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Air Regulation in Virginia: The Commonwealth as a Fulcrum for a Complex and Interrelated Scheme of Federal, State, and Local Statutes, Ordinances, and Regulations

Editor's Note: This article was written by Paul G. Turner, Esq., of Christian, Barton, Epps, Brent & Chappell in Richmond, Virginia.

I. The General Framework for Cooperative Federalism and Points of Potential Breakdown

Air regulation in Virginia, as in other states, is characterized by the "complex and interrelated nature of state and federal regulations governing air pollution and the concurrent authority to enforce said regulations shared by both the state and federal agencies." *Alabama ex rel. Graddick v. Veterans Admin.*, 648 F. Supp. 1208, 1211 (M.D. Ala. 1986) [hereinafter "*Graddick*"]. This shared authority evolved from the federal Clean Air Act (CAA), 42 U.S.C. §§ 7401 to 7642, as amended in 1970 and 1977. Federal clean air legislation has existed in some form since 1955, although the dominant focus prior to 1970 was on supporting state regulation rather than compelling state action through federal law. Virginia, like most states, had little involvement with air regulation until "Congress reacted by taking a stick to the States in the form of the [CAA] Amendments of 1970," Pub. L. No. 91-604, 84 Stat. 1676 (1970) [hereinafter "1970 Amendments"]. *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 64 (1975). Although reaffirming that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State," 42 U.S.C. § 7407(a),

> the difference under the [1970] Amendments was that the States were no longer given any choice as to whether they would meet this responsibility. For the first time they were required to attain air quality of specified standards, and to do so within a specified period of time.

Train, 421 U.S. at 64-65.

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A. State Implementation Plans.

The primary regulatory vehicle created by the 1970 Amendments was the state implementation plan (SIP) designed to achieve the EPA's national ambient (outdoor) air quality standards ("NAAQS"). NAAQS are the maximum allowable levels for certain toxins necessary to protect the public health and welfare. The EPA planned to reach these standards through enforcement of specific state emission limitations. 42 U.S.C. § 7409; 40 C.F.R. § 50. Virginia's SIP, including 88 revisions since the original submission in 1972, is set forth at 40 C.F.R. § 52.2420. Once the states propose the SIPs and the EPA approves them, they have status as both state and federal regulations and may be enforced by either the state or federal governments. *Graddick*, 648 F. Supp. at 1210-11. This process of implementation and enforcement has been characterized as "cooperative federalism" or a "partnership" requiring a delicate interplay among federal and state regulators.

The 1970 Amendments set forth certain deadlines for adoption of SIPs as follows:

> final promulgation of NAAQS for pollutants for which criteria have been issued by the EPA within 120 days of enactment of the 1970 Amendments;
>
> adoption of SIP's by the States within nine (9) months of promulgation of primary NAAQS for any air pollutant; approval or disapproval by the EPA of the SIPs within four (4) months of their submission to the EPA.

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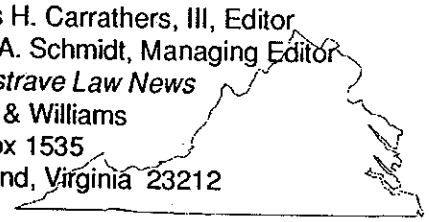

42 U.S.C. §§ 7409, 7410. The 1970 Amendments afforded states the opportunity to revise their SIPs by cross-referencing the plan adoption section with respect to requirements, but did not set forth a specific time frame for EPA response. 42 U.S.C. § 7410(a)(3)(A). Whether the four-month federal response period for original adoption [hereinafter the "Four-month Rule"] would apply was arguably left an open question.[1]

B. PSD Permits.

The CAA's 1977 amendments, Pub. L. No. 95-95, 91 Stat. 687 (1977) [hereinafter "1977 Amendments"], provided for identification of so-called air quality "attainment" and "non-attainment" areas within states. 42 U.S.C. § 7407(d). In attainment areas the goal was "prevention of significant deterioration" ("PSD") to be achieved principally through issuance of source-specific permits for construction or modification of stationary sources. 42 U.S.C. § 7475(a)(1); 40 C.F.R. § 52.21(i)(2)(1); *see also* Pedersen, *Why The Clean Air Act Works Badly, 129 U. Pa. L. Rev.* 1059, 1075 (1981). As with enforcement of other SIP regulatory provisions, state agencies may not issue PSD permits until the EPA has approved their permit procedures as part of their SIPs. 42 U.S.C. § 7410(a)(2)(D); 40 C.F.R. § 52.2451(c) (delegation to Virginia). The 1977 Amendments are silent as to EPA authority to revoke or veto a permit issued by a delegated state. As with the Four-month Rule, resolution of that issue remained for a later day.

