners. The trial court held that petitioners were neither “parties aggrieved” under the VAPA nor “owners aggrieved” under the State Water Control Law.¹⁹² The court of appeals affirmed the circuit court’s granting of the Board’s demurrer, relying on *Environmental Defense Fund v. State Water Control Board*.¹⁹³

In *Environmental Defense Fund v. Virginia State Water Control Board*,¹⁹⁴ the Circuit Court for the City of Richmond held that a water quality standard adopted by the State Water Control Board is a regulation for the purposes of the Administrative Process Act. Applying the standing test enunciated in *Sierra Club v. Morton*,¹⁹⁵ the court found that downstream riparian owners are persons affected by water quality standards.¹⁹⁶

In a subsequent proceeding the plaintiffs sought a stay of the Board’s decision to amend Westvaco’s VPDES permit.¹⁹⁷ The court rejected plaintiffs’ contention that the harm from dioxin effluent is irreparable, reasoning that any delay in the permitting process would exacerbate this harm because the company would, in the interim, not be subject to any dioxin limitations.¹⁹⁸ Following this, the plaintiffs challenged the adoption of a water quality standard for dioxin on the grounds that it did not comport with the State Water Control Law. The court held that the Board properly used EPA calculation methodologies and reasonably accounted for

190. *Id.* at 464, 404 S.E.2d at 733.

191. 13 Va. App. 213, 409 S.E.2d 634 (1991).

192. *Id.* at 215, 409 S.E.2d at 636.

193. *Id.* at 215-17, 409 S.E.2d at 636-37. On October 25, 1990, the Circuit Court of Fairfax County held that only “owners” as defined in VA. CODE ANN. §§ 62.1-44.16, .17 and .19 (Repl. Vol. 1992) have standing to petition for a public hearing on the reissuance of a VPDES permit pursuant to VA. CODE ANN. § 62.1-44.25 (Repl. Vol. 1992). *Herrity v. Water Control Board*, 21 Va. Cir. 422, 423 (Fairfax County 1990).

194. 22 Va. Cir. 412 (Richmond City 1991).

195. 405 U.S. 727 (1972).

196. *EDF*, 22 Va. Cir. at 415-16.

197. 25 Va. Cir. 64 (Richmond City 1991).

198. *Id.* at 65.

other factors in its determination of the standard.¹⁹⁹ Finally, the court denied EDF's motion for reconsideration of the court's ruling on the propriety of the establishment of a water quality standard for dioxin, again finding that the Board achieved the purposes of the State Water Control Law and acted within its legislative authority.²⁰⁰

In *State Water Control Board v. Appalachian Power Co.* (APCo),²⁰¹ the Board petitioned the court of appeals for a rehearing of a panel's earlier ruling affirming the trial court's invalidation of the Board's chlorine water quality standard.²⁰²

APCo argued that new regulations since promulgated by the Board rendered the validity of the challenged regulations moot, and sought its attorneys' fees under the Act.²⁰³ The court affirmed its earlier decision and held that the Board's adoption of superseding regulations did not moot whether the regulations originally challenged were valid and whether they controlled the extent of discharge into state waters from the date of their enactment until the effective date of the new regulations.²⁰⁴ The court found that the "same controversy which existed between the parties" throughout the litigation still existed as a "viable and justiciable issue."²⁰⁵ The court further recognized that even where the parties no longer have a legally cognizable interest in the outcome of the litigation, a court may proceed to adjudicate a controversy under the "capable of repetition, but evading review" exception to the requirements for standing or justiciability.²⁰⁶ The court went on to note that the validity of regulations from other agencies which must also conform with the requirements of the Virginia Administrative Procedure Act may have been called into question by the earlier panel decision:

While other agencies who are not a party to this proceeding and their regulations are not in issue, the SWCB and APCo, as well as other agencies, have a real interest in having a resolution of the

199. *Id.* at 68-70.

200. *Id.* at 71.

201. 12 Va. App. 73, 402 S.E.2d 703 (1991).

