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ENVIRONMENTAL LAW

*Henry R. Pollard, V**

I. INTRODUCTION

Federal and Virginia courts and legislatures acted on a wide variety of environmental issues and topics in the June 1995 to June 1996 period. This article reviews the key environmental developments at the federal and state level from that period involving air, water, waste, Superfund, wetlands, and environmentally related constitutional, land use, and property tort law.

II. JUDICIAL ACTION

A. *Constitutional Law*

In *Seminole Tribe of Florida v. Florida*,¹ the Tribe sued the State of Florida pursuant to a provision of federal Indian gaming law² based on the Indian Commerce Clause of the United States Constitution.³ Florida countered that the law violated the Eleventh Amendment principle of state sovereign immuni-

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1. 116 S. Ct. 1114 (1996).

2. The Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7) (Supp. 1996).

3. U.S. CONST. art. I, § 8, cl. 3.

ty⁴ by subjecting a state to suit by Indian tribes without the state's consent.⁵

The Supreme Court conducted a two prong analysis of 1) whether Congress made clear its intent to override state immunity and, if so, 2) whether Congress' action was founded on a proper Congressional power.⁶ Finding that Congress had made quite clear its intent to abrogate state sovereign immunity,⁷ the Supreme Court then turned to the second prong of the analysis. It found that only the Fourteenth Amendment⁸ and the Interstate Commerce Clause⁹ of the Constitution have formed the proper basis for state immunity abrogation.¹⁰ The Court further found that the Indian Commerce Clause affords the state no additional protections from abrogation of immunity than the Interstate Commerce Clause.¹¹

As part of its analysis of Congressional power to override state sovereign immunity under the Interstate Commerce Clause, the Supreme Court revisited its decision in *Pennsylvania v. Union Gas Co.*¹² In that case, the Supreme Court addressed the vulnerability of states to suit for potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"),¹³ popularly known as the Superfund law. The Court held in *Union Gas* that states are subject to Superfund liability and related damages.¹⁴ The Court reasoned that Congress' power to control interstate com-

4. U.S. CONST. amend. XI.

5. *Seminole Tribe*, 116 S. Ct. at 1121.

6. *Id.* at 1123. The first prong arises from the well-established principle that unless the abrogation of state immunity from suit in federal court is plain from the statute, the statute will not operate to effect such a result. See *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989). The second prong springs from the required, underlying constitutional analysis of whether Congressional authority exists for such abrogation. See *Green v. Mansour*, 474 U.S. 64, 68 (1985).

7. *Seminole Tribe*, 116 S. Ct. at 1123-24.

8. U.S. CONST. amend XIV, §§ 1, 5. The Supreme Court upheld this constitutional authority in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

9. U.S. CONST. art. I, § 8, cl. 3. Congressional power to abrogate state sovereign immunity under the Interstate Commerce Clause was acknowledged in the plurality decision of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

10. *Seminole Tribe*, 116 S. Ct. at 1125.

11. *Id.* at 1127. See *supra* note 9.

12. 491 U.S. 1 (1989).

13. 42 U.S.C. §§ 9601-9675 (1994) (as amended).

14. *Union Gas*, 491 U.S. at 5.

merce would be undermined if it did not also hold states subject to damages under laws addressing interstate commerce concerns.¹⁵ Thus, *Union Gas* served to extend federal Interstate Commerce Clause authority by allowing Congress to compel states to appear in federal court when sued by citizens under CERCLA.¹⁶ However, the *Union Gas* case was decided by a plurality of the Court, which has led to some confusion in its precedential value.¹⁷

At the prompting of the State of Florida, however, the Supreme Court then examined the validity of the *Union Gas* case. After a review of precedent cases and the language of the Eleventh Amendment itself,¹⁸ the Court ruled, five to four, that the *Union Gas* decision ran counter to the long line of state sovereign immunity cases before it, and amounted to a mistake. The Court explicitly reversed *Union Gas*,¹⁹ finding that the Interstate Commerce Clause does not permit Congress to subject states to citizen suits in federal courts.²⁰ According to the Court, the Indian Commerce Clause similarly fails to provide Congress with the authority to subject states to suit.²¹

By reversing *Union Gas*, the Supreme Court may have dramatically altered the ability of citizens to sue states under CERCLA, and even under other federal environmental laws. The potential impact of this decision, and state reaction to suits after this decision,²² should be very interesting.

15. *Id.* at 20.

16. *Id.* at 23.

17. See *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1127 (1996).

18. *Id.* at 1127-32.

19. *Id.* at 1131.

20. *Id.*

21. *Id.*

22. In fact, *Seminole Tribe's* effect has already been felt in Virginia in *New River Valley Greens v. United States Department of Transportation*, No. 95-1203-R (W.D. Va. 1996). In that case, the federal district court ruled that the Virginia Department of Transportation could not be sued for allegedly failing to comply with environmental impact statement procedures, based in part on *Seminole Tribe*.

B. Air

1. Virginia's Clean Air Act Challenges

The Commonwealth continued its two-front attack on the authority of the United States Environmental Protection Agency ("EPA") over state implementation of certain Clean Air Act ("CAA")²³ programs. Virginia's constitutional challenge to CAA Title I²⁴ and Title V,²⁵ which had been dismissed by the district court for lack of jurisdiction,²⁶ fared no better on appeal at the federal circuit court level. In *Virginia v. United States*,²⁷ the Fourth Circuit affirmed the district court's ruling on the dismissal for largely the same reasons expressed by the district court.

In the second line of cases,²⁸ Virginia challenged the EPA's authority to impose a broader standard for judicial standing²⁹

23. 42 U.S.C. §§ 7401-7679 (1994).

24. CAA Title I addresses air pollution prevention and control planning and certain overall air quality standards. 42 U.S.C. § 7401-7514. Virginia's Title I challenge was based on EPA's disapproval of certain components of Virginia's State Implementation Plan concerning Virginia's proposed vehicle emissions inspection and maintenance program and volatile organic compound emissions reductions. See 42 U.S.C. § 7410; *Virginia v. United States*, 74 F.3d 517 (4th Cir. 1996).

25. CAA Title V addresses permit requirements for stationary sources of emission under the CAA. 42 U.S.C. §§ 7661a-7661f. Under Title V, states can choose to implement an operating permit program at the state level after approval from EPA instead of being subject to a federal operating permit program run by EPA. 42 U.S.C. § 7661d. Virginia's Title V challenge involved the scope of judicial standing for appeal of Virginia's Title V operating permits. *Virginia v. United States*, 74 F.3d at 521-22.

26. The Federal district court summarily dismissed Virginia's challenge, citing CAA's specific requirement that appeals from agency decisions under the Act were appealable directly to the federal circuit court. *Virginia v. United States*, 926 F. Supp. 537 (E.D. Va. 1995). Hence, the federal district court ruled that it was without jurisdiction over the matter and dismissed the case without prejudice. *Id.* Virginia appealed this decision to the Fourth Circuit Court of Appeals.

27. 74 F.3d 517 (4th Cir. 1996).

28. This challenge was filed with the Fourth Circuit Court of Appeals as a petition for review of EPA's final action disapproving Virginia's proposed Title V program. See 59 Fed. Reg. 62,324 (1994). After filing its petition for review with the Fourth Circuit, Virginia made further changes to its proposed Title V program, effectively narrowing the dispute with EPA down to the issue of scope of standing for judicial review of air permit decisions issued by the state under its Title V program. See *Virginia v. Browner*, 80 F.3d 869, 875 (4th Cir. 1996).

29. The EPA determined, in its final action to disapprove Virginia's proposed Title V program, that Virginia's proposed scope of standing for judicial review is too nar-

in the Commonwealth's CAA Title V operating permit program.³⁰ Historically, Virginia's judicial standing to appeal air permit decisions by the regulatory agency has been limited to the site owner/permittee.³¹

The Court of Appeals for the Fourth Circuit opined in its decision of *Virginia v. Browner*³² that Virginia was not being forced to accept the EPA's judicial review standard, because Virginia had the option not to implement the Title V program.³³ Thus, the court of appeals reasoned, the EPA was not mandating that Virginia accept the judicial review standard.³⁴ Rather, Virginia could refuse to take control of the program, leaving the EPA to run the Title V program in Virginia instead.³⁵ It was a package of incentives (and disincentives) provided within the Clean Air Act³⁶ which in general made the program appealing to the states to run themselves.³⁷ To obtain an approved program and enjoy the additional regulatory flexibility, as well as the grant monies to run the program, states

row to meet the judicial review requirements of CAA, 42 U.S.C. § 7661a(b)(6) (1994), and implementing regulations at 40 C.F.R. §§ 70.4(b)(3)(x) and 70.7(h) (1996). The EPA's interpretation of the judicial standing requirements called for Virginia to guarantee standing to any person who could meet United States Constitution Article III standing requirements and who had participated in the public comment process of the permit decision. *See* 59 Fed. Reg. 62,324 (1994).

30. The State Air Pollution Control Board has promulgated regulations for implementation of the state's Title V program. *See* Federal Operating Permits for Stationary Sources (Rule 8-5), 9 VA. ADMIN. CODE 5-80-50 to 5-80-300 (1996) (formerly VRR 120-08-0501).

31. *Citizens for Clean Air v. Commonwealth*, 13 Va. App. 430, 412 S.E.2d 715 (1991). In fact, this standard was also the same for permit decisions by the State Water Control Board under the Virginia Pollution Discharge Elimination System ("VPDES") program as well. *See* *Town of Fries v. State Water Control Bd.*, 13 Va. App. 213, 409 S.E.2d 634 (1991).

32. 80 F.3d 869 (4th Cir. 1996).

33. *Id.* at 882.

34. *Id.* at 880-81.

35. *Id.* at 882.

36. Under the Clean Air Act, EPA had several sanction alternatives to choose from to induce Virginia to adopt a program meeting EPA requirements: (i) withholding certain federal highway funds, 42 U.S.C. § 7509(b)(1); (ii) stationary source emission offset sanction, 42 U.S.C. § 7509(b)(2); and (iii) Federal Title V permit program implementation, 42 U.S.C. § 7661(a)(d)(3). The circuit court found that each of these sanctions were constitutional and reasonably related to effecting the goals and requirements of the Clean Air Act. *Virginia v. Browner*, 80 F.3d 869, 881-83 (4th Cir. 1996).

37. By meeting EPA standards for Title V implementation, the state would avoid the sanctions and gain control of the Title V program. *See* 42 U.S.C. § 7509(b) (1994).

must bring their judicial standing provisions in line with the federal standing provisions.³⁸ In addition, the court of appeals found that the EPA had reasonably fashioned the standing requirement based on the language of the CAA and the goals of the statute.³⁹

As of July 1996, Virginia was in the process of determining whether it will appeal the Fourth Circuit decision to the United States Supreme Court. In addition, legislation from the 1996 session of the General Assembly may serve as a contingency measure and safety net for Virginia's Title V program, by bringing the standing provision of the State Air Pollution Control Law in line with the EPA's requirements.⁴⁰

2. Potential-to-Emit Cases

In *National Mining Ass'n v. EPA*,⁴¹ the petitioners took specific exception to the EPA's approach to calculating potential to emit for purposes of determining whether a source is a "major source" under the hazardous air pollutant scheme of CAA section 112.⁴² The United States Court of Appeals for the District of Columbia ruled that the EPA's inclusion of all facility emissions on adjacent properties was a valid application of CAA standards.⁴³ The EPA's requirement that fugitive emissions be included in the emission calculations for determination of major source status was likewise reasonable.⁴⁴ However, the court of appeals found that the EPA had failed to justify its disregard of

38. *Browner*, 80 F.3d at 880.

39. *Id.* at 878.

