# DELAWARE LAWYER

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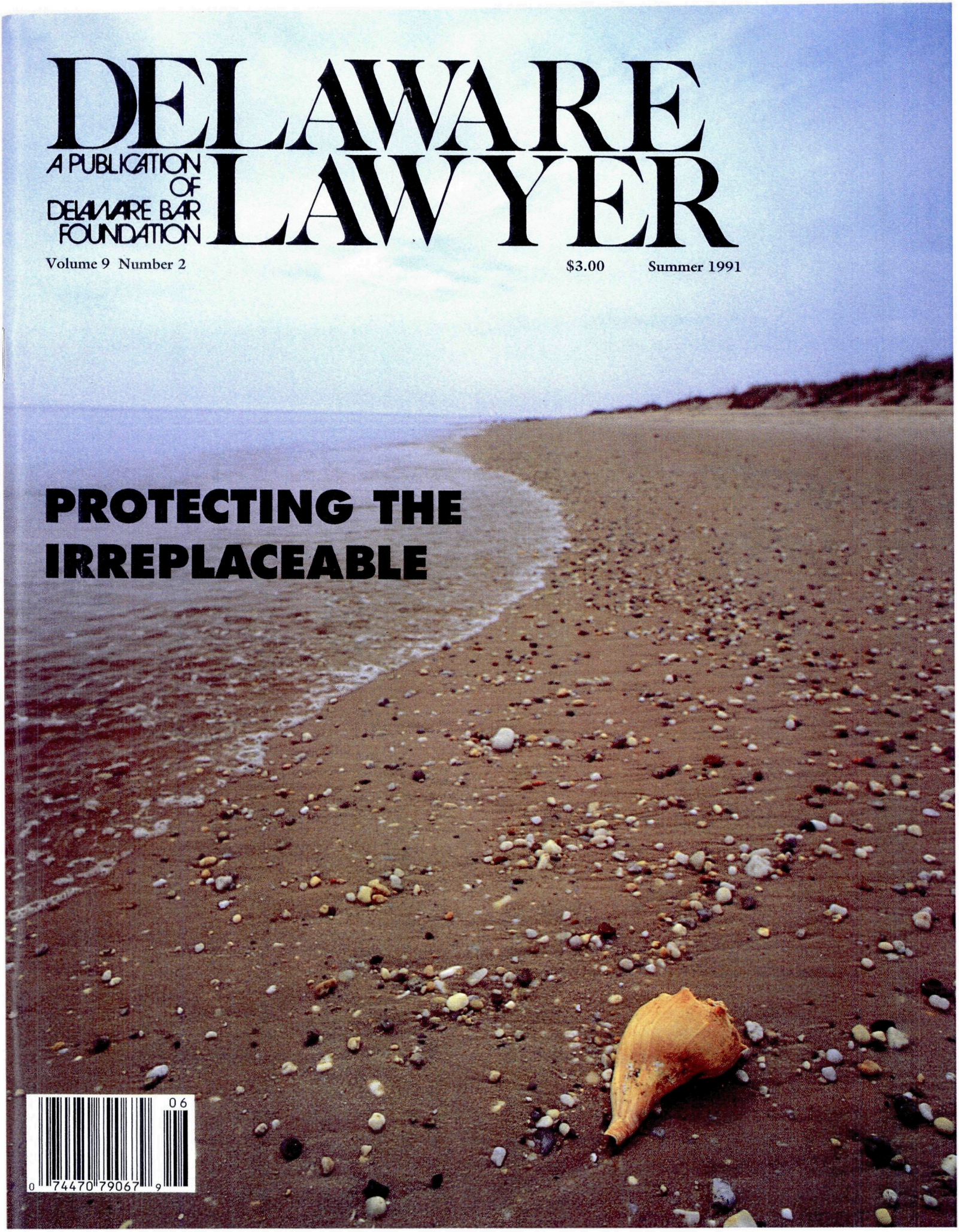

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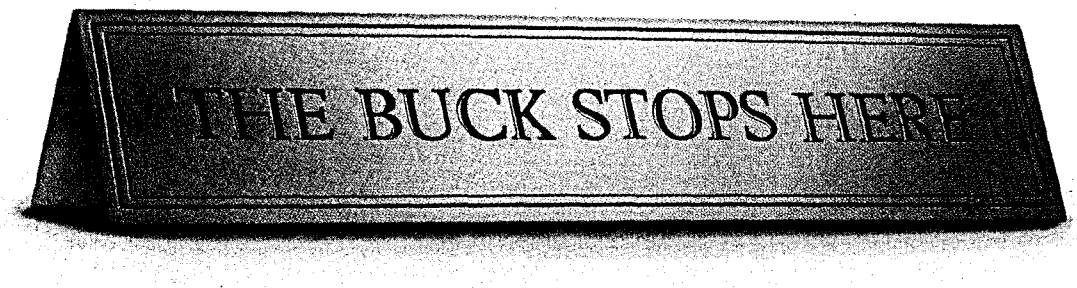


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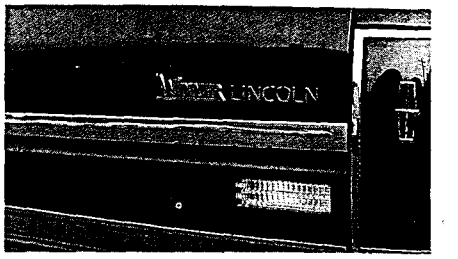


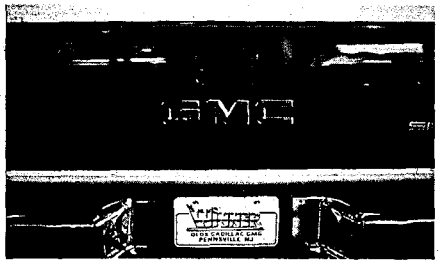


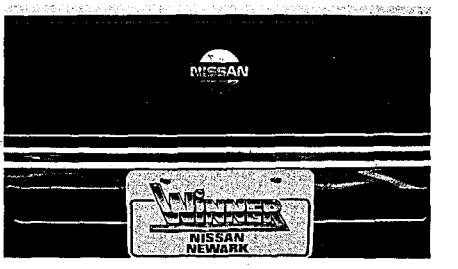


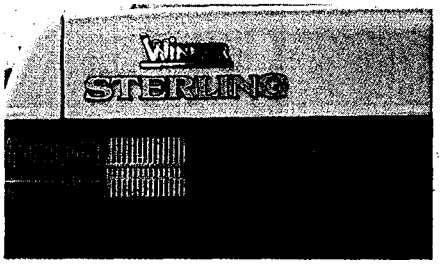


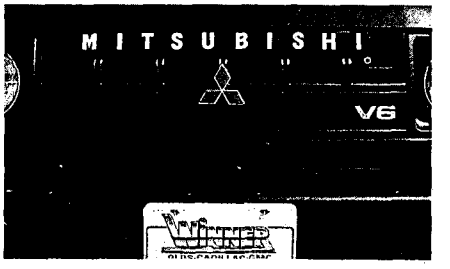


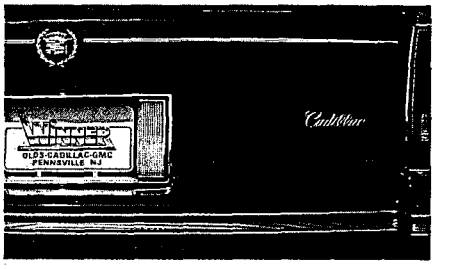


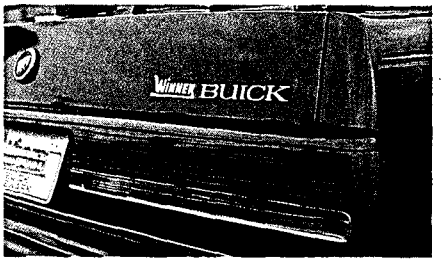


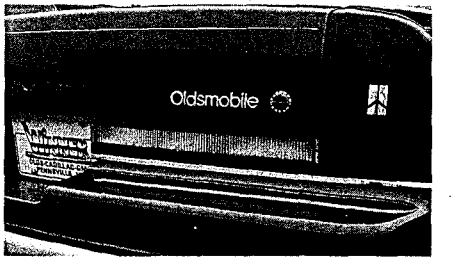


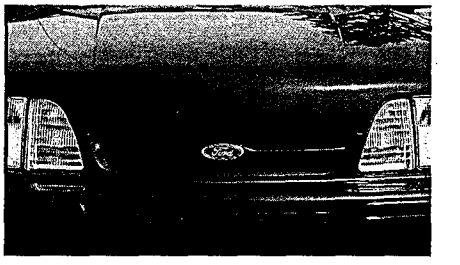

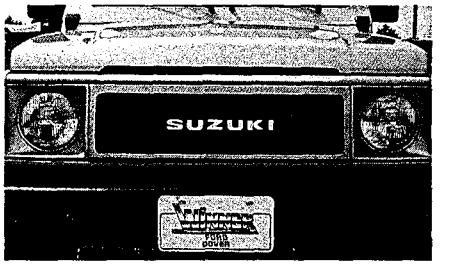


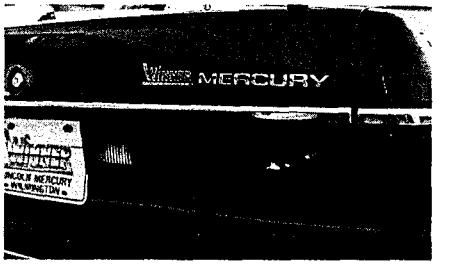


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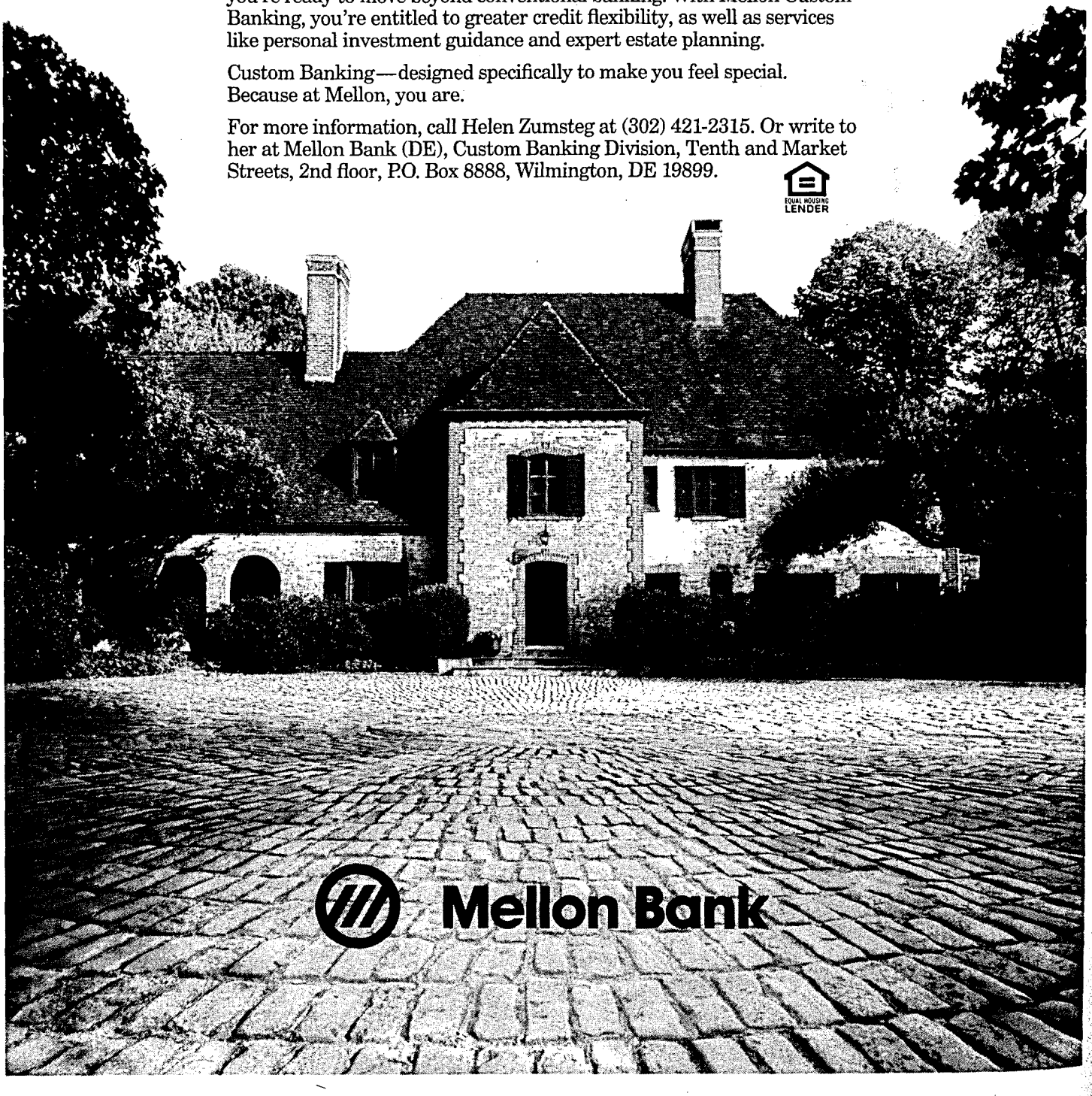

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**CO-EDITORS' MESSAGE** As we enter the 1990s it is abundantly clear that environmental law is here to stay and will continue to grow. We are also now in the second decade following passage of the federal Superfund law to clean up abandoned hazardous waste sites. Other federal and state environmental protection laws relating to water, air, and current-day management of solid and hazardous waste are in their third decade. These laws influence a multi-faceted array of business dealings, which in turn affect the courts called upon to adjudicate complex environmental, toxic tort, and insurance coverage litigation. All the while legislators will continue to respond to heightened public awareness of environmental issues by passing additional laws.

This issue of DELAWARE LAWYER is devoted principally to environmental law, discussed by experienced Delaware practitioners. We hope that these articles give environmental lawyers and the public they represent further insights into this demanding - and exciting - branch of the law and afford some understanding and appreciation of the breadth and complexity of the environmental issues confronting us. We take this opportunity to thank the gifted and generous authors of these highly informative and useful articles.

Roxanne E. Jayne, Esquire
Richard E. Poole, Esquire

**THE COVER:** The air polluting witches and the riverside slime appearing immediately above contrast disturbingly with the clean and lovely Delaware shore, a natural splendor, the preservation of which is an urgent topic of this issue.

**COVER PHOTOGRAGH BY CARLOS ALEJANDRO**



Illustration by Paulette Bogan Photograph by Susan L. Gregg

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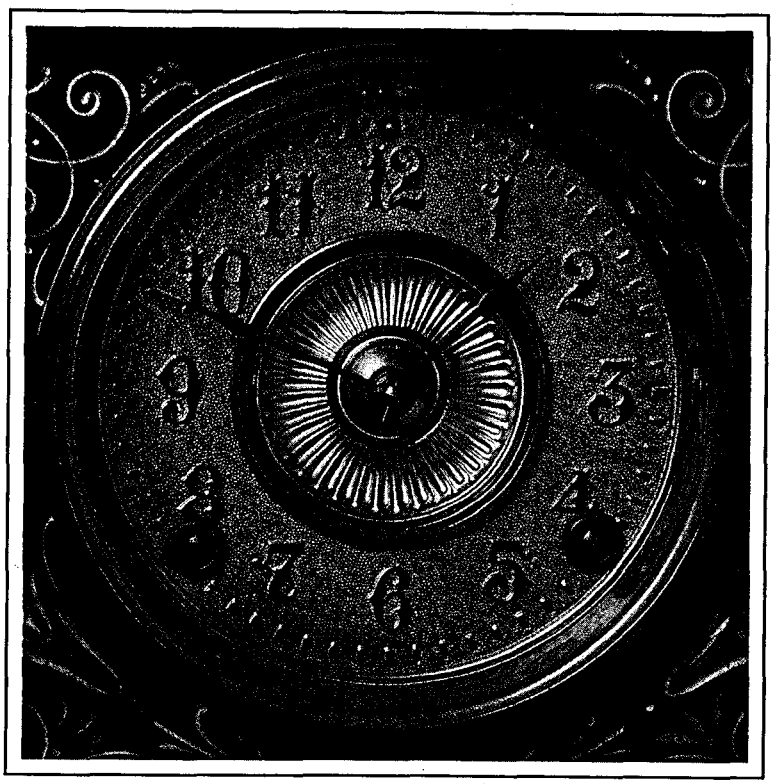

Clock courtesy of Hagley Museum and Library.

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# TO THE EDITOR

Gentlemen:

Upon publication of the last issue of DELAWARE LAWYER, Representative Steven H. Amick contacted me concerning inaccuracies in the section on the passage of the 1989 Trafficking Law. (See footnote 42). My article stated that the 1989 Trafficking law was proposed by Representative Amick and passed without any public hearings. In fact, the bill was proposed in the Senate and passed unanimously in the House. Representative Amick headed the Substance Abuse Committee of the House of Representatives but was not the creator or chief supporter of the legislation.

According to Representative Steven H. Amick hearings were held pursuant to House rules. Although they were not widely publicized as would be desirable, this is in part a product of media inattention as well as lack of legislative staff. (Delaware has a part time legislature.)

At no point does the article intend to imply a "cabal" existed to pass this legislation. The method by which this law passed was not unique. Representative Amick agrees that this points out the larger issue of the need to develop a broader method of obtaining expert and public input for major legislation, a subject that merits further discussion in future issues of this magazine.

