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Annual Survey of Virginia Law: Environmental Law

Kelley A. Kinney

Andrea West Wortzel

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ENVIRONMENTAL LAW

*Kelley A. Kinney**
*Andrea West Wortzel***

I. INTRODUCTION

This article reviews the key environmental developments at the federal and state levels during the period from June 1996 to June 1998. Legislation and judicial decisions are presented topically. Certain issues, such as public participation and environmental justice, are playing an increasing role and will likely impact all media.

II. WATER

Regulation of wastewater and drinking water has been impacted by two emerging issues during the past two years. First, citizen suits against the United States Environmental Protection Agency ("EPA") relating to the development of state impaired waters listings¹ has led to increased attention on the total maximum daily load process.² Second, watershed manage-

* Associate, McGuire, Woods, Battle & Boothe, L.L.P., Environmental Solutions Group, Richmond, Virginia. B.S., 1994, University of Kentucky; J.D., 1997 Vermont Law School; Masters of Studies in Environmental Law, 1998, Vermont Law School.

** Associate, McGuire, Woods, Battle & Boothe, L.L.P., Environmental Solutions Group, Richmond, Virginia. B.A., 1991, College of William and Mary; J.D., 1996, University of Richmond School of Law.

1. The Clean Water Act requires states to develop a list of waters that are impaired (i.e., not meeting water quality standards) every two years. See 33 U.S.C. § 1313(d) (1994).

2. Total maximum daily load ("TMDL") litigation has commenced in 25 states, including Maryland, Pennsylvania, West Virginia, Delaware and the District of Columbia. The litigation invokes the failure of the EPA to require states to timely submit their impaired waters listings and resulting total maximum daily loadings for those waters. Citizen groups have filed notices of intent to sue in four additional states, including Virginia. See *TMDL Litigation by State* (last modified Apr. 10, 1998) <<http://www.epa.gov/OWOW/tmdl/lawsuit1.html>>. TMDLs must be developed and implemented for each impaired water segment. TMDLs allocate the amount and type of

ment³ has become a common term in the field of water regulation. The President's Clean Water Action Plan focuses on the need to implement environmental programs on a watershed basis.⁴ This concept has driven legislation and regulations for wastewater and drinking water in Virginia.

A. Wastewater

1. Legislation

The Chesapeake Bay watershed has received a great deal of publicity during the past decade.⁵ In 1983, Virginia, Maryland, Pennsylvania, the District of Columbia, the EPA, and the Chesapeake Bay Commission formally agreed to undertake the restoration and protection of the bay using a cooperative, non-regulatory approach.⁶ A new bay agreement was signed in 1987⁷ and contained the goal of reducing the annual nutrient load⁸

discharges that may be made in that water segment. These allocations take on greater significance as growth occurs. The TMDL establishes the maximum quantitative amount of a pollutant which may be released from point and nonpoint sources without violating the state-established narrative and numerical water quality standards ("WQS"). See Diane K. Conway, *TMDL Litigation: So Now What?*, 17 VA. ENVTL. L.J. 83, 92 (1997).

3. "Watershed management" is a regulatory framework that focuses on water quality issues throughout a watershed. Environmental problems are dealt with in hydrologically-defined geographic areas, taking into consideration both ground and surface water flow. The focus is not solely on individual water bodies or dischargers. See, e.g., *Watershed Approach Framework* (last modified July 17, 1996) <<http://www.epa.gov/OWOW/watershed/framework.html>>.

4. See ENVIRONMENTAL PROTECTION AGENCY, CLEAN WATER ACTION PLAN: RESTORING AND PROTECTING AMERICA'S WATERS 73-88 (1996).

5. See, e.g., Scott Harper, *A Battered Bay: Virginia's Half of the Chesapeake Bay Is Being Anxiously Watched for Water Quality Problems that Could Harm Oyster and Crab Populations and Stymie a Recovery of Underwater Grasses*, VIRGINIAN-PILOT & LEDGER STAR, Apr. 3, 1996, at B1; Lawrence Latane III, *Heavy Flow Burdened Bay Cleanup Effort But EPA Predicts Water Quality Will Rebound*, RICH. TIMES-DISPATCH, Sept. 9, 1995, at B1; Lawrence Latane III, *Underwater Grasses Are Key to Chesapeake Water Quality*, RICH. TIMES-DISPATCH, Nov. 13, 1995, at A8.

6. See *1983 Chesapeake Bay Agreement* (last modified Mar. 4, 1996) <<http://www.chesapeakebay.net/bayprogram/pubs/83agree.htm>>.

7. See *1987 Chesapeake Bay Agreement* (last modified Mar. 4, 1996) <<http://www.chesapeakebay.net/bayprogram/pubs/87agree.htm>>.

8. Nitrogen and phosphorus are nutrients that come from point sources (wastewater treatment plants and industrial plants) and nonpoint sources (surface runoff from farms, residential property, and other urban areas). High levels of nutrients lead to increased algae populations which block light from reaching underwater

reaching the main bay from controllable sources by forty percent by the year 2000.

Amendments to the agreement in 1992 provided that the forty percent goal be maintained beyond the year 2000 and that tributaries upstream of the bay be integrated into the reduction efforts.⁹ In response to the forty percent reduction goal, Virginia enacted legislation in 1996 setting a timetable for the development of strategies for each of the tributaries feeding into the Chesapeake Bay.¹⁰ As the reduction deadline nears, Virginia is witnessing an abundance of legislation aimed at assisting regulated dischargers in meeting the forty percent reduction goal.¹¹ The Virginia Water Quality Improvement Act was passed in 1997, providing grant funding for up to fifty percent of the project cost to municipalities implementing biological nutrient removal projects.¹²

In addition, legislation was passed to allow individuals to make voluntary monetary contributions to the Chesapeake Bay restoration efforts through their tax return filings.¹³ Funds received through this program are credited to the Water Quality Improvement Fund.

Recognizing the vast degree of data collection still needed to complete the strategies, the legislature extended the deadlines for the development of strategies for the lower tributaries.¹⁴ The York and James River Tributary Strategies were due July 1, 1998, and the deadline for the Tributary Strategy for the Rappahannock River was extended to January 1, 1999.¹⁵ Initial strategies were published for public comment on July 1,

grasses. As algae die and sink to the bottom, their decay robs the water of oxygen which is essential for fish, shellfish, and other aquatic animals. See SHENANDOAH AND POTOMAC RIVER BASINS TRIBUTARY NUTRIENT REDUCTION STRATEGY, FINAL REPORT 3 (1996).

9. See *1992 Amendments to the Chesapeake Bay Agreement* (last modified Mar. 4, 1996) <<http://www.chesapeakebay.net/bayprogram/pubs/92agree.htm>>.

10. See VA. CODE ANN. § 2.1-51.12:2 (Cum. Supp. 1998).

11. See, e.g., *id.* § 2.1-51.12:2 (Cum. Supp. 1998); *id.* §§ 10.1-2117 to -2134 (Repl. Vol. 1998); *id.* § 58.1-346.7 (Repl. Vol. 1997).

12. See *id.* §§ 10.1-2117 to -2134 (Repl. Vol. 1998). Only those projects taking place in tributaries with approved strategies are currently eligible. See *id.*

13. See *id.* § 58.1-346.7 (Repl. Vol. 1997).

14. See *id.* § 2.1-51.12:2(B) (Cum. Supp. 1998).

15. See *id.*

1998, as well as a "Status Report" on the development of the Rappahannock Tributary Strategy.¹⁶ The bill adds factors to be considered in developing tributary plans, including the following:

- (i) studies relevant to the establishment of nutrient reduction goals; (ii) the relative contributions and impacts of point and nonpoint sources of nutrients; (iii) the scientific relationship between nutrient controls and the attainment of water quality goals; and (iv) estimating compliance costs for publicly owned treatment works affected by point source nutrient reduction goals and estimates of costs for nonpoint source nutrient reduction goals.¹⁷

To augment the Chesapeake Bay cleanup efforts, Virginia has passed legislation to strengthen its ability to enforce requirements in the bay watershed. House Bill 2758¹⁸ clarifies the power of the Chesapeake Bay Local Assistance Department ("CBLAD")¹⁹ to bring or to intervene in legal and administrative actions to ensure proper implementation, enforcement, and compliance by local governments covered by the Chesapeake Bay Preservation Act.²⁰

Local governments have been authorized to incorporate certain penalty provisions into their ordinances, developed to protect water quality in Chesapeake Bay Preservation Areas.²¹ Civil penalties may be assessed by a court for up to \$5,000 per day of violation.²² Alternatively, a local government may issue an order against a violator for the one-time payment of civil charges for each violation in specific sums, not to exceed \$10,000 for each violation. The local government orders may only be issued with the alleged violator's consent. The civil

16. See *Virginia Chesapeake Bay Program* (last modified July 6, 1998) <<http://www.deq.state.va.us/envprog/bay.html>>.

17. VA. CODE ANN. § 2.1-51.12:2 (Cum. Supp. 1998).

18. H.B. 2758, Va. Gen. Assembly (Reg. Sess. 1997) (codified at VA. CODE ANN. §§ 10.1-2103, -2104, -2106 (Repl. Vol. 1998)).

19. The Chesapeake Bay Preservation Act created the CBLAD to assist the Chesapeake Bay Local Assistance Board in providing land use development and water protection information and assistance to state, regional, and local governments. See VA. CODE ANN. §§ 10.1-2100 to -2115 (Repl. Vol. 1998).

20. See *id.*

21. See *id.* § 10.1-2109 (Repl. Vol. 1998).

22. See *id.* § 10.1-2109(E)(1) (Repl. Vol. 1998).

charges are in lieu of civil penalties and may be added to the cost of any restoration required or ordered by the local governing body or official.²³

The emphasis on the Chesapeake Bay also has led to renewed efforts to reduce nonpoint source pollution from agricultural sources, on both national and state levels.²⁴ House Bill 807²⁵ requires the Department of Environmental Quality ("DEQ") Director to establish a Clean Water Farm Award Program to recognize farms in Virginia using practices designed to protect water quality and soil resources. Farmers must be fully implementing a nutrient management plan in order to be eligible for recognition.

New requirements for the preparation of the annual Toxic Release Inventory published by DEQ were passed.²⁶ The State Water Control Board ("Board") must report annually on the status of its efforts to reduce the level of toxic substances in state waters.²⁷

Water legislation focusing on the development of the state's 303(d) and 305(b) lists also was passed.²⁸ The legislation re-

23. See *id.* § 10.1-2109(E)(2) (Repl. Vol. 1998).

24. See Gail S. Shane, *Concentrated Animal Feeding Operations: Will Increased Enforcement and More Stringent Regulations Under the Clean Water Act Adequately Protect Public Health and the Environment?*, 13 NAAG NAT'L ENVTL. ENFORCEMENT J. 1, Apr. 1998, available in WESTLAW, TP-ALL Database.

25. H.B. 807, Va. Gen. Assembly (Reg. Sess. 1998) (codified at VA. CODE ANN. § 10.1-104.3 (Repl. Vol. 1998)).

26. See VA. CODE ANN. §§ 62.1-44.17:2 to :3 (Repl. Vol. 1998).

27. See *id.* The report must include the following information:

1. [c]ompliance data on permits that have toxics limits;
2. [t]he number of new permits or reissued permits that have toxic limits and the location of each permitted facility;
3. [t]he location and number of monitoring stations and the period of time that monitoring has occurred at each location;
4. [a] summary of pollution prevention and pollution control activities for the reduction of toxics in state waters;
5. [s]ampling results from the monitoring stations for the previous year; and
6. [t]he Board's plan for continued reduction of the discharge of toxics which shall include, but not be limited to, additional monitoring activities, a work plan for the pollution prevention program, and any pilot projects established for the use of innovative technologies to reduce the discharge of toxics.

Id. § 62.1-44.17:3(B) (Repl. Vol. 1998).

28. See *id.* §§ 62.1-44.19:4 to :8 (Repl. Vol. 1998). The states are required to submit a listing of waters that are impaired (i.e., not meeting water quality standards) to the EPA every two years. See 33 U.S.C. § 1212(d) (1994). This list is commonly referred to as the 303(d) list. States are also required to provide the EPA with a sum-

quires that the 303(d) and 305(b) reports provide information on trends in water quality for specific and easily identifiable, geographically defined water segments. Additionally, the reports now must provide a basis for developing initiatives and programs to address current and potential water quality impairments. Accurate and comparable data for each water segment is required so that the reports reflect water quality that is representative of the state as a whole.²⁹

These requirements already have had an impact on the development of the 1998 303(d) list.³⁰ For example, data from the preceding five years must be used, rather than from only the two prior years. Also, increased monitoring, both in terms of the number of water miles monitored and the amount and type of monitoring data generated, must be implemented.³¹ Waters must now be listed as impaired if there is evidence of "(i) violations of ambient water quality standards or human health standards; (ii) fishing restrictions or advisories; (iii) shellfish consumption restrictions due to contamination; (iv) nutrient over-enrichment; (v) significant declines in aquatic life biodiversity or populations; or (vi) contamination of sediment at levels which violate water quality standards or threaten aquatic life or human health."³² The new legislative requirements for developing the lists have resulted in an increase in the number of water segments included on the 1998 303(d) list, as compared to the 1996 list.³³

Citizen right-to-know provisions are also significantly impacted by the legislation.³⁴ Notices must be posted at public access points to all toxic-impaired waters.³⁵ A citizen hotline must be maintained so that citizens can "receive information about the

mary of water quality conditions throughout the state every two years. *See id.* § 1315(b). The report summarizes data from the previous five years and is referred to as the 305(b) list. *See id.*

29. *See* VA. CODE ANN. § 62.1-44.19:5(A)(v) (Repl. Vol. 1998).

30. *See, e.g.*, DEPARTMENT OF ENVTL. QUALITY & DEPARTMENT OF CONSERVATION AND RECREATION, VIRGINIA 303(D) TOTAL MAXIMUM DAILY LOAD PRIORITY LIST AND REPORT DRAFT 3-5 (1998) [hereinafter PRIORITY LIST AND REPORT].

31. *See id.* at 4.

32. VA. CODE ANN. § 62.1-44.19:5(C)(1)(i)-(iv) (Repl. Vol. 1998).

33. *See* PRIORITY LIST AND REPORT, *supra* note 30, at 9.

34. *See* VA. CODE ANN. §§ 62.1-44.19:4 to :8 (Repl. Vol. 1998).

35. *See id.* § 62.1-44.19:6(A)(1) (Repl. Vol. 1998).

condition of waterways, including information on toxics, toxic discharges, permit violations and other water quality related issues.³⁶ Information about discharges that may be detrimental to the public health or may impair beneficial uses of state waters must be published in a local newspaper.³⁷

Once the 303(d) list is complete, the Board must develop and implement a plan to achieve "fully supporting" status for impaired waters, except where the impairment is established as naturally occurring.³⁸ Addressing toxic impairment is of particular concern. Owners of establishments that discharge toxics to toxic-impaired waters must evaluate the options for controlling such discharges.