40. See 1996 Va. Acts 1032, cls. 2-4; see also *infra* notes 53, 271, 289, 295 and 301-03, and accompanying text.

41. 59 F.3d 1351 (D.C. Cir. 1995).

42. 42 U.S.C. § 7412 (1994). To determine whether a source is a major source for hazardous air pollutants, the EPA considered the following in its calculation of potential to emit:

a) inclusion of emissions from all individual sources on the contiguous facility grounds, whether or not such individual sources were of the same type as the regulated source;

b) inclusion of fugitive emissions; and

c) recognition only of federally enforceable emission restrictions and controls.

See 40 C.F.R. § 63.2 (1995) (defining "fugitive emissions," "major source," and "potential to emit").

43. *National Mining Ass'n*, 59 F.3d at 1359.

44. *Id.* at 1361.

non-federally enforceable controls and limits, and granted a review of this part of the rule.⁴⁵ The court of appeals found that it was not Congress' intent to exclude valid and enforceable state and local government controls and limits on facility emission; instead, these controls deserve recognition by the EPA in calculating potential to emit and, therefore, in determining whether a facility qualified as a major source.⁴⁶

The next potential-to-emit case, *Chemical Manufacturers Ass'n v. EPA*,⁴⁷ ended with the United States Court of Appeals for the District of Columbia summarily vacating the EPA's rule requiring only federally enforceable controls as part of the new source review and prevention of significant deterioration programs of CAA Title I.⁴⁸

The issue of federally enforceable controls rose again in the context of CAA Title V operating permit requirements, with similar rejection by the court. In *Clean Air Implementation Project v. EPA*,⁴⁹ the United States Court of Appeals for the District of Columbia vacated the EPA's attempt to require federally enforceable limits for purposes of calculating potential to emit.

These decisions provide much greater flexibility to facilities which can now obtain a state or local permit that restricts certain operations at the facility. Such permit controls can be used to reduce the potential to emit to below major source levels, thereby further avoiding the costly and extensive operating permit requirements under the CAA Title V operating permit program and certain Title I hazardous air pollutant requirements.⁵⁰

The EPA is currently reviewing its options after losing all three cases. It issued an interim policy which outlines a proposed rulemaking in light of the *National Mining Ass'n* and *Chemical Manufacturers Ass'n* cases, that will alternatively incorporate federally enforceable requirements but with greater

45. *Id.* at 1365.

46. *Id.*

47. Nos. 89-1514 to 89-1516, 1995 WL 650098 (D.C. Cir. 1995) (per curiam).

48. *Id.* at *2.

49. No. 96-1224, 1996 WL 393118 (D.C. Cir. 1996) (per curiam).

50. This type of action results in what is called a "synthetic minor" source.

streamlining, or that will simply allow state and local permit controls to be used in potential-to-emit calculations.⁵¹ The EPA's interim policy is simply not to enforce the federally enforceable standard until it resolves the matter, probably in early 1997.⁵²

3. Relationship Between State Air Law and Clean Air Act

In *Cate v. Transcontinental Gas Pipe Line Corp.*,⁵³ Cate brought an action against the pipe line company for alleged violations of the CAA and the State Air Pollution Control Law.⁵⁴ Cate, who lived in Virginia adjacent to a natural gas pipeline compressor station operated by the defendant, alleged that emissions from the facility were in violation of a state administrative agreement issued to Transcontinental, the CAA National Ambient Air Quality Standards ("NAAQS") for nitrous oxide, and Virginia's restriction against excessive odor emissions.⁵⁵ In addition, Cate alleged that the noise and odor from the substation constituted a nuisance under Virginia common law.⁵⁶ Cate brought the action pursuant to the citizen suit provision of the CAA.⁵⁷

The district court first reviewed whether the state administrative agreement could be enforced through the CAA citizen suit section.⁵⁸ While the district court held that the agreement fell within the definition of "emission standards or limitations" because the agreement created a time line for meeting compli-

51. ENVIRONMENTAL PROTECTION AGENCY, EPA INTERIM POLICY ON FEDERAL ENFORCEABILITY REQUIREMENT FOR LIMITATIONS ON POTENTIAL TO EMIT (January 22, 1996).

52. *Id.*

53. 904 F. Supp. 526 (W.D. Va. 1995).

54. VA. CODE ANN. §§ 10.1-1300 to 10.1-1322.2 (Repl. Vol. 1993 & Cum. Supp. 1996).

55. *Cate*, 904 F. Supp. at 528.

56. *Id.*

57. *Id.* The CAA provides for private party enforcement of the CAA against facility owners or operators under certain conditions. 42 U.S.C. § 7604 (1994). Transcontinental argued that all of plaintiff's claims should be dismissed because they are not enforceable under the CAA, and that the nuisance claim to establish proper jurisdiction and was time barred under the state's statute of limitations.

58. *Cate*, 904 F. Supp. at 530.

ance,⁵⁹ the district court refused to hold that the agreement was, in fact, enforceable through a citizen suit because the agreement was not "in effect under" the CAA or a state implementation plan as required under CAA section 7604(f).⁶⁰ The district court distinguished between citizen suits attempting to compel compliance of NAAQS directly and those attempting to compel compliance with enforcement mechanisms established to enforce the NAAQS.⁶¹ Therefore, although citizen suits could not be brought to enforce the NAAQS themselves, citizen suits could be used to enforce administrative agreements or other emission limits or standards in effect under the CAA or state implementation plan designed to compel a party to reach compliance with the NAAQS.⁶²

The district court then examined whether Cate's claim that the compressor station was in violation of the NAAQS provided Cate with a cause of action to enforce the NAAQS as an emission limit.⁶³ The district court reviewed the impact of the Clean Air Act Amendments of 1990⁶⁴ to determine whether they expanded the scope of emission standards or limitations to include NAAQS standards.⁶⁵ The district court found the scope was not expanded, relying on *Coalition Against Columbus Center v. City of New York*,⁶⁶ and citing the EPA's position that "NAAQS are not directly enforceable against a source."⁶⁷

The district court then looked to whether the state's odor rule is federally enforceable under the CAA.⁶⁸ Transcontinental successfully argued that, because the odor rule is not part of the EPA-approved state implementation plan, Cate was without justification for pursuing enforcement of the odor rule under the CAA.⁶⁹

59. See 42 U.S.C. §7604(f)(1).

60. *Cate*, 904 F. Supp. at 535.

61. *Id.* at 531.

62. *Id.* at 532.

63. *Id.* at 535-36.

64. Pub. L. No. 101-549, 104 Stat. 2574 (1990).

65. *Cate*, 904 F. Supp. at 536.

66. 967 F.2d 764, 769 (2nd Cir. 1992).

67. *Cate*, 904 F. Supp. at 536. For EPA's position on enforceability of NAAQS, see 57 Fed. Reg. 32,276 (1992).

68. *Cate*, 904 F. Supp. at 536.

69. *Id.* at 537-38.

The district court then moved to the merit of the nuisance claim, determining that the chief issue in evaluating its merit turned on the application of the statute of limitations.⁷⁰ Cate argued that the nuisance was not permanent, but based on the facility's operation and therefore intermittent in nature.⁷¹ The district court was forced to address the distinction between an intermittent or continuous nuisance and a permanent nuisance.⁷² This issue was critical to the district court's determination of whether the statute of limitations had run on the plaintiff's claim.⁷³ The district court ruled the effects of the operations including the noise and the odor, were not permanent, but periodic.⁷⁴ The district court then held that, because the nature of the nuisance was intermittent, the nuisance claim was not barred for those injuries occurring over the last five years.⁷⁵ However, the district court found that the nuisance claim failed to allege federal diversity jurisdiction because the plaintiff neglected to allege damages greater than \$50,000.⁷⁶ Therefore, the district court granted Cate leave to amend his complaint to correct the defect, if possible.⁷⁷

C. Landfill Permitting Procedures

In *Residents Involved in Saving the Environment, Inc. ("RISE") v. Commonwealth*,⁷⁸ the Virginia Court of Appeals

70. *Id.* at 538-39. The statute of limitations for seeking property injury damages in Virginia is five years from the accrual of the cause of action. VA. CODE ANN. § 8.01-243(B) (Repl. Vol. 1992 & Cum. Supp. 1996). In turn, such cause of action accrues upon the date of first injury or harm, not the discovery thereof. VA. CODE ANN. § 8.01-230 (Cum. Supp. 1996).

71. *Cate*, 904 F. Supp. at 539.

72. *Id.*

73. Where a nuisance is permanent and original in nature, the statute of limitations begins to run on the first day of such permanent or original harm. *Virginia Hot Springs Co. v. McCray*, 106 Va. 461, 56 S.E. 216 (1907). However, where the nuisance is intermittent or periodic, a separate running of the statute of limitations exists for each intermittent harm, allowing damages for each separate event. *Hampton Rds. Sanitation Dist. v. McDonnell*, 234 Va. 235, 360 S.E.2d 841 (1987).

74. *Cate*, 904 F. Supp. at 539. In fact, the district court held that "the existence of the nuisances will tend to fluctuate with prevailing winds, weather patterns, and industrial activity." *Id.*

75. *Id.* at 539-40.

76. *Id.* at 540.

77. *Id.*

78. 22 Va. App. 532, 471 S.E.2d 796 (1996).

examined on appeal whether the Director of the Virginia Department of Environmental Quality ("DEQ") had a duty to make a specific determination pursuant to a permitting procedure of the Virginia Waste Management Act as to whether a solid waste landfill would cause a "substantial present or potential danger to human health or the environment."⁷⁹ The court of appeals ruled that the Director failed to make the proper determination before issuing the solid waste management permit to the permit applicant.⁸⁰ The court of appeals relied on a straightforward examination of the statute itself, as well as a review of the statutory purposes and policies of the DEQ.⁸¹ The court of appeals reversed the lower court's approval of the permit issuance and remanded the matter to the trial court to require the DEQ to make such a determination to render the permit valid.⁸²

D. Citizen Suit Authority under the Resource Conservation and Recovery Act

In *Meghrig v. KFC Western, Inc.*,⁸³ the United States Supreme Court addressed the question of whether a site owner is able to recover remediation costs incurred in past cleanups of environmental contamination under the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA").⁸⁴ When KFC Western began the construction of a Kentucky Fried Chicken restaurant on property it had purchased from the Meghriks, it discovered petroleum contamination at the site.⁸⁵ KFC Western remediated the site, and three years later sought,

79. *Id.* at 534-35, 471 S.E.2d at 798. The statutory standard is found at VA. CODE ANN. § 10.1-1408(1)(D) (Cum. Supp. 1996). DEQ argued that such a determination was implicit in the Director's decision to issue the permit. *RISE*, 22 Va. App. at 535, 471 S.E.2d at 798.

80. *RISE*, 22 Va. App. at 544-45, 471 S.E.2d at 803.

81. *Id.*

82. *Id.* at 545, 471 S.E.2d at 803.

83. 116 S. Ct. 1251 (1996).

84. *Id.* at 1253. RCRA controls the management of solid and hazardous wastes, as well as petroleum underground storage tank management. 42 U.S.C. §§ 6901-6991i (1994). RCRA's citizen suit section is found at 42 U.S.C. § 6972.

