The Battle Over Biosolids

by Eric Whitaker

Introduction

Land application of treated municipal sewage sludge, a practice commonly known as biosolids application, is now common nationwide, particularly in Virginia. In 2000, farmers spread about three million dry tons of biosolids across the United States and about 767,000 wet tons on farm lands in Virginia alone. These wastes, which would otherwise have been disposed of through such means as landfill dumping or incineration, thus became an inexpensive source of nutrients. Biosolids are applied to lands free of charge to farmers and can significantly reduce fertilizer costs.

Land application, however, poses challenges for the communities where the biosolids are spread. When biosolids are not incorporated into the soil, particularly in warm weather, the odors emanating from the recipient farms can pose a considerable nuisance to neighbors. Moreover, if the applications are not properly managed, they can pose significant health threats to the surrounding community. While EPA and the Virginia Department of Environmental Quality both take the position that biosolids are safe when used in accordance with the prescribed regulations, the Virginia Cooperative Extension has acknowledged that “[h]uman and animal health, soil quality, plant growth and water quality could be adversely affected if land application is not conducted in an agronomically and environmentally sound manner.” In August 2001, the Washington Post published two separate articles investigating biosolids-related complaints of numerous Virginia residents. These citizens claim that exposure to winds carrying biosolids particles from neighboring farms has impaired their health and overall quality of life.

Concerns for the potential health risks posed by biosolids applications prompted several counties to restrict such activities beyond the requirements imposed by EPA and Virginia state Biosolids-Use Regulations. Amelia, Goochland and Rappahannock counties even went so far as to ban...
Chair’s Corner
continued from page 1

As editor-in-chief of the Environmental Law Digest at Washington and Lee University School of Law, it has been both an honor and a pleasure to participate in the writing, editing and production of the Environmental Law News. I will remember it as one of the most rewarding activities of my law school career.

At the beginning of my tenure, I set a goal to improve both the content and the look of the Environmental Law News. As a result of the dedication of many persons, much was accomplished towards that goal.

I want to thank everyone involved with the Virginia Bar Association Environmental Law Section who assists with the newsletter. Meeting and working with members of the Environmental Law Section has been especially enjoyable. I was greatly encouraged from the start by the support given me by the Board of Governors. I would particularly like to thank Ellen Brown, Bob Kinney, Marina Phillips, and Chris Pomeroy for their efforts in producing the newsletter. Along with Ed Boling, their support for the Environmental Law Digest’s activities at Washington and Lee is also appreciated.

Much of the past year’s success has been due to the student staff of the Environmental Law Digest. I would like to thank them for their energy and enthusiasm. Production of the next issue will be overseen by a new student editorial board. I know that they will work hard on the Environmental Law News, and I wish them even more success.

Maynard Sipe
Biosolids
continued from page 1

the land application of biosolids. In January 2001, however, the Virginia Supreme Court ruled that counties could not ban biosolids land applications outright. In Blanton v. Amelia County, the court found that ordinances that prohibit the land application of biosolids are inconsistent with Virginia state licensing provisions for biosolids applications. The court held, however, that counties may nevertheless enact ordinances regulating the land application of biosolids, so long as those ordinances are consistent with the governing state statutes. In the subsequent 2001 special legislative session, the Virginia General Assembly passed a bill that amended Va. Code § 62.1-44.19.3. The amendment gives counties the authority to adopt biosolids testing and monitoring requirements to ensure compliance with applicable laws and regulations.

This article offers a primer on the national and Virginia state regulations governing the land application of biosolids. It also summarizes the Blanton decision, the subsequent legislative response, and litigation that followed. Finally, it outlines possible approaches to regulating biosolids land applications available to counties under current state law. It must be stressed, however, that this article does not purport to offer legal advice of any kind. Counties seeking to pass further biosolids regulations should conduct independent assessments of the legality of any prospective ordinances prior to their passage.

EPA and Virginia State Statutory Regulations: Are They Adequate?

Both federal and state laws govern the application of biosolids to farm land. As required by the Clean Water Act Amendments of 1987, EPA has developed and promulgated Standards for the Use or Disposal of Sewage Sludge, 40 CFR 503 (Part 503). Part 503 prohibits land application of sewage sludge that exceeds established limits for nine trace elements: arsenic, cadmium, copper, lead, mercury, molybdenum, nickel, selenium, and zinc. In addition, Part 503 requires that biosolids be treated, through methods such as lime stabilization and heat drying, in order to significantly reduce potential pathogens (e.g., viruses, bacteria, and parasitic worms) prior to application.

The regulations establish two acceptable levels of pathogen reduction — Class A and Class B. For biosolids to meet Class A standards, pathogens must, for the most part, be reduced below detectable levels. Class A biosolids may be applied without the impediment of site restrictions. Class B biosolids are the more commonly used, however.

Pathogens in Class B biosolids are reduced only to the extent that they are unlikely to cause a threat to public health and the environment when applied under restricted conditions. Those conditions include restricting human and animal access to treated lands for substantial periods of time, as well as imposing significant waiting periods for harvesting crops grown in treated soil. In addition, farmers must take measures to reduce the possibility that disease vectors, such as rodents, birds and insects, will carry pathogens away from the application site.

Virginia state regulations substantially mirror the restrictions established by EPA, but in several aspects are more stringent. The state discourages farmers from applying Class B biosolids more frequently than once every three years by imposing additional nutrient management planning and monitoring requirements on land amended more frequently. The regulations also require the maintenance of minimum buffer distances between lands receiving Class B biosolids and the surrounding community to avoid pollution of nearby lands and water sources. In addition, if Class B biosolids are applied to slopes greater than five percent between November 16th of one year and March 15th of the following year, farmers must employ techniques, such as directly injecting biosolids into the soil, to reduce the potential for runoff caused by rainfall.

The state regulations impose injection and minimum incorporation period requirements upon sites with insufficient residue cover or which are at risk of frequent flooding. Finally, Virginia requires the maintenance of an eighteen-inch barrier between applied Class B biosolids and underlying bedrock to protect underground water sources.

The adequacy of these state and federal protective regulations has been the subject of much recent debate, not only in the pages of the Washington Post, but even within EPA itself. Despite EPA’s official stance that the vast majority of scientific research conducted so far proves the safety of biosolids applications, a report last year by EPA’s inspector general office concluded that the agency “cannot assure the public that current land application practices are protective of human health and the environment.” The report also found that EPA provides “virtually no federal oversight of state biosolids programs.”

Virginia state supervision is also minimal; only two full-time biosolids permit inspectors are employed in the entire state. In the year 2000, the Virginia Health Department’s Office of Environ-
mental Health Services only investigated twenty-eight complaints pertaining to biosolids land applications, conducted twelve routine site inspections, and issued one violation. It was concerns over the efficacy of existing regulations to protect the welfare of citizens that led to the aforementioned banning of biosolids by three Virginia counties. The Supreme Court of Virginia subsequently invalidated such bans.