II. Breakdowns in Cooperative Federalism and the Judicial Reaction: Limbo to Rambo.

Some of the issues left undecided in the SIP approval and PSD permit administrative processes have resulted in breakdowns in "cooperative federalism," leaving the owner/operator of the air emission source caught in the middle. Two recent cases exemplify the judiciary's reaction to such problems.

1. On June 1, 1990, the Supreme Court of the United States resolved a conflict in the circuits (see II.A. *infra*) by holding that the Four-month Rule does not apply to SIP revisions. *General Motors v. United States*, 58 U.S.L.W. 4803 (U.S. June 14, 1990).

A. SIP Revision Approvals: The Four-Month Rule and Regulatory Limbo.

With respect to the SIP program generally, the EPA initially acknowledged considerable state independence in promulgating emission limitations as long as the NAAQS were met. When presented with an attack on Georgia's SIP "variance procedure" allowing "individually tailored" exceptions to the emission limitations, the EPA concluded that

> § 110(a)(3) permits a State to grant individual variances from generally applicable emission standards, both before and after the attainment date, so long as the variance does not cause the plan to fail to comply with the requirements of § 110(a)(2).

Train, 421 U.S. at 69-70. Acknowledging that it was dealing with a "complex statute," the Supreme Court accepted the EPA position, concluding that

> Congress . . . left to the States considerable latitude in determining specifically how the standards [NAAQS] would be met. This discretion includes the continuing authority to revise choices about the mix of emission limitations.

Id. at 87.

Some years later, in dealing with a proposed revision to Kentucky's SIP ("KSIP"), the EPA exhibited a somewhat different attitude about state modifications to their SIPs. As set forth in *United States v. Alcan Foil Prod.*, 694 F. Supp. 1280 (W.D. Ky. 1988), *aff'd in part, rev'd in part*, 889 F.2d 1513 (6th Cir. 1989), *cert. den.*, 58 U.S.L.W. 3800 (U.S. June 18, 1990) [hereinafter "*Alcan*"], the existing EPA-approved Kentucky SIP ("KSIP") required each emission source of volatile organic compounds ("VOCs") within a plant to meet emission limitations. Alcan was notified by the EPA that seven of its ten printing presses were out of compliance with VOC limitations under the existing KSIP. Under proposed KSIP revisions, which Kentucky had submitted over four months earlier to the EPA, Alcan could utilize the "bubble concept," *i.e.* "the entire facility could meet compliance requirements by offsetting emissions at one source within the plant by over-compliance at another source." *Id.* at 1282. Nevertheless, the EPA filed a civil enforcement action against Alcan under Sections 113 and 120 of the CAA, 42 U.S.C. §§ 7413 and 7420, to enforce the existing KSIP, because the EPA had not yet formally approved or disapproved the proposed revision.[2]

Responding to the suit, Alcan moved for summary judgment citing *American Cyanamid Co. v. United States Environmental Protection Agency*, 810 F.2d 493 (5th Cir. 1987). Alcan argued that where a state-submitted SIP revision had been pending for over four months, federal enforcement under an existing SIP was precluded until the EPA acted on the proposed revision. The EPA responded in part that its enforcement action under the existing KSIP could proceed until Alcan could prove compliance with the proposed revised KSIP, which it argued could not be determined on summary judgment. In its initial opinion the Court, assuming that the Four-month Rule applied to a revision, refused to shift the burden to the source, Alcan, as the EPA sought, and instead focused on the breakdown in the administrative process resulting in "regulatory limbo."

> The emphasis, then, is not upon whether Alcan is in compliance with the proposed KSIP revision. Rather, the primary issue is whether the EPA has acted responsibly to avoid a state of *regulatory limbo* such as exists in this instance.

Alcan, 649 F. Supp. at 1283 (emphasis added). Since the four-month period had expired, the Court forbade federal enforcement under the

2. The EPA recently argued that it had a veto over Missouri's implementation of its SIP's alternative compliance provision (ACP) allowing compliance on a plant-wide basis rather than by each individual operation. In rejecting the EPA's veto contention the Court acknowledged that the EPA could have pursued state and/or federal administrative revision of the ACP. *United States v. Ford Motor Co.*, 736 F. Supp. 1539, 1547-49 (W.D. Mo. 1990).

existing KSIP until the EPA took final action on the KSIP revision. *Accord, American Cyanamid*, 810 F.2d at 500. *Cf. Council of Commuter Org. v. Gorsuch*, 683 F.2d 648, 651-52 n.2 (2d Cir. 1982); *Council of Commuter Org. v. Thomas*, 799 F.2d 879, 888 (2d Cir. 1986).

