

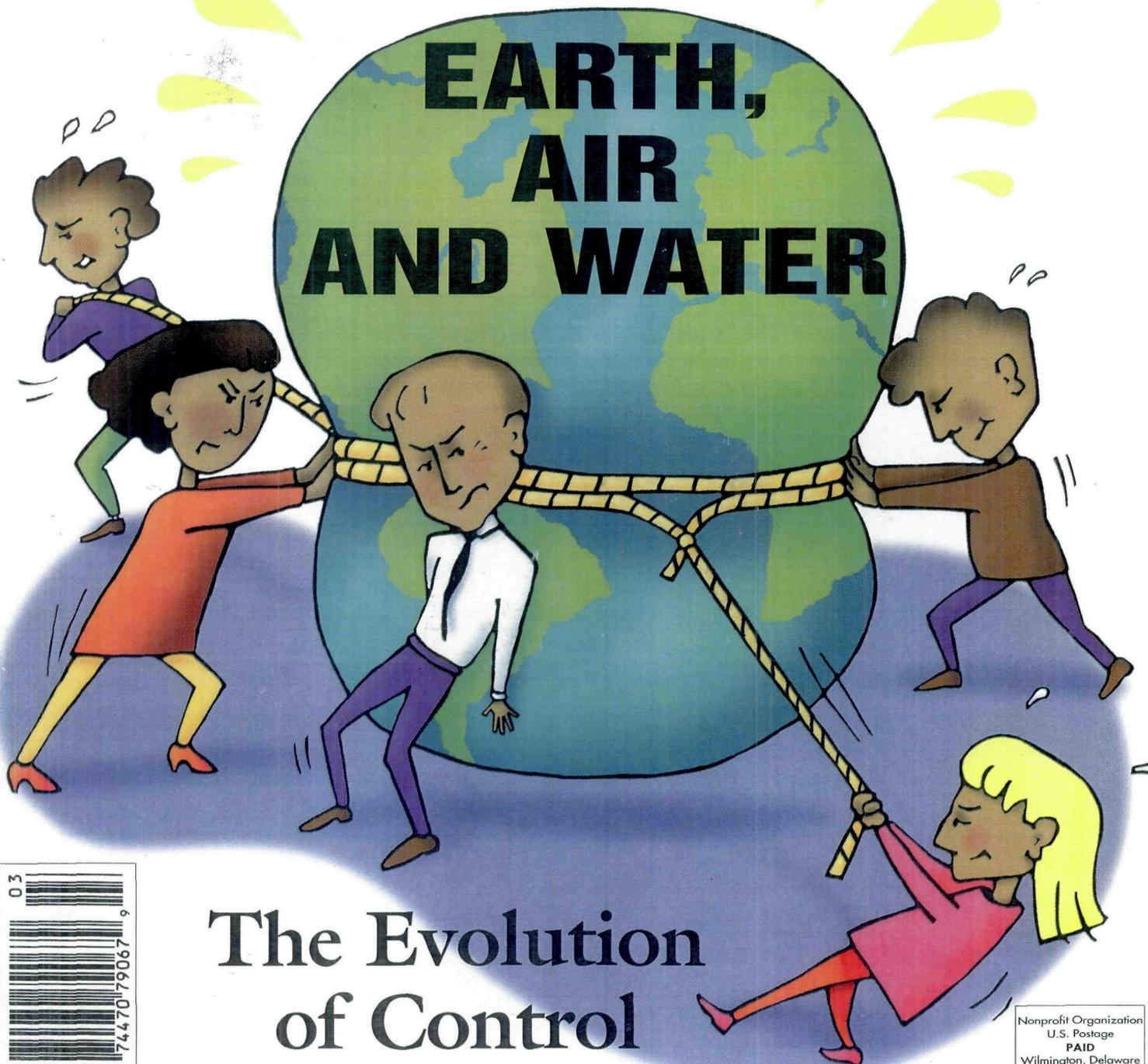
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A CLASS STRUGGLE THEORY OF THE LAW

DELAWARE LAWYER

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Volume 16 Number 1

\$3.00 Spring 1998



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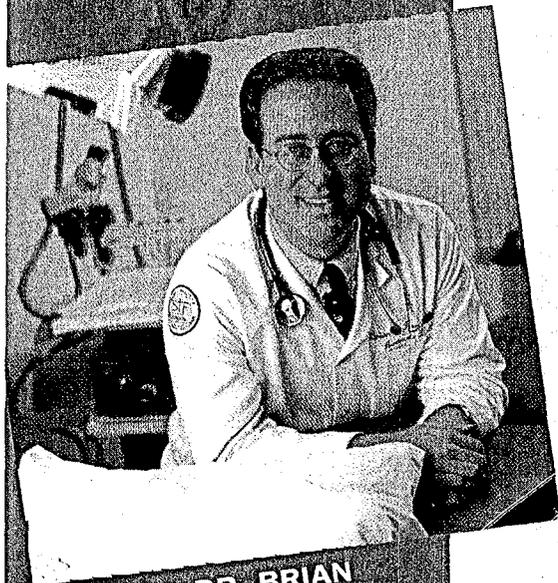
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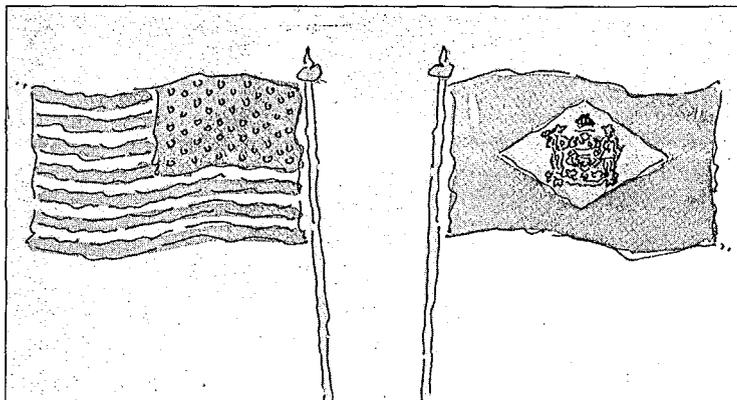
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Parternalism to Partnership: EPA and
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Cover Illustration by Nancy Tobin

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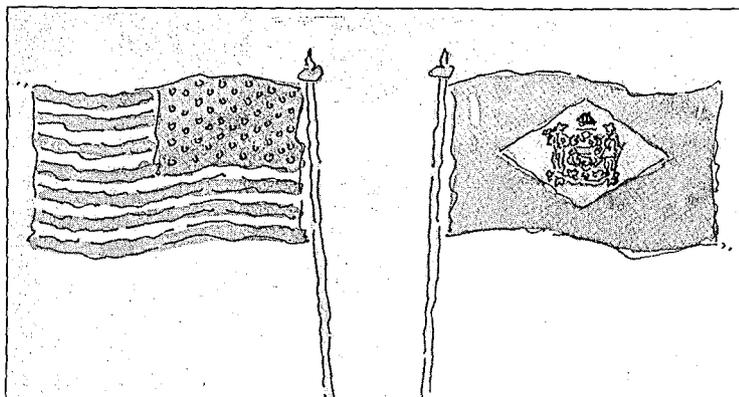
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As members of the Delaware legal community, we are privileged to live and work in a unique environment. We are especially fortunate in the case of our state's natural resources – which are bountiful and largely unspoiled. Protecting these natural resources, while accommodating healthy economic activity, is the challenge of environmental regulation.