Very truly yours,
David J. Facciolo


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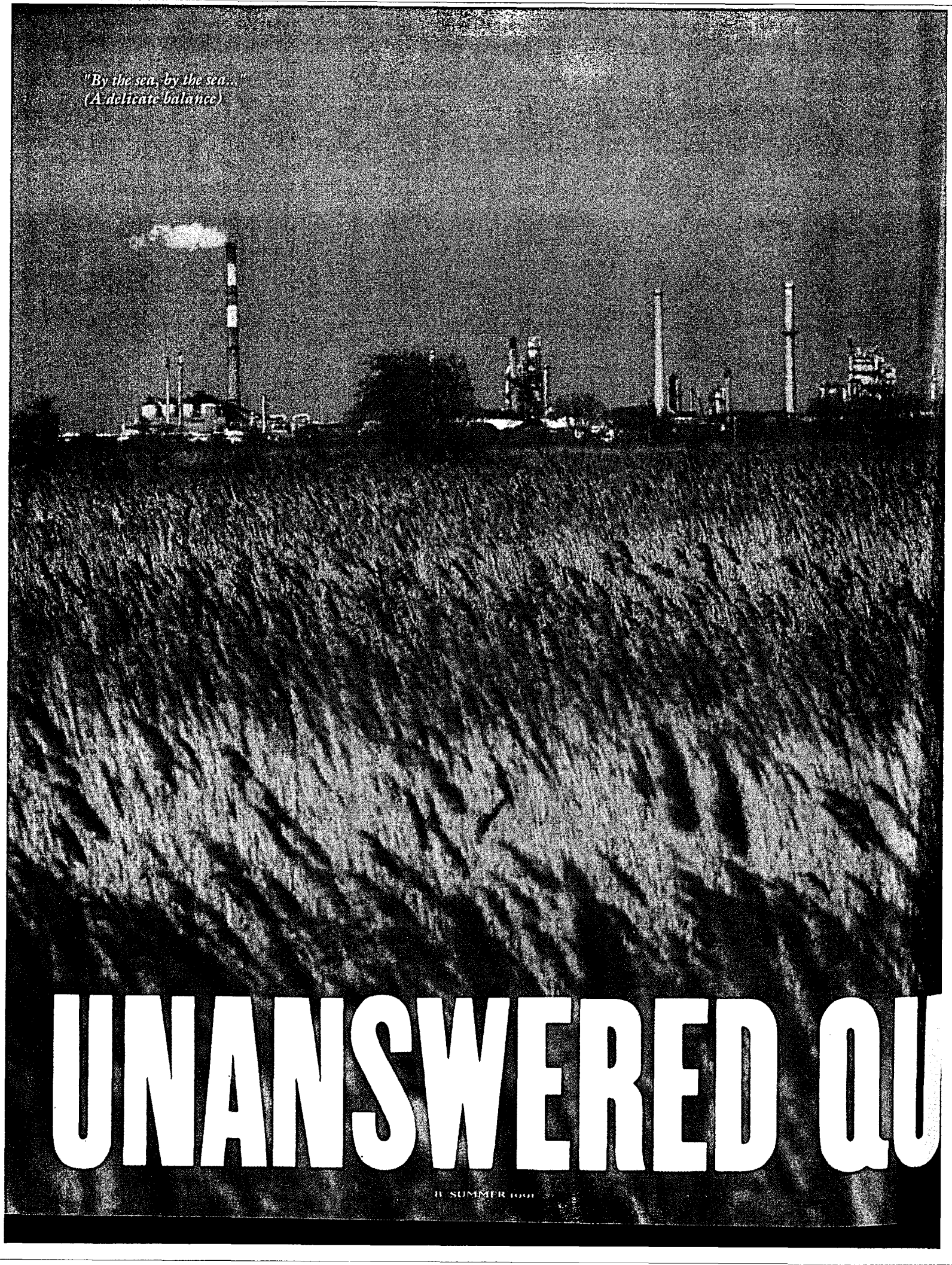
"By the sea, by the sea..."
(A delicate balance)
UNANSWERED QU
SUMMER 1991

# THE RESOURCEFUL ADMINISTRATION OF THE COASTAL ZONE ACT

BY JUNE D. MACARTOR

There is no more apt illustration of Bismarck's adage that "Politics is the art of the possible" than the passage and progress of the Delaware Coastal Zone Act. From its genesis at a New York reception to the present day balancing act of environmental integrity, economic development, and political necessity in making coastal zone decisions, the Coastal Zone Act has been a striking example of creating new processes to solve old problems of land use.

Should environmental programs be influenced by politics and current events? Of course. Land decisions aren't made in a vacuum. Ideas change through the years. Consider these passages:"(O)ne of those sluggish, reptile streams, that do not run but creep, and which wherever it passes, spreads its venom, and destroys the health of all those who inhabit its marshes." Willson v. Black-bird Creek Marsh Company, 2 Pet. 245 (1829) Statement by Defense Counsel cited in Barrett, Bruton, Honnold, Constitutional Law.

"(T)he coastal areas of Delaware are the most critical areas for the future of the State in terms of the quality of life in the State . . . the protection of the environment, natural beauty and recreation potential of the State is also of great concern." 7 Del. C. Section 7001.

These two passages, referring to the same lands and waters of the State of Delaware but published many years apart, reflect the transformation of legal and political response to the critical problems of the environment. The term "environment" itself is difficult to define. It has been suggested by Wagner in "The Human Use of the Earth" that rather than being a thing that can be pointed to and described, it is a way of thinking about the relationship of soil, water, vegetation, animal life, and air to certain things that human beings do, make, have, or are. Such a definition makes it clear that one aspect of the problem cannot be torn from the fabric woven of all the influences that govern its composition.

The Delaware Coastal Zone Act is a precise land use tool, covering a limited area and serving a limited purpose. It bears a relationship to strictly environmental

Photograph by Carlos Alejandro

# :STIONS: A SUCCESS STORY

statutes governing releases of undesirable substances, in that certain industries are held to have such undesirable characteristics as to preclude placing them in the select area of the Coast.

**However.**

Such industries were already in the select area at the time the Act was passed. Counties were jealous of their right to decide land use questions. Industry was affronted at the suggestion it could be undesirable. Environmentalists were primarily interested in preserving the vacant lands for public use, rather than eliminating existing uses. One compromise of area had already been made - to omit the Port of Wilmington from the Zone. How then to administer the Act to follow the spirit and letter of the law?

Such a thing is not done easily.

Restricting land use is not an invention of 20th century flower children. It has an established history, perhaps beginning with the Twelve Tables of Roman Law in 450 B.C. and continuing through all the more modern zoning cases. Related environmental cases from history include a 1307 London case in which a smoke nuisance was a hanging offense; a prohibition in 1610 of a pigsty that would pollute the air and, by dicta, the prohibition against building a limekiln so as to smoke out a neighbor or corrupt a neighbor's water from a lime-pit. And all the while the absolute rights of private property were proclaimed in Blackstone. The two incompatible doctrines arrived on these coasts with English law and continued through American law, marching through the halls of legislatures and courts, juggled by jurists and officials in a web of creative tension.

Such was the setting into which came the Delaware Coastal Zone Act, enacted into law twenty years ago, in June 1971.

So what was this fancy new law that brought fame (or notoriety, depending on which publication one read) to the First State? It defined a narrow strip of about 2 miles width along the coast and the Chesapeake and Delaware Canal, extending out into the water to the boundary of the State in which, with very few exceptions, "heavy industry" and bulk product transfer facilities were prohibited, and manufacturing needed a permit, except for existing uses. Straightforward, yes? Well, no. More complicated simplicity would be hard to imagine:

How to apply the definition of "heavy industry" to a particular use? How to follow the dictate of Section 7001 to attract new industry to Delaware while imposing restrictions said to be onerous by large segments of industry? How to avoid the constitutional challenge often discussed but not brought for many years? How to improve the Act without opening it for wholesale amendment? How to set environmental conditions in permitted uses? How to decide whether to forbid an industry that would not harm the specific location but had some of the characteristics of heavy industry? How to make procedures easy and requirements tough? How to recognize an "expansion or extension" of a nonconforming use? How to formulate the Coastal Zone Comprehensive Plan called for in the Act without ripping apart the fragile working arrangements that developed between applicants and environmentalists? How to use the criteria in the Act for evaluating applications? How to handle an application for a facility located primarily in another state but part of which extends into Delaware waters within the twelve mile circle? How to write regulations to cover all of the above?

**It is the declared public policy of the State of Delaware to control industrial development in coastal areas and indeed to prohibit new heavy industry in such areas.**

Such things are not done easily.

The Act is administered by the Department of Natural Resources and Environmental Control ("DNREC"), which succeeded the Office of Management, Budget and Planning in 1981. The Department promulgates regulations to be approved by the State Coastal Zone Industrial Control Board, which hears appeals from Department decisions. The Board has nine voting members, five appointed by the Governor and confirmed by the Senate, the director of the Delaware Development Office, and the chairs of the planning commissions of each county.

The Department and the Board began early to grapple with the issues posed above, starting with the procedures themselves. Resource limitations and preference led to the decision not to attempt to classify existing facilities as either nonconforming heavy industry or permitted manufacturing uses, since all were allowed to continue their existing operation as of right. A "status decision" step was introduced to avoid the waste of elaborate permit applications for proposed uses clearly prohibited or not regulated by the Act. Originally the filing of a status decision request was not publicized, leaving concerned citizens facing a fait accompli with no room for comment during the process and only 14 days to file appeals. This problem was addressed by the current practice of giving legal notice of the receipt of a status request. Procedures for the Board are adopted by regulations. Forms for applications and guidelines for the process are available on request.

The substantive issues in administering the Act have been more difficult to resolve. Some of the more interesting ones are discussed in this article, in no particular order. The list is neither exhaustive nor conclusive, since most of the 255+ projects handled have their own twists, and future projects can be expected to have theirs. I have omitted discussing projects that were pending in April at the time this was written (with some reluctance, since some interesting issues will be decided in those cases.)

**Issues**

1. The definition of "heavy industry" has been the subject of several efforts by DNREC and the Board to clarify and quantify the criteria given in the Act, rather than using the standard of "I know it when I see it". The report of a consulting firm, the discussions regarding the definition, five public hearings, and the handling of a number of applications have been of assistance in pinning down the conception. However, the use of Standard Industrial Codes and elaborate matrices to identify heavy industry was rejected in favor of a case-by-case approach where actualities could be evaluated. It has been determined that the list of examples of heavy industry is not all-inclusive. Facilities can be heavy industry if they have the identifying characteristics in the definition:

". . . involving more than 20 acres, and characteristically employing some but not necessarily all of such equipment such as, but not limited to, smokestacks, tanks, distillation or reaction columns, chemical processing equipment, scrubbing towers, pickling equipment and waste-treatment lagoons; which industry, although conceivably operable without polluting the environment, has the potential to pollute when equipment malfunctions or human error occurs." 7 Del. C. Section 7001(e).

Examples are then listed differentiating

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Pictured left: Art Mattei, Jr., Vice President, Security Instrument Corp. and Bill Betty, Assistant Vice President, Bank of Delaware

heavy and non-heavy industry. (Public sewage treatment plants, recycling plants, and all uses other than heavy industry, other manufacturing facilities and bulk product transfer facilities not regulated by the Act.) An appeal and court case arose on the heavy industry definition issue - Kreshtool v. Delmarva Power & Light Co., Del. Super., 310 A.2d 649 (1973) - in which Appellants contested the determination of the State Planner that the fifth boiler at Edgemoor (doubling the capacity of the plant) constituted a manufacturing use, not heavy industry. That determination was based on the absence from the proposed facility of physical characteristics sufficient to classify a heavy industry use. The Company also committed to using a lower sulfur fuel for the entire plant (and did for some years) to meet the "potential to pollute" test. The Court decision was one of administrative law, noting (several times) that the Court could not substitute its judgment for the Board's and finding no abuse of discretion by the Board when it "balance[d] the interest in industrial development against a growing concern for environmental protection", because there was substantial evidence in the record to support the decision. The Court did note that the State Planner was required to give reasons for his decision, but that the failure to do so until the appeal hearing caused no prejudice to Appellants. Although the Board (as to be distinguished from the Planner) is not required to give reasons, the Court examined the record to ascertain that the Board had considered all the relevant factors set out in the statute for permit issuance, environmental impact, economic effect, aesthetic effect, supporting facilities, effect on neighboring land uses, and local comprehensive plans.

A later legislative amendment of the Act related to heavy industry. In 1984 a sentence was added to Section 7003, "Uses absolutely prohibited in the coastal zone", stating that an existing steel manufacturing plant might continue, notwithstanding any temporary discontinuance of operations of not longer than 1 year - changed to 2 years in 1988. These amendments add weight to the position that, contrary to the treatment of nonconforming uses in ordinary zoning law, this Act intends existing heavy industry to continue, a position that furthers the announced policy of several administrations to maintain and strengthen the economic base in the State.

2. "Expansion or extension" has come in for its share of debate through the 20 years of administration of the Act. It arises in Section 7004, which says that:

"All expansion or extension of nonconforming manufacturing uses, as defined herein, and all expansion or extension of uses for which a permit is issued pursuant to this chapter, are likewise allowed only by permit."

The Agency has held that the nonconforming manufacturing uses referred to are those that were in existence in 1971. Bulk product facilities and heavy industry cannot expand or extend operations.

The Board approved a definition of expansion or extension as "a change of existing processes, facilities or buildings which significantly increases the production capacity, land use area or environmental impact." A batch operation thus could change products without coming in for a new permit before each batch. (The requirement of repeated applications would be fatal to that type of business without discernible benefit to the environment.)

The most notable application of this definition was the decision that the addition of the methanol plant at the Delaware City refinery was not an expansion or extension, because it was placed in the center of operations, involved a shift in product rather than significant increase in production capacity, and the environmental impact would hardly be noticeable in the atmosphere of the refinery. That decision was upheld on appeal to the Board and not taken to court. Additions to facilities of pollution control devices (under the law, literally the occasion for requiring a permit) have not been regulated by the Act (though they are, of course, by other laws) - a triumph of administrative common sense in reading the statute consistently with its purpose.

3. A literal reading of the statute was overturned in the Coastal Barge case. DNREC had said that a vessel to vessel transfer of bulk products did not fall within the prohibited bulk product transfer facility, defined as "any port or dock facility, whether an artificial island or attached to shore by any means, for the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa." (excepting those for a single industry or the Port of Wilmington) and was therefore not regulated by the Act. The Board disagreed on appeal and the Delaware Supreme Court ultimately affirmed the Board's decision, invoking the "golden rule of statutory interpretation" that an unreasonable result produced by one of several interpretations of a statute warants rejecting it. On that ground, the Court held the literal reading to be unreasonable as allowing ship to ship transfer and prohibiting ship to shore. The Court held the ship to be a "port" and the purpose of the Act to require that the language of "vessel to onshore" be viewed as illustrative of a bulk product transfer facility rather than a limitation on the definition. Coastal Barge Corporation v. Coastal Zone Industrial Control Board, Del. Supr., 492 A.2d 1242 (1985). This case raises the interesting conjecture that the oil lightering operation at Big Stone Anchorage must be limited to its uses and quantities as of June 28, 1971, since it is a nonconforming use rather than an unregulated one, and any expansion or extension of the same use is a prohibited bulk product facility use!

4. A constitutional challenge was finally brought. The issue was whether the Act was an impermissible burden on Interstate Commerce. The issues of Taking without Compensation and of Discrimination had been talked of for many years by industry but never brought to court. The case was filed in the United States District Court for Delaware and before it was concluded in the third Circuit half the world of environment, industry and politics had joined the fray, engaging the labors of 35 attorneys - a wondrous number for an environmental case in Delaware. (Think of the trees toppled to provide paper to serve massive briefs on all of them.) The District Court granted Summary Judgment to the State and the Third Circuit affirmed, although on different grounds. The Circuit Court held that Plaintiffs, Norfolk Southern companies, were not entitled to the heightened scrutiny given to state actions that purposefully or arbitrarily discriminate against interstate commerce, that the State was not entitled to the very deferential review given to legislation in areas of peculiarly strong state interest, and that the balancing rule would be used, looking at incidental burdens on interstate commerce to see if they are clearly excessive when compared to local benefits from the legislation.

The Court found no burden that discriminated against out-of-state interests or in favor of in-state interests. The Court declined to balance the national interest in coal exports against Delaware's interest in its environment, stating that "Balancing the societal value of decreasing unemployment in the Eastern coal mines and shrinking the size of the trade deficit against the societal value of protecting the coastal zone is within the province of Congress." Norfolk Southern Corp. v. Oberly, 822 F.2d 388 (3rd Cir. 1987).

5. Suppose part of a facility is in the Delaware Coastal Zone, the remainder in Pennsylvania, New Jersey, or Maryland.

# EIGHT SENSIBLE WAYS TO REDUCE YOUR EXPOSURE TO A MALPRACTICE LOSS + ONE WONDERFUL PIECE OF ADVICE.


**1** Always ask the "why?" question. You have to know why a client has chosen you. If it's because of your particular expertise or reputation—great. But, if it's because several other firms have withdrawn or because it's known that you're just a little too hungry—watch out!

**2** Trust your instincts. If you're being asked to do something that doesn't seem just right, turn down the business.

**3** Be careful who you hire. You are responsible for the acts of your partners, associates, and employees. Period!

**4** Don't keep a client you can't handle. If your client has outgrown your capabilities, be smart enough to recommend another firm. And, if you can no longer trust a client—withdraw!

**5** Avoid misunderstandings. Use engagement and disengagement letters. Agree on what has to be done and what it will cost. Once fees have been established bill regularly.

**6** Know your client's problems. You are trained to ascertain the facts and analyze them. Use this skill *before* accepting representation.

**7** Go back to school. Continuing education courses can be very important to you.

**8** Don't be a nice guy. It is not a required standard in your profession to be nice. Be professional. Even when it involves giving the client unhappy news.

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Many variations are possible - the Delaware part is attached to a prohibited use; the Delaware part would itself be permitted under an exemption if the out-of-state part were a permitted use; the Delaware part is allowable under any circumstance; or both parts are in Delaware but only one is in the Coastal Zone. A couple of these variations have arisen, leading to the formulation of some guiding principles. Since other states' officials would be certain to look askance at any thought of Delaware's exerting authority in their territories, the Administrators have addressed only the Delaware portion, and applied the same criteria they would apply if both portions were in Delaware. (But consider the bizarre result in Keystone, discussed below.) Thus if a pier had been a single use such as is exempt from the definition of bulk product transfer facility if the whole operation were in Delaware, it would formerly have passed muster. Unfortunately the application in which this issue arose could not qualify as single use since, among other reasons, the extension of the pier sought would serve transshipment purposes instead of providing a facility necessary to the operation of the refinery. The Board noted that two prior cases had been decided in accordance with this guideline. In a recent status decision, Keystone, the Deputies Attorney General insisted that the Administrator depart from past practice by requiring a Delaware Coastal Zone Permit for an entire New Jersey plant as well as for the pier and intake and outfall structures.

An interesting question, but one beyond the scope of this article, is the status vis-a-vis other environmental and land use statutes, as well as the Costal Zone Act, of existing facilities in New Jersey, part of which extend into Delaware waters.

6. A recurring issue is whether strict zoning standards are to be applied in attempting to phase out existing heavy industry. The Act does not specify. In accordance with the few clues there are, the Administrators have not seized those opportunities. The passage (twice) of a clause saving the steel plant, the balancing nature of the Purpose language, and the prevailing economic benefit atmosphere argue against it. The rising tide of environmental enthusiasm translated into legislative successes in many areas argue for it. Under those standards, stricter views would prevail on change of product, expansion and extension and abandonment, either voluntary or by destruction. It would certainly have affected the Brandywine Chemical, Oceanport, and the Getty (Methanol) cases.

