Synopsis of Environmental Law in the States

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SYNOPSIS OF ENVIRONMENTAL LAW IN THE STATES

The following synopsis highlights significant environmental law developments in the states. The individual state synopses include environmental legislation, caselaw, and recent developments from May 1, 1988 to August 30, 1989. Each state is listed in alphabetical order to facilitate efficient reference.¹

ALABAMA

RECENT DEVELOPMENTS

Effective September 14, 1989, the Alabama Department of Environmental Management (ADEM) will be empowered to limit the importation of out-of-state hazardous waste from twenty-three states and from the District of Columbia to Alabama's hazardous waste landfill in the city of Emelle.² The ban, Act 89-788, was enacted by the state legislature in the 1989 session.³ The ban applies to all hazardous waste regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resources Conservation and Recovery Act (RCRA), and requires states which lack adequate treatment or disposal facilities to sign a capacity assurance agreement with Alabama before they may be authorized to ship waste to an Alabama hazardous treatment facility.⁴ ADEM states that the purpose of Act 89-788 is to encourage states which have no hazardous waste disposal facilities of their own to take action.⁵

Recently, the Department of Environmental Conservation (DEC) has been discussing the need for additional strategies to combat ozone formation in the southeastern states.⁶ DEC's concern stems from the fact that the southeastern states, because of their plentiful vegetative sources, are producing much higher levels of ozone.⁷ The state is attempting to convince the federal

¹. Some states and state subjects have been omitted from this synopsis for lack of significant developments in the area of environmental law.
³. Id.
⁴. Id.
⁵. Id.
⁷. Id. Background levels of ozone are much higher because volatile organic
government to fund research programs in order to find out more about the nature and potential control of ozone in the region.8

WATER POLLUTION

In Hereford v. City of Linden9, the Alabama Supreme Court held that when a city constructs a test well in anticipation of expanding it into a public water supply, the city must first obtain a permit from ADEM.10 The plaintiffs demanded that the city be required to obtain a permit for construction of its water well project.11 The court agreed, emphasizing the importance of having ADEM monitor such a project from its inception in order to avoid potential contamination problems.12

ALASKA

RECENT DEVELOPMENTS

In light of the Exxon Valdez disaster, there recently have been several laws passed in the State of Alaska addressing oil pollution control. House Bill 68 calls for strengthening existing liability and cost recovery provisions for oil and hazardous substance releases.13 House Bill 68 would make it easier for the state to collect money from companies that are responsible for oil discharge.14

Senate Bill 271 increases civil fines for oil spills to a maximum of $50.00 per gallon of oil spilled.15 The maximum penalty may be imposed if a court determines the discharge was caused by

compounds (VOCs) are emitted by these vegetative sources. Id. VOCs, which are also emitted by automobiles and industrial plants nationwide, combine with nitrogen oxides in the presence of sunlight to form ozone. Id. The pollutant is a major component of smog. Id.

8. Id.
10. Id. at 51.
11. Id. at 50. Plaintiffs argued that ADEM is required to issue a permit before a test well may be drilled. Id. Plaintiffs alleged that the drilling could cause grave damage to their water supply. Id. ADEM revoked the city's permit but stated that such a permit was not required for a test well, and that ADEM would require the city to secure a permit if the city planned to extend the project to provide water for the city. Id. The plaintiffs moved for a preliminary injunction which was denied. Id.
12. Id. at 51.
14. Id.
15. Id. at 162.
either the defendant's intentional act or its gross negligence.\(^\text{16}\)

Three additional bills have been sent to the governor, but not yet signed. Senate Bill 264 would establish both a state oil and hazardous substance response office and a corps of volunteers trained in the cleanup of hazardous releases.\(^\text{17}\) A second bill, Senate Bill 261, would require the Department of Environmental Conservation (DEC) to create statewide oil and hazardous substance discharge and prevention plans.\(^\text{18}\) Thirdly, Senate Bill 260 would impose a severance tax of five cents per barrel on oil to be appropriated to an oil and hazardous substance release response fund.\(^\text{19}\)

**WATER POLLUTION**

In *State v. Anderson*,\(^\text{20}\) the Supreme Court of Alaska held that DEC could require approval of potential subdivision plans as a prerequisite to the sale of lots in the subdivision.\(^\text{21}\) DEC required that persons proposing subdivision plans had to first submit to DEC, for its approval, a plan showing proposed sewage facilities, wastewater treatment works and disposal systems, drinking water systems, and the amount of sewage that would typically be generated by the subdivision.\(^\text{22}\) The plaintiff, a real estate broker, objected to the pre-subdivision requirements, and filed a complaint against DEC seeking an injunction against the requirements' enforcement.\(^\text{23}\) The Superior Court issued a final judgement invalidating DEC's pre-subdivision requirements, and enjoined DEC from their enforcement of the requirements.\(^\text{24}\) The Supreme Court of Alaska reversed the Superior Court's ruling, and held that the pre-subdivision requirements were: 1) within the scope of authority of DEC; 2) reasonable; and, 3) not in conflict with any other state statute.\(^\text{25}\)

In *Miners Advocacy Council, Inc. v. State of Alaska, Department of Environmental Conservation*,\(^\text{26}\) another Alaska Supreme Court deci-

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16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
21. *Id.* at 1343.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 1344-47.
sion, the court held that DEC could certify National Pollution Discharge Elimination System (NPDES) permits\(^\text{27}\) for placer miners on a group basis, rather than on an individual, site-specific basis.\(^\text{28}\) The plaintiffs, the Miners Advocacy Council (MAC), argued that both federal law and DEC regulations required individual, on-site investigation before a permit could be issued.\(^\text{29}\) The court disagreed, stating that, because Congress intended to leave the issuance of NPDES permits to the states’ discretion, DEC was permitted to issue permits on a group basis if it so chose.\(^\text{30}\)

**ARIZONA**

**RECENT DEVELOPMENTS**

Recent developments in the area of air pollution include the signing of Senate Bill 1029 by Governor Mofford.\(^\text{31}\) Senate Bill 1029 is a new environmental law authorizing $1 million for a “brown cloud”\(^\text{32}\) study aimed at reducing ozone pollution levels in the Phoenix and Tucson areas.\(^\text{33}\)

**AIR POLLUTION**

In *Arizona v. Thomas*,\(^\text{34}\) the United States Court of Appeals for the Ninth Circuit denied the State of Arizona’s petition for review of the Environmental Protection Agency’s (EPA) disapproval of Arizona’s state implementation plan (SIP) for attaining national ambient air quality standards.\(^\text{35}\) Arizona submitted a proposed plan, which was rejected by EPA as too deficient.\(^\text{36}\) The court held that the decision of EPA was correct, and therefore denied the state of Arizona’s petition for review.\(^\text{37}\)


\(^{28}\) Id. at 1134.

\(^{29}\) Id. at 1131.

\(^{30}\) Id. at 1133-34. After a review of the legislative history of the federal Clean Water Act, the court concluded that Congress intended the state to play a primary role in the certification of permits. Id. at 1133.

\(^{31}\) Governor Signs Underground Storage Tank Bill, Three Other Pieces of Environmental Litigation, 20 Env’t Rep. (BNA) 479 (June 23, 1989).

\(^{32}\) Id.

\(^{33}\) Id.

\(^{34}\) 829 F.2d 834 (9th Cir. 1987).

\(^{35}\) Id. at 835. Pursuant to the federal Clean Air Act, each state is required to submit to EPA the state’s plan for attaining certain levels of particular air pollutants. Id.

\(^{36}\) Id. at 840.

\(^{37}\) Id.
CALIFORNIA

RECENT DEVELOPMENTS

On August 3, 1989, California enacted a law that revised the funding base for its hazardous waste program. The law imposes base rates for superfund taxes and disposal fees, an environmental tax on industry, and uses monies from the general fund. This is the first time that taxpayers have paid for the cost of cleaning up hazardous waste.

In September of 1988, the California state legislature passed Senate Bill 1997 which revised the vehicle emissions inspection program by establishing five levels of motor vehicle classifications based upon model year and emission control technology. The bill also created a sliding repair cost to owners ranging from $50 for older models to $300 for newer ones. Beginning in 1990, the law will also require auto manufacturers to warrant emission control equipment components for three years or 50,000 miles, and to replace or repair equipment that fails within these limits free of charge to the vehicle owner. Under the law, sellers of cars in private transactions will be required to test smog levels before the Department of Motor Vehicles will grant approval of the sale.

Also in September of 1988, the California legislature passed several laws with respect to the duties of the state Air Resources Board (ARB). Bill AB 4392 requires ARB to conduct a hearing concerning the reduction of public exposure to toxic air contaminants from motor vehicles by June 30, 1990.

Pursuant to another bill, AB 2595, ARB must establish criteria for designating air basins as either attainment or non-attainment areas for state ambient air quality standards. A report addressing the possible attainment of these standards for various pollutants must be submitted to the legislature by January 1, 1990.

39. Id.
41. Id.
42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
ARB must also take whatever measures that are necessary to achieve a 55% reduction in organic gas emissions from motor vehicles and other mobile sources and, in addition, a 15% reduction in nitrogen oxides by January 1, 1992.

Once again, in September of 1988, the California Legislature passed Senate Bill 1931 which extended the exemption from state fuel volatility standards for ethanol-gasoline fuel blends containing at least 10% ethanol until October 1, 1993. The extension, however, will only apply to gasoline blends that meet current volatility standards.

Again in September of 1988, the California Legislature also enacted Senate Bill 2297. The law requires the South Coast Air Quality Management District to adopt a five-year program to increase the use of clean-burning fuels by August 1, 1989. The law encourages an increased use of clean-burning fuels in both the stationary source and transportation sectors.

Also in September of 1988, the California Legislature enacted AB 2942. The law allows regional water quality control boards to exempt certain surface impoundments related to mining wastes from the Toxic Pits Cleanup Act. A second law, AB 3843, allows regional water quality control boards to exempt surface impoundments containing agricultural drainage water from the Toxic Pits Cleanup Act.

Bill AB 1983 was another law enacted by the California legislature in September of 1988. Bill AB 1983 sets the penalties for the reckless handling, treatment, storage, or transportation of hazardous wastes that creates an unreasonable risk of fire, explosion, serious injury, or death. The bill establishes fines for violations ranging from $5,000 to $100,000 for each day of violation and/or a jail sentence of up to three years.
passed AB 3188 which prohibits the transport of hazardous wastes within California destined for uncertified facilities outside the state or for sites on the federal superfund national priorities list.\textsuperscript{59} Transport of hazardous wastes destined for a foreign country is also restricted.\textsuperscript{60} The penalties for violating the statute include a fine of up to $25,000 and one year in jail.\textsuperscript{61}

**AIR POLLUTION**

In *Western Oil and Gas Association v. Monterey Bay Unified Air Control District*,\textsuperscript{62} the California Supreme Court held that the Tanner Act (Act)\textsuperscript{63} did not preclude air pollution control districts from regulating emissions of a substance before the state Air Resources Board (ARB) had identified the substance as a toxic air contaminant.\textsuperscript{64} The court noted that before passage of the Act the districts had the authority to regulate air pollution in this manner, and that since the Act did not expressly preempt the district's authority, the district could continue to regulate air pollutants in the absence of action by the ARB.\textsuperscript{65} The court also concluded that the legislative history did not support a finding of implied preemption.\textsuperscript{66}

**WATER POLLUTION**

In *Tahoe-Sierra Preservation Council v. State Water Resources Control Board*,\textsuperscript{67} the California Court of Appeal for the Third District held that the Federal Water Pollution Control Act (FWPCA)\textsuperscript{68} required the state to act in compliance with federal regulations only with respect to areas that FWPCA regulated.\textsuperscript{69} The court also held that FWPCA did not invalidate the state's authority to regulate nonpoint sources of pollution not contemplated by FWPCA, and, that the state was in fact required to do so by FWPCA.\textsuperscript{70}

59. Id.
60. Id.
61. Id.
64. 49 Cal. 3d at 411, 777 P.2d at 158, 261 Cal. Rptr. at 385.
65. Id. at 417-18, 777 P.2d at 162, 261 Cal. Rptr. at 389.
66. Id. at 419-20, 777 P.2d at 163-64, 261 Cal. Rptr. at 393-94.
69. 210 Cal. App. at 1431, 259 Cal. Rptr. at 139-40.
70. Id.
Board,\textsuperscript{71} due to complaints that the release of silt from a dam was causing damage downstream, the state Water Resources Control Board issued an abatement order to prevent the operators of the dam from opening the dam’s gates until a plan had been developed to prevent the discharge of silt into an adjoining creek at a rate greater than that at which the silt entered the lake.\textsuperscript{72} The order also required the Lake Madrone Water District (District) to prepare a plan for removing the downstream sediment.\textsuperscript{73}

The District, subsequently brought an action to revoke the abatement order arguing that under the Porter-Cologne Water Quality Control Act (Act),\textsuperscript{74} silt and sediment were not waste,\textsuperscript{75} and that the District was not a discharger of waste.\textsuperscript{76} The California Court of Appeal for the Third District looked to the statutory language of the Act. The court noted that waste was defined to include any waste substances associated with human habitation.\textsuperscript{77} Because the dam was built for purposes of human habitation, and because the dam caused a build up of silt that would not naturally occur, the court held that the District was a producer of waste as defined by the Act.\textsuperscript{78} The court also held that, given the ordinary usage of the word, the release of built up sediment was a “discharge” as defined by the Act.\textsuperscript{79}

In \textit{Paredes v. County of Fresno},\textsuperscript{80} the California Court of Appeal for the Fifth District denied the plaintiffs’ claim that the County of Fresno (County) had to take action against operators of public water systems that were contaminated above an “action level”\textsuperscript{81} for a particular contaminant.\textsuperscript{82} The court noted that the Department of Health Services (DHS) had the duty to set and enforce primary and secondary standards regarding unhealthy levels of contaminants in drinking water.\textsuperscript{83} The court also noted, however,

\begin{itemize}
  \item \textsuperscript{71} 209 Cal. App. 3d 163, 256 Cal. Rptr. 894 (1989).
  \item \textsuperscript{72} Id. at 166-67, 256 Cal. Rptr. at 896.
  \item \textsuperscript{73} Id.
  \item \textsuperscript{74} CAL. WATER CODE §§ 13000-14075 (West 1971 & Supp. 1990).
  \item \textsuperscript{75} 209 Cal. App. 3d at 167, 256 Cal. Rptr. at 896.
  \item \textsuperscript{76} Id.
  \item \textsuperscript{77} Id. at 168, 256 Cal. Rptr. at 897.
  \item \textsuperscript{78} Id. at 169-71, 256 Cal. Rptr. at 897-98.
  \item \textsuperscript{79} Id. at 175, 256 Cal. Rptr. at 900.
  \item \textsuperscript{80} 203 Cal. App. 3d 1, 249 Cal. Rptr. 593 (1988).
  \item \textsuperscript{81} According to the court “[a]n ‘action level’ is a level of contamination which, if exceeded, signals, in the opinion of the State Department of Health Services, a need for caution by potential water consumers.” Id. at 3 n. 2, 249 Cal. Rptr. at 593 n. 2.
  \item \textsuperscript{82} Id. at 3-4, 259 Cal. Rptr. at 593-94.
  \item \textsuperscript{83} Id. at 3, 259 Cal. Rptr. at 594.
\end{itemize}
that for small public water systems, local authorities had responsibility for enforcing these standards.\textsuperscript{84} Since local governments act on behalf of DHS, they cannot act with any greater authority than that given them by DHS.\textsuperscript{85} Consequently, the court held that where DHS had adopted an "action level" for a water contaminant but did not employ the "action level" as an enforceable standard, local government had no authority or duty to enforce the "action level" as a standard, and that failure to do so did not create a cause of action.\textsuperscript{86}

\textbf{SOLID AND HAZARDOUS WASTE}

In \textit{People v. Martin},\textsuperscript{87} the defendant was convicted of transporting and disposing hazardous waste in the form of empty containers.\textsuperscript{88} The defendant argued that California did not regulate transportation of empty containers because empty containers were not defined in the Hazardous Waste and Disposal Act,\textsuperscript{89} and that as a result the state regulations were preempted by federal regulations which exempted empty containers.\textsuperscript{90} The California Court of Appeal for the Second District found that although California did not define empty containers, the state did nevertheless regulate them because empty containers were included on a list of recyclable hazardous waste types.\textsuperscript{91} In addition the court noted that since California regulations were more stringent than federal regulations, the California regulations were to apply.\textsuperscript{92}

\textbf{ENVIRONMENTAL IMPACT REPORT CASES}

In \textit{Laurel Heights Improvement Association of San Francisco, Inc. v. Regents of the University of California},\textsuperscript{93} the plaintiffs challenged the defendant's Environmental Impact Report (EIR)\textsuperscript{94} for failure to discuss future uses of the defendant's proposed relocation site for

\begin{itemize}
\item 84. \textit{Id.} at 7-8, 259 Cal. Rptr. at 596.
\item 85. \textit{Id.} at 11, 259 Cal. Rptr. at 599.
\item 86. \textit{Id.} at 12-13, 259 Cal. Rptr. at 599-600.
\item 87. 211 Cal. App. 3d 699, 259 Cal. Rptr. 770 (1989).
\item 88. \textit{Id.} at 704, 259 Cal. Rptr. at 772.
\item 90. 211 Cal. App. 3d at 707, 259 Cal. Rptr. at 773.
\item 91. \textit{Id.} at 708, 259 Cal. Rptr. at 774.
\item 92. \textit{Id.}
\item 93. 47 Cal. 3d 376, 764 P.2d 278, 253 Cal. Rptr. 426 (1988).
\item 94. The California Environmental Quality Act (CEQA) requires an EIR for every project that an agency determines may have a significant environmental impact.
\end{itemize}
biomedical research facilities. The defendants argued that an EIR was not required for the site because they had not yet been given final approval for their future plans. The court held that because the California Environmental Quality Act (CEQA) required the EIRs to be prepared as early as feasible, "approval of a project or future portions of a project [was] not a prerequisite for an [EIR]."

The court used a two-pronged test in order to determine when an EIR had to include an analysis of the environmental impact of future uses: "(1) [when] the future use [was] a reasonably foreseeable consequence of the initial project; and (2) [when] the future use [was] likely to change the scope or nature of the initial project or its environmental effects." In McQueen v. Board of Directors of the Mid-Peninsula Regional Open Space District, the California Court of Appeal for the Sixth District held that under the California Environmental Quality Act (CEQA), an environmental impact review was required where the defendant, Board of Directors of the Mid-Peninsula Regional Open Space District, acquired improved surplus federal realty that contained hazardous wastes. The court explained that under CEQA, by acquiring the property, the District also acquired the legal responsibility to maintain, store or dispose of the hazardous wastes properly. The court noted the distinction in CEQA between "sale" and "acquisition", and held that CEQA did not provide a compliance exemption for "acquisitions" of government properties.

In Sundstrom v. County of Mendocino, the California Court of Appeal for the First District held that the county of Mendocino

95. 47 Cal. 3d at 387, 764 P.2d at 279-80, 253 Cal. Rptr. at 427-28.
96. Id. at 394, 764 P.2d at 284, 253 Cal. Rptr. at 432.
97. Id.
98. Id. at 395, 764 P.2d at 284, 253 Cal. Rptr. at 432.
99. Id. at 396, 764 P.2d at 285, 253 Cal. Rptr. at 433. The court also held that CEQA required that an EIR include a meaningful discussion of both project alternatives and mitigation measures. Id.
102. 202 Cal. App. 3d at 1130, 249 Cal. Rptr. at 441.
103. Id. at 1146-47, 249 Cal. Rptr. at 444-45. The court also noted that the District's obligation to conduct an EIR was not discharged by an agreement in which the federal government was responsible for undertaking the cleanup of the hazardous waste. Id.
104. Id. at 1146, 249 Cal. Rptr. at 446.
(County) failed to comply with CEQA when the county granted a use permit to construct a private sewage treatment plant without requiring an EIR. The court noted that the test for determining whether the county complied with CEQA in evaluating the need for an EIR was whether or not an objective good faith effort to comply had been demonstrated. The court found that: 1) the County's initial study was "a token observance of regulatory requirements"; 2) the County, by directing the applicant to conduct the relevant studies subject to approval by the planning commission, had improperly delegated legal responsibility; and, 3) the County had improperly postponed the environmental review to a future date resulting in preclusion of public scrutiny of the project.

COLORADO

RECENT DEVELOPMENTS

During the winter of 1988, Colorado's "Better Air Campaign," which included a voluntary no-drive program and an oxygenated fuels program, required that the gasoline sold by retailers have 2% oxygen by weight. The campaign measures represent an attempt by the state to reduce carbon monoxide emissions from automobiles.

In March 1989, the Colorado Legislature enacted HB 1016; HB 1016 added paper recycling facilities to the existing list of facilities that were exempt from state requirements. The exemption applies as long as the recycling facilities are not on the site of a landfill or incineration operation.

108. Id. at 305, 248 Cal. Rptr. at 357. Evidence of a good faith effort includes completion of a proper initial study to determine the need for an EIR and conducting an environmental assessment at the earliest possible time before approval of the project. Id.
109. Id. at 305, 248 Cal. Rptr. at 357.
110. Id. at 307, 248 Cal. Rptr. at 359.
111. Id. at 307-08, 248 Cal. Rptr. at 358-59.
113. Id.
115. Id.
SOLID AND HAZARDOUS WASTE

In *State of Colorado Legislature v. Department of the Army*, the state brought an action under the Resource Conservation and Recovery Act (RCRA), while a prior suit had been brought by the state against the Army under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Army asserted that the RCRA action should have been dismissed because the CERCLA action took precedence over the RCRA action. The District Court found no support for the Army's argument. The court noted that CERCLA was intended to operate independently and in addition to RCRA, and that neither CERCLA nor RCRA were mutually exclusive.

The Army also argued that RCRA section 6001, which provides, *inter alia*, that federal facilities are subject to state and local requirements, should be construed narrowly, and that Colorado's regulatory standards were not sufficiently precise or objective. The court, however, held that the state's standards were nearly verbatim recitations of federal regulations promulgated by the EPA.

In *State v. Idarado Mining Co.*, the United States District Court for the District of Colorado held that the state's response efforts under CERCLA had to be consistent with the National Contingency Plan. Moreover, the court reiterated that the defendant bore the burden of proving that the state's response efforts were not consistent with the National Contingency Plan.

In *Idarado Mining*, the court found that the defendants, owners and operators of mines, were liable for the cleanup of hazardous

119. 707 F. Supp. at 1563.
120. Id. at 1565.
121. Id. at 1569.
122. Id.
125. Id. at 1571-72.
128. 707 F. Supp. at 1230. The National Contingency Plan, which promulgates administrative procedures and standards for response action, can be found at 40 C.F.R. § 300 (1986).
129. 707 F. Supp. at 1231-32.
CONNECTICUT

RECENT DEVELOPMENTS

On August 7, 1989, Hamden, Connecticut became the first municipality in the state to adopt a ban on non-biodegradable retail food containers. The ordinance prohibits the use of polyvinyl chloride and polystyrene food wrappings, boxes, bags, non-reusable plates and cups, and cup lids. The ban is expected to affect local restaurants, groceries, school cafeterias, and other retail food establishments. Violation of the ordinance could lead to a maximum penalty of $100 in fines per day for non-compliance and three months in jail.

SOLID AND HAZARDOUS WASTE

In Enthone, Inc. v. Bannon, the Supreme Court of Connecticut held that the manufacturer of specialty chemicals, which were not hazardous until utilized by customers, was not subject to a statutory hazardous waste assessment as a generator for recycling or transshipping waste returned to it by its customers. The court concluded that the manufacturer did not fall within the definition of generator as defined by state regulations.

DELAWARE

RECENT DEVELOPMENTS

On December 8, 1988, regulations went into effect which require, inter alia, that operators of sanitary and industrial solid waste...
waste landfills install synthetic liners forty-five millimeters either in thickness or clay liners five feet in thickness.\textsuperscript{141} Also required by the regulations is a five foot separation between the liner and the seasonal high water level.\textsuperscript{142}

On January 20, 1989, regulations went into effect which require the registration of underground and above-ground heating oil storage tanks with capacities of more than 1,100 gallons, and the labeling of the tanks with the tank size and substance stored.\textsuperscript{143} The regulations also prohibit the use of bare steel tanks.\textsuperscript{144}

A ban on the installation of low-pressure pipe septic systems was lifted by the Delaware Department of Natural Resources and Environmental Control (DNREC) on May 1, 1989.\textsuperscript{145} Use of the systems was suspended on October 7, 1988, "because of a high rate of failures."\textsuperscript{146}

**SOLID AND HAZARDOUS WASTE**

In *State v. General Chemical Corporation*,\textsuperscript{147} the Delaware Superior Court held that the former Environmental Control Reporting Statute (ECRS) was repealed by House Bill 330 (H.B. 330),\textsuperscript{148} and that no savings clause was either explicit or implicit from the new rule.\textsuperscript{149} H.B. 330 was amended to incorporate section 102 of the Federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),\textsuperscript{150} Section 311 of the Clean Air Act, and the Delaware Uniform Commercial Code.\textsuperscript{151}

\begin{itemize}
  \item any landfill; and require owners and operators to monitor and maintain landfills for 30 years after closure.
\end{itemize}

141. *Id.* at 1784.
142. *Id.*
144. *Id.*
146. State Suspends Use of Low-Pressure Septic Systems, 19 Env't Rep. (BNA) 1299 (Nov. 4, 1988). Although it was expected that only five percent of the standard low-pressure pipes would malfunction, a survey indicated that thirty-two percent of the pipes were not functioning properly. *Id.*
149. *Id.*
150. 559 A.2d at 301.

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Water Act,¹⁵² and DNREC regulations.¹⁵³

The court also held that the former ECRS was not void for vagueness.¹⁵⁴ Defendant, General Chemical Corporation (General) argued that the statute's requirement that General give notice to DNREC of discharges of air contaminants or water pollutants at the "earliest opportunity" was vague both on its face and as applied to General.¹⁵⁵ The court responded that, since there was no First Amendment issue in the case, it would make no finding as to whether the statute was vague on its face.¹⁵⁶ The court also stated that when it could articulate factors by which both the person subject to the statute and the finder of fact could reasonably determine the statute's meaning, the statute would not be held void for vagueness as applied to the person.¹⁵⁷ After listing a number of factors by which a person subject to the reporting standard could be guided,¹⁵⁸ the court defined the term "earliest opportunity" as "the 'earliest time under all of the circumstances after immediate remedial safety measures had been taken at which a reasonable person could report' to DNREC."¹⁵⁹

FLORIDA

RECENT DEVELOPMENTS

Exposure to liability from the contamination caused by underground storage tanks is a major national concern. Florida has addressed this problem by enacting the Petroleum Liability Insurance Program to be administered by the Department of Environ-

¹⁵³ 559 A.2d at 300.
¹⁵⁴ Id. at 295-97.
¹⁵⁵ Id. at 294.
¹⁵⁶ Id. at 295.
¹⁵⁷ Id. at 297.
¹⁵⁸ The factors include
¹⁵⁹ Id.
mental Regulation for the owners and operators of these tanks.\textsuperscript{160} The program provides third party liability insurance to qualified program participants for incidents of contamination related to the storage of petroleum products, and provides restoration for eligible sites for those in the liability insurance program or those eligible for self-insurance.\textsuperscript{161} The program grants up to one million dollars in coverage for each incident with a deductible of five hundred dollars.\textsuperscript{162} Premiums are determined and approved by the Department of Insurance.\textsuperscript{163} In essence, the program steps up the insurance protection for owners and operators of storage tanks who may lack sufficient financial resources for such liabilities.