Environmental regulators are confronted with the competing interests of environmentalists, industry, developers, farmers, and others - in areas where scientists often disagree about impacts and risks. Traditional regulatory approaches to "point source" pollution (smokestacks and discharge pipes) have achieved significant improvements in environmental quality, but much work remains to be done. In addition, there is no shortage of new challenges – ozone transport in the Northeastern corridor, and *pfisteria piscicida* and its impact on fisheries, to name but two.

In recent years, regulatory agencies have moved away from "command and control" regulation to approaches that foster consensus building and stakeholder involvement. DNREC staff will refer to industry representatives as their "clients" – a reflection of change (but one that some find mildly troubling). The balance of regulatory and enforcement power has come to reside primarily at the state level, with the federal government in a largely oversight role. As these shifts occur, the face of environmental regulation has changed, and in some cases dramatically.

In this issue, we review these regulatory trends as they have affected Delaware. The articles present the perspectives of state and federal regulators, industry, environmentalists, and a former Governor, and we are fortunate to have the participation of an extremely talented and experienced group of authors.

As the articles demonstrate, environmental regulation is about balance. Balance among competing environmental goals, competing interest groups, and competing agencies is critical. The fundamental objectives of environmental regulation – clean air and clean water – are not really in dispute, but the best approach to meet these goals is the subject of intense debate. That debate is increasingly a public one, and ultimately involves all of us.

In closing, I want to express my thanks to all of the authors whose hard work and unfailing cooperation made this issue possible. My appreciation also goes to Bill Wiggin and his editorial staff for their invaluable assistance.



Robert W. Whetzel

Contributors



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Christophe A. G. Tulou has been Secretary of the Delaware Department of Natural Resources and Environmental Control since 1993 and is currently the Chairman of the Ozone Transport Commission. He holds a Juris Doctor from Georgetown University Law Center.

Richmond L. Williams is Environmental Counsel with Hercules Incorporated, a Wilmington based manufacturer of specialty chemicals. He was admitted to the Delaware Bar in 1982. Mr. Williams joined the Delaware Attorney General's Office in 1984 and was named head of the Environmental Unit in 1986. In 1988 Mr. Williams left the Attorney General's Office to go into private practice. He joined the Law Department of Hercules in 1990. He is Hercules' legal representative to The Chemical Manufacturers Association's committees on Superfund Reform.

This article reflects the personal opinions of the author and does not necessarily represent the position of Hercules Incorporated.

And while we're discussing the environment...

Cape Cod is a fragile land, at the mercy of man and nature. The "back shore" (the ocean side of the Cape) loses three feet of shoreline each year to the relentless pounding of the North Atlantic. Recently it became necessary to move back from eroding cliffs two lighthouses otherwise fated to topple into the sea. It was from the Marconi Station in Welfleet that President Theodore Roosevelt sent the first transatlantic wireless message to King Edward VII. Today the station has all but vanished in the ever-encroaching waves of the Atlantic Ocean.

The Cape is also menaced by humankind. Aware of the Cape because of public fascination with the Kennedy family, people come to visit, like what they find, and stay on in new housing developments, retirement villages, and condominiums cheek by jowl with the wetlands they both covet and defile. They pollute, they trespass, they destroy wetlands vegetation, and their presence dangerously stretches the resources of this narrow land. Fortunately the Kennedy charisma has had one splendid consequence: thanks to the leadership of the late President Kennedy, much forest, wetland, and waterfront have been saved from the developer's clutch and remain to be enjoyed as the Cape Cod National Seashore.

My wish to do something for the environment and – I shall be candid – for my own convenience led me into an instructive and profoundly satisfying experience.

At high tide my beach is separated from my house by a shallow lake. This requires bathers to take a considerable detour over marshland, with much damage to vegetation. Solution: a walkway direct to the beach across the region subject to flooding. But to protect one aspect of the environment one must risk damage to another. Accordingly I realized that I should have to be prepared to face complicated regulatory hurdles to achieve my plan.

I began by consulting the office of the Conservation Commission of the town of Orleans, Massachusetts. Their representative inspected the site and agreed that the pathway damage to vegetation was undesirable and that a walkway was a possible solution.

The Conservation Commission enforces two laws with extensive implementing regulations, the Wetland Protection Act (a state statute) and a town Wetland Bylaw, which complements state law, "identifies *additional* wetland values and interests", and imposes further restrictions tailored to *local* needs.

Once my application was under way I learned that I had to satisfy not only the requirements of these laws, but the Massachusetts Division of Fisheries and Wildlife, (Would my structure interfere with the mating habits of the endangered Northern Diamondback Terrapin? Fortunately my plan was deemed turtle friendly.) the Orleans board of Appeals, the local building inspector, and most of my neighbors. I was even required to send myself by certified mail a notice of my intentions, since I am my own neighbor by virtue of a contiguous parcel I own. This afforded an interesting out-of-body sensation.



How to get to the Beach?

Yes, multiple hurdles, and why not when so much is at stake? In Massachusetts a double-barreled statutory scheme for protecting wetlands through minute local attention to trouble spots and vigilant scrutiny is paying off. Local control and in-depth local knowledge ensure effective regulation. The Commission is right there to police potentially harmful conduct.

When I finally received a decision permitting me to build I was impressed by the thoughtful analysis, seeking to balance competing interests in a flexible and creative manner.

