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ENVIRONMENTAL LAW

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I. INTRODUCTION

Since publication of the 1994 Annual Survey of Virginia Law¹ several significant judicial decisions, state statutes and state regulatory initiatives have demonstrated the increasing nexus between federal and Virginia environmental law. The federal and state courts have helped define the interrelationships between environmental law, tort law, land use law, and procedural/jurisdictional issues related to environmental law.

In the absence of regulatory reform on the federal level, the General Assembly has enacted several significant statutes. Two new statutes seek to encourage voluntary cleanup of contaminated properties while removing the fear of civil prosecution in most instances. A further effort to encourage proactive environmental steps by industry can be found in legislation designed to give tax incentives for installation of certain types of pollution control equipment. The regulatory front has also seen agency initiatives which appear to be designed to achieve a balance between improvement of the environment and reduction of

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1. Brian L. Buniva & James R. Kibler, Jr., *Annual Survey of Virginia Law: Environmental Law*, 28 U. RICH. L. REV. 1041 (1994).

unnecessary burdens on Virginia businesses which do not significantly inhibit environmental progress.

This article addresses selected developments in the federal and state legislative and regulatory schemes, and case law from Virginia state courts, the United States District Courts for the Eastern and Western Districts of Virginia, the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court. The period covered is from mid-June of 1994 through mid-June of 1995.

II. JUDICIAL DECISIONS AFFECTING ENVIRONMENTAL LAW

A. *Constitutional Law Decisions*

The federal courts decided cases involving takings, the Dormant Commerce Clause and vested rights as those doctrines relate to environmental law during the last twelve months. The United States Supreme Court revisited the issue of regulatory takings, applying the doctrine to land use and zoning in *Dolan v. City of Tigard*,² a five-four decision authored by Chief Justice Rehnquist. The Court adopted the new "rough proportionality" test for determining whether a city's exaction of land dedication as a condition to issuing a development permit constituted an uncompensated taking in violation of the Fifth Amendment to the U.S. Constitution. Under this test, a local government is required to make an individual determination that a condition imposed upon the development is roughly proportional to the impact caused by the development.³

In *Dolan*, the City of Tigard, Oregon, had conditioned the approval of Dolan's building permit on Dolan's dedication of a portion of her property for flood control and traffic improvements.⁴ The Court began its analysis of this situation with the statement that one of the principal purposes of the Takings Clause of the Fifth Amendment is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a

2. 114 S. Ct. 2309 (1994).

3. *Id.* at 2329-30.

4. *Id.* at 2312.

whole."⁵ Citing *Nollan v. California Coastal Commission*⁶ and *Kaiser Aetna v. United States*,⁷ the Court noted that if the city had simply required Dolan to dedicate a strip of her land for public use rather than conditioning the grant of the redevelopment permit upon such a dedication, a taking would have occurred since such public access deprives the landowner of the right to exclude others, a right which is one of the most essential sticks in the bundle of property rights.⁸ Moreover, the Court noted that:

Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.⁹

The Court first examined the case to determine whether there was an essential nexus between the legitimate state interest and the permit condition.¹⁰ If the nexus exists, then the degree of connection between the permit conditions and the projected impact of the development must be evaluated to see if there is a rough proportionality between the condition imposed and the nature and extent of the proposed development.¹¹

The Court found that an essential nexus existed between the City of Tigard's requirement that Ms. Dolan dedicate portions of her property lying within the flood plain for improvement of storm drainage and dedication of property adjacent to the flood plain as a bicycle/pedestrian pathway, and the legitimate government purposes of preventing flooding along the creek and

5. *Id.* at 2316 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

6. 483 U.S. 825, 831 (1987).

7. 444 U.S. 164, 176 (1979).

8. *Dolan*, 114 S. Ct. at 2316. It should be noted that the Court classified the decision of whether or not to issue the redevelopment permit as "an adjudicative [as distinguished from a legislative] decision to condition petitioner's application for a building permit on an individual parcel." *Id.* Moreover, the conditions imposed upon Dolan were a requirement that she deed portions of her property to the city, not merely suffer use limitations on her own property. *Id.*

9. *Id.* at 2317 (citations omitted).

10. *Id.*

11. *Id.* at 2317, 2319-20.

reducing traffic congestion.¹² The Court held, however, that there was no rough proportionality between flood protection and the requirement for Dolan to deed her property to the city.¹³ With respect to the bicycle/pedestrian pathway dedication, the Court found that the city did not meet its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the proposed development was reasonably related to the required dedication of property.¹⁴ The Court reversed and remanded the case to allow the city to quantify its findings in support of the dedication for the bicycle pathway beyond the conclusory statement that the dedication could offset some of the traffic demand generated by the proposed project.¹⁵ The Court emphasized that “[n]o precise mathematical calculation is required” but stated that some quantification of impact related to the exaction is necessary.¹⁶

In *Chambers Medical Technologies of South Carolina v. Bryant*,¹⁷ the United States Court of Appeals for the Fourth Circuit analyzed the constitutionality of a South Carolina statute regulating infectious medical waste.¹⁸ Chambers challenged the decision of the district court holding that a “fluctuating treatment cap” mandated by the statute was constitutional under the Commerce and the Equal Protection Clauses.¹⁹ The South Carolina Department of Health and Environmental Control (DHEC) challenged the district court’s decision that the

12. *Id.* at 2317-18.

13. “The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control. . . . It is difficult to see why recreational visitors trampling along petitioner’s floodplain easement are sufficiently related to the city’s legitimate interest in reducing flooding problems along Fanno Creek, and the city has not attempted to make any individualized determination to support this part of its request.” *Id.* at 2320-21 (citations omitted).

14. *Id.* at 2321.

15. *Id.* at 2322.

16. *Id.*

17. 52 F.3d 1252 (4th Cir. 1995).

18. See S.C. CODE ANN. §§ 44-93-10 to -240 (Law. Co-Op. 1993).

19. *Chambers Medical Technologies*, 52 F.3d at 1255. The statute imposed a cap on the amount of infectious waste a permitted incinerator facility could incinerate in any month to no more than one-twelfth of the annual estimate of infectious waste the Department of Health and Environmental Control (DHEC) expected to be generated within South Carolina each year. *Id.* at 1257.

refrigeration requirement of the statute violates the Commerce Clause.²⁰

The Fourth Circuit's Commerce Clause analysis began with a recitation of the well-established principle that the "dormant" Commerce Clause "prohibits . . . legislation that 'unjustifiably . . . discriminate[s] against or burden[s] the interstate flow of articles of commerce.'"²¹ One of two tests applies depending upon the type of regulation at issue.²² Under one test, if the "statute discriminates against interstate commerce on its face, in its practical effect, or in its purpose, 'a virtually per se rule of invalidity' applies."²³ This type of discrimination occurs when the statute provides "for differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."²⁴ In order for a statute to survive the application of the per se rule, "the state must demonstrate that 'the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism'"²⁵ and that "there are no 'nondiscriminatory alternatives adequate to preserve the local interests at stake.'"²⁶

The second test, known as the *Pike v. Bruce Church, Inc.*²⁷ balancing test, applies if a state law regulates even-handedly with regard to in-state and out-of-state interests and the burdens on interstate commerce are only incidental.²⁸ Under such circumstances the law will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.²⁹ There is no clear line separating the category of state regulation that is virtually per se invalid from the regulation subject to the less intense balancing scrutiny.³⁰

20. *Id.* at 1263-65.

21. *Id.* at 1256 (quoting *Oregon Waste Sys. v. Dept. of Env'tl. Quality*, 114 S. Ct. 1345, 1349 (1994)).

22. *Id.*

23. *Id.* (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992)).

24. *Id.* (quoting *Oregon Waste Sys. v. Dept. of Env'tl. Quality*, 114 S. Ct. 1345, 1349-50 (1994)).

25. *Id.* (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992)).

26. *Id.* (quoting *Chemical Waste Management v. Hunt*, 504 U.S. 334, 342 (1992)).

27. 397 U.S. 137, 142 (1970).

28. *Chambers Medical Technologies*, 52 F.3d at 1256-57.

29. *Id.* at 1257.

30. *Id.*

The Fourth Circuit held that the fluctuating treatment cap does not discriminate against interstate commerce on its face, nor in its practical effect.³¹ The court reasoned that the method by which the treatment cap is established uniformly burdens infectious waste generated both in-state and out-of-state.³² Moreover, nothing prohibits Chambers, or any other permitted commercial waste incineration facility, from choosing to incinerate infectious waste generated out-of-state to the exclusion of waste generated in-state.³³

The court remanded for further proceedings in the district court on the question of whether the purpose of the cap requirement was to discriminate against interstate commerce.³⁴ The DHEC urged the court not to remand the case, arguing that even if the underlying purpose of the cap is to discriminate against interstate waste, the discrimination is justified by a valid interest unrelated to economic protectionism, and that there are no nondiscriminatory alternatives adequate to preserve the noneconomic protectionist interest.³⁵ The court found that the interests advanced by DHEC³⁶ were valid and unrelated to economic protectionism; however, the court also determined that there were nondiscriminatory alternatives that would equally or better further these interests.³⁷ The court concluded that if it must employ heightened scrutiny because of the legislation's discriminatory purpose, then the statute would be held unconstitutional.³⁸ If, on the other hand, the *Pike* balancing test is applied, the statute would pass constitutional muster under the Commerce Clause.³⁹ The court also conclud-

31. *Id.* at 1258.