\textbf{ENVIRONMENTAL POLICY}

In \textit{State v. Montco Research Products, Inc.},\textsuperscript{164} the District Court of Appeals for the Fifth District of Florida held that certain environmental and pollution control statutes did not require allegation or proof of actual harm.\textsuperscript{165} With respect to Count IV, criminal pollution,\textsuperscript{166} the Florida District Court of Appeals disagreed with the trial court's statutory interpretation requiring that actual harm be alleged whenever the violation of an environmental or pollution control statute having a penal provision is charged.\textsuperscript{167} In reversing Counts I, II, and III, and finding a sufficient allegation of actual harm in Count IV, the \textit{Montco} court demonstrated that the element of actual harm could not be engrafted on all environmental and pollution control statutes with penal provisions.\textsuperscript{168}

\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.} § 376.3072(2).
\textsuperscript{163} \textit{Id.} § 376.3072(4).
\textsuperscript{164} 529 So. 2d 826 (Fla. Dist. Ct. App. 1988).
\textsuperscript{165} \textit{Id.} The court found that the language of the first three counts sufficiently tracked the statutory language and determined them to be improperly dismissed by the trial court. \textit{Id.} at 827.
\textsuperscript{167} 529 So. 2d at 827. The court agreed that the criminal statute needed proof of actual harm, however, this requirement was improperly imputed to Counts I, II, and III.
\textsuperscript{168} 529 So. 2d at 827-28.
GEORGIA

RECENT DEVELOPMENTS

In 1988, the Georgia legislature amended the Georgia Hazardous Waste Management Authority Act (Act)\(^{169}\) by including within the definition of "project" the renovation of any existing waste treatment or disposal facility that provides for the treatment, storage, or disposal of any solid waste requiring special handling.\(^{170}\) The amendment also adds a new provision which would permit the Department of Industry and Trade to plan, own, and operate a hazardous waste facility and to charge a fee for the use of such a state facility.\(^{171}\) Additionally, the Act now provides partial immunity from liability to members, officers, and employees of the Georgia Hazardous Waste Management Authority.\(^{172}\) The effective date of the amended Act was July 1, 1988.\(^{173}\)

Also in 1988, the Georgia legislature enacted a new section to the Pesticide Control Act of 1976 (Act)\(^{174}\) in order to limit the possibility of strict liability being imposed on violators of the Act.\(^{175}\) This new section establishes a negligence standard for farmers who pollute the land, waters, air or other resources of the state through application or use of fertilizers, plant growth regulators or pesticides.\(^{176}\) The Act does not limit an individual’s right of action for personal injury or damage to property resulting from the application or use of chemicals by a person or entity

\(^{169}\) Ga. Code Ann. §§ 12-8-100 to -113 (1988). In 1981, the Georgia Legislature enacted the Georgia Hazardous Waste Management Authority Act which created the Georgia Hazardous Waste Management Authority (HWMA). The HWMA was to be "an instrumentality of the State of Georgia and a public corporation." Ga. Code Ann. § 12-8-102 (1988). The legislature granted the HWMA broad comprehensive authority. Id.


\(^{176}\) Ga. Code Ann. § 2-7-170(a)(1)-(3). The establishment of the negligence standard is accomplished by defining the due care standard for farmers in the application of the aforementioned chemicals or pesticides. Id.
engaged in agricultural or farming operations.\textsuperscript{177} The Act similarly does not prohibit strict products liability for any manufacturer of such fertilizers, plant growth regulators, or pesticides.\textsuperscript{178}

Additionally, in 1988, the Georgia legislature added a new section to its Solid Waste Management Act (Act)\textsuperscript{179} implementing a "good neighbor" policy by requiring that a county obtain approval from a neighboring county before constructing a solid waste disposal site within one-half mile of the county line.\textsuperscript{180} However, even without the consent of a neighboring county, the Director of the Environmental Protection Division of the Department of Natural Resources (DNR) may approve the site "if the requesting county provides evidence that no alternative sites or methods are available."\textsuperscript{181} The Act presently only applies to counties with a population of at least 350,000.\textsuperscript{182} As of April 1, 1990, the Act will apply to all counties, regardless of size.\textsuperscript{183}

In local matters, one of the counties that comprises metropolitan Atlanta has approved a ban on laundry detergents with more than a five percent phosphorous content.\textsuperscript{184} The Fulton County Commission approved the resolution banning phosphate detergents on April 19, 1989, and the ban took effect on November 1, 1989.\textsuperscript{185} Sale of phosphate detergents after this date could result in a $500 fine.\textsuperscript{186} The commission acted in response to a request from DNR to remove phosphorous from their waste water discharge.\textsuperscript{187} 

**SOLID AND HAZARDOUS WASTE**

On June 22, 1989, the Georgia Supreme Court decided

\begin{quote}
\textsuperscript{177} GA. CODE ANN. § 2-7-170(b) (Supp. 1989). \\
\textsuperscript{178} GA. CODE ANN. § 2-7-170(d) (Supp. 1989). \\
\textsuperscript{181} Id. Previously, only authorization of the Director was required to obtain a permit to construct or operate a solid waste facility. GA. CODE ANN. § 12-8-27(a) (1988). \\
\textsuperscript{182} GA. CODE ANN. § 12-8-28.1 (Supp. 1989). \\
\textsuperscript{183} Id. \\
\textsuperscript{184} Ban on Phosphate Detergents Approved to Limit Algae Blooms in Chattahoochee, 19 Env't Rep. (BNA) 2704 (Apr. 28, 1989). \\
\textsuperscript{185} Id. \\
\textsuperscript{186} Id. \\
\textsuperscript{187} Id. Studies have shown that phosphorous discharged into the Chattahoochee River (200 million gallons of treated city waste water are discharged into the river daily) is causing algae to grow in a downriver lake. Id. It has been estimated that 4 million pounds of phosphorous are pumped into the river annually. Id.
\end{quote}
Claussen v. Aetna Casualty & Surety Co. The plaintiff had filed an action against Aetna seeking a declaratory judgment that the insurance company was obligated under a "comprehensive general liability" policy to pay for the costs to be incurred in connection with the Environmental Protection Agency's (EPA) demand that his contaminated property be cleaned up. The plaintiff, Claus- sen, had previously leased the site to the city of Jacksonville, Florida for use as a landfill. Aetna denied coverage, and made a cross motion for summary judgment citing exclusion (f) of the policy, commonly referred to as the "pollution exclusion" clause. The federal district court granted Aetna's motion for summary judgment and the plaintiff appealed to the Eleventh Circuit. The Eleventh Circuit certified to the Georgia Supreme Court the question of whether or not the pollution exclusion clause applied and determined that the question was a matter of state law, and therefore a matter for the state court to decide.

The Georgia Supreme Court's decision ultimately rested on its interpretation of the word "sudden" as used in the pollution exclusion clause of the plaintiff's comprehensive general liability policy. The court held that construing "sudden" to mean "un- expected" would not violate the Georgia rules of contract interpretation, and therefore the clause did not preclude coverage for liability for environmental contamination cleanup costs.

189. 380 S.E.2d at 687.
190. Id.
191. Id. The clause states that coverage is excluded for:

... bodily injury or property damage arising out of the discharge, dispersal, or release or escape of smoke, vapors, soot, fumes, acid, al- kalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or other pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden or accidental . . . .

Id.
192. Id.
193. Id.
194. 380 S.E.2d at 687-90.
195. Id. Aetna argued that the use of the word "sudden" could only mean "abrupt". But the court held that if an insurance contract was capable of being construed two ways, as it was in this case, it would be construed against the insurer and in favor of the insured. Id.
PESTICIDES

In Radtke v. Arrow Exterminators, Inc., a Georgia Superior Court jury awarded $400,000 to a family whose home was made uninhabitable by the misuse of DP Concentrate, a pesticide containing chlordane and heptachlor. The plaintiffs sued the exterminator for the negligent application of the pesticide, claiming that the defendant's negligence resulted in a variety of compensable health problems. The jury awarded the plaintiffs $130,000 in punitive damages and $270,000 in compensatory damages.

HAWAII

RECENT DEVELOPMENTS

On May 11, 1989, Hawaii became the first state to enact an ozone-layer protection law when Governor John Waihee signed a measure restricting sales of chlorofluorocarbon (CFC)-containing air conditioning refrigerants and requiring air conditioning repairpersons to use machines that recycle CFCs. The law, Act 77 of the 1989 Legislature, takes effect January 1, 1991, and bans over-the-counter sales of CFC refrigerants in quantities of less than fifteen pounds. Aerosol-size cans of refrigerants are presently sold to do-it-yourselfers to recharge automobile air conditioning units. The long lead time before the law becomes effective is designed to allow the industry time to develop suitable alternatives to CFCs. The law would also treat as an offender any person who causes or allows CFCs to be released into the air from any source.

Violators of this law would be subject to a $100 fine per offense, and the contractors would be subject to having their licenses suspended, revoked, or not renewed. The Office of Consumer Protection of the State Department of Commerce and Consumer Affairs will be responsible for the enforcement of the

197. Id.
198. Id.
199. Measure Signed by Governor to Restrict Sale of CFC-Containing Air Conditioning Refrigerants, 20 Env't Rep. (BNA) 162 (May 17, 1989). CFC-11, CFC-12, CFC-113, CFC-114, CFC-115, and CFC-502 will be covered by the new law. Id.
200. Id.
201. Id.
202. Id.
203. Id.
new law.\textsuperscript{204}

Another recent development showed that the potential for groundwater contamination by pesticides, herbicides, or plant fungicides exists at a majority of sugar cane, pineapple, and seed corn plantations throughout Hawaii, according to a report by the State Department of Agriculture.\textsuperscript{205} The report, completed in January 1989, inventoried known sites of pesticide mixing and loading at the various plantations, and sampled the soil to a depth of nine feet at two of the sites.\textsuperscript{206}

The report neither drew conclusions nor made recommendations, nor did it cite any of the sampled plantations.\textsuperscript{207} While fines and penalties, including referral to stricter Health Department regulations, could be handed down by the Health Department where the law allows, the plantations, through the use of consent agreements, are being given an opportunity to improve their handling, not only of the pesticides, but also of the empty pesticide containers and run-off irrigation water.\textsuperscript{208}

Under a recent proposal from the State Health Department, installations of cesspools for sewage disposal would end in Hawaii in 1991.\textsuperscript{209} Hawaii is one of a handful of states that still allow installation of cesspools for such disposal.\textsuperscript{210} The proposal would ban cesspool use altogether by the year 2000.\textsuperscript{211} Homeowners have voiced concerns about the policy, focusing on the cost of replacing cesspools with septic tanks.\textsuperscript{212} Cesspools cost $2,000 to $3,000 to install.\textsuperscript{213} Septic tanks could cost at least $6,000 more than cesspools.\textsuperscript{214} There is also a shortage of septic tank installers in Hawaii.\textsuperscript{215}

\begin{thebibliography}
\bibitem{204}{\textit{Id.}}
\bibitem{205}Agricultural Chemicals Threaten Ground Water at Most Plantations Invento-ried, \textit{State Reports}, 19 \textit{Env't Rep.} (BNA) 2556 (March 31, 1989). The report said that 52 different pesticides, fungicides, and herbicides are used by the plantations in Hawaii. \textit{Id.} Among the most commonly used chemicals are Armex (duron), Aatrex (atrazine), Velpar (hexazinone), Evik (amaetryn), Dalpon, Tilt, and Polado. \textit{Id.}
\bibitem{206}{\textit{Id.}}
\bibitem{207}{\textit{Id.}}
\bibitem{208}{\textit{Id.}}
\bibitem{209}State Health Department Proposes Ban on Installation, Use of Cesspools by 2000, 19 \textit{Env't Rep.} (BNA) 2635 (Apr. 21, 1989).
\bibitem{210}{\textit{Id.}}
\bibitem{211}{\textit{Id.}}
\bibitem{212}{\textit{Id.}}
\bibitem{213}{\textit{Id.}}
\bibitem{214}{\textit{Id.}}
\bibitem{215}{\textit{Id.}}
\end{thebibliography}
To answer these concerns, state Representative Mark Andrews introduced a bill (HB 471) that would require the Health Department to document the risk of ground water contamination, rather than issue a blanket policy affecting all cesspools state-wide.\(^{216}\) Though the measure passed the House, it is being held up in the Senate Agriculture Committee.\(^{217}\)

In other recent news involving the Hawaii State Health Department (Department), it was announced by Director Lewin that an improved response and a "proactive" stance toward environmental concerns will most likely be the major features of a reorganization and restructuring of the Health Department.\(^{218}\) Criticized in the past for inadequate responses and unpreparedness for environmental emergencies, the Health Department, under Director Lewin, the first medical doctor in twenty years to head the Department, has proposed a plan to make the environmental health section of the Health Department more responsive.\(^ {219}\)

In legislative testimony, Director Lewin emphasized that his health state plan would strengthen communication within the government, while providing support services for environmental protection programs.\(^ {220}\) "The proposed reorganization," he said, "and a new laboratory will further enhance our abilities to protect and manage our environment. Through the establishment of sound health-based environmental policies, we feel we can allow for controlled growth without compromising the health and welfare of the people of Hawaii."\(^ {221}\)

**IDAHO**

**RECENT DEVELOPMENTS**

Governor Cecil Andrus announced, on September 7, 1988, that an agreement was reached between industry and conservationists on anti-degradation standards for state surface waters.\(^ {222}\)

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216. Id.
217. Id.
219. Id.
220. Id. at 2704.
221. Id.
222. Governor's Task Force Reaches Agreement on Non-Point Source Water Pollution Standards, 19 Env't Rep. (BNA) 998 (Sept. 16, 1988). While most aspects of the agreement will be implemented by rules and regulations, some provisions required legislative approval in 1989. Id.
Previously, Idaho was the only of the fifty states without anti-degradation standards to protect water bodies from non-point source pollution.\textsuperscript{223}

At the heart of the agreement is the establishment of six river basin committees to review pending industrial activities every two years.\textsuperscript{224} The committees are composed of industry, conservationists, and state agency members, and will determine which streams in each area will be subject to activity-by-activity review.\textsuperscript{225} If the committees are unable to reach a consensus, the governor will make a final decision with respect to the appropriate anti-degradation standard.\textsuperscript{226}

On May 19, 1989, Idaho imposed an emergency restriction on the chemical daminozide for all food and flower crops by establishing a notification and permit system for growers who possess the pesticide or intend to use it.\textsuperscript{227} Idaho became the second state to ban the use of daminozide on food crops.\textsuperscript{228}

On May 18, Governor Cecil Andrus announced that the Idaho Department of Agriculture (Department) will maintain records of owners and users of Alar, the commercial name of daminozide.\textsuperscript{229} The list will be made public in the hope of discouraging growers from using Alar.\textsuperscript{230} The restriction requires any person who possesses Alar to report it to the state agricultural department immediately.\textsuperscript{231} Any person intending to use Alar must obtain a permit through the Department at least forty-eight hours in advance of using it.\textsuperscript{232} Failure to notify the agricultural department of possession or use of Alar can result in civil and criminal penalties of up to a $1,000 fine and/or a year in jail.\textsuperscript{233}

\begin{thebibliography}{99}
\textsuperscript{223} Id.
\textsuperscript{224} Id.
\textsuperscript{225} Id. Activity-by-activity review entails a review of each industrial activity that contributes to non-point source pollution. \textit{Id.}
\textsuperscript{226} Id.
\textsuperscript{229} 13 Chem. Reg. Rep. (BNA) at 293.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Id. The permit application must include the user’s full name and address, location, type and total acreage of crop to be treated, and the percent amount of Alar to be used. \textit{Id.}
\textsuperscript{233} Id.
\end{thebibliography}
ILLINOIS

RECENT DEVELOPMENTS

On January 1, 1989, the Illinois legislature amended the state’s Clean Air Act, Clean Water Act, Safe Drinking Water Act, and Resource Conservation and Recovery Act. The purpose of the amendments was to ensure compliance with the guidelines of federal legislation and to create guidelines for state legislation. This compliance was to be achieved by making federal guidelines “required rules” of the state environmental protection acts.294

The amendment requires the state Pollution Control Board (Board) to adopt regulations that are identical in substance to federal regulations promulgated by the Administrator of the United States Environmental Protection Agency.295 The amendment also directs the Board to adopt regulations relating to hazardous waste management that were at least as stringent as those adopted under the federal Resource Conservation and Recovery Act of 1976.296

The purpose of this legislation is to ensure that guidelines promulgated by the Board will be at least as stringent as the guidelines established by the federal government for environmental protection.297 Not only do the amendments establish federal guidelines as a floor for environmental protection, but they further empower the Board to establish state guidelines which go above and beyond those set by the federal government.298

AIR POLLUTION

In Central Illinois Public Service Co. v. Pollution Control Board,299 the Illinois Appellate Court for the Fourth District determined that the power of the Pollution Control Board (Board) to regulate the activities of polluters was limited by the Board’s own prior policy.300 The case involved a suit brought by Central Illinois Public Service Company (Central Illinois), a company that operated a steam generating unit.301 Central Illinois challenged the Board’s affirmation of an Environmental Protection Agency (EPA)

234. ILL. ANN. STAT. ch. 111 1/2, para. 1028.2 (Smith-Hurd 1989).
236. Id.
237. Id.
238. Id.
240. Id. at 366, 518 N.E.2d at 1362.
241. Id. at 355, 518 N.E.2d at 1355.
decision which placed, as a condition on Central Illinois' operating permit, a limitation that Central Illinois could not exceed a sulfur dioxide emission of 6.0 pounds/mbtu.242 Central Illinois argued that the Board, in effect, had eliminated the emission standard's applicability to large emissions sources by finding that compliance with the standard was technically and economically infeasible.243

The court held that if the meaning of the language of a regulation was debatable, and circumstances had not changed since the promulgation of that regulation, an administrative agency would be bound by a long-standing interpretation of the regulation.244 The court determined that the Board could not impose the 6.0 pounds/mbtu emission standard on Central Illinois because the Board had a long-standing interpretation of the regulation applying these emission standards to large emissions sources.245

**SOLID AND HAZARDOUS WASTE**

In *Clutts v. Beasley*,246 the Appellate Court of Illinois, Fifth District, held that the Pollution Control Board's (Board) affirrnance of the Alexander County Board's approval of a proposed regional landfill complied with statutory requisites for factual findings, and that the approval of the proposed landfill was in accord with the evidence presented to the Alexander County Board.247

The plaintiff, a landowner whose property would be adjacent to the proposed landfill, argued that the Board's decision was inadequate because it did not include specific evidentiary findings of fact regarding the criteria for approval of the proposed landfill.248 The court rejected this argument, holding that a written decision by the Board, with a record showing the basis for its decision, was sufficient.249

The court also rejected the adjacent landowner's argument that the landfill proposal did not meet the statutory requirements

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242. *Id.*

243. *Id.* at 359, 518 N.E.2d at 1357.

244. *Id.* at 366, 518 N.E.2d at 1362.

245. *Id.*


247. *Id.* at 543, 541 N.E.2d at 844.

248. *Id.* at 544, 541 N.E.2d at 845.

249. *Id.* at 544-46, 541 N.E.2d at 845-46.
for approval.\textsuperscript{250} Although Illinois law requires that a new landfill be necessary to accommodate area waste needs, the court determined that the landfill did not have to "be necessary in absolute terms . . . [but in] terms of expediency and reasonable convenience."\textsuperscript{251} As to the location of the proposed landfill, the court determined that the landfill had been designed by an experienced engineer, and that the location had minimized incompatibility with, and effect on, property values.\textsuperscript{252}

\textbf{IOWA}

\textbf{RECENT DEVELOPMENTS}

The Iowa Department of Natural Resources (DNR) has proposed new standards to regulate non-point source pollution of groundwater.\textsuperscript{253} This proposal is the result of a mandate of the 1987 Iowa Groundwater Protection Act (Act)\textsuperscript{254} which requires DNR to assess state groundwater standards.\textsuperscript{255} The proposal provides groundwater regulation which is lacking in the 1987 Act. The proposal is aimed most specifically at farm chemicals.\textsuperscript{256} If approved by the legislature, the proposal may require manufacturers of certain farm chemicals to develop strategies to prevent groundwater contamination.\textsuperscript{257}

\textbf{SOLID AND HAZARDOUS WASTE}

In \textit{State v. Butler},\textsuperscript{258} the Jasper County Board of Health (Board) sought discretionary review of a district court decision which overturned the conviction of a landowner for failure to comply with a Board order requiring him to renovate his sewage system.\textsuperscript{259} The landowner had received an extension of time in which to comply with the order so that he would be able to meet the new sewage disposal regulation.\textsuperscript{260} The landowner refused to

\textsuperscript{250} Id. at 545, 541 N.E.2d at 846.
\textsuperscript{251} Id. (citing ILL. ANN. STAT. ch. 111 1/2, para. 1039.2(a) (Smith-Hurd 1988)).
\textsuperscript{252} Id.
\textsuperscript{253} Iowa Agency Submits Non-Point Pollution Plan, 19 Env't. Rep. (BNA) 2137 (Feb. 10, 1989).
\textsuperscript{254} IOWA CODE ANN. § 455 (West 1989).
\textsuperscript{255} Iowa Agency Submits Non-Point Pollution Plan, 19 Env't. Rep. (BNA) 2137 (Feb. 10, 1989).
\textsuperscript{256} Id.
\textsuperscript{257} Id.
\textsuperscript{258} 419 N.W.2d 361 (Iowa 1988).
\textsuperscript{259} Id.
\textsuperscript{260} Id.
construct his sewage system in accordance with the guidelines of the regulation, and was therefore sued by the Board in magistrate’s court.261 The magistrate’s jury convicted him of a simple misdemeanor for violation of the Iowa Code.262 The district court overruled the conviction on the ground that, because the landowner’s sewage disposal system was already in place when the regulation was promulgated, the new regulation did not apply to the landowner’s property.263

The Supreme Court of Iowa held that the landowner’s sewage disposal system was not excluded from the regulation.264 The court found that the regulation, which prohibited the discharge of sewage into any ditch, applied to all private sewage disposal systems which were not accessible to a public sewer.265 The court further explained that the regulation applied regardless of the time at which the private system was constructed.266 The court determined that the landowner was in violation of the regulation, and that the violation “was an act which authorized the local board of health to order alteration of the system.”267

KANSAS

WATER POLLUTION

The United States Court of Appeals for the Tenth Circuit, in Nunn v. Chemical Waste Management, Inc.,268 held that a waste disposal facility owner who guaranteed compliance with existing environmental laws in a land transfer contract would be liable for any breach of that guarantee.269 Chemical Waste Management (CWM) bought a waste disposal facility in Wichita from National Industrial Environmental Services (NIES).270 NIES guaranteed that the facility was in full compliance with all applicable environmental laws.271 Kansas’ Department of Health and the Environ-

261. Id.
262. Id.
263. Id. (citing IOWA CODE ANN. § 137.21 (West 1989)). The administrative regulations regarding sewage disposal were adopted after the landowner’s sewage disposal was in place. Id.
264. Id. at 362.
265. Id. at 363.
266. Id.
267. Id. The case was remanded by the court for further proceedings.
268. 856 F.2d 1464 (10th Cir. 1988).
269. Id. at 1468.
270. Id. at 1466.
271. Id. at 1467.
ment closed the facility thirteen months after NIES transferred the land to CWM, citing leakage of waste from the facility into nearby ground water.\textsuperscript{272} CWM thereafter ceased to make payments to NIES for the facility and sued NIES for breach of the guaranty.\textsuperscript{275} The United States District Court of the District of Kansas awarded $8.7 million to CWM for remedial costs and lost profits.\textsuperscript{274} The Tenth Circuit affirmed the trial court's decision but modified its damage award.\textsuperscript{275} The Tenth Circuit denied CWM's request for lost profits and required CWM to render full payment of the promissory note to NIES as soon as NIES satisfied the damage award.\textsuperscript{276}

**KENTUCKY**

**RECENT DEVELOPMENTS**

The Kentucky Legislature passed a bill in 1988 which put restrictions on incineration methods for the destruction of obsolete chemical weapons.\textsuperscript{277} The legislature passed the bill in response to an Army plan to begin incineration operations on chemical weapons at the Lexington-Blue Grass Army Depot in 1992.\textsuperscript{278} The Army is required by Congress, as part of a budgetary plan for manufacturing new chemical weapons, to destroy all existing chemical weapons.\textsuperscript{279} The new Kentucky law would compel the Army to observe certain incineration technology, including a 99.9999 percent efficiency in the destruction of the chemicals and a thorough training and evacuation program, before the chemical weapons could be burned in the state.\textsuperscript{280}

**AIR POLLUTION**

In *Bell Concrete Industries, Inc. v. Kentucky Natural Resources and Environmental Protection Cabinet*,\textsuperscript{281} the Court of Appeals of Kentucky held that: 1) the Kentucky Natural Resources and Protec-

\textsuperscript{272} Id.
\textsuperscript{273} Id.
\textsuperscript{274} Id. at 1466.
\textsuperscript{275} Id. at 1471.
\textsuperscript{276} Warranty of Environmental Compliance Breached by Ground Water Contamination, 19 Env't Rep. (BNA) 990 (Sept. 16, 1988).
\textsuperscript{277} Kentucky Urges Army to Reconsider Options, Take More Comments on Plan to Burn Weapons, 19 Env't Rep (BNA) 428 (July 29, 1988).
\textsuperscript{278} Id. at 428.
\textsuperscript{279} Id. at 429.
\textsuperscript{280} Id.
\textsuperscript{281} 764 S.W.2d 634 (Ky. Ct. App. 1988).

https://digitalcommons.law.villanova.edu/elj/vol1/iss1/7
Cabinet (Cabinet) could cite a corporation for violation of a permit regulation where the corporation was aware that it was required to obtain permits;282 and, 2) the Cabinet could not cite a corporation for violation of a fugitive emission regulation, promulgated pursuant to the Clean Air Act,283 if the Environmental Protection Agency (EPA) had disapproved of the regulation.284

Upon a Cabinet inspection, it was revealed that Bell Concrete Industries, Inc. (Bell), had constructed or modified an air pollution source on its property in violation of a Cabinet permit regulation.285 The Cabinet cited Bell not only for the violation of the permit regulation, but also for two violations of a fugitive emissions regulation.286 The Cabinet fined Bell $5,500 in civil penalties for the cumulative violations.287 A Kentucky Circuit Court affirmed the Cabinet's order to pay the fines, and Bell appealed to the Kentucky Court of Appeals.288

With respect to the alleged fugitive emissions violations, the court of appeals explained that the Cabinet had promulgated the fugitive emissions regulations in response to a mandate by the federal government requiring Kentucky to take steps to attain air quality of specific standards pursuant to the Clean Air Act.289 The court noted that since the Clean Air Act required the states to submit their fugitive emissions regulations to EPA for its approval, any regulations that received EPA's disapproval would be considered invalid.290 The court of appeals found that, because the Cabinet fugitive emissions regulation had met with EPA disapproval, the fugitive emissions regulation was invalid, and could not, therefore, have been applied to Bell.291 The court ordered the civil penalties to be reduced by the amount which was reflective of the fine for the fugitive emissions violation.292

The court also found that, with respect to the permit viola-

282. Id. at 636-37.
284. Bell, 764 S.W.2d at 636.
285. Id. at 634.
286. Id.
287. Id.
288. Id.
289. Id. at 635.
290. Id. at 636.
291. Id. The court seemed to imply from the fact that the regulation never appeared in the Federal Register that Bell could not have had notice of its existence. See id.
292. Id. at 637.
tions, because Bell had notice of the permit regulation, and because EPA had not disapproved of that regulation, the Cabinet had acted within its proper power to cite Bell for any permit violations. The civil penalties that the Cabinet had levied for Bell’s permit violations were therefore upheld.