Legislation was introduced during the past two General Assembly sessions proposing to increase water permit fees drastically. In 1997, the legislation would have required the Board to develop guidelines to ensure that the amount of permit fees would cover fifty percent of the water program's direct and indirect costs.³⁹ The bills, through amendments, were converted into a study of the DEQ water program costs and the degree of permit fee increases needed to cover those costs. As a result of the 1997 study,⁴⁰ legislators again introduced bills in 1998 proposing to increase permit fees so that 100% of the water program costs would be recovered. The increases would be phased in until July 1, 2003.⁴¹ The 1998 legislation, however, was also defeated. As in 1997, however, a study bill was introduced requesting the Auditor of Public Accounts to review the DEQ's water program costs and to determine whether permit fees would adequately cover those costs.⁴² It is likely that

36. *Id.* § 62.1-44.19:6(A)(2) (Repl. Vol. 1998).

37. *See id.* § 62.1-44.19:6(B) (Repl. Vol. 1998).

38. The plan shall include the date of expected achievement of water quality objectives, measurable goals, the corrective actions necessary, and the associated costs, benefits and environmental impact of addressing impairment and the expeditious development and implementation of TMDLs when appropriate. A priority ranking for impaired waters should be developed as part of the plan. *See id.*

39. *See* S.B. 1080 & H.B. 2245, Va. Gen. Assembly (Reg. Sess. 1997) (amending and reenacting VA. CODE ANN. § 62.1-44.15:6 (Repl. Vol. 1998)).

40. *See* DEPARTMENT OF ENVTL. QUALITY, EVALUATION OF THE PERMIT FEE PROGRAM, REPORT TO THE GENERAL ASSEMBLY (1998).

41. *See* S.B. 597 & H.B. 1394, Va. Gen. Assembly (Reg. Sess. 1998).

42. *See* H.B. 30, Va. Gen. Assembly (Reg. Sess. 1998).

legislation will be introduced again next year based on the study results.

In the interest of communities' right-to-know, legislation was introduced to amend the notification requirements associated with application for a new or modified Virginia Pollutant Discharge Elimination System ("VPDES") permit.⁴³ The Board must make a good faith effort to notify, in writing, each locality and riparian property owner impacted by the permit application.⁴⁴ Upon public notice of an enforcement action under the State Water Control Law, the Board must provide written information regarding the alleged violation to the locality where the offense has or is taking place.⁴⁵

Additionally, the General Assembly passed resolutions requesting the DEQ, the Department of Forestry, and the Department of Conservation and Recreation ("DCR") to provide leadership and necessary guidance to citizen groups monitoring the water quality of Virginia's rivers and streams.⁴⁶ The legislature's intent is for the Departments to ensure the data collected by these groups is valid and reliable.

In response to this legislation, the DEQ has entered into a letter of agreement with the Virginia Division Izaak Walton League of America, Virginia Save Our Streams Program.⁴⁷ In the agreement, the DEQ committed to using water monitoring

43. A VPDES permit is issued by the DEQ and authorizes (i) the discharge of pollutants from a point source to surface waters, and (ii) the use or disposal of sewage sludge. See 9 VA. ADMIN. CODE 25-31-10 (Cum. Supp. 1998).

44. See VA. CODE ANN. § 62.1-44.15:4(B) (Repl. Vol. 1998). For tidal waters, the notification must extend to localities and riparian property owners "to a distance one quarter mile downstream and one quarter mile upstream or to the fall line whichever is closer." For non-tidal waters, notification is due "each locality and riparian property owner to a distance one half mile downstream If the receiving river, at the point or proposed point of discharge, is two miles wide or greater, the riparian property owners on the opposite shore need not be notified." *Id.* § 62.1-44.15:4(D) (Repl. Vol. 1998).

45. See *id.* § 62.1-44.15:4(E) (Repl. Vol. 1998).

46. See H.J. Res. 118, Va. Gen. Assembly (Reg. Sess. 1998); H.J. Res. 159, Va. Gen. Assembly (Reg. Sess. 1998). House Joint Resolution 118 goes further than House Joint Resolution 159, encouraging the DEQ and DCR to provide all possible cooperation and assistance to citizen volunteers and to expand voluntary stewardship of Virginia's waters.

47. See Letter of Agreement Between the Department of Environmental Quality and the Virginia Division Izaak Walton League of America, Virginia Save Our Streams Program (Apr. 29, 1998) (on file with author).

data generated by the group in developing the 305(b) report and for other appropriate uses.⁴⁸ The agreement establishes training and quality control procedures to be followed in order for the data to be used.⁴⁹

The Virginia General Assembly also passed legislation focused on the quality of data gathered as part of the water permit program.⁵⁰ The Division of Consolidated Laboratory Services must develop a program for the certification of laboratories conducting any tests, analyses, measurements, or monitoring required under the Virginia Waste Management Act or State Water Control Law.⁵¹ The regulations are not to be promulgated until national accreditation standards by the National Environmental Laboratory Accreditation Conference have been adopted.⁵²

Two new types of general permits will be created because of recent legislation. House Bill 2107⁵³ requires the Board to coordinate the development of a general permit for the installation of certain water quality improvement and protection practices. For this general permit to apply, the activity must be (i) covered by a Corps of Engineers general permit, (ii) designed and supervised by a soil and water conservation district, (iii) consistent with specified design standards, and (iv) intended to improve water quality.⁵⁴ The purpose of the general permit is to expedite the use of water quality improvement projects.⁵⁵ Accordingly, the Virginia Marine Resources Commission must develop a process to accelerate the issuance of general permits for such projects.⁵⁶

The second general permit category applies to discharges of stormwater and process wastewater from industrial activities

48. *See id.* at 6.

49. *See id.* at 3-5.

50. *See* VA. CODE ANN. § 2.1-429.01 (Cum. Supp. 1998).

51. *See id.*

52. *See id.*

53. H.B. 2107, Va. Gen. Assembly (Reg. Sess. 1997) (codified at VA. CODE ANN. §§ 9-6.14:4.1, 28.2-103, 28.2-1207, 62.1-44.15:5.1 (Repl. Vol. 1998)).

54. *See* VA. CODE ANN. § 62.1-44.15:5.1 (Repl. Vol. 1998).

55. *See id.*

56. *See id.* The activities intended to be covered by such a general permit include bioengineered streambank projects and livestock stream crossings. *See id.*

associated with the manufacture of ready-mix concrete.⁵⁷ The permit would apply to both permanent and portable concrete plants. The general permit may include a requirement that settling basins for the treatment and control of process wastewater and commingled stormwater be lined with concrete or other impermeable materials. This requirement will apply to settling basins constructed on or after February 2, 1998.⁵⁸

2. Case law

On the enforcement side, the regulated community was dismayed at the recent decision in *United States v. Smithfield Foods, Inc.*⁵⁹ Essentially, the decision allowed the EPA to enforce state permit limits, in spite of the fact that the state had issued a consent order providing a schedule for achieving compliance and relieving Smithfield Foods, Inc. ("Smithfield") from any liability in the interim.⁶⁰ The EPA brought an enforcement action against Smithfield in federal district court for submitting required reports late and for violating effluent limitations contained in its VPDES permit.⁶¹ Smithfield was operating under a VPDES permit which contained limits for phosphorus, nitrogen, CBOD, cyanide, and ammonia that it was unable to meet.⁶² The defendant alleged that the DEQ had issued a special order granting Smithfield a reprieve from the permit limits if Smithfield agreed to connect its discharge to the Hampton Roads Sanitation District.⁶³ The court awarded the highest penalty in the history of the Clean Water Act to the EPA, finding that Smithfield had over 164 permit violations.⁶⁴ This award was based on the court's finding that the special orders of the DEQ were not incorporated into the permit, nor did they condition, revise, supersede, alter, modify, or change the terms

57. See *id.* § 62.1-44.15:5.2 (Repl. Vol. 1998).

58. See *id.*

59. 965 F. Supp. 769 (E.D. Va. 1997).

60. See *id.* at 785-87.

61. See *id.* at 781.

62. See *id.* at 783. The limits were based on state standards that were more stringent than the federal requirements. See *id.* at 774.

63. See *id.* at 784.

64. See *id.* at 796.

of the permit.⁶⁵ State-issued consent orders do not bind the EPA unless the Agency is a party to the agreements or the Agency consents to being bound.⁶⁶

The court concluded that the DEQ's state enforcement action did not preclude the EPA from bringing an enforcement action because Virginia's enforcement powers were not comparable to those found in section 309 of the Clean Water Act ("CWA").⁶⁷ Virginia's State Water Control Law⁶⁸ was found to be deficient in two respects: (i) the DEQ's ability to assess administrative penalties; and (ii) the public's participation rights. The district court went on to treble the damages.⁶⁹

This case is significant because Smithfield had an ongoing relationship with the state agency and was operating under a consent decree for which the EPA had received notice and an opportunity to comment. Nonetheless, the court found the EPA was not bound by the consent decree and could seek independent enforcement against Smithfield.⁷⁰

Several recent decisions outside the Fourth Circuit also could impact water pollution regulation in Virginia. The Fifth Circuit recently held that the EPA cannot require a state to engage in Endangered Species Act consultations in order to receive delegation to administer the NPDES permit program. In *American Forest & Paper Ass'n v. EPA*,⁷¹ Louisiana applied to the EPA for authority to administer its NPDES permit program. As a condition for receiving delegation, the EPA required that Louisiana consult with the Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") before issuing

65. *See id.* at 787.

66. *See id.* at 788-91. Smithfield filed a cross-bill seeking a declaratory judgment that the special order revised and superseded its permit. *See Treacy v. Smithfield Foods, Inc.*, 256 Va. 97, 500 S.E.2d 503 (1998). The Supreme Court of Virginia refused to issue a judgment on the grounds that there was no controversy between the DEQ and Smithfield. Both parties agreed that the VPDES permit was superseded by the special order for purposes of a state enforcement action. However, federal law would govern the determination of whether the special order precluded an enforcement action brought by the EPA. Smithfield's dispute was with the EPA, not the DEQ. *See id.*

67. *See Smithfield Foods, Inc.*, 965 F. Supp. at 787.

68. VA. CODE ANN. §§ 62.1-44.2 to 44.34:12 (Repl. Vol. 1992).

69. *See Smithfield Foods, Inc.*, 965 F. Supp. at 792-95.

70. *See id.* at 792-93.

71. 137 F.3d 291 (5th Cir. 1998).

permits. The EPA reserved the right to veto permits that were not modified in response to the comments provided by the FWS and NMFS. The court found that the EPA must approve a state permit program if it meets the nine requirements spelled out in section 402 of the CWA. The protection of endangered species is not a listed requirement. Accordingly, the EPA could not require Endangered Species Act reviews as a condition of delegation to administer the NPDES program.⁷²

A United States District Court in Washington called into question EPA regulations allowing state revisions to water quality standards to take immediate effect.⁷³ In *Alaska Clean Water Alliance v. Clarke*, Alaska submitted revisions to its water quality standards to the EPA for approval.⁷⁴ Under section 303(c)(3) of the CWA, the EPA must either notify a state within sixty days if the revisions have been approved or within ninety days if they have been disapproved.⁷⁵ The EPA regulations, however, provide that state water quality standards go into effect immediately upon adoption by a state and remain effective until revised by the state, even if the EPA does not approve the standard at the end of the review process.⁷⁶ Environmental groups brought suit against the EPA, challenging the regulation.

Applying the traditional test of agency regulatory authority set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁷⁷ the court found that Congress did not intend for new or revised state water quality standards to become effective until after the EPA had reviewed and approved them.⁷⁸ If this holding is adopted in Virginia, there could be a significant impact on the development and implementation of state water quality standards. Virginia is in the process of revising its water quality standards, and new standards will be

72. See *id.*

73. See *Alaska Clean Water Alliance v. Clarke*, No. C96-1762R, 1997 WL 446499, at *2 (W.D. Wash. July 8, 1997) (considering 40 C.F.R. § 131.21(C) (1997)).

74. See *id.* at *1.

75. See 33 U.S.C. § 1313(c)(3) (1994).

76. See 40 C.F.R. § 131.21(c) (1997).

77. 467 U.S. 837 (1984).

78. See *Alaska Clean Water Alliance*, 1997 WL 446499, at *3.

implemented without the EPA's review and approval, despite the *Alaska Clean Water Alliance* decision.

The Third Circuit recently decided a case that could affect the ability of citizen groups to bring suit in the Clean Water Act context.⁷⁹ In *Public Interest Research Group of New Jersey, Inc. v. Magnesium Electron, Inc.*, Magnesium Electron appealed the district court's ruling granting standing to the Public Interest Research Group ("PIRG").⁸⁰ The appeal was brought after the district court found that the permit violations in question had caused no environmental harm and posed no threat to the waterway in question. The Third Circuit held that the CWA does not authorize citizen suits where there has been no showing of injury or threat of injury.⁸¹ Permit limit violations alone are not sufficient to make this showing. This case could have a tremendous impact on the ability of environmental groups to bring suit for environmental violations that do not have a proven detrimental impact.

B. *Drinking Water*

High profile water supply disputes such as the Lake Gaston Pipeline litigation⁸² and the King William County reservoir controversy⁸³ have lead to increased attention to water supply planning in Virginia. Legislation considered by the General Assembly during the past two years reflects this trend. Several

79. See *Public Interest Research Group of N.J., Inc. v. Magnesium Electron, Inc.*, 123 F.3d 111 (3d Cir. 1997).

80. See *id.* at 114.

81. See *id.* at 120.

82. See, e.g., Karen Weintraub, *Mediation May End Gaston Fight: Virginia Beach, North Carolina Could Find Settlement on Pipeline Without the Help of Lawsuits*, VIRGINIAN-PILOT & LEDGER-STAR, Mar. 20, 1995, at B1; *Gilmore Files Court Papers Opposing North Carolina on Pipeline*, RICH. TIMES-DISPATCH, Jan. 11, 1997, at B4; *The EPA and Lake Gaston: Not Quite a Go-Ahead*, VIRGINIAN PILOT & LEDGER-STAR, Mar. 15, 1995, at A10.