On a motion for reconsideration, the EPA relied heavily on *United States v. National Steel Corp.*, 767 F.2d 1176 (6th Cir. 1985), a case with somewhat similar but not identical facts to *Alcan*. The EPA and National Steel had executed a consent decree which in part allowed National to seek approval of alternative emission reduction procedures, including the same "bubble concept" later desired by Alcan. National subsequently sought EPA approval for the "bubble concept," which would allow it to avoid certain individual emission control installations, as an amendment to the consent decree. Although National was warned in the consent decree that applications for compliance alternatives would not delay its enforcement, National apparently relied on alleged EPA encouragement that the bubble would ultimately be approved and thus deferred individual emission control construction. The EPA later informed National that the bubble would have to be considered as a revision to the Michigan SIP; in due course a proposed SIP revision was forwarded to the EPA. Four months went by with no EPA action; meanwhile, the consent decree's stipulated penalties hung over National's head as the decree's deadlines approached without EPA action or necessary construction by National. The EPA ultimately disapproved the proposed Michigan SIP revision and the consent decree's stipulated fines were sought from National.

In appealing the District Court's decision exacting fines exceeding $5 million, National argued in part, as Alcan would later, that Section 110(a)(2) of the CAA, 42 U.S.C. § 7410(a)(2), required that the EPA respond to a State's SIP revision within four months of its submission and that absent such action federal enforcement was precluded. In a footnote to the Sixth Circuit's principal ruling that National had not been denied substantive due process of law, the Court commented that the referenced section applied only to plan submittals, not revisions. *Id.* at 1182-83 n.1 (rejecting National's argument against enforcement).

In responding to *National Steel*, the *Alcan* Court first pointed out that there was no need to reach the Four-month Rule issue in *National Steel*. The Court noted that because the consent decree expressly disallowed such a defense, the comment about the Four-month Rule was "mere dictum." On appeal, the Sixth Circuit agreed with the District Court's characterization. *Alcan*, 889 F.2d at 1517. The District Court went further, however, citing *Train*, 421 U.S. 60, to conclude that even if there was no Four-month Rule federal enforcement under an existing SIP still should be precluded where a source is in compliance with a state proposed SIP revision "on which the EPA has neglected to act." *Alcan*, 694 F. Supp. at 1285. On appeal, the Sixth Circuit adopted the Four-month Rule but rejected the enforcement bar, allowing an action for civil penalties for noncompliance with an existing SIP to proceed forward to a determination "based on the equities as disclosed by the proof." *Alcan*, 889 F.2d at 1521.[3]

In support of its conclusion, the District Court recognized the central role played by the states in air pollution regulation.

> *Train*, like *National Steel*, does not specifically address the issue of the judicial "limbo" created when a state submits a SIP revision and the EPA takes no action on it. However, *Train* makes it very clear that the *primary rule-making role* for Clean Air Act standards is allocated to the States, not to the EPA.

3. Although temporarily barring enforcement, the *Alcan* District Court likewise would leave the question of retroactive penalties to the "equities of each individual case." *Id.* at 1287. The District of Columbia Circuit has indicated that under such circumstances retroactive penalties with interest are entirely proper, *Duquesne Light Co. v. Environmental Protection Agency*, 698 F.2d 456, 572 (D.C. Cir. 1983), while the Fifth Circuit has emphatically rejected such concept. *American Cyanamid*, 810 F.2d at 499-500. In rejecting the Four-month Rule's application to SIP revisions in *United States v. General Motors Corp.*, 58 U.S.L.W. 4803 (U.S. June 14, 1990) (see discussion *infra*), the Supreme Court did not mention the retroactive penalty issue. These issues could also be affected by the proposed CAA amendments. For example, proposed Senate Bill No. 1630 contains a 12-month period for EPA action on proposed revisions. 20 *Env't Rep.* (BNA) 1886-87 (March 23, 1990).

. . .

> Allocating to the *EPA secondary responsibility* recognizes the state's interest in protecting its own citizens, both from air pollution and from unnecessary or unduly restrictive regulations on the operation of its industry and business.

Alcan, 694 F. Supp. at 1285, 1286 (emphasis added). *See American Cyanamid*, 810 F.2d at 500. The Court would not allow a federally-created "regulatory limbo" to exist at the expense of state and private interests.