7. Suppose a wonderful environmental project came along, say one that would magically transform infectious wastes to food for the hungry. The process is clean but has a potential to pollute and is to be run by a company with a bad environmental record. It contains many of the characteristics of heavy industry and falls within the general category of cellulosic pulp-paper mills, which is designated in the statute as an example of heavy industry. What would you as the Administrator do?

8. What is included in "the Port of Wilmington"? Not defined in the Act, it was addressed in the Sico project. The State Planner stated that, while one of the projects applied for was within the Port of Wilmington, the other was not, and that the General Assembly did not intend the Port of Wilmington to expand down the length of the coastline. The State Planner concluded that the Port of Wilmington is at least no greater than the City limits of Wilmington. A subsequent memorandum in 1974 from Deputy Attorney General Taufen traced the historical origins of the Port of Wilmington from 1772 through the first use of the term in the Wilmington Home Rule charter of 1964, filed in 1965. He determined that it included no less than all of the Delaware and Christina River frontages within the City limits. This, he added, includes the River to the New Jersey shore.

The exemption of the Port of Wilmington was made to avoid limiting the economic development of that already industrial area (and to get the Bill passed). I have speculated quietly from time to time that a similar exemption for the two other major industrial complexes, limited to some logical boundaries, would have made little difference in environmental impact and reduced significantly the cost and complexities of administering the Act. I have heard some very quiet murmurs of assent back from environmentalists and administrators along with the expected enthusiastic assent of industrialists. No one, including me, has ever been willing to OPEN UP THE COASTAL ZONE ACT! Concerned groups have no apparent taste for revisiting the battle that accompanied the original passage of the Act, each group apparently fearing it will lose ground.

**Observations**

SO, what has been accomplished with this Act. Its deterrent effect has probably been its greatest value. While not at all the anti-industry law its detractors maintained, it has persuaded many potential heavy industry occupants to seek sites outside this two mile wide strip. A great deal of land area remains in Delaware for an economic base for our residents. While it cannot be quantified, the Coastal Zone has benefited the recreation and tourism uses that the Purpose section of the Act declares primary. Options remain for coastal land use; options that might have been foreclosed, absent the Act. The administration of the Act has matured. There are fewer appeals and fewer reversals. The Court has upheld the spirit of the Act against a too literal interpretation. It was ahead of other measures to improve land use and the environment, and now it blends with them. It is now a part of Delaware. Such things were not done easily.

Administration or Help for the Practitioner

The following procedures, used by the Department are taken from the DNREC publication Delaware Coastal Zone Act: Everything You Want to Know. Before embarking on the process you can save your client much time by meeting with the Development Advisory Service to outline informally a project and to learn what permits (not just Coastal Zone) are likely to be required and what information needs to be submitted. The Service includes several Departments and is close to one-stop shopping for governmental requirements. Write to DAS Coordinator, DNREC, 89 Kings Highway, P.O. Box 1401, Dover, DE 19903 or call (302)739-5409.

Status Decision

Applications for decisions under the Coastal Zone Act are made in two separate steps. The first procedural step is a status decision to decide whether or not an applicant's project is regulated by the Act and, if it is regulated whether it is a prohibited use or facility, or a use (manufacturing) requiring a permit.

If the applicant's project is a land or water use not regulated by the Act or a use that is prohibited, that is a final decision and a legal notice of the decision is published to give the public an opportunity to appeal. If no appeal from the applicant or public is received within fourteen (14) days following the date of the legal notice the decision becomes final.

If the applicant's project is a new manufacturing use or an expansion or extension of a nonconforming manufacturing use a permit is required. The applicant is instructed to apply for a permit and is sent the application forms at the time he is notified of the status decision.

The status decision notification to the applicant is always sent by certified mail and is sent to the person who signed the status decision application unless there is an authorized agent, such as an attorney, representing the company.

**Permit Application**

If a permit is required the administrative procedure moves to step two, the permit application.

The permit applicant is instructed to provide three (3) copies of the application with any attachments. One copy is the Department project file copy, the second copy is sent to the county or city planning department of the county or city where the project is located to be on file for public inspection, and the third copy is for review by appropriate sections of the Department of Natural Resources and Environmental Control to assess environmental impacts.

Upon receiving a complete and satisfactory permit application the Administrator schedules the required public hearing. It has been traditional to hold the hearing in the county where the applicant's project is located, within reasonable proximity to the project site. In most cases, this means holding the permit application hearing at the State Office building in Wilmington because most applications involve projects in northern New Castle County.

Once the public hearing arrangements have been made a newspaper legal notice is published at least fifteen (15) days prior to the date of the hearing and again at least seven (7) days prior to the hearing. The applicant pays for these public hearing legal notices. A written notice and/or a copy of the hearing legal notice is sent to the permit applicant.

At any time after the public hearing but no later than ninety (90) days after receiving the permit application (counting the day of receipt) the permit decision is made by the Secretary. the decision may be to:

(a) grant a permit outright

(b) grant a permit subject to project-specific as well as general stipulations

(c) deny a permit

The permit decision notice is sent by certified mail to the applicant and a legal notice of the decision is published. The applicant and anyone aggrieved by the permit decision can appeal to the State Coastal Zone Industrial Control Board within fourteen (14) days following the date of legal notice publication (not counting the day of publication). If no appeal is received within the allowed time the permit is issued to the applicant, sent by certified mail.

All newspaper legal notices of status and permit decisions are paid for by the applicant. There are status decision permit fees - $1;500 each.

**Appeals**

If there is an appeal of the Secretary's final status decision or permit decision the

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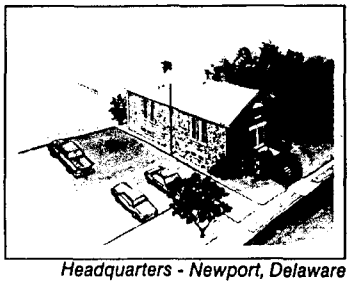

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State Coastal Zone Industrial Control Board has up to sixty (60) days following receipt of the appeal application (not counting the day of receipt) to make and announce its appeal decision.

There is an appeal application fee of one hundred dollars ($100) by check or money order made out to the Department of Natural Resources and Environmental Control.

Appeals to Superior Court from Board appeal decisions must be made within twenty (20) days following public notice of the Board's decision.

Appeals may be made by the decision applicant, by the Secretary of the Department of Natural Resources and Environmental Control or by any person aggrieved by the Secretary's decision or by the Board's appeal decision.

*Acknowledgement*

Robert H. MacPherson, now a private planning consultant in Dover, shepherded the Coastal Zone Act from the time it moved to DNREC until this year. He furnished information and much thoughtful discussion for this article and I thank him. Naturally, none of the opinions with which you disagree are his.

*Once again June MacArtor is turning her attention to land matters in Delaware after three years in the environmental regulatory field as Deputy Director of the Delaware Division of Air and Waste Management. During her previous employment at the Department of Justice, she advised the Coastal Zone Administrators for several years and furnished legal advice to the Department of Natural Resources and Environmental Control on all topics including work on public lands.*

PENDING CASE BULLETIN

The first citizens suit in the United States District Court for the District of Delaware pursuant to Section 505 of the Clean Water Act (33 U.S.C. Section 1365) was filed in May, 1988 by Natural Resources Defense Council, Inc. and Delaware Audubon Society against Texaco Refining & Marketing, Inc. ("Texaco") (C.A. No. 88-263-JRR). Plaintiffs alleged, inter alia, that Texaco had violated the terms of its national Pollutant Discharge Elimination System ("NPDES") permit in the operation of its oil refinery at Delaware city. The state and the federal governments had declined to bring their own actions.

Judge Roth granted partial summary judgment for plaintiffs in September, 1989 Natural Resources Defense Council, Inc. et al.v. Texaco Refining and Marketing, Inc., 719 F.Supp. 281 (D.Del. 1989). The District Court there found that Texaco had violated the waste water discharge limits in its NPDES permit 369 times between March, 1983 and January, 1989, and enjoined Texaco or persons in active concert or participation with Texaco from violating certain terms of the NPDES permit issued to Star Enterprise, the current owner and operator of the refinery. The portion of the District Court's Order relating to injunctive relief was subsequently reversed and remanded by the Third Circuit, Natural Resources Defense Council, Inc. v. Texaco Refining & Marketing, Inc.,906 F.2d 934, 941 (3d Cir. 1990).

A three week bench trial on the civil penalties aspect began before Judge Roth on February 4, 1991 to determine, among other issues, what civil penalties should be assessed for each of Texaco's NPDES permit violations (see 33 U.S.C. Section 1319(d). Among the defenses raised by Texaco during trial was whether the District Court lacked jurisdiction to order relief for past violations of "parameters" which were not being violated on an on-going or intermittent basis at the time this action was commenced, Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690 (4th Cir. 1989).

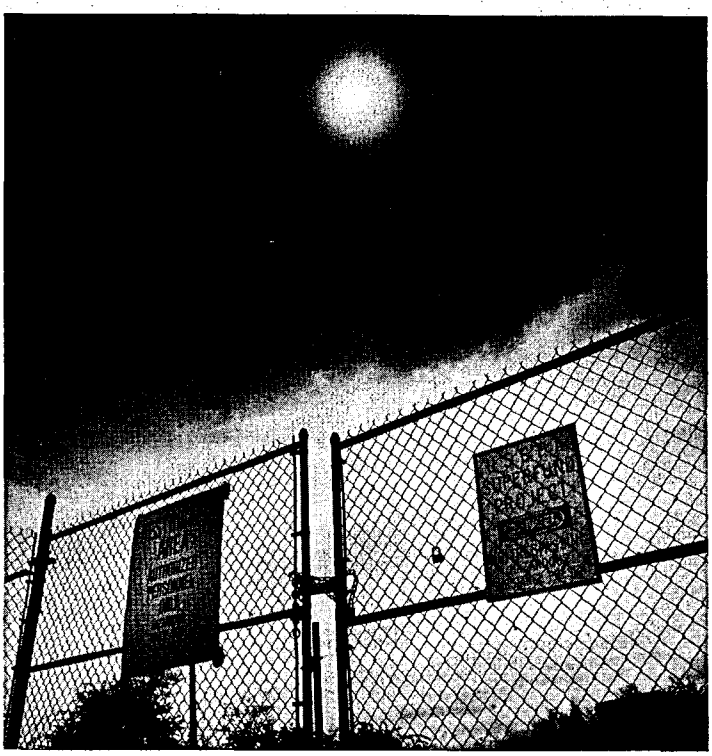
Several hundred documents were introduced into evidence by both sides, and each party relied on expert testimony at the trial which ended on February 21.

Plaintiffs are represented by Natural Resources Defense Council, Inc.'s in-house counsel Mitchell S. Bernard and Joseph Guth; local counsel is Richard R. Cooch of Cooch and Taylor, Wilmington. Texaco is represented by Richard D. Allen and Palmer L. Whisenant of Morris, Nichols, Arsht and Tunnell, Wilmington.

Richard R. Cooch

CHARLES J. DURANTE

# Stage Managing the Environmental Extravaganza



From the toxic site to the endangered court house.

In recent years, manufacturers have been beset with claims of liability for their treatment of the environment or defects in their products. The litigation has been daunting by conventional legal standards, often requiring technological expertise that is more often forgotten than taught in law school. In cases of "toxic torts," notably asbestos cases, the greatest challenges have been organizing cases involving dozens of defendants and perhaps thousands of claimants.

Now, a legal generation later, manufacturers have returned the volley with complex litigation of their own prompting, by suing their insurers, seeking indemnification from them for any liability the manufacturers incurred under these environmental and products liability cases, based upon general comprehensive liability insurance policies, which in some cases date back over half a century.

Eighteen of these insurance cases have been filed in state and federal courts in Delaware. Thirteen are pending in a Superior Court whose docket is already inundated. Their enormous legal and logistical complexity has threatened the administration of justice in the state's court of general jurisdiction.

Since so many manufacturers and insurers are incorporated in Delaware, it was inevitable that some claims would be litigated here. Yet, Delaware appears to have become the forum of choice — at least for manufacturers — even in cases where all the underlying environmental problems occurred outside the state.

Attorneys in the cases say manufacturers choose — or insurers fear — Delaware because its courts often adopt the maxim of contra proferentum, construing contracts against the drafter, which is usually the insurer. (Not always, though, as the Supreme Court showed in Du Pont v. Shell, Del. Supr., 498 A.2d 1108 (1985).)

Thus far, Delaware courts have kept jurisdiction over the cases, and thus have been confronted with logistical problems that would be novel even in a larger state, and threaten to overwhelm a court system where writs are still typed by hand.

The 13 cases pending in Superior Court — a 14th has been settled — present huge administrative and substantive demands. The seven judges who have handled the cases to date have shown creativity and decisiveness. This gives courthouse observers cautious optimism that the cases can be heard without unduly interfering with the other 7,500 cases on the docket — cases which, unlike much of the insurance litigation, have something to do with people who live in Delaware.

"One of these cases is as good as 100 cases in its demands," says Superior Court Administrator Thomas J. Ralston. "Five plaintiffs, 30 insurance companies, we charge them the same $125 filing fee as anyone else."

The demands of the insurance coverage cases are qualitatively different from the corporate setting, where Delaware Chancery and Supreme Courts have earned sustained nationwide regard for their ability to rule thoroughly and thoughtfully amid breakneck deadlines. The insurance cases are not to be decided in three hectic weeks, but are projected to take five or more years

Photograph by Leo Matkins

of unrelenting discovery, motions and trial. In one mammoth case, concerning coverage for environmental damage at 80 Monsanto Company sites, trials alone are scheduled to cover five years.

While local lawyers are glad to have the business, participants say the cases' demands raise questions about how the resources of Superior Court can cope with them. Some non-participants wonder whether Delaware courts should handle some of the cases at all.

"Once we're here, it's important that two things happen," says Richard E. Poole of Potter Anderson and Corroon, lead local counsel for Monsanto. "Affirmatively, that the cases are handled and the court is not overwhelmed by them, and on the other side, that these cases don't cause Superior Court to shut down. All the business of the Court has to be accommodated."

"These cases present a tremendous opportunity for Superior Court to achieve the stature as case managers as Chancery has," says Lawrence S. Drexler, of Elzufon, Austin and Drexler. "But we as members of the bar must be sensitive to the resources of the Court, so it can manage its criminal docket and other responsibilities, and hear these cases in a way that will do us proud."

Drexler, lead local counsel for Liberty Mutual, has been appointed Defense Coordinator in Monsanto in one of many Case Management Orders issued by a court that has been willing to use novel techniques to administer the cases, which if handled conventionally, could choke the system. Over 1,500 filings have been lodged on the record in Monsanto, the behemoth of the cases.

The judges assigned to these cases are regularly deluged with precedents on legal arguments before them, but find little antecedent guidance on how to administer such litigation. The Superior Court is breaking ground in case management methods, and Judge Vincent J. Poppiti has been invited to serve as a featured panelist at several American Bar Association meetings, including the meeting of the ABA Section of Litigation this coming August, to discuss the Delaware experience.

The cases have seen the appointment of Special Discovery Masters, the appointment of defense coordinators for the court's convenience, the use of central repositories of discovery documents outside of the Prothonotary, the development of a "telecopy tree" among defense counsel, and a special bar-bench committee on complex litigation procedure.

Perhaps because the stakes are so staggering — as high as $2 billion in Monsanto — perhaps because of cases' organizational or factual complexity, or perhaps because of so many out-of-state counsel, some of the cases have been more contentious than those customarily seen in Delaware courts.

"This case has already taken on the fervor of the Hundred Years War," observed a brief in Monsanto by Judith N. Renzulli, of Duane, Morris & Heckscher, lead local counsel for Travelers.

There have been battles over whether copies or originals must be inspected, written argument over how far within Wilmington city limits documents need be hand-delivered, briefing about whether file labels and file jackets needed to be copied, opposition to a motion for admission pro hac vice, and dozens of motions to compel or stop discovery, each triggering one or more further rounds of briefing. One memorandum of law exceeded 128 pages. Last September, several New York lawyers were barred from further participation in the cases.

**In one mammoth case, concerning coverage for environmental damage at 80 Monsanto Company sites, trials alone are scheduled to cover five years.**

"By necessity, in Delaware, we have gotten along, but that relationship is strained by the large presence of outside counsel," says Drexler. "There is a learning curve for outside counsel for the way law is practiced in Delaware." Monsanto is among four coverage cases pending before Judge Poppiti. The other pending cases, listed by insured: Du Pont, North American Philips and Stauffer, all assigned to Judge Poppiti; Sequa Chemical, assigned to Judge Jerome O. Herlihy; Clark Equipment, Celotex and Lone Star Industries, assigned to Judge Vincent A. Bifferato; Hoechst, assigned to Judge Richard S. Gebelein; Burlington Northern and ACC Chemical, assigned to Judge John E. Babiarz, Jr.; Playtex, assigned to Judge Susan C. Del Pesco; and Hercules, assigned to Judge Gebelein.

A second Monsanto case, dealing with products liability, has been settled, following a ruling issued February 20, 1991, by Judge Poppiti, agreeing with Monsanto that its insurance policy with American Centennial Insurance Company included coverage for Monsanto's legal defense costs.

Several other cases have been filed in Delaware District Court, involving Remington Arms; William C. Ward; T. V. Spano and the first case of them all, New Castle County v. Continental Casualty Company, on appeal to the Third Circuit.

Only in Stauffer, which concerns Tybouts Corner, are the insurers plaintiffs. Five other cases have tangible Delaware connections: Du Pont, with several local sites; Ward, also about Tybouts; Spano, involving Raintree Village; Lone Star, product liability for railroad tracks, some of which lie in Delaware; and Playtex, whose liability for toxic shock syndrome in part arises from actions at its Dover plant.

How did all the other cases come to Delaware courts? Rulings in New Castle County may have attracted insurer-plaintiffs. In this action, filed in 1985, the County sought a declaration that the insurers must defend and indemnify the County for claims arising from pollution leaching from the Llangollen and Tybouts Corner landfills.

Judge James L. Latchum ruled, 673 F. Supp. 1359 (1987), that the insurance contracts' pollution exclusion clauses did not entitle the insurers to summary judgment. The clauses stated that coverage would not apply to damage arising from discharge of any "irritants, contaminants or pollutants into or upon land, the atmosphere or watercourse . . ." The insurers lost because Judge Latchum found ambiguity in the rest of the sentence: "but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental." Construing the ambiguity in favor of the insured, Latchum held the proviso to hold the door open to coverage if the discharge of pollutants were unexpected.

Two months after Judge Latchum's decision, Monsanto and North American Phillips filed their actions in Superior Court, seeking declaratory relief and any resulting damages against all their respective insurers.