32. *Id.*

33. *Id.*

34. *Id.* at 1260.

35. *Id.* at 1261.

36. The valid noneconomic protectionist factors cited by DHEC were: (i) reduction of the disruption to traffic flow near facilities, (ii) prevention of leaking trailers, and (iii) minimizing the deposition of noncombusted material in landfills. *Id.*

37. For example, the State could improve traffic congestion by requiring facilities to supply adequate parking for trucks waiting to unload at the facility; it could regulate the types of containers used to transport the waste to avoid leaks; and it could impose more stringent incineration requirements to ensure more complete combustion. *Id.*

38. *Id.*

39. *Id.*

ed that the cap passed constitutional muster under the Equal Protection Clause, holding that the cap is rationally related to the legitimate state interests articulated with regard to the Commerce Clause analysis.⁴⁰ The court viewed the question "as a close one," perhaps defining the outer limits of Equal Protection Clause analysis under the rational relationship test in the Fourth Circuit.⁴¹

Additionally, the court affirmed the invalidation of the refrigeration requirement for waste that travels more than 24 hours after it leaves its point of generation. The court agreed with the district court that this requirement discriminates against interstate commerce in its practical effect, since only interstate shipments of waste would likely be burdened by the requirement.⁴² Consequently, the court applied heightened scrutiny, and the regulation could not withstand the glare.⁴³

B. *Personal Injury and Property Damage Cases*

*Adams v. Star Enterprise*⁴⁴ involved an action brought by landowners against operators of an oil distribution facility in Fairfax County. The landowners sought compensation for damages to their properties, even though their properties were not presently contaminated by an underground oil spill coming from the facility.⁴⁵ The complaint was brought under claims of private nuisance, negligence and strict liability, based upon an alleged violation of the Virginia State Water Control Law.⁴⁶ The district court found that Virginia law does not permit re-

40. *Id.* at 1263.

41. *Id.*

42. *Id.* at 1264.

43. *Id.*

44. 51 F.3d 417 (4th Cir. 1995).

45. *Id.* at 421.

46. *Id.* VA. CODE ANN. § 62.1-44.34:18 (Cum. Supp. 1995), (prohibiting the discharge of oil into or upon waters, lands, or storm drain systems within the Commonwealth). The statute makes any person who so discharges oil liable to any person for injury or damage to person or property, real or personal, including the loss of income, loss of the means to produce income, or loss of the use of the damaged property for recreational, commercial, industrial, agricultural or other reasonable uses that are caused by such discharge. VA. CODE ANN. § 62.1-44.34:18(C)(4) (Cum. Supp. 1995). The statute is a strict liability statute and entitles the prevailing plaintiff to an award of reasonable attorneys' fees and costs. VA. CODE ANN. § 62.1-44.34:18(F).

covery under the facts alleged by the landowners and dismissed each count of the Complaint and the United States Court of Appeals for the Fourth Circuit affirmed.⁴⁷

The Fourth Circuit described the fundamental issue presented as "whether property owners may recover for the diminution in value of their property and their reasonable fear of negative health affects resulting from the proximity of their property to an environmental hazard such as an underground oil spill."⁴⁸ After a review of existing Virginia case law, the Court concluded that the landowners could not recover damages under the theories advanced.⁴⁹ The court distinguished *Foley v. Harris*⁵⁰ by noting that in *Foley* the unsightly automobiles that were deemed to constitute a private nuisance were in fact visible from the plaintiff's property, a condition not existent in the facts alleged by landowners in *Adams*.⁵¹ The court stated that "[u]nder Virginia law, in order to recover for a nuisance, a property owner must show 'the nuisance complained of will or does produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities. . . .'"⁵²

The Fourth Circuit noted that "[i]n all Virginia cases permitting recovery for private nuisance, the activity or condition complained of was physically perceptible from the plaintiff's property."⁵³ In *Adams*, the complaint indicated that the underground oil spill was incapable of detection from the landowners' properties.⁵⁴ The court concluded that to permit a nuisance claim under these facts would extend Virginia nuisance law beyond its current boundaries, which the Fourth Circuit declined to do absent a clear indication from Virginia courts.⁵⁵

47. *Adams*, 51 F.3d at 421. The district court decision can be found at 851 F. Supp. 770 (E.D. Va. 1994). The District Court action was dismissed on a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

48. *Adams*, 51 F.3d at 421-22.

49. *Id.*

50. 223 Va. 20, 286 S.E.2d 186 (1982) (noting that maintenance of junked automobiles on property constituted a private nuisance).

51. *Adams*, 51 F.3d at 422-23.

52. *Id.* at 422 (quoting *Bragg v. Ives*, 149 Va. 482, 140 S.E. 656 (1927)).

53. *Id.* at 422-23.

54. *Id.* at 423.

55. *Id.*

As to the negligence count, the district court had assumed that Star Enterprise's negligence caused the oil spill, but dismissed the negligence claim on the ground that the spill was not the proximate cause of the landowners' alleged damages.⁵⁶ The Fourth Circuit held that, under Virginia law, absent a physical impact on the landowners' properties, the alleged damages are no more compensable in a cause of action for negligence than in a cause of action for private nuisance.⁵⁷

The property damage claim fared no better. The landowners argued that Star Enterprise's negligence interfered with their ability to contract with third parties for the sale of their homes because the oil spill created a stigma which reduced the value of their homes due to "fear in the minds of the buying public."⁵⁸ The court characterized these damages as purely economic or pecuniary losses which are generally non-compensable in the absence of direct physical impact.⁵⁹ The court also noted that the landowners had not cited any cases establishing an exception to the general rule which disallows recovery for economic harm absent physical impact.⁶⁰ Thus, the court concluded that the landowners could not recover for the alleged negligence without first demonstrating an actual physical encroachment on or damage to their properties.⁶¹

Finally, the court held that the Virginia State Water Control Law precluded recovery for mere economic losses caused by the diminution in value of property that is not physically impacted by an oil discharge.⁶² The court stated,

56. *Id.*

57. *Id.* The court of appeals cited *Hughes v. Moore*, 214 Va. 27, 197 S.E.2d 214 (1973), for the proposition that, "where conduct is merely negligent, not willful, wanton, or vindictive, and physical impact is lacking, there can be no recovery for emotional disturbance alone." *Adams*, 51 F.3d at 423. In order to recover for the emotional fears and apprehensions claimed, the plaintiff must demonstrate by clear and convincing evidence that the emotional stress produced a physical injury. *Id.* "Thus, [the] landowners' fears of future harm and ill-health effects from the migration of the oil spill are not compensable under Virginia law absent of showing a physical impact or physical injury." *Id.*

58. *Id.* at 424.

59. *Id.* at 425.

60. *Id.*

61. *Id.* at 424-25.

62. *Id.*

If the Virginia Legislature had wished not only to extend liability for oil spills to reasonable conduct [by adoption of a strict liability statute], but also to expand that liability beyond common-law boundaries and extend it to all property owners whose property values were adversely affected by an oil spill, it certainly would have done so in far more express terms. We therefore conclude the district court correctly dismissed Landowners' claim for damages under Virginia's State Water Control Law.⁶³

Damage recoveries for environmental contamination fared no better under South Carolina law in *Benesh v. Amphenol Corp. (In re Wildewood Litigation)*.⁶⁴ Benesh and ten other property owners sued Amphenol alleging nuisance, trespass and negligence for the release of trichloroethane (TCE) into groundwater and surrounding landowners' properties.⁶⁵ The landowners lived in a subdivision downhill from the plant. After the TCE was used in the plant, it was discharged into a "percolation basin," described as a depression dug in the ground, where the TCE was left to evaporate.⁶⁶ Amphenol expected that the TCE that did not evaporate would be bound in the soil and would not migrate to the groundwater.⁶⁷ The TCE levels of some of the owners' properties in a nearby lake fell within a range near or above the EPA and the South Carolina Department of Health and Environmental Control (DHEC) drinking water contamination levels.⁶⁸ However, the plaintiffs' drinking water was not contaminated by the TCE at issue.⁶⁹ The court found that there was sufficient evidence in the record from which a jury could reasonably find that Amphenol was not negligent per se for the discharge of the TCE into the percolation basin.⁷⁰ The Fourth Circuit concluded that a regulation prohibiting any waste amenable to treatment from being discharged into the waters of the state without such treatment was not violated

63. *Id.* at 426.

64. 52 F.3d 499 (4th Cir. 1995).