LOUISIANA

RECENT DEVELOPMENTS

The quality of Louisiana’s drinking water became a source of concern in 1989. EPA designated the Chicot Aquifer in southwest Louisiana and the Southern Hills Regional Aquifer in southeast Louisiana as the sole or principal sources of drinking water for their respective regions. This designation makes all projects in the area which receive federal funds subject to EPA review in order to reduce the risk of groundwater contamination.

The Louisiana Department of Environmental Quality (DEQ) found that forty percent of the bodies of water surveyed in the state have significant pollution problems. DEQ discovered that the source of the problem is “non-point source pollution”, mostly resulting from urban and agricultural runoff.

SOLID AND HAZARDOUS WASTE

The major hazardous waste case in Louisiana has revolved around Marine Shale Processors, Inc. (MSP). First, DEQ fined MSP, as an incinerator, for $2.8 million because of water pollu-

293. Id. at 636-37.
294. Id. at 637.
295. EPA Regions Grant Local Requests to Protect Drinking Water in Four States, 19 Env’t Rep. (BNA) 229 (June 17, 1988).
296. EPA Regions Grant Local Requests to Protect Drinking Water in Four States, 19 Env’t Rep. (BNA) 369 (July 15, 1988).
297. EPA Regions Grant Local Requests to Protect Drinking Water in Four States, 19 Env’t Rep. (BNA) 229 (June 17, 1988).
299. Id.
300. Roemer Signs Law on Recycling Standards, Ending Effort to Close Marine Shale Incinerator, 19 Env’t Rep. (BNA) 704 (Aug. 19, 1988). The battle began when Governor Buddy Roemer signed Louisiana Senate Bill 739 into law as Act 874. Id. The act imposed new controls on hazardous waste recycling facilities by holding them to the same emission standards as regular incinerators. Id. MSP claims that its major competitors, Hazardous Waste Treatment Council and Rollins Environmental Services, pushed for the legislation as a way to cause problems. Id.
tion violations at its Amelia facility in October 1988.\textsuperscript{301} MSP then sued DEQ to force determination of its status as a recycler or as a incinerator.\textsuperscript{302}

Finally, DEQ ordered MSP to close down the Amelia facility in May 1989.\textsuperscript{303} The company continued to incinerate while contesting the order in an administrative hearing.\textsuperscript{304} The State pointed to violations of its hazardous waste laws, including the importation of hazardous waste from Canada on nineteen occasions, as the reason for the closure order.\textsuperscript{305} MSP's request for a hearing stayed the order's affect.\textsuperscript{306} MSP claimed that its waste importation from Canada complied with EPA regulations which superseded Louisiana's law and barred MSP's liability.\textsuperscript{307} According to the state's attorney general, MSP avoided Louisiana law by moving the wastes into Louisiana via another state.\textsuperscript{308}

MAINE

RECENT DEVELOPMENTS

In 1989, the Maine legislature enacted laws establishing the Maine Waste Management Agency (Agency).\textsuperscript{309} The objectives of the Agency are to implement an integrated approach to solid waste management directed toward the processing, reuse, recycling, and reduction of generated toxic and non-toxic waste through the state.\textsuperscript{310} The Agency is authorized, among other things, to promulgate rules necessary to carry out its responsibilities, to make arrangements pertaining to the purchase, sale, and use of recycled products, and, if an emergency occurs with rela-

\textsuperscript{301} Marine Shale Fined $2.8 Million for Various Water Pollution Violations, 19 Env't Rep. (BNA) 1187-88 (Oct. 14, 1988). MSP refused to pay claiming it is a recycler and not an incinerator. DEQ then fined it as a recycler based on these claims. The fine was also imposed because of numerous other violations of state law.

\textsuperscript{302} Louisiana Ordered to Hold Hearing on Status of Marine Shale Facility, 19 Env't Rep. (BNA) 1486-87 (Nov. 25, 1988). If found to be an incinerator, MSP would be bound by the Resource Conservation and Recovery Act and would need a permit to do business. Effectively, MSP would shut down because the required permit takes a long time to acquire. \textit{Id.} at 1486.


\textsuperscript{304} \textit{Id.} at 187.
\textsuperscript{305} \textit{Id.} at 187-88.
\textsuperscript{306} \textit{Id.} at 188.
\textsuperscript{307} \textit{Id.}
\textsuperscript{308} \textit{Id.}
\textsuperscript{309} ME. REV. STAT. ANN. tit. 38, §§ 2101-2193 (West Supp. 1989).
\textsuperscript{310} \textit{Id.} § 2101.
tion to the disposal of hazardous waste anywhere in the state, to
direct solid wastes from one public or private waste facility to an-
other. The Agency may also enter into contracts, including, but not
limited to, contracts with firms, corporations, state agencies,
the United States government, and local municipalities. The
ability to contract was given to the Agency so that it could bargain
for services related to the recycling and disposal of solid waste.

Also in 1989, the Maine legislature passed several amend-
ments to the Maine Hazardous Waste, Septage and Solid Waste
Management Act (Act). Under the Act, the Maine Environ-
mental Protection Board (Board) is authorized to adopt provi-
sions for public notification concerning the location of land
spreading and sludge storage facilities.

The Act requires each municipality in the state to provide
disposal services for domestic and commercial solid waste gener-
ated within each municipality. Municipalities are obligated to
enact ordinances requiring transporters of solid waste to segre-
gate wastes, and to deliver wastes generated within the municipali-
ity to a designated reclamation facility.

Again in 1989, the Maine legislature passed amendments to

311. Id. § 2103(1).

312. Id. The Agency's duties include, but are not limited to, the develop-
ment of a state waste management and recycling plan, assisting in regional and
municipal waste recycling and waste reduction programs, promoting waste re-
duction, developing siting criteria for disposal facilities, reviewing applications
for expanded solid waste facilities, and instituting, in a court of competent juris-
diction, proceedings against any individual or entity to compel compliance with
any of the Agency's established regulations. Id. § 2103(2).


314. Id. § 1304(13-A). Other regulations adopted by the board relate to
pulp and paper mill sludge produced at industrial facilities. Id. § 1304(13-
A)(B)(1)&(2). The regulations on pulp and paper mill sludge produced at these
industrial facilities include provisions for the maximum storage period at facili-
ties without impervious liners, leachate collection and treatment to be fixed at
six months, and the prohibition on the location of sludge storage sites within
300 feet of a year-round river, stream, brook or pond nor within 75 feet of any
intermittent stream or brook, or any natural drainage way, including gullies,
swales, and ravines. Id. Other provisions mandate that facilities without imperv-
ious liners and leachate collection systems be used only once in any ten year
period. Id. § 1304(13-A)(B)(3).

315. Id. § 1304-B(1).

316. Id. § 1304-B(2). The amendments also place limitations on a municipali-
ity's ability to enter into service contracts for the disposal, transportation, and
handling of solid waste. The Act stipulates that the primary obligation of each
municipality, which is to supercede all other contracts made with other parties to
recycle or reduce solid waste, is to secure a minimum solid waste tonnage level
for use by local waste disposal facilities. Id. § 1304(B)(4-A).
the law governing the protection of natural resources.517 The amendments pertain to the state's rivers and streams, great ponds, fragile mountain areas, freshwater wetlands, significant wildlife habitat, coastal wetlands, and coastal sand dunes.518 The definition of coastal wetlands was expanded to include flat or other contiguous lowlands subject to tidal action during the maximum spring tide level as identified by the tide tables published by the National Ocean Service.519 Deleted from the definition of coastal wetlands were those areas subject to annual storm flowage at any time, excepting periods of maximum storm activity.520 The definition of freshwater wetlands was expanded to include areas of ten or more contiguous acres and areas of less than ten contiguous acres which are adjacent to a surface body of water.521 This freshwater wetlands definition excludes any river, stream or brook whose combined surface area, in a natural state, is in excess of ten acres, and whose inundated or saturated surface or ground water is sufficient to support wetland vegetation.522 Amendments to the Lake Restoration and Protection Fund (Fund), also found under the collection of laws governing the protection of natural resources, authorizes the Department of Environmental Protection (DEP) to establish a staffing program to provide information and guidance for the implementation of local standards for the protection and restoration of the state's lakes.523 DEP is also authorized, in conformity with the regulations establishing the fund, to develop a program to educate the public about lake restoration.524 DEP is also obligated, under the regulations establishing the fund, to encourage research within the state on lake vulnerability to pollution, control of phosphorous pollution in the lakes, and development of new lake and waterland diagnostic tools.525

Amendments were also made to the natural resources laws with respect to the maintenance and repair of private crossings

518. Id. § 480-A.
519. Id. § 480-B(2).
520. Id.
521. Id. § 480-B(4)(B). These areas include, but are not limited to, great ponds, rivers, streams, and brooks. Id.
522. Id.
523. Id. § 480-N(1).
524. Id. § 480-N(4). The program shall target school children, and shall involve extensive use of the media. Id.
525. Id. § 480-N(5)(A),(B), & (C).
over fragile ecological areas. Such maintenance and repair measures will be permitted only so long as erosion control measures are used to prevent sedimentation of the fragile ecological areas, any repairs or maintenance to crossing do not block fish from passage through the areas, and any repairs or maintenance do not amount to an additional intrusion into the fragile area.

In 1989, the Maine legislature also made several amendments to its laws governing the protection and improvement of air quality. The 1989 amendments simply required the Board of Environmental Protection (Board), when establishing emission standards, to consider the degree of air pollution existing within a particular region of the state, the length of time necessary to inform persons affected by the establishment of these emission standards of their existence, and the time necessary for persons affected by these new emission standards to install air pollution control apparatus to comply with the new emission standards.

A major addition to these emission laws included classification of incinerators by chamber volume and ability to burn solid waste. Classification and segregation of human, animal, industrial, and commercial waste for incineration purposes were also added by the 1989 amendments. In addition to classification requirements, discharges of particulate matter from incinerators, which result in the soiling of property or in the creation of a nuisance condition, was limited to 150 micrograms per cubic meter for any twenty-four hour period.

Finally, amendments were enacted requiring commercial, industrial, federal, state, and municipal facilities that contribute to the discharge of fugitive emissions, to establish and maintain a continuing program for the management of such emissions during any periods of construction, renovation, or normal operation in order to avoid potential nuisances created by these
emissions.333

WATER POLLUTION

In Camden & Rockland Water Co. v. Town of Hope,334 the Supreme Judicial Court of Maine denied the Zoning Boards of Appeals of the Town of Hope (town zoning board) the right to prohibit a company from building a pumping station on a state-owned great pond.335 Prior to the town zoning board’s denial of the company’s right to build, the company had been granted a permit by the legislature to construct the pumping station.336 The court found that where prior legislation had expressly granted a company the right to construct a pumping station, the town zoning board was precluded from exercising regulatory control with regard to the manner and extent to which the pumping station would withdraw water from the pond.337

SOLID AND HAZARDOUS WASTE

In Secure Environments Inc. v. Town of Norridgewock,338 the Supreme Judicial Court of Maine affirmed the right of the Board of Selectmen (Board) of the Town of Norridgewock (Town) to deny a corporation’s applications to construct and operate a secure landfill on property the corporation owned in town.339 The court found that the corporation failed to comply with criteria set forth in the town’s landfill ordinance. The landfill ordinance required the corporation to provide adequate technical and financial capacity to properly construct, operate, maintain, and close its landfill disposal facility.340

The court held that the town ordinance was in compliance with provisions found in the Maine Hazardous Waste, Septage, and Solid Waste Management Act (Act).341 The court explained that the Act allowed municipalities to pass ordinances with respect to the regulation of solid waste and septage disposal, pro-

333. Id. § 592-A(2).
334. 543 A.2d 827 (Me. 1988).
335. Id. at 828.
336. Id.
337. Id. at 829. The court also stated that, because the company offered to minimize the noise pollution emanating from the pump facility, the town zoning board acted arbitrarily in denying the company’s application to build a pumping station. Id. at 830.
338. 544 A.2d 319 (Me. 1988).
339. Id. at 321.
340. Id.
341. Id. at 322.
vided that the ordinances were no less stringent than, or inconsistent with, the regulations found in the Act. The court concluded by finding that the town had the authority to enact measures that would require the corporation to meet the town's ordinances before permitting the construction of the site in order to protect, enhance, and maintain the quality of the environment.

MARYLAND

RECENT DEVELOPMENTS

In May of 1989, the Maryland legislature passed several amendments to its landfill siting laws. General provisions relating to notice requirements on hearings conducted by the Maryland Secretary of the Department of the Environment (Secretary) were amended to include provisions requiring the landfill applicants to give notice of their applications by certified mail to the Secretary and to each member of the General Assembly in whose district a landfill system or incinerator will be located. The 1989 amendments also require applicants seeking a permit for a rubble landfill to give notice of the application and pre-permit hearing before the Department of the Environment (Department), by certified mail to the members of the General Assembly who represent the legislative district in which a rubble landfill will be located and to owners of real property located adjacent to the proposed site. Applicants must also post notice about the pre-permit hearing in a conspicuous place on the proposed landfill site.

The Secretary is prohibited from issuing a permit for a rubble landfill unless the county in which the rubble landfill is located has specified the kinds of waste that may be disposed of in its

342. Id.
343. Id. The court determined that both the regulations adopted in the town ordinance, and those found in the Maine Site Location and Development Act, made the construction of a landfill in the town dependent on the financial capacity of the developer, the traffic flow in and around the site, and the suitability of the soil for the construction of a landfill site. Id.
345. The Secretary conducts hearings in order to determine whether an individual or entity may be permitted to install, alter, or extend a public water supply, sewage, or refuse disposal system.
346. Id. § 9-209(b)(4).
347. Id. § 9-209(c).
348. Id.
349. Id.
solid waste management plan. An additional regulation on the landfill renewal applications requires a permit holder to give notice, by certified mail, of the renewal application to each member of the General Assembly in whose district the landfill system is located.

Amendments were also passed with respect to the siting laws for storage or disposal of sewage sludge. Applications for permits for the storage or disposal of sewage sludge require a public hearing conducted by the Department. The hearing must be conducted prior to the granting of a permit to construct or expand a structure used for the storage or disposal of any type of sewage sludge. If multiple counties and municipal corporations are affected by the granting of a sludge storage permit, the Department may choose to hold a consolidated hearing among the affected parties.

Amendments have also been added to the provisions of the Maryland siting laws penalizing individuals or corporations that violate permit restrictions on the disposal and storage of sewage sludge. The Department may penalize any individual or corporation up to $1000. The sum will vary depending upon the willfulness of the violators, any actual harm to the environment or human health, the cost of cleanup and the cost of restoring the lost natural resources, interference with general welfare, health and property, the location of harm resulting from the permit violation, the technology available to eliminate the violation, and the extent to which the current violation is part of a recurrent pattern committed by the violator. If a permit holder fails to correct a permit violation, each day that the violation goes unchecked will be treated as a separate and distinct violation for penalty purposes. A lien will be placed on the property of any permit holder who fails to pay any accrued penalties to the state of Maryland for past permit violations. All penalties collected are to be placed in the Sewage Sludge Utilization Fund.

350. Id. § 9-210(b).
351. Id. § 9-213(b)(2).
352. Id. § 9-234.1(b).
353. Id. § 9-234.1(d).
354. Id. § 9-269(b).
355. Id. § 9-269(b)(2)(i) & (ii).
356. Id.
357. Id. § 9-269(b)(3).
358. Id. § 9-269(b)(5)(i).
359. Id. § 9-269(b)(6).
The 1989 amendments to the siting laws also established the State Used Tire Cleanup and Recycling Fund (fund).\(^{360}\) The fund is to be used to remove and recycle used tires form disposal facilities, while implementing measures to restore those natural resources found on the site.\(^{361}\) All expenditures used to remedy violations of siting laws at a particular site are to be paid to the Department by the owner and operator of the site.\(^{362}\) The reimbursement monies go into the fund.\(^{363}\) The Attorney General of the State of Maryland may bring an action to recover costs and interest from any owner or operator of a tire disposal facility who fails to make these reimbursements.\(^{364}\)

An owner or operator of a used tire disposal facility may apply to the Secretary of the Department for financial aid in recycling and disposing of used tires to avoid paying a huge lump sum.\(^{365}\) If the financial aid requested by the applicant is granted by the Secretary, it shall be treated as a loan to be repaid by the applicant within thirty years.\(^{366}\)

Several amendments to Maryland's water management laws were passed by the Maryland legislature in 1989. The amendments focused on oil storage in the state.\(^{367}\) Included among these amendments are provisions requiring any owner, operator, or person in charge of an underground oil storage facility to register it with the Department of the Environment (Department).\(^{368}\) Upon failure to register, the Department may preclude any sale of oil from the underground oil facility.\(^{369}\) If any registered underground oil storage facility is no longer in use, the owner or operator of that facility is required to notify the Department of this occurrence no later than thirty days after its removal or discontinu-

\(^{360}\) Id. § 9-273.
\(^{361}\) Id. § 9-275(1).
\(^{362}\) Id. § 9-276(a).
\(^{363}\) Id.
\(^{364}\) Id. § 9-276(b).
\(^{365}\) Id. § 9-277(b). The application will be granted or denied based upon previous efforts expended by the applicant to correct the problem, the applicant's financial capacity, the problem prevention aspects of the proposed project, the cost effectiveness of the proposed project, provisions for monitoring and review, contribution of the proposed project toward meeting state and local solid waste plans and goals, and measures to assure accountability of all funds awarded to the applicant. Id.
\(^{366}\) Id. § 9-278(b)(1) & (2).
\(^{368}\) Id. § 4-411.1(a).
\(^{369}\) Id. § 4-411.1(b).
uance. The Department is authorized to adopt regulations defining "underground storage facility" and to pursue "any other measures necessary to regulate the use of underground oil facilities."

Representatives of the Department may at any reasonable time enter any oil storage facility to inspect the oil storage facility, to obtain water, oil, or soil samples from the facility, and to measure the volume and kinds of substances received or stored in the facility. Additionally, the Department may enter any property to assume control of any oil spill if the party responsible for the spill has not acted promptly to remove the spill or has not undertaken any measure to rectify the condition. If a Department representative is denied entry into the oil storage facility, the Secretary of the Department may seek an injunction to enter the facility or property.

WATER POLLUTION

In Department of the Environment v. Showell, the Court of Appeals of Maryland held that the Maryland Department of Health and Mental Hygiene (Department) had implicit authority to execute a consent order requiring a landowner to agree to restrictions on access to a public sewer system as a condition to the landowner's receiving of federal funds from the Environmental Protection Agency (EPA). A local landowner claimed that the Department's consent decree constituted a land use restriction on his property. The court found that, although the Department had no express authority to restrict access of a landowner to a public sewage system, the Secretary of the Department possessed broad powers to regulate sanitary facilities and initiate pollution control measures. Therefore, the court found that the execution of the consent decree was a valid exercise of the implicit pow-

370. Id. § 4-411.1(c).
371. Id. § 4-411.1(d).
372. Id. § 4-415.1(a).
373. Id. § 4-415.1(b).
374. Id. § 4-415.1(c).
376. Id. at 259, 558 A.2d at 391.
377. Id. at 266, 558 A.2d at 394.
378. Id. at 269, 558 A.2d at 396. Additionally, the court stated that, under Maryland statutory law, the Department was encouraged to comply with the conditions made by the federal government regarding the acceptance and administration of monetary grants. Id. at 271, 558 A.2d at 397.
MICHIGAN

RECENT DEVELOPMENTS

In an effort to encourage recycling and waste reduction programs, Governor Blanchard signed a measure to provide funding for these programs on June 29, 1989. The bill, (HB 4178), provides counties with authority to impose a surcharge on households and multi-dwelling units to fund the recycling and waste reduction programs. The surcharge could, in the most extreme case, amount to $25 annually per household. The bill’s surcharge provisions are, however, subject to a referendum vote, by which the residents of Michigan may block the bill’s passage into law.

Pursuant to Public Act 148 (Act), signed by Governor Blanchard on July 6, 1989, three-fourths of the unclaimed money from deposits on cans and bottles will be placed into a fund for environmental programs, the remainder to go to retailers. Under this Act, equal shares of the environmental funds will go toward toxic waste, solid waste, and a monitoring program for the cleanup of hazardous waste. The cleanup money may not, however, be used for a period of ten years, at which time only the interest from the fund will be available. The principle of the

379. Id. The court also rejected assertions made by the landowner that the consent order amounted to usurpation of the power of local governmental entities to control non-point source pollution and land use. Id. at 272, 558 A.2d at 397. The court held that the consent order’s effect on land use and non-point source pollution was incidental to the Department’s valid regulation of water pollution within the state. Id. at 272-73, 558 A.2d at 398. The court found that the consent order did not place any real restrictions on the landowner’s use of his land since he was not precluded from developing his land and installing a private sewage system. Id.

Finally, the court addressed the landowner’s claim that the Department’s decision to execute the consent order was arbitrary and capricious. Id. at 272-73, 558 A.2d at 397-98. The court found that any burden placed on the landowner’s rights were necessary and reasonable to promote the health and welfare of the community. Id. at 273, 558 A.2d at 398.


381. Id.

382. Id.

383. Id.


385. Id.

386. Id.
fund will be left to generate additional income.\textsuperscript{387}

Governor Blanchard also signed Public Act 52 (Act) on June 12, 1989, which deals with the disposal of incinerator ash.\textsuperscript{388} Major provisions of the Act provide the following: (1) incinerator ash is exempted from Michigan’s hazardous waste law; (2) a standard will be set for landfill designs; and, (3) owners are required to demonstrate their financial responsibility.\textsuperscript{389} This law also clears the way for incinerators planned by several other Michigan cities, but does not cover ash from hazardous waste incineration.\textsuperscript{390} A number of environmental groups, including the Sierra Club’s Michigan affiliate, have opposed this measure.\textsuperscript{391}

The state of Michigan has also established new rules for the handling and disposal of medical waste.\textsuperscript{392} The Medical Waste Emergency Rules were selected on June 1, 1989, over the more costly federal program.\textsuperscript{393} The federal program, the result of a bill (HR 3515) passed by the 100th Congress, is a pilot program that requires participating states to fill out detailed forms.\textsuperscript{394} Under the new Michigan rules, all generators of medical waste must submit their plans for the handling and disposal of the waste to the State Health Department for review.\textsuperscript{395}

\textbf{AIR POLLUTION}

In \textit{Her Majesty the Queen ex rel. Province of Ontario v. City of Detroit},\textsuperscript{396} the Canadian government and nonprofit environmental groups filed actions challenging the defendant’s proposed solid waste combustion facility.\textsuperscript{397} The United States Court of Appeals for the Sixth Circuit held that the Michigan Environmental Protection Act (MEPA)\textsuperscript{398} was not to be deemed federal law since MEPA was not part of Michigan’s State Implementation Plan

\begin{footnotesize}
387. Id.
389. Id.
390. Id.
391. Id.
393. Id.
394. Id.
395. Id.
396. 874 F.2d 332 (6th Cir. 1989).
397. Id. at 333.
\end{footnotesize}
(SIP) under the Clean Air Act (CAA). Consequently, MEPA creates "state environmental common law that is unaffected by federal law."  

In addition, the Sixth Circuit reversed the district court's holding with respect to the CAA's preemptive effect on MEPA. The Sixth Circuit held that the CAA did not preempt actions under MEPA; rather, the CAA preempted state law only to the extent that the CAA was more stringent than state law. The Sixth Circuit further held that nonprofit groups were not barred by the CAA from filing claims under MEPA.

In a state court of appeals case, *Detroit Edison Company v. Michigan Air Pollution Control Commission*, the court held that the Air Pollution Control Commission had the authority to include promulgated rules as conditions for permits as long as the rules did not violate the Air Pollution Control Act. The court also held that the authority to include these rules as conditions for permits did not deny the procedural or due process rights of the permittees.

**WATER POLLUTION**

In *Thomas Township v. John Sexton Corp.*, one of the issues before the court was whether a local or a statewide perspective should be adopted when applying MEPA's impairment standard. This case focused on the fate of an abandoned clay pit

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399. *Province of Ontario*, 874 F.2d at 341. The court stated that MEPA is not federal law since: (1) it is not part of the State Implementation Plan; and, (2) it does not create standards enforceable by the Clean Air Act. *Id.* The Clean Air Act is located at 42 U.S.C. §§ 7401-7642 (1983 & Supp. V 1987).

400. *Id.*

401. *Id.*


403. *Id.* at 342-43. The Sixth Circuit therefore reversed the district court's grant of summary judgment in favor of the City of Detroit and remanded with instructions for the district court to remand the action to the state court from which it had been removed. *Id.* at 344. The case had reached this point by virtue of, first, being removed from state court by defendant, City of Detroit and, second, the District Court for the Eastern District of Michigan denying plaintiffs' motion for remand to the state court and granting defendant's motion for summary judgement. *Id.* at 333-34. The appeals from both these orders were consolidated and held: both improvidently granted. *Id.*


405. *Id.* The Air Pollution Control Act is located at Mich. Comp. Laws Ann. §§ 336.11 to .106 (West 1987).