Travelers had beat Monsanto to a different courthouse, having filed a Federal action in Connecticut a day earlier. Monsanto parried with a Delaware Chancery action seeking to enjoin any insurer from filing any action elsewhere. Judge Joshua W. Martin was assigned the Superior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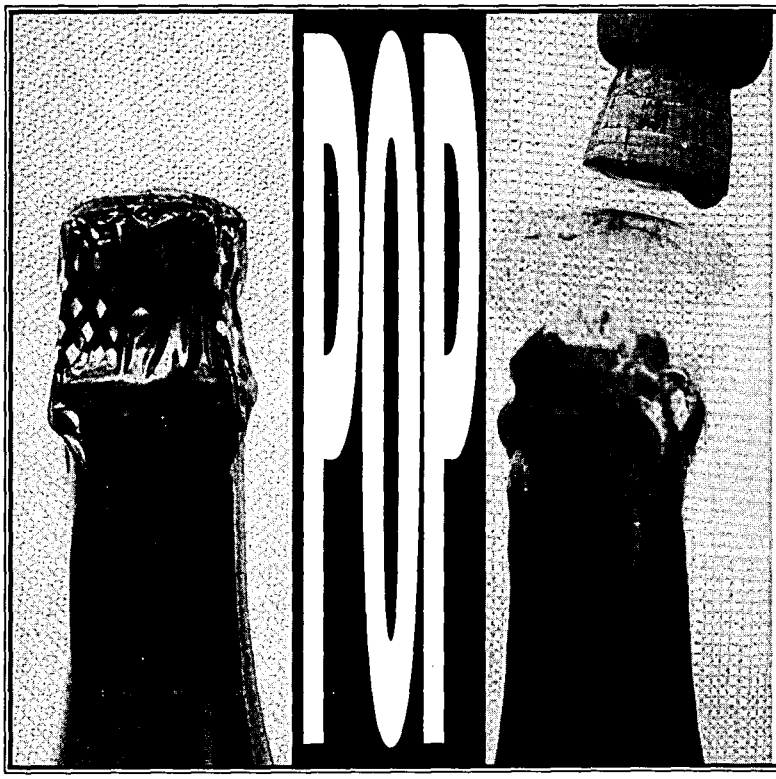


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Court action, and Chief Justice Andrew D. Christie appointed him as Vice Chancellor for the Chancery action, which has continued on a parallel track as each side has intermittently sought to enjoin the other. The Connecticut Federal Court stayed its action, 692 F. Supp. 90 (1988), deferring to and effectively inviting Martin's eventual decision.

Insurers contended there is little reason for Delaware to host litigation concerning events that occurred 1,000 or more miles away. Nearly every motion to dismiss for forum non conveniens has been resolved, invariably against the insurers. In the seminal ruling, 559 A. 2d 1301 (1988), Judge Martin held that judicial economy was best served by litigation hearing all Monsanto's claims in one forum, rather than, as urged by the insurers, letting them be heard separately in the 18 states where the environmental sites lie, and that Delaware was as suitable a forum as any. The Supreme Court of Delaware upheld Martin's ensuing refusal to certify an interlocutory appeal: "The manner in which the Superior Court exercised its discretion in this case does not appear to raise any important and urgent reasons for an immediate review."

Thus, cases are proceeding that have seen production of several million pages of documents — and seemingly as many discovery disputes.

Judge Martin appointed Harvey B. Rubenstein as special master in several of the cases. Judge Del Pesco has appointed L. Susan Faw to serve a similar role in Playtex. Judge Herlihy has named Prof. Leo Levin of University of Pennsylvania in Sequa

"The stakes for an insurer can be great in any one discovery ruling, since it could potentially be used in so many other cases which the insurer must defend," says Drexler. An examination of the record, though, discloses equal vigor by both sides in Monsanto, a case in which "[d]iscovery has taken on a life of its own," wrote Rubenstein in one ruling. Although Judge Poppiti has ruled that the "clearly erroneous" standard will govern exceptions from Rubenstein's decisions, many of the special master's decisions have engendered "requests for clarification." At least a dozen exceptions have been appealed to Judge Poppiti, each yielding another round of briefing. While memoranda to Rubenstein proceeds under relatively terse page limits, briefs to the Court about discovery issues have run over 80 pages or contained over 20 exhibits. The rulings have been equally complex; different portions of some decisions have been cited by both sides in other cases. At least one discovery dispute has led to another unsuccessful effort to obtain interlocutory Supreme Court review.

There has been discovery about discovery. This can happen when one party disputes the other's factual foundation for its position in a discovery motion, and demands a chance to cross-examine an affiant. Thus, a deposition ensues to see whether there is the need or basis to have another deposition.

There have been depositions with Rubenstein present. To schedule a deposition in front of a judicial officer is unusual, but his presence has helped several depositions move along, with prompt rulings on objections without adjournment.

**"This case has already taken on the fervor of the Hundred Years War."**

The case has put stresses on the collegiality with which law still tends to be practiced in Delaware. Some blame the large stakes; others blame outside counsel. Most agree that the parties are making progress in minimizing the occasionally acerbic tenor of the earlier proceedings.

In Du Pont, things seem breezy by comparison. "I have to give the defense a lot of credit," says Donald E. Reid, lead local counsel for Du Pont. "We have been able to keep the case focused on the litigation. There have only been two motions to compel. Most of the discovery disputes have been resolved, sometimes with a telephone conference with the judge. There has been a great deal of cooperation among counsel."

Indeed, beneath the bluster of what is placed in the record, the cooperation of Wilmington counsel has played a role in moving along some aspects of Monsanto. Most critically, the Case Management Orders rely heavily on the ability of counsel to seek agreement on the stages in which the case will go to trial. The Order schedules the case like a crowded golf course. The 80 polluted sites will be batched into groups of four. Advanced litigation will begin on a new foursome every four months, with deadlines for interrogatories, then depositions, then dispositive motions, then trials.

The first Monsanto trial is scheduled for September 1992. The search for a site is underway, since no Delaware courtroom is expected to be big enough. In a California case, a former public school was renovated for the trial.

Equally daunting problems face the court right now. Court administrator Ralston says that the asbestos litigation of the past decade broke much ground in enabling judges to see how to structure cases in non-traditional ways, but in no way prepared the court to handle its current duties.

"These cases defy time standards and all the axiomatic approaches to managing cases. We are moving a ton of paper," says Ralston. Before his resignation from the bench in late 1989, Judge Martin battled the deluge of paper by adopting local federal rules, whereby discovery papers are not filed with the court, before the Court amended its rules to do so generally.

Yet, this is still a court in which all civil work is done by hand. Judges have personal computers, but they are not networked. The court's mainframe computer is so overwhelmed that more than a minute can elapse between the Enter key and the appearance of data on the screen.

The recent State budget crisis particularly threatens the court system. Because "the courts are traditionally personnel-heavy," a five percent overall budget cutback would mean reducing the court's non-salary budget by 10 percent, says Ralston. Thus, as the court is pining for modern resources, its budget for pedestrian supplies like postage and stationery is impaired.

Meanwhile, the Court is overwhelmed with work. This is a familiar refrain in the court system, but represents no cry of wolf. The unabating explosion of civil cases ratchets upward by 5 to 10 percent per year, while an epidemic of drug arrests has boosted its criminal caseload by over 50 percent in two years. The Court would be falling farther behind but for a doubling of arbitrations in the past four years.

With no state money to pay for the Special Discovery Masters, the Court has paid them by assessing the litigants. A further special assessment of litigants has been discussed to finance a computer to manage documents. Some lawyers and judges believe it dangerous precedent, however, for the State to procrastinate on meeting the courts' needs generally, in hopes that pecunious litigants will pay for customized handling. One idea under consideration is to charge all Superior Court litigants a "user fee" in addition to the filing fee, to fund comprehensive computerization of the Court.

The Court has issued Case Management Orders to keep afloat while not denying due process. They have set ground rules for the treatment of confidential documents, contact with the court, status conferences and reducing overlap. Since there are over 40 defense counsel in Monsanto, for example, any motion could conceivably be met with 40 objections, each with a unique sentence or citation, all more or less arguing the same thing. The Case Management Orders have required the insurers to confer to minimize such duplication.

The orders in turn thrust on counsel the role of minimizing the potentially staggering permutations of paper. Not all insurers agree on tactics. One group, the London-based insurers, frequently drives on the opposite side of the tactical road from domestic defendants, within which there are further divisions that often get onto the public record. "We're like the U.N., each with a different agenda," says Drexler. To minimize discord, the insurers have established a steering committee on tactics, and a telephone network to spread word promptly of urgent developments.

In some cases, the Court has appointed Defense Coordinators, responsible for scheduling all matters before the judge on behalf of the defendants and for ascertaining all defendants' views on pending matters. The Defense Coordinator is "encouraged" to get all insurers to take the same position, although any who wish to break ranks or to raise different reasons for the same position taken by other insurers are entitled to do so. Drexler, Renzulli, and Anthony G. Flynn have been appointed in different cases.

The arrival of this litigation has turned many law offices into the hives that were previously only seen in takeover cases. The lawyers are getting an education in organic chemistry and hydrogeology, and in advancement of those disciplines over the twentieth century. Arguments may eventually focus upon whether the manufacturers' conduct was appropriate in light of the standards of technology at the time in question.

"Just organizing the case is mind-boggling," says Flynn, of Young, Conaway, Stargatt and Taylor, who represents Wausau. "Every document that comes in here is digested, then put on a database. We have a master calendar on which we're managing 15 sets of deadlines, whether motions on production or objections, at any given time. We get 10 faxes a day, just involving defense counsel communicating with each other."

Potter Anderson faces a daunting challenge. Not only does it and two Washington D.C. firms stand alone against 10 to 40 opposing counsel, but they are doing so in 11 different cases that have absorbed 12 lawyers, plus several paralegals.

Management of documents strains all sides' ingenuity. Two million documents have been produced. The insurers have rented a floor of office space to house a central repository. Potter Anderson's former word processing center has filled with coverage case file cabinets. Even with no discovery production, the docket entries nearly fill an entire room in the Public Building with no hint of abatement, nor clear idea where the next available room will be. Richard K. Herrmann of Bayard, Handelman & Murdoch, who represents several insurers in the cases, publishes a weekly review summarizing the developments in the cases, and together with his colleague Scott R. Harrison, has published The Delaware Book, a looseleaf summary of 160 pages (plus appendix) of the cases' jurisdictional and legal issues.

Not entirely lost in the logistics is the law emerging in the cases. The insurers argue that the language of the policies does not apply to the clean-up of toxic waste pollution, and that in any event, waste disposal practices of the manufacturers are the type of loss that the policies were not expected to cover.

While "Delaware law is perceived by insurance companies to be more favorable to the policy-holder than the law of certain other jurisdictions," says Poole, the Delaware Supreme Court has yet to be heard from. Nevertheless, insurers suffered a setback recently when Judge Poppiti concluded, citing Klair v. Reese, 531 A. 2d 219 (1987), that the Delaware Supreme Court has adopted a "modern view" of contract interpretation that requires the court to consider the content and circumstances surrounding the meaning of otherwise unambiguous provisions. Thus, while Poppiti found some pollution exclusion provisions to be "clear and unambiguous," insurers were not entitled to summary judgment. The question of what state's law will govern all or part of the cases is currently being briefed in several of them.

In a precedent-setting procedural development that has led to an explosive aftermath, a Miranda-type warning has been fashioned for use by investigators when seeking to interview former employees of an opposing party. Relying on a 1985 decision by Judge Gebelein that such interviews do not violate the Code on Professional Responsibility, Judge Poppiti

ordered that investigators identify themselves, their principals and their adverse purpose to the ex-employees they try to interview.

Upon finding that his original guidelines were violated by some insurer's investigators in Stauffer and Monsanto, Poppiti turned his guidelines into mandatory scripts; prohibited use at trial of any interviews obtained in violation of the guidelines; banished two New York attorneys from participation in any further proceedings; and promised that under certain circumstances, future violations might subject an offending party's attorneys to sanctions, including fines.

The two barred attorneys, of Coudert Brothers, had assured Poppiti at a transcribed conference last year that his order regarding interview guidelines were "always" obeyed by their investigators, who were given "specific instructions" to tell interviewees there was a controversy between the investigator's principal and the interviewee's former employer. On being presented with evidence that such was not the case, Poppiti revoked the pro hac vice admissions of the two attorneys, whose ensuing interlocutory appeal (not certified by Judge Poppiti) the Supreme Court of Delaware declined to take.

As the cases progress, a Complex Litigation Committee meets to consider ways to manage these and other cases. That Committee, consisting of Judges Del Pesco and Poppiti and attorneys Drexler, Flynn, Reid, and Poole, conducts early morning meetings to wrestle with the volume of paper and complexity of issues that threaten to choke the court.

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PAMELA B. LEVINSON

# Cleaning Up Our Act

## The Clean Air Act Amendment of 1990

On November 14, 1990 President Bush signed into law the Clean Air Act Amendments of 1990. The amendments were intended to strengthen a statutory and regulatory scheme to control air pollution that began in 1963 with the enactment of the Federal Clean Air Act, which had already been amended in 1970 and again in 1977. Nevertheless, the 1990 Amendments made dramatic revisions and additions to rectify what was perceived by many environmentalists as a complete failure of existing laws and regulations to adequately deal with pollutants adversely affecting human health and the environment.

Fair is foul, and foul is fair: Hover through the fog and filthy air."

*MacBeth, Act I, Scene I*

### A History of the Act Before the 1990 Amendments

To understand the impact of the 1990 amendments on industrial operations, one must compare them with the previous law and regulatory scheme.

The original Clean Air Act of 1963 created a merely advisory role for the federal government under which it issued reports and guidance regarding the health effects of various major pollutants. A second attempt at regulating air pollution was made with the enactment in 1967 of the Federal Air Quality Act. Under that legislation the government was to promulgate a list of air pollutants, identify technology to control them, and publish air quality criteria for the use by the states in controlling air pollution. Enforcement of air pollution control, however, was generally left to the States. There was no real attempt nationally actually to control and regulate individual sources of air pollution until the Clean Air Act amendments of 1970.

The 1970 Amendments established a program using both federal and state regulatory authorities. The Federal govern-

**GLOSSARY**

"... Fair is foul, and foul is fair: Hover through the fog and filthy air."

MacBeth, Act I, Scene 1

How to grope your way through the acronymic pollution of language unleashed by the EPA! ( Oops! Environmental Protection Agency).

| | |
|---|---|
| BACT | Best Available Control Technology |
| EPA | Environmental Protection Agency |
| GACT | Generally Available Control Technology |
| HAPs | Hazardous Air Pollutants |
| LAER | Lowest Achieveable Emission Rate |
| MACT | Maximum Achieveable Control Technology |
| NAAQS | National Ambient Air Quality Standards |
| NESHAPs | National Environmental Standards for Hazardous Air Pollutants |
| NSPS | New Source Performance Standards |
| PSD | Prevention of Significant Deterioration |
| SARA | Superfund Amendments and Reauthorization Act |
| SIP | State Implementation Plan |
| RACT | Reasonably Available Control Technology |
| VOC | Volatile Organic Compound |



Illustration by Paulette Bogan

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ment, through its Environmental protection Agency ("EPA") was responsible to take the air quality criteria for the pollutants identified under the Air Quality Act ("Criteria Pollutants") and establish acceptable health based standards for ambient air quality for these pollutants. These standards were termed National Ambient Air Quality Standards ("NAAQS"). Stationary and mobile sources (i.e. motor vehicles) were to be regulated to achieve these ambient air quality standards. Under this program, EPA established NAAQS for sulfur dioxide, small particulate matter, ozone, nitrogen dioxide, carbon monoxide, and lead.

The actual regulation of sources of air pollution for Criteria Pollutants was achieved through a regulatory system employing a Federal and State partnership. States were required to develop State Implementation Plans ("SIPs") to achieve and maintain compliance with the NAAQS in predetermined regions ("Air quality Control Regions"). SIPs were reviewed and approved by EPA. According to the law, SIPs were developed to ensure that NAAQS were met in all Air quality Control Regions by certain statutory deadlines. The regulation of existing stationary sources of air pollution was left to the States through the SIPs. It was up to the States to develop limitations on existing sources of air pollution in order to achieve NAAQS in the various regions. EPA, however, was required to promulgate technology-based nationwide standards for various categories of new stationary sources ("NSPS") as well as for motor vehicles.

In addition to creating the SIP system for maintaining and achieving NAAQS for Criteria Pollutants the 1970 Amendments required EPA to identify air pollutants for which no NAAQS were set but which would , nevertheless, "reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating irreversible, illness". Once having identified these Hazardous Air Pollutants ("HAPs"), EPA was directed to promulgate National Emission Standards for the Hazardous Air Pollutants ("NESHAPs"), which would be applicable to both new and existing sources of HAPs. The NESHAPs were required to set emission limitations to provide an "ample margin of safety to protect public health". Under this program, EPA identified only eight hazardous air pollutants and established emission standards for certain sources of only seven.

The next amendment to the Clean Air Act occurred in 1977, prompted in reaction to the complete failure of the prior legislative program to effectively control and cure air pollution. In most cases SIPs enacted in regions identified as not in compliance with NAAQS had been ineffective to bring them into compliance. Of necessity, the 1977 amendments extended the deadlines for compliance with NAAQS. However, sanctions were created if states failed to attain NAAQS by the deadlines. These included the cut-off of federal highway funds as well as a ban on the construction of new sources of air pollution. In the interim before the newly established statutory deadlines, if a region was not in compliance (a "Non-Attainment Area") the SIP for the region had to include a requirement that new or modified major stationary sources obtain air permits. Major stationary sources were defined as those having a potential to emit 100 tons per year or more of any air pollutant regulated under the Act. Air permits for new or modified major sources had to mandate the use of emission control technology that would attain the lowest achievable emission rate ("LAER") for the source. LAERs were the tougher of either: the most stringent SIP limitations for the source category, or, the most stringent limitation achieved in practice by that source category. Moreover, new or modified major stationary sources in non-attainment areas had to obtain "offsets" by demonstrating that the emissions produced by the new or modified source were offset by at least as great a reduction of the particular emissions in an existing source. Existing major sources were also regulated under the 1977 amendments by the requirement that they install reasonably available control technology (RACT).

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Under the 1977 Amendments, even in areas in compliance with NAAQS ("Attainment Areas"), new or modified stationary sources with a potential to emit 250 industrial tons a year or more (in some industrial categories only 100 tons), had to obtain a Prevention of Significant Deterioration ("PSD") permit. PSD permits were required to mandate the use of the best available control technology ("BACT") on the emission. BACT was defined as an achievable emission limitation set by EPA, which takes into account energy, environmental and economic impacts, and other costs.