65. *Id.* at 501.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 502-03.

since the jury could reasonably find that Amphenol treated the TCE by releasing it into the percolation basin first.⁷¹

The court also affirmed the directed verdict on the private nuisance claim, holding that because the TCE levels did not rise to the level of toxicological concern, the landowners presented no evidence that Amphenol had unreasonably interfered with the use and enjoyment of their property.⁷² It appears that the Fourth Circuit interprets South Carolina law to mean that only an impact which rises to the level of a toxicological concern constitutes an unreasonable interference with the use and enjoyment of another's property. Apparently, once the impact reaches that level a diminution in property values will be deemed to be an unreasonable interference with the use and enjoyment of property, justifying a recovery for damages on a nuisance claim. Assuming this analysis to be accurate, it appears that recovery of damages for a private nuisance under South Carolina law for environmental contamination requires more than the physical impact required under Virginia law as articulated in *Adams*.⁷³

*Nasim v. Warden, Maryland House of Correction*⁷⁴ involved a pro se § 1983 and § 1985 complaint⁷⁵ by a state prisoner who alleged forced exposure to asbestos and resulting psychological and medical injuries. The district court dismissed the complaint on the grounds that it was barred by the statute of limitations.⁷⁶ The Fourth Circuit, in a two-one decision, disagreed and reversed, holding that it was not apparent from the face of the complaint that it was not filed within the prescribed statute of limitations.⁷⁷

The analysis presented by the majority of the court related to the application of 28 U.S.C. § 1915(d), which permits a court to

71. *Id.* at 502 n. 2, 503.

72. *Id.* at 503. The owners produced testimony of an expert real estate appraiser describing sixty to eighty percent decreases in the values of the plaintiffs' properties as a result of the TCE plume. *Id.* at 502. It does not appear that the jury verdict on the trespass claim was appealed to the court of appeals.

73. *See supra* notes 44-63 and accompanying text.

74. 42 F.3d 1472 (4th Cir. 1995).

75. Federal Civil Rights Act, 42 U.S.C. §§ 1983, 1985 (1988).

76. *Nasim*, 42 F.3d at 1474.

77. *Id.* at 1473-1474.

dismiss an *in forma pauperis* complaint if it is satisfied that the action is factually (its allegations are fantastic, delusional or otherwise clearly baseless) and legally (the claims are based on an indisputably meritless legal theory) frivolous.⁷⁸ Of interest to environmental lawyers, however, is the court's determination that the plaintiffs' legal theory had an arguable basis in law and fact. The plaintiff alleged that the warden had purposely or with deliberate indifference exposed the prisoner to a toxic substance that endangered his health, a violation of his Eighth Amendment right to be free from cruel and unusual punishment.⁷⁹ Time will tell if civil rights litigation and environmental law will meet as a new method to advance plaintiffs' personal injury theories of recovery.

In an appeal of an electric transmission line condemnation proceeding, the Supreme Court of Virginia held that a landowner was not entitled to compensation for diminution in the market value of the remaining land attributable to the fears of cancer held by prospective purchasers. In *Chappell v. Virginia Electric and Power Company*,⁸⁰ the trial court granted a "motion in limine to exclude 'evidence of, or reference to, electromagnetic fields (EMF), any alleged link between EMF and adverse human health effects, any alleged public perception of any such link, and the effects, if any, of any such perception on property values.'"⁸¹ On appeal, the landowner challenged the quantum of the award of damage to the residue, contending that it was error to exclude evidence of public fear emanating from the presence of high voltage power lines and the effect of that fear on market value.⁸²

The court noted that the record did not contain a proffer showing "comparable sales consummated at prices allegedly

78. *Id.* at 1474-77 (applying 28 U.S.C. § 1915(d) (1988)).

79. *Id.* at 1473-74. The prisoner stated a cause of action under the Eighth Amendment when he alleged that the prison officials with deliberate indifference exposed him to a toxic substance. *Id.* at 1475 (citing *Helling v. McKinney*, 113 S. Ct. 2475, 2481, (1993)). The court of appeals noted that while the plaintiff's allegations that he was injured due to falling asbestos were unlikely, that was not a basis to dismiss the claim under 28 U.S.C. § 1915(d). *Id.* at 1480.

80. 250 Va. 169, 458 S.E.2d 282, (1995).

81. *Id.* at 171, 458 S.E.2d at 283.

82. *Id.* at 172, 458 S.E.2d at 284.

diminished by public fear of electric transmission lines."⁸³ Noting the difficulty of proving market value loss when there are no actual sales of comparable property,⁸⁴ and that the record failed to show that the difference in the value of the residue immediately before and immediately after the condemnation was greater than the award, the court affirmed the judgment of the trial court's confirmation of the condemnation award.⁸⁵

Another environmental property damage case of note is *Mulcahey v. Columbia Organic Chemicals Co.*⁸⁶ Landowners sought damages and injunctive relief in state court alleging that defendants negligently operated a chemical plant "by releasing hazardous substances into the soil, air, and groundwater in the vicinity of their property, thus creating grave threats, both economic and physical, to the plaintiffs."⁸⁷ Defendants removed the case to federal court alleging that the complaint raised federal questions sufficient to confer original jurisdiction on the district court.⁸⁸ Plaintiffs unsuccessfully moved for remand of the case to the state courts by arguing that mere citation of federal statutes which specify less relief than that sought by the plaintiffs does not transform a state law tort action into a case that must be tried in federal court.⁸⁹

The Fourth Circuit held that the reference to federal environmental statutes in a state common law negligence action could not support federal subject matter jurisdiction in this case. First, the remedy sought in the complaint (damages) cannot be obtained under the federal statutes.⁹⁰ Second, the plaintiffs are

83. *Id.*

84. *Id.*

85. *Id.* at 174, 458 S.E.2d at 285.

86. 29 F.3d 148 (4th Cir. 1994).

87. *Id.* at 149.

88. *Id.* at 149-50.

89. *Id.* at 150. The district court noted that while the environmental statutes cited in the complaint (Toxic Substance Control Act, 15 U.S.C. § 2601-2671 (1988 & Supp. V 1993); Federal Water Pollution Control Act, 33 U.S.C. § 1251-1387 (1988 & Supp. V 1993); Resource Conservation and Recovery Act, 42 U.S.C. § 6901-6992k (1988 & Supp. V 1993); Clean Air Act, 42 U.S.C. § 7401-7642 (1988 & Supp. V 1993); and Comprehensive Environmental Response, Cleanup, and Liability Act 42, U.S.C. § 9601-9675 (1988 & Supp. V 1993)) created private causes of action, these claims could not be brought by the plaintiffs because they had failed to comply with the requirements of these statutes for instituting such actions. *Mulcahey*, 29 F.3d at 150.

90. *Id.* at 154.

either procedurally or substantively barred from proceeding under any of the environmental statutes cited in the complaint.⁹¹ Thus, the court concluded that "the Plaintiffs' inability to proceed under these [environmental] statutes constitutes a congressional conclusion that the presence of a claimed violation of the statute[s] as an element of a state cause of action for negligence per se is insufficiently 'substantial' to confer federal question jurisdiction."⁹² Although not explicitly addressed by the decision, it appears that, as far as the Fourth Circuit is concerned, allegations of federal environmental law violations are perfectly appropriate to support state common law negligence claims for damages under a negligence per se theory.

A final environmental property damage case of note is an unreported decision in *Summit Realty Co. v. Sears Roebuck & Co.*⁹³ The United States District Court for the Eastern District of Virginia granted Sears' motion for partial summary judgment, declaring that under the commercial lease agreement Sears' landlord was responsible for all costs associated with bringing the underground storage tank (UST) into compliance with underground storage tank regulations.⁹⁴ The UST was operated by Sears, but owned by the landlord. The Court denied Sears' request to be awarded attorneys' fees and costs as the "substantially prevailing party" under RCRA.⁹⁵ Sears argued it should have been awarded its attorneys' fees even though the court dismissed the landlord's federal and state law environmental claim.⁹⁶

Pursuant to a 1976 lease, Sears installed two underground storage tanks, one for gasoline and one for waste oil.⁹⁷ In 1983, Sears entered into a new lease with the landlord, relocating the Sears store.⁹⁸ The new lease terminated the 1976

91. *Id.* at 152-53.

92. *Id.* (quoting *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 814 (1984)).

93. Civil Action No. 4:94CV00067 (E.D. Va. Jan. 31, 1995).

94. *Id.* slip op. at 9.

95. *Id.* slip op. at 16. RCRA provides that a court "may award costs of litigation to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate." 42 U.S.C. § 6972(e) (1988).

96. *Summit Realty*, slip op. at 16.

97. *Id.* slip op. at 2.