83. See, e.g., Lawrence Latane III, *Mattaponi Tribe Asks Court to Block Reservoir Project*, RICH. TIMES-DISPATCH, Feb. 14, 1998, at B4; Lawrence Latane III, *Reservoir Project Faces Legal Challenge: Environmentalists Oppose State Permit*, RICH. TIMES-DISPATCH, Jan. 16, 1998, at B1; Lawrence Latane III, *Water Project in Doubt: Study Questions Newport News' Needs*, RICH. TIMES-DISPATCH, May 30, 1998, at A1.

resolutions were passed during the 1997 and 1998 General Assembly sessions proposing studies aimed at protecting Virginia's water resources.⁸⁴

The State Water Commission⁸⁵ has been tasked with studying the feasibility of using different methods for maximizing Virginia's water resources.⁸⁶ The resolution outlines various water supply strategies for consideration, including water recycling, desalinization, tertiary treatment, and conservation.⁸⁷

House Joint Resolution 587⁸⁸ required the Department of Environmental Quality and Department of Health to study examples of water reuse and conservation programs throughout the United States. The focus of the study was to evaluate possible health effects from water reuse and the feasibility of implementing such programs in Virginia.⁸⁹ Additionally, the study proposed guidelines for appropriate gray water⁹⁰ reuse in Virginia and made recommendations on incentives to encourage rainwater collection and gray water reuse among targeted audiences. A report was provided to the General Assembly at the start of the 1998 Session.⁹¹

As a result of this study, the 1998 General Assembly passed legislation requiring the Department of Health, in conjunction with the DEQ, to develop guidelines by January 1, 1999, regarding the use of gray and rain water.⁹² The guidelines are intended to promote the use of rain water and gray water to

84. See, e.g., H.J. Res. 274, Va. Gen. Assembly (Reg. Sess. 1998); H.J. Res. 273, Va. Gen. Assembly (Reg. Sess. 1998); H.J. Res. 272, Va. Gen. Assembly (Reg. Sess. 1998); H.J. Res. 236, Va. Gen. Assembly (Reg. Sess. 1998); H.J. Res. 592, Va. Gen. Assembly (Reg. Sess. 1997); H.J. Res. 587, Va. Gen. Assembly (Reg. Sess. 1997); H.J. Res. 554, Va. Gen. Assembly (Reg. Sess. 1997).

85. The State Water Commission was formed to study water supply issues in Virginia and make recommendations for legislative changes relating to water supply. See VA. CODE ANN. § 9-145.8 (Repl. Vol. 1998).

86. See H.J. Res. 236, Va. Gen. Assembly (Reg. Sess. 1998).

87. See *id.*

88. See H.J. Res. 587, Va. Gen. Assembly (Reg. Sess. 1997).

89. See *id.*

90. Gray water is water that is domestic wastewater from sink, shower, dishwasher, and laundry drains. See *How To Conserve Water and Use It Effectively* (visited July 14, 1998) <<http://www.epa.gov/watrhomes/you/chap3.html>>.

91. See DEPARTMENT OF ENV'TL QUALITY & DEPARTMENT OF HEALTH, GRAY WATER USE AND RAIN WATER CAPTURE (1997).

92. See VA. CODE ANN. § 32.1-248.2 (Cum. Supp. 1998).

reduce fresh water consumption, ease demands on public treatment works and water supply systems, and promote conservation.⁹³

In similar legislation passed in 1997, the State Water Commission was directed to work with the Virginia Water Resources Research Center to study innovative technologies and other options for addressing the need to provide safe drinking water to homes in southwestern Virginia.⁹⁴ Innovative technologies to be considered include "water harvesting and cistern storage, small surface reservoirs, and cost-effective treatment, including the development of small package-system models."⁹⁵ The results of the two-year study will be reported to the 1999 General Assembly.

Reauthorization of the Safe Drinking Water Act ("SDWA")⁹⁶ in 1996 has led to additional legislative changes. The Virginia Code was amended to provide the Health Department with the new penalty powers created by the SDWA.⁹⁷ After a hearing, the Health Department is now able to issue special orders for waterworks violations, including civil penalties of not more than \$1,000 per day of violation.⁹⁸

Access to the Virginia Water Supply Revolving Fund⁹⁹ was broadened to include all owners of drinking water systems, whether local governments or individuals, partnerships or corporations, so long as the waterworks serves an average of twenty-five individuals for at least sixty days out of the year or has at least fifteen connections.¹⁰⁰ The bill also clarifies the relationship between the State Board of Health and the Virginia Resources Authority ("VRA") with respect to administration of the Fund. The State Board of Health (i) may require status reports from VRA, (ii) must reimburse VRA for its reasonable

93. *See id.*

94. *See* H.J. Res. 592, Va. Gen. Assembly (Reg. Sess. 1997).

95. *Id.*

96. 42 U.S.C. §§ 300f to 300j-26 (1994).

97. *See* VA. CODE ANN. §§ 32.1-167 to -176 (Repl. Vol. 1997); *id.* § 32.1-175.01 (Cum. Supp. 1998).

98. *See id.* § 32.1-175.01 (Cum. Supp. 1998).

99. *Id.* §§ 62.1-233 to -241 (Repl. Vol. 1998).

100. *See id.*

costs and expenses, and (iii) shall approve a fee for VRA's management services.¹⁰¹

In response to water supply issues in southwest Virginia, coal bed methane well operators are now required to replace domestic water supplies contaminated by the operation, if the supply is located within 750 feet of the operation.¹⁰² The new water supply must be capable of meeting pre-contamination uses.¹⁰³ Such replacement, however, is not required if the property owner refuses to allow the operator access to the property to sample the well water in order to verify the contamination.¹⁰⁴

Additionally, legislation was passed allowing property owners to object to a coal bed methane permit if the well or pipeline will unreasonably infringe on the owner's use of the surface.¹⁰⁵ The objection can be granted only if a reasonable alternative site is available within the unit and granting the objection will not materially impair any right contained in an agreement between the property owner and the operator.¹⁰⁶

C. Stormwater

The EPA was instructed to implement a comprehensive approach to stormwater regulation in 1987.¹⁰⁷ As part of this approach, regulations have been developed and implemented for large and medium sources of stormwater.¹⁰⁸ Most recently, EPA has proposed its Stormwater Phase II rule, which would apply to small municipal separate storm sewer systems¹⁰⁹ located in urban areas and to construction activities that disturb between one and five acres of land.¹¹⁰

101. *See id.* § 62.1-234 (Repl. Vol. 1998).

102. *See id.* §§ 45.1-361.43, -361.44 (Repl. Vol. 1998).

103. *See id.*

104. The coal bed methane well operator may enter the property at reasonable times and in a reasonable manner to obtain samples of water from the wells. *See id.*

105. *See id.* § 45.1-361.35 (Repl. Vol. 1998).

106. *See id.*

107. *See* 33 U.S.C. § 1342 (1994).

108. *See* National Pollutant Discharge Elimination System, 63 Fed. Reg. 1536, 1542-43 (1998) (to be codified at 40 C.F.R. pt. 122) (proposed Jan. 9, 1998).

109. *See id.* at 1551. Small municipal separate storm sewer systems serve populations less than 100,000. *See id.* at 1546.

110. *See id.* at 1551.

The proposed Stormwater Phase II rule would change the NPDES stormwater permit application regulations under the CWA to establish a sequential application process for all Phase II stormwater discharges. Phase II stormwater dischargers would be required to apply for permits by August 7, 2001,¹¹¹ and to implement stormwater discharge management controls.

The proposed rule encourages the use of general permits, allows municipalities to determine the nature of their own stormwater controls, and encourages the use of watershed approaches. Certain sources would be eligible for waivers based on TMDL and watershed-based waiver provisions.¹¹² Owners and operators of all categories of industrial activities that are able to certify that their industrial materials will have "no exposure" to stormwater will be exempt as well.¹¹³ The Phase II rule is expected to become final in March 1999. Permits will be issued under the program in March 2002.

On the state level, there have been some minor changes to stormwater regulation. Localities are now allowed to exempt cemeteries from local stormwater management fees.¹¹⁴ Additionally, localities must now waive stormwater service charges for roads that are owned and maintained by government agencies.¹¹⁵

III. AIR

A. *Federal Initiatives*

The EPA undertook several ambitious air pollution initiatives in 1997 that will affect both the standards and compliance obligations of sources in Virginia. Significantly, the EPA recently tightened the National Ambient Air Quality Standards ("NAAQS")¹¹⁶ for ozone¹¹⁷ and particulate matter.¹¹⁸ The

111. *See id.* at 1636.

112. *See id.* at 1553-54.

113. *See id.* at 1597.

114. *See* VA. CODE ANN. § 15.2-2114 (Cum. Supp. 1998).

115. *See id.*

116. The EPA is required, pursuant to section 109 of the Clean Air Act, to establish NAAQS for specified pollutants. *See* 42 U.S.C. § 7409 (1994). Section 110 of the Act then imposes the burden on states to implement the measures to be applied to

EPA revised the ozone standard from 0.12 parts per million ("ppm") over a one-hour average to 0.08 ppm over an eight-hour average¹¹⁹ to protect against longer exposure periods.¹²⁰ The Agency also targeted fine particles, 2.5 microns or less in diameter, in the promulgation of new standards for particulate matter ("PM"). Fine particles, which generally stem from industrial and residential combustion or vehicle exhaust, have been linked to health problems also associated with exposure to ozone, such as asthma¹²¹ and visibility impairment.¹²² The new PM 2.5 standards are a twenty-four-hour average of 50 $\mu\text{g}/\text{m}^3$ and an annual average limit of 15 $\mu\text{g}/\text{m}^3$.¹²³ These controversial NAAQS have been the subject of both industry challenges based on the Small Business Regulatory Enforcement Fairness Act ("SBREFA")¹²⁴ and legislative challenges¹²⁵ that have the potential of delaying implementation of the NAAQS for years.

In conjunction with the promulgation of the new particulate matter NAAQS, the EPA recently proposed Regional Haze Regulations aimed at improving visibility¹²⁶ in the nation's pristine areas, such as the Shenandoah Valley.¹²⁷ The proposal

sources necessary to attain NAAQS through State Implementation Plans ("SIPs"). See 42 U.S.C. § 7410 (1994).

117. See National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997) (to be codified at 40 C.F.R. pt. 50).

118. See National Ambient Air Quality Standards for Particulate Matter, 61 Fed. Reg. 65,638 (to be codified at 40 C.F.R. pt. 50 (proposed Dec. 13, 1996)).

119. See National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,861.

120. Long-term exposure to ambient ozone concentration has been linked to chronic health effects such as structural damage to lung tissue and accelerated decline in baseline lung function. See *id.* at 38,859 & n.4.

121. See National Ambient Air Quality Standards for Particulate Matter, 61 Fed. Reg. at 65,640.

122. See *id.* at 65,662.

123. See *id.* at 65,638.

124. See 5 U.S.C. § 611 (1996).

125. See H.R. 1984, 105th Cong. (1997) (providing for a four-year moratorium on the establishment of the new ozone and particulate matter standards pending further implementation of the CAA amendments of 1990 and additional review under the Act).

126. The regulations would also protect against effects such as soiling and material damage. See *id.*

127. See Regional Haze Regulations, 62 Fed. Reg. 41,138 (1997) (to be codified at 40 C.F.R. pt. 51) (proposed July 31, 1997). The EPA is proposing the Regional Haze Regulations pursuant to section 169 of the CAA which sets forth "as a national goal the prevention of any future, and the remedying of any existing, impairment of visi-

calls for presumptive "reasonable progress targets"¹²⁸ for improving visibility in pristine areas to be set and implemented through State Implementation Plan ("SIP") revisions.¹²⁹

As another component of the EPA's ozone control strategy, the EPA formally issued a call for revised Clean Air Act ("CAA") SIPs for twenty-two eastern states,¹³⁰ including Virginia. The call requires the states to reduce NOx¹³¹ emissions by 1.6 million tons over the next eight years.¹³² The proposal requires the Commonwealth to achieve a NOx-reduction budget¹³³ as a way to reduce ozone transport into the northeast. Virginia will be required, through an amendment to its SIP, to demonstrate how, and from what sources, it will meet this NOx reduction goal.¹³⁴ Emissions controls would need to be in place by 2002, and the proposed reductions achieved by 2005.¹³⁵ The burden of Virginia's proposed NOx reductions would fall primarily on coal-burning power plants and large and medium-sized boilers.¹³⁶ The proposed NOx reductions could result in significant regional growth and development burdens in the Common-

bility in mandatory class I Federal areas which impairment results from man-made air pollution." 42 U.S.C. § 7491 (1994).

128. Regional Haze Regulations, 62 Fed. Reg. at 41,145.

129. *See id.* at 41,148.

130. These states include: Alabama, Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Michigan, Missouri, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Wisconsin, and West Virginia. *See Information on the Proposed Rule for Reducing Regional Transport of Ground-Level Ozone (Smog)* (visited July 14, 1998) <<http://www.epa.gov/ttn/oarpg/otagsip.html>>.

131. NOx is a significant precursor to the formation of ozone. *See Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone*, 62 Fed. Reg. 60,318 (1997) (to be codified at 40 CFR pt. 52).

132. *See id.*

133. Virginia's proposed 2007 NOx reduction budget would require the Commonwealth to achieve a 21% reduction in NOx emissions. *See EPA Proposal Calls on 22 States to Cut NOx Emissions by 1.6 Million Tons Per Year*, [Oct.] Daily Env't Rep. (BNA) No. 198, at AA-1, AA-2 (Oct. 14, 1997).

134. The EPA plans to promulgate its rule on the regional reductions in September 1998, and states are required to submit their revised SIPs in 1999. *See id.* at AA-1.

135. *See Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone*, 62 Fed. Reg. 60,318, 60,367 (1997) (to be codified at 40 C.F.R. pt. 52).

136. *See id.* at 60,320.

wealth due to the increased costs of energy and technology necessary to achieve reductions, as well as the increased difficulty in building new sources or expanding upon existing sources.

The EPA has also added two weapons to its clean air enforcement arsenal which will have implications for sources throughout the Commonwealth of Virginia. The EPA is seeking, through the adoption in 1996 of new monitoring rules¹³⁷ and the adoption in 1997 of the Any Credible Evidence Rule ("ACE"),¹³⁸ to ensure continuous compliance with CAA requirements. The Compliance Assurance Monitoring Rule ("CAM") enhances monitoring requirements for sources that rely on pollution control devices¹³⁹ to achieve compliance with applicable CAA requirements and for sources that use other methods to meet emission limits.¹⁴⁰ Sources that use control devices would be required to monitor the operation and maintenance of their pollution control equipment and to correct and report any instances of equipment malfunction.¹⁴¹

In addition, the 1997 ACE Rule¹⁴² provides a strong example of the EPA's efforts to expand its enforcement authority. Traditionally, the EPA was limited to established performance and reference test¹⁴³ data for use in establishing CAA violations.¹⁴⁴ Such tests, which were promulgated through public rulemakings, were designed to ensure that the determination of compliance was linked directly to the underlying data which gave rise to the emission limit.¹⁴⁵ In contrast, the ACE rule

137. See Compliance Assurance Monitoring, 62 Fed. Reg. 54,900 (1997) (to be codified at 40 C.F.R. pts. 64, 70, 71).

138. See Credible Evidence Revisions, 62 Fed. Reg. 8314 (1997) (to be codified at 40 C.F.R. pts. 51, 52, 60, 61).

139. The CAM rule defines a "control device" as a piece of "equipment that removes pollutants or transforms pollutants to passive emissions." Compliance Assurance Monitoring, 62 Fed. Reg. at 54,902.

140. An "emission limitation or standard" includes any federally enforceable emission limitation, emission standard, standard of performance, or means of emission limitation as defined under the Clean Air Act. See *id.* at 54,909.

141. See *Fact Sheet: Compliance Assurance Monitoring* (last modified Oct. 3, 1997) <<http://www.epa.gov/ttn/uatw/cam/camprfs.html>>.