408. *Id.* at 516, 434 N.W.2d at 647. The distinction of a statewide versus a local perspective was outlined in *Kimberly Hills Neighborhood Association v. Dion,*
which had filled with water. The Natural Resources Commission granted the respondent, the John Sexton Corporation, an Inland Lakes and Streams Act (ILSA) permit to drain the artificial lake.\textsuperscript{409} The court held that the statewide perspective was the proper perspective when determining whether MEPA properly prohibited the draining of the lake.\textsuperscript{410}

**MINNESOTA**

**RECENT DEVELOPMENTS**

In an effort to protect Minnesota's ground water from the adverse effects of pesticides, Governor Perpich signed a bill, (SF 262), into law on June 2, 1989.\textsuperscript{411} A major provision of the bill requires that pesticides be registered with the state before their use.\textsuperscript{412} In addition, the bill provides for the creation of a fund financed by pesticide-user fees to address the problems of water pollution.\textsuperscript{413}

**WATER POLLUTION**

In City of Morton v. Minnesota Pollution Control Agency,\textsuperscript{414} the Court of Appeals of Minnesota held that the Minnesota Pollution Control Agency (MPCA) validly amended its rules when it imposed a two percent limit on grant amendments due to increased costs for the construction of publicly-owned wastewater treatment facilities.\textsuperscript{415} The MPCA is empowered to grant both federal and state funds to municipalities for the construction of wastewater facilities.\textsuperscript{416} Under MPCA rules, as amended, grant amendments for increases due to unanticipated site conditions are limited to

\textsuperscript{114} Mich. App. 495, 507, 320 N.W.2d 668, 673 (1982). The Kimberly Hills court held that legislative intent was clear that a statewide perspective was necessary. Id. MEPA's impairment standard is based on Article 4, § 52 of the Michigan Constitution, which directs the legislature to provide for the protection of the state's environment from pollution and impairment. 

\textsuperscript{409} Thomas Township, 173 Mich. App. at 509-10, 434 N.W.2d at 645.

\textsuperscript{410} Id. at 517, 434 N.W.2d at 648. The court cited Kimberly Hills as controlling.

\textsuperscript{411} Governor Signs Ground Water Legislation; Bill Focuses on Agricultural Chemical Control, 20 Env't Rep. (BNA) 451-52 (June 6, 1989).

\textsuperscript{412} Id.

\textsuperscript{413} Id.

\textsuperscript{414} 437 N.W.2d 741 (Minn. Ct. App. 1989).

\textsuperscript{415} Id. at 743. The petitioners in this case were municipalities seeking a pre-enforcement declaratory action challenging the MPCA's new rule. Id.

\textsuperscript{416} Id. Municipalities must first apply to the MPCA for financial assistance. Id.
two percent of the as-bid costs.\textsuperscript{417}

**SOLID AND HAZARDOUS WASTE**

In *In re Greater Morrison Sanitary Landfill*,\textsuperscript{418} the Court of Appeals of Minnesota held that cities and municipalities could be held individually liable for costs associated with the closing of landfills, even though they had withdrawn from the landfill board before the closure order.\textsuperscript{419} In this case, a number of cities and municipalities entered into a joint agreement to create a landfill.\textsuperscript{420} The landfill was managed by a landfill board made up of one representative from each governmental unit.\textsuperscript{421} The court, fearing a "last one out is it" contest,\textsuperscript{422} held that costs of the closing of the landfill should have been shared by previous owners and operators.\textsuperscript{423}

**MISSISSIPPI**

**RECENT DEVELOPMENTS**

On May 20, 1988, Governor Mabus signed two significant pieces of environmental legislation. The first, the Mississippi Water Pollution Control Revolving Fund Act,\textsuperscript{424} which went into effect immediately upon the governor's signature, provides funds to municipalities for wastewater treatment projects. The funds are collected in accordance with the federal Clean Water Act.

\textsuperscript{417} Id. The current version of the rule is at Minn. Stat. § 7075.0420(2) (1987).

\textsuperscript{418} 435 N.W.2d 92 (Minn. Ct. App. 1989).

\textsuperscript{419} Id. at 99-100. The statute authorizing the MPCA to close landfills is at Minn. Stat. §§ 116.07(4f), (4g) (1987). The cities and municipalities in this case argued that the statute should be construed to require only current owners and operators to close the landfill. 435 N.W.2d at 94.

\textsuperscript{420} Id.

\textsuperscript{421} Id.

\textsuperscript{422} Id.

\textsuperscript{423} Id. at 99-100. The court also rejected the cities' and municipalities' argument that the statutory provisions concerned with the closing of landfills, Minn. Stat. § 116.07 (4f) (1987) and the state Superfund Act, Minn. Stat. § 115B.03 (1)(a)(1) (1987) should be construed together in these matters as they are in pari materia. 435 N.W.2d at 97-99. The court held that these two statutes were not designed to address the same problems and as a result could not be construed together. Id. The court noted that the landfill closure law was designed to address landfills and impact only those who owned or operated landfills. On the other hand, the Superfund Act was designed to address hazardous chemicals and impact primarily those who release or transport such chemicals. Id.

\textsuperscript{424} SB 2142, codified at Miss. Code Ann. §§ 49-17-81 to -87 (Supp. 1988).
amendments of 1987. The second significant piece of legislation, the Mississippi Underground Storage Tank Act of 1988, creates a regulatory program for underground storage tanks and liability for cleanup costs for those responsible for leaking tanks.

**SOLID AND HAZARDOUS WASTE**

In *Pennick v. Mississippi Commission on Natural Resource*, the Supreme Court of Mississippi held that the Bureau of Natural Resources (the Bureau) was required to shut down the operation of a holding pond for creosote runoff because the owner of the property refused to join the lessee/operator of the property in signing the application for hazardous waste permits. The court also held that if the plaintiff, as the lessee/operator of the property, was unable to obtain a permit to operate the holding pool, he would be required to pay for any cleanup costs. The court noted that the state of Mississippi had adopted the federal regulations of the Environmental Protection Agency (EPA) through the Mississippi Hazardous Waste Regulations as amended. Accordingly, the court explained that the owner of the creosote plant was required to sign the permit. Despite findings that the holding pond had not contaminated the ground water, and that the cleanup costs would put the lessee in bankruptcy, the court held that the Bureau had to close the operation of the holding pond.

**MISSOURI**

**RECENT DEVELOPMENTS**

In 1989, Missouri made several statutory changes to existing environmental provisions in the areas of hazardous waste, envi-

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428. 533 So. 2d 179 (Miss. 1988).
429. Id. at 181.
430. Id. at 180.
431. Id. at 181. Specifically, section 270 of the Mississippi Hazardous Waste Act requires the owner of a plant to sign for the permit. Id.
432. Id. at 180. The court found, however, that the pond presented a clear "potential" for polluting. Id. at 181.
433. Id. at 180.
rnonmental protection, and administration. On June 20, 1989, the Missouri General Assembly repealed existing statutory hazardous waste categories, and empowered the Hazardous Waste Management Commission to formulate a new set of hazardous waste classifications based on the annual tonnage of waste produced by individual waste generators.\textsuperscript{434} The new version of the statute also provided a cap on fees charged to hazardous waste generators, and enumerated several exceptions from fee requirements.\textsuperscript{435} All fees collected are to be earmarked for the hazardous waste remedial fund.\textsuperscript{436}

On June 21, 1989, new sections were added to the new version of the statute. These new sections relate to the recycling of paper and aluminum cans, procurement policies of state agencies, and restrictions on foam and plastic containers.\textsuperscript{437} Contract specifications for various paper products will be changed to reflect higher percentages of recycled paper.\textsuperscript{438} As of January 1, 1992, the amendment prohibits the sale or distribution of food or beverage containers made from "polystyrene foam manufactured using any fully halogenated chlorofluorocarbon (CFC) found by the United States Environmental Protection Agency (EPA) to be an ozone-depleting chemical."\textsuperscript{439}

In 1989, the Missouri Emergency Response Commission\textsuperscript{440} was established pursuant to amendments to existing law, and was charged with responsibilities over coordination and implementation of emergency plans and the formation of local emergency planning districts.\textsuperscript{441} These activities will be funded from the chemical emergency preparedness fund as well as from other allocations from other government agencies, including the federal government.\textsuperscript{442}

In 1988, the Missouri Department of Natural Resources (DNR) developed proposed regulations governing standards for commercial operations using polychlorinated biphenyls (PCBs).\textsuperscript{443} The proposed regulations encompass contingency

\textsuperscript{435} Id. § 260.479, 2-5.
\textsuperscript{438} Id. § 34.031 2(2)(a)-(d).
\textsuperscript{441} Id. § 292.602.
\textsuperscript{442} Id. § 292.607, 1-2.
\textsuperscript{443} PCB Facilities Would Have to Obtain DNR Permit Under Proposed Legislation, 19 Env’t Rep. (BNA) 348 (July 8, 1988).
planning, waste analysis, financial and recordkeeping concerns, protection of groundwater, tank systems, and incinerators. 444

On May 5, 1988, Missouri Governor John D. Ashcroft signed legislation requiring treatment of infectious waste using the best available technology and extending the hazardous waste category tax funding of the state superfund through 1995. 445 The new law also provides that the Department of Natural Resources must review and approve transport routes for new hazardous waste facilities. 446

SOLID AND HAZARDOUS WASTE

With regard to hazardous waste disposal plans, in Mertzlufft v. Bunker Recycling & Reclamation, Inc., 447 the plaintiffs sought to enjoin the operation of an infectious waste incinerator without the necessary state permits. Appeals followed the circuit court’s granting of a permanent injunction and denying of attorneys’ fees. The Missouri Court of Appeals for the Southern District held that local residents had standing to seek equitable relief in the form of an injunction under the Hazardous Waste Management Law, 448 that the local residents were not required to prove irreparable harm, and that a separate preliminary injunction against the Department of Natural Resources did not render the present action moot. 449 Finally, the court of appeals held mandatory the award of attorneys’ fees. 450

TOXIC TORTS

Concerning biological injuries received from exposure to toxic chemicals, in Elam v. Alcolac, 451 toxic emissions from a chemical plant formed the basis for a number of claims by local residents alleging biological injuries caused by toxic chemicals. 452 The jury returned verdicts for the plaintiffs after which the circuit court denied the defendants’ motion for judgment notwithstanding the verdict, but granted a new trial concerning the award of

444. Id.
446. Id.
447. 760 S.W.2d 592 (Mo. App. 1988).
449. 760 S.W.2d at 599-600.
450. Id. at 600-02.
451. 765 S.W.2d 42 (Mo. App. 1988).
452. Id. at 49-50.
compensatory and punitive damages for negligence claims. The Missouri Court of Appeals for the Western District held that the jury finding that toxic emissions emanating from the plant were the legal cause of the plaintiffs' injuries was supported by the evidence, that the trial court correctly ruled on the evidentiary questions with the exception of the impermissible admission of evidence regarding chemically-induced AIDS syndrome, and that punitive damages were a question for resolution by the jury.

**LAND USE**

In *Green Acres Land & Cattle Co., Inc. v. State*, the Missouri Court of Appeals for the Western District held that the establishment, maintenance, and management of wildlife areas were not an unreasonable use of the State's constitutional authority, and that it did not constitute an unreasonable use of land or the maintenance of a nuisance. The court of appeals affirmed the dismissal of plaintiff landowners' petition against the state seeking damages for the inverse condemnation of crops as a result of the establishment and maintenance of wildlife areas. The court reasoned that the damage on the plaintiffs' land caused by the foraging of wild birds from the wildlife preserve was insufficient to state a cause of action. Moreover, the court of appeals found that the inverse condemnation claim was insupportable with respect to the state-owned wildlife management areas because the state exercised no control over the plaintiffs' land.

**MONTANA**

**RECENT DEVELOPMENTS**

In 1989, Montana enacted the Wastewater Treatment Revolving Fund Act (Act) which serves as enabling legislation for the implementation of federal Clean Water Act requirements. The Act provides financial assistance to local governments and private

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453. *Id.*
454. *Id.* at 229-30.
455. 766 S.W.2d 649 (Mo. App. 1988).
456. *Id.* at 652.
457. *Id.* at 650.
458. *Id.* at 652.
459. *Id.* at 651-52.
enterprises for the cost of wastewater treatment works. Also in 1989, the Montana Hazardous Waste Act was amended and re-titled the Montana Hazardous Waste and Underground Storage Tank Act (Act). The amendment of the Act ensured, inter alia, that petroleum products and hazardous substances stored in underground tanks would be subject to state regulation. Additionally, corrective action for hazardous waste management facility permit compliance was expanded to include releases beyond facility boundaries. Inspections by the Department of Health and Environmental Sciences pursuant to the recent amendment may now be made upon reasonable suspicion of non-compliance with storage regulations.

ENVIRONMENTAL POLICY

In Butte-Silver Bow Local Government v. State, the Montana Supreme Court held that the Resource Indemnity Trust Act (RITA) did not violate the reclamation section of the Environmental and Natural Resources Article of the State Constitution. The Supreme Court found that the language of the reclamation section did not restrict the use of RITA funds to the reclamation of lands as a matter of statutory construction. As a

461. Id. § 75-5-1103 (1989).
462. Id. §§ 75-10-401 to 451 (1989).
463. Id. § 75-10-402 (3) (1989).
464. Id. § 75-10-406 (7) (1989).
468. Mont. Const. art. IX, § 2. The reclamation section of the Environmental and Natural Resources Article states that: “All lands disturbed by the taking of natural resources shall be reclaimed. The legislature shall provide effective requirements and standards for the reclamation of lands disturbed.” Mont. Const. art. IX, § 2(1).
469. 768 P.2d 327, 330-31 (1989). The Montana Supreme Court also held that registered voters and taxpayers had standing to question the constitutionality of RITA and the use of trust funds, and that original jurisdiction requirements of the Supreme Court were met. Id. at 329. The Supreme Court further held that the statute permitted allocations to programs other than reclamation, and expenditures made did not contravene the provision excluding general operating expenses from allocation. Id. at 331.
470. Id. at 330-31. Subsection (2) of the reclamation section of the Environmental and Natural Resources Article simply stated that: “The legislature shall provide for a fund, to be known as the resource indemnity trust of the state of Montana, to be funded by such taxes on the extraction of natural resources as
result, appropriations made for general operating expenses to the Department of State Lands, the Department of Livestock, and the Department of Natural Resources in the 1987 biennium were permissible uses of RITA funds.471

NEBRASKA

RECENT DEVELOPMENTS

As of July 1, 1989, an amendment to the Wastewater Treatment Operator Certification Act 472 went into effect. 473 The amendment provides for appeal from decisions of the Director of Environmental Control by any person, in accordance with the Administrative Procedure Act. 474 Another act, the Wastewater Treatment Facilities Construction Assistance Act, became effective on August 25, 1989. 475 The essential purpose of this act is to provide local governments with financial incentives in the form of low-interest loans in order to stimulate the undertaking of wastewater treatment projects in local areas. 476 A cash fund, known as the Wastewater Treatment Facilities Construction Loan Fund, has been created to satisfy the water pollution control revolving fund requirement 477 of the federal Clean Water Act. 478 Loan eligibility is available for: "[s]econdary treatment and appurtenances; infiltration and inflow correction; major sewer system rehabilitation; the legislature may from time to time impose for that purpose." Mont. Const. art. IX, § 2(2). The Supreme Court noted that subsection (3) merely limited the use of trust principal to the extent of $100 million, and did not foreclose alternative uses of trust income or principal over and above the protected amount. 768 P.2d at 331.

471 Id. at 332. The Supreme Court held that use of RITA funds for the operation of programs designed to improve the total environment did not constitute violations of fiduciary trust responsibilities. Id.


476 Id. at 148.


new collector sewers and appurtenances; new interceptors and appurtenances; and correction of combined sewer overflows."

NEW HAMPSHIRE

RECENT DEVELOPMENTS

In *K.W. Thompson Tool Co. v. United States*, the United States Court of Appeals for the First Circuit held that the discretionary function exception applied to the waiver of sovereign immunity under the Federal Tort Claims Act. This decision enabled the plaintiff, a firearms manufacturer, to sue the United States for alleged violations committed by the Environmental Protection Agency (EPA). The plaintiff was subject to regulations under the Clean Water Act (Act) for the discharges made in the course of its manufacturing process. The plaintiff was sued by EPA for criminal violation of the Act. The plaintiff alleged that: 1) EPA failed to properly train and supervise EPA personnel; 2) EPA failed to use valid scientific data in issuing National Pollutant Discharge Elimination System permits for discharges; and, 3) EPA breached its duty to follow EPA policy by prosecuting the plaintiff criminally rather than civilly.

The court stated that the only mandatory duty imposed on

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480. 836 F.2d 721 (1st Cir. 1988).
481. 28 U.S.C. § 2680(a) (Supp. V 1987). The discretionary function exception states that sovereign immunity applies to:
   [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

*Id.*

This application of sovereign immunity is an exception to the waiver of 28 U.S.C. § 1346(b).

   for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting in the scope of his office of employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

*Id.*

EPA by the Act was that comprehensive programs be developed in order to control water pollution. The court also noted that EPA had wide discretion in determining how to develop and administer water pollution control programs.\textsuperscript{486} The court explained that EPA policy statements were intended as flexible general guidelines, and that the decision to prosecute was within EPA’s discretion. The court determined that if it were to involve itself in the agency’s decision to prosecute, it would be "trespassing on an executive function."\textsuperscript{487}

In Environmental Defense Fund \textit{v. Thomas},\textsuperscript{488} New Hampshire joined forces with the Environmental Defense Fund to compel the EPA Administrator to promulgate revised National Ambient Air Quality Standards (NAAQS) for sulphur oxides.\textsuperscript{489} The Court of Appeals for the Second Circuit held that the EPA Administrator did not have a nondiscretionary duty enforceable in district court to revise NAAQS for sulphur oxides. The Second Circuit did, however, state that the district court had jurisdiction to compel the EPA Administrator to take some formal action.\textsuperscript{490}

The Second Circuit determined further that subsection (d) of section 7409 of the Clean Air Act,\textsuperscript{491} which requires the EPA Administrator to review published criteria for pollutants and to promulgate new standards for pollutants every five years, was not to be read as imposing a mandatory duty on the EPA Administrator, nor was it to be read in conjunction with the clearly mandatory language of subsection (a) of section 7409 of the Clean Air Act.\textsuperscript{492} The court concluded by finding that the section 7409(d) language "as may be appropriate," was discretionary and governed all of section 7409(d), while interpreting the language of "shall" in section 7409(d) to mean that the district court had jurisdiction to order the EPA Administrator to make some formal decision regarding revision of NAAQS.\textsuperscript{493}

In Massachusetts \textit{v. United States},\textsuperscript{494} the United States Court of Appeals for the First Circuit held that a Nuclear Regulatory Com-

\begin{itemize}
  \item \textsuperscript{486} \textit{Id.} at 728.
  \item \textsuperscript{487} \textit{Id.} at 729.
  \item \textsuperscript{488} 870 F.2d 892 (2d Cir. 1989).
  \item \textsuperscript{489} \textit{Id.} at 894.
  \item \textsuperscript{490} \textit{Id.}
  \item \textsuperscript{491} 42 U.S.C \textsection\textsection 7401-7642 (1982).
  \item \textsuperscript{492} The language of \textsection 7409(d) states that: "the Administrator shall complete a thorough review of the criteria published \ldots and promulgate such new standards as may be appropriate \ldots ." 42 U.S.C. \textsection 7409(d) (1982).
  \item \textsuperscript{493} \textit{Thomas}, 870 F.2d at 898. 42 U.S.C \textsection 7409(a) (1982).
  \item \textsuperscript{494} 856 F.2d 378 (1st Cir. 1988).
\end{itemize}
mission (NRC) regulation which allowed licensing of a nuclear power facility under the Atomic Energy Act (AEA) was not unreasonable. The regulation was challenged because it did not require state and local governments to participate in developing the radiological emergency plan required in the event of a disaster under the AEA. The court explained that the AEA did not condition issuance of a license by the NRC exclusively on the existence of a state or local emergency plan. The court deemed reasonable the NRC’s issuance of a license based on a theory that state and local officials who refused to cooperate in developing a local emergency plan would ultimately cooperate with whatever plan was in place in the event of an emergency.

**AIR POLLUTION**

In *In re City of Berlin,* the New Hampshire Supreme Court ruled on an administrative determination made by the State Air Resources Council stating that a manufacturer was entitled to statutory tax exemptions for “any treatment facility, device, appliance, or installation” which had the purpose of “reducing, controlling, or eliminating any source of air or water pollution.” The same statute allowed similar tax exemptions for “any real estate necessary” to carry out the reduction of any source of air or water pollution. The court held that the manufacturer’s construction of a bark-burning boiler, which did not emit sulphur dioxide pollution, did not come within the purview of the statute because no “treatment” was undertaken. The court distinguished between the use of manufacturing processes that did not pollute and those that actually “treat[ed]” existing pollutants.

The court then turned its attention to the manufacturer’s tall stacks. The court held that the manufacturer’s tall stacks did

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495. *Id.* at 383. The Atomic Energy Act is located at 42 U.S.C. § 2011 (1954). The specific section referred to by the court was section 2201(i)(3). *Id.*
496. *Id.* at 380.
497. *Id.* at 383.
498. *Id.* This theory is referred to as the “realism doctrine.” *Id.* The court determined that it was not unreasonable for the NRC to presume that state and local governments, despite misgivings about the adequacy of a utility plan, would, in the event of an emergency at the plant, follow the only viable emergency plan. *Id.*
500. *Id.* (citing N.H. REV. STAT. ANN. § 72:12-a (Supp. 1988)).
501. *Id.*
502. *Id.* at 288, 553 A.2d at 761.
503. *Id.*
qualify under the statute for exemption from property taxes.\textsuperscript{504} The court stated that the use of tall stacks was sufficiently similar to the use of a discharge tunnel to control thermal discharge pollution, which was already deemed eligible for tax exemption under the statute.\textsuperscript{505}

**ZONING**

In *Rowe v. Town of North Hampton*,\textsuperscript{506} the plaintiff appealed from the denial of an application for a variance from the town’s wetlands ordinance. The plaintiff alleged that denial of the variance would result in unnecessary hardship because alternative uses for the land were not economically viable.\textsuperscript{507} The court set forth five requirements\textsuperscript{508} which the applicant had to satisfy in order to obtain a variance pursuant to the statute.\textsuperscript{509} The court stated that the plaintiff had failed to establish that a denial of the variance would result in unnecessary hardship to her.\textsuperscript{510} The court found that the financial situation of the applicant did not determine whether a hardship existed, rather the court stated that the hardship was determined by the uniqueness of the land.\textsuperscript{511} Because the plaintiff failed to prove that construction of a house and septic tank system on this land would not adversely affect its wetland status, construction was precluded by the local wetlands ordinance.\textsuperscript{512}

The court also addressed the plaintiff’s contention that denial of the variance was an unconstitutional taking, and that the wetlands restrictions substantially deprived her of an economical use of her land.\textsuperscript{513} In rejecting plaintiff’s argument, the court ex-

\textsuperscript{504} Id.
\textsuperscript{505} Id.
\textsuperscript{506} 131 N.H. 424, 553 A.2d 1331 (1989).
\textsuperscript{507} Id. at 426, 553 A.2d at 1334.
\textsuperscript{508} Id. at 427, 553 A.2d at 1333. The five requirements set forth by the court were:
1) that a denial of the variance would result in unnecessary hardship to the applicant;
2) that no diminution in value of surrounding properties would occur;
3) that the proposed use would not be contrary to the spirit of the ordinance;
4) that granting the variance would benefit the public interest; and,
5) that granting the variance would do substantial justice.
\textsuperscript{509} Id. (citing N.H. REV. STAT. ANN. § 674.33 (b)).
\textsuperscript{510} Id. at 431, 553 A.2d at 1336.
\textsuperscript{511} Id. at 429, 553 A.2d at 1334.
\textsuperscript{512} Id. at 432, 553 A.2d at 1336.
\textsuperscript{513} Id. at 426, 553 A.2d at 1332.
plained that the test to determine whether a taking had occurred was "whether the property owner ha[d] made a showing that the regulation thwart[ed] her substantial, justified expectations concerning the property and whether the burden the government action cast upon the property owner was unreasonably onerous."\textsuperscript{514}

The court upheld the trial court's conclusion that the plaintiff had no "substantial or justified expectation" regarding the property when it was purchased because there were laws in effect at the time that indicated a strong public policy for protecting wetlands.\textsuperscript{515} Further, the court explained that the land would still have value even if construction were not permitted, and the fact that the land would not be worth as much without the variance did not make the statute unconstitutional as to the plaintiff.\textsuperscript{516}

**FORESTRY**

In *Town of Wolfeboro v. Smith*,\textsuperscript{517} the New Hampshire Supreme Court interpreted the grandfather clause of a statute\textsuperscript{518} which required landowners to obtain permits before their property could be excavated. The court set forth a three-pronged test that the landowners had to meet in order for an excavation to qualify under the grandfather clause: 1) the excavation had to have been actively pursued by the landowners at the time when the law requiring permits became effective; 2) there must have been an objective manifestation of the landowner's intent to excavate the area prior to the enactment of the permit law; and, 3) that continued excavation would not have had a substantially different and adverse impact on the neighborhood.\textsuperscript{519} The court concluded that the landowners in this case failed to show that the intent to excavate existed prior to the imposition of the permit requirement and therefore, the excavators did not meet their burden of

\textsuperscript{514} Id. at 430, 553 A.2d at 1335.
\textsuperscript{515} Id. at 431, 553 A.2d at 1336.
\textsuperscript{516} Id.
\textsuperscript{518} Id. at 452, 556 A.2d at 757 (citing 1979 N.H. Laws 481:3). This grandfather clause provides that:

[a]ny owner of an existing excavation in use as of the effective date of this act [Aug. 24, 1979] and which is subject to this act may continue such existing excavation without a permit but shall perform restoration in compliance with RSA 155-E:5 within a reasonable period following the intended cessation of the excavation or any completed section thereof.

\textsuperscript{519} Id. at 457, 556 A.2d at 759.
NEW JERSEY

RECENT DEVELOPMENTS

The Ocean Dumping Ban Act of 1988 (Act) makes it illegal to dump sewage, sludge or industrial waste into the ocean after December 31, 1991. In order to ensure compliance with the Act, the Environmental Protection Agency (EPA) began to issue permits which worked to limit the amount and type of sewage, sludge or industrial waste that could legally be disposed of in the ocean. In addition to issuing permits, EPA is in the process of negotiating with each dumper to phase out ocean dumping, to replace ocean dumping with interim disposal methods, and to ultimately establish an alternative plan for long-term disposal. The Act imposes penalties, starting at $600 per dry ton, for dumping beyond the deadline.

In March 1989, six New Jersey dumpers broke off negotiations with EPA and filed a lawsuit. The lawsuit challenged EPA’s authority to require the dumpers to implement a long-term alternative to ocean dumping by December 31, 1991 in order to avoid paying dumping fees. The dumpers argued that they should have been allowed to waive the dumping fees because they would have ceased ocean dumping by 1991. EPA stood by its requirement that in order to qualify for a waiver the dumpers must have had a long-term alternative by December 3, 1991. The EPA did, however, stipulate that all fees would be returned if the dumper in fact did reach the 1991 deadline.