On June 14, 1990, arguably at the expense of the state and private interests that the *Alcan* District Court sought to protect, the Supreme Court of the United States eliminated such "regulatory limbo" or, as characterized by EPA Administrator William K. Reilly, "reject[ed] the creation of a loophole" by holding that the Four-month Rule did not apply to SIP revisions. *United States v. General Motors Corp.*, 58 U.S.L.W. 4803 (U.S. June 14, 1990); 20 *Env't Rep.* (BNA) 355 (June 22, 1990).

B. Federal Revocation of PSD Permits: Judge Rambo to the Rescue.

This same theme of preserving the states as a viable fulcrum in the air regulation process is also exemplified by a recent PSD permitting case. In *United States v. Solar Turbines, Inc.*, No. 88-0924 (M.D. Pa. Nov. 28, 1989) (LEXIS 16439) [hereinafter "*Solar*"], Judge Rambo addressed an EPA civil enforcement action concerning Pennsylvania's federally approved PSD permitting program. Defendant Solar had applied to the Pennsylvania Department of Environmental Resources ("PADER") for a PSD permit to construct a gas turbine cogeneration facility, complying with all regulatory requirements. PADER subsequently issued a permit to Solar after notice to the EPA. Several months later the EPA issued an administrative order under Section 167 of the CAA, 42 U.S.C. § 7477, requiring Solar to cease all activities under the permit. The EPA ultimately filed an action for injunctive relief to prevent the turbine's construction and for civil penalties under Section 113(b) of the CAA, 42 U.S.C. § 7413(b), contending that the PADER had misapplied best available control technology ("BACT")[4] (alleged failure to require available emission controls for nitrogen oxides) and that the permit was invalid. The Court addressed the following question:

> [W]hether the enforcement powers of section 167 extend to preventing a source from constructing after it has received a permit from a properly authorized [state] agency but when the EPA contests the permit as being improperly issued.

Id. at 5. The EPA contended that Solar's reliance on the permit and failure to respond to the EPA's administrative order rendered it "out of conformance" under Section 167 and thereby subject to the enforcement action.

Based on its statutory review, the Court concluded that any alleged PSD permit violation must be assessed against "objective standards," for example, failure to (i) apply for a permit, (ii) receive a permit prior to construction, (iii) supply information requested or (iv) comply with specific quantifiable air quality standards or restrictions on emission levels. PADER's alleged failure to properly apply BACT did not fit such classification.

Finally, the Court characterized the EPA's action as something which "largely amounts to a *veto* of the permit Solar received...." (emphasis added). Identifying certain specific grants of "veto" power to the EPA (Clean Water Act, 33 U.S.C. § 1342(d)(2)(B); CAA, 42 U.S.C. § 7545) but not finding any such specific authority in the PSD permit statutes and regulations, the Court concluded that such specific veto provisions lent "further support to the unreasonableness of EPA's expansive interpretation of its authority under section 167." Responding to the EPA's argument that to rule against it would eliminate federal oversight under Section 167, the Court noted that

4. To obtain a PSD permit a source must convince the permitting authority that it will utilize the best available control technology ("BACT") to combat air pollution. In determining BACT, energy, environmental and economic factors should be weighed. 42 U.S.C. § 7479(3).

the EPA had an alternative, namely to bring legal action against the state after issuance of the permit, an option which the EPA apparently rejected "because of a need to maintain harmonious state-federal relations." *Solar*, at 7.

As was the case in *Alcan*, which is cited in the *Solar* opinion, and *American Cyanamid*, Judge Rambo was unwilling to punish the emission source (Solar) for "PADER's [alleged] violations . . . outside the control of Solar" and for being "caught in the midst of a conflict between PADER [the state] and EPA."

> Accepting EPA's position would not only be contrary to the general enforcement scheme in the Clean Air Act, but would also lay waste to a source's ability to rely on a permit it has been issued by an authorized state permitting agency.