142. See Credible Evidence Revisions, 62 Fed. Reg. at 8314.

143. See 40 C.F.R. pts. 51, 52, 60, 61 (1997).

144. See Credible Evidence Revisions, 62 Fed. Reg. at 8315.

145. See Michael G. Dowd & Michael H. Levin, *By Any Credible Means: 'Any Cred-*

has now increased the types of evidence available to establish CAA violations. Evidence such as routine monitoring, continuous emissions monitoring results, opacity tests, engineering calculations, witness testimony, or virtually *any other evidence* now theoretically can be used to establish noncompliance.¹⁴⁶ In effect, the ACE rule has done away with accepted emission standards and left federal and state rules of evidence as the only limits on what information can be used to establish violations.

Sources have directed sharp criticism at the rule for both changing the definition of compliance and for exposing sources to an increased number of public and private actions by allowing a source's own records to be used against them.¹⁴⁷ Faced with these concerns, sources will be increasingly reluctant to generate additional data, even in efforts to improve pollution control, because that data could be used as evidence of a violation. The potential impact of this controversial rule has led to one of the largest regulatory challenges ever levied against a CAA provision.¹⁴⁸

A current debate exists as to what extent state audit privilege laws will be available as a shield against the EPA's expanding access to information pursuant to the CAM and ACE provisions. A war has been raging between the EPA and the states regarding the scope of state environmental audit privilege and immunity policy.¹⁴⁹ Virginia has adopted privilege and immunity legislation that protects from disclosure documents generated as the product of a voluntary environmental assessment. The privilege grants immunity from civil and administrative penalties to anyone voluntarily disclosing violations of environmental statutes, rules, or regulations.¹⁵⁰ The EPA

ible Evidence' Rule Radically Redefines Clean Air Act Compliance, LEGAL TIMES, June 16, 1997, at 533.

146. See *Credible Evidence Revisions*, 62 Fed. Reg. at 8315.

147. See Daniel Riesel, *Forecasting Significant Air Act Implementation Issues: Permitting and Enforcement*, 14 PACE ENVTL. L. REV. 129, 155 (1996).

148. More than 80 petitions for review have been filed in the United States Court of Appeals for the D.C. Circuit. See Dowd & Levin, *supra* note 145, at 533.

149. See E. Lynn Grayson & Christina M. Riewer, *EPA's Audit Policy and State Audit-Privilege Laws: Moving Beyond Command and Control?*, [1997] 27 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,243 (May 1997).

150. See VA. CODE ANN. §§ 10.1-1198, -1199 (Repl. Vol. 1998).

has indicated, at least with respect to Title V permit program enforcement authority, that Virginia's audit law will not interfere with requisite enforcement authority.¹⁵¹ Virginia may, however, still be subject to pressures from EPA regarding other delegated or impending delegated programs.¹⁵²

B. *Virginia Judicial Developments*

In October of 1996, Virginia asked the Supreme Court of the United States to review the decision of the United States Court of Appeals for the Fourth Circuit in *Virginia v. Browner*.¹⁵³ In that decision, the court found that the EPA had properly disapproved Virginia's program for the issuance of air pollution permits.¹⁵⁴ Specifically, the EPA disapproved of Virginia's submittal because of inadequate judicial standing provisions and Title V program fee provisions.¹⁵⁵ Also, Virginia failed to assure the EPA that all sources required by the CAA to obtain Title V permits would be required to attain operating permits.¹⁵⁶

On January 21, 1997, the United States Supreme Court declined to hear Virginia's case.¹⁵⁷ Virginia had prepared for this possibility by passing an acceptable judicial standing law that would become effective in the event the Supreme Court did not overturn EPA's disapproval of the Virginia program.¹⁵⁸ Virginia's revised standing provisions¹⁵⁹ did away with requirements that a petitioner must demonstrate a pecuniary in-

151. See Clean Air Act Interim Approval of Operating Permit Program; Commonwealth of Virginia, 62 Fed. Reg. 12,778, 12,785 (1997) (to be codified at 40 C.F.R. pt. 70) (proposed Mar. 18, 1997).

152. The EPA has expressed concerns with the effect that Virginia's Environmental Assessment Privilege and Immunity Law would have on programs such as the Public Water Supply Supervision ("PWSS") program. See Letter from Neil R. Bigioni, Assistant Regional Counsel, EPA Region III, to Roger L. Chaffe, Virginia Senior Assistant Attorney General (Sept. 4, 1997) (on file with the author).

153. 80 F.3d 869 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 764 (1997).

154. See *id.* at 883.

155. See *id.* at 880.

156. See Clean Air Act Proposed Disapproval of Operating Permit Program; Commonwealth of Virginia, 60 Fed. Reg. 48,435 (1995) (codified at 40 C.F.R. pt. 70).

157. See *Virginia v. Browner*, 117 S. Ct. 764 (1997).

158. See Clean Air Act Interim Approval of Operating Permits Program; Commonwealth of Virginia, 62 Fed. Reg. 12,778, 12,780 (1997) (codified at 40 C.F.R. pt. 70).

159. See VA. CODE ANN. §§ 10.1-1318, 10.1-1485, 62.1-44.29 (Repl. Vol. 1998).

terest to have standing.¹⁶⁰ Instead, standing now exists for anyone meeting the standard for judicial review of a "case or controversy pursuant to Article III of the United States Constitution."¹⁶¹ Virginia corrected the other deficiencies in its Title V program by including all sources subject to sections 111 and 112 of the CAA within the applicability of the Virginia operating permit requirements and permit fee provisions.¹⁶²

After this correction, the EPA granted interim approval for Virginia to administer its own state operating permit program.¹⁶³ Interim approval became effective July 10, 1997, and will expire July 12, 1999.¹⁶⁴ During this time, permits issued by the Commonwealth will be valid, and the Commonwealth will be protected from EPA sanctions.¹⁶⁵

The United States Court of Appeals for the Fourth Circuit, in *United States v. Hoechst Celanese Corp.*,¹⁶⁶ addressed the National Emission Standard for Hazardous Air Pollutant's ("NESHAP")¹⁶⁷ definition of "use."¹⁶⁸ The court found a company liable for leaks of benzene that occurred after the EPA provided the company with actual notice of its interpretation of the regulations.¹⁶⁹ The controversy involved an exemption to the emissions regulations for "[a]ny equipment in benzene service that is located at a plant site designed to produce or use less than 1000 megagrams of benzene per year."¹⁷⁰ Hoechst Celanese Corp. ("HCC") had construed the term "use" to mean "consumption" and determined that its plant fit within the

160. *See id.* § 10.1-1318 (Repl. Vol. 1998).

161. *Id.*

162. *See* 9 VA. ADMIN. CODE 5-80-50 (1996 & Supp. 1998) (formerly VRR 120-08-0501); 9 VA. ADMIN. CODE 5-80-310 (1996 & Supp. 1998) (formerly VRR 120-08-0601); *see also* Clean Air Act Interim Approval of Operating Permit Program; Commonwealth of Virginia, 62 Fed. Reg. 12,778, 12,780 (1997).

163. *See* 40 C.F.R. pt. 70 (1997).

164. *See* Technical Amendments To Clean Air Act Interim Approval of Operating Permit Program; Commonwealth of Virginia, Correction of Effective Date Under Congressional Review Act, 63 Fed. Reg. 13,346 (1998).

165. *See* Clean Air Act Final Interim Approval of Operating Permit Program; Commonwealth of Virginia, 62 Fed. Reg. 31,516, 31,518 (1997) (codified at 40 C.F.R. pt. 70 app. A).

166. 128 F.3d 216 (4th Cir. 1997).

167. *See* 40 C.F.R. §§ 61.01-19, 61.110-112, 61.240-247 (1997).

168. *See Hoechst Celanese*, 128 F.3d at 219.

169. *See id.* at 230.

170. 40 C.F.R. § 61.110(c)(2) (1997).

exemption.¹⁷¹ Therefore, HCC had never filed reports for the plant or complied with any regulatory requirements.¹⁷² The Fourth Circuit determined that HCC's interpretation of "use" was reasonable prior to 1989, when, based on the approval of similar exemptions to HCC plants in other regions, HCC had clarification that its interpretation of "use" was reasonable.¹⁷³ However, HCC could not avail itself of a fair notice defense for violations that occurred after 1989, when the EPA provided the defendant with actual notice of the Agency's interpretation of its benzene emissions regulations.¹⁷⁴

C. Virginia Legislative Developments

On December 11, 1997, in Kyoto, Japan, the parties to the United Nations Framework Convention on Climate Change¹⁷⁵ entered into the Kyoto Protocol¹⁷⁶ which calls for many industrialized nations to cut greenhouse gas emissions¹⁷⁷ by six percent to eight percent below 1990 levels.¹⁷⁸ Among the sharpest criticisms of the Kyoto Protocol is its failure to require developing countries to cut their emissions.¹⁷⁹ It seems unlikely that the United States will ratify the Protocol, given that the resolu-

171. See *Hoechst Celanese*, 128 F.3d at 220.

172. See *id.*

173. See *id.* at 225.

174. See *id.* at 228-29.

175. Protocol to the United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849. Delegates included representatives from over 150 countries including: Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, European Community, Finland France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Kingdom of Great Britain and Northern Ireland, and United States. See *id.*

176. Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22.

177. The six greenhouse gases covered by the Kyoto Protocol include carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydro fluorocarbons, and per fluorocarbons. See *Protocol to the United Nations Framework Convention on Climate Change, Annex A* (visited July 14, 1998) <<http://www.bigeye.com/kyoto.htm>>.

178. Specific limits for key industrial powers include: European Union, eight percent below 1990 levels; United States, seven percent below 1990 levels; and Japan, six percent below 1990 levels. See *id.* at Annex B.

179. See *Recent Developments in the Congress*, [1998] 28 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,097, 10,098 (Feb. 1998).

tion adopted in the Senate last summer to disapprove any protocol did not "mandate new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period."¹⁸⁰ The Virginia General Assembly took similar action on this front with Senate Joint Resolution 58,¹⁸¹ which followed the intent of Congress to prevent ratification of the Kyoto Protocol until developing countries commit to limiting such emissions.

Title II of the CAA requires states that contain certain ozone and carbon monoxide (CO) nonattainment areas,¹⁸² including Virginia, revise their SIPs to incorporate Clean Fuel Fleet Programs.¹⁸³ The Virginia Clean Fuel Fleet Program,¹⁸⁴ pursuant to the federal guidelines,¹⁸⁵ specifies certain percentages of new vehicles acquired by fleet operators that must be phased in to the Clean Fuel Program starting in 1999.¹⁸⁶ In 1998, the Virginia General Assembly resolved to amend the Virginia program by replacing the list of specific localities to which the Clean Fuel Fleet Program applied with a generic description, based on the CAA.¹⁸⁷ House Bill 682¹⁸⁸ also authorized the abolition of the entire Clean Fuel Fleet program if approved by the EPA.

180. S. Res. 98, 105th Cong. (1997).

181. S.J. Res. 58, Va. Gen. Assembly (Reg. Sess. 1998).

182. Nonattainment areas covered include the Washington, D.C. metropolitan area, Atlanta, Chicago-Gary-Lake Counties, Milwaukee-Racine, Baton Rouge, and Denver-Boulder. *See* Clean Fuel Fleet Program, 63 Fed. Reg. 20,103, 20,104 (1998) (to be codified at 40 C.F.R. pt. 88).

183. *See id.*

184. *See* VA. CODE ANN. § 46.2-1179.1(A) (Repl. Vol. 1998). "Clean Alternative Fuel" includes methanol, ethanol, other alcohols, reformulated gasoline, diesel, natural gases, liquified petroleum gas, hydrogen, and electricity or other power sources used in clean fuel vehicles as required by the CAA. *See id.* A "fleet" consists of ten or more centrally fueled vehicles owned or operated by a single entity. *See id.*

185. *See* 42 U.S.C. § 7586 (1994).

186. *See* VA. CODE ANN. § 46.2-1179.1(B) (Repl. Vol. 1998).

187. The program will now apply to "localities designated by the federal Environmental Protection Agency, pursuant to the federal Clean Air Act, as serious, severe, or extreme air quality nonattainment areas, or as maintenance areas formerly designated serious, severe, or extreme." *Id.*

188. H.B. 682, Va. Gen. Assembly (Reg. Sess. 1998) (codified at VA. CODE ANN. § 46.2-1179.1 (Repl. Vol. 1998)).

IV. SOLID AND HAZARDOUS WASTE

A. *Federal Judicial Developments*

Several recent Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")¹⁸⁹ decisions have expanded on the principles of operator and arranger liability in the Commonwealth of Virginia. On June 8, 1998, the Supreme Court of the United States reached a significant decision regarding the imposition of operator liability¹⁹⁰ on corporate parent companies participating in and exercising control over the operations of a facility. Traditionally, corporate parent operator liability focused on whether the corporate parent exercised control over the business activities of its subsidiary.¹⁹¹ In *United States v. Bestfoods*,¹⁹² the Supreme Court limited liability for parent corporations to situations where "operation is evidenced by participation in the activities of the facility, not the subsidiary."¹⁹³ *Bestfoods* also recognized the presumption that corporate officers and directors of both a parent and subsidiary may "change hats" to represent the two corporations separately.¹⁹⁴ Thus, the district court's imposition of liability based on the actions of joint officers and directors, was improper.¹⁹⁵ In the future, plaintiffs seeking to impose operator liability on a parent corporation will be forced to show that employees exclusive to the parent corporation exercised control over the environmental management decisions at the subsidiary facility. Otherwise, they will bear the burden of overcoming the presumption that joint officers acted properly.¹⁹⁶

189. 42 U.S.C. §§ 9601-9675 (1994).

190. Responsible parties for purposes of CERCLA include "any person who at the time of disposal of any hazardous substance owned or operated any facility." 42 U.S.C. § 9607(a)(2) (1994).

191. See *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990).

192. 118 S. Ct. 1876 (1998).

193. *Id.* at 1887 (quoting Lynda J. Oswald, *Bifurcation of the Owner and Operator Analysis under CERCLA: Finding Order in Chaos of Pervasive Control*, 72 WASH. U. L.Q. 223, 269 (1994)).

194. See *id.* at 1888.

195. See *id.* at 1889.

196. See *Limited Liability for Corporations Affirmed as High Court Remands Bestfoods' Case*, [June] Daily Env't Rep. (BNA) No. 110, at A-5 (June 9, 1998).

The United States Court of Appeals for the Fourth Circuit has addressed several important CERCLA issues including arranger liability, potentially responsible party ("PRP") standing, and allocation. In *United States v. North Landing Line Construction Co.*,¹⁹⁷ the Fourth Circuit adopted the "crucial decision" approach to the imposition of CERCLA arranger liability.¹⁹⁸ The court, in refusing to extend CERCLA liability to every party in the chain of disposal, determined that the imposition of arranger liability requires actual knowledge of the disposal of waste at a certain location.¹⁹⁹ The court determined that North Landing, which did not make the decision to send PCB-laden transformers to the Superfund site, did not make a practical decision to deal with a specific and known responsible party. Also, the court concluded that North Landing did not have actual or constructive knowledge that the hazardous materials were to be sent to the Superfund site and failed to make the required decision to dispose of the waste at a particular site. Therefore, the company could not be subject to liability as an arranger.²⁰⁰

In *Pneumo Abex Corp. v. High Point, Thomasville & Denton Railroad Co.*,²⁰¹ the Fourth Circuit determined that a federal district judge erred in imposing CERCLA liability upon five railroads based on the disposal arrangement for wheel bearings at a site contaminated by lead and other metals.²⁰² The court determined that to be a PRP²⁰³ under CERCLA, the party must not only arrange for the treatment and disposal of a hazardous substance,²⁰⁴ but the substance must also be a waste.²⁰⁵ The court held that the contract between the railroads and the foundry, for the shipment of used wheel bearings

197. 3 F. Supp. 2d 694 (E.D. Va. 1998).