In another matter New Jersey Representative Guy Molinari

520. Id. at 457, 556 A.2d at 760.
523. Id. Two bills introduced in the House, HR 1469 and HR 1281, would impose even tougher penalties under the Act. Id. Some of the proposed alternatives included water, out-of-state landfilling, or incineration as interim alternatives. All five New Jersey dumpers proposed to use incineration as their long-term solution. Three New York dumpers plan to sell their dewatered sludge and have yet to decide on a long-term alternative. Id.
524. Id.
525. Id. The April 19th lawsuit was Passaic Valley Sewerage Commissioners v. Reilly, No. C-89-1670 (D.N.J. filed April 19, 1989).
526. Id.
issued a report in April 1989 detailing toxic chemical releases reported by manufacturers in northeastern New Jersey for 1987. The report also called for a stronger focus on environmental protection programs, pollution prevention, and research dealing with the effects of toxic chemicals on human health.\footnote{527} Molinari’s report was based on 1,200 toxic release inventory reports filed under section 313 of the Emergency Planning and Community Right-to-Know Act.\footnote{528}

According to the report, nearly 14.5 million pounds of toxic chemicals were released into the air, 39.6 million pounds released into water, 41 million pounds transferred to publicly owned treatment works, and 54 million pounds shipped offsite.\footnote{529} Molinari said that “these statistics show that the area studied must be considered one of the most severely stressed in the United States in terms of toxic pollution and that its population should be considered one of the most at risk from such pollutants.”\footnote{530}

On May 1, 1989, the New Jersey Department of Environmental Protection (DEP) proposed the classification of polychlorinated biphenyls (PCBs) as hazardous waste.\footnote{531} DEP’s intention was to cover any inadequacies in current federal regulations.\footnote{532}

DEP stated that “[t]he listing of PCBs as a hazardous waste will require generators, transporters, servicing/recycling companies, and transfer, storage, and disposal facilities that accumulate or dispose of PCB hazardous waste to comply with state hazardous waste rules, which will protect against both accidental and deliberate release of PCBs into the environment.”\footnote{533} The economic impact of the new regulations is predicted to be “moderate” ac-
EPA approved New Jersey and New York regulations limiting the volatility of gasoline sold in those states during the summer months. The purpose of this regulation is to limit volatile organic compound emissions from gasoline, which contribute to ozone formation. Both regulations were scheduled to take effect between June 30 and September 15, 1989.

**AIR POLLUTION**

In *American Petroleum Institute v. New Jersey Department of Environmental Protection*, the Superior Court of New Jersey decided a case which dealt with recent regulations promulgated by the New Jersey Department of Environmental Protection (DEP). The regulations prescribed an implementation schedule for stage II vapor recovery systems. American Petroleum Institute challenged the validity of DER’s regulations arguing that: 1) the new regulations were “arbitrary, capricious, and unreasonable”; and, 2) the implementation schedule prescribed in the regulations was not supported by the record.

The court sustained the validity of DER’s regulations after an examination of the legislative history of the regulations. The court held that the regulations were consistent with the purpose and intent of the legislature.

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534. *Id.*
535. *Fuel Volatility Rules Approved for NJ, NY, 20 Env't Rep. (BNA) 480 (June 25, 1989).* The states were limited to 9.0 pounds per square inch Reid vapor pressure. *Id.*
536. *Id.*
537. *Id.*
539. Stage II Vapor Recovery requirements are set forth in N.J. ADMIN. CODE at 7:27-16.3(1): “[t]ransfer of gasoline into vehicular fuel tanks (must) be performed using a vapor control system . . . designed, operated and maintained to prevent VOS [volatile organic substance] emissions to the outside atmosphere . . . and to prevent overfilling of vehicular fuel tanks and spillage.” *Id.* at 565, 554 A.2d at 4.
540. *Id.* at 566-67, 554 A.2d at 5.
541. The legislative history stressed the need for such a regulation given the volatility of the pollutants that would be released absent such regulation. The legislative history focused primarily on the effect the regulations would have on limiting the deterioration of atmospheric ozone. It was also noted that twenty-six states had already seen fit to pass similar regulations to capture gasoline vapors which had been forced out of the tanks of vehicles. *Id.* at 566, 554 A.2d at 4.

The court also stressed the purpose of the Stage II Vapor Recovery Program and the need to regulate VOS emissions to achieve the program’s goal of attaining the National Ambient Air Quality Standard. Finally, the court rejected
WATER POLLUTION

The Superior Court of New Jersey ruled on the issues of stream encroachment permits and temporary solid waste facility permits in In re Stream Encroachment Permit. In the case the court held that the State Department of Environmental Protection (DEP) was not acting arbitrarily, capriciously, or unreasonably by granting stream encroachment permits for a resource recovery facility. The court stated that DEP had properly relied on “extensive studies over a long period of years” showing that no feasible alternative site was available. The court further held that DEP’s authority for granting such permits was within the legislative framework and criteria for such matters.

The court also held that the issuance of temporary solid waste permits prior to disclosure statement approval was not prohibited by New Jersey’s Solid Waste Management Act because the record was sufficient to support a DEP conclusion that the corporation had been rehabilitated.

NEW MEXICO

RECENT DEVELOPMENTS

In 1988, the New Mexico legislature amended its Air Quality Control Act to permit local governing bodies to license private vehicle emissions inspection and testing stations. Subsequent to the amendments, both the city of Albuquerque and the sur-

American Petroleum’s argument that the regulation was not supported by the record of public hearings. Id. at 566-67, 554 A.2d at 5.
543. Id. at 455, 555 A.2d at 1128.
544. Id. at 459, 555 A.2d at 1151.
Throughout the opinion, the court stressed that its review of the action of the administrative agency had to be limited. The court followed the basic principle of deference to the Agency unless it found that the Agency determination (in this case regarding the issuance of permits) was arbitrary, capricious, and unreasonable. Id.
548. Sanctions Imposed in 1985 Lifted After Albuquerque Reinstates I/M Program, 19 Env’t Rep. (BNA) 1117 (Sept. 30, 1988). The Albuquerque area of New Mexico has had some of the most severe carbon monoxide problems in the country, caused to a large extent by vehicle emissions. Id. In 1985, the Environmental Protection Agency (EPA) imposed sanctions when the city of Albuquerque and surrounding Bernalillo County terminated their emissions inspection and testing programs. Id. The program was dropped in 1984 when the New Mexico Superior Court ruled that local governments lacked the power to charge fees for inspections at stations operated by local governments. Id.
rounding Bernalillo County made plans to implement inspection and monitoring (I/M) requirements for vehicle emissions. EPA quickly responded to the new requirements by lifting prior sanctions imposed upon New Mexico, including the denial of federal air quality assistance funds and the potential loss of federal highway construction funds.

In March 1989, New Mexico Governor Garrey Carruthers vetoed comprehensive waste legislation passed by the state legislature. The law was intended to tighten the state's landfill regulations and would have mandated, for waste generated by other states, recycling and fees for dumping garbage in New Mexico. A day after vetoing this legislation, the Governor announced a one-year moratorium on opening new landfills in the state. Nevertheless, New Mexico remains the only state which does not require the licensing of landfills.

On March 30, 1989, the New Mexico legislature enacted the Hazardous Chemicals Information Act. This statute "codifies federal reporting requirements into state law, authorizes enforcement of the requirements and mandates a fee system to help fund the program." The new law, which became effective on July 1, 1989, incorporates the reporting requirements under the Emergency Planning and Right-to-Know Act (EPCRA). The statute further authorizes civil penalties of up to $5000 for willful non-compliance with any of the reporting requirements and creates the Hazardous Chemicals Information Management Fund to help finance state management of data submitted in compliance with the law.

New Mexico received a $1.1 million grant to finance the regulation and reclamation expenses of the state's abandoned mine lands and surface coal mine programs for one year beginning

549. Id.
550. Id.
552. Id.
553. Id. at 2525.
556. Id.
557. See Governor Signs Title III Measure Codifying EPCRA Reporting Requirements, 19 Env't Rep. (BNA) 2610 (Apr. 14, 1989). The EPCRA is also known as Title III of the Superfund Amendments and Reauthorization Act (SARA).
558. Id. at 2611.
June 30, 1988. The grant, funded by a combination of Interior Department appropriations and abandoned mine land funds, was divided between New Mexico's abandoned mine lands cleanup program and the inspection and enforcement program for active surface mines.

**NEW YORK**

**RECENT DEVELOPMENTS**

In 1988, New York enacted a Solid Waste Management Act which established solid waste management priorities as follows:

(a) first, to reduce the amount of solid waste generated;
(b) second, to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused;
(c) third, to recover, in an environmentally acceptable manner, energy from solid waste that can not [sic] be economically and technically reused or recycled; and
(d) fourth, to dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or other methods approved by the department.

This legislation clearly sets forth a state policy of reducing and recycling waste where possible and of providing adequate and safe disposal for waste which cannot be eliminated or recycled.

In September 1988, New York enacted legislation which set strict penalties for the illegal release of infectious waste into the environment. In addition to the penalties, $2 million was appropriated for the vigorous enforcement of New York's laws pertaining to the storage, treatment, and disposal of infectious waste.

In April 1989, the largest fine to date for pollutant discharge permit violations under New York's Water Resources Law was levied against Deutsch Relays Incorporated. The Department

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559. *New Mexico Receives $1.1 Million Grant*, 19 Env't Rep. (BNA) 280 (June 24, 1988).
560. Id.
562. See Id.
564. Id.
566. New York Agency Imposes $1 Million Penalty, Orders Study at Contaminated

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of Environmental Conservation (DEC) ordered the company, to pay a $1.05 million fine for illegally discharging waste water on 874 occasions.567 The company was also ordered to perform a remedial investigation and feasibility study of the contaminated site and to post a $1 million bond in order to guarantee that the site was cleaned up.568

In June 1989, the EPA approved New York’s stringent reduction in its fuel volatility standard to nine pounds per square inch.569 This standard is in effect for all gasoline sold during the summer months and is intended to limit volatile organic compound emissions from gasoline, thus helping to prevent local ozone formation.570

In 1989, revisions were made to the state’s hazardous waste regulatory program which included closure and remedial requirements and definitions of hazardous waste.571

Also in 1989, four bills were enacted to protect New York’s beaches, tidal wetlands, and other water resources.572 First, the legislature created a state revolving loan fund which will receive federal grants under the Federal Water Quality Act of 1987.573 Pursuant to this law, New York will be expected to receive $1 billion in federal funds by 1994 for sewage treatment plants.574 Second, the legislature created the Clean Oceans Fund to collect federal penalties assessed against local governments in New York for failure to meet the 1992 deadline for the cessation of ocean dumping of sewer sludge.575 Third, a bill was enacted to establish a comprehensive state system for the regulation and tracking of medical wastes.576 Finally, the state enacted a statute to provide greater protection of tidal wetlands through more efficient administrative methods and tougher enforcement measures, in-

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567. Id.
568. Id.
570. Id.
573. Id. (citing 1989 N.Y. LAWS 565).
574. Id.
575. Id. (citing 1989 N.Y. LAWS 564).
576. Id. (citing 1989 N.Y. LAWS 180).
cladding higher fines and permit fees.\textsuperscript{577}

\textbf{AIR POLLUTION}

In \textit{Long Island Lighting Co. v. New York Department of Environmental Conservation},\textsuperscript{578} the Long Island Lighting Company (LILCO) appealed the Albany Supreme Court's dismissal of its request to compel DEC to hold hearings on LILCO's application for authorization to use higher sulfur content fuel at its electric generating facilities.\textsuperscript{579} In affirming the lower court's decision, the New York Supreme Court, Appellate Division, held that LILCO's request was not an application for a special fuel allowance permit under the Uniform Procedures Act, but rather a request to initiate a rule change.\textsuperscript{580} The Appellate Court noted that the DEC was "under no legal obligation to initiate a rule change simply at the request of a regulated party" since the DEC has discretionary power to provide special fuel allowances.\textsuperscript{581} In addition, the court stated that there was adequate evidence to support DEC's refusal to approve higher sulfur content limits at the Long Island Lighting Company's facilities because LILCO was able to maintain operations, "albeit under more stringent fuel limitations."\textsuperscript{582}

\textbf{WATER POLLUTION}

In \textit{Industrial Liaison Committee of the Niagara Falls Area Chamber of Commerce v. Williams},\textsuperscript{583} the New York Court of Appeals upheld DEC's amended ambient water quality standards, which had been challenged by an association of industrial dischargers known as the Industrial Liaison Committee.\textsuperscript{584} The court based its decision on a finding that DEC, in promulgating the revised standards, had satisfied statutory requirements for public notice, meaningful comment and opportunity to be heard.\textsuperscript{585} According to the court

\begin{itemize}
\item \textsuperscript{577} \textit{Id.} (citing 1989 N.Y. \textit{Laws} 666).
\item \textsuperscript{578} 145 A.D.2d 70, 537 N.Y.S.2d 926 (1989).
\item \textsuperscript{579} \textit{Id.} at 71, 537 N.Y.S.2d at 928.
\item \textsuperscript{580} \textit{Id.} at 73, 537 N.Y.S.2d at 928. Uniform Procedures Act provides for authorization of permits not for legislative rule making.
\item \textsuperscript{581} \textit{Id.} at 73, 537 N.Y.S.2d at 928-29.
\item \textsuperscript{582} \textit{Id.} at 73, 537 N.Y.S.2d at 928.
\item \textsuperscript{583} 72 N.Y.2d 137, 527 N.E.2d 274, 531 N.Y.S.2d 791 (1988).
\item \textsuperscript{584} \textit{Id.} at 146, 527 N.E.2d at 278, 531 N.Y.S.2d at 795. These standards are used to determine effluent limitations for permits issued under the State Pollution Discharge Elimination System (SPDES). \textit{N.Y. ENVTL. CONSERV. LAW} § 17-0801 to -0829 (McKinney 1984).
\item \textsuperscript{585} \textit{Williams}, 72 N.Y.2d at 143, 527 N.E.2d at 276, 531 N.Y.S.2d at 793.
\end{itemize}
DEC was not acting arbitrarily or capriciously when it made a determination under the State Environmental Quality Review Act (SEQRA), ignoring speculative environmental consequences which might arise under the new or amended standards.586

**SOLID AND HAZARDOUS WASTE**

In *New York Public Interest Research Group, Inc. v. Town of Islip*,587 the Court of Appeals of New York analyzed DEC consent orders in light of SEQRA and local legislation: the legislation greatly restricted expansion in existing landfills located in deep flow recharge areas unless no other feasible means of waste management was available.588 The court held that the term expansion included lateral but not vertical expansion, and therefore, that an agreement between DEC and Islip to increase the landfill's height did not violate the local statute as alleged by the plaintiff, New York Interest Research Group Incorporated.589 The court also stated that the burial of ash from the town of Islip's resource and recovery system in an existing portion of the landfill was not lateral expansion.590

In *Dana Distributors Inc. v. Department of Environmental Conservation*,591 the court held that DEC's rule requiring beverage distributors to pay handling fees to dealers or redemption centers, even if the distributors did not have agreements with the dealers or centers, was neither unauthorized nor in conflict with the terms of the New York State Returnable Containers Act (the Act).592 The Act authorized DEC to make rules and regulations governing the circumstances under which distributors would be required to accept the return of empty containers.593 Therefore, in accordance with the language of the Act, the court reasoned that DEC was authorized to require distributors to accept all returns of empty

(Referring to requirements of New York's Administrative Procedure Act section 202 (McKinney 1984)).

586. *Id.* (plaintiffs alleged DEC failed to disclose background data upon which it relied in settling water quality standards).
588. *Id.*
589. *Id.* at 502-03, 520 N.E.2d at 521-22, 525 N.Y.S.2d at 802-03.
590. *Id.* at 504, 520 N.E.2d at 522-23, 525 N.Y.S.2d at 804.
592. *Id.* at 1072, 532 N.Y.S.2d at 353. There has been a great deal of controversy over the New York State Returnable Container Act, N.Y. ENVTL. CONSERV. LAW §§ 27-1003 to 27-1017 (McKinney 1984). (distributors contend they are unfairly burdened by statute's acceptance requirement).
593. *Id.* at 1071-72, 532 N.Y.S.2d at 351-52.
containers and to pay applicable handling fees.\textsuperscript{594} Finally, the court held that the Act was reasonably related to the public policy goals of solid waste management and resource recovery and was therefore not unconstitutional.\textsuperscript{595}

In \textit{New York State Superfund Coalition v. New York Department of Environmental Conservation},\textsuperscript{596} the New York Supreme Court, Appellate Division, upheld a lower court's decision that New York's regulations governing the cleanup of hazardous waste sites were overbroad in defining which waste sites constituted a "significant threat" to the environment and therefore the regulations were annulled.\textsuperscript{597} In its ruling, the court found DEC regulations to be inconsistent with state law.\textsuperscript{598} The DEC regulations required "only that the hazardous waste at a particular site h[e]ld the 'potential' for hazards to human health or the environment prior to being determined a 'significant threat,'" whereas the New York statute, upon which the DEC regulations were based, required that a "significant threat" to the environment actually exists.\textsuperscript{599}

In \textit{Technicon Electronics Corp. v. American Home Assurance Co.},\textsuperscript{600} the New York Supreme Court, Appellate Division, reversing a lower court finding of indemnity on the part of the defendant insurer, held that the plaintiff manufacturer's discharge of toxic waste over several years was not a "sudden and accidental event" covered by Technicon's insurance policy.\textsuperscript{601} Therefore, the court determined that the "pollution exclusion" clauses, which restrict policy coverage to "sudden and accidental" hazardous releases, relieved the defendant insurer's from responsibility to defend Technicon against personal injury claims and EPA proceedings and to indemnify in case Technicon lost the personal injury cases.\textsuperscript{602}

In \textit{Powers Chemco Inc. v. Federal Insurance Co.},\textsuperscript{603} the New York

\textsuperscript{594} Id. at 1072, 532 N.Y.S.2d at 352.
\textsuperscript{595} Id. at 1073-74, 532 N.Y.S.2d at 352-53.
\textsuperscript{596} 144 A.D.2d 72, 536 N.Y.S.2d 886 (1989).
\textsuperscript{597} Id. at 75, 536 N.Y.S.2d at 888.
\textsuperscript{598} Id.
\textsuperscript{599} Id. (emphasis added). According to the court, "[h]azardous wastes always hold the 'potential' for harm to humans or the environment." Id. Therefore, under this DEC regulation, every hazardous waste site could pose a "significant threat" and require remediation. Id.
\textsuperscript{600} 141 A.D.2d 124, 533 N.Y.S.2d 91 (1988).
\textsuperscript{601} Id. at 131, 533 N.Y.S.2d at 95 (plaintiff Technicon was insured by defendant; leak occurred over extended period of time, therefore, not "sudden").
\textsuperscript{602} Id.
\textsuperscript{603} 144 A.D.2d 445, 533 N.Y.S.2d 1010 (1988).
Supreme Court, Appellate Division, affirmed summary judgment for the defendant insurance company, holding that the insurance policy’s “pollution exclusion” clause precluded coverage for the costs of removing certain hazardous wastes.604 Since it neither expected nor intended the discharge, the plaintiff argued that the exclusion provision was inapplicable because the pollution was “accidental and sudden”, but the court determined that whether the discharge was unexpected and unintentional or knowing and intentional were relevant factors in determining discharger’s liability.605 The court further stated that the fact that the discharge of hazardous materials was attributable to a prior owner of the property, without the insured’s knowledge and consent, did not render the “pollution exclusion” clause inapplicable.606

In *Colonie Motors Inc. v. Hartford Accident & Indemnity Co.*,607 the New York Supreme Court, Appellate Division, addressing facts similar to *Powers Chemco*, reached a different decision than in *Powers Chemco*. The court in this case held that insurer was obligated to pay for the costs of cleanup because the discharge of oil was “sudden and accidental . . . as construed in the context of the facts” of this case.608 The court explained that the “pollution exclusion” did not apply to costs incurred by an insured in cleaning up waste oil which leaked out of a crack in an underground piping unit.609 The court based its ruling on a determination that the insured did not know of the crack or discharge and that the insured could not have discovered the problem by routine maintenance or inspection procedures.610

**PETROLEUM**

In *Consolidated Edison Co. of New York, Inc. v. Department of Environmental Conservation*,611 the Court of Appeals of New York held

604. *Id.* at 447, 533 N.Y.S.2d at 1011 (summary judgment granted in full; lower court granted only partial summary judgment).

605. *Id.* (plaintiff admitted to discharging toxic waste over long period of time, therefore, pollution exclusion clause applied).

606. *Id.*


608. *Id.* at 183, 538 N.Y.S.2d at 632 (court recognized that “sudden and accidental” must be construed as whole in context of particular facts and without undue reliance on individual definitions of either word).

609. *Id.*

610. *Id.*

611. 71 N.Y.2d 186, 519 N.E.2d 320, 524 N.Y.S.2d 409 (1988) (plaintiff Consolidated Edison sued DEC claiming that portions of DEC’s new bulk storage code which required additional safeguards were null because they were superseded by statutes).
that statutes regulating petroleum bulk storage facilities did not preempt DEC's authority to regulate the storage of pollution-causing liquids and gases. According to the court, the statutes at issue were not in conflict with each other, and could operate together in harmony with DEC's broad power to regulate bulk storage of petroleum by promulgating new storage codes.

WETLANDS

In Wedinger v. Goldberger, the Court of Appeals of New York affirmed a lower court's holding that the failure of DEC to designate properties as freshwater wetlands on a map did not exempt the properties from DEC jurisdiction and regulation. The court also ruled the landowner's claims of de facto taking were premature because designating the property as wetlands did not bar development of the property outright, but only required the developer to obtain a permit.

PESTICIDES

In New York v. Abalene Pest Control Co., New York's first felony conviction for the unlawful disposal of pesticides under state law, a Saratoga judge sentenced the former manager of a New York pest control firm to one year in jail.

In New York v. Blank, a related suit involving Abalene Pest Control Co., the state filed suit under CERCLA to compel an investigation, feasibility study, and cleanup of Abalene's Moreau site.

NORTH CAROLINA

RECENT DEVELOPMENTS

In 1989, the North Carolina General Assembly enacted the

612. Id. at 196, 519 N.E.2d at 325, 524 N.Y.S.2d at 414.
613. Id. (statutes at issue: Oil Spill Prevention, Control and Compensation Act of 1977 and 1983 Control of Bulk Storage of Petroleum Act).
615. Id. at 438, 522 N.E.2d at 28, 527 N.Y.S.2d at 183.
616. Id. at 440-41, 522 N.E.2d at 29-30, 527 N.Y.S.2d at 184-85.
618. Id.
620. Id.
North Carolina Waste Management Commission Act of 1989 which establishes the framework for a regional approach to hazardous waste management.621 With the passage of this act, the legislature repealed its ban on hazardous waste disposal within the state's borders.622 The repeal was part of an effort to convince South Carolina to lift its prohibition on hazardous waste from North Carolina.623

During the summer of 1989, a complicated EPA hearing was held to determine the validity of a 1987 North Carolina water quality law that blocked the siting of a GSX waste treatment facility in the state.624 The EPA called the hearing to assess whether the North Carolina water quality law was overly restrictive and in violation of the Resource Conservation and Recovery Act and the Commerce Clause of the United States Constitution.625 It was alleged by EPA, GSX Chemical Services Inc., and Hazardous Waste Treatment Council, that the water quality law was designed to prevent waste treatment facilities from locating within the state, rather than to protect public health and welfare.626

OHIO

SOLID AND HAZARDOUS WASTE

In Ohio v. Stirnkorb627, the Clermont County Court of Common Pleas sentenced the operations manager of an Ohio hazardous waste facility to one year in jail and fined him $30,000 for allowing contaminated rainwater to be released from the facility.628 The operations manager was convicted on eight felony counts and two misdemeanor counts for violating Ohio’s hazard-

622. Id.
623. Id.
624. EPA Extends North Carolina RCRA Hearing; Will Resume in July, Last for 10 More Days, 20 Env’t Rep. (BNA) 322 (June 9, 1989). “The [contested] law prohibits commercial hazardous waste facilities from discharging waste water to surface water that is used as a drinking water supply, unless there is 1,000-to-1 dilution at the point of discharge.” Id.
625. Id. (citing 42 U.S.C. §§ 6901-6992k (1976) and U.S. CONST. art. 1, § 8, cl. 3).
626. Id.
628. Id. The operations manager was also sentenced to five years probation with an opportunity to reduce his jail term by serving up to 1,500 hours of community service with a local emergency planning commission. Id.
OUS WASTE DISPOSAL\textsuperscript{629} AND WATER POLLUTION\textsuperscript{630} STATUTES.\textsuperscript{631}

OKLAHOMA

RECENT DEVELOPMENTS

On May 8, 1989, Governor Bellmon signed a bill (HB 1532) which created a scrap tire superfund.\textsuperscript{632} Beginning July 1, 1989 the bill requires that all tire sales facilities in the state assess a $1 waste tire recycling fee on the sale of new and used tires for use on automobiles and light trucks weighing less than 10,000 pounds.\textsuperscript{633} These sales facilities must then remit 97.5\% of the $1 fees to the state.\textsuperscript{634} Accordingly, a waste tire recycling facility will be eligible to receive up to $.50 per tire per year from the fund, provided that the waste tire facility takes at least 25\% of the tires it processes from tire dumps on the Oklahoma Department of Health's priority enforcement list.\textsuperscript{635}

In an effort to protect Oklahoma's ground waters, Governor Bellmon signed a bill (HB 1316) on April 24, 1989 that created a $10 million environmental indemnity fund for underground tank owners.\textsuperscript{636} The fund will be generated through a tax on fuel distributors under a new law, called the Oklahoma Underground Storage Tank Regulation Act.\textsuperscript{637} Accordingly, owners of leaking underground petroleum tanks will be liable for the first $10,000 of costs associated with leakage, after which the fund will reimburse tank owners $1 million per leakage occurrence, provided that the tank is used for petroleum marketing purposes.\textsuperscript{638}

\begin{itemize}
  \item \textsuperscript{631} No. 85-CR-52408, slip op. (Ohio Ct. Comm. Pleas, Clermont County, July 19, 1989).
  \item \textsuperscript{632} \textit{Oklahoma Scrap Tire Superfund Created}, 20 Env't Rep. (BNA) 165 (Mar. 5, 1989).
  \item \textsuperscript{633} \textit{Id.}
  \item \textsuperscript{634} \textit{Id.}
  \item \textsuperscript{635} \textit{Id.}
  \item \textsuperscript{636} \textit{Oklahoma—$10 Million Underground Tank Indemnity Fund Will Use Money from Tax on Fuel Distributors}, 20 Env't Rep. (BNA) 22 (Mar. 5, 1989).
  \item \textsuperscript{637} \textit{Id.}
  \item \textsuperscript{638} \textit{Id.}
\end{itemize}
OREGON

RECENT DEVELOPMENTS

On September 9, 1988 the Oregon Environmental Quality Commission (the Commission) adopted the "background level" standard for hazardous waste cleanup pursuant to the state's superfund law.639 A background level is the level of hazardous emissions that occurs naturally, prior to any releases at a site.640 If the background level is not attainable, the Commission may require the cleanup of a hazardous site to the lowest feasible level necessary to promote public health and safety.641