Solar at 8.[5] As in *Alcan*, the judiciary in *Solar* acted to preserve the state's status in the air regulation process while also assuring fair treatment of the private source.[6]

C. State Regulation of Asbestos Management at Federal Facilities.

Asbestos regulation, where the respective functions of federal, state and local governments are both interrelated and independent, is a further example of the important state role in the air regulation field. Section 112 of the CAA, 42 U.S.C. § 7412, authorizes the EPA to promulgate national emission standards for hazardous air pollutants ("NESHAPS"). Early on asbestos was listed as a hazardous air pollutant and federal regulations were promulgated governing asbestos removal. 36 Fed. Reg. 5931 (March, 1971): 40 C.F.R. § 61.140. As with PSD permitting, the Commonwealth was subsequently delegated authority to enforce such regulations (letter of December 30, 1975, from Daniel J. Snyder, III, Regional Administrator, Region III, United States Environmental Protection Agency, to Earl J. Shiflet, Secretary of Commerce and Resources, Commonwealth of Virginia) subject to the EPA's concurrent enforcement authority under Section 113 of the CAA.

The Commonwealth itself has enacted a number of statutes reflecting federal, state and local regulation of asbestos:

- Asbestos contractors must be licensed by the Department of Commerce and comply with the Department's regulations (*Va. Code* § 54.1-500, *et seq.*);
- Local building departments may not allow demolition or renovation of buildings built prior to 1978 (with limited exceptions) without the owner's certification that the building has been inspected[7] for asbestos according to state standards and that any required response actions will be undertaken according to appli-

5. In her opinion, Judge Rambo relied in part on *Greater Detroit Resource Recovery Auth. v. Adamkus*, No. 86-CV-72910-DT (E.D. Mich. Oct. 21, 1986) [hereinafter "*Adamkus*"], where the Authority had obtained a PSD permit to construct a municipal solid waste combustion facility from the Michigan Department of Natural Resources ("MDNR") operating under EPA delegation. The permit was ultimately granted after notice to EPA and without EPA comment and the Authority subsequently issued $500 million in bonds to build the facility. Over a year later, the EPA determined that the MDNR's BACT analysis had been inadequate under the CAA and announced that it was "revoking" Michigan's PSD delegation with respect to the Authority. The Authority subsequently initiated an action for injunctive and declaratory relief against the EPA. The Court could find no support for the EPA's action. Accordingly, the plaintiff's motion for summary judgment was granted and the EPA "enjoined from any action or attempt to revoke this permit on the basis solely of any evidence now discovered and facts known as of this date." *Adamkus* at 18.
6. The state's status may be affected by one of the proposed amendments to the CAA. Title IV of H.R. 3030 would create a "new permit system patterned on NPDES program under the Water Act...." Carter, *Clean Air Act Amendments - Mid-Term Status Report, Winter 1990 A.B.A. Sec. Nat. Resources, Energy, and Envir. Law. National Resources Law Newsletter.* Section 405(b) of H.R. 3030 affords the EPA a 90-day period to object in writing to a proposed permit while Section 405(e) provides for EPA modification or termination of an existing permit if a state permitting authority and the EPA cannot otherwise reach agreement.
7. As reported in the Fall 1989 issue of the *Administrative Law News*, p.6, the standards for such asbestos inspections discussed in these paragraphs were exempted from the VAPA in 1988 while amendments to them were included under the VAPA in 1989.

cable state and federal standards, including NESHAPS and the Occupational Safety and Health Act ("OSHA") (*Va. Code* § 36-99.7);

- The issuance or renewal of licenses for hospitals located in pre-1978 buildings is conditioned on confirmation of satisfactory asbestos inspections conducted within twelve months and confirmation that any required response actions will be undertaken pursuant to applicable standards (*Va. Code* § 32.1-126.1);

- Licensing of child-care centers located in buildings built prior to 1978 requires confirmation that an asbestos inspection has been conducted (*Va. Code* § 63.1-198.01); and

- Condominium public offering statements must in the case of buildings "substantially completed" prior to July 1, 1978, include confirmation that an asbestos inspection has been or will be conducted and that any required response actions have been or will be completed prior to conveyance of any unit in such condominium (*Va. Code* § 55-79.94).

Pursuant to Section 118(a) of the CAA, 42 U.S.C. § 7418(a), federal instrumentalities in Virginia must comply with all such state and local requirements.

As with SIP revisions and PSD permits, interplay among the federal and state governments respecting asbestos regulation has not always been harmonious. In *Graddick*, 648 F. Supp. 1208, (discussed *supra*), Alabama brought suit against the Veterans Administration and its contractors for violations of both federal and state laws respecting asbestos removal at a VA medical facility. The Court ultimately held that Sections 112(d)(1), 118(a) and 304 of the CAA, 42 U.S.C. §§ 7412(d)(1), 7418(a) and 7604, "both grant the plaintiffs standing to bring this action and create liability for violations in each of the defendants," *id.* at 1210, since a state is a "person" who can bring a citizens suit against federal agencies for NESHAP violations (§ 7604) and under Section 112 can "enforce emission standards for hazardous air pollutants if its implementation plans are approved by the EPA." The Court also concluded that the Supreme Court's holding in *Hancock v. Train*, 426 U.S. 167 (1976), that is, a Section 118 compliance suit could not be brought by the states against federal facilities, had been overruled by the 1977 CAA Amendments to Section 118. *Graddick*, 648 F.2d at 1211.[8]

Finally, the Court concluded that this was not a case of attempted enforcement of state regulations in federal courts since the NESHAPS asbestos regulations enforced by Alabama also constituted federal regulations.