202. 9 Va. App. 254, 386 S.E.2d 633 (1989); see Ryan, *supra* note 1, at 604.

203. *Appalachian Power*, 12 Va. App. at 74, 402 S.E.2d at 704.

204. *Id.* at 75-76, 402 S.E.2d at 704-05.

205. *Id.* at 75, 402 S.E.2d at 704.

206. *Id.* (quoting *Murphy v. Hunt*, 455 U.S. 478, 481-82 (1982)).

question because the question is capable of repetition if the panel decision looms unresolved.²⁰⁷

Finding no basis in the record to support the contention that the Board acted unreasonably in attempting to promulgate its water quality standards or in prosecuting its appeals, the court denied APCo's claim for attorneys' fees.²⁰⁸

V. GENERAL ENVIRONMENTAL LEGISLATION

The 1991 General Assembly passed legislation requiring any party subject to a temporary or permanent environmental injunction to demonstrate financial capability to comply with the injunction.²⁰⁹ The legislation applies only when a court has awarded an injunction to the Commonwealth requiring that a party abate, control, prevent, remove, or contain any substantial or imminent threat to the public health or the environment, or develop a closure plan to address such a threat that might result when a facility ceases operation.²¹⁰

The 1991 General Assembly also established the Virginia Environmental Emergency Response Fund to be created from civil penalties and charges imposed on persons who violate regulations and orders of the State Water Control Board, Department of Air Pollution Control, or the Department of Waste Management.²¹¹ The fund is to be used to respond to environmental pollution incidents and to develop and implement corrective actions. Administration and disbursement of money from the fund is to be made by the State Comptroller at the written request of the department heads of the Department of Air Pollution Control, the Department of Waste Management, and the State Water Control Board. Requests exceeding \$100,000 must be approved by the Governor.²¹²

The 1992 General Assembly passed legislation authorizing the creation of the Department of Environmental Quality (DEQ) by consolidating programs, functions, and staff of the State Water

207. *Appalachian Power*, 12 Va. App. at 75-76 n.1, 402 S.E.2d at 705 n.1.

208. *Id.* at 77, 402 S.E.2d at 705-06.

209. Act of Mar. 15, 1991, ch. 236, 1991 Va. Acts 335 (codified at VA. CODE ANN. § 8.01-631.1 (Repl. Vol. 1992)).

210. VA. CODE ANN. § 8.01-631.1 (Repl. Vol. 1992).

211. Act of Apr. 3, 1991, ch. 718, 1991 Va. Acts 1393 (codified at VA. CODE ANN. §§ 10.1-2500 to -2502 (Cum. Supp. 1992)).

212. VA. CODE ANN. § 10.1-2502 (Cum. Supp. 1992).

Control Board, Department of Air Pollution Control, Department of Waste Management and Council on the Environment.²¹³ Effective April 1, 1993, the various boards and departments are to be consolidated to enable coordination of permit review and issuance procedures, development of uniform administrative systems, and coordination of state reviews with federal agencies. The DEQ is empowered to implement all regulations adopted by the boards and to administer funds appropriated for environmental programs.²¹⁴

Under the new legislation, state agencies will be required to submit environmental impact reports on all major state projects to the DEQ.²¹⁵ Within sixty days of receipt of the report, the DEQ will be required to review the report and submit a statement to the Governor regarding the environmental impact of the project.²¹⁶ Approval of the Governor will be required for the funding of a major state project.²¹⁷

213. Act of Apr. 15, 1992, ch. 887, 1992 Va. Acts 1667 (codified at VA. CODE ANN. §§ 10.1-1182 to -1192 (Cum. Supp. 1992)).

214. VA. CODE ANN. § 10.1-1183 (Cum. Supp. 1992).

215. *Id.* § 10.1-1188. A major state project is defined as any project costing \$100,000 or more. *Id.*

216. *Id.* § 10.1-1189.

217. *Id.* § 10.1-1190.