85. *Meghrig*, 116 S. Ct. at 1253. RCRA sets federal standards for the operation of petroleum underground storage tanks and for the remediation of releases therefrom. 42 U.S.C. §§ 6991-6991i.

under an equitable restitution theory, cost recovery from the Meghrips as the past owners through RCRA's citizen suit section.⁸⁶

The Supreme Court's unanimous decision looked to the plain language of the RCRA citizen suit provision, and found that citizen suits may be brought only during the presence of an imminent endangerment at the site, not after the site has already been cleaned up.⁸⁷ Second, the Court looked to the types of remedies afforded under the citizen suit provision and found that they were limited to injunctive relief,⁸⁸ thereby excluding cost recovery for past cleanup activities.⁸⁹ The Court's decision also served to resolve a split between federal circuits concerning such cost recovery actions.⁹⁰

E. *Recovery of Cleanup Costs from the Virginia Petroleum Storage Tank Fund*

In *Duncan v. Department of Environmental Quality*,⁹¹ the City of Richmond Circuit Court addressed a dispute between Duncan and the Virginia Department of Environmental Quality ("DEQ") concerning reimbursement of cleanup costs for underground storage tank ("UST") remediations and removals pursuant to the Virginia Petroleum Storage Tank Fund ("Tank Fund") regulation.⁹² The dispute centered around the DEQ's interpretative policy that unless a hole is documented in the body of an UST itself, reimbursement for the cost of removal of the tank is not allowed.⁹³ Having been denied costs associated

86. *Meghrip*, 116 S. Ct. at 1253.

87. *Id.* at 1255.

88. *Id.* at 1254.

89. *Id.* However, the Court reserved judgment on whether a party could seek injunctive relief compelling a responsible party to pay costs as part of a proper RCRA citizen suit. *Id.* at 1256.

90. The Ninth Circuit held that the citizen suit provision did allow for the recovery of costs of past cleanups. *Meghrip v. KFC Western, Inc.*, 49 F.3d 518 (1995). Another case in the Eighth Circuit reached the opposite result. *See Furrer v. Brown*, 62 F.3d 1092 (1995).

91. No. HG-1094-4 (Va. Cir. Richmond City 1995).

92. 9 VA. ADMIN. CODE 25-590-210 (1996) (formerly VRR 680-13-03 § 21).

93. *See* Petition for Appeal at 3-4, *Duncan v. Department of Environmental Quality*, No. HG-1094-4 (Richmond City 1995). This interpretation is not found in the Tank Fund regulation or in DEQ's *Guidance Manual: Reimbursement Claim Process for the*

with removal of five tanks located in one pit as a result of this interpretation,⁹⁴ Duncan appealed the initial decision by the DEQ's staff to an internal review board, per Tank Fund policy guidelines.⁹⁵ The review board upheld the staff decision to deny reimbursement of the costs.⁹⁶

Duncan filed his appeal of the DEQ's final decision to the City of Richmond Circuit Court under the Virginia Administrative Process Act ("APA"),⁹⁷ believing that UST corrective action reimbursement decisions made under the UST-related portions of the State Water Control Law ("SWCL"),⁹⁸ and supporting regulations addressing reimbursement from the Tank Fund,⁹⁹ are subject to appeal under the APA.¹⁰⁰ Duncan claimed that the DEQ's policy of denying coverage under the Tank Fund for removal costs for USTs which do not have documented holes was arbitrary, capricious, and counter to the intent and language of the SWCL and UST regulations.¹⁰¹ Duncan also argued that the DEQ's denial of reimbursement for those costs was unsupported by the evidence provided to the DEQ.¹⁰²

The DEQ countered that applications for reimbursement from the Tank Fund, and decisions made regarding these applications, are not subject to appeal under the APA.¹⁰³ The DEQ argued that such decisions were exempted from the APA as "money or damage claims against the Commonwealth or agencies thereof"¹⁰⁴ or "grants of state or federal funds or proper-

Virginia Petroleum Storage Tank Fund, Form 95-0001 (March 1, 1995) [hereinafter "Tank Fund Guidance Manual"].

94. Petition for Appeal at 2, *Duncan* (No. HG-1094-4).

95. Tank Fund Guidance Manual at 38-39.

96. Petition for Appeal at 3, *Duncan* (No. HG-1094-4).

97. VA. CODE ANN. §§ 9-6.14:1 to 9-6.14:25 (Repl. Vol. 1993 & Cum. Supp. 1996).

98. *Id.* §§ 62.1-44.34:8 to -34:13 (Cum. Supp. 1996).

99. 9 VA. ADMIN. CODE 25-590-210 (1996) (formerly VRR 680-13-03 § 21).

100. Petition for Appeal at 1-2, 5, *Duncan* (No. HG-1094-4).

101. *Id.* at 3-4.

102. *Id.* at 4-5. Duncan provided expert testimony and evidence to the DEQ Reconsideration Panel that petroleum contamination existed in the pit from which five USTs connected together by piping had been pulled, and that the contamination had not been caused by any source other than the USTs or UST piping in that pit. *See id.* at 3. In addition, Duncan presented expert testimony that all five USTs had to be removed because of the extent of contamination. *Id.*

103. *See Demurrer and Motion to Dismiss* at 2-6, *Duncan*, No. HG-1094-4 (Va. Cir. Richmond City 1995).

104. VA. CODE ANN. § 9-6.14:4.1(B)(1) (Cum. Supp. 1996).

ty."¹⁰⁵ In addition, the DEQ argued that construction of the SWCL revealed that the General Assembly did not intend that UST cleanup reimbursement decisions be subject to the APA.¹⁰⁶ The DEQ also stressed that because such actions were exempt from the APA, Tank Fund reimbursement decisions made by the DEQ were immune from suit under the doctrine of sovereign immunity.¹⁰⁷

The City of Richmond Circuit Court issued a letter opinion, holding that Tank Fund reimbursements amount to grants of state funds under the APA, thereby denying Duncan's petition to appeal the agency decision and dismissing the case.¹⁰⁸ As a result of this finding, the circuit court never addressed the issue of whether the DEQ's interpretative policy was reasonable.

Duncan appears to be the first litigated case to address the ability to appeal DEQ Tank Fund reimbursement decisions. That such decisions are considered grants of state money (at least in the City of Richmond Circuit), and therefore excluded from the APA for purposes of appeal, will likely come as a surprise to many businesses and industries. In any case, the result of *Duncan* presents a particularly troublesome hurdle for UST owners and operators seeking to obtain full reimbursement for UST cleanup and removal costs.¹⁰⁹

105. VA. CODE ANN. § 9-6.14:4.1(B)(4) (Cum. Supp. 1996).

106. See Demurrer and Motion to Dismiss at 5-6, *Duncan* (No. HG-1094-4).

107. *Id.* at 6-8.

108. *Duncan v. Department of Env'tl. Quality*, Chancery No. HG-1094-4 (Va. Cir. Richmond City Dec. 27, 1995) (letter opinion). Shortly after the court rendered its decision, Duncan filed a Petition for Writ of Mandamus and Bill of Complaint for Declaratory Relief, *Duncan v. Department of Env'tl. Quality*, No. HH-172-4 (Va. Cir. Richmond City 1996), requesting that the circuit court compel the DEQ staff to follow the plain language of the definition of "underground storage tank" and other parts of the SWCL. Duncan argued that the DEQ's review of reimbursement applications amounted to a ministerial, and not a discretionary, function. *Id.* Duncan also argued that the DEQ's requirement that holes in the underground storage tanks be documented was contradicted by the SWCL. *Id.* Duncan also requested declaratory judgment that DEQ was required to follow the definition of "underground storage tank" contained in the SWCL. *Id.* However, after further pleadings were filed by both parties, Duncan terminated the case before the circuit court ruled on his petition.

109. This can be especially troubling as the costs of removing and disposing of remaining UST contents and the removal and disposal of the USTs themselves are often the most substantial costs incurred as part of the corrective action process. In addition, it is often practically impossible to conduct the required investigation and

F. Superfund

In *United States v. Olin Corp.*¹¹⁰ the federal district court was called to review a consent decree between the EPA and several potentially responsible Superfund parties in an otherwise typical Superfund case involving groundwater contamination in Alabama. The district court's ruling turned out to be a very atypical decision that raises serious questions about CERCLA's retroactive effect and applicability to purely intra-state contamination.

The district court looked to the United States Supreme Court's decision in *Landgraf v. USI Film Products*¹¹¹ for controlling precedent as to the presumption against intended retroactive effect of federal law.¹¹² The district court ruled after an extensive legal and historical analysis of previous cases addressing CERCLA retroactivity,¹¹³ and application of *Landgraf*,¹¹⁴ that Congress did not expressly provide for the retroactive effect of CERCLA, either through language in the statute¹¹⁵ or in its legislative history.¹¹⁶ The district court also concluded that CERCLA could still function as intended without retroactive effect.¹¹⁷

In addition, the *Olin* court held that application of CERCLA to purely local contaminated sites without impact on interstate commerce exceeded the Interstate Commerce Clause authority of Congress.¹¹⁸ Relying on *United States v. Lopez*,¹¹⁹ the district court opined that in the case at bar there was no link

cleanup of UST sites without first removing the UST from the ground. As a result, UST owners and operators are put in the position of necessarily having to remove an UST to conduct the investigation and remediation of the site in accordance with the SWCL and UST regulations, only to find that the removal costs are not eligible for reimbursement under the DEQ's policy.

110. 927 F. Supp. 1502 (S.D. Ala. 1996).

111. 511 U.S. 244 (1994).

112. *Olin*, 927 F. Supp. at 1511-12.

113. *Id.* at 1507-11.

114. *Id.* at 1511-12.

115. *Id.* at 1512-13.

116. *Id.* at 1513-16.

117. *Id.* at 1519.

118. *Id.* at 1533.

119. 115 S. Ct. 1624 (1995).

between the cleanup of the site and economic activity substantially affecting interstate commerce because of the local nature of the contamination.¹²⁰ The district court also held that there was no jurisdictional component in CERCLA to overcome the constitutional weakness.¹²¹

The *Olin* decision is based on an extensive review of CERCLA's history and Supreme Court decisions which address the retroactivity and Interstate Commerce Clause issues. Other courts may therefore give it serious consideration. Current CERCLA defendants will no doubt begin to cite *Olin* in their pleadings and in settlement discussions with the EPA. However, the EPA has filed an appeal, so *Olin's* full impact is still uncertain.

*Westfarm Associates L.P. v. Washington Suburban Sanitary Commission*¹²² presented an opportunity for the Fourth Circuit Court of Appeals to address whether a publicly owned treatment works ("POTW") could be considered a "facility," and whether discharges of hazardous substances from cracks and other faults in its sewer pipes amounted to "releases of hazardous substances," under CERCLA.¹²³

Westfarm attempted to sell certain property which it had held for real estate development purposes, but an environmental investigation related to the sale revealed perchloroethylene ("PCE") in the groundwater of the property.¹²⁴ Westfarm's in-

120. *Olin*, 927 F. Supp. at 1533.

121. *Id.*

122. 66 F.3d 669 (4th Cir. 1995).

123. The court of appeals also examined whether the POTW could enjoy sovereign immunity in the face of alleged negligent acts or omissions in the construction, maintenance, and operation of the sewer lines. The court of appeals looked to specific Maryland law, which waived the POTW's sovereign immunity for purposes of negligence claims. *Id.* at 684. The court of appeals found that while the POTW had no common law duty to "enact or enforce regulations which might prevent POTW users from discharging perchloroethylene (PCE) into the sewer system," the court also found that the public duty doctrine did not remove POTW from the common law duty to take due care in the maintenance and operation of its sewer system. *Id.* at 685. Finding that the evidence presented during the case substantiated claims that the sewer was not constructed in a workmanlike manner, and that the POTW had failed to maintain the sewers in proper condition even after having gained knowledge that the sewer lines had been damaged or cracked, the court of appeals held that the POTW was in fact negligent and therefore liable to Westfarm for property damages associated with the release of PCE onto its property. *Id.* at 683-88.