> Given the complex and interrelated nature of state and federal regulations governing air pollution and the concurrent authority to enforce said regulations shared by both the state and federal agencies, ADEM [Alabama Department of Environmental Management] cannot be said to be attempting to enforce state regulations without also being found to be enforcing federal regulations.

Id.[9]

The combination of the Virginia State Air Pollution Control Board's enforcement of NESHAPS regulations (see delegation letter) and Virginia's state and local asbestos laws provides another clear example of the substantial role of state and local governments in air pollution regulation, albeit this time in both interrelated (NESHAPS) and independent (state and local enforcement against federal facilities under Section 118) modes.

8. The delegation of authority to Virginia to enforce NESHAPS asbestos regulations expressly excludes federal facilities. This limitation was overruled *sub silentio* by the 1977 Amendments to Section 118 of the CAA, 42 U.S.C. § 7418 (federal facilities equally subject to all air pollution controls).
9. Some additional interesting federal-state enforcement issues outside the scope of this article arise under the SIP program. *See, e.g.*, Luneburg, *Federal-State Interaction Under The Clean Air Amendments of 1970*, 14 *B.C. Indus. and Com. L. Rev.* 637 (1973); Buche, *State Implementation Plans Under The Clean Air Act: Continued Enforceability As Federal Law After State Court Invalidation On State Grounds*, 19 *Val. U.L. Rev.* 877 (1985).

III. Independent State Regulation: Virginia's Indoor Clean Air Act

With respect to indoor air as opposed to ambient air regulated under the federal Clean Air Act, Virginia's first state-wide effort at regulation was recently passed by the General Assembly as the Virginia Indoor Clean Air Act (the Virginia Act), Va. Code Ann. §§ 15.1-291.1 to 15.1-291.11 (effective July 1, 1990). Unlike the federal Clean Air Act, the Virginia Act offers multi-governmental regulation without an interrelated administrative process. The Virginia Act is divided topically into certain mandatory and optional, state and local provisions as follows:

A. Mandatory Statewide No-Smoking Area Regulations (Va. Code § 15.1-291.2).

- No-smoking areas must be provided in buildings owned or leased by the Commonwealth and certain local governments;
- Prohibition of smoking in various identified areas;
- Provision of no-smoking areas in restaurants having a seating capacity of 50 or more;
- Provision of no-smoking areas in educational facilities, health care facilities and retail establishments of more than 15,000 square feet;
- Mandatory signs respecting smoking or no-smoking areas;
- Twenty-five dollar maximum civil penalty for smoking in a no-smoking area after being asked not to do so.

B. Mandatory Statewide Smoking Area Regulations (Va. Code § 15.1-291.3).

Building proprietors and managers of regulated space may designate smoking areas if:

- ✔ reasonable no-smoking areas are provided;
- ✔ the smoking areas are separated from normally used public areas; and
- ✔ no-smoking areas are protected from permeation of smoke into them from smoking areas through the use of ventilating systems and existing physical barriers.

C. Local Ordinances - Mandatory and Optional Provisions (Va. Code § 15.1-291.4 to -291.6, §§ 15.1-291.8 to -291.9).

Local ordinances existing prior to January 1, 1990, are grandfathered and cannot be declared invalid or unenforceable because of inconsistency with the Virginia Act. Those adopted after January 1, 1990, shall not contain provisions exceeding the new law but may provide for future regulation of smoking in the private work place subject to any written agreement and, for a total ban, to a majority vote of the affected employees unless otherwise provided for in an employment contract as an employment precondition. Any such local ordinance must make it unlawful for persons to smoke in certain designated places (elevators, common areas of an educational facility, no-smoking areas of a restaurant, indoor service lines and cashier areas and school buses and public conveyances). Such local ordinances may require management to designate additional no-smoking areas (in retail and service establishments of 15,000 square feet or more, public meeting rooms, places of entertainment and cultural facilities, indoor recreational facilities, other public places and restaurants with a seating capacity of 50 or more persons). In addition, certain signs are required. *Va. Code* § 15.1-291.9.