*"The Commission is concerned, however, that the approval of this project will send a signal to property owners that walkways are always preferable to established paths over a marsh. The Commission does not necessarily believe that the above statement is true and reserves the right to judge each project on its own merits without presuming any precedent from the approval of this project. The Commission is very cautious with structure in a resource area and does not take such projects lightly. Because this project is located in the Inner Cape Cod Bay Area of Critical Environmental Concern, where the performance standard is no adverse effect, the Commission has to weigh the established practice of path against the proposed project. It is with these thoughts in mind that the Commission hereby approved the project."**

After two years of cautious progress I have my walkway (May through October). Some fine tuning must be done this spring, when the structure will be lowered a foot. But I have gained more than a convenience: something of equal value, experience in dealing with a paramount issue of our times.

Perhaps the best thing about local response to environmental problems (aside from the fact that it is informed) is that you deal with your neighbors – local folks – and not with some distant bureaucrat, who all too often takes his function to be the creation of difficulties rather than solutions.

W.E.W

*It is easy enough to choose between good and evil, but we face much more difficult and vexing choices between unavoidable evils, and even between good and good.

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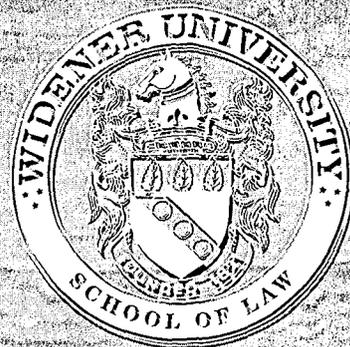
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Pierre S. du Pont

IN RE DNREC

In the matter of the Department of Natural Resources and Environmental Control, there is good news, bad news, and considerable mental anguish.

The good news is that the Delaware environment is steadily becoming much cleaner, toxic air emissions are down, releases of toxics into waterways have decreased and all of this is being accomplished with a continually growing population. The bad news is that serious environmental problems remain, discharge permits seem to be violated regularly, DNREC has a backlog of work, and the cost of running the Department is rapidly escalating as the already heavily laden Department is burdened with oversight of additional projects.

And, the mental anguish is suffered by all – by employers whose progress is throttled by Federal and State regulations and costs and whose every move is subject to the watchful eye of environmental agencies and to the almost predatory interest of citizen groups; by environmentalists who see new eco-hazards in every technology and a threat to the environment associated with every new job created in Delaware; and by the people of the state, the group which has the most to lose, in cost, opportunities, and health, safety and welfare.

All of this anguish is, all things considered, about what one would expect from the environmental regulatory scheme America selected some twenty years ago.

Having been responsible for running the Department for eight years, and having watched my two successors struggle to mediate the daily arguments between employers and conservationists, I can both understand the anguish and perhaps bring some perspective to our progress.

First, Delaware is doing well in cleaning up the water and air, but at a high cost in both dollars and future opportunity for our people. As Charts 1A and 1B show, both air and water pollution have been substantially reduced over time. When serious efforts began in the 1970s to clean up the environment, fixed point discharges of pollutants were the initial target. As these charts show, that war is being won.

The cost of winning the war has of late become extraordinarily high. Expenditures by the DNREC have increased over the past dozen years at a rate well above the rate of inflation. In addition, the number of employees has increased, even throughout the last five years. Chart 2 illustrates the State's growth in spending on the environment. Unfortunately, this rise in DNREC expenditures does not reflect any special concern by Delaware's government for the environment, for the growth of Delaware's state government has for the last dozen years been among the fastest in the nation.

Worse, even with this enormous expenditure of money, there are significant problems in Delaware's environmental regulatory scheme:

- Delaware will need about 1-1/2 years to catch up in surface water discharge permit renewals.
- As of January 1998 approximately 30% of water permits have expired.
- Delaware is about 17 years behind in determining how much pollution each body of water can handle.
- In 1996, Delaware was reported as being ranked the seventh-worst state as measured by the number of violations of industrial discharge permits.

Despite the remaining difficulties, Delaware has made significant progress in battling the fundamental problems of water and air pollution. The State's Department of Natural Resources and Environmental Control has led the charge toward attaining a healthier and safer environment by determining the causes of environmental degradation and working to develop plans for pollution control. Governor Carper announced in October that Delaware industries reduced certain toxic emissions by more than 10 percent over 1995 and that industries "surpassed a 1989 goal to cut emissions in half by 1995, reducing statewide releases by 63 percent over that period." In addition, the Division of Air and Waste Management of DNREC has tracked 59 industrial facilities and found a fifty percent reduction in the amount of reported emissions of toxics into the air since 1987.