198. *See id.* at 701.

199. *See id.* at 702.

200. *See id.* at 701.

201. 142 F.3d 769 (4th Cir. 1998).

202. *See id.* at 776.

203. A potentially responsible party "refer[s] to a party who may be covered by the statute at the time that said party is sued under the statute." *See id.* at 773 n.2. Generally, past and present owners and operators, arrangers for disposal, and generators of the hazardous substance are covered persons under CERCLA. *See* 42 U.S.C. § 9607(a) (1994).

204. *See* 42 U.S.C. § 9601(14) (1994).

205. *See Pneumo Abex Corp.*, 142 F.3d at 774.

for subsequent processing into new bearings, was not a transaction for the disposal of hazardous waste sufficient to impose CERCLA liability.²⁰⁶ The Fourth Circuit's decision was based on the intent of the parties to reuse the wheel bearings in their entirety in the creation of new wheel bearings, noting that "[t]he Foundry paid the appellants for the bearings; the appellants did not pay the Foundry to dispose of unwanted metal."²⁰⁷ Therefore, because the railroads had not arranged for the disposal of a waste, they incurred no liability under CERCLA. *Pneumo Abex Corp.* is significant for its recognition that recycling of materials containing hazardous substances does not necessarily constitute the "treatment" or "disposal" of hazardous substances.²⁰⁸

Pneumo Abex Corp. also marked the Fourth Circuit's adoption of the position, consistently shared by other federal courts, that a potentially responsible party must sue other potentially responsible parties only under section 113,²⁰⁹ CERCLA's contribution provision.²¹⁰

The Fourth Circuit also addressed the res judicata effect of prior third party claims brought by a plaintiff against subsequent CERCLA cost recovery actions in *Beazer East, Inc. v. United States Navy*.²¹¹ In *Beazer*, the court determined, in finding that a subsequent section 107 of CERCLA action was barred under principles of res judicata, that section 113(g)(2) does not allow for multiple section 107 actions on liability, as opposed to costs, at the same site.²¹²

The Fourth Circuit has reached several significant decisions regarding Resource Conservation and Recovery Act ("RCRA")²¹³ issues, including corrective action orders and citi-

206. *See id.* at 775.

207. *Id.*

208. *See id.* at 774.

209. Section 113 allows a court to exercise equitable discretion in apportioning liability among responsible parties. Section 107, in contrast, contemplates the imposition of joint and several liability. *See* 42 U.S.C. §§ 9603, 9607 (1994).

210. *See Superfund: Fourth Circuit Joins Other Courts in Limiting Suits by Responsible Parties*, [May] Daily Env't Rep. (BNA) No. 85, at A-8 (May 4, 1998).

211. 111 F.3d 129 (4th Cir. 1997) (unpublished table decision).

212. *See Beazer East, Inc. v. Dep't of the Navy*, [1997] 27 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,308 (4th Cir. Apr. 11, 1997).

213. 42 U.S.C. §§ 6901-6992 (1994).

zen suit provisions. *Cavallo v. Star Enterprise*²¹⁴ was an important decision regarding the preemption of state law claims based on liability arising under a federally mandated cleanup. In that decision, the Fourth Circuit overturned a Virginia federal judge's determination that a family's state law negligence and trespass claims over a tank farm's release and cleanup of petroleum products were federally preempted by RCRA. The RCRA corrective action orders²¹⁵ in place at the site encompassed only remediation efforts, and not all of Star Enterprise's activities at the tank farm involved remediation.²¹⁶ Furthermore, the court of appeals determined conduct mandated by an EPA consent order, but improperly performed, would not be preempted by federal environmental law and could be a basis for liability.²¹⁷ Therefore, state law damages claims will be preempted by EPA orders only if (1) the tortious activities were "required, directed, or supervised by the EPA, and (2) were performed properly."²¹⁸

In another decision addressing the effect of RCRA corrective action orders, the Fourth Circuit in *Wheeling-Pittsburgh Steel Corp. v. EPA*²¹⁹ determined that an administrative order did not violate provisions of a prior consent decree. The petitioner asserted that the consent decree, which required disputes to be resolved pursuant to the dispute resolution mechanisms of the decree, barred the EPA from issuing a corrective action order at the facility.²²⁰ In dismissing the plaintiff's petition for dispute resolution, the Fourth Circuit affirmed the EPA's position that the terms of the decree did not deprive the Agency of the authority to issue additional orders at the site.²²¹ In so doing, the court noted that the EPA's interpretation of its own consent decree would be judged under an arbitrary and capricious standard and "[e]ven if the EPA's interpretation is neither the only

214. 100 F.3d 1150 (4th Cir. 1996).

215. RCRA § 7003 provides for judicial and administrative abatement of imminent hazards. 42 U.S.C. § 6973. RCRA § 3008(h) governs corrective actions of releases at interim status facilities, and RCRA § 3004(u) addresses corrective action for permitted facilities. 42 U.S.C. §§ 6928(h), 6924(u).

216. *See Cavallo*, 100 F.3d at 1156.

217. *See id.*

218. *Id.*

219. No. 97-1756, 1997 WL 697100, at *1 (4th Cir. Nov. 10, 1997) (per curiam).

220. *See id.* at *1.

221. *See id.* at *2.

nor the best reading of the consent decree, it is certainly reasonable enough so as not to be arbitrary and capricious."²²²

Finally, in *Leister v. Black & Decker*²²³ the Fourth Circuit addressed RCRA citizen suit requirements.²²⁴ It affirmed the dismissal of a citizen suit alleging personal and property damage from the presence of trichloroethylene ("TCE") and tetrachloroethylene ("PCE") emanating from Black & Decker property.²²⁵ The court noted that RCRA's citizen suit provision "requires more than a showing that the hazardous waste may present an endangerment to health or the environment."²²⁶ Rather, the danger to health and the environment must be "imminent" and "substantial."²²⁷ Because the filtration systems in the plaintiffs' wells eliminated the risk of contaminated groundwater, the plaintiffs had failed to make such a showing.²²⁸

B. Virginia Legislative Developments

The interest in hauling solid waste²²⁹ by barge has kindled a controversy which found its way onto center stage of the 1998 Virginia General Assembly.²³⁰ Spurred in part by the desire to

222. *Id.*

223. No. 96-1751, 1997 WL 370846, at *1 (4th Cir. July 8, 1997).

224. Under RCRA's citizen suit provision, private parties may commence a civil action "against any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B) (1994).

225. See *Leister*, 1997 WL 378046, at *4.

226. *Id.* at *2.

227. See *id.*

228. See *id.* at *1.

229. Solid waste is defined as:

any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits . . . or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended.

42 U.S.C. § 6903(27) (1994).

230. See, e.g., H.B. 816, Va. Gen. Assembly (Reg. Sess. 1998) (codified at VA. CODE

prohibit the interstate transport of solid waste into Virginia, the 1998 General Assembly passed House Bill 816²³¹ and Senate Bill 657²³² to regulate the transport of wastes on state waters. These bills require the Waste Management Board to develop regulations governing (i) the transport, loading and unloading of certain types of solid and medical wastes by ship, barge, or other vessel upon navigable waters of the Commonwealth, and (ii) the issuance of permits to facilities receiving such wastes.²³³ House Bill 818 and Senate Bill 656, which would have prohibited the transport of solid and medical wastes by ship, barge, or other vessel²³⁴ on state waters, were carried over to the 1999 Session. These bills, which have brought to the forefront the question of whether, and to what extent, Virginia will seek to impose restrictions on out-of-state waste, undoubtedly will continue to occupy the legislative agenda in the future.

In further action addressing the out-of-state disposal of solid waste in Virginia, the DEQ now is required to report annually to the General Assembly the amounts of solid waste disposed in Virginia.²³⁵ The report must identify solid waste categorically, and include both estimates of amounts of solid waste generated

ANN. § 10.1-1454.1 (Repl. Vol. 1998)); S.B. 657, Va. Gen. Assembly (Reg. Sess. 1998) (codified at VA. CODE ANN. § 10.1-1454.1 (Repl. Vol. 1998)); H.B. 818, Va. Gen. Assembly (Reg. Sess. 1998) (continued to 1999 Legislative Session); S.B. 656, Va. Gen. Assembly (Reg. Sess. 1998) (continued to 1999 Legislative Session); H.J. Res. 109, Va. Gen. Assembly (Reg. Sess. 1998) (memorializing Congress to pass legislation which would provide states with the authority to regulate out-of-state waste); H.B. 1323, Va. Gen. Assembly (Reg. Sess. 1998) (rejecting legislation to create a solid waste contingency fund and impose a tonnage fee on imported and exported waste).

231. H.B. 816 (enacted as Act of Apr. 16, 1998, ch. 717, 1998 Va. Acts 1706).

232. S.B. 657 (enacted as Act of Apr. 16, 1998, ch. 705, 1998 Va. Acts 1636).

233. *See id.*; H.B. 816.

234. The prohibition would be only to the extent not inconsistent with the United States Constitution. The ability of a state to decline out-of-state waste is limited by the commerce clause. *See* U.S. CONST. art. I, § 8, cl. 3. The Supreme Court of the United States has traditionally disfavored regulations imposing barriers to the interstate transport of waste. *See* *City of Phila. v. New Jersey*, 437 U.S. 617 (1978); *see also* *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 511 U.S. 93 (1994) (holding that a surcharge on out-of-state waste is per se invalid under the commerce clause); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992) (explaining that a state may not avoid invalidation under the commerce clause by restricting inter-county waste as well as interstate waste); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992) (holding that an additional disposal fee for an out-of-state waste violates the commerce clause).

235. *See* VA. CODE ANN. § 10.1-1413.1 (Repl. Vol. 1998).

out-of-state and disposed of in Virginia, as well as estimates of amounts of solid waste managed or disposed of by different methods. To facilitate preparation of the report, permitted solid waste facilities must provide the DEQ with any material information in their possession.²³⁶

Specifically addressing solid waste recycling, the 1997 General Assembly moved to require local and regional solid waste planning units to maintain a twenty-five percent recycling rate.²³⁷ The Virginia Recycling Markets Development Council also was instructed to determine the volume of various categories of materials currently recycled in the Commonwealth and to submit its findings in its 1998 Annual Report.²³⁸

The General Assembly also moved to reduce notice and publication requirements for authorities who set fees or charges for refuse collection.²³⁹ Rather than requiring a schedule of fees or charges to be published twice, with a public hearing held no sooner than sixty days after the second publication, House Bill 1100 allows for a single publication with a hearing to be held no sooner than fifteen days after publication.²⁴⁰ The notice and publication requirements for fees related to sewage disposal and stormwater control facilities were not, however, altered by House Bill 1100.²⁴¹

House Bill 649²⁴² empowers the Virginia Waste Management Board to issue administrative orders called "special orders" that have a duration of not more than twelve months and contain a civil penalty of not more than \$10,000.²⁴³ Such orders can only be issued for violations of: (i) any law or regulation administered by the Board; (ii) any condition of a Board-issued permit or certificate; or (iii) any case decision or order of the Board. In any event, the orders can only be issued when a

236. *See id.*

237. *See id.* § 10.1-1411 (Repl. Vol. 1998).

238. *See id.* § 9-145.47 (Repl. Vol. 1998).

239. *See* H.B. 1100, Va. Gen. Assembly (Reg. Sess. 1998) (codified at VA. CODE ANN. § 15.2-5136 (Cum. Supp. 1998)).

240. *See id.*

241. *See id.*

242. H.B. 649, Va. Gen. Assembly (Reg. Sess. 1998) (codified at VA. CODE ANN. §§ 10.1-1455, -2500 (Repl. Vol. 1998)).

243. This power is slightly more restrictive than the similar power given to the Air Pollution Control Board and the State Water Control Board. *See id.*

hearing has been held, and at least two notices of violations related to the same incident have not resulted in satisfactory compliance.²⁴⁴

Finally, the General Assembly amended the definition of household hazardous waste to include specific products which contain hazardous chemicals or substances, such as certain kinds of batteries, paint products, and empty household product containers.²⁴⁵

V. BROWNFIELDS

A. Federal Developments

The EPA established the Brownfields Action Agenda in 1995.²⁴⁶ The initial program was intended to be a catalyst for states to develop incentives and programs to expedite the clean-up of properties that are under-utilized because of the presence of contamination. However, it soon became apparent that state incentives alone were not enough. The primary deterrent to developing contaminated properties is the fear of liability felt by prospective purchasers, the communities, and lenders. In an effort to resolve these issues, the federal government has passed guidance documents and legislation aimed at alleviating the fear of federal prosecution.²⁴⁷

244. *See id.*

245. *See* VA. CODE ANN. § 10.1-1400 (Repl. Vol. 1998).

246. The Brownfields Action Agenda, announced by the EPA on January 25, 1995, outlined four elements for action: (1) awarding grant funds for Brownfields Assessment Demonstration Pilots; (2) clarifying liability and cleanup issues; (3) fostering partnership among brownfields stakeholders; and (4) encouraging local workforce development job training initiatives. *See U.S. EPA-OSPS Brownfields Homepage* (last modified Aug. 14, 1998) <<http://www.epa.gov/brownfields>>.

247. Prospective purchaser agreements have been offered by the EPA as one means of alleviating the liability concerns of prospective purchasers. In some instances, the EPA will provide prospective purchasers of property that is listed or proposed for listing on the National Priorities List, *see* 42 U.S.C. § 9605 (1994), with a covenant not to sue the purchaser if certain criteria are met. Those criteria include: (1) "an EPA action at the facility has been taken, is ongoing, or is anticipated to be undertaken;" (2) the EPA "receive[s] a substantial benefit either in the form of a direct benefit for cleanup, or as an indirect public benefit . . . with a reduced direct benefit to the EPA;" (3) "the continued operation of the facility or new site development, with the exercise of due care, will not aggravate or contribute to the existing contamination or interfere with the EPA's response action;" (4) "the continued opera-

Comfort/Status Letters are used by EPA to alleviate concerns of prospective purchasers.²⁴⁸ If a purchaser requests such a letter, EPA will provide one of the following four responses:

(1) No previous Federal Superfund Action letter—issued if the site is not within the Comprehensive Environmental Response, Compensation, and Liability Information System (“CERCLIS”);

(2) No Current Federal Superfund Interest Letter—issued if the site is no longer found in CERCLIS, has been delisted from the National Priorities List, or is situated near, but not within, the boundaries of a CERCLIS site;

(3) Federal Interest Letter—issued if the EPA plans to take some action at the site, but has not yet determined the specific type of action;

tion or new development of the property will not pose health risks to the community and those persons likely to be present at the site;” and (5) “the prospective purchaser is financially viable.” Guidance on Settlements with Prospective Purchasers of Contaminated Property, 60 Fed. Reg. 34,792, 34,792-95 (1995). These agreements also provide contribution protection, which means that the purchaser may not be sued by third parties forced to pay cleanup costs due to contamination at the site. *See id.*

The EPA developed its Contaminated Aquifer Policy to protect purchasers of property that may have been contaminated by neighboring property. The EPA will exercise enforcement discretion by not taking action against a property owner when (i) hazardous substances have come to the property solely through the result of groundwater migration, and (ii) the landowner did not cause or contribute to the release or threat of release of any hazardous substance. Under this policy, the EPA will analyze the relationship between the landowners and the person who contaminated the aquifer. The EPA also will perform a fact specific analysis of the effect that groundwater wells on the landowner's property may have had on the spread of contamination. *See Policy Toward Owners of Property Containing Contaminated Aquifers*, 60 Fed. Reg. 34,790, 34,790 (1995).