98. *Id.*

lease and allowed Sears to continue to utilize the UST's until such time, if any, as the landlord relocated or replaced the existing UST's.⁹⁹ Subsequently, new UST's were placed underground at the new facility by parties other than Sears, and the old tanks were removed.¹⁰⁰ As state and federal deadlines for UST upgrades approached, the landlord and Sears disagreed as to responsibility for the upgrade.¹⁰¹ Unable to resolve the disagreement, Sears advised the Virginia Department of Environmental Quality that it had abandoned the tanks and that they would be removed at its expense while reserving the right to seek compensation from the landlord.¹⁰² The landlord chose to file a complaint against Sears alleging violations of CERCLA, RCRA, and the Virginia Oil Discharge Statute and asserting common law claims for unlawful detainer and waste.¹⁰³ Sears filed an answer denying liability and filed a counterclaim seeking contribution for any cleanup costs it had incurred and seeking damages for costs incurred by Sears enclosure and cleanup of the site under the lease.¹⁰⁴

The district court held that the underground storage tanks constituted "fixtures" since they were buried completely below the surface, covered by asphalt or concrete, and installed to fulfill an essential purpose for which the leasehold was being used.¹⁰⁵ In addition, the intent of the parties as expressed in the 1976 and 1983 leases caused the court to conclude that the old tanks were fixtures and the new tanks belonged solely to the landlord.¹⁰⁶ Since the lease made the landlord responsible for additions, alterations, replacements, and repairs to the lease premises and all its fixtures, the court concluded that the landlord was responsible for assuring that the UST's complied with the upgrade requirements of the regulations.¹⁰⁷ The court ruled, however, that all costs associated with the removal and treatment of contaminated soils and delivery of clean fill to the

99. *Id.*

100. *Id.* slip op. at 3.

101. *Id.*

102. *Id.*

103. *Id.* slip op. at 4.

104. *Id.*

105. *Id.* slip op. at 8.

106. *Id.*

107. *Id.* slip op. at 9.

site will be deducted from the amount Summit owes Sears for the closure and removal of the underground storage tanks.¹⁰⁸

In refusing to grant attorneys' fees to the tenant as the substantially prevailing party under RCRA, the court noted that, although there clearly was no release of hazardous substances at the site as defined by the applicable statutes, the claims that were ultimately dismissed were brought by the landlord based on a genuine concern that hazardous substances were present on the site.¹⁰⁹ This concern was based in part on surface stains and other contamination directly attributable to the tenant's use of the site.¹¹⁰ The court ruled that, in the absence of a finding of bad faith or malice on the part of the landlord in filing its original suit, the plaintiff should not be burdened with attorneys' fees in this case.¹¹¹ The court noted that RCRA does not explicitly require the presence of bad faith to award attorneys' fees. However, the court concluded that, taking the matter as a whole, the award of attorneys' fees to the defendant was not appropriate.¹¹²

C. *Environmental and Land Use Cases*

The Supreme Court of Virginia settled several issues regarding the nexus between environmental law and zoning in *Concerned Taxpayers of Brunswick County v. County of Brunswick*.¹¹³ A citizens' group and nearby landowners sued the county for granting a conditional use permit (CUP) and a waste management disposal contract in connection with the planned construction of a regional landfill by a private company.¹¹⁴ The circuit court ruled that "the Board's actions were entitled to a strong presumption of validity, and that the facts alleged were insufficient to show that the Board engaged in arbitrary and capricious conduct" and dismissed all counts on demurrer.¹¹⁵

108. *Id.* slip op. at 15.

109. *Id.* slip op. at 16.

110. *Id.*

111. *Id.*

112. *Id.* slip op. at 16-17.

113. 249 Va. 320, 455 S.E.2d 712 (1995).

114. *Id.* at 324, 455 S.E.2d at 714.

115. *Id.* The litigation involved two separate lawsuits. The first suit challenged the zoning decision of the Board of Supervisors to grant the conditional use permit. The

The Supreme Court of Virginia affirmed in part and reversed in part. In the first count the plaintiffs alleged the applicant did not have an enforceable contract to purchase a parcel of land intended to become a part of the landfill and thus did not have a legally sufficient interest in the land to apply for the CUP under the zoning ordinance and state law.¹¹⁶ Noting that the Board has power to issue the CUP only if done in the manner required by law, the court concluded that the Taxpayers stated a cause of action for noncompliance with the county's zoning ordinance and reversed the trial court.¹¹⁷

The court also reversed the trial court's dismissal of the citizens' allegation that the county was arbitrary and capricious in approving the CUP.¹¹⁸ The citizens alleged that the county disregarded the environmental consequences of the landfill despite the requirements of Virginia Code sections 15.1-489 and -490¹¹⁹ that zoning actions protect the environment and conserve natural resources.¹²⁰ The citizens attacked the siting of the new landfill, without conducting geotechnical studies near the existing, leaking county landfill, which has contaminated groundwater.¹²¹ The court noted that in sustaining the demurrer, "the trial court referred only to the strong presumption of authority that is accorded to legislative action" and "effectively held that the County's zoning action is not subject to judicial review."¹²² The court held that the alleged facts, if true, con-

second suit challenged the waste management and disposal contract granted by the County which is not directly pertinent to the issues raised in this article. The supreme court affirmed the dismissal of the taxpayers' contract challenge and held that the trial court did not abuse its discretion in imposing sanctions upon the Concerned Taxpayers for seeking an order of accounting and restitution against certain individual members of the Board for allegedly misappropriating public funds in the contract procurement process. *Id.* at 334, 455 S.E.2d at 720.

116. *Id.* at 325, 455 S.E.2d at 714; VA. CODE ANN. § 15.1-491 (Repl. Vol. 1989) (requiring applicants to be the property owner or a contract owner with the owner's written consent). The contract contained a default provision which stated that if either Seller or Purchaser defaults the contract becomes null and void. Taxpayers alleged that the purported contract is a legal nullity, lacked mutuality and was unenforceable as a matter of law. *Concerned Taxpayers*, 249 Va. at 325, 455 S.E.2d at 715.

117. *Concerned Taxpayers*, 249 Va. at 325, 455 S.E.2d at 715.

118. *Id.* at 328-29, 455 S.E.2d at 717.

119. VA. CODE ANN. §§ 15.1-489 to -490 (Repl. Vol. 1989).

120. *Concerned Taxpayers*, 249 Va. at 327, 455 S.E.2d at 716.

121. *Id.*

122. *Id.*

stituted probative evidence that the Board's action was unreasonable.¹²³ Until the evidence is heard "the trial court cannot determine whether the Board's decision is 'fairly debatable.'"¹²⁴

The court sustained the dismissal of the other counts and held that a governing body may overrule a Planning Commission's determination that the landfill was inconsistent with the county's comprehensive plan, even though the Planning Commission decision had not been appealed to the Board.¹²⁵ The court ruled that Virginia Code section 15.1-456(B) does not limit the Board's authority to overrule the action of the Planning Commission to instances when an appeal of the Planning Commission decision is filed.¹²⁶

Finally, the court affirmed the dismissal of a count challenging the zoning decision because it authorized siting of a landfill in violation of siting requirements, and is otherwise unsuitable as a landfill site because it violates certain siting requirements established by the Virginia Waste Management Act and the Solid Waste Management Regulations.¹²⁷ The court held that "[t]he Waste Management Act does not require a local governing body to determine whether a use is in compliance with the Act's provisions."¹²⁸ That function is delegated to the Department of Environmental Quality (DEQ) after determining that the proposed facility poses no substantial danger to human health or the environment.¹²⁹

Another landfill challenge involving a challenge to a permit issued by DEQ for a private company for a regional landfill in King and Queen County was adjudicated in *Residents Involved*

123. *Id.* at 328, 455 S.E.2d at 716.

124. *Id.*

125. *Id.* at 326, 455 S.E.2d at 716.

126. *Id.* at 326-27, 455 S.E.2d at 716. "Code § 15.1-456(B) permits a governing body to overrule the action of the local commission. That section does not limit the governing body's authority to overrule the action of the local commission to instances when an appeal is filed by the owners or their agents. Rather, the governing body may overrule the commission on its own motion by a majority vote." *Id.* (citing VA. CODE ANN. § 15.1-456(B) (Cum. Supp. 1995)).

127. *Id.* at 328, 455 S.E.2d at 716-17.

128. *Id.*

129. *Id.*

in *Saving the Environment, Inc. v. Commonwealth*.¹³⁰ The first issue in this permit challenge, pursuant to the Virginia Administrative Process Act,¹³¹ was whether a permittee intervenor has the right to move for a change of venue to the circuit court wherein the proposed facility is to be located.¹³² The court held that a defendant must move to change venue within twenty-one days of service of process or within the time of extension for filing responsive pleadings.¹³³ Since the original defendant, DEQ, did not object to venue, there was no other party in the case to object within the time required.¹³⁴ Any objection to venue not made within the required time is waived and an intervenor "is not in a position to assert an objection to venue."¹³⁵

The second issue, decided in a separate opinion,¹³⁶ involved the extent to which the Director of DEQ must investigate whether the proposed facility poses a substantial present or potential danger to human health or the environment pursuant to Virginia Code section 10.1-1408.1.¹³⁷ The plaintiffs urged that the statute requires DEQ to conduct an independent investigation and make a determination of no adverse human health or environmental impact before issuing the permit.¹³⁸ The Court held that the "investigation and evaluation" requirement does not require the Director to conduct an independent investigation.¹³⁹ The statute requires the Director "to investigate and evaluate the comments of the local government to see that the

130. 32 Va. Cir. 336 (Richmond City 1994).

131. VA. CODE ANN. § 9-6.14:1 to :25 (Repl. Vol. 1993).

132. *Residents*, 32 Va. Cir. at 337.