Industrial Toxic Air Release

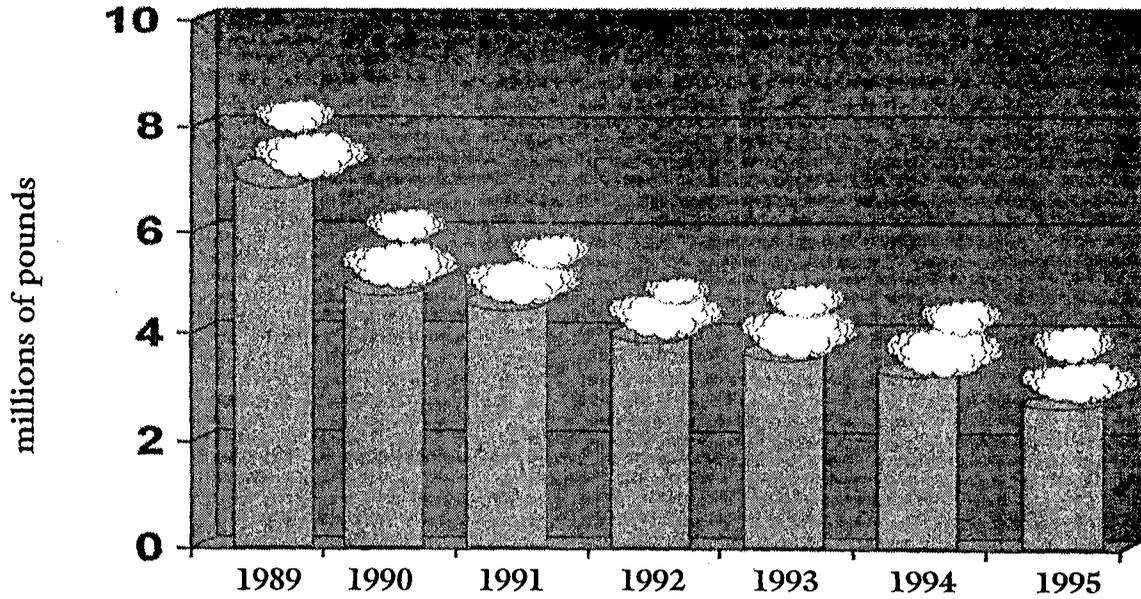


CHART
1A

Source: Division of Air and Waste Management

Industrial Releases of Toxics Into Waterways

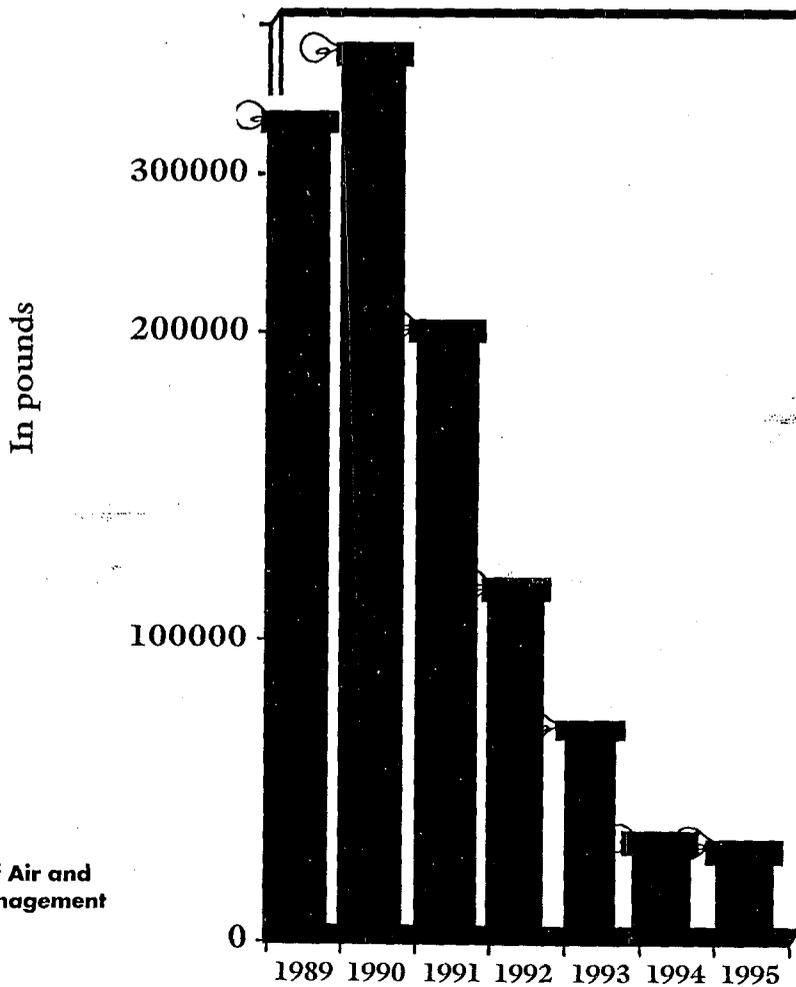
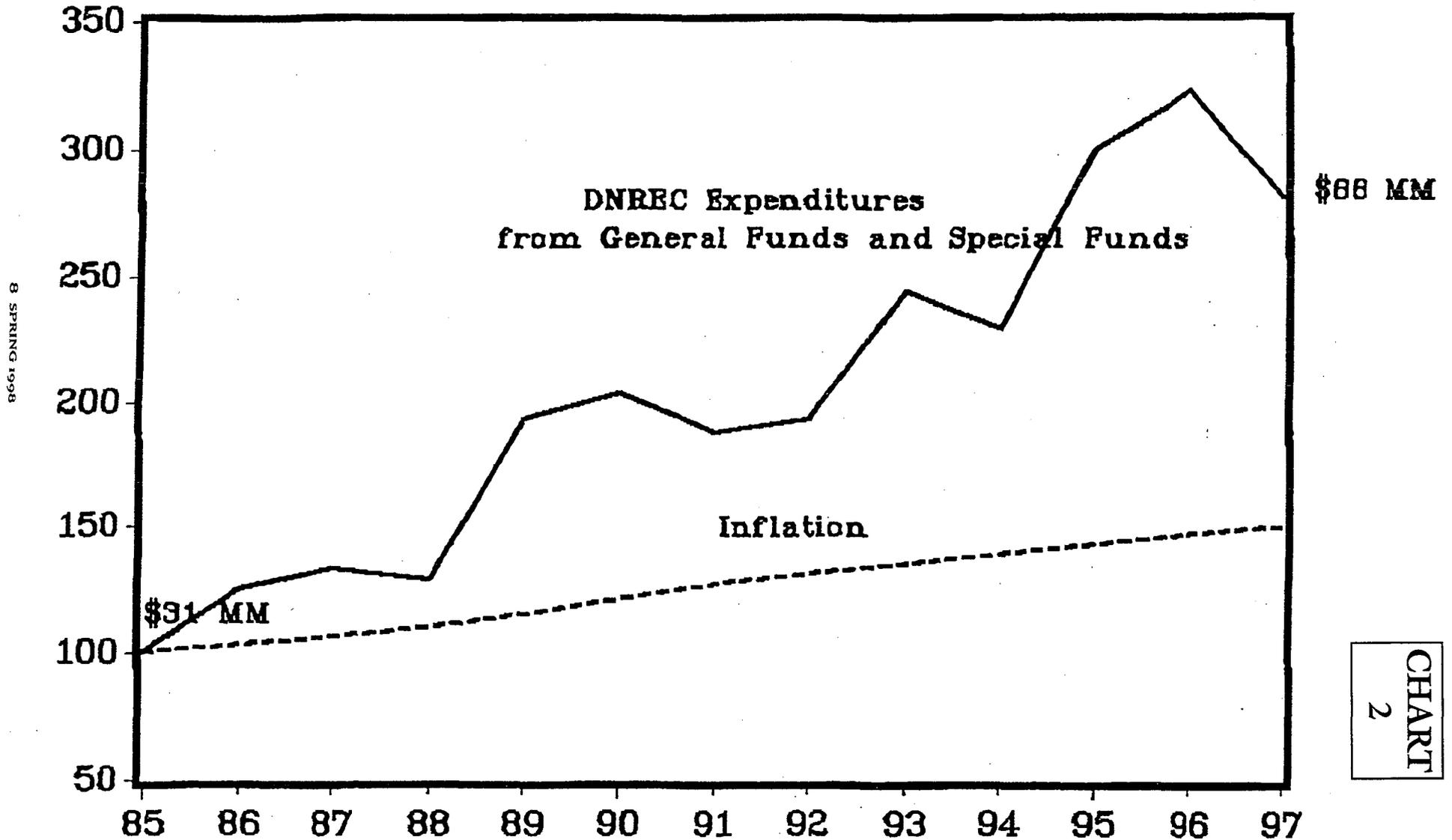


CHART
1B

Source: Division of Air and
Waste Management

DELAWARE SPENDING ON THE ENVIRONMENT

(1985 = 100)



Similarly, industry releases of toxics into waterways have undergone marked decreases, from over 250,000 pounds in 1989 and 1990 to less than 50,000 pounds in 1995. David Small, chief of information and education of the Department of Natural Resources and Environmental Control, stated that "[i]n 1987, we had 1.5 million pounds of toxics released into Delaware waters, but in 1994, we had only 92,500 pounds. In a span of seven years, we've had about a 94 percent reduction." In addition releases of hazardous substances have been aggressively handled by the Department, and since 1990, DNREC has played a major role in the investigation and clean-up of over 120 contaminated sites in Delaware.