124. *Id.* at 673-74. PCE is a toxic organic solvent used extensively in dry cleaning

vestigations further revealed the source of PCE to be a nearby dry cleaning trade association research facility that had routinely disposed of waste PCE into the public sewer system after completing research projects, amounting to an average of three gallons per year.¹²⁵ The sewer line leading from the research facility joined with a sewer main line which then subsequently ran near the Westfarm property.¹²⁶ Westfarm inspected the sewer lines and identified cracks and gaps in the sewer line near the Westfarm property. These defects in the line allowed PCE to escape into the soil and the groundwater.¹²⁷ Expert testimony provided by Westfarm established that the sewer line had not been built in a workmanlike manner and had not been properly maintained over time.¹²⁸ In addition, there was evidence that the sewer authority knew that the research facility was storing PCE on its property and placing PCE into the sewer lines per an industrial discharge permit granted by the POTW.¹²⁹ The POTW is a state agency under Maryland law.¹³⁰

The court of appeals looked to whether the sewer pipes owned by the POTW could be considered a "facility" as that term is defined under CERCLA.¹³¹ The court found that, while the sewer pipes belonging to the POTW did not fit neatly into the definition of facility,¹³² CERCLA intended to include local and state agency POTW's within its liability scheme.¹³³ The court of appeals, examining CERCLA in its entirety and specifically relying on *Pennsylvania v. Union Gas Co.*,¹³⁴ found that Congress intended to include state and local government agen-

processes. *Id.* at 674.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 675-76.

130. *Id.* at 676.

131. *Id.* at 678-80.

132. *Id.* at 678. CERCLA defines "facility" to include any "pipe or pipeline (including any pipe into a sewer or publicly owned treatment works)." 42 U.S.C. § 9601(9) (1994).

133. *Westfarm*, 66 F.3d at 678.

134. 491 U.S. 1, 8 (1989), *rev'd in* *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996); *see supra* notes 5-17 and accompanying text.

cies within the scope of liability under CERCLA.¹³⁵ However, the recent Supreme Court decision in *Seminole Tribe of Florida v. Florida*,¹³⁶ discussed above in this article,¹³⁷ casts doubt on this part of the Fourth Circuit's holding. *Seminole Tribe* directly reversed *Union Gas*,¹³⁸ which involved Superfund liability. To the degree that *Seminole Tribe* found that Congress' attempt to abrogate state sovereign immunity under the Interstate Commerce Clause was an invalid exercise of congressional power,¹³⁹ the Fourth Circuit may have come to a different conclusion if it had the *Seminole Tribe* decision before it at the time of *Westfarm*.

The Fourth Circuit Court of Appeals also found that the leaking of PCE into the soils and groundwater from the POTW's sewer lines amounted to a "release" under CERCLA.¹⁴⁰ The court of appeals declined to follow the POTW's assertion that it should be able to enjoy the innocent landowner's defense under CERCLA,¹⁴¹ because the POTW failed to produce sufficient evidence of due care in its maintenance of the sewer lines and failed to take steps to prevent what was a foreseeable disposal of the PCE from the research facility into its sewer lines.¹⁴²

In *Pneumo Abex Corp. v. Bessemer & Lake Erie Railroad Co.*,¹⁴³ the district court addressed several challenges to a cost recovery and contribution claim filed by Abex against several railroad parties in a Superfund action involving a foundry previously acquired by Abex. The case involved the sale of used and worn railroad journal bearings to Abex for reprocessing in the manufacturing of new bearings.¹⁴⁴ The worn bearings were sold by the railroad companies to Abex, which melted them down to remove dirt, grease, and extraneous metal contami-

135. *Westfarm*, 66 F.3d at 678.

136. 116 S. Ct. 1114 (1996).

137. *See supra* part II.A.

138. *Seminole Tribe*, 116 S. Ct. at 1128.

139. *Id.* at 1126.

140. *Westfarm*, 66 F.3d at 680-81.

141. 42 U.S.C. § 9607(b)(3) (1994).

142. *Westfarm*, 66 F.3d at 682-83.

143. 921 F. Supp. 336 (E.D. Va. 1996).

144. *Id.* at 339.

nants, and then recast them.¹⁴⁵ After further addition of other component metals, the recasting process vented off particular material which was alleged to have accumulated on its property.¹⁴⁶ Abex then formed new bearings by pouring the molten ingredients into molds formed from sand.¹⁴⁷ After the sand molds had been used to the point where they were no longer viable, Abex removed the sand and placed it on the back of its property.¹⁴⁸

After settling with the EPA to address the removal of contamination from the site under CERCLA section 106,¹⁴⁹ Abex and related parties brought contribution and cost recovery actions pursuant to CERCLA section 107(a)¹⁵⁰ against the railroad defendants.¹⁵¹ The defendants argued several defenses, two of which deserve note. First, the railroads argued that the bearings sold to Abex should not be considered hazardous substances simply because the bearings contain elements which are listed as hazardous substances.¹⁵² Second, the railroads argued that their actions should not be "disposal or treatment" of a hazardous substance under CERCLA because the bearings were sold to Abex as valuable raw material in its recasting process.¹⁵³

The district court rejected the railroad's arguments, finding that the distinction between the bearings and their component metal as hazardous substances was too tenuous.¹⁵⁴ The district court also found that the railroad defendants failed to counter Abex's claim that the bearings' component metals had

145. *Id.* at 340.

146. *Id.*

147. *Id.*

148. *Id.*

149. 42 U.S.C. § 9606 (1994).

150. 42 U.S.C. § 9607(a). This section provides for the recovery of cleanup costs incurred in accordance with the National Contingency Plan from the current owner or operator of a facility, anyone who arranged for the transportation to, treatment, or disposal of hazardous substances at a facility, or transported hazardous substances to a facility, or a past owner or operator who contributed to the release of hazardous substances. *Id.* Certain defenses do exist, however. See 42 U.S.C. § 9607(b).

151. *Pneumo Abex*, 921 F. Supp. at 341.

152. *Id.* at 342-43.

153. *Id.* at 343-46.

154. *Id.* at 344-46.

contributed to the facility's contamination.¹⁵⁵ The district court also discounted the defendants' "useful product" argument by likening the worn journal bearings to spent lead acid batteries.¹⁵⁶ The district court relied on *Chesapeake & Potomac Telephone Co. v. Peck Iron & Metal Co.*,¹⁵⁷ which held that such used batteries did not constitute a "useful product" because the seller did not have any further use for them.¹⁵⁸ In *Peck Iron*, the district court concluded that the purpose of the transfer of such batteries was to dispose of them rather than for any particular future use.¹⁵⁹ In fact, the *Pneumo Abex* court ruled that the "only remaining use [of the bearings] was to serve as a part of" the manufacturing process which contributed to contamination of the site.¹⁶⁰ In conjunction with the "useful product" argument, the district court similarly dismissed the railroads' arguments that they had not arranged for the disposal or treatment of the railroad bearings.¹⁶¹ The district court dispensed with this claim by finding that the purpose of the transfer of the railroad bearings to Abex was to have them melted down and formed into new bearings, constituting "treatment" under CERCLA.¹⁶² The district court also found that the railroads' actions amounted to "disposal" of hazardous substances, because the bearings were ultimately discarded through particulate emissions or actual release onto the grounds of the foundry.¹⁶³

The district court addressed another argument made by the defendants that plaintiffs were restricted to a CERCLA section 113¹⁶⁴ contribution action, and were barred from bringing a CERCLA section 107¹⁶⁵ cost recovery action.¹⁶⁶ The district

155. *Id.* at 343.

156. *Id.* at 344.

157. 814 F. Supp. 1269 (E.D. Va. 1992).

158. *Id.* at 1275.

159. *Pneumo Abex*, 921 F. Supp. at 344 (citing *Peck Iron*, 814 F. Supp. at 1274).

160. *Id.* at 344.

161. *Id.* at 344-46.

162. *Id.* at 345.

163. *Id.* at 345-46.

164. 42 U.S.C. § 9613(f) (1994). This section permits potentially responsible parties to seek contribution from other potentially responsible parties.

165. 42 U.S.C. § 9607.

166. *Pneumo Abex*, 921 F. Supp. at 346. The distinction between these two causes of action is significant in the scope of liability which can be shifted from the plaintiff

court dismissed the defendants' arguments that plaintiffs, as potentially responsible parties themselves, were restricted to a CERCLA section 113 cause of action.¹⁶⁷ However, the district court structured the shift of liability under the CERCLA section 107 action in a manner similar to that under *Peck Iron*.¹⁶⁸ Thus, the defendants had the burden to establish that the harm to the environment allegedly contributed by the railroad bearings was divisible from other contamination, such that the court could establish a reasonable basis for apportionment of the liability.¹⁶⁹ In addition, the district court refused to shift the plaintiffs' share of liability to the defendants, although orphan shares associated with defunct or unknown contributors to contamination would be shifted to the defendant.¹⁷⁰

G. *Water and Oil Pollution*

In *National Shipping Co. v. Moran Mid-Atlantic Corp.*,¹⁷¹ the district court addressed an oil tanker company's claim against a tug boat company related to an alleged negligent collision between the tug and the tanker which resulted in the release of 9,000 gallons of fuel oil into the Elizabeth River.¹⁷² National Shipping Co. ("NSCSA") brought its cause of action under four theories of law: general maritime law, the Virginia State Water Control Law,¹⁷³ common law negligence, and the Oil Pollution Act of 1990.¹⁷⁴ The release of the fuel oil resulted in an extensive cleanup effort in the Elizabeth River and

to the defendant. Under a CERCLA § 107 action, the defendants are subject to joint and several liability, whereas CERCLA § 113(f) provides for a division of liability based on relative contribution to the harm. *Id.*

167. *Id.* at 347.

168. *Id.*

169. *Id.* at 348.

170. *Id.*

171. 924 F. Supp. 1436 (E.D. Va. 1996).

172. *Id.* at 1439.

173. VA. CODE ANN. §§ 62.1-44.34:18(C)(4) (Repl. Vol. 1992).

174. 33 U.S.C. § 2701 to 2761 (1994).

along the shoreline, with total cleanup expenses of over \$1 million.¹⁷⁵

The district court first examined the interplay between the Oil Pollution Act ("OPA") contribution provision¹⁷⁶ and common law contribution under general maritime law.¹⁷⁷ The district court dispensed with NSCSA's general maritime claims as being preempted by OPA, because OPA specifically provides for a cause of action against other liable parties for remediation expenses and third party compensation.¹⁷⁸ However, the district court preserved NSCSA's action against Moran for collision damages, which are excluded from exemption under OPA and preserved under maritime law.¹⁷⁹ The district court summarily dismissed NSCSA's State Water Control Law claim, again based on the theory of preemption.¹⁸⁰

The district court took up the interaction between OPA's contribution provision and state common law negligence and contribution.¹⁸¹ The district court dismissed Moran's counterclaim of negligence against NSCSA.¹⁸² With respect to the contribution claim, the district court found that OPA's savings clause¹⁸³ did not preserve the plaintiff's ability to seek damages over and above the contribution limit set forth in OPA.¹⁸⁴ The district court found instead that it was Congress' intent to permit only those present who had been damaged by an oil spill to seek damages under state law in addition to those permitted by OPA.¹⁸⁵ The district court interpreted Congress' intent of this added level of recovery not to extend to benefit the responsible owner whose vessel was involved in a collision.¹⁸⁶

The district court also rejected NSCSA's common law indemnification argument, finding that in order to enjoy the benefit of

175. *Moran*, 924 F. Supp. at 1453.

176. 33 U.S.C. § 2709.

177. *Moran*, 924 F. Supp. at 1447.

178. *Id.*

179. *Id.* at 1453-54.

180. *Id.* at 1447.

181. *Id.*

182. *Id.* at 1455.

183. 33 U.S.C. § 2718(a).

184. *Moran*, 924 F. Supp. at 1447-48; see 33 U.S.C. § 2704 (1994).

185. *Moran*, 924 F. Supp. at 1448.