**Blanton v. Amelia County**

In *Blanton v. Amelia County*, 540 S.E.2d. 869 (Va. 2001), the Supreme Court of Virginia ruled local ordinances that ban biosolids applications impermissibly conflict with state biosolids permitting statutes and the Biosolids Use Regulations. The plaintiffs were farmers and farmland owners who had either obtained or applied for biosolids use permits. They argued that the Amelia county ordinances banning biosolids were inconsistent with state laws permitting biosolids applications and violated Va. Code § 1-13.17. Va. Code § 1.13.17 states, inter alia, that county ordinances "must not be inconsistent with the Constitution and laws of the United States or of this Commonwealth." The Circuit Court granted the county’s motion for summary judgment, and the plaintiffs appealed. The Supreme Court reversed, finding that Amelia County’s ordinances were inconsistent with the state biosolids licensing statute, Va. Code § 32.1-164.5. The court reaffirmed the long-standing principle that county ordinances may enlarge upon the provisions of a statute by requiring more than the statute requires, so long as there is no conflict between the two. The court concluded, however, that the ordinances were inconsistent with § 32.1-164.5 “because the ordinances forbid certain plaintiffs from using biosolids on their farmland even though those plaintiffs have obtained licenses to use biosolids pursuant to the statutory and regulatory scheme established by the General Assembly.” In reaching this holding, the court was careful to acknowledge that the Biosolids Use Regulations do “contemplate that local governments will have some involvement in regulating biosolids application... [These state regulations] do not prohibit a local government from enacting ordinances which may affect the land application of biosolids.” The court stressed, however, that local ordinances and requirements must not be inconsistent with Code § 32.1-164.5 or the applicable regulations.

**The Legislative Response and Subsequent Litigation**

Following *Blanton*, the General Assembly of Virginia passed an amendment to Code § 62.1-44.19:3, which expressly authorizes local governments to police land applications of biosolids. The amendment reads, in pertinent part: “Any county, city, or town may adopt an ordinance that provides for the testing and monitoring of the land application of sewage sludge within its political boundaries to ensure compliance with applicable laws and regulations.”

The exact meaning of this amendment is debatable. Industry advocates have argued, in a federal case filed in the Western District of Virginia by Synagro-WWT, Inc. against Louisa County and its officials, that the General Assembly intended, through this amendment, to limit the role of local governments strictly to testing and monitoring compliance with state and federal laws. In support of its motion for a preliminary injunction to prevent enforcement of Louisa County’s biosolids regulatory ordinances, Synagro argued that the ordinances violated the *Dillon* rule. This rule, Synagro asserted, limits the powers of county boards to “those conferred expressly, or by necessary implication” by statute. Since no statute or code section expressly authorizes the sorts of ordinances Louisa had passed, Synagro concluded that they were impermissible.

Synagro’s argument, however, conflicts with the Supreme Court’s reasoning in *Blanton*, which rests upon the firm precedent that local ordinances may regulate activities more strictly and more expansively than do state statutes, so long as the two do not conflict. “The mere fact that the state, in the exercise of its police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two... both will stand. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescription.”

Furthermore, Synagro’s argument is inconsistent with Regulation 12 VAC 5-585-620, which requires biosolids applicants to comply with local zoning and other applicable local ordinances. The Supreme Court itself in *Blanton* specifically acknowledged that, according to 12 VAC 5-585-620, “the Biosolids Use Regulations require that ‘[c]onformance to local land use zoning and planning should be resolved between the local government’ and the holder of a permit.” The Supreme Court’s statement can be read to affirm localities’ right to impose reasonable zoning regulations on biosolids applications.
In the end, the court in Synagro–WWT, Inc. v. Louisa County granted Synagro’s motion for preliminary injunction. However, because the court had already found that the balance of hardships tipped decisively in Synagro’s favor, it only required that Synagro show that “there are enough serious questions at issue [to establish] that ‘the plaintiff has not embarked on frivolous litigation,’” in order to prevail. The injunction was, therefore, not based upon a finding that Synagro was likely to succeed on the merits. In fact, the court, basing its reasoning in part on Blanton, concluded that “it would appear that Louisa County has some authority to enact ordinances addressing biosolids application, even when the restrictions contained therein exceed those present in parallel state regulation.” The court noted, though, that “the extent of [Louisa’s] authority is by no means clear,” and there were therefore “firm grounds for Synagro’s current suit.”

Louisa County and Synagro settled the case following the issuance of the injunction, so the merits of Synagro’s arguments were never reached. It seems likely that biosolids ordinances passed by counties in the future will attract litigation as long as the limits of county authority are not fully defined. There are obviously no guarantees as to how the Supreme Court will rule on future local regulations that go beyond testing and monitoring. In the wake of Blanton, however, local governments appear to retain the power to enact laws providing for a variety of reasonable restrictions to help ensure the safety of the local community. The following is a brief discussion of some arguably permissible county options.

Local Regulatory Options

Monitoring, Testing, and Enforcement

The recent legislative amendment to Code § 62.1-44.19:3 gives counties explicit authority to monitor and test biosolids. The EPA inspector general’s report referred to in the aforementioned Washington Post article notes the apparent inadequacy of federal and state monitoring as a significant cause for concern. Local monitoring regulations could go a long way towards better ensuring community safety. Local ordinances can require monitoring of biosolids applications on a variety of fronts. Regulations can impose stringent monitoring of both surface and ground waters to ensure that biosolids runoff does not contaminate local water supplies. Localities can also require that soil characteristics, such as pH and ambient metal levels, be monitored regularly to guarantee long-term soil health and productivity.

The biosolids themselves can be tested prior to application. Such testing can guarantee that contaminants do not exceed safe levels. In addition to testing for the nine contaminants addressed by national and state regulations, localities may choose to test for a larger spectrum of pollutants. Moreover, counties could possibly adopt penalty provisions to punish those who fail to meet monitoring requirements.

Buffers

Localities can adopt minimum buffer requirements beyond those already required by state and federal laws, to better protect their communities from the possible negative consequences of biosolids applications. While Virginia state law already requires that an eighteen-inch bedrock buffer be maintained between treated soils and groundwater sources, counties can increase this buffer. They could likewise increase minimum distances between biosolids and local surface waters to better prevent runoff contamination. Requiring greater distances between treated fields and nearby roads or residences could also abate odor problems and risks of human or livestock exposure. Such requirements would not run afoul of Virginia’s “Right to Farm” law, since it specifically does not apply to biosolids applications.