On November 4, 1988 the Oregon Environmental Quality Commission adopted a temporary rule which prohibited the disposal in Oregon of waste which was classified as hazardous by its state of origin.642 The rule was aimed at waste which was deemed hazardous in California but which would not have been classified as hazardous in Oregon.643 In addition, the rule authorized the Commission to begin permanent rule-making to prohibit another state's hazardous waste from being disposed of in solid waste facilities in Oregon.644

AIR POLLUTION

In Forelaws on Board v. Energy Facility Siting Council,645 the Supreme Court of Oregon held that respondent Energy Facility Siting Council (EFSC) was not required to issue a permit license to intervenor Teledyne Wah Chang Albany (TWCA) for the storage of zirconium sludge in holding ponds at its manufacturing facility in Albany, Oregon.646 Because the levels of radiation found in the zirconium sludge were properly deemed by the EFSC not to fall within the definition of "radioactive waste" found in subsection 469.300(17)(a) of the Oregon Revised Statutes,647 the EFSC was not compelled to issue a license for the

640. Id.
641. Id.
643. Id.
644. Id.
646. Id. at 207, 760 P.2d at 215.
storage of intervenor’s industrial waste.648

In Cusma v. City of Oregon City,649 the Oregon Court of Appeals affirmed an order of the Land Use Board of Appeals requiring the petitioner, an executive officer of a waste transfer facility, to comply with local government permit restrictions on the amount of solid waste to be processed at the facility on a daily basis.650 The court determined that subsection 459.095(1) of the Oregon Revised Statutes651 did not permit the petitioner to adopt independent resolutions on the amount of solid waste to be processed at the facility.652 The court determined that while subsection 459.095(1) prevented a local government from adopting regulations in conflict with solid waste management programs implemented by metropolitan service districts and approved by the Department of Environmental Quality (DEQ), petitioners’ waste management plan contained no provisions establishing the amount of solid waste to be processed daily at the facility.653 Thus, the court concluded that the local government’s regulations were binding on the petitioner.654

**FORESTRY**

In the area of forestry, there have been two related United States Supreme Court decisions in 1989. In Robertson v. Methow Valley Citizens Council,655 the Court held that a United States Forest Service impact statement was in compliance with standards established by the National Environmental Policy Act (NEPA).656 Petitioner argued that Methow Valley Citizens Council’s (Methow Valley) permit, authorizing the construction of a ski resort on federal land, should have been held invalid based upon the lack of detailed measures employed to mitigate harm to the local environment as a result of the proposed ski resort construction.657 The Court found that the Council on Environmental Quality (CEQ), which was authorized by presidential order to implement regulations under NEPA, only required that such environmental impact

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648. *Forelaws*, 306 Or. at 210, 760 P.2d at 217.
650. *Id.* at 3, 757 P.2d at 434.
653. *Id.* at 5-6, 757 P.2d at 436.
654. *Id.*
656. 109 S. Ct. at 1838.
657. 109 S. Ct. at 1843.
statements focus on reasonably foreseeable impacts on the environment due to the proposed construction, rather than a more detailed explanation of the available remedial actions.658

In Marsh v. Oregon Natural Resources Council,659 the Supreme Court held that the Army Corps of Engineers (Corps) decision not to file a supplemental environmental impact statement relating to the construction of a dam was not violative of standards established under the National Environmental Policy Act (NEPA).660 Applying the arbitrary and capricious standard of review found in section 10(e) of the Administrative Procedure Act (APA),661 the Court found that the Corps had conducted a sufficient evaluation of the potential harmful effects to the local environment downstream from the construction site.662

Several forestry issues were resolved in 1000 Friends of Oregon v. Land Conservation & Development Comm'n, Lane County.663 The case arose over a dispute as to the validity of a proposed county comprehensive land use plan which allowed the building of residences on protected forest land.664 The court first held that "necessary and accessory" building was not a legitimate reason for permitting the county to construct housing on forest lands.665 The court noted that the aforementioned purpose was contrary to Oregon's Statewide Planning Goal 4, which mandated that forest land be conserved for forest use.666 Second, the court held that the use of property within Goal 3 or Goal 4 zones had to strictly adhere to that particular Goal in which zone the land was located.667 The court stated that there was no doubt that the Land Conservation and Development Commission (LCDC) could create a mixed zone if the land and property uses were closely interrelated, but individual parcels could not meet one Goal by merely having a similar use in another Goal.668 Third, the court deter-

658. 109 S. Ct. at 1848-49 (emphasis added).
660. 109 S. Ct. at 1865.
661. 109 S. Ct. at 1860, n. 21.
662. 109 S. Ct. at 1863-64.
663. 305 Or. 384, 752 P.2d 271 (1988).
664. Id. at 386, 752 P.2d at 273.
665. Id. at 387-97, 752 P.2d at 274-80.
666. Id.
667. Goal zones are designated areas of land zoned according to the Oregon Statewide Planning Goal in an attempt to preserve certain types of land, e.g., forest land in Goal 4 and agricultural land in Goal 3. See id. at 386, 752 P.2d at 273.
668. Id. at 387-402, 752 P.2d at 280-82.
mined that the substantial evidence test was proper for review of the LCDC's decision.\textsuperscript{669}

**PENNSYLVANIA**

**RECENT DEVELOPMENTS**

On July 28, 1988, the Municipal Waste Planning, Recycling and Waste Reduction Act (Act)\textsuperscript{670} was approved to help the state meet the increasingly severe landfill problems. The Act establishes the framework for municipalities to create new disposal and recycling programs and to enforce those programs by levying penalties for non-compliance.\textsuperscript{671}

On October 18, 1988, Governor Casey signed the Hazardous Sites Cleanup Act.\textsuperscript{672} This law is designed to supplement the federal superfund act, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).\textsuperscript{673} The Hazardous Sites Cleanup Act will enable Pennsylvania to cleanup sites not qualifying for aid under CERCLA. Much of the funding for the state superfund is procured through the state's mill capital stock and franchise tax.\textsuperscript{674}

In 1989, state regulations had been proposed to cut the volatility rate of gasoline below Environmental Protection Agency's (EPA) standards.\textsuperscript{675} Both Department of Environmental Resources (DER) and Governor Casey felt that EPA's efforts at reducing pollution due to butane emissions from cars were inadequate.

**AIR POLLUTION**

In *United States v. Wheeling-Pittsburgh Steel Corp.*,\textsuperscript{676} (*Wheeling-Pitt II*), the United States Court of Appeals for the Third Circuit reversed a district court decision allowing an amendment to a

\textsuperscript{669} Id. at 402-07, 752 P.2d at 282-85. Additionally, attorney's fees were denied in light of the Administration Procedure Act (OR. REV. STAT. § 183.025-725, 183.497(1), 197.005, 197.040, 197.320, 197.650 (1987)). *Id.* In doing so, the court found that using tax lots to determine minimum farming lot sizes failed to meet the substantial evidence test.

\textsuperscript{670} 53 PA. CONS. STAT. § 4000.101 (1988).

\textsuperscript{671} *Id.*

\textsuperscript{672} 35 PA. CONS. STAT. § 6020.101 (1988).


\textsuperscript{674} *Id.*

\textsuperscript{675} *Pennsylvania Asks EPA to Consider Stricter Rule on Gasoline Volatility*, 20 Env't Rep. (BNA) 15-16 (May 5, 1989).

\textsuperscript{676} 866 F.2d 57 (3d Cir. 1988).
consent decree. Prior to its amendment, the consent decree had required Wheeling-Pittsburgh Steel Corporation (Wheeling-Pitt) to install a sulphur dioxide emission control system in its coke plant.\textsuperscript{677} The district court allowed the consent decree to be amended based on the finding that a "grievous wrong" would have been incurred by Wheeling-Pitt and the surrounding community if the Wheeling-Pitt plant were not allowed to start-up prior to installation of the emission control system.\textsuperscript{678}

The Third Circuit held that the district court abused its discretion when amending the consent decree because the district court failed to satisfy the standard set forth in an earlier Third Circuit decision, \textit{United States v. Wheeling-Pittsburgh Steel Corp.} \textsuperscript{679} \textit{(Wheeling-Pitt I)}. \textit{Wheeling-Pitt I} placed "severe restrictions on the ability of the district court to amend consent decrees."\textsuperscript{680} Using the standard set forth in \textit{Wheeling-Pitt I}, the Third Circuit applied a balancing test to determine that the economic interests of both Wheeling-Pitt and the Commonwealth of Pennsylvania did not outweigh the compelling public interest promoted by the federal Clean Air Act.\textsuperscript{681}

In \textit{Concerned Citizens of Bridesburg v. Philadelphia Water Dep't.},\textsuperscript{682} the United States Court of Appeals for the Third Circuit affirmed a district court judgment holding the city of Philadelphia in contempt of court.\textsuperscript{683} The city was held in contempt of court because it repeatedly violated an injunction\textsuperscript{684} issued by the district court pursuant to the Pennsylvania State Implementation Plan.\textsuperscript{685} The injunction was issued against the city for its operation of the Northeast Water Pollution Control Plant, which was held to be in violation of odor regulations.\textsuperscript{686} In upholding the district court's

\textsuperscript{677} Id. at 62.
\textsuperscript{678} Id. at 60.
\textsuperscript{679} Id. (citing \textit{Wheeling-Pitt I}, 818 F.2d 1077 (3d Cir. 1987)).
\textsuperscript{680} Id.
\textsuperscript{681} Id. at 62. The court held that the state's economic interest in keeping the defendants' plant open despite its failure to comply with air quality standards established by the Clean Air Act (CAA) was superseded by the more compelling public interest of removing pollutants from the air. \textit{Id}. Additionally, the court found the arguments by Sharon, the company which purchased Wheeling-Pitt, that Sharon had no control over the allegedly unforeseen situation, to be unconvincing since Sharon had advance knowledge of Wheeling-Pitt's failure to comply. \textit{Id}.
\textsuperscript{682} 843 F.2d 679 (3d Cir. 1988).
\textsuperscript{683} Id. at 680-81.
\textsuperscript{684} Id. at 680-82.
\textsuperscript{685} 40 C.F.R. § 52.2300 (1987).
\textsuperscript{686} \textit{Philadelphia Water Dep't.}, 843 F.2d at 680.
In *Eureka Stone Quarry, Inc. v. Commonwealth*, the Commonwealth Court of Pennsylvania affirmed a trial court order which found Eureka Stone Quarry (Eureka) guilty on three charges of violating air pollution standards. Summary citations were issued against Eureka by DER for violations of section 8 of the Air Pollution Control Act and for violations of title 25, sections 123.1, 123.2, and 127.25 of the Pennsylvania Code. These statutory provisions prohibit the release of visible contaminants, like dust, into the air. Evidence presented by DER proved that Eureka allowed dust to escape beyond its property and that Eureka's water suppression system, which could have mitigated the dust problem, was partially operational, thus putting Eureka in violation of the statutory air pollution standards. In particular, the court interpreted title 25, section 123.2 as regulating both active and inactive operations, thereby making Eureka's stockpiling of refuse a violation of section 123.2 because wind was lifting dust off the refuse piles into the air. The court also found that the verbal communication of pending prosecution, coupled with a notification letter, was sufficient notice of pending litigation, and therefore, that Eureka was not denied procedural due process.

**WATER POLLUTION**

In *Proffitt v. Rohm & Haas*, the Third Circuit reversed a district court holding that an EPA stay from enforcing the Clean Water Act could indefinitely bar a private citizen's action against a polluter. In 1976, Rohm & Haas and EPA entered into a stipulated agreement which set limitations on the amount

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687. *Id.* at 682. Also, since the injunction was coercive, because it was designed to prod the city into compliance, no proof of actual loss by the citizens was required to support the injunction. *Id.*


689. *Id.* at 301-2, 544 A.2d at 1130.


693. *Id.* at 305, 544 A.2d at 1131.

694. *Id.*

695. 850 F.2d 1007 (3d Cir. 1988).


697. *Proffitt*, 850 F.2d at 1013-15. According to the court, in case like this a "citizen's suit is 'interstitial' rather than 'intrusive.'" *Id.*
of pollutants Rohm & Haas was permitted to discharge into neighboring navigable waters.\textsuperscript{698} EPA granted a stay of enforcement provided that certain conditions, including a final administrative decision concerning the limitations on the amount of discharged pollutants, were satisfied.\textsuperscript{699} In 1978, a modified draft permit was granted to Rohm & Haas, but it was never effectuated.\textsuperscript{700} The court determined that public notice was required for such a modified permit because the modification had the effect of deleting certain routine substantive requirements.\textsuperscript{701} Assuming, \textit{arguendo}, that the 1978 permit was valid, the Third Circuit found that the stay evaporated because none of the conditions, particularly the drafting of the final administrative decision, materialized.\textsuperscript{702} Therefore, a private citizen, who satisfied the criteria of Chapter 33, section 1365 of the United States Code, was not barred from initiating a suit for enforcement of the Clean Water Act.\textsuperscript{703}

An environmental issue concerning statutory construction was resolved in \textit{Eckert v. Pierotti}.\textsuperscript{704} The Commonwealth Court of Pennsylvania held that section 1502 of the Second Class Township Act\textsuperscript{705} was repealed insofar as it was inconsistent with the Pennsylvania Sewage Facilities Act.\textsuperscript{706} The plaintiffs, property owners, argued that the Second Class Township Act granted them the power to block proposed construction of a waste water collection facility by filing a protest signed by a sixty percent minimum of the town.\textsuperscript{707} The court determined this to be in conflict with the General Assembly's intent to provide a comprehensive program for water management through the Sewage Facilities Act, thereby repealing the conflicting sections of the Second

\begin{itemize}
\item \textsuperscript{698} \textit{Id.} at 1109.
\item \textsuperscript{699} \textit{Id.} at 1010.
\item \textsuperscript{700} \textit{Id.}
\item \textsuperscript{701} \textit{Id.} at 1012. The court determined that public notice was necessary: 1) as a means by which the public would be provided with the necessary information that would enable them to organize a hearing on the issue of Rohm & Haas' permit amendments; and, 2) to provide the public with notice of those amendments which deleted substantive requirements which prohibited excessive dumping by Rohm & Haas of chemicals in violation of the Clean Water Act (CWA). \textit{Id.} at 1012-13.
\item \textsuperscript{702} \textit{Id.}
\item \textsuperscript{703} \textit{Id.}
\item \textsuperscript{704} 123 Pa. Commw. 8, 553 A.2d 114 (1989).
\item \textsuperscript{705} 53 Pa. CONS. STAT. ANN. § 66502 (Purdon Supp. 1989).
\item \textsuperscript{706} 35 Pa. CONS. STAT. ANN. § 750 (Purdon Supp. 1989).
\item \textsuperscript{707} \textit{Eckert}, 553 A.2d at 116-17.
\end{itemize}
Class Township Act and barring the plaintiffs' claim.\textsuperscript{708} In \textit{United States v. Philadelphia},\textsuperscript{709} the City of Philadelphia was sued, by EPA for violations of the Clean Air Act. This suit is part of EPA's continuing effort to bring all municipalities into compliance with the Clean Air Act.\textsuperscript{710} It is the fourth such case against the city in the past ten years, and it alleges various violations at a southwest treatment plant.\textsuperscript{711}

\textbf{SOLID AND HAZARDOUS WASTE}

In \textit{Versatile Metals, Inc. v. Union Corp.},\textsuperscript{712} the Federal District Court for the Eastern District of Pennsylvania held that the vendor-lessee and purchaser-lessee of a facility where a polychlorinated biphenyl (PCB) release occurred, were jointly and severally liable for the subsequent contamination to the land adjoining the facility.\textsuperscript{713} The defendant, Union Corporation, operated a copper oxide production plant which leaked PCBs.\textsuperscript{714} In 1984, the plaintiff purchased the property and continued the copper oxide operations at the facility.\textsuperscript{715} Soon thereafter, the contamination was discovered, and the defendants undertook cleanup procedures pursuant to CERCLA.\textsuperscript{716} Since the court was unable to distinguish between the damage which was caused prior to the sale of the facility from that damage which occurred subsequent to the sale, both parties were found to be jointly and severally liable.\textsuperscript{717} However, since the defendant could not prove that its remedial action was consistent with the National Contingency Plan,\textsuperscript{718} its counterclaim under CERCLA for contribution was disallowed.\textsuperscript{719}

\begin{itemize}
\item 708. \textit{Id.} at 117.
\item 710. \textit{Id.}
\item 711. \textit{Id.}
\item 713. \textit{Id.} at 1571.
\item 714. \textit{Id.}
\item 715. \textit{Id.} at 1570.
\item 717. \textit{Id.} at 1570-71.
\item 718. \textit{See id.} at 1574-82. In order for a private party to recover under CERCLA, the party must incur cleanup expenses consistent with the National Contingency Plan (NCP). \textit{Id.} at 1574. The NCP was originally passed in 1982 to assist in the determination of which hazardous wastes and which hazardous waste sites could be cleaned up using federal funds. \textit{Id.}
\item 719. \textit{Id.} at 1582. Additionally, the court entered a judgment in favor of the defendant for over one million dollars on its state common law waste claim. \textit{Id.} The court recognized that the plaintiff failed to return the premises in "substan-
In *Piccolini v. Simon's Wrecking*, the Federal District Court for the Middle District of Pennsylvania addressed federal and state environmental claims concerning the contamination of plaintiffs' property by the storage of hazardous waste at defendants' landfill. The plaintiffs claimed that the defendants' storage of hazardous wastes at the landfill violated provisions found in CERCLA, resulting in both contamination to their land and diminution in its value. The court found that while subsection 101(23) of CERCLA entitled the plaintiffs to recover "response costs from the defendants for expenses incurred in cleaning up their land," they were not entitled to be compensated for the diminution in the value of their land under CERCLA. The court denied the defendants' motion to dismiss the plaintiffs' pendant state claims of strict liability, negligence, and nuisance, holding they had been properly pleaded and were within the jurisdiction of the court to hear.

In *Western Pennsylvania Water Co. v. DER*, the Commonwealth Court of Pennsylvania upheld an order issued by the Department of Environmental Resources (DER) to the plaintiff. The plaintiff obtained a permanent easement across private property for the purpose of installing pipes to extend its distribution system. During excavation, an abandoned oil well was encountered, and oil began to contaminate the surrounding soil. DER ordered the plaintiff to correct the condition, and to create a plan to deal with similar problems in the future. The plaintiff attempted to appeal this order to the Environmental Hearing Board (EHB). EHB denied the plaintiff's appeal, and effectively upheld DER's order.

The Commonwealth Court asserted that in order to reverse

tially the same condition", and therefore was liable to pay for the damages caused by its lack of reasonable care. *Id.* at 1569-70.
721. *Id.* at 1065.
722. *Id.* at 1067.
724. *Id.* at 1068.
725. *Id.* at 1069-71 (providing general elements of proof for each cause of action).
727. *Id.* at 909.
728. *Id.* at 906.
729. *Id.*
730. *Id.* at 906-07.
731. *Id.* at 907.
the EHB decision, the court would have to make a determination "that an error of law ha[d] been committed, constitutional rights ha[d] been violated, or that necessary factual findings [w]ere not supported by substantial evidence."732 No such determination was made, and the EHB order was upheld.733 The court also determined that because the plaintiff, as the holder of a permanent easement, was an "occupant" for purposes of the Clean Streams Act,734 the plaintiff was liable for its violations of the Clean Streams Act, and especially for the clean up of the contaminated soil.735

In Fleck v. Timmons,736 the Superior Court of Pennsylvania affirmed a trial court decision holding that the presumption of liability established by the Solid Waste Management Act (SWMA)737 was not available to a private party who instigated a claim.738 The appellants, well owners, argued that the appellees violated SWMA by pumping kerosene into underground storage tanks, thereby contaminating appellants' well.739 The Superior Court concluded that section 661 of SWMA did create a presumption of liability, but that this presumption of liability flowed not to the plaintiffs, but only to the executive branch of government.740 This presumption was limited to the executive branch of government because the executive branch needed the presumption in order to continue to effectively regulate the solid waste situation in the state.741

733. Id. at 909.
735. Western Pa. Water Co., 560 A.2d at 907-08. Additionally, DER's order was determined to be an appropriate exercise of police power. Id.
738. The rebuttable presumption found in section 611 of Pennsylvania's Solid Waste Management Act (SWMA) as stated in plaintiff's jury instructions provides, in part:
that a person or municipality which stores or disposes of hazardous waste shall be liable, without proof of fault, negligence, or causation for all damages, contamination, or pollution within 2,500 feet of the perimeter of the area where hazardous waste activities have been carried out. Such presumption may be overcome by clear and convincing evidence that the person or municipality so charged did not contribute to the damage, contamination, or pollution.
Fleck, 374 Pa. Super. at 422-23, 543 A.2d at 151.
740. Id. at 423, 543 A.2d at 149-50.
741. Id. 543 A.2d at 152 (ultimately, defendant won litigation because plaintiff was unable to prove causation).
In another SWMA case, *Blosenski Disposal Service v. DER*,\(^742\) the Pennsylvania Commonwealth Court affirmed a trial court decision that plaintiff-Blosenski’s depositing of solid waste at his waste transfer station without first obtaining the necessary permits from the Department of Environmental Resources (DER), was a violation of section 610 of SWMA.\(^743\) In so doing, the Commonwealth Court determined that the section 610(4) phrase “2nd unlawful” was a typographical error which did not preclude the plaintiff from liability under the Act on the theory that this was plaintiff’s first offense.\(^744\) Therefore, the court held that “depositing” of solid waste was a punishable offense under SWMA.\(^745\)

In a recent case, *Pennsylvania v. Acculens Inc.*,\(^746\) the defendant pleaded no contest to an allegation that it violated SWMA by dumping waste out of a window into a storm drain. Although this was a relatively minor violation, the state was willing to prosecute the defendant, which may suggest that the state will use SWMA expansively to promote its environmental goals.

**MINING**

In *DER v. Big B Mining Co.*,\(^747\) the Commonwealth Court upheld an Environmental Hearing Board (EHB) order which reversed DER’s denial of an operating permit to Big B Mining Company based on defendant company’s failure to comply with water quality standards limiting the amount of pollutants allowed to be dispersed into a local stream.\(^748\) The court held that EHB had not abused its discretion by employing a balancing test posit-

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\(^743\) Plaintiff was charged with two violations of section 610 of SWMA, which included:

1) violation of subsection 610(2) of SWMA prohibiting the operation of a solid waste processing facility without a DER permit; and,

2) a violation of subsection 610(4) of SWMA prohibiting utilization of the plaintiff’s land as a waste processing area without a permit issued by the DER.

\(^744\) Id. at 320, 543 A.2d at 162. Additionally, the court held that the warrantless entry by a DER agent, who reasonably relied on SWMA, did not violate Blosenski’s fourth amendment rights. Id. The court bolstered its argument by stating that “naked-eye observations”, such as those in this case, are not unconstitutional. Id. at 321-22, 543 A.2d at 162-63.

\(^745\) Id. at 322, 543 A.2d at 164-65.


\(^748\) Id. at 592, 544 A.2d at 1003.
ing Big B Mining's past history of compliance with the state's water quality standards against the theoretical dangers presented by DER.\textsuperscript{749} Because EHB was authorized to substitute the DER's findings with its own interpretation of EHB regulations, the court found that EHB had acted properly in finding that Big B Mining Co. had complied with those provisions found in subsection 95.1(b) of title 25 of the Pennsylvania Code.\textsuperscript{750} The court determined that EHB had properly weighted the "public value" of the defendant company's mining, which included a substantial influx of revenue into the local community against the potential harmful effects to local streams as a result of such mining.\textsuperscript{751} The court found EHB correct in its determination that the benefit to the local community outweighed the resulting harm to the environment.\textsuperscript{752}

In Lucky Strike Coal Co. \textit{v.} DER,\textsuperscript{753} the Commonwealth Court affirmed an EHB determination that Lucky Strike Coal Company (Lucky Strike) was in violation of the Clean Streams Law because Lucky Strike allowed its wastewater to overflow into surface waters.\textsuperscript{754} Lucky Strike unsuccessfully alleged that EHB had abused its discretion by using a "cold record".\textsuperscript{755} The court held that although the EHB members, who found Lucky Strike in violation of the Clean Streams Law, were not present at the hearing, the adjudication was not an abuse of discretion because there was a presumption that the EHB members personally considered the records of the hearing.\textsuperscript{756}

Some Pennsylvania statutes require that in order to appeal a civil penalty assessment, the plaintiff must post a bond equal to the amount of the civil penalty assessment. The constitutionality of this requirement was addressed recently in two cases. In \textit{Tracey}
Mining Co. v. Commonwealth, the court held that the posting of a bond was constitutional. The court noted "that federal courts ha[d] consistently upheld the constitutionality of the bond requirement." An exception to this general rule was created by the Pennsylvania Commonwealth Court in Twelve Vein Coal Co. v. DER. The plaintiff, Twelve Vein Coal Company (Twelve Vein), argued that the bond requirement was unconstitutional because it violated Twelve Vein's right to due process, by requiring pre-payment of money which Twelve Vein claimed not to possess due to poor business. According to Twelve Vein, since it did not have the money with which to post bond, its right to appellate review was being restricted without due process of law. Although the case was remanded for a factual determination concerning Twelve Vein's capacity to post the bond, the court implied that if Twelve Vein's assertion was true, the bond requirement will be deemed unconstitutional with respect to Twelve Vein.

SUPERFUND

The United States Supreme Court, in Pennsylvania v. Union Gas Co., held that CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), created state's liability for damages in a federal court, and that the eleventh amendment of the United States Constitution did not provide immunity to a state in a CERCLA action. EPA declared a Pennsylvania creek contaminated by coal tar to be the nation's first superfund site, and proceeded to clean the creek. After a careful analysis of the Constitution, the Supreme Court reasoned that Congress was authorized to render a state liable when legislating pursuant to the Commerce Clause, regardless of the eleventh amendment grant of state immunity.
On November 8, 1988, Rhode Island voters approved a referendum which authorized $25 million to protect the state’s environment.765 One referendum allows the state to issue up to $10 million in state bonds to protect the watersheds of public drinking water supplies.766 Water suppliers will also match the money generated by the referendum to protect their own watersheds.767

The second referendum allows the state to issue up to $15 million in revenue bonds for waste water treatment programs in Rhode Island.768 The revenues will be used to:

study and run pilot programs on pretreatment, sediment and sludge abatement issues; provide low-interest loans for private entities for sewage and waste water [sic] treatment; provide matching funds and/or grants for municipal waste water [sic] projects; and provide revolving low-interest loans for pretreatment, pretreatment equipment, and facilities, monitoring enforcement and administration and urban runoff programs.769

On June 7, 1988, a bill was signed into law establishing a revolving loan fund to replace federal sewage treatment construction grants.770 The grants are being phased out under the Clean Water Act.771 The bill (H-9551) provides for 1990 and 1992 referendums seeking $80 million in revolving loan funds for upgrading sewage treatment facilities on Pawtuxet River.772

On July 11, 1989, Rhode Island Governor DiPrete signed several environmental bills.773 The Litter Control, Recycling and Hard-to-Dispose-of Materials Act (H-5504 Sub A) is designed to

766. Id.
767. Id.
768. Id.
769. Id. at 1505-06.
772. Loan Fund Issue to Be Placed on Ballot Under Bill Signed Into Law By Governor, 19 Env't Rep. (BNA) 212 (June 10, 1988).
encourage the creation of, and an awareness of the need for, public and private recycling.