186. *Id.*

such an argument, NSCSA must stand in the shoes of a party who is legitimately able to bring a common law action.¹⁸⁷ NSCSA was not such a party, because it was not one of the victims of the oil spills as set forth in the OPA's savings clause.¹⁸⁸

Finally, the district court established that NSCSA could recover collision costs from Moran under general maritime law, as the OPA's contribution provisions did not extend to these types of claims, and therefore did not preempt general maritime law.¹⁸⁹ The district court found that the tug was operated negligently, causing the collision and the resulting oil spill, therefore justifying NSCSA's recovery of collision damages from Moran.¹⁹⁰

H. Wetlands

Under the case name *Cargill, Inc. v. United States*,¹⁹¹ the United States Supreme Court refused to entertain an appeal of the Ninth Circuit's decision in *Leslie Salt Co. v. United States*,¹⁹² which addressed whether abandoned salt pits which filled with water and provided temporary habitat for migratory birds for a only a few months of the year constituted wetlands under the Clean Water Act. The Ninth Circuit had held that such pits, despite their temporary value as a habitat for migratory birds, nonetheless constituted a wetlands under the U.S. Army Corps of Engineers' wetlands regulations.¹⁹³

The preamble to the Corps' 1986 regulations indicates that waters of the United States include those waters which serve

187. *Id.*

188. *Id.*

189. *Id.* at 1453.

190. *Id.* at 1452-53.

191. 116 S. Ct. 407 (1995).

192. 55 F.3d 1388 (9th Cir.), *cert. denied sub nom.*, *Cargill, Inc. v. United States*, 116 S. Ct. 407 (1995).

193. *Id.* at 1391; *see* 33 C.F.R. § 328.3(a) (1996). The Corps' definition, duplicated under EPA's wetlands regulations, reads as follows "(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa, lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 40 C.F.R. § 230.3(s)(3) (1996).

as habitats for birds listed under the migratory bird treaties or for other migratory birds which cross state lines.¹⁹⁴ Although the preamble could not be considered an official regulation because it had not been subjected to notice and comment procedures under the Federal Administrative Procedure Act,¹⁹⁵ the Ninth Circuit found that the Corps' interpretation of the CWA amounted to a reasonable interpretive rulemaking, which normally falls outside of notice and comment rulemaking procedures.¹⁹⁶ The court of appeals also found that the Corps' interpretation was reasonable given the nexus between the flights of migratory birds and the interstate commerce provision of the "waters through the United States" included in the definition of "wetlands" under the Corps' regulations.¹⁹⁷ The court of appeals further found that the Corps' interpretation was reasonable and, therefore, was given due deference.¹⁹⁸ The court of appeals relied in this respect on *United States v. Bayview Homes, Inc.*¹⁹⁹

I. *Endangered Species*

In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,²⁰⁰ the United States Supreme Court held that the United States Fish and Wildlife Service, in its endangered species regulations, properly interpreted the meaning of "harm to endangered species" to include acts which result in "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."²⁰¹ This particular part of the regulation, relating to the protection of the northern spotted owl, a threatened species under the regulations, was challenged by landowners, loggers and others de-

194. 51 Fed. Reg. 41,217 (1986).

195. 5 U.S.C. § 553 (1994).

196. *Leslie Salt*, 55 F.3d at 1394.

197. *Id.* at 1393-94.

198. *Id.* at 1394-95.

199. 474 U.S. 121, 131 (1985) (citing *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984)).

200. 115 S. Ct. 2407 (1995).

201. *Sweet Home Chapter*, 115 S. Ct. at 2407. The regulatory definition is found at 50 C.F.R. § 17.3 (1994).

pendent on the forest industries in the Pacific Northwest.²⁰²

The Supreme Court examined three main points in finding that the regulation was proper. First, the Court held that the Service's interpretation of "harm" as included in the Endangered Species Act ("ESA") definition of "take"²⁰³ was reasonable, giving a meaning to the term "harm" as used in that definition and not rendering it mere surplusage.²⁰⁴ The Court then found that the ESA's broad purpose, to protect endangered species against activities which can cause their degradation or diminution in numbers, supported the Secretary's interpretation to extend protection to species' habitats.²⁰⁵ The Court declined to follow the respondents' argument that other portions of the ESA, which permit certain takings of endangered species incidental to other lawful activities, did not support the contention that Congress intended habitat modifications to be outside the scope of prohibited activities which could lead to the death or diminution in numbers of endangered species.²⁰⁶ The Court further rejected an argument by the respondents that legislative history supported a different conclusion.²⁰⁷ Finally, the Court recognized that broad discretion had been granted to the Secretary of the Interior to develop regulations to carry out the ESA, providing a foundation for deference to the Service in interpreting the ESA to achieve its purposes, including the Secretary's interpretation in the case at hand.²⁰⁸ Justice Scalia offered a vigorous dissent, finding that the Secretary of the Interior had clearly exceeded the scope of the ESA when he interpreted habitat modification as a form of harm and therefore a form of prohibited taking under the ESA.²⁰⁹

202. *Sweet Home Chapter*, 115 S. Ct. at 2410.

203. 16 U.S.C. § 1532(19) (1994) "[t]he term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.*

204. *Sweet Home Chapter*, 115 S. Ct. at 2413.

205. *Id.* at 2413-14.

206. *Id.* at 2417-18.

207. *Id.* at 2416-18.

208. *Id.* at 2418.

209. *Id.* at 2423 (Scalia, J., dissenting).

J. *Environmental Torts and Damages*

The United States District Court for the Western District of Virginia considered an environmentally related personal injury action in *Cavallo v. Star Enterprise*,²¹⁰ where plaintiff Cavallo alleged that vapors emitted from released aviation jet fuel at Star Enterprise's facility triggered respiratory and allergic sensitivity to petroleum vapors. In a motion in limine filed by the defense, the district court examined whether the *Daubert* rule for admission of expert testimony²¹¹ compelled the court to exclude plaintiff's expert's opinions on the relationship between the volatile organic compound released from the plant and the plaintiff's injuries.²¹² The district court focused on the "second prong" under the *Daubert* rule, which related to the "fit" of the scientific validity of the theory or method used by the expert to support his opinion and the situation in the case at hand.²¹³ After reviewing the scientific evidence relied upon by the plaintiff's experts, the district court found that the evidence, and the scientific conclusions established by that evidence, were not transferable or applicable to the case at hand due to (i) the lack of established similarity between chemical exposures in the underlying studies and the facts of the case, (ii) the uncertainty as to the exact nature of the chemical compounds to which the plaintiff had been exposed, and (iii) available information on the type of material involved in the release establishing that high thresholds of exposure are normally necessary for manifestations of injury to arise.²¹⁴ The district court then upheld the defendants' motion for summary judgment based on the exclusion of plaintiff's expert's testimony.²¹⁵

210. 892 F. Supp. 756 (E.D. Va. 1995).

211. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (ruling that the courts must prevent expert scientific testimony from being admitted where the expert testimony is not both relevant and reliable).

212. *Cavallo*, 892 F. Supp. at 759-60.

213. *Id.* at 761-62.

214. *Id.* at 763-73.

215. *Id.* at 774.

K. Land Use and Related Environmental Cases

The Virginia Court of Appeals addressed, in *Lawless v. County of Chesterfield*,²¹⁶ whether the owner and operator of an unauthorized landfill could be cited for more than one day's worth of violations of a county zoning ordinance addressing landfill operations. The court of appeals looked at Chesterfield County Code section 21.1-5(b)(1)—providing that each day's violation of a conditional use permit issued pursuant to that section constitutes a separate offense—and whether that county Code section violated Dillon's Rule.²¹⁷ The court of appeals examined Title 15.1 of the Virginia Code, which permits local governments to adopt and implement zoning ordinances,²¹⁸ to see whether there was any express or necessarily implied power granted to local governments to seek individual misdemeanor counts for each day of noncompliance.²¹⁹ The court of appeals compared the misdemeanor penalty authority under Title 15.1²²⁰ to the civil sanction authority under that same title,²²¹ and found that the civil sanction authority permitted localities to assess civil penalties on a per-day basis, up to \$3,000. The court of appeals, however, found no such language in the criminal violation provision of Title 15.1.²²² It also found that the locality's interest in applying criminal sanctions on a per-day basis was not essential to the adequate enforcement of the zoning ordinance.²²³ Therefore, the court of appeals held that the County Code section enforcing compliance with the zoning ordinances through per-day criminal sanctions "violat[ed] Dillon's Rule and [was] void."²²⁴ Lawless's second conviction under the County Code section, based on the same facts that were applied in his first conviction, was therefore reversed and dismissed.²²⁵ This case casts serious doubt on any locality's effort to apply per-day

216. 21 Va. App. 495, 465 S.E.2d 153 (1995).

217. *Id.* at 497, 465 S.E.2d at 154.

218. VA. CODE ANN. §§ 15.1-427 to -503.3 (Repl. Vol. 1989 & Cum. Supp. 1996).

219. *Lawless*, 21 Va. App. at 497, 465 S.E.2d at 155.

220. VA. CODE ANN. § 15.1-491(e) (Cum. Supp. 1996).

221. VA. CODE ANN. § 15.1-499.1 (Cum. Supp. 1996).

222. *Lawless*, 21 Va. App. at 497, 465 S.E.2d at 155.

223. *Id.* at 502, 465 S.E.2d at 156.

224. *Id.* at 503, 465 S.E.2d at 156.

225. *Id.*

criminal sanctions for zoning violations, including those addressing landfills or other environmentally related land use issues, where the same facts are used to demonstrate the multi-day violation.

In *Front Royal & Warren County Industrial Park Corp. v. Town of Front Royal*,²²⁶ a landowner sought compensation for lost value of property and business income as a result of the defendant's refusal to extend sewer utilities to his properties, despite an annexation court order requiring the town to construct such water and sewer lines. After a very convoluted procedural history before Virginia and federal courts,²²⁷ the federal district court concluded that it was in a position to address plaintiff's claims for damages arising from a regulatory taking as a result of the town's refusal to install water and sewer lines as previously ordered by the annexation court.²²⁸ Plaintiff's action was pursued in the context of a section 1983²²⁹ action against the town and town officials for their refusal to follow the orders of the annexation court.²³⁰ The district court found that the plaintiff had "utilized the procedures available pursuant to Virginia law to seek compensation for an alleged taking," but that he had been "denied just compensation pursuant to the procedures of Virginia law."²³¹ The district court also recognized that the factual situation of the case at bar did not compare exactly to previous instances of regulatory taking.²³² However, the district court determined that the case at bar had enough similarities to such cases to warrant application of regulatory taking principles to the action.²³³

The district court then examined the various regulatory taking principles which had been established in recent years by the United States Supreme Court, including the principle by which a regulatory taking does not necessarily have to be of a

226. 922 F. Supp. 1131 (W.D. Va. 1996).

227. *Id.* at 1135-37.

228. *Id.* at 1137.

229. 42 U.S.C. § 1983 (1994).

230. *Id.* at 1143.

231. *Id.* at 1145.

232. *Id.*

233. *Id.*

permanent nature in order to be compensable.²³⁴ The district court also looked to *Nollan v. California Coastal Commission*²³⁵ for the general principle that the purpose of the Takings Clause²³⁶ is to prevent unfair and unjust burdening of private individuals with public responsibilities.²³⁷ The district court also relied on *Florida Rock Industries, Inc. v. United States*²³⁸ for the proposition that individuals should be able to make investment decisions on the basis that the government will not unfairly impose public burdens on private individuals or act arbitrarily and capriciously such that reasonable investment-backed expectations would be frustrated.²³⁹ The district court found that the town had refused to follow the annexation court's order to extend sewer and water, thereby acting arbitrarily and capriciously, resulting in the loss of investment-backed expectations of the plaintiff.²⁴⁰ The district court also examined whether realistic alternative uses of the property were available, such that the takings may not have amounted to a complete taking.²⁴¹ Finding that the property was in an industrially zoned area where alternative uses were unlikely and economically unrealistic,²⁴² the district court held that a regulatory taking of the plaintiff's property without just compensation had occurred as a result of the town's refusal to implement the annexation court's order.²⁴³

The district court then addressed the substantive due process issues within the section 1983 action filed by the plaintiff.²⁴⁴ The district court concluded that, based on the history associated with the annexation court's order to extend sewer and water to the plaintiff's property, the plaintiff had a recognizable interest in the provision of such sewer and water lines to its proper-

234. *Id.* at 1145-46. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

235. 483 U.S. 825, 836 n.4 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, (1960)).