Injection and Incorporation

Injection of biosolids below the surface of treated lands, and requirements that biosolids be incorporated into treated soil within short periods following application, have both proven beneficial. These techniques can significantly reduce the odor problems associated with biosolids applications, and are also effective means of preventing excessive runoff during rainy seasons. While Virginia state law already requires such techniques in areas subject to frequent flooding, counties could require incorporation or injection as a mandatory part of most or all biosolids application operations.

Conclusion

The application of biosolids to farmlands, while an effective way of recycling wastes and reducing fertilizer costs, is a controversial practice with which many communities in Virginia currently struggle. Since banning these applications altogether is no longer a viable option, local governments may wish to consider which further regulations, if any, would aid in protecting public health and assuring the concerns of their constituents. The Supreme Court in Blanton specifically found that state Biosolids Use Regulations...
contemplate the involvement of local governments in regulating biosolids applications.\textsuperscript{44} Moreover, the court clearly said that state regulations do not prohibit counties from passing ordinances that will affect biosolids applications so long as those ordinances are not inconsistent with the state regulations.\textsuperscript{45} Counties should be aware, however, that any ordinances imposing more than monitoring and testing requirements are likely to be challenged by the biosolids industry in court.

\textsuperscript{1}Ellen Z. Harrison & Malaika M. Eaton, The Role of Municipalities in Regulating the Land Application of Sewage Sludges and Septage, 41 Nat. Resources J. 77, 79-80 (2001).
\textsuperscript{2}David Snyder & Fredrick Kunkle, Health Fears Over Sludge Spur Quest For Controls, Wash. Post, Aug. 6, 2001, at B1.
\textsuperscript{4}Fredrick Kunkle, Sludge-Spreading Raising Concerns Over Health Fears, Wash. Post, Aug. 23, 2001, at VA 10; Snyder & Kunkle, supra note 2, at B1.
\textsuperscript{5}Id.
\textsuperscript{6}261 Va. 55, 540 S.E.2d 869 (Va. 2001).
\textsuperscript{7}Va. Code Ann. § 62.1-164.5 states, inter alia, that “No person shall…land apply, market or distribute sewage sludge in the Commonwealth without a current Virginia Pollution Abatement Permit.” The statute further outlines regulations which must be promulgated by the Board of Health to further regulate the application of biosolids.
\textsuperscript{8}Blanton, 540 S.E.2d at 873-74.
\textsuperscript{9}Id. at 874.
\textsuperscript{10}Id.
\textsuperscript{11}Id.
\textsuperscript{12}Snyder & Kunkle, supra note 2, at B1.
\textsuperscript{13}40 C.F.R. § 503.32(b) (2002).
\textsuperscript{14}40 C.F.R. § 503.33 (2002).
\textsuperscript{15}12 VAC 5-585-510 (A)(3)(a)(1).
\textsuperscript{16}12 VAC 5-585-510 (A)(3)(b) and (c).
\textsuperscript{17}Id.
\textsuperscript{18}Id.
\textsuperscript{19}12 VAC 5-585-510 (A)(2).
\textsuperscript{20}Snyder & Kunkle, supra note 2, at B1.
\textsuperscript{21}Id.
\textsuperscript{22}Id.
\textsuperscript{23}Id.
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\textsuperscript{25}Blanton, 540 S.E.2d at 873-74.
\textsuperscript{26}Id. at 874.
\textsuperscript{27}Id.
\textsuperscript{28}Va. Code Ann. § 62.1-44.19:3(c) (Michie 2001).
\textsuperscript{29}Memorandum in Support of Plaintiff’s Motion For Preliminary Injunction at 9-13, Synagro–WWT, Inc. V. Louisa County, No. 3:01cv0060 (W.D. Va., filed June 7, 2001). The Louisa ordinances would have: 1) required that applicators deliver a nutrient management plan developed by an independent vendor to the “County Coordinator,” a newly-created position, prior to application; 2) granted the County Coordinator authority to establish setback lines and site buffers in accordance with county zoning ordinances; 3) mandated that, wherever possible, the application of biosolids be avoided or delayed if the application would conflict with a community social event; 4) required that signs be posted at an application site at least thirty days prior to the anticipated application date; and 5) required applicators to provide the County Coordinator with a performance bond prior to applying biosolids. Id. at 3.
\textsuperscript{30}Id. at 9.
\textsuperscript{31}Id.
\textsuperscript{32}Id. at 9-13.
\textsuperscript{33}Blanton, 540 S.E.2d at 874.
\textsuperscript{34}12 VAC 5-585-620, which governs the minimum information required for completion of a biosolids management application, requires the applicant to comply with “local government zoning and applicable ordinances.”
\textsuperscript{35}Blanton, 540 S.E.2d at 874.
\textsuperscript{36}Synagro–WWT, Inc. V. Louisa County, No. 3:01cv0060 (W.D. Va. July 18, 2001) (order and memorandum opinion granting preliminary injunction).
\textsuperscript{37}Id. at 12.
\textsuperscript{38}Id.
\textsuperscript{39}Id. at 13
\textsuperscript{40}Id.
\textsuperscript{41}These regulatory options were directly inspired by Harrison and Malaika, supra note 1, at 92 et seq. For a more thorough analysis of the regulatory options available to counties generally, this article is an invaluable resource.
\textsuperscript{42}Snyder & Kunkle, supra note 2, at B1.
\textsuperscript{44}Blanton, 540 S.E.2d at 874.
\textsuperscript{45}Id.
Environmental Law News

Case Digest

Federal Circuit Court

Sovereign Immunity Bars Private Suit Against West Virginia in Federal Court

*Bragg v. West Virginia Coal Ass’n*, 248 F.3d 275 (4th Cir. 2001)

by William West, Class of 2004 Washington and Lee University School of Law

Several citizens of West Virginia and the West Virginia Highland Conservatory ("plaintiffs") sought injunctive relief against the director of the West Virginia Department of Environmental Protection ("Director" and "WVDEP"), challenging his issuance of permits for mountaintop-removal mining. Plaintiffs’ alleged that the Director issued permits in violation of both federal and state law relating to Surface Mining Control Act, 30 U.S.C. § 1201, et seq. ("SMCRA"). The litigants settled all but counts 2 and 3 of plaintiffs’ claim before trial, and the District Court resolved those counts on summary judgment in the plaintiffs’ favor.

In finding for the plaintiffs on count 2, the District Court found that the Director had a non-discretionary duty to make findings required by the state statutory scheme before authorizing valley fills within 100 feet of intermittent or perennial streams. Under count 3, the court found that the Director had violated the statutory scheme by failing to deny permits for valley fills affecting such streams, pursuant to 30 C.F.R. § 816.57.

The Director appealed the judgment of the District Court on several grounds. The Director claimed the District Court erred in its ruling that the Eleventh Amendment does not bar suit against him for violations of the state’s SMCRA scheme. The Director also contested federal jurisdiction over these claims.