The regulatory program for air pollution control established under the 1977 Clean Air Amendments remained in effect until the enactment of the 1990 Amendments. The broad scope of changes to the regulatory program contained in the 1990 amendments were driven largely by the public attention to environmental issues and the general perception that earlier laws and regulations had failed to control air pollution. At the time of enactment of the 1990 Amendments, ambient air quality standards as to Criteria Pollutants (originally identified under the 1967 Air quality Act) were not being met: over 100 regions failed to meet the NAAQS for ozone; more than 40 regions for carbon monoxide, and over 50 regions for particulate matter. In addition, environmentalists were dissatisfied with EPA's slow progress to identify and regulate hazardous air pollutants that could pose potential health hazards beyond just the Criteria Pollutants. Media attention to destruction of the stratospheric ozone layer and the United States international commitment under the 1989 Montreal Protocol to phase out fluorocarbons (and other compounds that affected the ozone layer) fueled the legislative initiative. Public sensitivity was further heightened by growing awareness of the effects of acid rain. It was in this sensitive political climate and subject to a complicated pre-existing regulatory program that the 1990 Clean Air Act amendments were developed.

Major Provisions of the 1990 Amendments

The Amendments contain eleven titles. The first seven most directly affect industry:

| | |
|---|---|
| Title I | Stationary Source Control and Non-Attainment |
| Title II | Mobile Source Control |
| Title III | Air Toxics Control |
| Title IV | Acid Rain Control |
| Title V | Permits |
| Title VI | Stratospheric Ozone Protection |
| Title VII | Enforcement |

Title I deals with the attainment or non-attainment of NAAQS in various quality control regions. Non-attainment areas are further categorized by the severity of that non-attainment. For example, ozone non-attainment areas are classified as marginal, moderate, serious, severe, or extreme. Carbon monoxide non-attainment areas are classified as moderate or serious. All small

particulate matter non-attainment areas are classified as moderate. However, the amendments permit some areas to be reclassified subsequently as serious.

The primary thrust of the non-attainment provisions of the 1990 Amendments is ozone non-attainment. The definition of a major stationary source in an ozone non-attainment area varies, depending on the category of non-attainment. The more severe the non-attainment category, the lower the threshold emission level for a major source. VOC (Volatile Organic Compound) emissions (ozone precursors) of 10 tons per year or more in extreme ozone non-attainment areas are major sources. In severe and serious ozone non-attainment areas, the threshold limits are increased to 25 and 50 tons per year, respectively. In marginal and moderate non-attainment areas the threshold remains at the 100 tons per year level.

The mandatory use of LAER emissions control technology on new and modified major sources is retained from prior law. As with prior law, emissions offsets are required to be obtained for new or modified major sources in non-attainment areas. However, in ozone non-attainment areas, the ratio of offsets required compared to emissions from the new or modified source increases in accordance with the severity of the non-attainment category. Emissions offsets range from 1.1 to 1 in marginal areas to 1.5 to 1 in extreme areas. Moreover, application of RACT restrictions on existing major sources in ozone non-attainment areas has now been expanded to cover a broader category of sources.

In addition to mandating LAER and RACT controls on stationary sources in ozone non-attainment areas, the amendments require that SIPs include increasingly greater restrictions on a variety of emissions, depending on the severity of the non-attainment category. Vehicle inspection and maintenance programs are required in all ozone non-attainment areas. In moderate, serious, severe, and extreme areas, gasoline vapor recovery systems are required at certain facilities. Employers of 100 or more persons in serious, severe, and extreme areas must establish plans to reduce work-related vehicle trips and miles travelled by employees, including commuting. Industry must now face penalty assessments on all major sources of VOCs in severe and extreme ozone non-attainment areas. (The fee is $5,000 per ton of VOCs emitted in excess of 80% of the source's baseline amount. The baseline amount for purposes of calculating the fee is the lower of a source's actual or allowable emissions during the year.) In serious, severe, and extreme areas, modifications to existing sources emitting more than 100 tons per year require internal VOC offsets in a ratio of at least 1.3 to avoid LAER requirements. Even in the case of modifications to existing sources emitting less than 100 tons per year, VOC emissions are subject to the requirement of internal offsets in a ratio of 1.3 to 1 to avoid the imposition of BACT.

The amendments also impose mandatory SIP provisions for non-attainment areas for Criteria Pollutants other than ozone. Carbon monoxide non-attainment areas are divided into categories of moderate or serious. As with ozone non-attainment, the threshold level for defining a major stationary source is reduced, depending on the severity of the non-attainment category. Major stationary sources in serious carbon monoxide non-attainment areas are defined as those with potential to emit 50 tons per year of carbon monoxide. Beginning in 1993, the sale of oxygenated gasoline is mandated in serious areas.

Title II of the 1990 Amendments governs regulation of mobile source emissions. Beginning in 1994 auto manufacturers must reduce tailpipe emissions of hydrocarbons, carbon monoxide, and nitrogen oxide. By 1995 reformulated gasoline must be used in urban areas with the most severe ozone pollution. Beginning in 1992 urban areas with carbon monoxide pollution must have an increased oxygen content in gasoline during the winter. Beginning in 1996 a specified number of clean fuel motor vehicles must be produced for sale in California. Starting in 1998 owners of fleets of 10 or more vehicles in urban centers in serious, severe, and extreme ozone non-attainment areas and more serious carbon monoxide non-attainment areas must begin phasing in clean fuel vehicles as they replace old vehicles. Title II also contains requirements with regard to fuel content and characteristics, including a ban on the sale of leaded motor vehicle fuel after December 1, 1995.

With the collection and dissemination of data on the release of hazardous substances into the atmosphere under the Superfund Amendments and Reauthorization Act ("SARA"), public attention during the debate on the 1990 Amendments focused on the unregulated emissions of hazardous substances (including suspected carcinogens) into the air. Dissatisfaction with EPA's progress to identify only eight hazardous air pollutants and regulate only seven caused Congress to completely revamp the air toxics program in the 1990 amendments. This new air toxics program is contained in Title III of the Amendments. It is expected that compliance with the provisions contained in Title III of the 1990 Clean Air Act Amendments will be the significant and most costly for the chemical industry.

Under the new air toxics program, Congress did not wait for EPA to determine what hazardous air pollutants required regulation. Instead Title III lists 189 hazardous air pollutants that Congress has determined EPA should regulate. Title III then mandates that EPA establish maximum achievable control technology ("MACT") which must be used on all sources of the listed hazardous air pollutants with the potential of at least 10 tons emission a year of any one hazardous substance, or 25 tons a year of any combination of hazardous air pollutants. Even sources that may not emit the threshold amount may be regulated as "area sources" if EPA determines that a particular category of emitter should be regulated to achieve a necessary reduction in the emission of hazardous air pollutants. EPA may require either MACT or a less stringent generally available control technology ("GACT") on area sources.

The list of 189 toxics and pollutants contained in the 1990 Amendments is only a starter: EPA must review the list periodically and, through rule making, add or delete substances. Listed substances are to include pollutants other than Criteria Pollutants "which present or may present through inhalation or other routes of exposure, a threat of adverse human health effects . . . or adverse environmental effects." In order to remove a substance from the list EPA must affirmatively determine that adequate data are available to indicate the substance "may not reasonably be anticipated to cause an adverse health or environmental effects."

Regulating emission controls under the air toxics program is a two-step approach. Initially EPA must promulgate MACT standards for major sources and either MACT or GACT standards for area sources. Statutory deadlines are imposed for the listing of major and area source categories and the promulgation of MACT and GACT by EPA. MACT for new or reconstructed sources must be at least as stringent as that achieved in practice by the best controlled source in the relevant category, even if only one source employs such a control. MACT for existing sources or modifications of existing sources, however, need only be as stringent, but may be more stringent than, the best performing 12% of existing sources in the category (or

the best performing 5 sources if there are less than 30 sources in the category). It is important to note that the 1990 Amendments require EPA to review and, if necessary, to revise emissions standards for air toxics at least every eight years. There is, therefore, no guarantee that once control technology is in place to comply with MACT standards, that it will be sufficient to meet future regulatory requirements. The regulations, therefore, provide incentive to industry not to select control technology that merely meets regulatory minima. By purchasing technology that goes beyond minimum required controls (even if initially more expensive), a facility may avoid a double investment: presently adequate emissions control equipment later scrapped for replacement equipment (which could have been purchased in the first place) necessary to met a new MACT.

MACT initially is a technology based standard: the standard is determined by what technology is in existence and used by a particular category of industry. The amendments, however, require that once EPA has set a MACT standard based on existing technology, EPA must, within six years after enactment of the Amendments, determine the residual risk to public health presented by emissions permitted under the technology based MACT, report to Congress on those risks, and make recommendations to Congress on legislation to address the residual risk. If Congress fails to act on EPA's recommendation, EPA must promulgate additional standards in order to "provide an ample margin of safety to protect public health . . . [or] adverse environmental effect." With regard to known or suspected carcinogens, residual risk standards must be set if technology based standards do not reduce lifetime cancer risk to less than one in one million for most exposed individuals.

Existing major sources of toxic emissions must obtain permits in accordance with the provision of Title V of the Amendments. Newly constructed, reconstructed, or modified major sources must obtain pre-construction permits. Permits will incorporate MACT or GACT standards. New sources must comply with MACT or GACT standards at the time of start up. Existing sources, however, have three years from the date of enactment of the standard to comply. EPA is required to grant a six year extension for MACT compliance to existing sources that can demonstrate a voluntary 90% reduction in emissions, generally using 1987 as the baseline year. The reduction must have been made before the applicable standard is imposed. However, in the case of standards imposed before January 1, 1994, a reduction may be made after standards are proposed if an enforceable commitment is made by the source to EPA to achieve the reduction before proposal of the standard. Sources that install LAER or BACT to control Criteria Pollutants are automatically exempt from MACT standards for five years after the technology is installed.

Title III also contains provisions concerning sudden and accidental releases of substances into the air which are "reasonably anticipated to cause serious adverse effects to public health and the environment." EPA is required to list at least 100 chemical substances that fit this criterion. A duty is imposed on owners and operators of stationary sources producing or handling such substances to identify potential hazards from accidental release and to take actions necessary to prevent the release. If a release occurs, the owner/operator must take action necessary to minimize the consequences of the release. A five member board is created to investigate and issue recommendations in the event of a release and to promulgate release reporting regulations.

(continued on page 46)

NORMAN D. GRIFFITHS

# Waste Minimization/ Pollution Prevention

If waste minimization efforts are truly to have a chance of success, industry must shed itself of certain basic mind-sets that have existed for decades.

Waste minimization, in a relatively short period of time, has become an urgent issue facing American industry. Although this article addresses the chemical industry, many of the principles have universal appeal and indeed are being adopted by society as a whole.

The choice between investing in expensive pollution control equipment/ waste management practices and the resources to oversee such pollution control operations, or investing in preventing the generation of the waste in the first place is an easy one. Implementation may not be so easy. Control of pollution through an "end-of-the-pipe" strategy requires manpower, energy, materials, and capital investment. In addition, such a strategy generally removes wastes from one source (e.g. wastewater treatment, air scrubbers, etc.) and places them in another, such as a surface impoundment or landfill. For effective change to occur, new thinking is needed regarding certain basic manufacturing philosophies. Waste generation must become an integral part of all new product research and development efforts. In the past, the product would be developed first, and consideration about the management of wastes generated from that manufacturing operation would occur later. Creative thought needs to focus on building the better mousetrap and minimizing or eliminating *at the source,* the wastes generated from manufacturing the product. Waste minimization must become an "automatic" consideration as new products are developed and as existing manufacturing operations are upgraded. American industry is in a global, competitive dogfight. Acceptance by this global society will be crucial if it is to survive. That society has now clearly said that it wants quality products that are manufactured in an environmentally sound manner.

In 1989 the Chemical Manufacturers Association ("CMA") authorized NFO, Inc. to conduct a survey to determine the public's opinion of the chemical industry. The survey revealed that it was low. Of eleven industries, including computer, food, airlines, automobiles, lumber & paper, pharmaceutical, petroleum, and nuclear power, among others, only the tobacco industry was ranked lower than chemicals. Although the responses indicated an acknowledgement that the chemical industry provides useful products, concerns about undesirable by-products or side effects, along with a perception that the industry paid little attention to the public's concerns, were evident.

CMA, on behalf of the chemical industry, undertook a program to increase recognition of the industry as being responsive to public concerns about chemical manufacturing and disposal entitled: "RESPONSIBLE CARE: A Public Commitment". I hasten to add that Responsible Care is not simply a PR campaign. Each of the 170 CMA member companies has committed to operating under certain guiding principles. Participation is implemented through the adoption of the Responsible Care Codes of Management Practice. This commitment is now a requirement for new and continued membership in CMA. These Codes are intended to become an integral part of each company's practice. The Codes are: (1) Community Awareness and Emergency Response ("CAER"); (2) Waste and Release Reduction ("WARR"); (3) Safe Plant Operations; (4) Transportation and Distribution Safety; (5) Waste Management; (6) Product Stewardship; (7) Worker Health and Safety; and (8) Research and Development. Each member is required to perform a self-evaluation and report back to CMA annually on its progress in implementing each of the Codes.

The WARR Code, recently re-named

the Pollution Prevention Code of Management Practices, involves fourteen management practices. They include a commitment by senior management of each member company to the reduction of releases to air, water and land. They also include a requirement to develop a quantitative inventory of wastes generated and released at each facility. Also required is an evaluation sufficient to set reduction goals, along with training and public dialogue. Priorities are set with a preference to source reduction, recycle/reuse and treatment of wastes (including destruction). Progress is continually measured. The efficacy of waste and release prevention objectives in research and development of new products is studies, along with various processes, facilities and not only their own waste management practices, but also those of their contractor facilities. Protection of groundwater at the member's site is also considered along with an evaluation of prior sites still under a member's ownership.

Initiatives such as Responsible Care are intended to demonstrate the industry's continuing desire and commitment to improve its health, safety, and environmental performance. It is hoped that this demonstration will elevate the public's confidence in the industry.

The Chairman of the Board of my Company has defined "corporate environmentalism" as ". . . an attitude and a performance commitment that place corporate environmental stewardship fully in line with public desires and expectations.". That "attitude" and "performance commitment" are at the heart of the matter. If waste minimization efforts are truly to have a chance of success, industry must shed itself of certain basic mind-sets that have existed for decades. Safety, health, and environmental protection must become priorities in all planning.

Multi-national companies can no longer consider solely the United States, but must address global environmental issues. Natural resources cannot be viewed as un-limited. They are finite. Attitudes about waste management must be changed to thinking in terms of elimination, recycle/ reuse, destruction, and lastly disposal of waste, in that order of priority. Along these same lines, assumptions that waste generation must necessarily increase with capacity increases are no longer valid, because new technology, as well as improvements in existing manufacturing technology now make it possible to increase capacity with no net increase or even a reduction in waste.

Although science and technology have .come a long way and provide the answers to some of the issues related to waste minimization, industry cannot be driven, or limited, by technology. Public opinion is an overriding concern that must be balanced during the planning process. One step toward combined responses to both issues is to institutionalize waste minimization in all industrial plant projects, e.g. by designing all expansion projects to include abatement equipment or incorporating process changes that result in no increase in emissions.

Attitudes about the cost factors associated with waste minimization/pollution prevention must be re-directed. Environmental stewardship must be treated as a competitive advantage. A view of waste minimization as simply a cost item is shortsighted. Businessmen who believe that the first priority of a business is to make a profit miss a fundamental point. Although profits are critical to the survival of a business, its long-term success is not based on profit alone, but is also derived from customer satisfaction. Profit is the measuring rod of that satisfaction. It is the *result* of providing superior products and/or services. Today's customers are acutely aware of pollution and demand that businesses manufacture the products they want *and* do so in an environmentally sound manner. Protection of the environment is now part of the laundry list of things that contribute to customer satisfaction. Compliance with ever-stricter, evolving environmental laws and regulations is expensive. Ultimately, some of the costs are passed on to consumers. But compliance with the law will produce significant improvements in our environment. Going beyond regulatory compliance to a practice approach to waste management will produce even greater results in the protection of the environment, that will easily outweigh the initial investment.

At the federal level, interest in eliminating wastes at their source has been spurred by the land disposal restrictions ("land ban") of the Resource Conservation and Recovery Act ("RCRA") and the Superfund Amendments and Reauthorization Act ("SARA") Section 313 requirement that industries report all releases of certain chemicals into the environment. The EPA has established an Office of Pollution Prevention and declared it to be one of the Agency's most important objectives.

Section 122 (b) (1) of RCRA requires waste generators to certify on shipping manifests that ". . . the generator has a program in place to reduce the volume or toxicity of hazardous waste to the degree determined by the generator to be economically practical." In 1988, the RCRA reauthorization bill as introduced by Senator Max Baucus (D-MT) contained a provision mandating industrial waste reduction standards. These examples illustrate EPA's preference for a non-regulatory approach to source reduction as a means of promoting pollution prevention.

In November, 1990, Congress passed the "Pollution Prevention Act of 1990". It was the result of combining legislation introduced by Rep. Howard Wolpe and Senator Frank Lautenberg. The Act is premised on the principle that prevention or reduction of pollution at its source is more desirable than waste management and pollution control. It declares the national policy of the United States to be pollution prevention reduction at the source whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner whenever feasible; pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be used only as a last resort and should be conducted in an environmentally safe manner.

The law suggests that cost-effective opportunities to reduce pollution at its source are available through the changes in production, operation and raw materials usage. It also points out that such opportunities have not come into practice largely because the regulatory stress has been on treatment and disposal, rather than source reduction. A suggestion is made that it is the intent of EPA to gather and disseminate information and technical assistance to industry in order to overcome "institutional barriers" to adoption of source reduction practices.

The provision in the Act dealing with data collection requires each facility currently required to file an annual SARA Section 313 Report, to file a "Toxic Chemical Source Reduction and Recycling Report". This report must contain: (1) the quantity of the chemical entering any waste stream prior to recycling, treatment, or disposal during the calendar year; (2) the amount of the chemical from the facility which is recycled during the calendar year, the percentage change from the previous year, and the process of recycling used; (3) the source reduction practices used with respect to that chemical during the year; (4) the amount expected to be reported under items (1) and (2) for the two calendar years immediately following the calendar year for which the report is filed; (5) a ratio of production in the pro-

duction year to production in the previous year; (6) the techniques that were used to identify source reduction opportunities; (7) the amount of any toxic chemical released into the environment that resulted from a catastrophic event, remedial action, or other one-time event; (8) the amount of chemical from the facility treated during such calendar year and the percentage change from the previous year. Although information contained in such reports will be subject to the "confidential information" requirements of SARA Section 322, the information provided in these reports will largely be available to the public much like that filed under Section 313.

Federal matching grants will be available to States for programs to promote the use of source reduction techniques by businesses. EPA will monitor such activities to ensure the State is providing training in source reduction, and will make technical assistance available to provide businesses with advice.