D. Areas Exempt From Local Smoking Ordinances.

Finally, smoking in the following areas may not be regulated by local ordinances: bars and lounge areas, retail tobacco stores, restaurant areas utilized for private functions and similarly used conference, meeting and assembly rooms, non-public office or work areas, pedestrian travel and seating areas of enclosed shopping centers or malls and hotel and motel lobbies.

E. Enforcement of Local Ordinances.

Local ordinances may provide a civil penalty of no more than $25 for violations. *Va. Code* § 15.1-291.10.

In summary, apart from any federal involvement, Virginia has now taken its own action respecting smoking hazards. Unlike the federal

legislation, the Virginia Indoor Clean Air Act is predicated on independent state and local enforcement under an umbrella of state law. Consequently, neither the conflicts and gaps peculiar to interrelated regulatory processes nor the requisite cooperation among different governmental levels for the common good of the regulatory program are essential parts of the regulatory program. Whether the increasing future importance of indoor air pollution issues will dictate a more pervasive and complex regulatory system remains to be seen.

IV. Conclusion

Air regulation in Virginia is focused today and will be focused in the foreseeable future in a myriad of forms ranging from regulations adopted and enforceable by both federal and state governments against private sources to state and local law enforceable against federal facilities. The Commonwealth is the pivot point or fulcrum around and through which such air regulation flows. Although much publicity and emphasis has been placed on important substantive changes that may emanate from new amendments to the Clean Air Act now before Congress, it is not anticipated that the central position of the states in the air regulation process will materially change. ∎

State Regulates LUST!

✐ *Editor's Note: This article was written by Kenworth E. Lion, Jr., Esq., of Miller & Hern in Glen Allen, Virginia.*

Jimmy Carter had better not move to Virginia. The Virginia State Water Control Board ("SWCB") has decided to regulate L.U.S.T. ("leaking underground storage tanks").

There are some two million underground storage tanks ("USTs") in the United States and approximately 60,000 known USTs in Virginia. A statistical study estimates that between 75,000 and 300,000 of these USTs may be leaking now or will leak in the near future. Since 1979 the SWCB has received approximately 1000 complaints about leaking USTs and this number continues to increase. These complaints are believed to represent only a fraction of the actual number of leaking tanks. The major causes of UST leaks are corrosion-induced holes in the tanks or their piping, spills or overfills when product is pumped into the USTs, and installation failure when the USTs or their piping are not adequately stabilized underground. The major problem caused by leaking USTs is contamination of irreplaceable groundwater supplies, which are used by the majority of Americans as their primary source of water. These underground reservoirs have little if any capacity to cleanse themselves once contaminated. As little as a gallon of gasoline can render up to a million gallons of groundwater unsafe to drink. Restoration of contaminated groundwater through pumping and treating to remove the contaminants can cost hundreds of thousands, even millions, of dollars.

In 1988 the Environmental Protection Agency ("EPA") issued a massive set of new regulations governing USTs. The regulations are designed to establish uniform national regulatory requirements for all covered UST systems, while preserving a primary role for the states in the implementation and enforcement of these requirements. Essentially all of the requirements will be enforced at the state level, unless the states decide to defer to the EPA. The SWCB is authorized by the Virginia General Assembly to conduct a UST program patterned upon the federal program. Va. Code Ann. §§ 62.1-44.34:8 to 62.1-44.34:13 (Cum. Supp. 1989). The SWCB has adopted technical regulations governing tank design and cleaning requirements which are more stringent in some respects than the EPA regulations. The SWCB also has adopted finan-

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Richmond, Virginia 23219

cial responsibility regulations equivalent to the EPA regulations requiring tank owners to have insurance or some other financial guarantee for spill clean-up costs. The technical regulations became effective on October 25, 1989, and the financial responsibility regulations became effective May 9, 1990.

The UST regulations are applicable to tanks containing petroleum products, any one of some 700 "hazardous substances" regulated under the Superfund law, and hazardous wastes. The regulations cover any tank or combination of tanks (including underground pipes connected thereto) used to contain an accumulation of the regulated substances and the volume of which (including the volume of underground pipes connected thereto) is 10% or more beneath the surface of the ground. Certain categories of tanks are exempted from the UST regulations in Virginia, including farm and residential tanks with a capacity of 1,100 gallons or less used for storing motor fuel for noncommercial purposes, septic tanks, regulated wastewater treatment systems, tanks holding 110 gallons or less, and tanks with a capacity of 5,000 gallons or less used for storing heating oil for consumptive use on the premises where stored.