The Fourth Circuit held that § 1254(a), which provides that the Secretary of the Interior shall assume regulatory responsibility for SMCRA if a state fails to submit an acceptable program or fails to implement, enforce or maintain an approved program, does not "federalize" the program unless the Secretary finds that the state program is deficient. *Id.* The court concluded that either the state or the Department of the Interior must have “exclusive jurisdiction”; shared jurisdiction is not possible under SMCRA. *Id.*

The court further held that the state did not implicitly waive immunity by adopting SMCRA. The federal statute’s citizen suit provisions (§ 1270) allow citizens to bring a federal action against the “appropriate state regulatory authority...to the extent permitted by the Eleventh Amendment...where there is alleged a failure of the...appropriate state regulatory authority.” 30 U.S.C. § 1270(a)(2). The court decided that since there is not an express waiver of immunity in

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The Fourth Circuit rejected the District Court’s conclusion that sovereign immunity did not bar the suit against the Director. To reach this conclusion, the appellate court relied largely on § 1253(a) of SMCRA, which grants a state with an approved program “exclusive jurisdiction over the regulation of surface coal mining.” 30 U.S.C. § 1253(a). Although the court concluded that “SMCRA does manifest an ongoing federal interest in assuring that minimum standards for surface coal mining are enforced,” it limited this interest to continual federal oversight that can ultimately result in the withdrawal of the state’s exclusive jurisdiction. 248 F.3d 275, 294.

The Fourth Circuit held that § 1254(a), which provides that the Secretary of the Interior shall assume regulatory responsibility for SMCRA if a state fails to submit an acceptable program or fails to implement, enforce or maintain an approved program, does not “federalize” the program unless the Secretary finds that the state program is deficient. *Id.* The court concluded that either the state or the Department of the Interior must have “exclusive jurisdiction”; shared jurisdiction is not possible under SMCRA. *Id.*

The court further held that the state did not implicitly waive immunity by adopting SMCRA. The federal statute’s citizen suit provisions (§ 1270) allow citizens to bring a federal action against the “appropriate state regulatory authority...to the extent permitted by the Eleventh Amendment...where there is alleged a failure of the...appropriate state regulatory authority.” 30 U.S.C. § 1270(a)(2). The court decided that since there is not an express waiver of immunity in
the statutory language, and the Eleventh Amendment generally bars suits against state actors, the citizen suit provisions are inoperative while a state is maintaining “exclusive jurisdiction” over its approved program. The court held that, where Congress has not made clear that a state must waive sovereign immunity as a condition for implementing a program, courts cannot presume that a state has waived its immunity. Bragg at 298.

Moreover, the court also found that the Ex Parte Young exception to Eleventh Amendment Immunity, which allows federal suits seeking injunctive relief against state actors for violations of state law, did not apply. Because the federal nature of the program “drops out” upon the Secretary’s approval of the program, the Director cannot violate “federal” law under SMCRA so long as the state retains autonomy over its program.

Accordingly, the Fourth Circuit dismissed the suit for lack of jurisdiction, but expressly permitted plaintiffs to seek relief in the West Virginia state courts.

Regulations of Out-of-state Waste Violate Dormant Commerce Clause and Supremacy Clause of the Constitution

Waste Management Holdings v. Gilmore, 252 F.3d 316 (4th Cir. 2001)

by Michael Adamson, Class of 2004 Washington and Lee University School of Law

The Commonwealth of Virginia appealed a District Court decision, Waste Management Holdings v. Gilmore, 87 F. Supp. 2d 536 (E.D. Va. 2000), granting summary judgment to five plaintiffs involved in the disposal of out-of-state municipal solid waste (“MSW”) in Virginia landfills. The District Court held that five statutory provisions meant to regulate the volume and transportation of MSW in Virginia violated the dormant Commerce Clause of the United States Constitution. The District Court also held two provisions also violated the Constitution’s Supremacy Clause. The Fourth Circuit addressed several threshold issues and then determined that a strict scrutiny standard of review should be applied as questions of fact existed as to whether the state’s statutory provisions were enacted for the purpose of discriminating against out-of-state persons, or were discriminatory in their practical effects. The court then affirmed that three of the provisions, concerning the volume and truck transportation of MSW, violated the dormant Commerce Clause and that one provision, prohibiting the barge transportation of MSW on three specific rivers, violated the Supremacy Clause. Other holdings of the District Court were vacated and remanded for further review.

In response to growing concerns regarding the flow of out-of-state MSW into state landfills, the Virginia General Assembly enacted five statutory provisions which: (1) capped the daily rate of MSW that could be accepted at any landfill; (2) required Virginia’s Waste Management Board (“the Board”) to limit MSW barge containers to be stacked no higher than two high; (3) prohibited MSW barges from operating on the Rappahannock, James and York rivers; (4) required waste certification procedures for any vehicle with four or more axles transporting MSW; and (5) required the Board to further regulate transport of MSW by vehicles of four or more axles. Virginia Code §§ 10.1-1408.3, 10.1-1454.1(A), 10.1-1454.2, 10.1-1408.1(Q), 10.1-1454.3(A),(D). Two landfill operators, two MSW transporters and one Virginia county that hosts a regional landfill (“Plaintiffs”) challenged these provisions under 42 U.S.C. § 1983, upon which the District Court granted summary judgment. The Virginia officials named as defendants in the action (Governor Gilmore, Sec-
Secretary of Natural Resources Woodley, and Director Treacy of the Virginia Department of Environmental Quality) appealed. The Fourth Circuit reviewed de novo.

The court first addressed several threshold issues. It held that the doctrine of sovereign immunity would not bar the action under the Ex Parte Young exception, which allows “a suit in federal court to enjoin a state officer from enforcing an unconstitutional statute.” Waste Management Holdings, 252 F.3d at 329. The court, however, did dismiss Governor Gilmore as a party since he lacked “a specific duty to enforce the challenged statutes.” Id.

The plaintiffs did have standing to challenge the statutory provisions, as the county was authorized by statute to enter into contracts to handle MSW and the landfill operators were not required to apply for an increase in their tonnage allotment before bringing suit. Id. at 332. Additionally, saving clauses stating that three of the provisions would “be implemented only to the extent allowed by federal law” were ineffective because “the language of those clauses is repugnant to the straightforward, limiting language” of the provisions. Id. at 333.

The court, citing Environmental Technology Council v. Sierra Club, 98 F.3d 532 (4th Cir. 1996), applied a two-tier standard of review for statutory provisions challenged under the dormant Commerce Clause. Strict scrutiny is required “where a state law discriminates facially, in its practical effect, or in its purpose.” Alternatively, the court will presume the law is valid if the statute merely “regulates evenhandedly and only indirectly affects interstate commerce” unless “burdens on commerce are clearly excessive.” 252 F.3d at 333. The court held that the provisions were not facially discriminatory, but it also held that summary judgment could not be granted based on whether the provisions discriminated in their practical effects or purpose. Id. at 334-35.