236. U.S. CONST. amend. V, § 1.

237. *Town of Front Royal*, 922 F. Supp. at 1148.

238. 18 F.3d 1560 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

239. *Town of Front Royal*, 922 F. Supp. at 1148.

240. *Id.* at 1151.

241. *Id.* at 1149.

242. *Id.*

243. *Id.*

244. *Id.*

ties.²⁴⁵ The district court then looked again to the town's refusal to implement the annexation court's order, again viewing such refusal as "manifest arbitrariness and capriciousness in depriving the plaintiff of that cognizable property interest."²⁴⁶ The district court also found that equal protection was denied to the plaintiff, because the defendant could establish no legitimate state interest which was furthered by its refusal to comply with the annexation court's order to extend sewer and water to the plaintiff's property.²⁴⁷

As to damages, the district court recognized that between the time the plaintiff's action had originally started and the time of the court's decision in the case at bar, the town had in fact extended sewer and water to the plaintiff, such that any damages associated with the denial of sewer and water would be associated with that time period when denial affected the taking.²⁴⁸ The district court based this calculation on the differences in fair market value between the time of the taking and the time after the taking ceased, plus a reasonable rate of return on the difference in market value.²⁴⁹ The district court also awarded attorney's fees to the plaintiff.²⁵⁰

While the facts and procedural history in *Town of Front Royal* appear to be unique in many ways compared to other regulatory takings cases, the district court found that the overarching principles of past regulatory takings cases were nonetheless applicable to a situation where a taking was not of a permanent nature, and where there was demonstrable arbitrary and capricious denial of development of a vested property interest. This case may therefore open new doors for recovering compensation in future regulatory taking cases.

245. *Id.* at 1150-51.

246. *Id.* at 1151.

247. *Id.* at 1152.

248. *Id.*

249. *Id.* at 1152-53.

250. *Id.* at 1153.

L. *Environmental Crimes and Criminal Procedure*

The Fourth Circuit expanded the court's ability to consider conduct outside of the predicate acts of an environmental criminal conviction in setting the sentence for the defendant. In *United States v. Pizzuto*,²⁵¹ the court of appeals ruled that conduct related to dismissed criminal counts which demonstrates the defendant conducted repeated illegal acts or related crimes could be considered when determining whether enhancement of the sentence for the actual conviction is appropriate under the federal sentencing guidelines.²⁵² By this ruling, the court of appeals extended its holding in *United States v. Williams*²⁵³ to environmental crimes.

M. *Significant Miscellaneous Cases*

In *Mortarino v. Consultant Engineering Services, Inc.*,²⁵⁴ the Supreme Court of Virginia examined whether constructive fraud occurred in the purchase of property subsequently found to contain wetlands. Mortarino and his business, MGT Virginia, Inc., desired to purchase a certain piece of property and took steps through a straw man, James Morrow, to purchase the property.²⁵⁵ The purchase agreement between Mortarino and Morrow established that the purchase of the property was contingent on a finding that there were no wetlands on the property which would impede its development.²⁵⁶ Morrow hired Consultant Engineering Services to conduct a wetlands survey of the property, who then retained Clayton Bernick to conduct the actual field survey of the property.²⁵⁷ The resulting wetlands report issued to Morrow by Consulting Engineering Services stated that there were no wetlands on the property.²⁵⁸ Howev-

251. No. 94-5433, 1995 WL 610346 (4th Cir. Oct. 18, 1995).

252. *Id.* at *2-3; see United States Sentencing Commission, *Guidelines Manual* §§ 2Q1.2(b)(1)(A) & 1B1.3(a) (November 1993).

253. 880 F.2d 804, 805 (4th Cir. 1989).

254. 251 Va. 289, 467 S.E.2d 778 (1996).

255. *Id.* at 291, 467 S.E.2d at 780.

256. *Id.*

257. *Id.*

258. *Id.* at 292, 467 S.E.2d at 780.

er, this statement was qualified by the following language: "the presence of wetlands are [sic] so opinionated that there is always the possibility that a different interpretation could be made."²⁵⁹ Based in part on the report, Morrow made arrangements to acquire the property, and then transferred his interest in the arrangement to Mortarino, who eventually purchased the property from the seller.²⁶⁰ Subsequent evaluation of the property revealed that nearly all of the property was considered jurisdictional wetlands under the Corps of Engineers' wetlands guidelines.²⁶¹ The Corps later confirmed this assessment.²⁶² As a result, Mortarino was prevented from developing the property.²⁶³

Mortarino brought a constructive fraud case against the defendants, alleging that he had reasonably relied on the findings of the initial wetlands report as a factual statement of the nature of the property. The supreme court narrowed the issue to whether the wetlands findings were factual representations or opinions.²⁶⁴ Citing *Saxby v. Southern Land Co.*,²⁶⁵ the supreme court hinged its decision on the rule that only misrepresentations of fact can form the basis of constructive fraud.²⁶⁶ The supreme court then looked to whether statements made in the wetlands report were statements of fact or representations of opinion.²⁶⁷ The supreme court held that the statements were "unambiguous representations of the present quality or character of the property and, thus, are representations of fact, and not mere expressions of opinion."²⁶⁸ The supreme court dismissed the qualifying language in the report related to wetlands findings being opinionated, holding that the end result of the report was a factual representation on which the plaintiff reasonably relied in his purchase of the property, and for which the purchase contract afforded a remedy.²⁶⁹ However, the su-

259. *Id.* (quoting the wetlands report).

260. *Id.*

261. *Id.*

262. *Id.* at 292, 467 S.E.2d at 780-81.

263. *Id.*, 467 S.E.2d at 781.

264. *Id.*, 467 S.E.2d at 781.

265. 109 Va. 196, 198, 63 S.E. 423, 424 (1909).

266. *Mortarino*, 251 Va. at 293, 467 S.E.2d at 781.

267. *Id.* at 293-94, 467 S.E.2d at 781.

268. *Id.* at 294, 467 S.E.2d at 781.

269. *Id.*, 467 S.E.2d at 781-82.

preme court found that Mortarino had failed to plead all of the elements of a cause of action for constructive fraud, such that it could not grant relief.²⁷⁰ The supreme court instead reversed the trial court's refusal to allow Mortarino to amend his pleadings to reflect all of the elements of constructive fraud as an abuse of discretion.²⁷¹ Therefore, Mortarino was granted a second chance in his constructive fraud action, with the benefit of the supreme court's finding that the wetlands report amounted to a representation of fact and not opinion.

The Mortarino case is likely to have a significant impact on a prospective purchaser's ability to obtain damages or rescission of a land purchase contract based on incorrect findings of environmental conditions which were relied upon by the purchaser. The impact of this case would seem to have immediate effect on not only wetlands cases, but also other environmental reports addressing site contamination, endangered species, and other environmental sensitive areas.

III. LEGISLATION

A. *Federal*

Congress's environmental enactments from June 1995 to June 1996 were few, but Congress did attempt to address several environmental issues. It continued its efforts to reform the Comprehensive Environmental Restoration, Compensation, and Liability Act of 1980 ("CERCLA"),²⁷² also known as the Superfund law, feeling growing pressure from industry to soften liability provisions and correct the failure of CERCLA to address site cleanups in a cost-effective and efficient manner.²⁷³

270. *Id.* at 295, 467 S.E.2d at 782.

271. *Id.* 295-96, 467 S.E.2d at 782-83.

272. 42 U.S.C. §§ 9601-9675 (1994). CERCLA provides for a nationwide program of assessing liability for, and cleaning up, abandoned contaminated sites and dumps. Liability under CERCLA has generally been held to be strict, joint and several, and retroactive. *United States v. Monsanto Co.*, 858 F.2d 160, 167, 171, 173 (4th Cir. 1988).

273. As of June 1996, there remained significant differences on issues of repealing retroactive liability and natural resources damages assessments. *See* 27 *Env. Rptr.* 475 (BNA June 21, 1996).

Congress also worked to reauthorize the Safe Drinking Water Act ("SDWA")²⁷⁴ and the Coastal Zone Management Act ("CZMA").²⁷⁵ Three significant proposed changes to the SDWA include modification of the contaminant listing requirements,²⁷⁶ enhancing community right-to-know reporting by public water suppliers,²⁷⁷ and establishing a revolving fund to finance public water supply system upgrades.²⁷⁸

B. Virginia

In the spring of 1996, the General Assembly undertook a great variety of environmentally related legislative measures.

1. Water Law

Senate Bill 480²⁷⁹ expanded the State Water Control Law ("SWCL")²⁸⁰ self-reporting responsibilities of wastewater discharge permit holders.²⁸¹ Permitted facilities must now report the discharge of prohibited wastes²⁸² into or upon state waters²⁸³ or drain systems²⁸⁴ or a discharge which may reason-

274. 42 U.S.C. §§ 300f to 300j-26 (1994).

275. Coastal Zone Protection Act of 1996, Pub. Law 104-150, 110 Stat. 1380 (1996) (to be codified in scattered sections of 16 U.S.C.).

276. Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, §§ 102-03, 110 Stat. 1613, 1617-23 (1996).

277. *Id.* § 114, 110 Stat. at 1636-41.

278. *Id.* § 130, 110 Stat. at 1662-72.

279. S.B. 480, Va. Gen. Assembly, (Reg. Sess. 1996) (codified at VA. CODE ANN. § 62.1-44.5 (Cum. Supp. 1996)).

280. VA. CODE ANN. §§ 62.1-44.2 to -44.34:28 (Repl. Vol. 1994 & Cum. Supp. 1996).

281. Section 62.1-44.5(A) provides that "[e]xcept in compliance with a certificate issued by the [State Water Control] Board, no person shall discharge industrial waste, sewage and other wastes or noxious or deleterious substances into or upon state waters, or otherwise negatively change the physical, chemical or biological characteristics of such waters which could adversely affect public health or the environment or recognized uses of the waters for domestic or industrial consumption or recreation or any other use." VA. CODE ANN. § 62.1-44.5(A) (Cum. Supp. 1996). Therefore, those parties wishing to discharge such materials into state waters must first receive a certificate of discharge, or permit, from the State Water Control Board for such activity.

282. Prohibited wastes include "sewage, industrial waste, other wastes or any noxious or deleterious substance." VA. CODE ANN. § 62.1-44.5(B) (Cum. Supp. 1996).

283. "State waters" is defined as "all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction."

ably be expected to enter state waters in violation of the SWCL or regulations promulgated thereunder²⁸⁵ within twenty-four hours to the Virginia Department of Environmental Quality ("DEQ")²⁸⁶ or the local emergency services coordinator²⁸⁷ and appropriate federal authorities. Following this immediate notification, written notification must follow to the DEQ director within forty-eight hours.²⁸⁸ These requirements are similar to those in existence for the improper or unpermitted discharge of oil to state waters.²⁸⁹

2. Enforcement and Judicial Review

House Bill 1008²⁹⁰ provides significant new authority for the DEQ to issue unilaterally "special orders" requiring certain corrective measures to be taken by a facility in response to alleged violations of any laws under the jurisdiction of the SWCB, the State Air Pollution Control Board ("SAPCB"),²⁹¹ and the Virginia Waste Management Board ("VWMB").²⁹² Any action contemplated under the special order must be able to be

VA. CODE ANN. § 62.1-44.3 (Repl. Vol. 1994).