Congress recently enacted legislation attempting to alleviate lender liability concerns. The legislation provided statutory authority to the EPA's 1992 policy, clarifying that a lender is exempt from CERCLA liability only if it “holds indicia of ownership primarily to protect a security interest” without participating in management of the facility. 42 U.S.C. § 9601(20)(E)(i) (Supp. II 1996). This applies to all types of lenders and security arrangements, not just traditional commercial lenders and mortgages. In order to be protected, the lender must divest the property at the earliest reasonable time on commercially reasonable terms. *See* 42 U.S.C. § 9601(20)(E)(ii)(II); *see also* National Oil and Hazardous Substances Pollution Contingency Plan: Lender Liability Under CERCLA, 57 Fed. Reg. 18,344, 18,344-62 (1992).

248. *See Policy on the Issuance of Comfort/Status Letters*, 62 Fed. Reg. 4624, 4624 (1997).

(4) State Action Letter—issued when a state has the lead oversight for a response action.²⁴⁹

To support state voluntary cleanup programs, the EPA has entered into memoranda of agreement (“MOA”) with some states agreeing not to bring any action against a site if the site has received a “no further requirements” letter or certificate of completion/satisfaction from the state agency.²⁵⁰ The EPA may still bring an action if it determines that (i) there is an “imminent and substantial endangerment to public health or welfare or the environment;”²⁵¹ (ii) there is previously undiscovered or new contamination found at the site; (iii) new information of a material nature is learned about the site; or (iv) the “no further requirements” letter or “certificate of completion” was obtained fraudulently.²⁵²

Most recently, the Taxpayer Relief Act²⁵³ was signed into law on August 5, 1997, allowing taxpayers to elect to treat certain environmental remediation expenditures as expenses deductible in the year paid or incurred, rather than being capitalized. Expenditures must be incurred in connection with the abatement or control of hazardous substances at a qualified contaminated site.²⁵⁴ These incentives are only available in certain target areas, such as empowerment zones, enterprise communities, or the EPA Brownfields pilot project locations.²⁵⁵ The Act has a sunset provision providing that the incentive is only available for expenses incurred between August 6, 1997, and January 1, 2001.²⁵⁶

The EPA is in the process of awarding Brownfields Cleanup Revolving Loan Fund Demonstration Pilots²⁵⁷ to state and lo-

249. *See id.* at 4625-26.

250. *See* Notice of Availability of Final Draft Guidance for Developing Superfund Memoranda of Agreement Language Concerning State Voluntary Cleanup Programs, 62 Fed. Reg. 47,495, 47,500 (1997).

251. *Id.* at 47,498.

252. *See id.*

253. *See* 26 U.S.C.A. § 198(a) (Supp. 1998).

254. *See id.* § 198(b)(1).

255. *See id.* § 198(c)(2)(A).

256. *See id.* § 198(h).

257. *See The Brownfields Economic Redevelopment Initiative, Proposal Guidelines for Brownfields Cleanup Revolving Loan Fund Demonstration Pilots* (last modified Apr. 30, 1997) <<http://www.epa.gov/swerosps/bf/html-doc/rlfguide.htm>>.

cal governments. Only entities that had been awarded national or regional Brownfields assessment pilots are eligible for revolving loan funds.²⁵⁸ In order to be selected, eligible communities

must demonstrate (1) an ability to manage a revolving loan fund and environmental cleanups; (2) a need for cleanup funds; (3) commitment to creative leveraging of EPA funds with public-private partnerships and in-kind services; and (4) a clear plan for sustaining the environmental protection and related economic development activities initiated through the . . . program.²⁵⁹

The size of the awards will range from \$50,000 to \$350,000. The fund must be used to provide low-interest loans to public and private parties for the cleanup of brownfields sites that have already been assessed for contamination.²⁶⁰

B. *Virginia Developments*

Virginia has also made efforts to encourage the remediation of brownfields sites. In 1995, the General Assembly passed the Voluntary Remediation Program ("VRP").²⁶¹ Regulations governing the program became effective in June 1997²⁶² and are administered by the DEQ's Waste Management Board. The program offers expedited permitting, relaxed cleanup standards, and a certificate of satisfactory completion²⁶³ at the conclusion of the cleanup. Such incentives are aimed at encouraging owners of brownfields property to voluntarily bring their property back to useful life.²⁶⁴

258. *See id.*

259. *Id.*

260. *See id.*

261. *See* VA. CODE ANN. §§ 10.1-1429.1 to -1429.3 (Repl. Vol. 1998).

262. *See* 9 VA. ADMIN. CODE 20-160-10 to -130 (Cum. Supp. 1998).

263. The certificate of satisfactory completion is issued by the DEQ once the site has been cleaned up in accordance with an approved remedial action plan. The certificate guarantees immunity from enforcement actions brought under the Virginia Waste Management Act, Virginia State Water Control Law, Virginia Air Pollution Control Board, or other applicable Virginia law. The regulations provide that the certificate would be revocable at any time if contamination posing a risk to human health and the environment is rediscovered on site or found to have migrated off-site, or if information on certification was false, inaccurate, or misleading. *See id.* at 20-160-110.

264. The VRP is open to any person who owns, operates, has a security interest

In 1997, the Commonwealth established the Remediated Property Fresh Start Program,²⁶⁵ which provides a limit on the liability for prospective purchasers of property cleaned up under CERCLA, so long as it has been remediated to the satisfaction of the EPA Administrator. Additionally, Virginia passed legislation in 1997 providing authority to local governments to implement tax incentives for "environmental restoration sites,"²⁶⁶ defined to include voluntary remediation program sites.²⁶⁷ The governing body of any county, city, or town may, by ordinance, exempt or partially exempt such property from local taxation annually for a period not in excess of five years.²⁶⁸

In 1998, the Virginia General Assembly passed legislation requesting a study on the possibility of implementing "smart growth"²⁶⁹ measures in Virginia.²⁷⁰ The Commission on the Condition and Future of Virginia's Cities also was created to study legislative measures to help cities achieve economic

in, or enters into, a contract for the purchase or use of contaminated property and who wishes to voluntarily remediate the property. *See id.* at 20-160-30(B) (Cum. Supp. 1998). Sites contaminated with hazardous waste, solid waste, or petroleum are eligible so long as the cleanup is not "clearly mandated" by any state or federal environmental law. *See id.* at 20-160-30(C) (Cum. Supp. 1998). Once enrolled in the program, standards for remediation would be flexible. The cleanup standards are based on a risk assessment of the site reflecting the current and future uses of the site. Cleanup standards would be more stringent if the site was intended for residential or educational use; however, if the site would remain classified for industrial use, the standards would be less stringent. *See id.* at 20-160-90(B) (Cum. Supp. 1998). The program does provide that the site could not be used in a capacity where the same contaminants would be used. *See id.* at 20-160-30, -90.

265. *See* VA. CODE ANN. § 10.1-1429.4 (Repl. Vol. 1998).

266. An environmental restoration site is real estate which contains or did contain environmental contamination from the release of hazardous substances, hazardous wastes, solid waste, or petroleum. The restoration of such a site would abate or prevent pollution to the atmosphere or waters of the Commonwealth and is subject to voluntary remediation. Upon restoration, the site receives a certificate of continued eligibility from the Virginia Waste Management Board during each year which it qualifies for the tax treatment described in this section. *See id.* § 58.1-3664 (Repl. Vol. 1998).

267. *See id.*

268. *See id.*

269. Maryland enacted "smart growth" legislation in 1997. Smart growth measures target state funding for infrastructure to those areas designated for growth. *See* MD. CODE ANN. STATE FIN. & PROC. §§ 5-7B-01 to 5-7B-10 (1995 & Supp. 1997).

270. *See* S.J. Res. 177, Va. Gen. Assembly (Reg. Sess. 1998).

stability.²⁷¹ Growth management will become a key issue given its impact on all environmental media.

VI. WETLANDS

Recent wetlands case law has led to significant changes in regulation governing the issuance of section 404 permits.²⁷² First, in early 1997, the federal district court of the District of Columbia rejected the Army Corps of Engineer's ("Corps") "Tulloch Rule."²⁷³ The rule, which required a section 404 permit for incidental fallback that generally coincides with dredging activities, was determined by the court to be overbroad and to exceed the scope of the Corps' authority to regulate additions of materials to wetlands. The court found that incidental fallback "represents a net withdrawal, not an addition of material" and cannot be regulated as a discharge by the Corps.²⁷⁴

In an even bolder decision, the Fourth Circuit rejected the Corps' definition of "waters of the United States."²⁷⁵ In *United States v. Wilson*, defendants were convicted of felony violations of the Clean Water Act for knowingly discharging fill and excavated material into wetlands without a permit.²⁷⁶ The defendants appealed their convictions on the ground that the Corps' regulations governing wetland permits exceeded the Corps' regulatory authority. The regulatory definition developed by the Corps defines waters of the United States to include all waters

271. See H.J. Res. 432, Va. Gen. Assembly (Reg. Sess. 1998).

272. See Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, 1344 (1994).

273. The Tulloch Rule changed the preexisting framework which provided a de minimis exception from the definition of the "discharge of dredged material" requiring a permit. Under the Tulloch Rule, any addition of dredged material, including excavated material, is deemed the discharge of dredged material and requires a permit. The rule has been interpreted to include "incidental" fall back, which includes soils or sediments falling from the bucket back into the water. See *American Mining Congress v. United States Army Corps of Eng'rs*, 951 F. Supp. 267 (D.D.C. 1997), *aff'd sub nom.* *National Mining Ass'n v. United States Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998). The court enjoined the Corps from using the rule. See *id.* at 1410.

274. *Id.* at 1404.

275. See *United States v. Wilson*, 133 F.3d 251, 254 (4th Cir. 1997). The Corps' petition for rehearing was denied on January 26, 1998. See *Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson* (last modified June 2, 1998) <<http://wnn.epa.gov/owow/wetlands/wilson.htm>> [hereinafter *Guidance for Section 404*].

276. See *Wilson*, 133 F.3d. at 253.

whose degradation "could affect" interstate commerce.²⁷⁷ The court concluded this definition was overly broad and exceeded the authority granted to the Corps by the Clean Water Act. Moreover, the court indicated the regulation likely violated the Commerce Clause of the United States Constitution.²⁷⁸

The court also determined that "sidecasting," or moving dredged material from one area in a wetland to another during the construction of drainage ditches, does not violate the Clean Water Act.²⁷⁹ The court reasoned that because "sidecasted" soil is not equivalent to the addition of a new material, it is not a "discharge" under the Clean Water Act definition of discharge.²⁸⁰

Finally, the court found that the Clean Water Act requires the government to prove a defendant's knowledge of facts meeting each essential element of the substantive offense.²⁸¹ However, the government is not required to prove that the defendant knew his conduct was illegal.²⁸²

Since the *Wilson* decision, the EPA has issued written guidance regarding section 404 jurisdiction over isolated waters.²⁸³ The guidance makes clear that the Corps will only apply the *Wilson* decision within the Fourth Circuit and will continue to litigate this issue in other courts. For now, the Corps and EPA will not cite 33 C.F.R. § 328.3(a)(3) as a basis for asserting Clean Water Act jurisdiction within the Fourth Circuit. Permits

277. See 33 C.F.R. § 328.3(a)(3) (1998).

278. See *Wilson*, 133 F.3d at 257.

279. See *id.* at 260.

280. See *id.* at 259-60.

281. See *id.* at 262. In other words, the government must prove the following facts in order to establish a felony violation under the Clean Water Act:

- (1) that the defendant knew that he was discharging a substance . . . ;
- (2) that the defendant correctly identified the substance he was discharging . . . ;
- (3) that the defendant knew the method or instrumentality used to discharge the pollutants;
- (4) that the defendant knew the physical characteristics of the property into which the pollutant was discharged that identify it as a wetland . . . ;
- (5) that the defendant was aware of the facts establishing the required link between the wetland and waters of the United States; and
- (6) that the defendant knew he did not have a permit.

Id. at 264.

282. See *id.* at 262.

283. See *Guidance for Section 404*, *supra* note 275.

issued to isolated waters on the basis of 33 C.F.R. § 328(a)(3) will remain in effect.²⁸⁴ Environmentalists are upset about the decision because it significantly reduces the number of wetlands under federal regulation and sets a precedent for using the Commerce Clause to rollback other federal protection laws.²⁸⁵

Several cases of note occurred outside of the Fourth Circuit. Most recently, a United States district court in *Mango v. United States*²⁸⁶ ruled that district engineers of the Corps do not have the statutory authority to issue section 404 permits for the discharge of dredged or fill material into navigable waters of the United States.²⁸⁷

The case involved the criminal prosecution of several defendants for alleged violation of a section 404 permit issued by a Buffalo District Engineer. The Clean Water Act authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue section 404 permits.²⁸⁸ The Act, however, neither authorizes, nor proscribes further delegation of this permitting authority by the Secretary of the Army to its district engineers. The defendants argued that because the Clean Water Act only punishes violations of permits issued by the Secretary of the Army, defendants could not be prosecuted for violation of a permit issued by a district engineer.²⁸⁹

The court applied the traditional test of agency authority set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²⁹⁰ Based upon this plain language review, the court found that "the language of section 404 unambiguously demonstrates that Congress intended to limit the Secretary's delegation authority to the Chief of Engineers."²⁹¹ The court explained that the absence of an express proscription against subdelegation by the Secretary "does not provide the court with

284. *See id.*

285. The Commerce Clause is beginning to impact environmental regulation in a number of areas. *See, e.g.*, interstate waste discussion, *supra* note 234.

286. 997 F. Supp. 264 (N.D.N.Y. 1998).

287. *See id.*

288. *See* 33 U.S.C. § 1344(d) (1994).

289. *See Mango*, 997 F. Supp. at 269.

290. 467 U.S. 837, 842 (1984) (holding that agencies must give effect to the clear intent of Congress).