The court quoted “protectionist” press releases from the bill’s sponsor, State Senator Bolling, and a widely publicized letter sent by Governor Gilmore to New York Mayor Giuliani, which contended that “the home state of Washington, Jefferson and Madison has no intention of becoming New York’s dumping grounds.” Id. at 336-37. The court concluded “that no reasonable juror could find that in enacting the statutory provisions at issue, Virginia’s General Assembly acted without a discriminatory purpose” and proceeded to apply the strict scrutiny standard of review. Id. at 335.

Strict scrutiny requires a two-part test to determine whether “the provision is demonstrably justified by a valid factor unrelated to economic protectionism, and that no nondiscriminatory alternatives exist that are adequate to preserve the local interests at stake.” Id. at 341. The court determined that all the provisions passed the first part of the test, since a reasonable juror could infer that MSW generated outside Virginia posed risks beyond those generated by the more tightly-controlled content of Virginia’s MSW. Id. at 342. A sworn declaration by Director Treacy outlining the dangers of the barge transport of MSW that “cannot be alleviated absent enforcement of the Stacking Provision and the Three Rivers’ Ban” was sufficiently persuasive for these two provisions to pass the second prong of the test. Id. at 344.

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Strict scrutiny requires a two-part test to determine whether “the provision is demonstrably justified by a valid factor unrelated to economic protectionism, and that no nondiscriminatory alternatives exist that are adequate to preserve the local interests at stake.” Id. at 341. The court determined that all the provisions passed the first part of the test, since a reasonable juror could infer that MSW generated outside Virginia posed risks beyond those generated by the more tightly-controlled content of Virginia’s MSW. Id. at 342. A sworn declaration by Director Treacy outlining the dangers of the barge transport of MSW that “cannot be alleviated absent enforcement of the Stacking Provision and the Three Rivers’ Ban” was sufficiently persuasive for these two provisions to pass the second prong of the test. Id. at 344. However, the defendants failed to demonstrate that less-burdensome alternatives existed for the two trucking provisions and for the capping provision. Id. at 343-44.

Thus, the court affirmed summary judgment that these three provisions violated the dormant Commerce Clause. Id. at 343, 345.

The court then dispensed with two other contentions from the defendants that would allow Virginia to escape application of the dormant Commerce Clause. As Virginia “was not acting as a private participant in the waste disposal market,” the “market participant doctrine is inapplicable.” Id. at 345. Additionally, Subchapter IV of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6941-6949a, did not demonstrate sufficiently clear congressional intent to allow discrimination against out-of-state MSW. Id. at 347. The court also dispensed
with the defendant’s affirmative defense based on assertions of New York’s protectionism since neither New York State nor New York City was a plaintiff in the action. *Id.* at 347.

The court then considered whether the two barge transport provisions violated the Supremacy Clause. The court cited *National Home Equity Mortgage Assoc. v. Face*, 239 F.3d 633 (4th Cir. 2001) as establishing the test of “whether it is impossible to comply with both state and federal law or whether the state law stands as an obstacle to the accomplishment of the full purposes and objectives of the relevant federal law.” 252 F.3d at 348. The court cited *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265 (1977), holding that the three river ban violated the Supremacy Clause by excluding federally licensed commerce upon a state waterway. *Id.* at 348. However, the court held that the dangers inherent in stacking MSW containers did present a genuine issue of material fact sufficient to vacate the finding that the stacking provision violated the Supremacy Clause. *Id.* at 348.

### Fourth Circuit Opted for Broad Interpretation of “Disposed of” Under CERCLA

*Crofton Ventures Limited Partnership v. G&H Partnership*, 258 F.3d 292 (4th Cir. 2001)

by William West, Class of 2004
Washington and Lee University
School of Law

In early 1991, Crofton Ventures Limited Partnership (“Crofton Ventures”) took title of a 32-acre tract of land formerly owned by the defendants. Crofton Ventures subsequently discovered hazardous waste on a portion of the property. Crofton Ventures cleaned the property, and brought suit in the District of Maryland under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9601 et seq., against the former owners and operators of the land. At the conclusion of a bench trial, the District Court entered judgment for the defendants. The Fourth Circuit reversed, holding that the District Court had erroneously interpreted § 9607(a)(2). The correct interpretation of the statute would permit Crofton Ventures to recover cleanup costs unless the District Court “conclud[e] that the buried drums did not leak between 1977 and 1991, regardless of when they were buried, to make a finding that the owners and operators during that period were not liable under § 9607(a)(2).” *Id.* at 300.

The Fourth Circuit vacated and remanded the CERCLA claim, holding that the District Court had erroneously interpreted § 9607(a)(2). The correct interpretation of the statute would permit Crofton Ventures to recover cleanup costs unless the District Court “conclude[s] that the buried drums did not leak between 1977 and 1991, regardless of when they were buried, to make a finding that the owners and operators during that period were not liable under § 9607(a)(2).” *Id.* at 300.

The Fourth Circuit then applied this standard to the findings of fact of the District Court. The appellate court found that sufficient evidence existed to conclude that the drums leaked TCE into the ground between 1977 and 1991. The decision of the District Court was vacated, and the case was remanded for further proceedings. *Id.* at 298.
Judge Michael dissented, though he agreed with the majority’s interpretation of the statute. Michael believed that Crofton Ventures had only raised this “passive disposal” theory at the conclusion of the trial. Id. at 301 (Michael, J., dissenting). His examination of the record led him to conclude that, prior to closing arguments, Crofton Ventures had argued that the defendants had actively dumped TCE on the site. Consequently, he would not have ruled on the “passive disposal” theory, and would have affirmed the judgment of the District Court.

The majority disagreed. The court held that Crofton Ventures did not state a novel theory, but instead attempted to define “disposal” in a broad sense that included leaking. Id. at 298. Because Crofton Ventures had used “disposal” broadly, the court reasoned, Judge Michael’s concern that Crofton Ventures was unfairly getting a second bite at the apple were unwarranted.

EPA Approval of a Revised State Implementation Plan Subject to Arbitrary and Capricious Review

1000 Friends of Maryland v. Browner, 265 F.3d 216 (4th Cir. 2001)

by Angela Jones, Class of 2002 Washington and Lee University School of Law

1000 Friends of Maryland, a citizen’s environmental group, sought judicial review of a final Environmental Protection Agency (“EPA”) action determining that Maryland’s revised motor vehicle emissions budget was adequate for Clean Air Act (“CAA”) conformity purposes. Specifically, 1000 Friends of Maryland alleged that the EPA violated the CAA when it approved Maryland’s motor vehicle emissions budget without requiring the state to submit updated photochemical grid modeling demonstrating the adequacy of the plan.