133. *Id.* (citations omitted).

134. *Id.* at 337.

135. *Id.*

136. *Residents Involved in Saving the Environment, Inc., v. Commonwealth*, No. HAD-822-1 (Richmond City 1995) (letter opinion from Melvin R. Hughes, Jr., Judge, Circuit Court of the City of Richmond, to counsel (May 4, 1995) (on file with the *University of Richmond Law Review*)).

137. *Id.* (citing VA. CODE ANN. § 10.1-1408.1 (Repl. Vol. 1993)). This Code Section provides, in part, that "[n]o permit for a new solid waste management facility shall be issued until the Director has determined, after investigation and evaluation of comments by the local government, that the proposed facility poses no substantial present or potential danger to human health or the environment. . . ." *Id.* § 10.1-1408.1(D) (Cum. Supp. 1995).

138. *Residents Involved in Saving the Environment, Inc.*, slip op. at 2.

139. *Id.*

proposed facility has or has not any impact on human health or the environment."¹⁴⁰

The nexus between zoning amendments and preemption by federal environmental law was the issue in *Welch v. Board of Supervisors of Rappahannock County*.¹⁴¹ Several landowners challenged a zoning ordinance amendment prohibiting application of sewage sludge on agricultural lands in the county, claiming that the zoning amendment was preempted by the Federal Clean Water Act.¹⁴² The court examined the statute and found it did not expressly forbid the zoning amendment.¹⁴³ In fact, the statute clearly grants localities "the authority to make determinations concerning 'the manner of disposal or use of sludge . . .,' and the 'right' to pass substantive standards regarding pollution so long as the standards are not less stringent than federal law."¹⁴⁴

The plaintiffs claimed that although Congress gave localities some role in the regulation of sludge disposal, that grant was not sufficiently extensive to allow a locality to ban any one practice of disposal or use through a zoning amendment.¹⁴⁵ The court determined that since the Clean Water Act and the zoning ordinance could be harmonized, the zoning amendment was not preempted.¹⁴⁶ The Board of Supervisors had made a choice allowed by federal law to prohibit one form of sludge disposal or use, but did not impermissibly prohibit all forms.¹⁴⁷

D. *Miscellaneous Environmental Decisions*

The remaining cases described are decisions which do not fall neatly into one of the categories specified above, but neverthe-

140. *Id.* The authors understand that this ruling will be appealed to the court of appeals and may in fact be pending as of the time of publication of this article.

141. 860 F. Supp. 328 (W.D. Va. 1994).

142. *Id.* at 330-31; 33 U.S.C. §§ 1251-1376 (1980 & Supp. V. 1993).

143. *Welch*, 860 F. Supp. at 330-31.

144. *Id.* at 331 (quoting 33 U.S.C. §§ 1345(e), 1370 (1988)).

145. *Id.*

146. *Id.*

147. *Id.* (noting that "[w]here the state or local regulation addresses public health concerns, there is a presumption against preemption.") (citing *Hillsborough County v. Automated Medical Labs*, 471 U.S. 707 (1985)).

less are, in the opinion of the authors, decisions of interest to environmental law practitioners.

Virginia's Tenth Amendment challenges to the Clean Air Act Amendments of 1990 failed for lack of subject matter jurisdiction in *Virginia v. United States*.¹⁴⁸ The Commonwealth sought declaratory and injunctive relief against the EPA contending that (i) the Title V operating permit program, (ii) the vehicle inspection and maintenance and the 15% volatile organic compounds (VOC) reduction program amendments to the State Implementation Plan (SIP), (iii) the mandatory and discretionary sanction provision, and (iv) the transportation conformity requirements of the Clean Air Act violate the Tenth Amendment to the United States Constitution.¹⁴⁹ The Commonwealth contended that Congress has coerced Virginia to enact and enforce these regulatory programs in derogation of state sovereignty, that these provisions constitute federal attempts to control the exercise of sovereign state powers in violation of the Guarantee Clause,¹⁵⁰ and that the withholding of highway funding for noncompliance with the Clean Air Act violates the Spending Clause.¹⁵¹

The court agreed with the positions of the United States and held that exclusive jurisdiction to review any and all EPA final actions taken under the Clean Air Act is in the United States Court of Appeals,¹⁵² and that Virginia's attack on EPA's dis-

148. No. 3:95CV21 (E.D. Va. June 12, 1995).

149. *Id.* slip op. at 4. The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

150. U.S. CONST. art. IV, § 4, which declares: "The United States shall guarantee to every state in this Union a Republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

151. U.S. CONST. art. I, § 8, cl. 1, which reads: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States. . . ."

152. *Virginia*, slip op. at 7.

[petition for review of the Administrator's action in approving or promulgating any implementation plan . . . or any other final action of the Administrator under [the CAA] (including any denial or disapproval by the Administrator under subchapter 1 of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.

cretionary enforcement and sanction authority, as it might relate to the Richmond and Northern Virginia nonattainment zones, was not ripe.¹⁵³ In dismissing the case without prejudice, the court expressed no opinion about the merits of Virginia's position. "Today's decision is but a simple judgment that there is no role for this Court to play as Virginia and the EPA wage their ongoing dispute. The controversy must be resolved elsewhere."¹⁵⁴

The nearly thirteen-year-old battle over the Lake Gaston-Virginia Beach water supply pipeline project¹⁵⁵ between the City of Virginia Beach and the State of North Carolina and others resulted in two court decisions in 1994. In *City of Virginia Beach v. Brown*,¹⁵⁶ Judge Smith dismissed as moot Virginia Beach's challenge to North Carolina's authority to review the project for compliance with North Carolina's coastal management plan since the United States Department of Commerce had overruled North Carolina's objection to the project in a completed administrative proceeding. In this litigation, Virginia Beach and Virginia Power asked the Federal Energy Regulatory Commission (FERC) to amend the Virginia Power permit to allow for the diversion.¹⁵⁷ North Carolina applied to an agency within the United States Department of Commerce for permission to review the pipeline project for consistency with the North Carolina Coastal Management Plan under the Coastal Zone Management Act (CZMA).¹⁵⁸ The Department, through its agency for Ocean and Coastal Resource Management, de-

42 U.S.C. § 7607(b)(1) (1988 & Supp. V 1993) (emphasis added).

153. *Virginia*, slip op. at 16. As to the Hampton Roads nonattainment zone, the court described Virginia's position as "nothing short of ludicrous." *Id.* at 18. EPA has initiated a rulemaking which is not complete and in which Virginia has ample opportunity to participate in the view of the court. *Id.* slip op. at 18-19.

154. *Id.* slip op. at 19.

155. A number of published opinions have resulted from this controversy. See *North Carolina v. City of Virginia Beach*, 951 F.2d 596 (4th Cir. 1991); *City of Virginia Beach v. Roanoke River Basin Ass'n*, 776 F.2d 484 (4th Cir. 1985); *North Carolina v. Hudson*, 731 F. Supp. 1261 (E.D. N.C. 1990), *aff'd sub nom. Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58 (4th Cir. 1991), *and cert. denied*, 112 S. Ct. 1164 (1992); *North Carolina v. Hudson*, 665 F. Supp. 428 (E.D. N.C. 1987); *Virginia Beach v. Mecklenberg County*, 246 Va. 233, 435 S.E.2d 382 (1993); *Tidewater Ass'n of Home Builders v. Virginia Beach*, 241 Va. 114, 400 S.E.2d 523 (1991).

156. 858 F. Supp. 585 (E.D. Va. 1994).

157. *Id.* at 587.

158. 16 U.S.C. §§ 1451-1464 (1988 & Supp. V 1993).

clared that North Carolina did not need permission and could review the project under the CZMA for consistency with the North Carolina Plan.¹⁵⁹ North Carolina objected to the project as being inconsistent, and Virginia Beach appealed to the Department of Commerce.¹⁶⁰ The suit was filed challenging North Carolina's right to review a project which wholly falls in Virginia for consistency with the North Carolina Plan.¹⁶¹ During the pendency of the suit the Department overruled North Carolina's objections on the merits.¹⁶²

Even though it had prevailed on the merits, Virginia Beach opposed the dismissal on the grounds that it was entitled to a declaration that the CZMA and the project's compliance with the North Carolina Plan was inappropriate. The Court, noting the absence of a showing that Virginia Beach is likely to be haled before the Department of Commerce for another CZMA review of this project, declared that this case was moot and did not fall within the exception of being "capable of repetition, yet evading review."¹⁶³

The second Lake Gaston Pipeline case was a petition for a writ of mandamus to compel the FERC to enter a final decision on the application of Virginia Beach and Virginia Power for approval of the water pipeline project. *In re City of Virginia Beach*¹⁶⁴ resulted in a denial of the extraordinary remedy of mandamus, largely due to the assurances given to the court of appeals that the environmental impact statement required under the agency's review would be expedited.¹⁶⁵

The court noted that mandamus can be appropriate in rare circumstances where the ongoing agency proceedings suffer from a "fundamental infirmity" threatening petitioner's right to a fair proceeding.¹⁶⁶ This infirmity may occur when an agency

159. *Brown*, 858 F. Supp. at 587. The CZMA permits states to implement coastal management plans. 16 U.S.C. §§ 1451-1464 (1988 & Supp. V 1993).