However, this progress has cost far too much. The Department's expenditures have nearly tripled in a dozen years, from approximately \$31MM in 1985 to a total of approximately \$88 MM in 1997. Although the numbers themselves are daunting, the costs of a growing government are not in expenditures alone. Every additional environmental regulation and every additional requirement for compliance adds yet another burden to economic growth and another reduction in job opportunities for Delawareans. Today DNREC administers some 70 environmental permit requirements, ranging from Coastal Zone permits to storage tank, water usage, storm water, sludge, and VOC emission permits. Each one requires filings, records, data and time, all of which have both an economic and an opportunity cost to us all.

The critics point out that this progress comes with a high price tag and for a job not so well done. A series of 1996 press stories detailed some of the remaining problems. According to News Journal stories "[A] study of federal environmental records ranked Delaware the seventh-worst state as measured by the number of violations of industrial discharge permits," and "[o]ver the past 2 1/2 years, 80 percent of the licensed dischargers violated at least some of the conditions of their water pollution permits." DNREC also acknowledged that "Delaware needs about 2 1/2 years to catch up with [water permit] renewals and will process 29 permits this year alone. Admittedly we've got a backlog."

There is much to be done, and DNREC seems to be moving more quickly to do it. Late last year an agreement was reached to begin an inventory

of Delaware's streams and rivers and the setting of pollution reduction standards for each. As Widener Law Professor James R. May notes in his article (see page 16), only about 3 percent of Delaware's estuarine waters, [and] 15 percent of river and stream miles have even been assessed for water standards compliance. But that has now changed. Under an agreement reached between EPA, DNREC, and the Sierra Club, Delaware will undertake a far-reaching assessment and pollution control program for our waters. Similarly, an agree-

**The cost of
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tion, the number
of employees has
increased, even
throughout the
last five years.**

ment was reached in January regarding Coastal Zone regulations, a goal that has proved elusive since the law was enacted more than twenty years ago.

So the good news increases, and the bad news diminishes. But the mental anguish goes on apace. Industry and environmental groups still wage full-scale war for every foot of environmental turf. Grace Pierce-Beck of the Audubon Society still fears environmental problems when product lines are expanded in the Coastal Zone, and opposes tradeoffs that would improve

overall environmental conditions but allow manufacturing expansion in some locations. Environmental radical Allen Muller of Green Delaware thinks Delaware's political system is controlled by the polluters and developers and sees the Coastal Zone agreement as an attempt to rewrite the guts out of the Coastal Zone Act.

The reason for the anguish is twofold. First, there is a regulatory mindset left over from '70s environmental thinking: there must be a program for every occasion. Call it public policy by acronym: more WQSLs, TMDLs, and CPPs are the answer to every problem. Regulations are detailed and specific, but sometimes nonsensical. Some, for example are based on industrial SIC codes (see Richmond L. Williams' article, page 31) regardless of what may actually be happening in the plant's industrial process. Others, particularly at the national level, demand specific pollution abatement technologies. For example, Congress in the 1970s demanded that utilities install stack scrubbers, and prohibited them from burning cleaner, lower sulfur coal to meet air quality goals. These technologies are required regardless of cost and even when other ideas would reduce pollution more quickly.

Second, the mindset of "us versus them" remains as well. In the beginning, industry regarded the environmental movement as a direct threat. To a lesser extent it still does, and sometimes correctly so, as the above Pierce-Beck view shows. And the environmentalists are still anti-growth and development, as the Muller position demonstrates.

It seems the result-oriented policies of DNREC are far more productive in both reducing pollution and encouraging economic opportunity. As Christophe A.G. Tulou, Secretary of DNREC testified to the U.S. Senate Committee on Environment and Public Works: "In Delaware we work with violators to get them back in compliance as quickly as possible." That strategy, he believes is better than fines and criminal charges in improving the environment.

The record would suggest he is right, for the good news continues to come in. Not that it reduces the anguish very much, of course, for that seems to come with the territory. ♦

Tara J. Hoffner, an associate with Richards, Layton & Finger, also contributed to this article.

Christophe A. G. Tulou

PATERNALISM TO PARTNERSHIP: EPA AND THE STATES GETTING THEIR ACT TOGETHER

Environmental protection is undergoing a quiet revolution. Government officials and citizens throughout the country are reviewing laws, institutions, and practices to see whether they can ensure a healthful and sustainable future. Much is at stake as federal and state regulators clarify their environmental goals and define their roles in administering and enforcing the laws necessary to meet them.

The Changing Environmental Challenge

Underlying this revolution is a significant change in the nature of the environmental threats we face today. Two decades ago, environmental insults were more obvious. Smokestacks belched smoke and discharge pipes spewed suspicious substances into rivers and streams. Over the years, laws were passed and regulations adopted to stem the flow, and they have worked very effectively. Today these discrete point sources of pollution are carefully controlled, and their impact on the environment has been greatly reduced. In a sense, these sources represent the 'low-hanging fruit' of environmental management.

The remaining challenges are more subtle and complex. Pollution sources may be many miles, or even many states, away. For example, Delaware's ozone, or smog, problem can be traced in part to sources as far away as West Virginia and Ohio.