Ozone is a pollutant regulated by the EPA. 40 C.F.R. §50.9 (2001). Given Baltimore’s high levels of ozone, the area is classified a serious non-attainment area, and thus Maryland is required by the CAA to include within its state implementation plan (“SIP”) measures to control ozone. The SIP must include an attainment demonstration showing how the area will achieve ozone national ambient air quality standards (“NAAQS”) before a pre-selected deadline (November 15, 2005). The motor vehicle emissions budget is an integral part of the SIP and, if determined adequate by the EPA, it may be relied upon in determining whether a proposed transportation project conforms to the relevant SIP, even when the SIP has not yet been approved. Pursuant to 42 U.S.C.A. § 7511 a(c)(2)(A), attainment demonstrations “must be based on photochemical grid modeling or any other analytical method determined by the Administrator in the Administrator’s discretion to be at least as effective.”

The motor vehicle emissions budget submitted by Maryland in April of 1998, which included photochemical grid modeling, was determined inadequate for NAAQS conformity purposes in October of 1999. 64 Fed. Reg. at 70,409 (1999). EPA determined however that the grid modeling submitted with the SIP was statutorily sufficient, therefore no new modeling submission was required. Id. at 70,407. A revised motor vehicle emissions budget was eventually approved by the EPA, and Petitioner filed this action for judicial review, contending that the EPA violated the CAA by finding the revised motor vehicle emissions budget adequate without requiring additional photochemical grid modeling or any other similarly effective analytical method.
Pursuant to the Administrative Procedures Act, final agency actions will be upheld unless found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 265 F.3d 216 at 229 citing Virginia v. Browner, 80 F.3d 869, 876 (4th Cir. 1996). The court found that although § 7511a(c)(2)(A) of the CAA does require attainment demonstrations to be supported by sufficient modeling, there is no mandatory time frame for such modeling, nor is there any requirement that new modeling must be performed in connection with every revision to a SIP. The EPA, therefore, did not act in violation of the CAA by allowing Maryland to revise the motor vehicle emissions budget portion of its SIP without requiring submission of new photochemical grid modeling.

Turning to the question of whether the Agency’s actions were arbitrary and capricious, the court placed emphasis on the fact that a supplemental “weight of the evidence” analysis is allowed by the EPA, and was invoked in the instant determination. 265 F.3d 229. This analysis demonstrates that the revised budget is in fact consistent with attainment based on reasonable analysis of the information before the EPA. Id.

Considering the EPA’s actions here were in accordance with law and not arbitrary or capricious, the court denied the petition for judicial review.

Fourth Circuit Clarifies Citizen Standing Under National Historic Preservation Act

United States v. Pye, 269 F.3d 459 (4th Cir. 2001)

by Angela Hepler, Class of 2004
Washington and Lee University School of Law

Russ and Lee Pye brought suit against the United States Army Corps of Engineers (“Corps”), demanding that it conform to statutory and regulatory requirements prior to issuing a permit to construct a road impacting upon the waters of the United States. The Corps moved for summary judgment, alleging that the Pyes did not have standing, and the District Court granted the motion. The Fourth Circuit reviewed the District Court’s summary judgment de novo, and reversed. 269 F.3d 459, 462.

The land owned by the Pyes is adjacent to what is known as the “Sheppard Tract.” The 750-acre Sheppard Tract contains Area M, which encompasses 33 acres, including an eighteenth century plantation house and an African-American cemetery. The cemetery may partially overlap the Pyes’ property. Both the house and the cemetery are eligible for inclusion in the National Register of Historic Places. The county made a proposal to improve an existing dirt road that links the Sheppard Track and Highway 17. The road was planned to be used for access to an ash monofill, a dirt borrow pit, and a police dog training area. The improvement would include filling 0.23 acres of wetland occupied by the road. Because of the wetland filling, the county must obtain a permit from the Corps under section 404 of the Clean Water Act. The Pyes sued under the Administrative Procedure Act (“APA”), the Clean Water Act, the National Historic Preservation Act (“NHPA”), the National Environmental Policy Act and the Endangered Species Act.

To show standing under the APA a plaintiff must show: 1) an injury that is traceable to the defendant’s conduct; 2) a court can supply a remedy; and 3) the injury is within the zone of interest protected by the statute. Id. at 466-67. The injury created must be “concrete, particularized, and not conjectural or hypothetical” Id. at 467. Affidavits by a professional archeologist stated that the Corps’ permit would adversely affect the historical area by providing easier access for looters. In a prior case, a nearby plaintiff was held to have standing based on the failure of agencies to comply with the NHPA. In the instant case, the court noted that the fact the proposed construction does not touch the historic property is irrelevant, because damage can occur to the historic areas in less direct ways, such as allowing better access to looters. Id. at 469.
The injury to the Pyes was determined to be within the zone of interest targeted by the NHPA because the issues at stake were the preservation of the nation’s historic heritage and the Pyes’ interest was directly protected by this Act and its regulations. Id. at 470. The Fourth Circuit found that the injury was traceable to the defendant’s conduct because, but for the improvements made to the road, an increase in the possibility of looters would not occur. Id. at 371. Finally, the Pyes had to show that the court could redress their injuries with the requested relief. The Pyes needed only to prove that there is a procedural remedy by which their concerns could be presented before an agency. The court could redress the injury by requiring the Corps to comply with procedures set out in the NHPA.

Because the Pyes established that they were injured by the Corps in a “concrete and particular” way, they were within the zone of interest served by the NHPA, and the court could remedy their injuries, the Fourth Circuit found that they had standing to bring the suit. Id. at 472.

Federal District Court

Corps Failure to Consider a Component of a Sewage Treatment Facility in Permit Issuance Violates CWA, NEPA and NHPA


by Leslie Beam, Class of 2003 Washington and Lee University School of Law

Frances Crutchfield and Henry Broaddus, local residents of Hanover County, brought an action in the U.S. District Court of the Eastern District of Virginia challenging the authorization, by the U.S. Army Corps of Engineers (“Corps”), of Nationwide Permits (“NWPs”) applied for by the county. The NWPs approved the County’s wastewater treatment plan (“WWTP”), discharge force main, and outfall, three components of a sewage treatment project developed to meet the county’s growing wastewater treatment needs. Crutchfield and Broaddus (“Plaintiffs”) brought an action alleging that authorization of the NWPs was a violation of the Clean Water Act (“CWA”), National Environmental Policy Act (“NEPA”), and National Historic Preservation Act (“NHPA”). The District Court found that the Corps violated the acts because of its failure to properly consider an integral fourth component of the sewage treatment project, the sewer interceptor, when making its authorization.