160. *Brown*, 858 F. Supp. at 587.

161. *Id.*

162. *Id.*

163. *Id.* at 589-90 (citing *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)).

164. 42 F.3d 881 (4th Cir. 1994)

165. *Id.* at 886.

166. *Id.* at 884-85.

unduly delays the resolution of a matter in an egregious manner.¹⁶⁷ The court took umbrage at the fact that the agency's environmental impact statement was not scheduled to be issued for four and one-half years after application was made.¹⁶⁸ Nevertheless, the court noted that while it was not "happy" about the overall time elapsed, it was convinced that there were rational explanations for the length of time for each segment of the environmental review, and the petition was denied.¹⁶⁹

In a case somewhat similar to *Virginia Board of Medicine v. Virginia Physical Therapy Association*,¹⁷⁰ the Fourth Circuit ruled that it did not have jurisdiction to review an EPA internal memorandum advising that a National Pollutant Discharge Elimination System (NPDES) permit was required for storm water discharges from oil and gas facility construction activities in *Appalachian Energy Group v. Environmental Protection Agency*.¹⁷¹ An ad hoc affiliation of nine trade associations in the oil and gas industry feared that the EPA was attempting, under the guise of an internal legal interpretation, to impose an unauthorized regulation on oil and gas operations by requiring a permit for every exploratory activity, most of which involve some construction.¹⁷² The group sought a declaration that the memorandum was contrary to the Clean Water Act and amounted to a new rule, adopted without compliance with the Administrative Procedure Act.¹⁷³

The court concluded that the memorandum did not approve the issuance or denial of a permit, did not relate to a pending decision to issue or deny a permit, and had not been used as a basis to issue or deny a permit.¹⁷⁴ Moreover, the court noted, the memorandum did not purport to issue a new rule; it only provided the writer's interpretation of two regulations.¹⁷⁵ Thus, the agency action sought to be reviewed was the genera-

167. *Id.* at 885.

168. *Id.*

169. *Id.* at 886.

170. 13 Va. App. 458, 413 S.E.2d 59 (1991), *aff'd*, 245 Va. 125, 427 S.E.2d 183 (1993).

171. 33 F.3d 319 (4th Cir. 1994).

172. *Id.* at 320.

173. *Id.*; 5 U.S.C. §§ 500-596 (1994).

174. *Appalachian Energy*, 33 F.3d at 321.

175. *Id.* at 322.

tion of an internal memorandum expressing an opinion and the transmission of that memorandum to the public.¹⁷⁶ The court noted that while the memorandum might signal the position that the EPA might eventually take with regard to NPDES permits for such activities, until it does, it has not issued a permit, nor has the EPA taken a final action subject to judicial review.¹⁷⁷ Consequently, the court of appeals lacked subject matter jurisdiction under the Clean Water Act to review the memorandum.¹⁷⁸

A final decision of note involved statutory interpretation under the Resource Conservation and Recovery Act (RCRA)¹⁷⁹ in *Owen Electric Steel Co. v. Browner*.¹⁸⁰ The issue in the case was whether the "slag" produced as a byproduct of steel production is "discarded" and therefore a "solid waste" subject to regulation or whether it is not a "discarded material" and thus exempt from regulation because it is ultimately recycled and used in roadbeds.¹⁸¹

After reviewing several decisions the court ruled that the "fundamental inquiry in determining whether a byproduct has been 'discarded' is whether the byproduct is immediately recycled for use in the same industry."¹⁸² If not, then the byproduct is justifiably seen as part of the waste disposal problem and subject to regulation as a solid waste.¹⁸³ Consequently, the petition was denied and the slag was required to be handled in accord with the full panoply of RCRA regulatory requirements.¹⁸⁴

176. *Id.* at 321-22.

177. *Id.*

178. *Id.*; see 33 U.S.C. § 1369(b) (1988).

179. 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993).

180. 37 F.3d 146 (4th Cir. 1994).

181. *Id.* at 148. The record revealed that the slag lies dormant, exposed on the ground for six months before it is recycled and used for a purpose unrelated to the manufacture of steel, i.e. as roadbed material. *Id.*

182. *Id.* at 150.

183. *Id.*

184. *Id.*

III. STATUTORY AND REGULATORY DEVELOPMENTS

Reducing environmental regulation, streamlining government, and providing incentives for voluntary, proactive measures have been consistent political themes for the past few years on both the federal and state levels. The past twelve months saw these theories put into practice as the General Assembly and administrative agencies took steps to put the emphasis for environmental protection on the private sector.

A. *Environmental Audit Privileges*

One of the rapidly emerging issues in environmental law is whether voluntary environmental audits should be admissible or discoverable against the audited party. Environmental audits are management tools used to assess a company's compliance with federal, state, and local environmental laws, regulations, and ordinances, as well as internal company policies.

Some federal courts have protected such audits under the auspices of the attorney-client privilege, the work product doctrine,¹⁸⁵ or the newly recognized "self-critical analysis" privilege.¹⁸⁶ The United States Environmental Protection Agency

185. In *Olen Properties Corp. v. Sheldahl, Inc.*, 24 ENVTL. L. REP. (Envtl. L. Inst.) 20,936 (C.D. Cal. Apr. 12, 1994), the Magistrate Judge ruled that environmental audit memoranda prepared by an expert to assist the defendant's attorneys in evaluating compliance with environmental laws were "prepared for the purpose of securing an opinion of law" and therefore protected under the attorney-client privilege. *Id.* The Magistrate Judge also ruled that the expert's notes, prepared for counsel to assist in the defense of the pending action, were entitled to the work product doctrine's limited immunity from discovery. *Id.* at 20,937.

186. In *Reichhold Chem. v. Textron, Inc.*, 25 ENVTL. L. REP. (Envtl. L. Inst.) 20,307 (N.D. Fla. Sept. 20, 1994), the court held that the self-critical analysis privilege afforded the landowner defendant a qualified privilege for post hoc analyses of "past conduct, practices, and occurrences, and the resulting environmental consequences." *Id.* at 20,309. The court limited the privilege to reports prepared for "candid self-evaluation" and analysis of the cause and effect of pollution, where the reports were created with the expectation of confidentiality and have in fact been kept confidential. *Id.* The Court noted:

[I]t is self-evident that pollution poses a serious public health risk, and that there is a strong public interest in promoting the voluntary identification and remediation of industrial pollution. The public interest in allowing individuals and corporations to candidly assess their compliance with environmental regulations "promotes sufficiently important interests to outweigh" the interest of opposing private litigants in discovering this

and the Department of Justice have likewise maintained policies favoring environmental self-audits for several years.¹⁸⁷ However, neither the federal agencies nor the federal courts can decide the fate of such audits in state courts, and the regulated community has found the protection offered by the federal courts and agencies too tenuous. In response, new measures have been proposed or enacted on both the federal and state levels to protect and to encourage voluntary environmental audits. Colorado and Oregon were the first states to enact such statutes.¹⁸⁸ Two bills introduced in the 104th Congress would enact a federal privilege and borrow heavily from the two major state law schemes.¹⁸⁹ The EPA recently announced and requested comment on an interim policy which does not differ markedly from its earlier policies.¹⁹⁰

potentially highly prejudicial, but minimally relevant, evidence. I view the self-critical analysis privilege as analogous to the rule on subsequent remedial measures [FED. EVID. 407], and have no difficulty concluding in the abstract that an entity's retrospective self-assessment of its compliance with environmental regulations should be privileged in appropriate cases.

Id. at 20,308. The Court further held that parties seeking to assert the privilege must demonstrate: (1) that the information must result from a critical self-analysis undertaken by the party seeking protection; (2) the public must have a strong interest in preserving the free flow of the type of information sought; (3) the information must be of a type whose flow would be curtailed if discovery was allowed; and (4) the privileged document must have been prepared with the expectation that it would be kept confidential and has, in fact, been kept confidential. *Id.* Application of the *Reichhold Chemicals* factors to the statutory environmental privilege enacted in Virginia could result in the protection of audit documents from disclosure in federal court actions brought under federal environmental statutes.

187. See *Department of Justice, Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator*, 21 ENVTL. L. REP. (Envtl. L. Inst.) 35,399 (July 1, 1991); *Voluntary Environment Self-Policing and Self-Disclosure Interim Policy Statement*, 60 Fed. Reg. 16875 (Apr. 3, 1995); *Environmental Auditing Policy Statement*, 51 Fed. Reg. 25,004 (July 9, 1986).

188. See COLO. REV. STAT. ANN. § 13-25-126.5 (West Cum. Supp. 1994); OR. REV. STAT. § 468.963 (Supp. 1994).

189. See H.R. 1047, 104th Cong., 1st Sess. (1995) (Voluntary Environmental Self-Evaluation Act) and S. 582, 104th Cong., 1st Sess. (1995) (Voluntary Environmental Audit Protection Act). H.R. 1047, introduced by Congressman Hefley (R-CO), is modeled after the Colorado statute. S. 582, introduced by Senator Hatfield (R-OR), reflects minor compromises between the Colorado and Oregon statutes.