Although homeowners with heating oil storage tanks with a capacity of 5,000 gallons or less are not subject to the UST technical and insurance requirements, they may be liable nonetheless for any contamination which occurs because of a leaking tank or an overflow spill. For example, if a leaking fuel oil tank causes contamination of a neighbor's well, the owner of the leaking tank may be found financially liable for removal and disposal of contaminated soil, as well as cleanup of the groundwater. For the average homeowner, the financial impact can be daunting, if not ruinous. Thus, even though their heating oil tanks are not subject to the UST regulations, homeowners should be alert to the substantial financial liabilities which may be incurred and should take appropriate actions to ensure that leaks will not occur. Since EPA studies have shown that bare steel tanks leak with much greater frequency after about 12 years in use, appropriate actions may include replacement of existing underground tanks in some instances.

The SWCB's technical regulations require a phased upgrade of all old tanks; establish strict performance standards for new tanks; require certification of proper installation of new tanks; require leak detection methods and devices; and provide procedures for the reporting and cleanup of spills and overfills.

The SWCB's financial responsibility regulations are applicable to owners and operators of petroleum USTs and to petroleum storage tank vendors. All petroleum marketing firms owning 100 or more USTs should already be in compliance. Currently, the SWCB regulations state that petroleum marketing firms owning 13 to 99 USTs at more than one facility must have obtained compliance by April 26, 1990. However, by Interim Final Rule effective May 2, 1990, EPA extended the compliance date by one year, to April 26, 1991. This was done to provide affected tank owners with additional time to meet insurers' standards for coverage and to allow additional time for submittal and EPA review and approval of state assurance funds. All other petroleum UST owners, including all local government entities, and all petroleum storage tank vendors are currently required to be in compliance by October 26, 1990. It is anticipated that this compliance date also will be extended.

The SWCB regulations require that financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases must be demonstrated in at least the following per-occurrence amounts:

- $50,000 for corrective action; and
- $150,000 for compensating third parties for bodily injury and property damage.

Financial responsibility in the annual aggregate amount of at least $200,000 must also be demonstrated. If the owner and operator are separate persons, only one is required to demonstrate financial responsibility; however, both are liable in the event of noncompliance.

The required per-occurrence and annual aggregate coverage amounts are not intended to limit the liability of the owner or operator. Generally, an owner or operator may use any one or a combination of the following mechanisms to demonstrate financial responsibility for one or more underground storage tanks:

- financial test of self-insurance
- guarantee
- liability insurance and group self-insurance pool coverage

- surety bond
- letter of credit
- irrevocable trust fund
- standby trust fund using a guarantee, surety bond, or letter of credit.

The State Corporation Commission ("SCC") has established rules, forms, and procedural requirements which it deems necessary for approval and monitoring of group self-insurance pool coverage. Commonwealth of Virginia *ex rel.* State Corporation Commission, *Ex Parte*: In the Matter of Adopting Rules Governing Underground Storage Tank Owners and Operators Group Self-Insurance Pools, Case No. INS890261 (July 14, 1989). The rules cover pool license requirements, report filing requirements, reserve requirements, responsibilities of the pools' supervisory boards, license revocation, and penalties. A pool is required to maintain a net worth of no less than $100,000. In addition, the pool may levy an assessment on its members to supplement the pool's assets to ensure payment of claims.

The Virginia Underground Petroleum Storage Tank Fund ("Fund") was established by the General Assembly as a nonlapsing revolving fund to be used by the SWCB for administering the regulatory program. Va. Code Ann. §62.1-44.34:11 (Cum. Supp. 1989). The Fund will be used for costs in excess of the financial responsibility requirements up to $1 million per occurrence for both taking corrective action and compensating third parties. The first priority for disbursements from the Fund is for corrective action costs necessary to protect human health and the environment. Third party liability claims against the Fund are to be paid only in accordance with final court orders where the SWCB has been represented or in cases of an agreed settlement between the third party and the SWCB. No person may receive reimbursement from the Fund under certain circumstances, including (1) where the person, his employee or agent, or anyone within the knowledge of that person violated the SWCB's substantive UST regulations, (2) where the release occurrence is caused, in whole or in part, by the willful misconduct or negligence of the person, or (3) where the claim is reimbursable by an insurance policy or other financial mechanism.

Given the substantial compliance requirements and liabilities, owners and operators of USTs, if they have not already done so, should develop a compliance program as quickly as possible. ∎

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