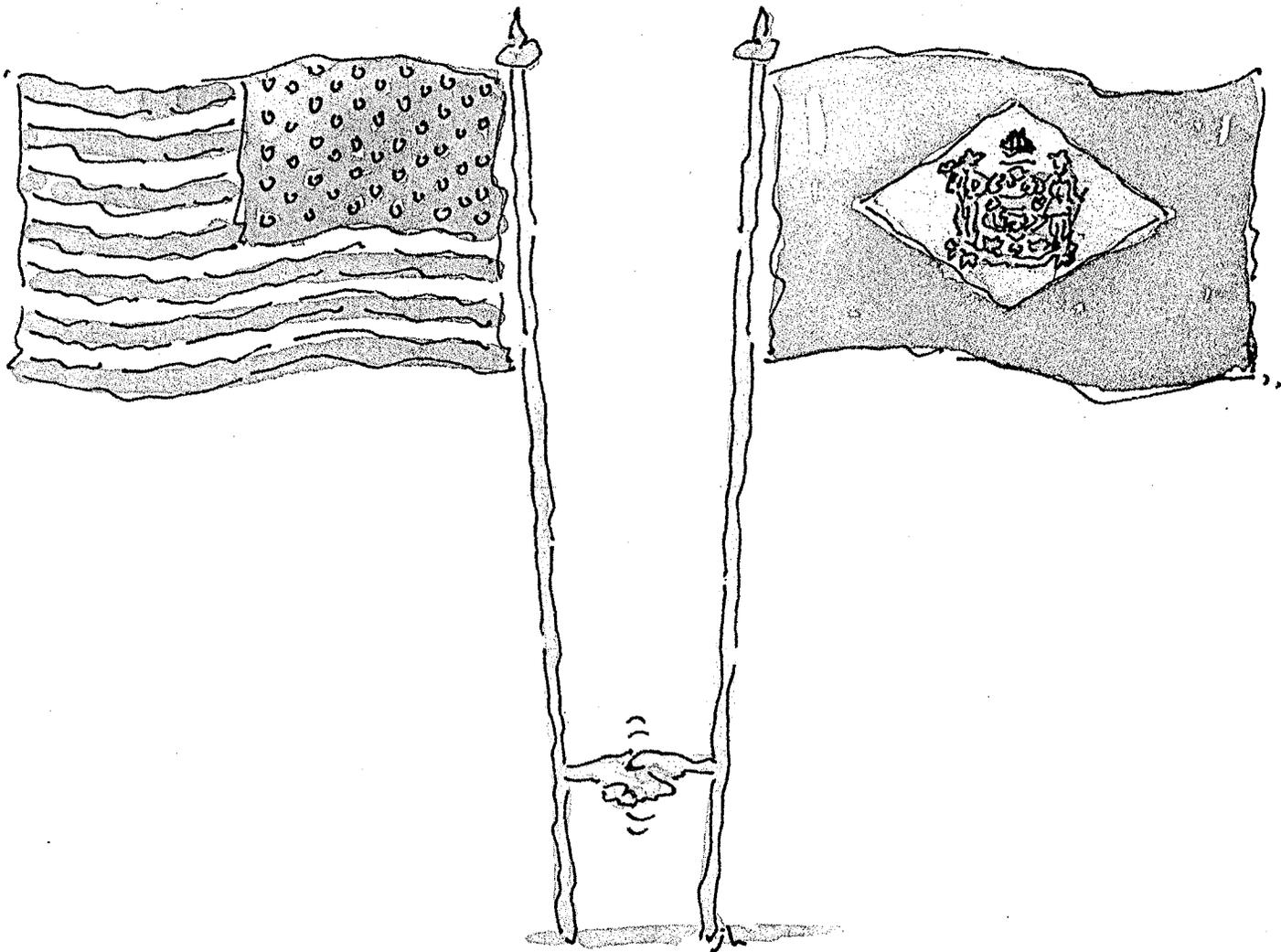
Discrete pollution sources are also becoming harder to identify and control. Regulatory attention is turning from smokestacks to tailpipes, motorboat engines, and dry cleaners. The predominant threat to rivers and streams is no longer easily identified pipes, but more diffuse runoff of oily, fertilizer-rich or toxic runoff of rainwater from city streets, parking lots,

lawns and farm fields. Figuring out where this pollution is coming from and determining how to control it involves much more monitoring, assessment, analysis, and expense than was required for the more obvious sources.

For example, the Delaware Department of Natural Resources and Environmental Control (DNREC) and the Division of Public Health within the Department of Health and Social Services have announced many advisories against the consumption of fish from Delaware waterways. These fish have become tainted by exposure to pollutants. Restoring healthy fisheries will require a broad range of expertise, not only from the two State agencies, but from the Federal government, local jurisdictions, industry, and neighboring states. A return to clean fish may require cleanup of contaminated industrial sites along affected waterways, the restoration of wetlands, remediation of contaminated sediments in the streams and rivers, better farming practices, tighter controls on industrial discharges, and the control of certain air pollutants.

Environmental laws, regulations, institutions, and practices designed to address the obvious problems of the past do not readily facilitate the multi-media, multidisciplinary response necessary to meet the problems of today.

The environmental management process has also become too focused on activities and is too little concerned about environmental results. Until very recently, one of the hardest questions to answer has been: "how's the environment?" If agencies controlled the smokestacks, the environment would improve. Who needed to measure that improvement? Besides, it often took years for improvements in broad environmental indicators, like air quality, to be evident, and such measurement costs money. Reaching the higher environmental "fruit" will require better assurances that our activities are properly directed and that they are as effective and efficient as possible.



Otherwise, costs could climb, bottom lines could be adversely affected, and great and needless harm could be done to our economy. Aside from the economic impacts, the very people who are the key to improvement will be antagonized and will resist future attempts to achieve environmental goals. New management techniques appropriate to these changing circumstances must be coupled with the enforcement of existing rules. Yet, if the general enforcement posture is not also adjusted, additional resistance and antagonism could impede needed partnerships.

The Enforcement Dilemma

Enforcement of laws is essential to the protection and improvement of our environment. Enforcement, too, is changing as it becomes increasingly obvious that past practices will not meet changing needs. For the past two decades, environmental enforcement has been rigid, focusing almost exclusively on the letter of the law. This aggressive approach was necessary not only to ensure compliance with a relatively new set of laws, but also to educate polluters that stewardship of the environment was

a serious responsibility. This approach to enforcement became known as "command and control".

Many states and the EPA are exploring and exploiting the opportunities of a post-command and control world seeking new mechanisms of accountability. As the states and EPA struggle to define this new approach, friction has occurred. EPA has expressed concern about the effectiveness of new enforcement programs in some states. In fact, EPA's Inspector General is conducting audits of selected programs in response to concerns that enforcement of environmental laws may have waned.