190. *Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement*, 60 Fed. Reg. 16,875 (Apr. 3, 1995).

The 1995 Session of the General Assembly also responded to the issue in a more concrete fashion by enacting an audit privilege statute.¹⁹¹ The new statute protects voluntary environmental audits in two ways: it protects information collected, generated, or developed in the course of an environmental audit, and it shields those who voluntarily disclose and diligently correct violations of environmental laws.¹⁹² This new statute is akin to pre-existing Virginia and federal legislation providing a self-critical analysis privilege in the context of health care peer reviews.¹⁹³

Under the new Virginia statute, information collected, generated, or developed during the course of an environmental audit¹⁹⁴ is privileged from public disclosure under most circumstances. The audit may be conducted by the owner or operator of a facility or by an independent contractor at the request of the owner or operator.¹⁹⁵ No person who possesses or helps to prepare an audit document may be compelled to disclose the document, information about its contents, or the details of its preparation.¹⁹⁶ Furthermore, absent written consent of the owner or operator, the information is not admissible in an administrative or judicial proceeding.¹⁹⁷ The statute specifically protects "information collected, generated or developed in the course of, or resulting from, an environmental assessment, including but not limited to field notes, records of observation, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, videotape, computer-generated or elec-

191. VA. CODE ANN. §§ 10.1-1198 to -1199 (Cum. Supp. 1995).

192. *Id.*

193. *See* 42 U.S.C. § 11137(b) (1988 & Supp. V 1993); VA. CODE ANN. §§ 8.01-581.16 to -581.17 (Repl. Vol. 1992 & Cum. Supp. 1995).

194. "Environmental assessment" means a voluntary evaluation of activities or facilities or of management systems related to such activities or facilities that is designed to identify noncompliance with environmental laws and regulations, promote compliance with environmental laws and regulations, or identify opportunities for improved efficiency or pollution prevention." VA. CODE ANN. § 10.1-1198(A) (Cum. Supp. 1995).

195. *Id.* Similarly there is no requirement that the information must be produced as a result of an information request by the Department of Environmental Quality or other agency of the Commonwealth or political subdivision. *Id.*

196. *Id.* § 10.1-1198(A).

197. *Id.* § 10.1-1198(B).

tronically recorded information, maps, charts, graphs and surveys."¹⁹⁸

Despite the breadth of the audit privilege, disclosure of audit documents or information may be compelled in four circumstances: (1) when information is uncovered that demonstrates a clear, imminent and substantial danger to the public health or the environment; (2) when information contained in the audit is already required by law to be disclosed, *i.e.*, as a condition of an environmental permit or pre-existing consent order; (3) when information contained in the audit was prepared independently of the voluntary environmental audit; and (4) when audit documents or portions thereof are collected, generated or developed in bad faith.¹⁹⁹ One asserting the privilege has the burden of proving a *prima facie* case that the privilege applies.²⁰⁰ The elements of a *prima facie* case are that the audit (1) was conducted by or at the behest of the facility owner or operator; (2) was voluntary; and (3) was designed to identify areas of environmental noncompliance with law or identify opportunities for improved efficiency or pollution prevention.²⁰¹ Once this burden has been carried, the burden shifts to the party seeking disclosure of the information to prove, based upon independent knowledge, that a statutory exception to the privilege exists.²⁰²

If the party seeking disclosure demonstrates probable cause to believe that an exception applies, a hearing officer or court may have access to the relevant portion of the document to conduct an *in camera* review for the sole purpose of determining whether an exception applies.²⁰³ The court or hearing examiner may have access to the relevant portion of a document under such conditions as may be necessary to protect its confidentiality.²⁰⁴ A moving party who obtains access to the document or information may not divulge any information from the

198. *Id.* § 10.1-1198(A).

199. *Id.* § 10.1-1198(B).

200. *Id.* § 10.1-1198(C).

201. *Id.*

202. *Id.* The person attempting to compel disclosure must be a party to an informal fact-finding proceeding held pursuant to § 9-6.14:11 at which a hearing officer is present, a formal hearing pursuant to § 9-6.14:12, or a judicial proceeding. *Id.*

203. *Id.*

204. *Id.*

document or other information except as specifically allowed by the hearing examiner or the court.²⁰⁵

A second feature of the legislation is a statutory immunity from administrative or civil penalties²⁰⁶ for voluntarily disclosed violations.²⁰⁷ The statute states that, "to the extent consistent with requirements imposed by federal law, any person making a voluntary disclosure of information to a state or local regulatory agency regarding a violation of an environmental statute, regulation, permit or administrative order is immune from administrative or civil penalties authorized thereunder."²⁰⁸ A disclosure is 'voluntary' if

(i) it is not otherwise required by law, regulation, permit or administrative order, (ii) it is made promptly after knowledge of the violation is obtained through a voluntary environmental assessment, and (iii) the person making the disclosure corrects the violation in a diligent manner in accordance with a compliance schedule submitted to the appropriate state or local regulatory agencies. . . ."²⁰⁹

Persons who make voluntary disclosures in bad faith may not invoke the immunity.²¹⁰

Whether the statute will apply in federal courts is an open question. Under the Federal Rules of Evidence, the state law privilege may not apply to federal enforcement actions or to citizen suits or private cost recovery actions brought under federal law.²¹¹

205. *Id.*

206. *Id.* The statute does not bar a civil action against an owner or operator claiming compensation for injury to persons or property. *Id.*

207. *Id.* § 10.1-1199.

208. *Id.*

209. *Id.*

210. *Id.*

211. Federal Rule of Evidence 501 provides that privileges in federal courts are governed by the Constitution, federal statutes, Rules of the Supreme Court, and common law principles as interpreted by federal courts, except in civil actions where state law provides the rule of decision. FED. R. EVID. 501.

For its part, the new Virginia statute provides that it does not "alter, limit, waive or abrogate any other statutory or common law privilege." VA. CODE ANN. § 10.1-1198(B) (Cum. Supp. 1995). To the extent that the Virginia audit privilege statute is viewed as conferring a substantive versus a procedural right, federal courts may honor the privilege and prohibit disclosure of audit documents.

B. *Voluntary Remediation*

It is universally recognized that the Comprehensive Environmental Response, Compensation and Liability Act of 1980²¹² (CERCLA or Superfund) needs reform. Last year's Survey reported that Superfund reauthorization was overdue in the 103rd Congress.²¹³ Despite sweeping political change in both chambers, the 104th Congress has also failed, as of the date this article was written, to enact consensus amendments, proffered a year before, to mitigate CERCLA's harsh liability scheme, accelerate cleanups, and implement site-specific, risk-based cleanup goals based upon surrounding uses, the proposed future use of the site, and the characteristics of the waste.

The Virginia Department of Environmental Quality (DEQ) implemented an informal Voluntary Remediation Program (VRP) administratively in 1993, under the auspices of the Waste Management Board's general authority, to encourage and expedite voluntary cleanups of hazardous waste sites. The regulated community's initial interest in the program faded due to bureaucratic hurdles, inadequate staffing, and inflexible, lowest common denominator cleanup standards. In its two-year history, few entities, if any, signed on to the program.

In response, the 1995 General Assembly enacted a statutory VRP with the same mission: reduce, if not eliminate, the need for DEQ enforcement actions or cleanups.²¹⁴ Under the statute, the Waste Management Board must promulgate regulations implementing the program by July 1, 1997.²¹⁵ During the interim, the DEQ is directed to administer a voluntary remediation program on a case-by-case basis consistent with the criteria set forth in the statute.²¹⁶

Under the statute, persons who own, operate, have a security interest in or enter into a contract for the purchase of contaminated property are eligible to participate in the program.²¹⁷

212. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

213. Buniva & Kibler, *supra* note 1, at 1074.

214. VA. CODE ANN. §§10.1-1429.1 to -1429.3 (Cum. Supp. 1995).

215. *Id.* § 10.1-1429.1(B).

216. *Id.*

217. *Id.* § 10.1-1429.3.

Sites are eligible so long as remediation has not clearly been mandated by the EPA, the DEQ, or a court order pursuant to CERCLA, RCRA,²¹⁸ the Virginia Waste Management Act,²¹⁹ the State Water Control Law²²⁰ or other applicable statutory or common law.²²¹ Cleanups of releases of hazardous substances, hazardous wastes, solid wastes or petroleum are eligible under the VRP.²²²

One key feature of the new VRP is the requirement that DEQ establish methodologies to determine site-specific, risk-based remediation standards.²²³ In the past, regulators have employed "cookie-cutter" approaches to determining cleanup levels, sometimes requiring contaminated sites to be "cleaner" than surrounding parcels which were not deemed to be contaminated enough to warrant attention. The DEQ must consider protection of public health and the environment and future industrial, commercial, residential, or other uses of the property to be remediated and the surrounding properties.²²⁴ The Department will evaluate reasonably available and effective remediation technology and analytical quantitation technology, the availability of relatively less expensive institutional or engineering controls, and natural background levels for hazardous constituents when considering cleanup goals.²²⁵ By law, the remediation standards can be no more stringent than applicable or appropriate relevant federal standards (ARARs).²²⁶ The

218. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992K (1988 & Supp. V 1993).