The EPA has also launched several voluntary waste reduction programs. The Industrial Toxics Project is a new EPA initiative for achieving voluntary reductions of 17 high-priority chemicals. Participants provide the agency with numerical reduction goals and strategies/methods for reaching them. Although this program will consider reductions through recycling and treatment, it encourages the reduction or elimination of pollution at its source. EPA encourages participants to communicate their "successes" to the general public.

EPA also launched a voluntary program aimed at reducing acid rain and greenhouse gas emissions by reaching "agreements" with 24 major corporations to install energy efficient lighting and thereby cut national electricity demand by 10% or more, reducing annual air pollution by 235 million tons. Companies joining the "Green Lights" program expect to profit by reducing their electricity bills by over $18 billion a year.

Delaware's waste minimization program "The Three R's for the 90's: Reduce, Reuse, Recycle" provides businesses, farmers, households, and government agencies with information, education, and technical assistance in finding ways to reduce the amount of air, water, and solid wastes they generate. It emphasizes the elimination of waste at the source, instead of installing control equipment after the pollution has entered the waste stream.

In 1990, the State Legislature passed the Waste Minimization/Pollution Prevention Act (Del. Title 7, Ch. 78). This law declared as its purpose, the enhancement of protections of human health and the environment by establishing a multimedia Waste Minimization/Pollution Prevention Program designed to facilitate this goal through: (a) targeting industries and locations for technical assistance; (b) providing waste minimization/pollution prevention, education and outreach; and (c) developing a statewide recycling program. The priority of concern clearly set forth in the Act is reduction of waste at the source, followed by waste reduction methods involving recovery, reuse, recycling, and finally treatment.

**Although profits are critical to the survival of a business, its long-term success is not based on profit alone, but is also derived from customer satisfaction**

The multi-media approach of this law is directed toward ". . . all environmental media including, but not limited to, work places within facilities, water, land and air.". Waste Minimization is defined in the Act as meaning a ". . . process by which a facility conducts an analysis of a production process to determine the waste minimization techniques which could be implemented.". The program contemplates the formation of an Implementation Committee composed of various Secretaries of State agencies, representatives of industry, academia, civic organizations, local government, environmental organizations, and the private solid waste collection industry. Recognition of the task facing the program in turning around long-standing waste management practices is evident through the mechanism of selecting a "target industry" for evaluation and technical assistance. Within the "target", the focus is on small companies that do not generally have the resources to explore effective ways to minimize wastes. Although other industries may request assistance during the Committee's work with the target industry, the purpose of addressing the issue industry-by-industry is to build an information data base of waste-minimization-pollution prevention techniques that might have broader application.

Other components of the Program include increasing public awareness of the program and publication of a pollution prevention newsletter to be distributed to industry and the public.

Is waste minimization for a major chemical plant using technology that might be several decades old a realistic prospect? The answer is a resounding YES! Increased regulations, higher disposal costs, and increased liability have prompted a critical examination of end-of-pipe pollution control techniques compared with elimination of pollutants in the process. Waste reduction techniques such as inventory management, modification of production processes and reducing/recovery of waste are a few examples of "practices" that can significantly contribute to the reduction/elimination of waste.

Oftentimes, wastes arise from damaged, off-spec, spilled, out-of-date, or contaminated raw materials. A plant takes two hits in such cases; once for disposal costs and a second for the cost of replacing the raw materials. Adopting techniques such as changing ordering patterns; adopting just-in-time manufacturing practices; or tightening up on inventory control will greatly reduce this source of waste. Du Pont's "Supply Chain Management" process is an example of a cooperative initiative between receipt of a customer's order and delivery of the product, which has a corresponding effect on reducing inventories.

Examination of current manufacturing processes for ways to improve efficiency is another tried and true method for minimizing waste. Making optimum use of raw materials to guard against loss is but one way of improving manufacturing efficiency. Along these same lines, proper maintenance of equipment can reduce waste generation. Leaking equipment not only generates waste, but can lead to equipment failures that cost the plant much more in the long run. However, leaked material should not automatically be looked upon as waste. Consideration should be given to reuse/recovery of such materials. In that regard, installation of better seals to prevent leakage or use of drip pans to collect and reuse leaked material are two ways of accomplishing this.

Another potential reduction technique is reformulating a product/process to use less hazardous raw materials. This provides the added benefit of not only reducing the amount of hazardous waste generated, but reducing the hazardous characteristics of the end product. This technique also has the potential to produce savings on invest-

ment in environmental equipment to meet regulatory standards.

Reducing waste volume is the most obvious means of waste minimization/elimination. there are several techniques that have been used successfully toward this end. Segregation of wastes with no recovery potential from those that can be recovered/reused is one means of reducing waste volume and at the same time saving money on raw materials. A printing company segregates and collects toluene used for press and roller cleanup operations by color and type of ink. This materials is now reused for thinning the same type and color of ink, thus eliminating a hazardous waste stream.

These are but a few examples of how waste minimization can work in real situations. It should also be apparent that technology alone isn't the answer to an effective waste minimization program. It takes sincere commitment and a full integration of waste minimization principles into one's thinking, beginning at the birth of a product. It requires a different way of looking at waste, first with a view to eliminating it, but failing that, considering waste streams, as one corporate executive put it, as nothing more than specialty products that haven't yet found their market.

*Norman D. Griffiths is a member of the New Jersey and District of Columbia Bars and an associate member of the Delaware State Bar Association. He has been a member of the Du Pont Legal Department for eight years and is currently assigned to the Environment Group with responsibility for advising Du Pont plants in several States including Delaware, on a variety of environment issues. Norman is a member of the St. Thomas More Society and serves on a number of Boards, including the Delaware Council on Crime and Justice, Family Service of Delaware, and St. Francis Hospital. Norman spent six years as a police officer in Washington, D.C..His hobby is raising his four children.*

LAWRENCE K. G. POOLE

# Shakespeare v. The Lawyers.

If Holinshed, who wrote the Chronicles of England, was the source of this line, the appeal to authority loses its potency. Who'd want to walk around wearing a Raphael Holinshed T-shirt?

Lawyers have accustomed themselves to the attacks of society. Many attacks cite the words of Dick the Butcher found in The Second Part of King Henry VI, Act IV, Scene ii - "The first thing we do, let's kill all the lawyers." Critics of lawyers appeal to this authority to prove their point and they do it repeatedly, ad nauseam. While some of my friends in the Plaintiff's bar have suggested that this passage should be read as meaning, "First, let's kill all the insurance defense lawyers", the clear and unambiguous language of the passage does not permit so restrictive a reading. Furthemore, the lack of insurance defense lawyers at the time of Henry VI also argues against such a reading. Fortunately for lawyers, this appeal to authority is not well founded:

The three parts of King Henry VI contain 6,033 lines. Of these, 1791 lines were copied intact, most probably from the Holinshed Chronicles, and 2,373 were paraphrased from the same source. See Alexander Lindey, Plagiarism and Originality, p. 74-75 (1952). This establishes considerable uncertainty whether Shakespeare wrote this line or plagiarized it. If Raphael Holinshed, who wrote The Chronicles of England, was the source of this line, the appeal to authority loses its potency. Who would walk around with a T-shirt citing Raphael Holinshed?

The second flaw in the appeal to authority is that it equates lines spoken by a character with the playwright's personal beliefs. Under this approach, Shakespeare believes in free will! "The fault, dear Brutus, is not in our stars, But in ourselves, that we are underlings." Julius Caesar, Act I, Scene ii. But this same Shakespeare considers man's destiny predetermined - "arming myself with patience to stay the providence of some high powers that govern us below." Julius Caesar, Act V, Scene i. Thus Shakespeare manages to disagree with himself within the confines of the same play.

When the passage regarding lawyers is considered in context, our reservations regarding the weight these words should be given increase. The aptly named Dick the Butcher is described in the dramatis personae as a rebel, one of Jack Cade's followers. These rebels kill a clerk for knowing how to read and write and a Lord for speaking Latin. In casting the death sentence on the latter, their leader, Jack Cade, comments, "I feel remorse in myself for his words, but I'll bridle it. He shall die, an it be but for pleading so well for his life." See Act IV, Scene ii and Act IV, Scene vii. Dick the Butcher and the other rebels carry out the punishment.

Cade's proposals for the society that he will rule fall well short of the New Jerusalem. Cade proposes to burn all the records of the realm. As a benign substitute, he proposes, "My mouth shall be the parliament of England." Act IV, Scene vii. Having assumed proud absolute power, Cade pronounces, "The proudest peer in the realm shall not wear a head on his shoulders unless he pay me tribute. There shall not be a maid married but she shall pay to me her maidenhead ere they have it." Act IV, Scene vii.

As one of the rebels, Dick the Butcher, fully supports Jack Cade. The rebels would overthrow traditional Christian values for a world in which virtue must yield to arbitrary power. There would be no ordered liberties nor any justice. The rebel's motivation for killing lawyers is not to stop injustice, but to perpetuate their own arbitrary power and avoid the consequences by destroying those responsible for enforcing the legal system.

If one can safely assert that these evil characters with their base motivations represent Shakespeare's true beliefs, then there is no horror, no cruelty, no violation of nature of which Shakespeare does not

approve. "I am determined to prove a villain and hate the idle pleasures of these days." Richard III, Act I, Scene i.

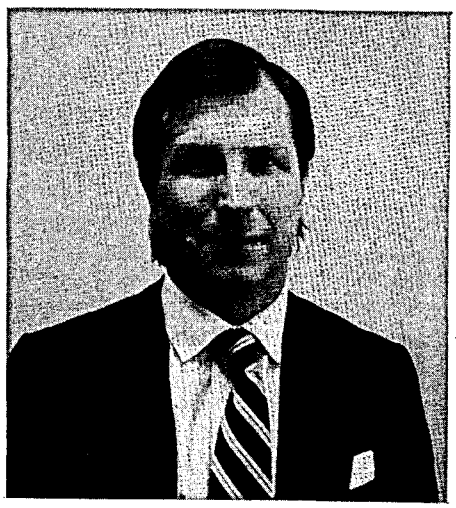
Surely, the prudent will not unhesitatingly assume that Shakespeare and his characters are united in their views. Surely, the wise would identify Shakespeare with Prospero, who uses his potent art and rough magic to contain the appetites of Caliban, and with Portia, who speaks of

**Killing lawyers doesn't stop injustice - it enthrones arbitrary power as Shakespeare eloquently points out!**

mercy as a necessary component of the law; not with Jack Cade and his rebel followers.

No doubt this Aristotelian appeal to reason will not stop the continued misuse of Shakespeare as an instrument for attacking the legal profession, but, as lawyers, we can take comfort in knowing that those who appeal to Shakespeare, appeal in error, and in remembering Montesquieu's aphorism, "Most expressions of contempt deserve to be treated with contempt."





*Lawrence K. G. Poole received his undergraduate degree from Emory University in 1974 and his J.D. from George Washington University in 1977. He is a member of the Georgia Bar, practicing in the outskirts of Atlanta.*

*As the accompanying article shows, English literature retains its fascination for him.*

LAWRENCE A. HAMERMESH

# Our Right to Bear Arms: A Response


Illustration by Vala Kondo

There is nothing intellectually dishonest in claiming that many sorts of gun control measures are constitutionally sound.

**BELATED DEBATE**

*The following contribution requires an explanation. Some time back we commissioned two authors to take opposite sides on the issue of gun control. One of them, Greg Inskip, did his work promptly and submitted a fine article, which appeared in Volume 8, Number 3 of DELAWARE LAWYER. The other author, despite considerable prodding, never produced. We went ahead and printed the Inskip article because we felt it was too good a performance to waste. Not surprisingly it prompted a demand for equal time. Hence Larry Hamermesh's comments below. Since Larry has had the benefit of examining Greg's contribution (the original plan was to print both articles blind in fairness to both authors) we give Greg the last word. WEW*

Gregory A. Inskip's recent article in this publication entitled "Our Right to Bear Arms" was cogent in some respects and thought-provoking throughout. Some of the omissions and incorrect statements in that article, however, disserve the constitutional law position it advocates.

1. According to "Our Right to Bear Arms," "intellectually honest lawyers should agree that an individual, personal right to bear arms is set forth in plain English in the Second Amendment." The article neglects to mention, however, that numerous appellate and trial court judges — ordinarily intellectually honest, presumably — have, along with the ACLU and the American Bar Association, uniformly reached the opposite conclusion.[1] The Third Circuit held in 1942 that the Second Amendment "was not adopted with individual rights in mind, but as protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power."[2] In 1968, the New Jersey Supreme Court took the same view:

"As the language of the amendment indicates it was not framed with individual rights in mind. Thus it refers to the collective right 'of the people' to keep and bear arms in connection with 'a well-regulated militia.'[3]"

The Sixth Circuit in 1971 ruled flatly that the Second Amendment "applies only to the right of the State to maintain a militia and not to the individual's right to bear arms," and therefore "there can be no serious claim to any express constitutional right of an individual to possess a firearm."[4] More recently, in 1987, the District of Columbia Court of Appeals "agree[d] with numerous other courts that the Second Amendment guarantees a collective rather than an individual right," and in 1988 the Eighth Circuit summed up by stating that "[l]ater cases have analyzed the Second Amendment purely in terms of protecting state militias, rather than individual rights."[5]

As far as I know there is no contrary holding in any case, and certainly "Our Right to Bear Arms" cites none. This is not to say that the individual vs. collective right issue under the Second Amendment is beyond fair debate. It is less than fair, though, for "Our Right to Bear Arms" to label the collective right view as "ACLU's vision of a meek and disarmed citizenry," "the ACLU's position, " "The ACLU viewpoint," and "the ACLU's collectivist interpretation of the Second Amendment." If the author's intent was to impugn that constitutional interpretation by associating it with an organization he

hopes some readers believe is aberrant, even-handedness might have suggested some mention of the case law that supports that interpretation.

2. Another important limitation of the Second Amendment that "Our Right to Bear Arms" neglects to mention is that it restricts only federal action, and has no application to state or local firearms regulations. The United States Supreme Court so held back in 1886, in United States v. Presser.[6] While many (although not all) elements of the Bill of Rights have since been deemed applicable to the States through incorporation in the Fourteenth Amendment, the Second Amendment has never been one of them. Perhaps this is the result of the prevailing judicial view that the Second Amendment protects State, not individual, rights, and does not embody a fundamental individual liberty interest that the Fourteenth Amendment reaches. In all events, the commentator (Don Kates, Jr.) to whose work "Our Right to Bear Arms" is indebted was among those who attempted in 1982 to overturn Presser, but the United States Court of Appeals for the Seventh Circuit squarely rejected the attempt.[7] So far as established case law is concerned, state and local level gun control measures present policy issues which the Second Amendment simply does not affect.

3. "Our Right to Bear Arms" asserts provocatively that "gun control advocates . . . are not intellectually honest." Perhaps the author did not mean that statement as broadly as it reads. It should be very clear, though, that there is nothing intellectually dishonest in claiming that many sorts of gun control measures are constitutionally sound, even if one accepts the constitutional law position advocated in "Our Right to Bear Arms." That article itself implicitly approves the concept of gun control laws "aimed at restricting gun possession among persons with prior records of violence . . ." Likewise, Mr. Kates' law review article (in the 1983 Michigan Law Review) — a piece that otherwise endorses a broad reading of the Second Amendment — acknowledges that licensing and registration requirements that do not arbitrarily limit gun ownership can be constitutional.[8] The Kates article also acknowledges that under the Second Amendment governmental authorities can even prohibit, as well as regulate, private ownership of a wide variety of firearms, such as fully automatic weapons, "Saturday night specials" (small caliber, low quality handguns), and other weapons not in common use among law-abiding citizens.[9] Thus, the statement in "Our Right to Bear Arms," unsupported by any authority, that "our government cannot constitutionally prevent any law-abiding citizen from owning" what are called "assault rifles" is suspect, to say the least. Even under the broad Second Amendment analysis advocated by the Kates article, some forms of what one might call an assault rifle should clearly be constitutionally susceptible to governmental prohibition.

Whatever Second Amendment rights an individual citizen may have to keep and bear arms, it is beyond dispute that governmental authorities can broadly regulate private gun ownership without violating any such constitutional right. As a corollary, there is nothing intellectually dishonest about advocating devotion to the Bill of Rights and at the same time advocating gun control in one or more of a variety of forms. The recently-adopted Delaware statute requiring point-of-sale background checks as a prerequisite to purchasing a firearm does not even approach a constitutional issue.[10] Properly, the debate about such measures is a policy one, in which this response does not engage, and not a constitutional one.

4. More for rhetorical — even demagogical — purposes than for constitutional analysis, "Our Right to Bear Arms" recites that the ACLU (a) "opposes the use of metal detectors in airports," (b) "will affirmatively support gun control legislation to disarm honest citizens," and (c) asserts constitutional protection of "the opportunity to terrorize airplane passengers with a gun." A simple inquiry to the ACLU would have revealed each of these statements to be untrue. In 1973, when airport searches often relied on "profiles" using constitutionally suspect categories or were more personally intrusive than they are today, the ACLU did record its opposition to airport searches.[11] Now that metal detectors are the ordinary means for detecting hijacking threats, however, the ACLU policy adopted in 1973 has been dormant for years. In fact, ACLU's national executive director has recited that since his tenure began in 1978, the ACLU has never challenged airport metal detectors in court or issued any public statement opposing them. It thus is hardly fair to conclude that the ACLU supports a constitutional right to "terrorize airplane passengers with a gun." (In contrast, one ardent advocate of the Second Amendment recently argued that metal detectors in a public court building violate that constitutional provision. He lost.[12])

Nor does the ACLU, as an institution, "affirmatively support gun control legislation," to "disarm honest citizens" or otherwise. From June 1979 to April 1980 the ACLU was on record as intending to "affirmatively support gun control legislation." That policy was then pointedly questioned, reconsidered and, ultimately, withdrawn in 1982.[13] Gun control legislation, desirable or not, is simply not on the ACLU's agenda.

I have tried to limit the foregoing discussion to qualifying several overbroad assertions of constitutional law and correcting some erroneous assertions about the ACLU. As a director of the Delaware affiliate of the ACLU and a card-carrying member of Handgun Control Inc., however, I cannot resist noting a basic philosophical difference with "Our Right to Bear Arms." That article claims that "a government of freedom under law cannot be maintained by laws, lawyers or policemen alone." In particular, "Our Right to Bear Arms" sees gun ownership as a bulwark in protecting American citizens against tyrannical excess. I do not. Perhaps in an age gone by, that bulwark was important. Today, however, I place my trust in the courts. Right or wrong, they have been and will be enforcers of the individual freedoms our Constitution guarantees, should other branches of government try to curtail those freedoms. If we can rely on the courts to protect rights under the Second Amendment, whatever they may be, we can rely on the courts to protect the integrity of the rest of the Bill of Rights.