The court first found that the Corps could not authorize the NWPs under the CWA without consideration of an associated sewer interceptor. The court held that the NWPs at issue fail the “independent utility” analysis of 33 C.F.R § 330.6(d). This regulation states that:

\[\text{[P]ortions of a larger project may proceed under the authority of the NWPs while the [Corps] evaluates an individual permit application for other portions of the same project, but only if the portions of the project qualifying for NWP authorization would have independent utility and are able to function or meet their purpose independent of the total project.}\]

Because there was no precedent interpreting the “independent utility” requirement of this regulation, the court examined the plain text of the regulation to delineate the standard. The court then concluded that the sewer interceptor is the “linchpin of functionality and utility for the WWTP, the force main, and the outfall,” and thus must be considered concurrently with these three components when authorizing the NWPs. The Corps’ failure to consider the
interceptor for authorization when issuing the challenged NWPs was, therefore, a violation of the CWA.

The court next held that the Corps had to consider the sewer interceptor when deciding whether to prepare an EIS under NEPA. The Corps must consider individual and cumulative impacts of actions in determining whether the actions will significantly affect the quality of the human environment, and thus whether an EIS is required under NEPA. 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.27(b)(7). Because the WWTP, force main, and outfall were found indivisible from the interceptor in their effect on the environment, the court held that the Corps must consider all four components of the treatment system in determining whether to prepare an EIS. As the Corps failed to consider the cumulative effects of the four interdependent components, the court found that it violated NEPA.

Lastly, the court held that the Corps had to consider the sewer interceptor in determining the “area of potential effects” of the NWPs under NHPA. Because the interceptor was not considered with the rest of the sewage treatment project, the agency did not consider the interceptor in determining the “area of potential effects” of the verification of the NWPs. Consequently, any determination made by the Corps regarding the effect of the undertaking under NEPA could not be adequately made. Thus, the court held that Corps must now make that determination with consideration of the interceptor.

Because the Corps improperly failed to consider the interceptor when authorizing the challenged NWPs, the court held that the action was arbitrary, capricious, and not in accordance with law. Thus, the action was set aside, and further injunctive relief was deferred pending a conference of the parties involved.

Virginia Supreme Court

Privity Exists Between EPA and Virginia Agencies, Thereby Invoking Res Judicata and Precluding Subsequent Enforcement Actions


by Ryan Leonard, Class of 2003 Washington and Lee University School of Law

Two state agencies, the State Water Control Board (“SWCB”) and the director of the Department of Environmental Quality (“DEQ”), brought suit in the Circuit Court of the Isle of Wright County against Smithfield Foods, Inc. (“Smithfield”) for an alleged violation of a Virginia Pollutant Discharge Elimination System (“VPDES”) permit. The permit carried the weight of both state and federal law. Prior to the conclusion of the state action, the United States Environmental Protect Agency (“EPA”) successfully brought a federal enforcement action against Smithfield for violations of the permit. Following the federal action, Smithfield entered a plea of res judicata with regard to the pending state action. The court sided with Smithfield and dismissed the state’s enforcement action. The state agencies appealed. The Virginia Supreme Court affirmed the decision of the Circuit Court, holding the state agencies were in privity with the EPA with regard to the prior federal action.

In reaching its decision, the Virginia Supreme Court examined the nature of the relationship between the state agencies and the EPA. The court noted “the touchstone of privity for purposes of res judicata is that a party’s interest is so identical with another that representation by one party is representation of the other’s legal right.” Nero v. Ferris, 222 Va. 807, 813 (1981). The key question presented was whether the EPA
and the state agencies shared the same “legal right.”

The agencies asserted that privity did not exist between the parties. In support of their position, they argued that their interests and legal rights were distinct from those of the EPA. The state agencies proposed that their interests were based on state law, while the EPA’s were derived from federal law, specifically the Clean Water Act. The agencies also argued there was no privity because they did not “share a subjective intent” with the EPA to enforce the permit together.

The court disagreed with the state agencies’ reasoning. The court noted that a single permit adequately represented the rights and interests of the agencies and the EPA. The parties engaged in a “joint endeavor” aimed at the protection of water quality. Further, the EPA and the state agencies believed their interests would be protected by the state-issued permits. As a result, the two parties share an “identity of interest” with regard to the protection of water quality in Virginia. Consequently, the state agencies’ legal rights were represented by the EPA in the federal enforcement action.

In response to the state agencies’ other contentions, the court noted that a single permit adequately represented the rights and interests of the agencies and the EPA. The parties engaged in a “joint endeavor” aimed at the protection of water quality. Further, the EPA and the state agencies believed their interests would be protected by the state-issued permits. As a result, the two parties share an “identity of interest” with regard to the protection of water quality in Virginia. Consequently, the state agencies’ legal rights were represented by the EPA in the federal enforcement action.

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Virginia Court of Appeals

Editors note: This case has been appealed to the Virginia Supreme Court. The opinion of the court was adopted from the panel decision. Those practitioners interested in this case should closely read the dissenting opinion of Judge Benton.

Fines Upheld for Company Refusing to Turn Over Company Documents Relating to Contracting to Remove Asbestos


by Lester Brock, Class of 2004
Washington and Lee University School of Law

Abateco Services Inc. (“Abateco”) brought this action in the Circuit Court of the City of Hopewell, appealing a decision of the Department of Prof-
warrant. This resulted in a conviction of four willful violations of the Department’s regulations and a fine of $9,665, affirmed by this court in Abateco Services, Inc. v. Bell, 23 Va. App. 504, 477 S.E.2d 795 (1996). In addition, the Board for Asbestos and Lead of the Department of Professional and Occupational Regulation (“Board”) sought further disciplinary action against Abateco under Virginia Code § 54.1-516(A)(3) for failing to comply with state and federal standards. The Board fined Abateco $2,000 and suspended its license for 60 days for willfully violating Virginia Code § 54.1-516(A)(3) and the Asbestos Licensing Program Regulation 13.6.A.1(18 Virginia Code 15-20-450). The Circuit Court reversed the Board’s decision, and the Board appealed.

Abateco argued the Circuit Court’s prior holding in Abateco v. Bell, that Abateco was contractually bound to produce requested documents without a search warrant, left open the question of whether a search warrant was necessary in the absence of a contractual waiver. Abateco claimed the state or federal regulations are not enforceable until this issue was determined. The court disagreed. It held that the Circuit Court should have enforced the court’s prior finding that Abateco’s refusal to produce the requested documents violated these standards.

The court next addressed the issue of whether Abateco’s good-faith reliance on counsel negates its willful violation of VOSHA regulations. Relying on U.S. Supreme Court interpretations of “willful” with regard to federal OSHA regulations, the court found that a “good faith” reliance on counsel does not negate a willful violation. As defined in OSHA, a “willful act” is one done “intentionally,” and an act done in good faith is one done “honestly without fraud or deceit.” Thus, whether an act is done in good faith is irrelevant to whether it was willful. In a dissenting opinion, Judge Benton stated that the majority’s definition contradicts the Virginia Supreme Court’s definition of willful in civil and criminal contexts, which requires knowledge that acts violate the law or are done in careless disregard. Under this definition, a good faith reliance on counsel may negate a willful violation.