284. "Drain systems" is not defined within the statute.

285. The State Water Control Board ("SWCB") is the citizen board charged with oversight of SWCL regulatory implementation. *See* VA. CODE ANN. §§ 62.1-44.7 to -44.15:5 (Repl. Vol. 1994 & Cum. Supp. 1996). The SWCB has promulgated numerous regulations related to the discharge of industrial waste, sewage and other wastes into or upon state waters, including the Virginia Pollutant Discharge Elimination System ("VPDES") regulations, found at 9 VA. ADMIN. CODE 25-30-10 to 25-30-550 (1996) (formerly VRR 680-14-02 §§ 1.1 to 10.1).

286. The DEQ is the regulatory agency established to oversee the day-to-day management of the water protection laws and regulations of the state, and serves to support the SWCB in its regulatory capacity. *See* VA. CODE ANN. §§ 10.1-1182 to -1197 (Repl. Vol. 1994 and Cum. Supp. 1996).

287. Each locality has an emergency services coordinator or director to oversee local emergencies, which can include significant discharges or releases of harmful wastewaters into the environment. VA. CODE ANN. § 44-146.19 (Repl. Vol. 1994).

288. VA. CODE ANN. § 62.1-44.5(B) (Cum. Supp. 1996).

289. VA. CODE ANN. § 62.1-44.34:19 (Repl. Vol. 1994).

290. H.B. 1008, Va. Gen. Assembly, (Reg. Sess. 1996) (codified at VA. CODE ANN. § 10.1-1186.10 (Cum. Supp. 1996)).

291. The SAPCB oversees the implementation of Virginia's air protection laws and regulations. VA. CODE ANN. §§ 10.1-1301 to -1307.01 (Repl. Vol. 1993 & Cum. Supp. 1996).

292. The VWMB oversees the operations and promulgates the state regulations of the various solid and hazardous waste management programs in the Commonwealth. VA. CODE ANN. §§ 10.1-1401 to -1402.01 (Repl. Vol. 1993 & Cum. Supp. 1996).

accomplished within one year of the order's effective date.²⁹³ In addition, this legislation provides the DEQ with the authority to assess administrative penalties²⁹⁴ of up to \$10,000 without the consent of the alleged violator.²⁹⁵

This legislation represents a significant shift from previous authority, which allowed the assessment of administrative penalties only after consent of the party.²⁹⁶ In a practical sense, this legislation should enhance the DEQ's ability to address smaller, less serious violations involving short-term cleanups or involving small penalties, despite the lack of consent from the party. When warranted, such cases had been referred to the Attorney General's office to obtain injunctive relief and penalties.²⁹⁷

House Bill 1412²⁹⁸ provided contingency measures for judicial appeal standing requirements under the SWCL, SAPCL, and the VWMA in the face of recent actions by the United States Environmental Protection Agency ("EPA") on judicial review of state agency permit actions, as well as the continuing litigation between the Commonwealth and the EPA concerning Virginia's implementation of Title V of the Clean Air Act

293. VA. CODE ANN. § 10.1-1182 (Cum. Supp. 1996).

294. Administrative penalties are also referred to as civil charges. *See* VA. CODE ANN. § 10.1-1316(C) (Repl. Vol. 1993); VA. CODE ANN. § 10.1-1455(F) (Repl. Vol. 1993); VA. CODE ANN. 62.1-44.15(8d) (Cum. Supp. 1996).

295. VA. CODE ANN. § 10.1-1182 (Repl. Vol. 1993).

296. *See* VA. CODE ANN. §§ 10.1-1316(C), -1455(F) (Repl. Vol. 1993), VA. CODE ANN. § 62.1-44.15(8d) (Cum. Supp. 1996). The term "special orders" is already included in the administrative order authority for the SWCB, VA. CODE ANN. § 62.1-44.15(8a)-(8b) (Cum. Supp. 1996), and the SAPCB, VA. CODE ANN. §§ 10.1-1309 to -1309.1 (Repl. Vol. 1993). Under these authorities, such special orders are orders of these respective citizen boards rather than the DEQ and do not allow the imposition of civil charges or penalties.

297. Because in the past the DEQ was not able to obtain administrative penalties unilaterally, and because the formal administrative hearing process itself is relatively cumbersome, when a case deserved both injunctive relief and an assessment of penalties of some kind, the DEQ was often put in the position of having to refer the case to the Attorney General's Office to bring a law suit. Except in emergency cases, such litigation tends to increase significantly the time line for obtaining relief and/or penalties from the alleged violator.

298. H.B. 1412, Va. Gen. Assembly, (Reg. Sess. 1996) (to be codified at VA. CODE ANN. §§ 10.1-1318,-1457 (Cum. Supp. 1996) (effective upon satisfaction of contingency specified in H.B. 1412, cl. 4) and VA. CODE ANN. § 62.1-44.26 (Cum. Supp. 1996) (effective upon satisfaction of contingency specified in H.B. 1412, cl. 4)); *see also infra* notes 313-19 and accompanying text.

("CAA").²⁹⁹ The EPA requires, as part of a state-run CAA program, a relatively broad standing requirement for judicial review of CAA permitting decisions.³⁰⁰ The EPA also requires similar standing opportunities for state-run Clean Water Act ("CWA") permit decisions.³⁰¹ Alternate portions of the bill are to be implemented depending on the outcome of Virginia's litigation with EPA.³⁰²

Traditionally in Virginia, only owners aggrieved by a final permit decision could appeal such a decision by the SWCB³⁰³ or the SAPCB.³⁰⁴ Virginia courts have interpreted this standard to include only facility owners³⁰⁵ and not third parties, such as other citizens or environmental groups.³⁰⁶ The EPA has insisted that this judicial review standard be expanded to include such parties,³⁰⁷ so long as the parties meet minimum standing requirements under Article III of the United States

299. The Commonwealth has challenged in two lawsuits several of EPA's positions concerning judicial standing in review of final state agency air permit decisions. *See supra* notes 26-28 and accompanying text. Title V of the Clean Air Act, 42 U.S.C. §§ 7661a-f (1995), addresses operating permit requirements for facilities that emit pollutants above certain levels.

300. *See* 59 Fed. Reg. 62,324 (1994).

301. *See* 61 Fed. Reg. 20,972, 20,973-74 (1996).

302. *See* H.B. 1412, cls. 3-4, Va. Gen. Assembly, (Reg. Sess. 1996).

303. *See* VA. CODE ANN. §§ 62.1-44.25, -44.29 (Repl. Vol. 1992 & Cum. Supp. 1996).

304. *See* VA. CODE ANN. § 10.1-1318 (Cum. Supp. 1996).

305. *See* *Citizens for Clean Air v. Commonwealth*, 13 Va. App. 430, 412 S.E.2d 715 (1991); *Town of Fries v. State Water Control Bd.*, 13 Va. App. 213, 409 S.E.2d 634 (1991).

306. *See* *Environmental Defense Fund v. Virginia State Water Control Bd.*, 12 Va. App. 456, 404 S.E.2d 728 (1991).

307. In fact, the EPA specifically cited Virginia's previous standing requirement for appeal of Virginia Pollution Discharge Elimination System ("VPDES") permit decisions under Virginia Code § 62.1-44.29 as failing to provide adequate appeal rights for third parties. 61 Fed. Reg. 20,973 (1996) (codified at C.F.R. § 123.30). The EPA has taken steps to change its requirements for states who wish to implement a National Pollution Discharge Elimination System ("NPDES") program to require such states to provide broader standing for appeal by third parties and citizen groups. *Id.* at 20,973-174. However, the Commonwealth unsuccessfully continued its challenge of the EPA's disapproval of its Clean Air Act State Implementation Program and Title V delegation based on the EPA's requirement of a broader standing requirement to the Fourth Circuit Court of Appeals. *See* *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996) (upholding EPA's denial of Virginia's proposed operating permit program under Title V of the Clean Air Act).

Constitution³⁰⁸ and had participated in the public comment process.³⁰⁹

In response to the EPA's position concerning standing in judicial appeal of air permits, one of the alternative enactments of House Bill 1412 broadens the judicial review standard of the State Air Pollution Control Law to include persons who meet Article III standing requirements, have participated in a public comment process related to the final decision of the State Air Pollution Control Board, and have exhausted all available administrative remedies for review of the State Air Pollution Control Board's decision.³¹⁰ Standing for appeal of SWCB water discharge permits³¹¹ and VWMB solid and hazard waste permitting decisions³¹² were similarly amended. However, the bill operates to enact the above changes only after Virginia has obtained a "final and unappealable decision of a court of competent jurisdiction" which rules that the current air permit judicial review standing is inadequate.³¹³

If, on the other hand, the Commonwealth prevails in its claim, or until it loses its challenge of the EPA's interpretation, the bill operates to change the standing for appeal of water discharge permits from any "owner aggrieved" to any "person aggrieved" by a final decision of the SWCB.³¹⁴ This last change is to take effect as another contingency in light of the EPA's separate rulemaking requiring states to include interested third parties other than owners in judicial reviews of water permits.³¹⁵

308. See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, (1982); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *NRDC v. Watkins*, 954 F.2d 974, 978 (4th Cir. 1992).

309. *Virginia v. Browner*, 80 F.3d 869, 877 (4th Cir. 1996).

310. VA. CODE ANN. § 10.1-1318(B) (Cum. Supp. 1996).

311. VA. CODE ANN. § 62.1-44.29 (Cum. Supp. 1996).

312. VA. CODE ANN. § 10.1-1457 (Cum. Supp. 1996).

313. Act of Apr. 17, 1996, ch. 1032, cl. 4., 1996 Va. Acts. 2527.

314. Act of Apr. 17, 1996, ch. 1032, cls. 1, 3, 1996 Va. Acts 2526, 2527. This change also makes the SWCL permit appeal standing requirement the same as the existing standing requirement for solid and hazardous waste management permits under the VWMA. See VA. CODE ANN. § 10.1-1457 (Repl. Vol. 1993).

315. 61 Fed. Reg. 20,972 (1996) (codified at 40 C.F.R. § 123).

3. Solid and Hazardous Waste Law and Brownfields Restoration

House Bill 649³¹⁶ provides local government and state agencies authority to enter abandoned waste sites³¹⁷ and conduct cleanup of such sites,³¹⁸ without incurring environmental liability as site owners or operators.³¹⁹ This code provision may also benefit local and state agencies in addressing certain so-called "brownfields,"³²⁰ which do not necessarily present significant environmental concerns, but which nonetheless are problematic sites for the locality or state agency.³²¹

House Bill 1211³²² amended the Virginia Waste Management Act ("VWMA")³²³ to provide for enforcement and citizen suit immunity for parties who acquire title or other property interest in Superfund properties³²⁴ after an EPA-approved cleanup has occurred.³²⁵ Designed to cut off the long-term threat of regulatory and third-party liability for such sites,³²⁶ this bill may, in conjunction with such programs as the Voluntary Remediation Program,³²⁷ provide further incentive for redevelop-

316. H.B. 649, Va. Gen. Assembly, (Reg. Sess. 1996) (codified at VA. CODE ANN. § 10.1-1406.1 (Cum. Supp. 1996)).

317. Abandoned waste sites are those suffering from inadequate remediation and financial assurance for closure and where the owner or operator cannot be located. VA. CODE ANN. §§ 10.1-1406.1(A), (B) (Cum. Supp. 1996).

318. VA. CODE ANN. § 10.1-1406.1(B) (Cum. Supp. 1996).

319. VA. CODE ANN. § 10.1-1406.1(C) (Cum. Supp. 1996).

320. Brownfields are abandoned or vacant industrial or commercial sites which typically have some environmental contamination, but which do not present enough risk to qualify as a Superfund site. In recent years, the EPA has begun to focus on these sites by offering grants to localities to identify them and create incentives for private sector cleanups.