FOOTNOTES

1. American Bar Association, Policy Book (August 1975). The case law is collected in Annotation, "Federal Constitutional Right to Bear Arms," 37 ALR Fed 696 (1978).

2. United States v. Tot, 131 F.2d 261, 266 (3rd Cir. 1942), reversed on other grounds, 319 U.S. 463 (1943).

3. Burton v. Sills, 248 A.2d 521, 527-28 (N.J.), app. dism'd, 394 U.S. 812 (1968).

4. United States v. Warin, 530 F.2d 103 (6th Cir.), cert. denied, 426 U.S. 948 (1976).

5. Sandidge v. United States, 520 A.2d 1057 (D.C. App.), cert. denied, 484 U.S. 868 (1987); United States v. Nelsen, 859 F.2d 1318, 1320 (8th Cir. 1988).

6. 116 U.S. 252 (1886).

7. Quilici v. Morton Grove, 695 F.2d 261, 269-70 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983). Cf. Kates, "Hand-

gun Prohibition and the Original Meaning of the Second Amendment," 82 Mich. L. Rev. 204, 252-57 (1983).

8. Kates, supra, 82 Mich. L. Rev. at 264-66.

9. Id. at 260-61.

10. 11 Del. C. Section 1448A, 67 Del. L., c. 414 (1990).

11. ACLU Policy #270, adopted April 14-15, 1973.

12. Justice v. Elrod, 832 F.2d 1048, 1051 (7th Cir. 1987).

13. March 15, 1988 letter from Ira Glasser, ACLU Executive Director, to Charles Peters, Editor, The Washington Monthly.

*Lawrence A. Hamermesh, a member of the firm of Morris, Nichols, Arsht & Tunnell, is a distinguished member of the corporate bar. He is also an active and dedicated civil libertarian.*

* * *

GREGORY A. INSKIP

**A REPLY**

Unlike Mr. Hamermesh, the Framers of the Constitution did not rely exclusively upon the courts to "be enforcers of the individual freedoms our Constitution guarantees." They relied upon each of the three branches of government to check the usurpations of the others. Most of all, however, they relied upon an upstanding, armed citizenry as the natural check on both tyranny and crime.Like Mr. Hamermesh, I merely note this "basic philosophical difference" and turn now to the specific contentions made in his response.

1. It is not true that appellate judges "uniformly" have reached the conclusion that the Second Amendment does not protect an individual right to bear arms. Early in the nineteenth century, Justice Story stated that the right of individual citizens to keep and bear arms is an essential safeguard against tyrannical government:

"It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against usurpation and arbitrary power of the rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.[1]"

In 1857, the United States Supreme Court described the Second Amendment right to keep and bear arms as an individual right, in pari materia with the several protections of the First and Fifth Amendments:

"For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances.

"Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.

"These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care.[2]"

Very recently, the Court again observed that the "people" protected by the Second Amendment are the same "persons" protected by other core provisions of the Bill of Rights:

"The Second Amendment protects 'the right of the people to keep and bear Arms,' and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to 'the people.' . . . While this textual exegesis is by no means conclusive, it suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[3]"

State high courts likewise have ruled that the Second Amendment protects a right of an individual citizen, although early cases sometimes upheld limitations on carrying concealed firearms.[4] The Texas Supreme Court explained the policy of the amendment as follows: "the people cannot be effectually oppressed and enslaved, who are not first disarmed."[5] In 1846 the Georgia Supreme Court uncompromisingly stated that "The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree. . . ."[6]

2. Mr. Hamermesh asserts that the Second Amendment has not, thus far, been held applicable to the States through incorporation in the Fourteenth Amendment. The point is an academic one in the many states, like Delaware, which protect the right to bear arms in their own constitutions. Article 1, Section 20 of the Delaware Constitution provides that "A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use."

Anyone who takes the history of the Fourteenth Amendment seriously cannot hold that it incorporates some of the Bill of Rights but not the Second Amendment. Before the Civil War, Delaware and other states enacted laws prohibiting blacks from having arms.[7] Lysander Spooner and other abolitionists attacked these laws and slavery itself on the grounds that blacks were "people" who enjoyed the Second Amendment right to bear arms, and the further right to defend themselves with those arms against would-be slaveholders.[8] The infamous Dred Scott decision rejected the abolitionists' cause but accepted their logic, holding that citizenship could not be conferred upon African-Americans because, inter alia "it would give them the full liberty of speech in public and in private upon all subjects upon which [a state's] own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went."[9]

With the Emancipation Proclamation, the arming of many blacks and ultimately the surrender of the Confederacy, the abolitionists seemingly had prevailed. But after the war, some states again attempted to disarm African Americans via new black codes, setting in motion a federal reaction that culminated in the proposal of the Fourteenth Amendment.[10] In Halbrook's words, "the same Congress that passed the Fourteenth Amendment was willing to dissolve the state militias, and even to disenfranchise most Southern whites; it took care not to infringe upon the right of the disenfranchised Southern whites to have weapons, while safeguarding the same right to newly emancipated slaves."[11] The legislative history of the civil rights legislation that ensued (1871 and 1875) demonstrates unequivocally that the incorporation of the First through the Eighth Amendments was contemplated by the

framers of the Fourteenth Amendment.[12]

3. Mr. Hamermesh asserts that it was "demagogical" to blame the ACLU for positions it has taken in the past. The ACLU is said to have "reconsidered" and "withdrawn" its gun control policy in 1982. In fact, the move was only cosmetic; the ACLU resolved that year to remain an "affiliate" member of the national Coalition to Ban Handguns.[13] The ACLU to this day holds that "the possession of weapons by individuals is not constitutionally protected."[14] It also remains true that the ACLU opposes metal detectors in airports.[15] Mr. Hamermesh protests that this policy is "dormant," whatever that means. But the ACLU cannot deny that its current policies would restrict the liberty of ordinary citizens to have firearms while simultaneously making it easier for terrorists or criminals to use them.

Mr. Hamermesh does not speak for the ACLU when he asserts that "The recently-adopted Delaware statute requiring point-of-sale background checks as a prerequisite to purchasing a firearm does not even approach a constitutional issue." The ACLU currently holds that gun ownership by anyone can be suppressed, but that an applicant's "personal history" should not be a consideration for a gun permit.[16] Once again, the ACLU has arrived at a position hostile to ordered liberty: "If the government must allow sane and law-abiding citizens to have guns, then it must let the psychotics and felons have them, too."

4. Mr. Hamermesh does not dispute that the Framers of the Constitution -men like James Madison, Alexander Hamilton, Samuel Adams, Patrick Henry, George Mason and Richard Henry Lee - intended and understood that the Second Amendment would guarantee an individual, personal right to bear arms. Even if there were, in Mr. Hamermesh's words, a "fair debate" about the meaning of the language of the amendment, the intent of the Framers would control. Our right to keep and bear arms, like our rights to speak freely and to worship as we choose, may have evolved in "an age gone by," but it remains the supreme law of the land.

* * *

I thank Mr Hamermesh for sending me a copy of his response sufficiently in advance for this reply to be prepared in time for simultaneous publication. Dan M. Peterson, Esquire and Palmer L. Whisenant, Esquire called my attention to legal material discussed herein.

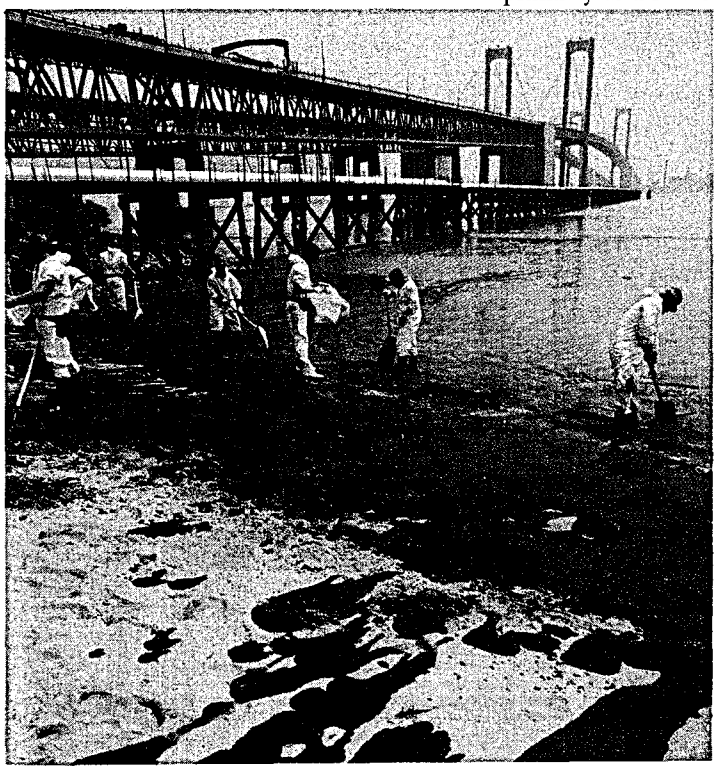
(continued on page 47)

HAROLD I. SALMONS, III

# Multiple Liability for Oil Pollution?

**Potential conflicts between federal and state pollution legistration.**

On August 18, 1990, President Bush signed the Oil Pollution Control Act of 1990[1] (the "Federal OPCA") into law ushering in a "new and improved" federal oil spill prevention and liability regime. The Federal OPCA was enacted primarily as a result of the 11 million gallon oil spill caused by the Exxon Valdez in Prince William Sound but also as a result of several other oil spills occurring shortly thereafter including an approximately 840,000 gallon spill in the Delaware River caused by the grounding of the s/s Rivera.[2] Indeed, when considering the Federal OPCA, the Senate Environment and Public Works Committee took note of the fact that "one day after the spill in the Delaware River, the oil had been carried 15 miles downstream, and the Delaware Secretary of the Environment said that 'the standard response failed.'"[3]



Too close to home? An oil spill in the shadow of the twin bridges-June 1989

The Federal OPCA contains provisions giving the federal government more power in directing cleanup activities after an oil spill, strengthening the existing National Contingency Plan to handle oil spills, establishing a National Planning and Response System, requiring owners and operators of certain oil related facilities and vessels to prepare and submit individual response plans, and requiring new vessels constructed for the carriage of oil to be equipped with double hulls when operating in U.S. waters. In addition to these stronger prevention and control mechanisms, the Federal OPCA also contains provisions redefining liability for oil spills under federal law.

Delaware's Oil Pollution Liability Act [4] (the "Delaware OPLA") establishes a liability regime for oil spills under state law. As will become evident, the two schemes are not wholly consistent. What follows is a brief introduction to the liability provisions of the Federal OPCA, a brief refresher on the liability provisions under the Delaware OPLA, and a brief discussion of some of the more interesting effects of the Federal OPCA on the "continued vitality" of the Delaware OPLA.

## THE FEDERAL OIL POLLUTION CONTROL ACT OF 1990

Congress enacted the Federal OPCA building upon the existing oil pollution liability framework set forth in Section 311 of the Federal Water Pollution Act.[5] Similar to the statutory framework established with respect to hazardous wastes[6], Section 1002 of the Federal OPCA establishes joint, several, and strict liability for each "responsible party" for a vessel or a facility[7] from which oil is discharged[8] or which poses the substantial threat of a discharge of oil into or upon the navigable waters or adjoining shorelines of the United States. If a responsible party can establish that a discharge or threat of discharge and the resulting removal costs and damages were caused solely by the act of one or more third parties (other than employees and agents of, and those in privity with, the responsible party), then such third party is treated as the responsible party although the responsible party may have to pay removal and damage claims and then seek contribution from such third party[9].



Photograph by Susan L. Gregg

Section 1002 provides that "notwithstanding any other provision or rule of law," each responsible party is liable for the removal costs and damages that result from an oil spill. Section 1002 defines removal costs to include all costs of containment, removal and other actions necessary to minimize or mitigate damages resulting from an oil incident. Section 1002 further specifies the following damages that are recoverable under the Federal OPCA:

(A) damages for injury, destruction and loss of use of natural resources, which are recoverable by certain governmental entities as public trustees;

(B) damages for injury to or economic loss resulting from destruction of property, which are recoverable by any person who owns or leases the property;

(C) damages for loss of subsistence use of natural resources, which are recoverable by any person who uses the natural resources injured, destroyed, or lost, without regard to the ownership or management of the resources;

(D) damages equal to the net loss of taxes, royalties, rents, fees or net profit shares due to the injury, destruction or loss of property or natural resources, which are recoverable by certain governmental entities;

(E) damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction or loss of property and natural resources recoverable by any person;

(F) damages for net costs of providing increased or additional public services during or after removal activities, which are recoverable by certain governmental entities.

Pursuant to Section 1005, responsible parties are also liable to claimants for interest on any claim accruing, generally, from the thirtieth day after the day on which such claim is presented.

Section 1003 provides limited defenses to a responsible party under the Federal OPCA. A responsible party can avoid liability if it can prove, by a preponderance of the evidence, that a discharge of oil or substantial threat of discharge of oil and the resulting damages or removal costs were caused solely by (1) an act of God[10], (2) an act of war, (3) an act or omission of a third party other than an employee or agent of, or party in privity with, the responsible party (but only if the responsible party establishes that it exercised due care with respect to the oil and took precautions against foreseeable acts or omissions of such third party and the foreseeable consequences of such acts or omissions), and (4) any combination of (1), (2), and (3) above. As to a particular claimant, a responsible party is not liable under the Federal OPCA to the extent that the incident was caused by the gross negligence or willful misconduct of that claimant[11]. Finally, none of the defenses listed above are available if the responsible party (1) failed to report the incident, (2) failed to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities, and (3) without cause, failed to comply with certain orders issued under certain of the remaining sections of Section 311 of the Federal Water Pollution Control Act or the Intervention on the High Seas Act (33 USC Section 1471 et seq[12].

**Congress has provided a pervasive liability regime to address the damages resulting from oil spills.**

Section 1004 limits the total liability of a responsible party for removal costs and damages under Section 1002. Section 1004 provides that the damages and removal costs incurred by a responsible party shall not exceed, per incident, (i) the greater of $1,200 per gross ton or $10,000,000 in the case of tank vessels[13] greater than 3,000 gross tons, or $1,200 per gross ton or $2,000,000 in the case of tank vessels of 3,000 gross tons or less, (ii) the greater of $500,000 or $600 per gross ton for all other vessels, (iii) all removal costs plus $75,000,000 for offshore facilities, and (iv) $350,000,000 for onshore facilities and certain deepwater ports. These limitations are not available if the oil spill was caused by the gross negligence or willful misconduct of, or the violation of applicable Federal safety, construction or operating regulations by the responsible party or any employee or agent of, or person in privity with, the responsible party. Additionally, these limitations are not available if the responsible party failed to properly report the incident, failed to cooperate with responsible Federal officials in the removal actions, or failed to comply with certain Federal orders. Section 1016 requires that a responsible party for any vessel of 300 gross tons must establish and maintain evidence of financial responsibility sufficient to meet the maximum limits discussed above. Responsible parties with respect to an offshore facility must establish and maintain such evidence in an amount equal to $150,000,000. The Federal OPCA contains no financial responsibility requirements for responsible parties for onshore facilities.

Section 1017 provides that U. S. District Courts shall have original jurisdiction over controversies arising under the Federal OPCA and that state trial courts with competent jurisdiction over claims for removal costs or damages shall have concurrent jurisdiction to consider claims under the Federal OPCA or state law. Finally, Section 1018 specifically provides that nothing in the Federal OPCA or the "Act of March 3, 1851"[14] (the "Limitations of Liability Act") shall affect or be construed as pre-empting the authority of any state from imposing any additional liability or requirements with respect to an oil discharge within such state or any removal activities in connection with the discharge or the obligations or liabilities of any person under state law.

## THE DELAWARE OIL POLLUTION LIABILITY ACT

On July 11, 1977, the Governor signed Delaware's Oil Pollution Liability Act[15] (the "Delaware OPLA") into law.

The Delaware OPLA establishes a liability regime similar to Section 311 of the Federal Water Pollution Control Act, the predecessor of the Federal OPCA. Thus, the Delaware OPLA is quite similar to the Federal OPCA in structure. Section 6203 of the Delaware OPLA states simply that "a discharge[16] of oil which causes an incident[17] is prohibited."

Pursuant to Section 6208, the owner and operator of a vessel[18] (including demise charterers or any person who is responsible for the operation, manning, victualing, and supplying of a vessel) or of a facility[19] which is the source of, or which poses a threat of, oil pollution,[20] is jointly, severally, and strictly liable for all costs and damages allowable under Section 6207. Under Section 6207, claims may be asserted for all necessary costs of investigation and prosecution arising out of or directly resulting from oil pollution as well as claims for the following damages for economic loss arising out of or directly resulting from oil pollution:

(A) cleanup costs, which are recoverable by any claimant;

(B) injury to or destruction of property which are recoverable by any person if the property is owned or leased by the person, or the natural resource involved is utilized by the person;

(C) loss of use of property, which are

recoverable by any person if the property involved is owned or leased by the person, or the natural resource involved is utilized by the person;

(D) injury to or destruction of natural resources, which are recoverable by the Governor as public trustee;

(E) loss of use of natural resources, which are recoverable by any person if the property involved is owned or leased by such person, or the natural resource involved is utilized by the person;

(F) loss of profits or impairment of earning capacity due to injury or destruction of property or natural resources, which is recoverable by any person if such person derives at least 15% of his income from activities that utilize the property or natural resources; or

(G) loss of tax revenue for a period of one year due to injury to property, which is recoverable by the State or any political subdivision thereof.

Section 6208(g) provides that owners and operators shall be liable for such interest as may be awarded in the discretion of the court as well as court costs and attorneys' fees in addition to the damages listed above and despite the limitation of liability provisions of the Delaware OPLA discussed below.

The Delaware OPLA provides limited defenses to owners and operators to the liabilities discussed above. Generally, owners and operators will not be liable under Section 6208(a) if the oil pollution was caused by an act of war, hostilities, civil war, or insurrection or by a natural phenomenon of an unforseen, exceptional, inevitable, and irresistible character. As to a particular claimant, Section 6028 (c) provides that a responsible party has no liability to such claimant if such oil pollution or economic loss was caused by the gross negligence or willful misconduct of that claimant.

The Delaware OPLA also limits the liability of owners and operators of vessels and facilities. Section 6208(b) limits the liability of the owner and operator of a vessel or a facility that is the source of, or which poses a threat of, oil pollution to $150.00 per gross ton in the case of vessels (all watercraft except ships which are vessels carrying oil in bulk as cargo), the greater of $250,000 or $300 per gross ton (up to $30,000,000) in the case of a ship, or $50,000,000 or any lesser amount as may be established by the Secretary in the case of a facility. These limitations, however, are not available to an owner or operator if the oil pollution was caused by the gross negligence or willful misconduct within the privity or knowledge of the owner or operator, or if the incident was caused by the gross or willful violation of applicable safety, construction, or operating standards of the State, or if the owner or operator failed to provide the requisite proof of financial responsibility. Section 6209 requires the owner or operator of any vessel over 300 gross tons that uses the waters of the State to maintain evidence of financial responsibility that satisfies the maximum exposure discussed above.