291. *Mango*, 997 F. Supp. at 277.

a license to ignore the proscription necessarily implied by the explicit limiting language of section 404.²⁹²

While it is difficult to predict whether the court's reasoning in *Mango* will be followed by other courts, or even upheld on appeal, the decision clearly calls into question the validity and enforceability of section 404 permits issued by district engineers. Additionally, permit conditions, which are not directly related to the discharge of dredged or fill material into regulated waters, also remain subject to ongoing scrutiny.

In *United States v. Rapanos*,²⁹³ the Sixth Circuit found that wetland property owned by the defendant was not protected by the Fourth Amendment. In this case, the defendant refused to allow Michigan Department of Natural Resources officials onto his property to make a visual wetlands determination without a search warrant. The court found that the property was not protected by the Fourth Amendment because the property met the "open fields" exception.²⁹⁴ The property consisted of 175 open acres, surrounded on two sides by a highway. Accordingly, the court found that the defendant did not have a reasonable expectation of privacy in the property.²⁹⁵ A visual inspection made during a warrantless entry onto open fields does not constitute an unreasonable search for Fourth Amendment purposes.²⁹⁶

The Eleventh Circuit recently held that the five-year statute of limitations for civil penalties does not bar or apply to a suit for injunctive relief and restoration against an alleged violator of CWA requirements for wetlands protection.²⁹⁷ Accordingly, equitable relief, including wetlands restoration, may be obtained long after legal remedies are precluded.²⁹⁸

On the regulatory side, the Corps has announced that "six new nationwide permits authorizing categories of activities with

292. *Id.*

293. 115 F.3d 367 (6th Cir. 1997).

294. *See id.* at 372-73 (citing *Hester v. United States*, 265 U.S. 57 (1924) and *Oliver v. United States*, 466 U.S. 170 (1984)).

295. *See id.* at 373.

296. *See id.* at 374.

297. *See United States v. Banks*, 115 F.3d 916, 922 (11th Cir. 1997).

298. *See id.* at 922.

minimal impacts on wetlands [will] be issued and six existing permits [will] be modified."²⁹⁹ The proposal, "which authorizes development with minimal impacts on wetlands of one-third of an acre to three acres in size," would replace Nationwide Permit 26 and is expected by the end of 1998.³⁰⁰

The new proposed permits would apply to the following activities:

- (1) residential, commercial, and institutional activities affecting non-tidal water between one-third and three acres;
- (2) master-planned development activities affecting up to ten acres of non-tidal waters;
- (3) stormwater management facilities involving construction on up to two acres in so-called non-Section 10 waters, described in the Rivers and Harbors Act as those navigable by boat, with no acreage limit for maintenance;
- (4) passive recreational facilities that would disturb between one-third and one acre of non-tidal waters or 500 linear feet of stream;
- (5) mining activities on up to three acres of non-tidal waters; and
- (6) reconfiguration of existing drainage ditches restricted to the minimum necessary of non-Section 10 waters. Preconstruction notification would be required if any sidecasting is involved.³⁰¹

There also have been several changes to wetlands regulations on the state level. House Bill 2414 requires the Virginia Marine Resources Commission to develop a procedure to expedite the issuance of wetlands permits in emergency situations.³⁰² A new tax break has been created for wetlands and riparian buffers. Local governments may exempt or partially exempt from local property tax, wetlands and riparian buffers that are subject to perpetual easement by water allowing flooding.³⁰³

299. *Wetlands: Six New Classes Covered at Activities Under Proposed Corps Replacement Permits*, [June] Daily Env't Rep. (BNA) No. 122, at AA-1 (June 25, 1998).

300. *Id.*

301. *Id.*

302. See VA. CODE ANN. § 9-6.14:4.1 (Repl. Vol. 1998); *id.* § 28.2-1307 (Repl. Vol. 1997).

303. See *id.* §§ 58.1-3230, -3665, -3666 (Repl. Vol. 1997 & Cum. Supp. 1998).

VII. OIL POLLUTION

Legislation was passed to include a gas owner or operator or storage field operator among those that are heard de novo by the Virginia Gas and Oil Board.³⁰⁴ Additionally, appeals of permits which were objected to by gas storage field operators will now stay the permit in certain circumstances.³⁰⁵ The consent required as part of the permit application for coal bed methane gas wells may now be considered granted on sites owned by multiple tenants, where co-tenants holding the majority interest in the site consent, and none of the tenants has leased the tract for coal development.³⁰⁶ Finally, a well-spacing requirement was added for gas storage fields certificated by the State Corporation Commission prior to January 1, 1997.³⁰⁷ Gas storage field operators must be given notice of hearing applications involving the field operator's certificated area.³⁰⁸

Legislation also was passed creating a right to a contribution action by an owner or operator that incurs costs in responding to a discharge that was caused by a third party.³⁰⁹ Similarly, any person or operator who pays costs or damages to the Commonwealth or a third party for harm caused by a discharge, or threat of discharge, may bring a cost recovery action against the person whose acts or omissions have caused or contributed to the discharge or threat.³¹⁰

The State Water Control Board now is able to require a person causing a discharge of oil to take any steps "deemed necessary in the judgment of the Board" to affect a cleanup.³¹¹ Such steps may be in addition to, or in lieu of, those that may be found in the person's oil spill contingency plan.³¹²

304. *See id.* § 45.1-361.9 (Repl. Vol. 1998). Legislation governing oil, gas, or coal operations is administered by the Virginia Gas and Oil Board and the Department of Mines, Minerals, and Energy.

305. *See id.* § 45.1-361.23 (Repl. Vol. 1998).

306. *See id.* § 45.1-361.29 (Repl. Vol. 1998).

307. *See id.* §§ 45.1-361.19, -361.30 (Repl. Vol. 1998).

308. *See id.*

309. *See id.* § 62.1-44.34:18 (Repl. Vol. 1998).

310. *See id.*

311. *Id.*

312. *See id.*

The provisions governing the obligations of the DEQ and the Department of Health ("DOH"), in response to an oil spill, have been modified. The DEQ must compile a list of the locations of oil releases, which are serious enough to have a site characterization analysis performed, and must submit the list to the DOH on a monthly basis.³¹³ A person who has a well located in an area affected by an oil release may request the DOH to test that well's water for oil contamination. If the test indicates that the water supply is a potential risk to public health, the state will assume the costs of the test.³¹⁴ The DOH also must also maintain a list of private laboratories that perform well water tests for public use. Residential property disclosure statements must contain a notice to prospective purchasers and owners that the DEQ maintains information which identifies the location of oil releases that may affect the property.³¹⁵

Recent case law has held that "muck"³¹⁶ is not covered by the oil residue discharge rules found in the Act to Prevent Pollution by Ships.³¹⁷ In *United States v. Apex Oil Co.*, defendants were accused of conspiring to discharge cargo-related oil residues at sea.³¹⁸ The federal court of appeals, relying on *Cose v. Getty Oil Co.*,³¹⁹ held that "muck" is not refined petroleum or a useful petroleum product.³²⁰ Accordingly, "muck" should be treated as a discarded waste, not an oil residue.

Other case law of interest has provided that the Oil Pollution Act ("OPA")³²¹ allows a trustee (appointed by either the President, a governor, the governing body of an Indian tribe, or the head of a foreign government) to recover for damages to natural

313. See *id.* § 32.1-176.5:1 (Repl. Vol. 1997 & Cum. Supp. 1998) (effective Jan. 1, 1999); *id.* § 62.1-44.15:4.1 (Repl. Vol. 1998); see also *id.* § 55-519 (Repl. Vol. 1995 & Cum. Supp. 1998) (effective Jan. 1, 1999).

314. See *id.* § 32.1-176.5:1 (Repl. Vol. 1997 & Cum. Supp. 1998) (effective Jan. 1, 1999).

315. See *id.* § 55-519 (Repl. Vol. 1995 & Cum. Supp. 1998) (effective Jan. 1, 1999); *id.* § 32.1-176.5:1 (Repl. Vol. 1997 & Cum. Supp. 1998).

316. "Muck" is the residue remaining after oil is cleaned out of a ship's hold. See *United States v. Apex Oil Co.*, 132 F.3d 1287, 1290 (9th Cir. 1997).

317. 33 U.S.C. §§ 1901-1915 (1994); see also 33 C.F.R. pt. 151 (1997).

318. See *Apex Oil*, 132 F.3d at 1288.

319. 4 F.3d 700 (9th Cir. 1993) (holding that the bottoms of crude oil tanks were discarded waste and not petroleum products).

320. See *Apex Oil*, 132 F.3d at 1291.

321. 33 U.S.C. §§ 2701-2761 (1994).

resources due to an oil spill in navigable waters or adjoining shorelines.³²² The National Oceanic and Atmospheric Administration ("NOAA") was tasked with promulgating regulations for the assessment of natural resource damages.³²³ The final rules authorize the recovery of non-use or "passive" losses.³²⁴ To determine a non-use value, a survey technique known as "contingent valuation" is used. Under this technique, a hypothetical market is created and citizens are asked to respond to a survey about how much they would pay to protect a given resource. Responses are averaged to determine the value citizens place on the resource.³²⁵ The court held that this technique was authorized by the OPA.³²⁶ The court, however, did remand the portion of the rule regarding the trustee's removal authority, claiming that the NOAA did not adequately explain the difference between the authority granted in the final regulation and the proposed rule.³²⁷ The court also found that the NOAA failed to explain the interrelationship of the trustee's residual removal authority and the primary authority of EPA and the Coast Guard.³²⁸

VIII. UNDERGROUND AND ABOVE GROUND STORAGE TANKS

The Virginia Underground Storage Tank ("UST") Program³²⁹ has undergone several recent changes designed to secure final program approval from the EPA. The most significant modification to the program was introduced by House Bill 615,³³⁰

322. See *General Elec. Co. v. United States Dep't of Commerce*, 128 F.3d 767, 770 (D.C. Cir. 1997).

323. See 15 C.F.R. §§ 990.10-.60 (1998).

324. "Passive" losses are determined by the value citizens place on the mere existence of natural resources. See *General Elec.*, 128 F.3d at 772.

325. See *id.*

326. See *id.* at 778.

327. See *id.* at 775.

328. See *id.* at 774-75.

329. The DEQ administers the UST program in accordance with the State Water Control Law, the Petroleum Underground Storage Tank Financial Responsibility Requirements Regulation, and the Underground Storage Tank Technical Standards and Corrective Action Requirements Regulation. See VA. CODE ANN. §§ 62.1-44.34:8 to :13 (Repl. Vol. 1998); 9 VA. ADMIN. CODE 25-580-10 to -590-230 (1996 & Cum. Supp. 1998) (formerly VRR 680-13-02 to -03).

330. H.B. 615, Va. Gen. Assembly (Reg. Sess. 1998) (codified at VA. CODE ANN. §§ 62.1-44.34:11 to :13 (Repl. Vol. 1998)).

which incorporated the federal UST statutory provisions, relating to demonstration of financial responsibility³³¹ into the Virginia Financial Responsibility Regulation.³³² Specifically, House Bill 615 incorporated federal provisions which require an owner or operator to maintain financial resources of at least \$1,000,000³³³ for each occurrence.³³⁴ To satisfy the financial responsibility requirement, an owner or operator may use any one or more of the following assurance mechanisms: "insurance, guarantee, surety bond, letter of credit, [or] qualification as a self-insurer."³³⁵ These amendments are not expected to add any additional monetary or administrative burden on Virginia UST owners and operators, as the DEQ traditionally required UST owners and operators to use the Virginia sliding scale³³⁶ in conjunction with the Virginia Petroleum Storage Tank Fund³³⁷ to demonstrate the federally required amounts.³³⁸

House Bill 615 also requires any person or state agency seeking reimbursement from the fund for costs and expenses incurred for oil cleanup to have acted at the direction of the State Water Control Board in undertaking the cleanup.³³⁹ The bill further limits eligibility for reimbursement to those who file a

331. See 40 C.F.R. § 281.37 (1998).

332. 9 VA. ADMIN. CODE 25-590-10 to -590-230 (1996 & Cum. Supp. 1998) (formerly VRR 680-13-02).

333. Owners and operators of 1 to 99 petroleum USTs must demonstrate financial responsibility for up to \$1 million in corrective action and third parties injury costs. Owners and operators with 100 or more USTs must demonstrate that they are able to pay an annual aggregate of \$2 million. See 40 C.F.R. § 281.37(a)(1)-(4) (1998); 9 VA. ADMIN. CODE 25-590-40(A) (1996 and as amended by 14:23 Va.R. 3607 (1998)) (formerly VRR 680-13-03 § 4).

334. The EPA defines "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in a release from an underground storage tank." 42 U.S.C. § 6991b(d)(5)(A) (1994).

335. 42 U.S.C. § 6991b(d)(1) (1994); VA. CODE ANN. § 62.1-44.34:12(A) (Repl. Vol. 1998).

336. See 9 VA. ADMIN. CODE 25-590-40(A) (1996 and as amended by 14:23 Va.R. 3607 (1998)) (formerly VRR 680-13-03 § 4).

337. The Virginia Petroleum Storage Tank Fund is a revolving fund established to reimburse owners and operators for certain qualifying tank cleanup costs. See VA. CODE ANN. §§ 62.1-44.34:8, :10, :11 (Repl. Vol. 1998).

338. Memorandum from Mary-Ellen Kendall, Financial Programs Manager, Department of Environmental Quality, *Underground Storage Tank Program Regulatory Update* (on file with author).

339. See VA. CODE ANN. § 62.1-44.34:11(A)(2)(k) (Repl. Vol. 1998).

claim by July 1, 2000, or within two years of the issuance of a site remediation letter by the Board, whichever is later.³⁴⁰

In the courts, a North Carolina federal district court recently held that nuisance and trespass claims may be brought for continuing migration of contamination, even though the current property owners were not responsible for the USTs.³⁴¹ The court concluded that once UST owners became aware of the contamination, they became responsible for any continued migration of the contamination.³⁴²

IX. MISCELLANEOUS ENVIRONMENTAL ISSUES

A. Citizen Standing

Recently, the Supreme Court squarely addressed citizen suit requirements under both the Endangered Species Act ("ESA")³⁴³ and the Emergency Planning and Community Right-to-Know Act ("EPCRA").³⁴⁴ In *Bennett v. Spear*,³⁴⁵ the United States Supreme Court expanded citizen standing under the ESA.³⁴⁶ The Court determined the traditional 'zone of interest' test³⁴⁷ has been negated by the ESA citizen suit provision.³⁴⁸ The Supreme Court relied on the ESA citizen suit provision which allows "any person" to file suit. Such a provision, the Court held, is sufficiently broad to allow a plaintiff asserting any interest, whether economic or environmental,³⁴⁹ to establish standing so long as a demonstrable injury is present.³⁵⁰

340. See *id.* § 62.1-44.34:11(A)(10) (Repl. Vol. 1998).

341. See *Rudd v. Electrolux Corp.*, 982 F. Supp. 355, 370-71 (M.D.N.C. 1997).

342. See *id.*

343. 16 U.S.C. §§ 1531-1544 (1994).

344. 42 U.S.C. §§ 11,001-11,050 (1994).