321. Such sites are often eyesores for a community and may present some degree of risk to neighboring residents. Localities would like to cleanup the sites and convert them to productive, tax-generating properties.

322. H.B. 1211, Va. Gen. Assembly, (Reg. Sess. 1996) (codified at VA. CODE ANN. § 10.1-1429.4 (Cum. Supp. 1996)).

323. VA. CODE ANN. § 10.1-1400 to -1457 (Repl. Vol. 1993 & Cum. Supp. 1996).

324. The property must be listed on the National Priorities List under CERCLA, 42 U.S.C. §§ 9601 to 9675 (1994).

325. VA. CODE ANN. § 10.1-1429.4 (Cum. Supp. 1996).

326. VA. CODE ANN. § 10.1-1429.4(A) (Cum. Supp. 1996). The bill removed liability under the VWMA, SAPCL, SWCL, other state law, and private citizen suits for contamination on, or immediately adjacent to, the property.

327. See VA. CODE ANN. §§ 10.1-1429.1 to -1429.3 (Cum. Supp. 1996).

opment of formerly heavily contaminated sites. Immunity under this statutory change also extends to lenders and others who hold a security interest in the property,³²⁸ enhancing the possibility of obtaining financing for such redevelopment projects.³²⁹ The purchaser of such property must not have been under pre-existing liability under state law or regulation related to this property.³³⁰ The immunity is only as extensive as the scope of contamination addressed under the EPA approved cleanup;³³¹ therefore, liability may still arise for contamination not addressed under the cleanup approved by the EPA. In addition, the change provides no protection at the federal level from Superfund liability.

4. Wetlands

House Bill 1123³³² addressed recent developments in the United States Army Corps of Engineers' ("Corps") wetlands banking policies.³³³ These policies provide greater flexibility for the use of wetland banking to satisfy mitigation requirements for wetland impacts.³³⁴ Virginia law now incorporates the major banking mitigation tests of the Corps' new guidance and allows such banking to be used in order to meet wetland mitigation requirements which may be required under state law.³³⁵ This legislation may enhance the development of wetland banks as commercial enterprises by ensuring a greater demand in the state for wetland banking mitigation. It also

328. VA. CODE ANN. § 10.1-1429.4(A) (Cum. Supp. 1996).

329. Lenders have been hesitant to lend to would-be redevelopers of contaminated sites for fear of potential Superfund or other cleanup liability.

330. VA. CODE ANN. § 10.1-1429.4(A) (Cum. Supp. 1996).

331. *Id.*

332. H.B. 1123, Va. Gen. Assembly, (Reg. Sess. 1996) (codified at VA. CODE ANN. § 28.2-1308(C) (Cum. Supp. 1996); VA. CODE ANN. § 33.1-223.2:1 (Repl. Vol. 1996); VA. CODE ANN. § 62.1-44.15:5(B) (Cum. Supp. 1996)).

333. 60 Fed. Reg. 58,605 (1995).

334. *Id.* The Corps requires that impacts to wetlands be corrected and/or mitigated through remediation of harm or other on-site or off-site wetland enhancement or preservation projects. *Id.*

335. See VA. CODE ANN. § 28.2-1308(C) (Cum. Supp. 1996); VA. CODE ANN. § 33.1-223.2:1 (Repl. Vol. 1996); VA. CODE ANN. § 62.1-44.15:5(B) (Cum. Supp. 1996).

provides greater consistency between state law and federal guidance related to flexibility in the use of wetland banking in the mitigation process.

5. Petroleum Storage Tank and Oil Discharge

House Bill 591³³⁶ reformed the lender liability provisions of underground storage tank provisions of the SWCL, minimizing potential liability where the subject property is held as part of a security interest in the property.³³⁷ This amendment also permits lenders to conduct cleanups of leaking underground storage tanks and to seek reimbursement from the Virginia Petroleum Storage Tank Fund³³⁸ established under the SWCL for such cleanups.³³⁹ This bill should have a significant impact on banks' and other lenders' willingness to provide financing for sites which are known to have underground storage tanks on the property, but which may present potential environmental risks.

House Bill 1167³⁴⁰ incorporated various other changes to the SWCL's underground storage tank provisions, the Virginia Petroleum Storage Tank Fund,³⁴¹ and the financial responsibility requirements for underground storage tanks ("UST").³⁴² First, heating oil USTs greater than 5,000 gallons used for onsite storage are no longer exempt from the definition of "underground storage tank."³⁴³ Therefore, owners and grantors will need to include these tanks in financial assurance calculations

336. H.B. 591, Va. Gen. Assembly, (Reg. Sess. 1996) (codified at VA. CODE ANN. §§ 62.1-44.34:8, -44.34:10, -44.34:11 (Cum. Supp. 1996)).

337. The bill excludes from the definition of "Owner of an underground storage tank" a person who holds only a security interest in the tank who has not participated in the management of the tank or been involved in petroleum operations or business. VA. CODE ANN. §§ 62.1-44.34:8, -44.34:10 (Cum. Supp. 1996).

338. The Virginia Petroleum Storage Tank Fund is a revolving fund established in part to reimburse owners and operators for qualifying tank cleanup costs. *See* VA. CODE ANN. § 62.1-44.34:11 (Cum. Supp. 1996).

339. VA. CODE ANN. § 62.1-44.34:11(q) (Cum. Supp. 1996).

340. H.B. 1167, Va. Gen. Assembly, (Reg. Sess. 1996) (codified at VA. CODE ANN. §§ 62.1-44.34:8, -44.34:14, -44.34:15.1 (Cum. Supp. 1996)).

341. VA. CODE ANN. § 62.1-44.34:11 (Cum. Supp. 1996).

342. VA. CODE ANN. § 62.1-44.34:12 (Cum. Supp. 1996).

343. VA. CODE ANN. §§ 62.1-44.34:8, -44.34:10 (Cum. Supp. 1996).

and reporting.³⁴⁴ Second, House Bill 1167 created a new definition for "responsible person." The new definition establishes that the person who is the owner or operator of an underground storage tank or an aboveground storage tank at the time of release therefrom is reported to the Board, and not necessarily the owner operator who caused the release, is the party against whom State Water Control Board ("SWCB") or DEQ may enforce cleanup responsibility.³⁴⁵ Third, the Bill removed from the previous version of the statute the requirement that underground storage tank vendors maintain financial responsibility.³⁴⁶

Another significant change made by House Bill 1167 is to establish that in most cases the costs being reimbursed by the Virginia Petroleum Storage Tank Fund must be "reasonable and necessary per occurrence costs."³⁴⁷ Thus, the General Assembly codified the policy position of the DEQ that such per occurrence cost must be reasonable and necessary.³⁴⁸ The Bill also changed the types of products which are to be taxed as part of the revenue generation to finance the Virginia Petroleum Storage Tank Fund.³⁴⁹ In addition, the Bill made clear that owners or operators of an underground storage tank or an aboveground storage tank facility who fail to report a release of petroleum or discharge of oil to the SWCB, as called for under applicable federal, state and local law, shall not be eligible for reimbursement from the Virginia Petroleum Storage Tank Fund for any cleanup of such releases or discharges.³⁵⁰ Finally, the Bill amended the SWCL to require that the Virginia Petroleum Storage Tank Fund balance be kept at a sufficient amount to serve as an adequate financial responsibility demonstration mechanism for underground storage tank owners and opera-

344. See VA. CODE ANN. § 62.1-44.34:12(A) (Cum. Supp. 1996).

345. VA. CODE ANN. § 62.1-44.34:8 (Cum. Supp. 1996); see also VA. CODE ANN. § 62.1-44.34:9(1), (9) (Cum. Supp. 1996).

346. VA. CODE ANN. § 62.1-44.34:12(A) (Cum. Supp. 1996).

347. VA. CODE ANN. § 62.1-44.34:11(A)(2)(a)-(d), (h) (Cum. Supp. 1996).

348. DEQ's interpretation of "reasonable and necessary" is set forth in its VIRGINIA DEP'T OF ENVTL. QUALITY GUIDANCE MANUAL: REIMBURSEMENT CLAIM PROCESS FOR THE VIRGINIA PETROLEUM STORAGE TANK FUND at 18 (March 1, 1995).

349. The Bill adds dyed diesel fuel, but deletes aviation special fuel sold, delivered or used, and natural gas or liquefied petroleum gases imported, sold or used in the Commonwealth. VA. CODE ANN. § 62.1-44.34:13(A)(1) (Cum. Supp. 1996).

350. VA. CODE ANN. § 62.1-44.34:11(A)(9) (Cum. Supp. 1996).

tors.³⁵¹ However, passage of the Bill also allows the SWCB to pay reduced reimbursements, or delay such reimbursements on a temporary basis, if such action is necessary to maintain an adequate balance in the Fund.³⁵²

6. Land Use

There was little in the way of environmentally related land use bills promulgated this past year. Under House Bill 1522,³⁵³ local governments are now required to include mineral resources³⁵⁴ in their consideration of local comprehensive planning.

7. Air Law

House Bill 1512³⁵⁵ represents a direct challenge to the EPA's attempt to organize states in the development of regional standards for ozone emissions and their transport across state lines. Thus, this bill effectively prevents Virginia from entering into agreement with, or joining, the Ozone Transport Commission³⁵⁶ consisting of the northeastern states, or any similar multi-state organization designed to develop such standards, without express consent of the General Assembly.³⁵⁷

351. VA. CODE ANN. § 62.1-44.34:11(A)(10) (Cum. Supp. 1996).

352. VA. CODE ANN. § 62.1-44.34:11(A)(10) (Cum. Supp. 1996).

353. H.B. 1522, Va. Gen. Assembly, (Reg. Sess. 1996) (codified at VA. CODE ANN. §§ 15.1-427, -446.1, -447 (Cum. Supp. 1996)).

354. "Mineral resources" is not defined in the Bill.

355. H.B. 1512, Va. Gen. Assembly, (Reg. Sess. 1996).

356. Ozone Transport Commission was created by the Clean Air Amendments of 1990 to establish a multi-state cooperative organization which would study the effects of cross boundary movement of ground level ozone and the need to establish restrictions on emissions of ozone causing pollutants. See 42 U.S.C. 7511c(a) (1994).

357. H.B. 1512, Va. Gen. Assembly, (Reg. Sess. 1992). In House Bill 1512, the General Assembly made it clear that, because of the pending challenge to the constitutionality of the Ozone Transport Commission, as well as expressed desire for further study of causes of and the effects of a cross state movement of ozone, the General Assembly has severely curtailed the ability of the DEQ to participate in the activities of the Ozone Transport Commission or any similar multi-state organizations. *Id.*

IV. CONCLUSION

The period of June 1995 through June 1996 brought significant and various developments in Virginia's environmental law and related tort and land use laws. Continuing struggles between the Commonwealth and the EPA related to implementation of various aspects of the delegated programs under the Clean Air Act and perhaps the Clean Water Act may continue. Whether *Seminole Tribe v. State of Florida*³⁵⁸ and *United States v. Olin*³⁵⁹ will have any material impact on environmental actions remains to be seen, but some ground work has already been laid with these cases for potential shifts in the federal-state relationship under major environmental programs. Congress' attempts to resolve differences in needed reform of Superfund, the Safe Drinking Water Act, Resource Conservation and Recovery Act (RCRA), and the Clean Water Act may bring further charges at the federal level. In any event, the General Assembly continues to make its mark on Virginia's environmental laws, and with Virginia's gubernatorial election coming in the fall of 1997, Virginia environmental law will likely continue its evolution at an even quicker pace.

358. 116 S. Ct. 1114.

359. 927 F. Supp. 1502 (S.D. Ala. 1996).