## SOME OF THE MORE INTERESTING EFFECTS OF THE FEDERAL OPCA ON THE DELAWARE OPLA

1. The Federal OPCA Does Not Pre-empt the State OPLA, or Does It?

Congress has provided a pervasive liability regime to address the removal costs and damages resulting from oil spills. Delaware has also created such a regime to redress costs and damages resulting from spills in Delaware. Does the Federal OPCA pre-empt the Delaware OPLA? Congressional intent on this question seems clear: Section 1018 of the Federal OPCA asserts that it does not pre-empt a state's authority to impose additional liability or requirements with respect to an oil discharge within a state or affect the obligations or liabilities of any person under state law. Furthermore, a United States Supreme Court decision addressing the issue in the context of an earlier federal oil pollution statute confirms that this is an area in which states may legislate. However, the reasoning behind the Supreme Court's decision and the pervasiveness of the new Federal OPCA may make the answer to the pre-emption question far from clear.

In Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) the Supreme Court found that the Florida Oil Spill Prevention and Pollution Control Act (the "Florida Act") providing for strict liability of certain parties responsible for oil spills was not pre-empted by the Water Quality Improvement Act of 1970 (the "1970 Federal Act"), a predecessor of the Federal OPLA. In reaching this conclusion, the Supreme Court looked to the intent of Congress embodied in the language of the 1970 Federal Act[21] and found that the Act did not preclude, but indeed contemplated, state legislation. The Court reasoned there would be no collision between the 1970 Federal Act and the Florida Act because the former was concerned primarily with reimbursing the Federal Government for clean up costs it incurred, and the Florida Act covered damages incurred by the State and other parties. The Court noted that the 1970 Federal Act "in no way touches those areas"[22]. The Court continued, "[a]nd so, in the absence of federal pre-emption and any fatal conflict between the statutory schemes, the issue comes down to whether a state constitutionally may exercise its police power respecting maritime activities concurrently with the Federal Government."[23] The Supreme Court found that sea-to-shore pollution has historically been within the reach of the state police power and is not taken away by the Admiralty Extension Act[24] leaving states to regulate in a "twilight zone" where state regulation in this traditional federal maritime arena is permissible. The Supreme Court, however, left for another day the question of whether certain of the liability provisions of the Florida Act present any "fatal conflicts" with any of the provisions of the 1970 Federal Act.

There have been no pre-emption or "fatal conflict" challenges to the Delaware OPLA under prior federal oil pollution control and liability acts. However, unlike the 1970 Federal Act construed by the Supreme Court in Askew, the Federal OPCA is concerned not only with the "actual clean up costs incurred by the Federal Government" but with liability and damages for losses suffered both by states and by private interests. Therefore, notwithstanding the language of Section 1018 of the Federal OPCA, some may argue that Congress has in fact occupied the field to such a degree that the Federal OPCA pre-empts the State OPLA. Additionally, there remain questions whether any portions of the State OPLA present any "fatal conflicts" with any portions of the Federal OPCA.

2. The Federal OPCA Sinks the Federal Limitation of Liability Act

Before the enactment of the Federal OPCA, the Limitation of Liability Act[25] limited a vessel owner's liability to the combined values of the vessel and its pending freight. The Supreme Court in Askew did not address whether the Limitation of Liability Act would limit recovery against a vessel owner for oil spill liability under state law, although it noted that the Solicitor General argued that the Limitation of Liability Act would prevail over the Florida Act by virtue of the Supremacy Clause[26]. Now it is clear that such Limitation of Liability Act will not limit a vessel owner's liability in connection with an oil spill under the Federal OPCA or under the Delaware OPLA.

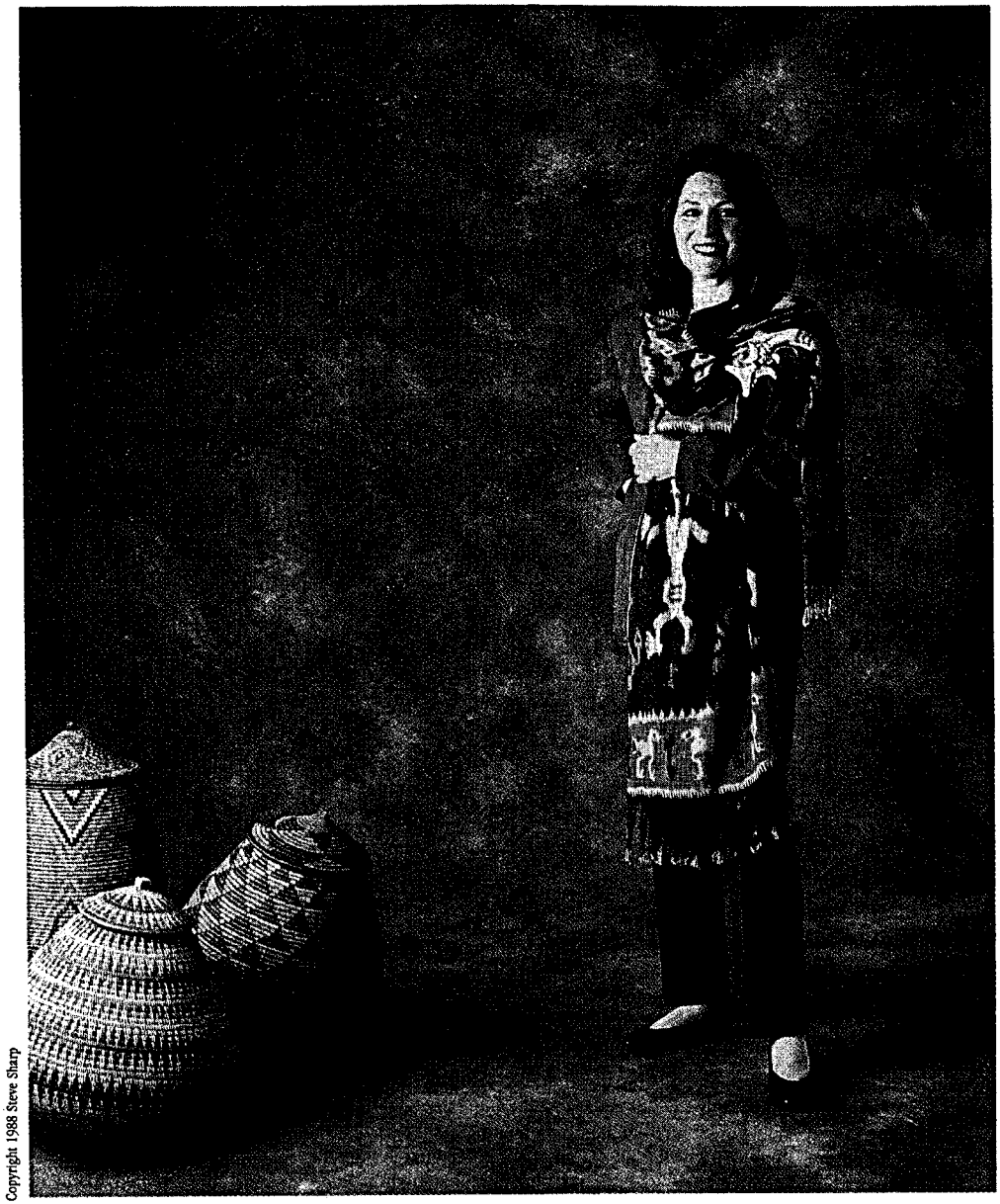
3. The Federal OPCA Sinks the Robins Dry Dock Doctrine

# Let's not

In Robins Dry Dock v. Flint, 275 U.S. 303 (1927) the Supreme Court applied to maritime accidents the well established principle that there can be no recovery for

Federal OPCA or state law. Section 6214 of Delaware's OPLA vests that jurisdiction in the Superior Court in and for the county in which the incident in question wholly

# Delaware Today Magazine Reader





*Carol Balick*
*Owner, Artisans III*

# CLEAN AIR

*continued from page 30*

Finally, Title III contains provisions that deal specifically with municipal waste incinerators, coke ovens utility emissions, and emissions associated with oil and gas explosion or production. Studies are also required of EPA regarding radionuclide emissions, the effects of air toxics on certain enumerated bodies of water, and the use of hydrochloric acid.

Title IV is designed to reduce the potential for acid rain, which is the return to earth of sulfur dioxide and nitrogen oxide in the atmosphere in the form of precipitation. Title IV regulates sulfur dioxide and nitrogen oxide emissions from utility units, which are viewed as the primary sources of sulfur dioxide and nitrogen oxide emissions into the air. The acid rain program mandates a nationwide reduction from 1980 levels of sulfur dioxide emissions by 10 million tons and of nitrogen oxide emissions by 2 million tons by the year 2000. Certain expressly listed power plants must begin reduction on January 1, 1995 and all remaining utility units must begin reductions on January 1, 2000. Reductions are made by imposing a fixed amount of emissions authorized for each emissions unit. The allocation is based on operations during 1985 through 1987. Title IV also creates a market-based system of allowances whereby authorizations to emit after a specified date may be bought and sold on the open market. Penalties are imposed on units that emit in excess of their permitted allowances.

Title V establishes a new permit system under which operating permits will be required for all major stationary sources of Criteria Pollutants, utility units regulated under the acid rain provisions, and all sources subject to regulation under the air toxic emissions program. Before the 1990 Amendments, federal law had only required that new or modified major stationary sources obtain permits, although some states had already established programs requiring operating permits. Permits will incorporate all federal and state limitations, standards, and requirements. Compliance with the terms of a permit shields a facility from being found in violation of the Clean Air Act. Permits may extend for a maximum of five years but must be revised to include new requirements. EPA is required to issue regulations establishing the specifics of the permit program by the fall of 1991. These will include the specifics on permit applications, monitoring, reporting, and fees. States are required to submit a permit program to EPA by fall 1993, which will carry out the EPA's regulatory permit program. Permit applications must be submitted by a source within one year after a source becomes subject to a permit program. EPA must review all permits proposed by a State. the Amendments provide for citizen petitions to challenge proposed permits.

Stratospheric ozone depletion is addressed in Title VI of the 1990 Amendments. This title carries out commitments made by the United States as a signatory to the 1989 Montreal Protocol to phase out the use and production of ozone depleting compounds. the provisions of Title V are intended to go beyond the minimum commitments made under the Montreal Protocol. These ozone depleting compounds include chloroflurocarbons, halons, carbon tetrachloride, methyl chloroform, and hydrochloroflurocarbons. EPA is required to promulgate regulations governing the phase out of use and production of the enumerated substances.

The enforcement provisions of Title VII are intended to broaden EPA enforcement powers. The amendments enlarge EPA investigative powers by authorizing EPA to compel submissions of compliance certifications. EPA is authorized to issue administrative penalty orders for up to $25,000 a day for violations and field citations for up to $5,000 a day. Private citizens may now sue for civil penalties. But the most significant expansions and additions are to criminal sanctions available under the Act. Crimes now include felonies as well as misdemeanors. The negligent release of certain hazardous substances that endanger others is a misdemeanor. A knowing release that endangers others, however, is a felony with potential punishment of up to 15 years imprisonment. Criminal liability also arises from any knowing violation of the Act. There are bounties of up to $10,000 for information leading to the imposition of civil penalties or convictions of crimes.

It is clear that the criminal liability provisions in the 1990 Amendments are intended to make high level management and corporate officers those most likely targeted for criminal enforcement. The Amendments expressly define "operator" and "person" to include senior management personnel and corporate officers. By contrast, the term operator expressly does not encompass a "stationary engineer" or "technician" who may have supervisory or training duties but who is not senior management or a corporate officer. Moreover, only in the case of knowing violations does a "person" subject to criminal prosecution include an employee carrying out his normal activities and acting under orders from his employer.

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The 1990 Clean Air Act Amendments are far reaching. They add new areas of regulation and strengthen existing laws. It has been predicted that compliance with the air toxics program will be the most expensive of the new provisions for the chemical industry. The expanded scope of potential criminal and civil penalties contained in the Amendments, combined with the creation of bounty provisions and citizen suits, give the agency useful tools for ensuring compliance.

What should industry do now to respond to the Amendments? Industry leaders should know now, or at the very least take immediate action to know, what pollutants are emitted at their facilities. If releases include Criteria Pollutants, industry should know the attainment status of the relevant Air Quality Control Region. Instead of relying on emissions calculations, actual emission testing can be done to verify the efficiency of existing control technology. Prior release reporting under SARA should be examined to determine consistency with existing permits and registrations, and to begin the identification of air toxic emissions. An inventory should be made of emissions control technology that is in place at each facility, including information on the installation date. Market research into other available control technology should be undertaken. Armed with the facts, companies can then determine strategies for compliance, and can plan for necessary increases in capital expenditures and operating costs.

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# A REPLY

*continued from page 40*

FOOTNOTES

1. 3 J. Story, Commentaries on The Constitution 476 (1833), quoted at Stephen P. Halbrook, That Every Man Be Armed, Albuquerque: U. of New Mexico Press (1984)

2. Dred Scott v. Sandford, 60 U.S. (19 Howard) 393, 417 (1857)

3. United States v. Verdugo-Urquidez, ___ U.S. ___, 110 S. Ct. 1056, 1061 (1990)

4. Halbrook at 95-96, 179-83

5. Cockrum v. State, 24 Tex. 394, 401 (1859); see also State v. Chandler, 5 La. Ann. 489, 490 (1850)

6. Nunn v. State, 1 Ga. 243, 251 (1846)

7. Halbrook at 99; see Delaware Revised Code (1852) Ch. 52, Section 8

8. Halbrook at 102-106

9. 60 U.S. at 417

10. Halbrook at 108-115. In Delaware, the ban on gun ownership by "free negroes and free mulattoes" was reenacted in 1863. 12 Del. Laws. Ch. 305, Section 7. This and other provisions were omitted from the 1874 Revised Statutes "because they are not enforced by the Authorities of this State, being in conflict with Acts of Congress" (p. 257).

11. Halbrook at 142

12. Halbrook at 142-153

13. ACLU Board Minutes of June 12-13, 1982, as reported in William A. Donahue, The Politics of the American Civil Liberties Union, New Brunswick (U.S.A.) and Oxford (U.K.): Transaction Books (1985) at 259

14. ACLU Policy No. 47, quoted in Sanford Levinson, The Embarrassing Second Amendment, 99 YALE LAW JOURNAL 637, 644 (1989)

15. ACLU Policy Guide (1981), No. 266, quoted in Donahue at 263

16. ACLU Policy Guide (1981), No. 45, discussed in Donahue at 259. A few years earlier, the ACLU was even more explicit in its demand that felons, addicts and insane people have equal access to firearms:

> . . . to deny a license to any person convicted of any felony or ever committed to an institution by a court for reasons of alcoholism, narcotics addiction, or mental incompetence, or to any non-citizen, would be to deny both the wide variety among types of offenses classified as felonies and the possibility of rehabilitation.

ACLU Policy Guide (1976), No. 43, quoted in Donahue at 259.

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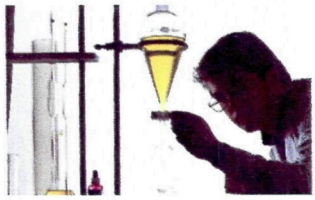

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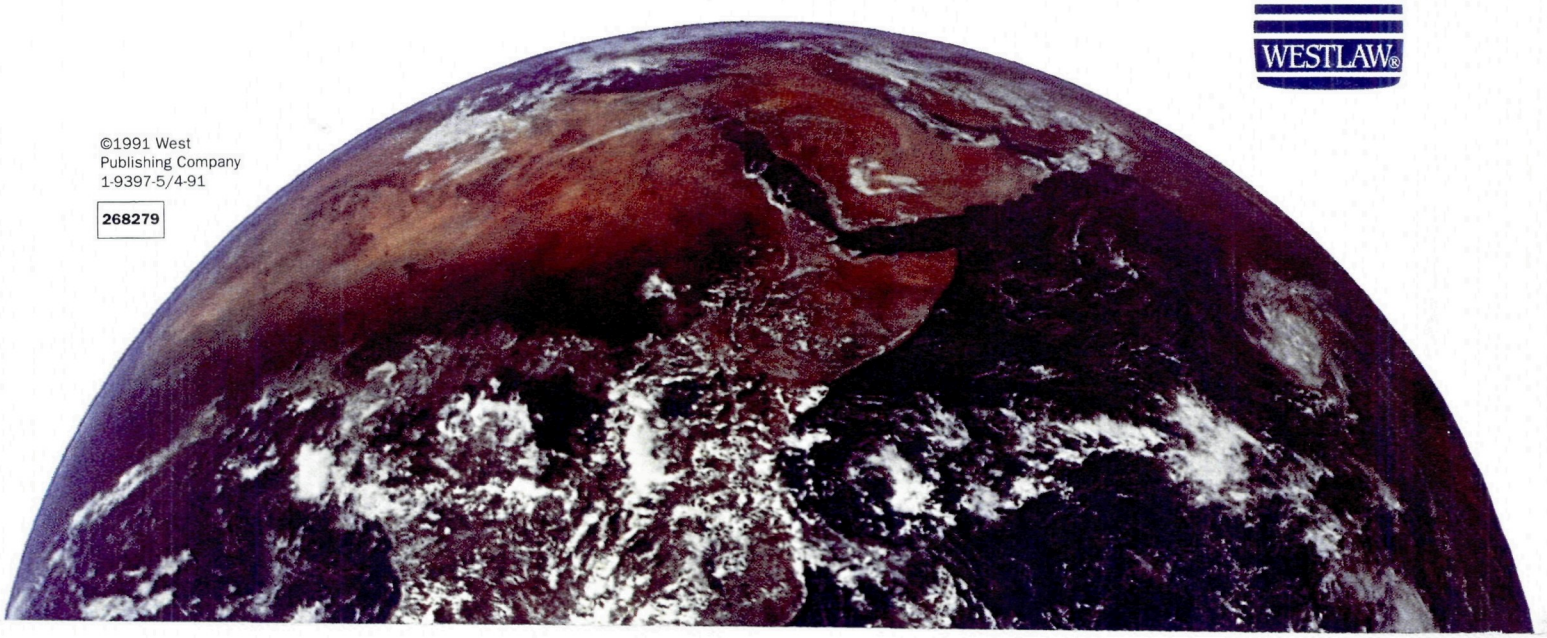



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