345. 117 S. Ct. 1154 (1997).

346. See 16 U.S.C. § 1540(g).

347. The zone of interest test requires that a plaintiff possess an injury falling "within the 'zone of interest' sought to be protected by the statutory provision whose violation forms the legal basis for [the] complaint." *Spear*, 117 S. Ct. at 1167; see also *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

348. See *Spear*, 117 S. Ct. at 1162.

349. Traditionally, courts have limited standing only to those plaintiffs seeking to protect endangered species under the ESA. See *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995).

350. See *Spear*, 117 S. Ct. at 1159; Ann E. Carlson, *Standing for the Environment*,

In *Steel Co. v. Citizens for a Better Environment*,³⁵¹ the United States Supreme Court determined that citizen suits may not be brought for wholly past violations of EPCRA if the violations are fully addressed before the suit is filed.³⁵² The EPCRA establishes a reporting scheme whereby users of toxic chemicals must inventory the toxic chemicals used by their facilities annually³⁵³ and report any releases of these inventoried chemicals into the environment.³⁵⁴ EPCRA's citizen suit provision provides that a citizen may sue in federal district court after giving sixty-days notice to the violator, the EPA, and state authorities.³⁵⁵ The Supreme Court of the United States, relying on the absence of a remedy to redress the citizen's claims,³⁵⁶ determined that the structure of the EPCRA's citizen suit provision precludes penalties for purely historical violations of the Act.³⁵⁷ In effect, the decision will limit justiciability to suits with ongoing violations, allowing nonreporting companies to evade liability by delaying compliance until a citizen notice letter is received, but before the citizen files suit.³⁵⁸ *Steel* underscores the ever-increasing emphasis on community right-to-know issues by creating a significant burden on citizen enforcement of EPCRA.

45 UCLA L. REV. 931, 951 (1998).

351. 118 S. Ct. 1003 (1998).

352. *See id.* at 1020.

353. *See* 42 U.S.C. § 11,022(a) (1994).

354. *See id.* The EPCRA inventory and reporting requirements of sections 312 and 313 of the Act are triggered when a listed toxic chemical is manufactured, processed, or otherwise used in quantities exceeding a threshold quantity established in section 313. *See id.* § 11,023(a), (c).

355. *See id.* § 11,046(d).

356. The request for declaratory judgment was worthless because the past EPCRA violations were uncontroverted. Civil penalties payable to the United States Treasury would not redress the group. The costs of litigation could not alone support standing. And the requested injunctive relief was aimed at deterring future EPCRA violations, but the group only alleged past violations. *See Steel Co.*, 118 S. Ct. at 1018-19.

357. *See id.*

358. *See* Jim Hecker, *EPCRA Citizen Suits After Steel Co. v. Citizens for a Better Environment*, [1998] 28 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,306 (June 1998).

B. *Supplemental Environmental Projects*

The DEQ now is officially authorized to undertake supplemental environmental projects through consent orders.³⁵⁹ A supplemental environmental project ("SEP") is an environmentally beneficial project undertaken as a partial settlement of a civil enforcement action that is not otherwise required by law. The project must have a reasonable geographic nexus to the violation or, if no such project is available, must advance objectives of the law or regulation violated. The project must be accepted by the person subject to the order and is enforceable just as any other provision of the order. Approval of the SEP is within the sole discretion of the responsible board, official, or court, and is not subject to appeal. The DEQ has developed a policy to govern the agency's use of SEPs.³⁶⁰

The EPA has issued a new policy on the use of SEPs, effective May 1, 1998, similar in most respects to the 1995 interim policy.³⁶¹ Changes include new provisions encouraging community input into the SEP selection process, provisions prohibiting the use of SEPs to mitigate claims for stipulated penalties, and revised penalty calculation provisions. The legal guidelines governing the use of SEPs were also revised.³⁶²

C. *Small Business Environmental Compliance Assistance Fund*

Legislation was passed by the General Assembly in 1997, creating the Small Business Environmental Compliance Assistance Fund.³⁶³ The fund provides loans to small businesses for the purchase and installation of environmental pollution control and prevention equipment. The DEQ administers this fund,

359. See VA. CODE ANN. § 10.1-1186.2 (Repl. Vol. 1998).

360. See *Use of Supplemental Environmental Projects (SEP)* (last modified July 13, 1998) <<http://www.deq.state.va.us/current/sep.html>>.

361. See *Issuance of Final Supplemental Environmental Projects Policy*, [Apr.] Daily Env't Rep. (BNA) No. 83, at E-3 to E-12 (Apr. 10, 1998).

362. See *id.*

363. See VA. CODE ANN. §§ 9-6.14:4.1, 10.1-2500, 10.1-2502, 10.1-1197.1 to .4 (Repl. Vol. 1998).

determines which small businesses receive loans, and the terms and conditions of the loans.³⁶⁴

D. *Environmental Mediation*

Alternative dispute resolution ("ADR") is increasingly seen as a less costly alternative to litigation. In 1997, the General Assembly granted the State Air Pollution Control Board, the State Water Control Board, and the Virginia Waste Management Board discretionary authority to employ mediation or a dispute resolution proceeding. This authority is limited to use "in appropriate cases to resolve underlying issues, reach consensus or compromise on contested issues."³⁶⁵ Each Board is to adopt its own rules and regulations to implement the utilization of nonbinding mediation and dispute resolution proceedings.³⁶⁶ The statute is clear that alternative dispute resolution is not recommended if:

- (1) [a] definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
- (2) [t]he matter involves or may bear upon significant questions of state policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the Board;
- (3) [m]aintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;
- (4) [t]he matter significantly affects persons or organizations who are not parties to the proceedings;
- (5) [a] full public record of the proceeding is important, and a mediation or dispute resolution proceeding cannot provide such a record; and
- (6) [t]he Board must maintain continuing jurisdiction over the matter with the authority to alter the disposition of the matter in light of changed circumstances, and a mediation or dispute resolution proceeding would interfere with the Board's fulfilling that requirement.³⁶⁷

364. *See id.* § 10.1-1197.1 to .4 (Repl. Vol. 1998).

365. *Id.* § 10.1-1186.3(A) (Repl. Vol. 1998).

366. *See id.* § 10.1-1186.3(D) (Repl. Vol. 1998).

367. *Id.* § 10.1-1186.3(A) (Repl. Vol. 1998).

E. *Prosecution of Environmental Offenses*

The General Assembly authorized the Attorney General to prosecute violations of state air, waste, and water laws.³⁶⁸ The Attorney General may only take such action if the local Commonwealth's Attorney concurs.

F. *Environmental Impact Reports*

The 1997 General Assembly expanded the scope of environmental impact reports. The reports must include a project's impact on wildlife habitat.³⁶⁹

X. EXPECTATIONS FOR THE FUTURE

A. *Environmental Justice*

A recent flurry of controversy³⁷⁰ at both the state and federal level, regarding the issue of environmental justice, will undoubtedly have wide ranging implications throughout the Commonwealth in coming years. At the direction of President Clinton's Executive Order 12898,³⁷¹ the EPA and its regional offices have begun to include environmental justice as a consideration in the review of federally delegated state permit programs and in prioritizing enforcement.³⁷²

In addition, pursuant to recent EPA environmental justice guidelines, state agencies, such as the DEQ, must comply with

368. See *id.* § 2.1-124 (Cum. Supp. 1998).

369. See *id.* § 10.1-1188 (Repl. Vol. 1998).

370. Several recent cases that have challenged agency issuance of permits to facilities located in minority communities have received widespread attention in recent months. See *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413 (E.D. Pa. 1996), *rev'd in part and remanded*, 132 F.3d 925 (3d Cir. 1997) (holding that individuals could bring suit under federal civil rights laws challenging the discriminatory effect of Agency permit issuance); see also *NAACP-Flint Chapter v. Michigan Dep't of Env'tl. Quality*, 564 N.W.2d 38 (Mich. Ct. App. 1997).

371. Exec. Order No. 12,898, 3 C.F.R. § 859 (1995), *reprinted in* 42 U.S.C. § 4321 (1994).

372. See *Taking Environmental Justice Claims Seriously*, [1998] 28 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,373 (July 1998).

Title VI of the Civil Rights Act of 1964³⁷³ as a condition of receiving environmental grant funding from the federal government.³⁷⁴ The EPA's nondiscrimination policy is designed to ensure that federal actions substantially affecting human health or the environment do not have discriminatory effects based on race, color, or national origin.³⁷⁵ The Interim Guidance directs the EPA's Office of Civil Rights ("OCR"), which considers charges filed under Title VI of the Civil Rights Act, to pursue informal resolution of administrative complaints when possible.³⁷⁶ After a complaint is received by the OCR, an investigation will be conducted to determine if the project at issue would create a disparate impact on the surrounding minority populations. The EPA is currently investigating fifteen Title VI complaints.³⁷⁷ If a disparate impact is found, the state authority must either rebut the finding, modify the permit to mitigate the disparate impact, or provide adequate justification for why the permit should nonetheless proceed. If the state agency's response is inadequate, the OCR will then issue a formal written determination of noncompliance to the recipient and will begin procedures to suspend EPA grant assistance to the agency.³⁷⁸

Although the OCR is directed to pursue informal resolutions of administrative complaints wherever practicable, the pressure imposed on state agencies pursuant to these Title VI regulations could lead to increased future emphasis on environmental justice considerations in DEQ permitting decisions. The EPA's environmental justice policy could also potentially impact facility siting, permitting, and other environmental programs in the Commonwealth.

The implications of the EPA's Title VI policy have caused a great deal of controversy. As a result, the Administrator of the EPA recently sent a letter to the Conference of Mayors attempt-

373. 42 U.S.C. § 2000(d) (1994).

374. *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (last modified Feb. 13, 1998) <<http://es.epa.gov/oeca/oej/titlevi.html>> [hereinafter *Interim Guidance*].

375. *See id.* at 1.

376. *See id.* at 6.

377. *See* Letter from Carol Browner, EPA Administrator to the U.S. Conference of Mayors (June 18, 1998) <<http://www.epa.gov/swerosps/bf/html-doc/confmayo.htm>> [hereinafter *Letter from EPA*].

378. *See Interim Guidance, supra* note 374, at 6.

ing to resolve concerns about the impact of Title VI on Brownfields programs.³⁷⁹ An EPA advisory committee has been established to address these issues and provide recommendations to the EPA by December 1998. The EPA plans to issue final guidance in the spring of 1999.³⁸⁰

B. *Endocrine Disruptors*

The controversial topic of "endocrine disruptors" may have a significant role to play in the stringency of cleanup standards in the future. The 1996 publication of *Our Stolen Future*, co-authored by Dr. Theo Colborn, brought the concept of endocrine disruptors to the forefront of scientific debate.³⁸¹ Endocrine disruptors are chemicals such as PCBs, dioxins, and many pesticides which interfere with the endocrine system in both humans and animals, causing abnormal reproductive patterns.³⁸² Based on the notion that an endocrine disruptor's trigger level for causing reproductive harm would be much lower than a trigger level for causing cancer, this area of developing science could have broad implications for environmental standards traditionally based on risk assessments involving chemical carcinogenicity.³⁸³ Incorporation of these lower thresholds into risk assessments would lead to more protective standards. Lower thresholds would have wide ranging implications not only for environmental RCRA and CERCLA cleanup standards, but also for natural resource damage assessments and water quality regulations.³⁸⁴ Emerging environmental legislation addresses the concept of endocrine disruption through screening and testing provisions designed to assess the toxic effects of endocrine disrupting chemicals. For example, the 1996 Food Quality Protection Act³⁸⁵ and the 1996 amendments to the Safe Drinking

379. See *Letter from EPA, supra* note 377.

380. See *id.*

381. THEO COLBORN ET AL., *OUR STOLEN FUTURE* (1996).

382. See, e.g., Charles W. Henderson, *Environment WHO Program Will Oversee Endocrine Disruptors*, *CANCER WKLY. PLUS*, Apr. 6, 1998.

383. See *id.*; see also SPECIAL REPORT ON ENVIRONMENTAL ENDOCRINE DISRUPTION: AN EFFECTS ASSESSMENT AND ANALYSIS, EPA Doc. No. EPA/630/R-96/012 (Feb. 1997); Joby Warrick, *Proportion of Male Births Down in U.S., Study Says; Pollution Suggested as Possible Cause*, *WASH. POST*, Apr. 1, 1988, at A14.

384. See *Disrupting Risks*, *Hazardous Waste News* (BPI), at 121 (Apr. 20, 1998).

385. Pub. L. No. 104-170, 110 Stat. 1489 (1996).

Water Act³⁸⁶ require the establishment of screening and testing programs for endocrine disrupting chemicals.³⁸⁷ In addition, the EPA is planning to address endocrine disruptors under the Toxic Substances Control Act ("TSCA") through the development of a screening and testing program to evaluate certain chemicals for their potential to disrupt the hormonal systems of humans and animals.³⁸⁸

C. *Public Access to Information*

The advent of the Internet has led to increasing legislation mandating access by the public to environmental information. In 1997, the General Assembly provided for the development of an Environmental Information System.³⁸⁹ The resolution requested that the United States Department of Agriculture adopt a proposal by the Natural Resources Conservation Service, Virginia's Soil and Water Conservation Districts, the National Center for Resource Innovations-Chesapeake, Inc., and the Fund for Rural American Programs. The proposal would assist Virginia in developing an environmental information system. The intent was for Virginia agencies to be able to share information and experience with other agencies. Access to this information would aid Virginia agencies in making decisions about environmental policy based on effective socio-economic and agri-environmental analyses.³⁹⁰

Additionally, legislation was introduced during the 1998 General Assembly mandating that water and air permittees provide the DEQ with information about equipment malfunctions.³⁹¹ The DEQ would be required to publish the information on the

386. Pub. L. No. 104-182, 110 Stat. 1613 (codified as amended at 42 U.S.C. §§ 300f to 300j-25 (West Supp. 1997)).

387. See Wendy P. Feiner, *Just When You Thought It Was Safe To Go Back in the Water: A Guide To Complying With the 1996 Amendments To the Safe Drinking Water Act*, 4 ENVTL. L. 193, 205-06 (1997).

388. See TSCA: Four Major Issues Seen Driving Agency Action on Toxics in 1998, [Jan.] Daily Env't Rep. (BNA) No. 7, at 5-24 (Jan. 12, 1998).

389. See H.J. Res. 537, Va. Gen. Assembly (Reg. Sess. 1997).

390. See *id.*

391. See S.B. 589, Va. Gen. Assembly (Reg. Sess. 1998).

Internet in a searchable format for a period of at least two years. The legislation was soundly defeated, but it is expected to resurface.

These bills mark a growing trend of legislation aimed at providing information to the public. The regulated community should be careful to ensure that such information is provided in the proper context.

XI. CONCLUSION

In the past two years, many new issues have surfaced that will impact the regulated community. As technology continues to change and new information becomes available, the environmental field is likely to continue to evolve. Specifically, issues relating to environmental justice, interstate commerce, public participation, and endocrine disruptors are likely to affect environmental regulations in the future.