The EPA has expressed special concern about state efforts to provide some level of enforcement immunity to businesses that perform voluntary audits of their environmental performance. If these businesses uncover violations, they are protected from enforcement if the problems are not too serious and if they are rectified promptly. EPA and environmentalists are concerned that this audit protection represents an abrogation of enforcement responsibility.

Fortunately, the amount and quality of discourse between EPA and the states is greater than ever. States are sharing perspectives on environmental goals for the country, providing suggestions on EPA's goals and objectives under the Government Performance and Results Act, and helping develop performance measures to evaluate successes under the National Environmental Performance Partnership System (NEPPS). Despite evidence of conflict, EPA and the states do not seem that far apart in terms of a shared vision for our nation's environment.

The State Role in Enforcement

The states have assumed the lion's share of environmental responsibility, including the management of Federal mandates. For example, EPA has delegated most Federal regulatory programs to Delaware based upon its demonstrated performance in environmental management. As part of Delaware's acceptance of full authority for these programs, the State Attorney General provided assurances regarding the State's capacity to enforce. According to EPA's estimates, states account for 87% of environmental civil enforcement each year. This estimate excludes criminal enforcement activities.

The State/EPA enforcement relationship varies widely, as was clearly demonstrated at a hearing this past summer on the issue before the Senate Environment and Public Works Committee in Washington. While some states, including Virginia and Colorado, bemoaned the heavy hand of EPA enforcement, others including Connecticut and Delaware pointed to informal and effective relationships that, in most instances, combine common sense with effective enforcement.

The Partnership Promise

Even in states where the relationship is good, the development of Performance Partnership Agreements under the

National Environmental Performance Partnership System (NEPPS) has raised some questions about the role of enforcement in environmental management.

Over thirty states either have established or are working to develop new working relationships with EPA under NEPPS. The states are taking EPA up on its promise as part of the NEPPS process — to work in partnership with them to build the capacity necessary to meet state environmental priorities. States seek a relationship that recognizes they are at the forefront of environmental management, and that the fastest way to shared goals is through partnership, not paternalism.

Under the NEPPS umbrella, states and EPA are moving away from case-specific review of activities towards a more holistic consideration of the state enforce-

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ment programs, encouraging innovation and creativity in achieving environmental goals. These agreements address outcomes more than activities or processes. Delaware, for example, has agreed with EPA on the following outcomes:

- promptly correcting violations that threaten Delaware's environment or the health of Delaware's citizens;

- achieving and maintaining widespread compliance with the environmental laws, both to protect human health and the environment, and to assure that those who violate the laws do not obtain an economic benefit from their unlawful activity; and

- preventing violations through use of applicable enforcement and compliance tools and targeted assistance.

With these results in mind, many states have argued since the beginning of the NEPPS process that effective enforcement should be integral to all our environmental goals, not an end unto itself.

Doing it Right: The Role of Compliance

Generally, the states contend that compliance, not enforcement, is the appropriate goal. In other words, responsible agencies should be striving through whatever means to get all polluters to meet environmental objectives, usually spelled out in regulations or specific permits. If compliance with these requirements is the goal, then enforcement becomes only one of many mechanisms for achieving that goal. Agencies should be aiming their efforts at the compliance target; enforcement should be but one of the many tools that must be effectively used to reach the goal.

Over the years, the command-and-control approach to environmental enforcement has resulted in a regulated community that fears environmental agencies. This fear impedes potential partnerships that could hasten movement toward environmental objectives. Instead, critical information is withheld, and environmental improvements are delayed.

Most states are finding new and more effective ways to get violators back into compliance as quickly as possible. These states are relying on compliance assistance to achieve that goal much faster, much more cheaply, and with far greater goodwill than they would through aggressive enforcement. Under this approach, environmental agencies are assisting responsible companies achieve compliance through technical assistance and penalty mitigation in cases where they report minor violations and fix them promptly. This approach has been memorialized in EPA's penalty mitigation policy which has been used as a model by several states. States are also working closely with companies to identify potential problems before they become violations, thus ensuring that they remain in compliance. Such compliance assistance efforts help create allies for our environmental efforts.

Several companies are moving beyond mere compliance by adopting forward-looking environmental management strategies such as continuous improvement through ISO 14000 certification, pollution prevention, and

enhanced product stewardship.

Overly aggressive and ill-timed enforcement is a dare: it inspires polluters to assume an adversarial relationship with their environment and regulatory agencies, and to challenge enforcers to discover their misdeeds. Neither the states nor EPA can afford that cat-and-mouse approach to environmental management.

Nonetheless, enforcement is essential. In fact, in Delaware and in other states which are investing heavily in compliance assistance, the enforcement stick must, in certain cases, be bigger than ever. Those facilities with compliance problems who choose not to participate in compliance assistance efforts, or who continuously violate environmental obligations, should

**If the general
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face the full force of public indignation and legal recourse. In these cases, states and EPA can forge a powerful enforcement partnership that combines the benefits of compliance and deterrence.

EPA should continue to be an important enforcement partner. States will continue to rely on EPA to assist with "bad actors," to settle transboundary pollution problems, to set protective national standards, and to ensure that states meet Federal environmental protection responsibilities. States will also continue to work with EPA through Performance Partnership Agreements to build the capacity needed to meet Federal and state environmental goals. States like Delaware need EPA, just as EPA needs the states. That is what partnership is all about. ♦



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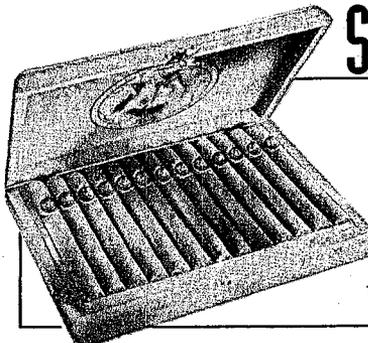
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The great commercial and social traditions of Delaware revolve around ready access to clean, dependable water. A century ago, DuPont depended on the fast, clean-flowing Brandywine to fuel its first powder mills and usher in the petrochemical revolution. Today, clean water is no less important. It goes without saying that clean water is important for fish and wildlife and their habitat in the State. But what we often forget is that clean water is essential to Delaware's great petrochemical, pharmaceutical, agricultural and animal farming, automotive, port, fishing, crabbing, housing, shopping, motel, restaurant, and tourism industries.