Finally, the court addressed whether the fines imposed by the Board violated the Eighth Amendment of the United States Constitution and Article I, § 9 of the Constitution of the Commonwealth of Virginia for being grossly excessive. Abateco argued that the $2,000 fine was unconstitutional, because it had already been fined in Abateco v. Bell, 23 Va. App. 504, 477 S.E.2d 795 (1996), and that the duplicity of penalties by different agencies for the same act is per se unconstitutionally excessive. The court rejected this argument, claiming the penalties were not grossly disproportionate because the totality of the fines did not exceed the maximum fine Abateco could have received for either infraction alone.

DEQ Issuance of Landfill Permit Voided


by Ryan Leonard, Class of 2003 Washington and Lee University School of Law

Appellants, Concerned Taxpayers of Brunswick County (“Concerned Taxpayers”), sought review of the issuance of a solid waste management permit by the Department of Environmental Quality (“DEQ”) to AEGIS Waste Solutions (“AEGIS”) for the operation of a solid waste landfill. The Circuit Court upheld DEQ’s permit issuance, and Concerned Taxpayers appealed, arguing that
three parcels of land encompassed by the permit were not certified as complying with all local ordinances as required by Virginia Code § 10.1-1408.1(B)(1). The Virginia Court of Appeals held that: 1) Concerned Taxpayers had standing to seek judicial review, and 2) DEQ did not have the authority to issue a permit or issue amendments when the application contained land parcels that were not certified by the local governing body.

The court first addressed Concerned Taxpayers standing to seek judicial review. The Virginia Waste Management Act provides that, “any person who has participated, in person or by the submittal of written comments, in the public comment process...and who has exhausted all available remedies for review of the Board’s decision, shall be entitled to judicial review thereof in accordance with the Administrative Process Act.” The court found that Concerned Taxpayers met these requirements because it qualified as a person under the Virginia Waste Management Act and had exhausted all available remedies for review of the state agency’s decision.

The court then determined whether Concerned Taxpayers met the requirements for standing under Article III of the United States Constitution: 1) injury in fact; 2) a causal connection between the injury and the conduct complained of; and 3) likelihood that the injury will be redressed by a favorable decision. Because of Concerned Taxpayers’ organizational status, the court also addressed the standing requirements for associations set forth in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1997), that: 1) its members would have standing to sue in their own right; 2) the interests it seeks to protect are germane to the organization’s purpose; and 3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. The court found that Concerned Taxpayers had satisfied all the above requirements, and therefore had standing to seek judicial review of DEQ’s issuance of the permit.

The second part of the court’s holding, that DEQ did not have the authority to issue the permit, hinged on the application process. The first step in acquiring a DEQ permit to build a new solid waste management facility is to file a notice of intent that includes the precise location and intended use of the new facility. AEGIS’s application failed to satisfy these requirements because it included three parcels that it had not yet acquired. Although the first part of its application was accompanied by the necessary certification, that certification did not extend to the three parcels that had not yet been acquired but were included on the site map. The court held that the application process could only continue as to the parcels included in the certification. Because the permit included the three parcels that had not been acquired by the submission of the Part A application and the certification, the permit was void, and any later amendments to the permit were also void.
HB 1293 [Act]
Oyster Grounds Removed for Private Use

Removes 0.79 acres for private usage from the natural oyster rocks, beds and shoals included in the Baylor Survey. The grounds removed are 0.39 acres from Public Ground Number 6 and 0.4 acres from Public Ground Number 7, both located in the Lafayette River in the City of Norfolk.

HB 178
[Amending Sections 10.1-603.16 through 10.1-603.20]
Flood Assistance Fund

Expands the uses of the Flood Prevention and Protection Assistance Fund to include the awarding of grants or loans to public bodies owning dams and the awarding of loans to private dam owners to assist in paying the costs of modifications in the dam’s design, or repairs to or maintenance of the dam. The fund distributes grants and loans to local public bodies for the development and implementation of flood prevention or protection projects or studies as a part of a required federal match.

HB 211
[Amending Section 10.1-512]
Boundaries of Soil and Water Conservation Districts

Requires that the Virginia Soil and Water Conservation Board consider relevant funding factors when determining the boundaries of soil and water conservation districts; the Board must consider funding factors in addition to the sundry miscellaneous factors already contained in Section 10.1-512(viii).

HB 448
[Amending Section 10.1-1181.2]
Notice of Timber Harvesting; Penalty

Requires the commercial timber-harvesting operator to notify the State Forester of the commercial harvesting of timber prior to completion but not later than three working days after the commencement of a harvesting operation. If the operator fails to do so, the State Forester may assess a civil penalty of $250 for the initial violation and up to $1,000 for subsequent violations within a two-year period.
HB 870
[Amending Section 10.1-411.1]  
Clinch-Guest Scenic River  
Extends Virginia Scenic Rivers System designation to Clinch River from the Route 58 bridge in St. Paul to the junction with the Guest River (approximately 9.2 miles). The bill also provides that the Clinch-Guest Scenic River Advisory Board will be composed of nine area residents. At least one must be a riparian landowner on the Clinch River, and at least one must be a riparian landowner from within the LENOWISCO Planning District Area.

HB 91
[Amending and Reenacting § 62.1-44.15]  
Amends subsection 5(c) to allow the State Water Control Board to condition the issuance of certificates permitting dredging projects upon a showing of financial responsibility for the completion compensatory mitigation requirements. Financial responsibility may be demonstrated by a letter of credit, certificate of deposit or performance bond.

HB 463
[Adding Sections 10.1-1230 through 10.1-1237]  
Brownfield Restoration and Land Renewal Act  
Provides that the Virginia Waste Management Board will administer a program of voluntary remediation of brownfields where remediation has not clearly been mandated by existing federal and state law. Allows the Director of the Department of Environmental Quality to grant amnesty in exchange for voluntary disclosure of contamination where such a grant is consistent with applicable law, and permits liability limitations for remediation costs. Establishes procedures under which local governments and state agencies may apply to gain access to abandoned brownfields. The Act also creates the Virginia Brownfields Restoration and Economic Redevelopment Assistance Fund to provide grants and loans to promote cleanup and reuse of contaminated sites.

SB 115
[Amending Section 28.2-110 and 28.2-111]  
Ballast Water Reporting Requirements  
Designates the Hampton Roads Maritime Association as the Virginia Marine Resources Commission’s agent for the collection of Ballast Water Control Report forms, which will be filed with the Commission monthly. Exempts ships from filing a report if their previous port of call is within the United States Exclusive Economic Zone and a report was filed at that previous port of call.
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