A second bill (H-7726) will create a statewide landfill siting process under which officials may condemn land needed for landfill sites.\textsuperscript{774} Under a related bill (H-6289 Sub A), the state may purchase all residential property within 1,000 feet of the state's Central Landfill and make offers on property between 1,000 and 2,000 feet from the landfill.\textsuperscript{775}

Another bill (H-7736 Sub A) authorizes Rhode Island to issue $95 million in bonds, of which $74.5 million will be used to finance state environmental programs.\textsuperscript{776} The monies will fund environmental emergencies and cleanups, the purchase of coastal land and open space areas, and water quality programs.\textsuperscript{777}

The fourth bill (H-6911 Sub A) provides for a 1990 voter referendum regarding whether the state may issue $40 million in bonds to establish a Rhode Island Clean Water Protection Financing Agency.\textsuperscript{778}

A fifth bill (H-5568) increases the statute of limitations for environmental crimes, including the illegal disposal of harmful waste, from three to seven years, and increases the maximum fine for these offenses from $1,000 to $5,000 and five years imprisonment.\textsuperscript{779}

The governor also signed bill H-5044, which imposes criminal penalties for the illegal disposal of infectious and medical waste,\textsuperscript{780} bill H-6554, which prohibits the sale or distribution of any beverage in a metal container that is opened by a detachable metal ring or tab,\textsuperscript{781} and bill S-1272, which prohibits the sale or distribution of food or beverages in a plastic container containing more than one resin, excluding its cap, lid or ring.\textsuperscript{782}

\textbf{WATER POLLUTION}

In \textit{F. Ronci Co. v. Narragansett Bay Water Quality Management}}
District Commission, the Supreme Court of Rhode Island outlined the breadth of the authority of the Narragansett Bay Water Quality Management District Commission (Commission). The court stated that the Commission’s enabling act empowers it to establish toxic discharge limitations and to enjoin or remedy the violation of these limitations. To this end, the Commission may conduct administrative hearings and make findings of fact. If a violator refuses to comply with these toxic discharge limitations, the Commission may institute enforcement proceedings in the Superior Court for Providence County. Although the factual findings established by the administrative hearing are not binding on a trial court during the enforcement proceeding, they are considered presumptively correct.

SOLID AND HAZARDOUS WASTE

In Regan v. Cherry Corp., the United States District Court for the District of Rhode Island invoked tort principles to find a

783. 561 A.2d 874 (R.I. 1989). Both F. Ronci Co. (Ronci), a shoe and belt buckle manufacturer, and the Narragansett Bay Water Quality Management District Commission appealed portions of the Providence County Superior Court’s decision requiring that Ronci construct a pretreatment facility and comply with relevant discharge standards for its metal electroplating process, as ordered by the Commission. Id. at 875-76.

784. Id.


786. 561 A.2d at 879; R.I. GEN. LAWS § 46-25-25(4) (1988). Prior to 1988, it was beyond the scope of the Commission to levy civil fines. 561 A.2d at 879. The case was governed by these earlier rules. In 1988, however, section 46-25-25.4 of the General Laws of Rhode Island was amended so that the Commission was authorized to impose administrative penalties in accordance with chapter 25, title 46 of the General Laws of Rhode Island and article 10.6 of the Commission’s regulations. Id. at 881; 1988 R.I. PUB. LAWS 46 § 1.

787. 561 A.2d at 881.

788. Id.

789. Id. at 879. The Supreme Court of Rhode Island also held that the Commission’s rules were not unconstitutional either on their face or as applied to Ronci. Ronci argued that the use of the words “significant quantities” in a rule that puts specific restrictions on a plant that has “significant quantities of process waste water [sic] from non-electroplating manufacturing operations” was unconstitutionally vague. Id. The court disagreed, holding that the ordinance was sufficient because it was capable of being understood by a person of ordinary intelligence. Id. at 877-78. The court also held that the right to a jury trial attached in a Commission proceeding to impose or enforce civil penalties. Id. at 881-82.

defendant corporation liable for pollution. The corporation argued that the plaintiffs were unable to maintain a trespass action because the plaintiffs did not own the property in question at the time of the alleged dumping. Relying on Restatement Second of Torts Section 161, the court held that a subsequent purchaser of land could maintain such an action.

SOUTH CAROLINA

RECENT DEVELOPMENTS

On June 20, 1989, Governor Campbell signed legislation (H-3326) requiring the development of suitability standards for hazardous waste disposal sites and statements from disposal sites showing that the sites are financially able to carry out their function. The bill also increases waste disposal fees and establishes as law an executive order enacted by Governor Campbell (19 ER 2378) which bans waste from states which do not allow the burial of waste within their own borders.

791. Id.
792. Id.
793. Id. (quoting the Restatement)
[t]he actor's failure to remove from land in the possession of another a structure, chattel, or other thing which he tortiously . . . placed on the land constitutes a continuing trespass for the entire time during which the thing is on the land and . . . confers on the possessor of the land an option to maintain a succession of actions based on a theory of continuing trespass or to treat the continuance of the thing on the land as an aggravation of the original trespass.

RESTATEMENT (SECOND) OF TORTS § 161 comment b (1965). With regard to the transfer of land the Restatement states that:
the rule of continuing trespass stated in Comment b is of particular importance where there has been a transfer of the possession of the land . . . . If the possessor interest in the land has been transferred subsequent to the actor's placing of the thing on the land, the transferee of the land may maintain an action for its continuance there . . . .

RESTATEMENT (SECOND) OF TORTS § 161 comment e (1965).


795. Id. Prior to the enactment of the legislation, North Carolina passed a law that required dilution of all waste sent to North Carolina for disposal; a move described as "a thinly veiled attempt to block waste disposal in its own state." South Carolina Agency Tells EPA It Will Restrict Outside Waste Flow, 19 Env't Rep. (BNA) 268 (June 24, 1988). The Environmental Protection Agency (EPA) failed to prohibit North Carolina from taking such action. Id. On January 18, 1989, Governor Campbell banned the importation of any hazardous waste from states that did not dispose of waste within their own borders. 20 Env't Rep. (BNA) at 479. The order initially banned waste from 32 states. South Carolina Removes Nine More States From Ban List For Hazardous Waste Site, 19 Env't Rep. (BNA) 2527 (Mar. 24, 1989). On March 22, 1989, Governor Campbell agreed to accept up to 850 tons of waste from North Carolina to prevent an "environment-
On July 7, 1989, South Carolina allowed North Carolina to resume exporting waste for burial in South Carolina. A day earlier, Governor Campbell signed an executive order that put a cap on hazardous waste imports and required that waste bound for landfill in Pinewood, South Carolina, be pretreated. North Carolina met the state’s requirements, and the hazardous waste was imported.

WATER POLLUTION

In Midlands Utility Inc. v. South Carolina Department of Health and Environmental Control, the Supreme Court of South Carolina held, inter alia, that liability under the South Carolina Pollution Control Act (Act) did not require showing of environmental harm. The court found that under the Pollution Control Act (identified by the court as the Clear Water Act) a violation of the Act itself or a violation of a Department of Health and Environmental Control (DHEC) permit or order, would result in a civil penalty of up to $10,000 per day of the violation, regardless of the harm done to the environment. The court stated that "[t]he section does not make a showing of harm a prerequisite to liability, and, in [the court’s] opinion, the circuit court erroneously read into Section 48-1-330 of the Code of the Laws of

796. South Carolina To Let North Carolina Ship In Some Hazardous Waste To Avoid 'Crisis', 19 Env’t Rep. (BNA) 2551 (Mar. 31, 1989). The reprieve from the ban was to last only ten days unless the North Carolina legislature passed a bill to renew efforts to create an intrastate hazardous waste site. Id.

797. Id.

798. Id. Florida also met the requirements of the order, and was allowed to resume waste disposal at the South Carolina site. Id.

799. 298 S.C. 66, 378 S.E.2d 256 (1989). In 1982 the Department of Health and Environmental Control (DHEC) issued a ruling accusing Midlands Utility Inc. (Midlands) of violating DHEC regulations, permits, orders, and the Pollution Control Act. Following an administrative adjudicatory hearing, both Midlands and DHEC appealed to the full Board of the Department of Health and Environmental Control (Board), which ordered Midlands to take corrective actions and assessed civil penalties for violations totaling $38,200. Midlands then appealed to the circuit court which reversed the decision of the Board in its entirety. Id. at 67, 378 S.E.2d at 257.

800. The court also held that discharge monitoring reports were admissible as an admission of a party and that the circuit court erred in setting aside the civil penalties assessed against Midlands by the Board. Id. at 68, 378 S.E.2d at 257-58.


802. 298 S.C. at 67, 378 S.E.2d at 258-59.

803. Id.

South Carolina a condition which [was] not there.  

SOUTH DAKOTA  
RECENT DEVELOPMENTS  

On March 15, 1989, Governor Mickelson signed into law the South Dakota Centennial Environmental Protection Act of 1989 (Act). The Act requires testing of all newly-placed privately owned ground wells, and provides for wellhead protection programs and groundwater research. The Act also provides for a “toxic amnesty day” during which South Dakotans can dispose of toxic household waste at designated regional centers throughout the state.

South Dakota also introduced a new Solid Waste Disposal Act in 1989 (Disposal Act). The Disposal Act established the following hierarchy for solid waste management:

1. Volume reduction at the source;  
2. Recycling and reuse;  
3. Use for energy production, if appropriate; and,  
4. Disposal in landfills or combustion for volume reduction.

Those persons operating a solid waste disposal facility in South Dakota will now be required to: 1) obtain operating permits; and, 2) install on-site groundwater monitoring systems.

Any person violating any of the provisions of this chapter, or any rule or regulation or order of the Department, shall be subject to a civil penalty not to exceed ten thousand dollars per day of such violation.

Id.  

807. Id. Revenue for the five-year study would come from registration fees collected from the state’s pesticide, fertilizer, petroleum, and gold mining industries. Id.  
808. Id.  
810. Id. § 34A-6-1.2. In an effort to reduce the total load upon existing and future landfill sites, landfill disposal is listed last.  
811. See S.D. CODIFIED LAWS ANN. § 34-A-6-1.4 (1989). Agricultural operations are excepted under this section, to the extent that such operations are confined to “normal farming” and do not “create a nuisance” or “unlawfully pollute ground or surface water.” Id. The Solid Waste Disposal Act gives South Dakota’s board of Minerals and Environment (Board) the responsibility for adopting a statewide comprehensive solid waste disposal plan. The Board’s plan will
To further ensure that South Dakota's landfills will be operated properly, liability for all deleterious effects that solid waste disposal may have will rest in perpetuity with both waste generators and landfill owners and operators.\textsuperscript{812} The Disposal Act mandates that landfill owners provide financial assurance that their landfill sites will remain solvent, at least to the extent that the owners can afford to remain in compliance for not only the site's lifetime, but also for the ensuing thirty years after closure.

In 1988, South Dakota created a state superfund by passing the Regulated Substances Discharge Act (Discharge Act).\textsuperscript{813} The fund's sources, according to the statute, include:

1) Contributions from the petroleum release compensation fund;
2) Contributions from the temporary pesticide registration fund;
3) Monies taken directly from the state's general fund;
4) All monies recovered from statutory violators, excepting criminal fines and penalties;
5) Interest; and,
6) Gifts, grants and reimbursements.\textsuperscript{814}

The Discharge Act authorizes the Secretary of the Department of Water and Natural Resources (the Department) to use the fund in the event that a responsible party either cannot be identified or refuses to undertake immediate remedial clean up efforts.\textsuperscript{815} If the Department incurs any corrective action costs, the Department can file a recovery action against the responsible parties in circuit court.

\textit{AIR POLLUTION}

In \textit{In re Air Quality Construction Permit},\textsuperscript{816} the Supreme Court of South Dakota held that a sand and gravel quarry had the right to cover a fifteen-year period from the effective date of the Disposal Act, and will be comprehensively updated no later than the Disposal Act's tenth anniversary.\textit{Id.}

\textsuperscript{812} \textit{Id.} \S 34A-6-1.9. In order to trace liability to an out-of-state generator, the Board has the discretion to order landfill owners or operators to document solid waste sources.\textit{Id.}

\textsuperscript{813} \textit{Id.} \S\S 34A-12-1 to 34A-12-17 (1988).

\textsuperscript{814} \textit{Id.} \S\S 34A-12-3, 34A-12-9.

\textsuperscript{815} \textit{Id.} \S 34A-12-4. If necessary, the filing of a lien against the property of the responsible party is allowed under the provisions of the Discharge Act.\textit{Id.} \S 34A-12-19.

\textsuperscript{816} 441 N.W. 2d 927 (1989).
open for business because the administrative process which controlled the issuance of air quality-related construction permits was not arbitrary, capricious or clearly erroneous.\textsuperscript{817}

The South Dakota Board of Minerals and Environment (Board) had issued a construction permit to Fisher Sand and Gravel for quarry construction. The permit’s issuance was challenged on the grounds that the sand and gravel company’s evidence concerning anticipated air pollution contribution, due to the quarry’s operation, was so deficient that the Board’s decision must have been arbitrary, capricious, and clearly erroneous.\textsuperscript{818}

The Court explained that a proposed business, such as the quarry, first had to secure an air quality construction permit.\textsuperscript{819} Next, the quarry was required to apply for an operations permit.\textsuperscript{820} However, under South Dakota’s administrative rules regarding air pollution standards, the two application processes could in effect be combined. The quarry could operate under the construction permit and create an emissions database upon which a final determination could be made as to whether an air quality operations permit would be granted.\textsuperscript{821} Citing the “unique nature” of the permit application process, the court held that any complaints regarding the quarry’s application were premature, and that the evidence offered in support of the construction permit was sufficient.\textsuperscript{822} With such sufficient evidence, the court found that the Board’s decision was not arbitrary, capricious, or clearly erroneous.\textsuperscript{823}

\textsc{Water Pollution}

In \textit{Blue Fox Barr, Inc. v. City of Yankton},\textsuperscript{824} the Supreme Court of South Dakota held that a municipality was liable neither in tort nor in contract to a sewer customer whose motel sustained damage due to a sewer back-up.\textsuperscript{825}

During the late 1970’s and early 1980’s, the defendant, Yankton, South Dakota, had improved its sewage handling facilities by

\textsuperscript{817} Id. at 927.
\textsuperscript{818} Id. “The [quarry] business would involve crushing of mined rock, which gave rise to emission of [particulate] air pollutants.” Id.
\textsuperscript{819} Id. at 928.
\textsuperscript{820} Id.
\textsuperscript{821} Id. at 928.
\textsuperscript{822} Id.
\textsuperscript{823} Id.
\textsuperscript{824} 424 N.W.2d 915 (1988).
\textsuperscript{825} Id. at 917.
installing a lift station, complete with automatic monitoring and circuit breaker equipment. At the same time, numerous customers outside the city limits, including the plaintiff-corporation's motel, hooked up to Yankton's utilities system. In September of 1984, the motel's basement was flooded by a sewer backup. Alleging causes of action in negligence, strict liability, and breach of contract, the corporate owner of the motel filed suit against the city of Yankton. Yankton responded by filing a summary judgment motion, based upon the doctrine of sovereign immunity. The trial court denied Yankton's motion for summary judgment and submitted the case to a jury, which found for the city. Upon appeal, the jury verdict was upheld.

The court first ruled that the doctrine of sovereign immunity was inapplicable to the city of Yankton because Yankton, by constructing and maintaining the sewer system, was acting in a corporate or proprietary function, and was therefore liable for torts in the same manner as any other corporation or individual. The court then held that the city of Yankton could not have entered into a contract with the motel, because the statute allowing the city to provide sewer service to the motel, as a non-resident individual or corporation, clearly provided that such service would constitute a privilege, and not an outright contractual arrangement. Lastly, the court dismissed the motel's allegations that the city was strictly liable in tort for the damages caused by

826. Id.
827. Id.
828. Id.
829. Id.
830. Id. at 917-18.
831. The statute upon which the court based its reasoning was section 9-48-32 of the South Dakota Codified Laws Annotated. The statute states that:
A municipality wherein sewage treatment or septic plant is maintained shall have the power to contract for the privilege of connecting to said plant for the purpose of treating or disposing of private sewage or industrial waste originating within the municipality or within one mile of the corporate limits, provided said plant has the capacity over the requirements of the municipality for handling such sewage or industrial waste.
Id. at 919 (quoting S.D. CODIFIED LAWS ANN. § 9-48-32).
832. Id.
The "power to contract" language in SDCL 9-48-32 is clearly qualified by the phrase which immediately follows, "for the privilege of connecting." This language implies that the only contractual right that could be granted to the [motel] [was] the "benefit" of connecting to the sewer line.
Id.
the sewer back-up because to entertain such an allegation would "place such an unreasonable burden upon the city that its author-
ities would hesitate to give the city the benefits of a [sewer] system."833

SOLID AND HAZARDOUS WASTE

In Blue Legs v. U.S. Bureau of Indian Affairs,834 the United States Court of Appeals for the Eighth Circuit held that neither sover-
eignty accorded to native American tribes nor government agency status of the Bureau of Indian Affairs (BIA) or the Indian Health Service (IHS) could bar prosecution for violations of the Re-
source Conservation and Recovery Act (RCRA).835 Two Oglala Sioux tribe members filed suit against the Environmental Protec-
tion Agency (EPA), and the Oglala Tribe, alleging that dumpsites on the Pine Ridge Reservation were in violation of federal envi-
ronmental laws.836 The Oglala Tribe stated that because the tribe members had not exhausted tribal court procedures, the tribe members' case lacked ripeness.837 The BIA and IHS in turn ar-
ged that RCRA did not obligate them to undertake any financial responsibility for remedial cleanup efforts.838

The court found that the Oglala Tribe's limited powers of tribal sovereignty did not bar the reach of federal environmental law.839 The court also held that the BIA and IHS agencies also fell under RCRA's ambit, and were liable to the plaintiffs because of the Congressional intent behind RCRA.840

833. Id. at 920.
834. 867 F.2d 1094 (8th Cir. 1989).
835. Id. at 1095. The court held that the Oglala Sioux tribe and the gov-
ernment agencies charged with administering their reservation should share landfill clean up responsibility. Id.
836. Id. The complaint specifically mentioned fourteen garbage dumps on
the reservation in violation of RCRA. The sites were located close to communi-
ties, and were contaminating ground water. Id.
837. Id. at 1097. The tribe argued that "respect for tribal self-government require[d] that the plaintiffs initially bring suit in tribal courts." Id.
838. Id. at 1098.
839. Id. at 1098. The court stated that:
RCRA place[d] exclusive jurisdiction in federal courts for suits brought
pursuant to section 6972(a)(1) of the Resource Conservation and Re-
covery Act. Any action under paragraph (a)(1) of this subsection [had to]
be brought in the district court in which the alleged violation
occurred.
Id. (quoting 42 U.S.C. § 6972(a)(1)).
Further, the court did not uphold the tribe's sovereign immunity because it held that Congress intended RCRA to cover "persons" and defined persons to
include Indian tribes. Id.
840. Id. at 1339-41. The court held these agencies liable under RCRA be-
TENNESSEE

RECENT DEVELOPMENTS

The Tennessee Solid Waste Act (Act)\textsuperscript{841} established procedures for determining where solid waste disposal facilities may be sited and maintained in each county. The Act sets forth public notice requirements regarding solid waste disposal facility siting proposals. The Act provides for public hearings in an attempt to balance the state’s growing need for solid waste disposal sites through land use regulations.\textsuperscript{842}

The Tennessee General Assembly also amended existing legislation concerning entries of judgment against polluters.\textsuperscript{843} The amendments allow any citizen to challenge court-ordered judgments entered regarding state actions against polluters. \textsuperscript{844}

In July 1988, the Tennessee Petroleum Underground Storage Tank Act (Act) was passed.\textsuperscript{845} This Act provided for underground petroleum storage container construction standards\textsuperscript{846}, established strict liability for underground releases\textsuperscript{847}, and created a fund for petroleum release cleanups.\textsuperscript{848} The Act requires owners of all tanks, including those returned from service\textsuperscript{849} and those presently in use, to notify the Commissioner of Health and Environment of the existence of such tank or tanks in order to obtain tank use certification.\textsuperscript{850} Tanks already in compliance with federal notification standards are exempt from Tennessee notification requirements.\textsuperscript{851} The Act also provides for an underground tank superfund,\textsuperscript{852} and for civil\textsuperscript{853} and criminal\textsuperscript{854} penalties.

\begin{itemize}
\item \textsuperscript{842} Id.
\item \textsuperscript{844} Id.
\item \textsuperscript{846} Id. § 68-53-105 (1988).
\item \textsuperscript{847} Id. § 68-53-104 (1988).
\item \textsuperscript{848} Id. § 68-53-110 (1988).
\item \textsuperscript{849} Id. § 68-53-106(a)(2) (1988).
\item \textsuperscript{850} Id. § 68-53-106 (1988).
\item \textsuperscript{851} Id. § 68-53-106(a)(5) (1988).
\item \textsuperscript{852} Id. § 68-53-101 (1988).
\item \textsuperscript{853} Id. § 68-53-121 (1988).
\item \textsuperscript{854} Id. § 68-53-120 (1988).
\end{itemize}
SOLID AND HAZARDOUS WASTE

In *Wayne County v. Tennessee Solid Waste Control Board*, the Tennessee Court of Appeals precluded the Tennessee Solid Waste Control Board (the Board) from granting tort damages and restitution to a landowner whose wells were polluted by a county landfill. The court held that the landowner could seek redress only through the courts.

In 1976, the appellant, Wayne County, installed a landfill facility near the landowner's home. Within one year, the landowners noticed a marked change in their well water's quality. Four years later, leachate began to escape from the landfill. After numerous attempts to show that the landfill had ruined down-gradient water wells, the Board ordered Wayne County to close the landfill and to provide the landowners with uncontaminated water. The court affirmed the trial court's ruling that the landfill contributed to the landowner's well contamination, but overturned the trial court's ruling that the Board had the authority to order Wayne County to provide fresh water to the landowners. Although the court limited the landowners' right of redress through the Board's administrative proceeding, the court explained that the landowners could maintain a tort action for either private or public nuisance in a court of competent jurisdiction.

TEXAS

RECENT DEVELOPMENTS

New state legislation (HB 1403), signed on June 14, 1989, amends the state's Uniform Act Regulating Traffic on High-

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856. *Id.* at 278.
857. The court agreed with the trial court that nothing in the Solid Waste Disposal Act gave the Board the authority to grant redress for private causes of action regarding damage caused by polluters. *Id.* at 283.
858. *Id.* at 280.
859. *Id.* at 277, n.1. "Leachate was described by [landowners' expert witness] as a 'black noxious liquid substance with an oily rainbow sheen upon its surface.' It is caused by improperly covering the waste in a landfill, thereby allowing surface water to penetrate the landfill and mix with the waste." *Id.*
860. *Id.* at 278.
861. *Id.* at 281. "While [the Act] gives the Board broad authority to take steps to abate the acts causing a nuisance to the public in general, we concur with the trial court's determination that the Board does not have the statutory authority to fashion remedies in essentially private nuisance actions." *Id.*
862. *Id.* at 283-84.
ways. The amendment authorizes the Public Safety Commission to establish parameters for a motor vehicle emissions inspection and maintenance program for any area of the state.

In an effort to protect Texas' ground waters, Governor Clements signed House Bill 183 on June 14, 1989, creating a regulatory program for the licensing of underground storage tank installers. The regulatory program will be structured in a manner that is similar to current federal guidelines. The Texas Water Commission will administrate the program by collecting examination and licensing fees along with assessing penalties to violators.

Governor Clements signed several bills on June 14, 1989, dealing with waste disposal. House Bill 2979 requires that all hazardous waste in Texas be stored, processed, and disposed of only by industrial facilities. The Texas legislature is employing HB 2979 to amend the state's Solid Waste Disposal Act due to concerns expressed about public health hazards created by illegal disposal of hazardous waste in municipal solid waste facilities. House Bill 1963 calls for the establishment of an advisory council (the Texas Hazardous Materials Safety Board) to better coordinate state agencies' response to federal hazardous material regulations.

Senate Bill 1502 amends the state Solid Waste Disposal Act by setting up a fund that will be used to facilitate the financing, investigation, and cleanup of abandoned hazardous waste sites. The Texas Water Commission (Commission) will be empowered to use monies from the fund to take action with respect to facilities posing "immediate and irreversible harm". The Commission will be empowered to implement remedial action programs for facilities which fail to eliminate hazardous situations for which they are responsible. The expenses for such

863. TEX. REV. CIT. STAT. ANN. art. 6701(d) (Vernon 1975).
865. Id.
869. Id.
remedial actions are to be borne by the persons to whom a reme-
dial action order was issued.\textsuperscript{872}

In other legislative activity, Governor Clements signed Senate Bill 1519 in June 1989.\textsuperscript{873} This Bill provides financing for a Texas Health Department program which offers aid to local governments engaged in landfill cleanup projects. The monies for the program will be generated through a fee placed on municipal waste used in new landfills.

Governor Clements also signed a joint senate and house bill which requires new plastic containers in Texas to be marked with a code revealing the materials used to make the containers in an effort to facilitate proper disposal and recycling.\textsuperscript{874}

\textbf{SOLID AND HAZARDOUS WASTE}

In \textit{Texas v. Malone Service Co.},\textsuperscript{875} a Texas jury recommended that a disposal company and two individuals pay $3 million in civil penalties for dumping 400 different types of industrial waste, on 418 different occasions, since September 1979, into an earthen sludge pit.\textsuperscript{876} The civil penalty was reported to be the largest ever recommended by a state court jury.

In \textit{Texas v. Hart},\textsuperscript{877} an action was brought by the state alleging that a creosoting company had discharged hazardous waste into a creek tributary. The Court of Appeals of Texas, in reversing the lower court's dismissal of the state's claim, held that an action for civil penalties under the Texas Solid Waste Disposal Act\textsuperscript{878} was not a penal action and therefore did not invoke the pleading requirement of the penal code.\textsuperscript{879} The court explained that an operator of a hazardous waste facility has a continuous duty to notify emergency response authorities of activities involving hazardous waste, and thus an operator of a hazardous waste facility could have been found to have violated a notification requirement more than once.\textsuperscript{880}

\textsuperscript{872} Id.
\textsuperscript{873} Texas: Budget Snafu Undermines New Law on Assistance for Landfill Cleanup, 20 Env't Rep. (BNA) 499 (June 30, 1989).
\textsuperscript{874} Id. Texas: New Law Requires Labeling of Materials Using Special Codes on Plastic Containers, 20 Env't Rep. (BNA) 127 (May 12, 1989).
\textsuperscript{876} Id.
\textsuperscript{877} 753 S.W.2d 213 (Tex. Ct. App. 1988).
\textsuperscript{879} Id. Hart, 753 S.W.2d at 214. Creosote is wood preserving waste water.
\textsuperscript{880} Id. The court found that: 1) the lower court abused its discretion by
Several important pieces of environmental legislation concerning solid and hazardous waste were enacted by Utah in 1989. Utah passed a state superfund law to deal with hazardous waste site cleanup costs and leaking underground storage tank expenses. The Hazardous Substances Mitigation Act (Mitigation Act) provides for regulation of hazardous substance releases by the Director of the Division of Environmental Health, consistent with the substantive requirements of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Mitigation Act provides for civil penalties of no more than $10,000 per day of violation.