219. VA. CODE ANN. §§ 10.1-1401 to -1457 (Repl. Vol. 1993 & Cum. Supp. 1995).

220. VA. CODE ANN. §§ 62.1-44.2 to -44.34:28 (Repl. Vol. 1993 & Cum. Supp. 1995).

221. VA. CODE ANN. § 10.1-1429(A) (Cum. Supp. 1995).

222. *Id.*

223. *Id.* § 10.1-1429.1(A)(1).

224. *Id.*

225. *Id.*

226. *Id.* "Applicable requirements" and "relevant and appropriate requirements" are terms of art and defined in the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. 300 (1994). Known collectively by the acronym ARARs, these are standards under federal or state law which specifically address a hazardous substance, pollutant, or circumstance at a CERCLA site or which are sufficiently similar to supply a standard for the cleanup. *Id.* § 300.5. The NCP requires identification of ARARs for cleanups under CERCLA. *Id.* §§ 300.400(g), 300.700(c).

State law standards must be more stringent than federal requirements in order to be "applicable" or "relevant and appropriate" under the NCP and CERCLA. *Id.* § 300.5.

DEQ is also to establish procedures that minimize the delay and expense of remediation, both on the part of the party undertaking the remediation and by the Department in processing submissions and overseeing remediation. The streamlined process will include waivers or expedited issuance of any required permits.²²⁷

The key benefit of participating in the VRP is the issuance of "no further action" letters at the program's conclusion.²²⁸ When a voluntary cleanup achieves applicable cleanup standards or DEQ determines that no further action is required, DEQ will issue certifications of satisfactory completion of remediation, based on then-present conditions and available information.²²⁹ Certification also provides immunity from enforcement actions under the Waste Management Act,²³⁰ the State Water Control Law,²³¹ the Virginia Air Pollution Control Law,²³² or other applicable state law.²³³ Such a certification signals potential purchasers, lenders and others that the site is "clean" and that the risk of future liability is minimized.

Lack of adequate staffing was one impediment to the success of the informal VRP. The new statute seeks to correct this by establishing registration fees to fund the program.²³⁴ The fees are to be used to defray DEQ's actual, reasonable costs expended at the site and may not exceed \$5,000 or one percent of the cost of the remediation, whichever is less.²³⁵

The statute also recognizes that contamination does not respect property boundaries, and that the cooperation of adjacent landowners is often necessary to effect a cleanup. The statute authorizes DEQ, at the request of the person volunteering to remediate the site, to seek temporary access to private or public property where necessary to conduct the remediation.²³⁶ A

227. VA. CODE ANN. § 10.1-1429.1(A)(4) (Cum. Supp. 1995).

228. *Id.* § 10.1-1429.1(A)(3).

229. *Id.*

230. *Id.* §§ 10.1-1400 to -1457.

231. VA. CODE ANN. §§ 62.1-44.2 to -44.34:28 (Repl. Vol. 1993 & Cum. Supp. 1995).

232. VA. CODE ANN. §§ 10.1-1300 to -1326 (Repl. Vol. 1993 & Cum. Supp. 1995).

233. *Id.* § 10.1-1429.2.

234. *Id.* § 10.1-1429.1(A)(5).

235. *Id.*

236. *Id.* § 10.1-1429.3.

property owner who denies DEQ access creates a rebuttable presumption that the owner waives his rights, claims, and causes of action against the person volunteering to perform the remediation.²³⁷ The presumption may be rebutted by showing good cause for the denial or by showing that the person requesting access acted in bad faith.²³⁸

Regulations implementing the VRP are not likely until July 1, 1997. In the interim, DEQ is expected to encourage proactive behavior by owners and operators, to minimize staff micro-management, and to focus on establishing a site-specific remediation plan based upon a fair assessment of the risks that the contamination poses to nearby residents or the environment. In addition, DEQ officials are investigating ways to eliminate red tape and minimize delays in cleanup implementation.

C. Revised Medical Waste Incinerator Regulations

On July 14, 1994, the State Air Pollution Control Board adopted final regulations pertaining to medical waste incinerators.²³⁹ These final regulations were markedly different and decidedly less stringent than the proposed regulations. Among other things, the final regulations eased restrictions on emissions of particulates, carbon monoxide, hydrogen chloride, dioxins, and furans. Accounts in the popular press attributed the change to new members of the Board.²⁴⁰

Opponents of the new regulations invoked a provision in the Virginia Administrative Process Act which stays the regulatory process if more than twenty-five persons petition the agency for an opportunity to submit oral and written comments on a final regulation that is substantially different than the one proposed.²⁴¹ More than 1,100 persons petitioned the Air Board to

237. *Id.*

238. *Id.*

239. VR 120-01. Regulations for the Control and Abatement of Air Pollution (Revision HH-Rule 5-6, Regulated Medical Waste Incinerators), §§ 120-05-0601 to -0618, 10:23 Va. Regs. Reg. 5706 (1994).

240. See, e.g., Rex Springston, *Lax New Air Pollution Rules to Get a New Airing: They Will Regulate Medical Waste Incinerators*, RICHMOND TIMES-DISPATCH, Oct. 4, 1994, at B-5.

241. VA. CODE ANN. § 9-6:14:7.1(K) (Cum. Supp. 1995).

reconsider.²⁴² The Board held an additional public hearing on the final regulations, permitted additional written public comments, and readopted the final regulations without change.²⁴³

D. *Tax Incentives for Pollution Control*

Tax incentives are often suggested as an alternative to regulation, a derivative of market-based incentives. The General Assembly acted in 1995 to amend the statutes pertaining to the classes of pollution control equipment eligible for exemption from the state sales and use tax and local personal property taxes. The legislature designated the Department of Mines, Minerals, and Energy, rather than the Department of Environmental Quality, as the certifying authority for certified pollution control equipment and facilities used in coal, oil, and gas production.²⁴⁴ Legislation also broadened the types of facilities and equipment eligible for the exemption to include waste disposal facilities certified by the Waste Management Board.²⁴⁵

E. *Coal Combustion By-Products*

Participants in the Governor's "Opportunity Virginia" project, designed to develop a statewide strategic plan for economic development, identified regulatory requirements for fly-ash disposal as an impediment to continued competitiveness of the state's coal industry and of Southwest Virginia.²⁴⁶ In response, the Waste Management Board adopted regulations exempting coal combustion by-products from the Virginia Solid Waste Management Regulations and permitting use of such materials in structural fills and mined land reclamation projects.²⁴⁷ The

242. See Springston, *supra* note 240.

243. VR 120-01, Regulations for the Control and Abatement of Air Pollution (Revision HH - Rule 5-6, Regulated Medical Waste Incinerators), §§ 120-05-0601 to -0618, 11:15 Va. Regs. Reg. 2405 (1995).

244. VA. CODE ANN. § 58.1-609.3(9) (Cum. Supp. 1995); VA. CODE ANN. § 58.1-3660(B) (Cum. Supp. 1995).

245. VA. CODE ANN. § 58.1-3660(B) (Cum. Supp. 1995).

246. GEORGE ALLEN & ROBERT T. SKUNDA, OPPORTUNITY VIRGINIA: A STRATEGIC PLAN FOR JOBS AND PROSPERITY 73 (1994).

247. VR 672-20-20, Regulation Governing Management of Coal Combustion By-Products, §§ 1.1 to 5.2, 11:9 Va. Regs. Reg. 1470 (1995).

regulations contain certain siting requirements, but allow for disposal of coal combustion by-products without a permit if the operator can demonstrate legal control of the site throughout closure and certify that levels of certain constituents will not exceed maximum levels set out in the regulations.²⁴⁸

F. *Title V Operating Permit Program*

The Air Pollution Control Board continued its efforts to implement an operating permit program. Under Title V of the Clean Air Act Amendments of 1990, each state must submit to the EPA a program requiring operating permits for most significant sources of regulated emissions.²⁴⁹ Although the Air Board adopted and published final regulations on the topic, to date the EPA and the Commonwealth have failed to agree that Virginia's program meets the EPA's standards. Among the issues to be resolved are whether Virginia's laws sufficiently provide citizens with standing to challenge permitting decisions, the types of sources required to comply with the permitting program, and whether Virginia's program adequately provides for permits to specify applicable federal requirements.

IV. CONCLUSION

As the cases, statutes, and regulations of the past year demonstrate, the laws and regulations of Virginia are becoming increasingly important in environmental law. Virginia's political leaders have attempted to assert primacy over environmental control in the Commonwealth. Prospects for continued litigation over Clean Air Act issues and the impact of Virginia's new audit privilege statute on enforcement promise that the interaction of federal and state regulatory efforts will continue for some time to come.

248. *Id.*

249. 42 U.S.C. § 7661a(d) (Supp. V 1993).