The Underground Storage Tank Act (Storage Tank Act) provides for regulation of underground and petroleum storage tanks with civil liability for release from tanks subject to limitations of liability for claims of third parties. The Storage Tank Act also requires certificates of registration of storage tanks and of compliance with statutory requirements to be eligible for payment of costs from the Petroleum Storage Tank Fund.

Also of interest, Utah more than doubled existing hazardous waste disposal fees from $9 per ton to $20 per ton for out-of-state waste disposed of or treated at in-state commercial facilities. This measure was taken partially to recover revenue Utah had lost in the past by charging lower rates than some other states.

891. Id.
VERMONT

RECENT DEVELOPMENTS

Governor Kunin signed a bill, H 260, on May 24, 1989, banning the use of ozone-depleting chemicals from a variety of products for a four year period. 892 Included in the prohibition was the use of chlorofluorocarbons in automobile air conditioners. 893

AIR POLLUTION

In Vermont v. Thomas, 894 the United States Court of Appeals for the Second Circuit held that current regulations, promulgated by the Environmental Protection Agency (EPA) to meet the goals of the Clean Air Act, 895 did not provide for federally enforceable measures to combat the problem of "regional haze." 896 The court noted that EPA had found impairment of the air quality to be of two kinds: 1) "plume blight," i.e., pollution traceable to a single source; and, 2) "regional haze," i.e., air pollution from a number of sources, and thus, difficult to detect. 897

The state of Vermont had drafted state implementation plans (SIPs) 898 which reflected its conclusion that out-of-state sulfate emissions were primarily responsible for the regional haze affect-

893. Id.
894. 850 F.2d 99 (2d Cir. 1988).
896. Thomas, 850 F.2d at 100. Regional haze is viewed as a problem requiring long-term solutions. Id. at 101. The court was sympathetic to Vermont's contention that more than ten years had passed since EPA had characterized the problem as one requiring long-term strategies to combat it, but nevertheless held such an issue was better left to the national rulemaking process rather than to a SIP approval proceeding. Id. at 104.
897. Id. at 101. EPA adopted a phased approach to deal with these two different types of pollution. See 45 Fed. Reg. 80,085 (1980). Phase I of the program dealt with plume blight, while Phase II addressed regional haze. Id. at 80,085-87. Phase II was a future program that would be initiated once monitoring and scientific techniques progressed to a point that EPA could develop a regulatory program for this type of pollution. Id. at 80,087.
898. The Clean Air Act directs EPA to prescribe national ambient air quality standards and requires states to ensure that the national standards are complied with by adopting state implementation plans (SIPs). 42 U.S.C. §§ 7409-10. EPA coordinates the regional air pollution control measures implemented by the states, thus establishing shared state and federal responsibility for achieving a cleaner and safer environment. Id. § 7401(a)(3), (4). EPA is empowered to approve or disapprove SIPs and any subsequent revisions to ensure that these SIPs meet the requirements of the Act and EPA regulations. Id. § 7410.
ing visibility at the Lye Brook National Wilderness Area. The Lye Brook National Wilderness Area is a 12,000 acre mountain plateau in the southern portion of the Green Mountain National Forest and Vermont’s only Class I area. The 1977 amendments to the Clean Air Act directed EPA, in pertinent part, to adopt regulations protecting visibility in certain national parklands and wilderness areas, designated as “Class I Federal Areas”.

EPA's promulgated regulations, however, differed significantly from the “no action” interpretive approach to the visibility issue. Specifically, the court agreed with EPA that the phased approach to impaired air quality did not authorize the implementation of measures to combat regional haze through federally enforceable SIPs.

899. *Thomas*, 850 F.2d at 101. The Lye Brook National Wilderness Area is a 12,000 acre mountain plateau in the southern portion of the Green Mountain National Forest and Vermont’s only Class I area. *Id.* The 1977 amendments to the Clean Air Act directed EPA, in pertinent part, to adopt regulations protecting visibility in certain national parklands and wilderness areas, designated as “Class I Federal Areas”. 42 U.S.C. § 7491. Class I areas are defined to include international parks, national wilderness areas exceeding 5,000 acres, national memorial parks exceeding 5,000 acres, and national parks exceeding 6,000 acres. 42 U.S.C. § 7492(a). Class I areas were singled out by Congress for special protection due to their scenic beauty. *Thomas*, 850 F.2d at 100. Congress thus directed EPA to provide guidelines for the states in order to preserve these areas and increase visibility enhancement. 42 U.S.C. § 7491(1)(a), (b). EPA subsequently enacted regulations in 1980 pertaining to these Class I areas. 40 C.F.R. 51.300-341 (1980). These regulations require that each state’s SIP contain a “long-term (10-15 years) strategy” to reduce visibility impairment in each Class I area. *Id.* at 51.306(a). It is against this background that Vermont promulgated its SIP and its proposed long-term strategy to combat the effects of regional haze at Lye Brook.

*Id.* at 104. While EPA agreed that the visibility impairment at Lye Brook was due predominantly to out-of-state causes, they proposed taking “no action” because they had not yet established requirements for strategies relating to regional haze. *Id.* at 102. EPA objected to Vermont dictating a national solution without EPA’s promulgating regulations in order to implement a Phase II regional haze program. *Id.* Thus, their approval of Vermont’s SIP, and its subsequent federal enforceability, would be outside the scope of EPA's existing regulations. *Id.*

900. *Id.* In addition, Vermont asked that four of these upwind states not containing Class I areas, be added to the list of 36 states required to submit visibility plans. *Id.*

901. *Id.* at 103. The court held that the preamble to the regulations limited their scope and found that EPA intended to limit their scope to the issue of plume blight. *Id.* The court further held that the Clean Air Act itself and its legislative history made it clear that it was EPA who was charged with the responsibility, through its rulemaking powers, to ensure the attainment of the goals of the Act. *Id.* Thus, Vermont’s SIPs were, in effect, ultra vires and not subject to federal enforcement. *Id.* at 103-104.

902. *Id.* at 103. The “phased approach” distinguishes between single source impairments, which would be approached in phase I of the program, and more complex impairments such as regional haze, which are more difficult to address and would be approached in phase II of the program. *Id.* See supra note 6.
SOLID AND HAZARDOUS WASTE

In a case involving liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)\(^{903}\) and the Resource Conservation and Recovery Act (RCRA),\(^{904}\) the United State District Court for the District of Vermont, in *Vermont v. Staco, Inc.*,\(^{905}\) held that inadequate prophylactic measures to prevent employees from transporting mercury out of a plant constituted "release" for liability under section 9601(22)\(^ {906}\) of CERCLA and "disposal" for liability under section 6903(2) of RCRA.\(^ {907}\) In this case, the state brought suit against the owners of a mercury thermometer manufacturing plant to recover expense costs associated with the removal of mercury as a hazardous substance alleged to be contaminating the local sewage treatment plant, sewer lines, and certain septic tanks.\(^ {908}\) Although the state had previously sued many of the same defendants in state court,\(^ {909}\) the district court held that principles of res judicata did not bar the present action because the present action was based on different statutory provisions than was the previous action.\(^ {910}\) The court also stated that the principle of res judicata did not bar the present action because the mercury releases in the present action were different from those originally litigated.\(^ {911}\)

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906. *Id.* at 823-33. The court noted that the CERCLA definition of "release" at section 9601(22) was given a broad judicial interpretation and included "any environmental presence of a hazardous substance originating from a known industrial, manufacturing, or storage facility." *Id.* at 832.
907. *Id.* at 836. The court noted that Section 6903(3) of RCRA defined "disposal" broadly. *Id.* In addition, the court noted that while "handling" was not statutorily defined, it did subject persons to liability under RCRA, and that allowing employees to become carriers of mercury because of inadequate protective procedures constituted handling under RCRA. *Id.*
908. *Id.* at 825.
909. *Id.* at 827. The previous suit had been for violation of the Vermont Water Pollution Control Act, located at *VT. STAT. ANN.* tit. 10, § 1259(a) (1984).
910. *Staco*, 684 F.Supp. at 826-27. The present suit was based on violations of section 1274 of the Vermont Statutes. *Id.* (citing 10 *VT. STAT. ANN.* tit. 10 § 1274 (1984)). Section 1274 involves the enforcement of the Water Pollution Control Act. The action brought in this case concerned subsequent violations of the Act, thus allowing the state to institute enforcement action against a violator who "failed to comply with any provisions of any order... issued in accordance with this chapter." *VT. STAT. ANN.* tit. 10 § 1274 (1984). The action also invoked pertinent provisions of federal and state environmental laws that were not available at the time of the previous state proceeding. *Staco*, 684 F.Supp. at 827.
911. *Id.* at 827. The state action was based on the release of mercury from 1973 to 1984 when the plant was still in production. The present suit, however,
In *Allen v. Uni-First Corp.*, the issue before the Vermont Supreme Court was whether or not it was prejudicial error for the trial court to limit the jury’s consideration of areas of contamination to two specific areas in a nuisance case involving the disposal of toxic waste. In *Allen*, the defendant, an industrial drycleaning corporation, used a chemical solvent in its operations. The solvent had escaped, and had contaminated at least two public areas. The plaintiffs brought a nuisance action, charging that, as a result of the toxic leaks, their property value had been adversely affected. The court noted that the plaintiffs’ private nuisance theory depended on their ability to show that there was a public perception of widespread contamination. The trial court restricted the jury’s deliberations to the two public areas contaminated and did not allow the jury to consider the overall contamination issue pleaded by the plaintiffs. As a result, the court held that there had been prejudicial error in restricting the jury’s deliberations, and therefore reversed the trial court and remanded the case for a new trial.

**VIRGINIA**

**RECENT DEVELOPMENTS**

The State of Virginia agreed to drop a $19.7 million lawsuit that it had filed against a rayon manufacturer. The state had filed suit against the owners of Avtex Fibers Incorporated for violations of environmental and worker safety laws at one of the company’s plants. The state dropped the lawsuit in response was based on releases in 1985 that were the result of a mercury release by drainage.

913. Id. at 962.
914. The solvent was perchloroethylene, commonly known in the dry cleaning industry as “perc.” Id. at 963.
915. The two public areas considered by the jury were the town well and the public schools. Id. at 963.
916. Id.
917. Id.
918. Id. at 963-64.
919. Id. at 965.
921. Id. The plant is located at Front Royal, Virginia. Id. The Front Royal plant is the sole supplier of rayon fabric to the United States space program for use in rocket nozzles. Id.

The Front Royal plant has been cited in the past for well over one hundred environmental law violations since 1980. Id. at 1669. The violations range from...
to an Avtex proposal to correct environmental problems at the plant and to pay fines levied by the state.922

**COAL MINING**

In *Brown v. Red River Coal Co.*,923 the Virginia Court of Appeals held that the state could maintain a Notice of Violation (NOV) against a coal operator for violations of the Virginia Coal Surface Mining Control and Reclamation Act924 even if the coal operator was not at fault in causing the violation.925

A Virginia Division of Mined Land Reclamation (DMLR) inspector issued an NOV after finding that Red River Coal Company (Red River), a coal operator, was in violation of the Virginia Coal Surface Mining Control and Reclamation Act.926 The Commissioner of DMLR vacated the NOV upon a finding that Red River was not at fault in causing the violation.927

The court of appeals stated that coal surface mine reclamation was a substantive area preempted by federal law.928 The court explained that once in such a federally preemptive area, states could not enact laws that were either inconsistent with or narrower than federal law.929

Because the federal law had been interpreted by the federal authorities to mandate the issuance of NOVs to both negligent and non-negligent mine operators, the court reasoned, the Virginia Act also had to require non-negligent NOVs to be sustained.930 The court concluded that because the vacation of Red River's NOV pursuant to the state coal mining reclamation act was broader in scope than what was allowed by the federal act, the NOV would have to be reinstated.931

unlawful discharge of pollutants into the Shenandoah River to exposure of plant employees to potentially dangerous chemicals. *Id.*

922. *Id.* at 1668. Avtex proposed an earlier cleanup plan which was rejected by the state due to Avtex's inability to demonstrate its ability to finance the cleanup plan. *Id.* at 1669.


924. VA. CODE ANN. §§ 45.1-266 to 45.1-270.7 (1989).

925. 7 Va. App. at 331, 373 S.E.2d at 610.

926. *Id.*

927. *Id.* A third party had disturbed Red River's inactive mine. *Id.*

928. *Id.*

929. *Id.*

930. *Id.* at 332-33, 373 S.E.2d at 610-11.

931. *Id.* at 333, 373 S.E.2d at 611.
WASHINGTON

RECENT DEVELOPMENTS

In an effort to remedy the destruction of Washington’s natural resources, Governor Gardner imposed stringent liability standards on the oil industry.\textsuperscript{932} HB 2242, signed May 8, 1989, imposed a moratorium until July 1, 1995, on leasing for oil or gas exploration or drilling on Washington’s tidal or submerged lands.\textsuperscript{933} HB 2242 also required that oil tankers demonstrate financial responsibility to meet liability for costs of oil spill removal, civil penalties, and damages to natural resources.\textsuperscript{934}

HB 1854 amends the state water pollution control act, and enables the state to collect money damages resulting from the destruction of natural resources caused by illegal oil discharge into state waters.\textsuperscript{935} The amendment alters the current language defining damages, as the amount required to restock state waters, replenish resources, and otherwise restore the waters.\textsuperscript{936} Also, effective July 23, 1989, HB 1671, another legislative bill, requires local governments to provide certain waste reduction and recycling services, and authorizes the counties to contract for the collection of recyclable materials.\textsuperscript{937} HB 1671 sets a goal of recycling at 50% statewide.\textsuperscript{938} HB 1671 imposes a special $1 surcharge on each new rubber tire. The surcharge will earn $6 million per biennium, for a total $12 million by 1993.\textsuperscript{939} The earnings from the surcharge will pay for the disposal of illegally

\textsuperscript{932} Governor Signs Legislation on Oil Spills, Drilling Moratorium, Waste Reduction, Recycling, 20 Env't Rep. (BNA) 180 (May 26, 1989).
\textsuperscript{933} Id.
\textsuperscript{934} Id.
\textsuperscript{935} Id.
\textsuperscript{936} Id. at 181. The amendment states the damages include whatever is necessary to restore the resource and compensate for the lost value during that period of time between injury and restoration. Damages also include compensation for lost value if restoration is not technologically feasible.
\textsuperscript{937} Id.
\textsuperscript{938} Id.
\textsuperscript{939} Id.
dumped tires.940

HB 1086 establishes a regulatory program for underground storage tanks.941 The new law sets penalties for its violation and prohibits delivery of regulated substances to tanks which lack permits.942

HB 1180 created an independent state agency to provide discounted reinsurance to insurance companies or risk retention groups.943 These insurance companies and risk retention groups will be selected by the state agency’s administrator to sell pollution insurance to those in control of underground petroleum storage tanks.944 This law, which took effect on July 23, 1989, is designed to help owners and operators of underground storage tanks meet EPA financial responsibility rules by giving the state agency broad authority to design and price reinsurance and insurance coverage.945

On May 14, 1989, the governor signed SB 5566. SB 5566 updated and clarified the authority of the State Board of Health with respect to its duties relating to the enforcement of the Safe Drinking Water Act.946

AIR POLLUTION

In Asarco, Inc. v. Puget Sound Air Pollution Control Agency,947 the Court of Appeals of Washington examined the scope of the individual rule-making authority of the Puget Sound Air Pollution Control Agency (PSAPCA) and the Department of Energy (DOE) to determine whether those agencies had exceeded the scope of their authority by fining Asarco for violation of two regulations.948

In December 1983, a PSAPCA inspector witnessed an Asarco employee dumping a by-product of the company’s copper-smelting activity into a disposal unit, and observed large quantities of blue-white smoke coming out of the company’s disposal unit. The PSAPCA inspector, using the standard method (or Ringlemann method), to gauge the opacity of smoke, determined that it

940. Id.
941. Id.
942. Id.
943. Id.
944. Id.
945. Id.
946. Id.
948. Id. at 49, 751 P.2d at 1230.
exceeded the amounts allowable under both PSAPCA and DOE regulations. Subsequently, Asarco was assessed a civil penalty for its violation of these regulations.\textsuperscript{949}

PSAPCA adopted and applied PSAPCA Regulation 1, Section 9.03(b)(1) to the present case.\textsuperscript{950} DOE promulgated a very similar regulation in 173-400-040(1) of the Washington Administrative Code (WAC).\textsuperscript{951} Asarco argued that air contaminants creating a degree of opacity, did not amount to air pollution as defined by these regulations.\textsuperscript{952} Furthermore, Asarco stressed that PSAPCA Regulation 1 Section 9.03(b)(1) and section 173-400-040(1) of WAC as applied to its case were in conflict with the intent and purpose of the Washington Clean Air Act\textsuperscript{953} and thus should not have been applied to Asarco.\textsuperscript{954}

The Superior Court agreed with Asarco and found that the two regulations were invalid. The Washington Court of Appeals however, reversed the Superior Court’s decision.\textsuperscript{955} The Court of Appeals stressed that, as a judicial body, its ability to question the validity of the opacity test as an indicator of air pollution was very limited. The court further emphasized that it, “[w]as not free to substitute its judgment as to desirability or wisdom of the rule, for the legislative body, by its delegation to the agency, ha[d] committed those questions to administrative judgment and not to judicial judgment.”\textsuperscript{956}

\textsuperscript{949} Id. at 50, 751 P.2d at 1231.
\textsuperscript{950} PSAPCA Regulation 1, Section 9.03(b)(1) in part provides: [I]t shall be unlawful for any person to cause or allow the emission of any air contaminant for a period or periods aggregating more than three (3) minutes in any one hour which is (1) “darker in shade than that designated as No. 1 (20% density) on the Ringlemann Chart, as published by the US Bureau of Mines.” Id.
\textsuperscript{951} § 173-400-040(1) of WAC states in part:
(1) VISIBlE EMISSIONS. No person shall cause or permit the emission for more than three minutes, in any one hour, of an air contaminant from any emissions unit which at the emission point, or within a reason-
\textsuperscript{952} able distance of the emission point, exceeds twenty per-cent opacity

\textsuperscript{953} The Washington Clean Air Act (WCAA) was enacted in 1967 to provide and maintain safe levels of air pollution emissions in the state in compliance with the Federal Clean Air Act. The WCAA has defined “air pollution” as the “presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as is ... injurious to human health . . . . WASH. REV. CODE ANN. § 70.94.030(2) (1987).
\textsuperscript{954} Asarco, 51 Wash. App. at 51, 751 P.2d at 1231 (quoting WAC § 173-400-040(1)).
\textsuperscript{955} Id. at 51, 751 P.2d at 1232.
\textsuperscript{956} Id. at 53, 751 P.2d at 1234.
In *City of Everett v. Snohomish County*, the Supreme Court of Washington addressed the question of whether the land-use activities of the City of Everett, as an intruding sub-unit of government, was immune from the zoning regulations of Snohomish County, as a host sub-unit of government.

The court examined traditional tests used for zoning conflicts and held that these traditional tests oversimplified very complicated issues which varied from case to case. The court refused to accept any one of these traditional “blanket rules” because the court found them to be problematic. The court chose instead to let the legislative intent be determinant. The Legislature, according to the court, prescribed, by statute, the extent to which state facilities should have been subject to local land use controls.

The court reviewed the statutes empowering the respective subunits’ activities and determined that because the legislature intended that the City be required to comply with the zoning of the County in establishing a sewage/sludge and solid waste disposal site in the County, the County had the discretion to decide whether or not to issue a permit to the City.

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dissent by Judge Worswick arguing that regulations fining companies like Asarco for opaque emissions, should be held invalid in all cases, regardless of whether or not these emissions constitute air pollution. *Id.* at 59, 751 P.2d at 1235-36. 957. 112 Wash. 2d 433, 772 P.2d 992 (1989).

958. The City of Everett brought suit against Snohomish County after Snohomish County failed to issue Everett a use permit for a sewer/sludge disposal waste facility. *Id.* at 435, 772 P.2d at 993.

959. The four tests examined in this case are as follows:

1. Superior Sovereignty test establishes that the unit is higher up on the hierarchical structure of government rules.
2. Governmental-proprietary test establishes that the unit performing the governmental function prevails.
3. Eminent Domain test establishes that government can be immune from local zoning.
4. Balancing of Interests test considers all interests involved.

*Id.* at 437-39, 772 P.2d at 994-95. 960. *Id.* at 439, 772 P.2d at 995.

961. *Id.* at 441, 772 P.2d at 996. The court predicated this idea on the theory that under the state constitutional system, it is the legislature which not only enacts statutes enabling the municipalities to adopt zoning ordinances, but which also enacts the “statutes which authorize state agencies and other subunits to undertake these governmental functions.” *Id.*

962. *Id.*

963. *Id.* at 443, 772 P.2d at 997.
WEST VIRGINIA

RECENT DEVELOPMENTS

On April 24, 1989, Governor Gaston Caperton signed a new statute, which is intended to encourage county recycling programs and to reduce the flow of garbage by thirty percent by the turn of the century. Along with recycling goals, the law requires plans for identifying solid waste landfill sites in each of the state’s fifty-five counties, as well as a siting plan for potential hazardous waste dump sites. Additionally, the law gives the West Virginia Public Service Commission jurisdiction over commercial garbage dumping fees.

The new law establishes an interim goal of reducing the state’s flow of waste twenty percent by January 1, 1994, in advance of the thirty percent goal by the year 2000. Additionally, each county must complete their respective siting plans for the location of all commercial garbage dumps and other solid waste facilities by July 1, 1990. A new $1-per-ton interim assessment fee, started on July 1, 1989, and continuing through June 30, 1991, will be levied on all garbage dumped at the state’s licensed landfills.

WISCONSIN

RECENT DEVELOPMENTS

On June 2, 1989, the Wisconsin legislature passed legislation providing penalties for the release of genetically engineered organisms into the environment. The purpose of this legislation is to provide for state and federal regulation of man-made organisms through strict permit and licensing procedures, as well as penalties, to minimize the amount of “unnatural” elements in the ambient air.

AIR POLLUTION

In New Richmond v. State of Wisconsin Department of Natural Re-

965. Id.
966. Id.
967. Id.
968. Id.
969. Id.
971. Id.
sources, the citizens of the city of Richmond challenged the Wisconsin Department of Natural Resources' (DNR) decision to grant an air pollution control permit and solid waste facility license for the construction of an incinerator without an environmental impact statement (EIS). Under the Wisconsin Environmental Policy Act (WEPA), DNR has the initial authority to determine whether a particular set of circumstances requires an EIS, but when that authority is challenged, it is up to the reviewing court to determine whether or not the DNR's decision was reasonable under the circumstances.

The Wisconsin Court of Appeals reviewed the administrative record of DNR's examination of the relevant environmental issues and held that DNR's examination reflected an "in-depth consideration" of the relevant environmental issues, possible effects of an incinerator on New Richmond, and available environmental alternatives. Therefore, DNR's decision to forego the EIS was held to be reasonable. The city's petition to review the appellate court's decision was subsequently denied by the Wisconsin Supreme Court.

**SOLID AND HAZARDOUS WASTE**

In *Waste Management of Wisconsin, Inc. v. State of Wisconsin Department of Natural Resources*, Waste Management challenged the authority of DNR to allow a competitor of Waste Management to open and operate a landfill facility. The question presented to the Wisconsin Supreme Court was whether Waste Management had standing to contest DNR's determination of the need for another facility.

The injury suffered by Waste Management was recognized by the court as primarily economic. However, the court held that Waste Management lacked the standing necessary to challenge DNR's decision because the economic interests of Waste Management did not supersede DNR's environmental interest in solid waste management.

972. 145 Wis. 2d 535, 428 N.W.2d 279 (1988).
973. *Id.* at 539, 428 N.W.2d at 280.
974. *Id.* at 541-2, 428 N.W.2d at 282.
975. *Id.* at 551-2, 428 N.W.2d at 286.
977. 144 Wis. 2d 499, 424 N.W.2d 685 (1988).
978. *Id.* at 501-2, 424 N.W.2d at 687.
979. *Id.* at 505-6, 424 N.W.2d at 688.
980. *Id.* at 510, 424 N.W.2d at 689.
In order to maintain the ground water quality at a level as pristine as much of the land above, Wyoming has enacted legislation that restricts oil field waste disposal facilities.\(^9\) The provision provides that no person shall locate, construct, or operate any commercial oil field waste disposal facility within one mile of any occupied dwelling house or school without sufficient consent.\(^8\) Any knowing violation of the provision will subject that person to penalties under Wyoming law.\(^4\) In order to receive a permit to establish a facility, bond shall be posted to cover costs such as closure, inspection, maintenance, and environmental control and monitoring.\(^5\) When the director has determined that a violation has been remedied or the damage abated, the director shall release the portion of the bond or financial insurance instrument being held under the provisions of the act.\(^6\) Essentially, this new provision safeguards against the pollution of the ground-water supply by oil field waste disposal facilities before it happens and provides a means to remedy the situation if contamination does occur.

**ENVIRONMENTAL POLICY**

In *V-1 Oil Co. v. Department of Environmental Quality*, the United States District Court for the District of Wyoming held in part that: (1) Wyoming law permitted a warrantless search; and, (2) the warrantless search was not reasonable.\(^7\)

First, the court found that the controlling law enabled an environmental inspection officer to make a warrantless nonconsensual search of the soil and area surrounding the service station's...
gasoline tanks. The court noted that where the officer was qualified to make the search, performed the search during business hours, made the search without delay after properly presenting himself at the station, and where the area was temporarily exposed constituted sufficient criteria to allow the warrantless search under Wyoming law.

Second, the court found that the warrantless search by a state administrative officer was not unreasonable upon fulfillment of the requirements for warrantless searches as set forth by the United States Supreme Court in New York v. Burger. The court opined that the state's effort to obtain a court order before taking the soil samples coupled with the health and safety dangers resulting from leaks in underground gasoline storage tanks was sufficient to fulfill the Burger test. Therefore, the court determined that the service station's rights were not violated.

Oil Co. is significant in two respects: (1) It shows that state statutes may be construed in such a way to allow warrantless searches even without an express provision in the statute; and, (2) it demonstrates that when an owner of a pervasively regulated business is involved, certain privacy interests may be subordinated to the state's concerns of health and safety.

990. Id. at 581-82. A warrantless search of a pervasively regulated business will be deemed reasonable if:

(a) There is "a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made."
(b) "The warrantless inspections must be 'necessary to further [the] regulatory scheme.'"
(c) "The regulatory statute must perform two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." New York v. Burger 482 U.S. 691, 703 (1987).