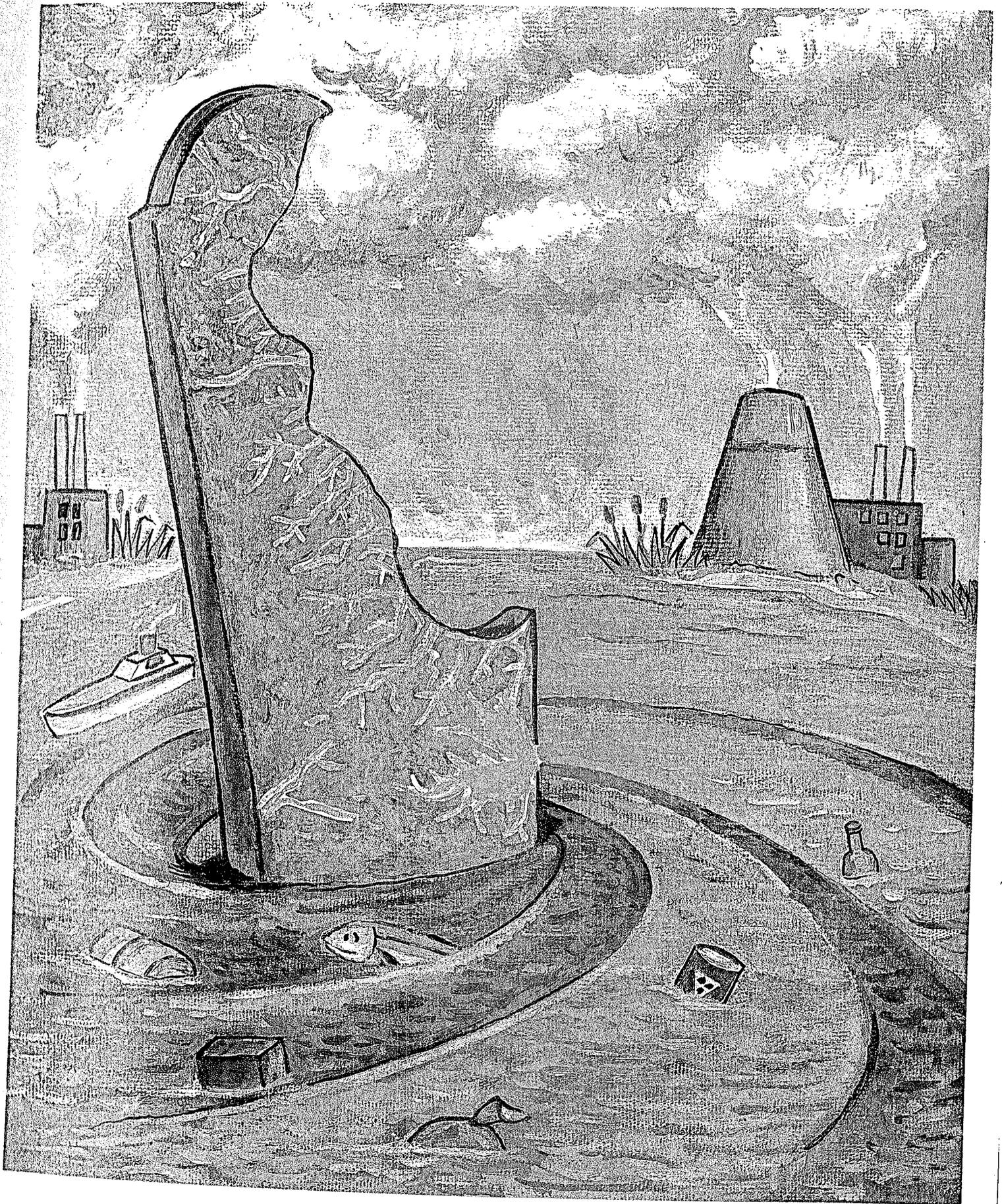
The State's manufacturing sector depends on clean water to run efficiently. By maintaining property values, clean water is good for homeowners and developers. It helps keep health care, taxes, and insurance costs down. In short, clean water is essential to the success of our State's economy, sustains our values and quality of life, and is good for business.

There is no shortage of water bodies in Delaware. Delaware contains approximately: 3,160 miles of rivers and streams; 4,500 acres of lakes, reservoirs, and ponds; 132,000 acres of freshwaters wetlands; 89,760 acres of coastal and tidal wetlands; 866 square miles of estuaries and bays; and, 25 ocean coastal miles. Until a quarter century ago, we treated much of these waters with contempt. Our most important and historic rivers, the Delaware, the Christina, the Brandywine, the Indian, the Nanticoke and others were virtually devoid of life. Devoid of fish. Devoid of people enjoying these waters. Devoid of residential and commercial developments. Devoid of fishers earning a living from these affected waters. So twenty-five years ago, the Governor of Delaware and each of our

federally elected officials enthusiastically supported the Clean Water Act (hereafter "CWA"), which was a bi-partisan effort to clean up the nation's — and Delaware's — waters. With the CWA, Congress declared war on pollution. The authors of CWA aspired to making all waters safe and healthy and to eliminating all discharges of pollution. Water quality in Delaware has correspondingly improved. The stench is gone from the Delaware and Christina Rivers and people and fish are returning to these living resources. Delaware's coastal tourism has never been more robust.

Unfortunately, however, most of Delaware's waters still do not meet the water quality standards established to protect human health and aquatic life. Astoundingly, a full ninety percent of inspected rivers and streams and three-quarters of lakes do not comply with water quality standards. Fish advisories plague scores of our waters, including the Christina and the Brandywine. Health advisories still plague many of our coastal waters, many in coastal communities. Blue crab populations are in imminent peril. A toxic organism, *pfeisteria piscicida*, continually threatens our health and fishing industries. Sea lettuce grows with abandon in artificially nutrient-rich waters to the detriment of aquatic life. A myriad of pollutants or other stressors and sources are responsible, including bacteria, nutrients like nitrogen and phosphorous, dissolved oxygen, PCBs, zinc, chlorinated benzenes, chlorinated pesticides, metals and temperature. These are discharged by point sources (such as a plant or factory), and non-point sources (such as farms, parking lots, lawns, roadways and Superfund sites, contaminated groundwater discharges to surface water, and atmospheric deposition) with little or no prospect of enforcement by governmental agencies.

Worse still, we do not understand the extent of the State's water quality problems because most of Delaware's waters have



yet to be inspected to see if they meet "water quality standards" ("WQSs"). Surprisingly, in the CWA's twenty-five year history, only about 3 percent of estuarine waters, 15 percent of river and stream miles and 60 percent of lakes have been assessed, and wetlands and coastal waters have not been assessed for compliance with water quality standards.

By now, EPA and the State of Delaware were supposed to have worked together to restore the State's most polluted waters. They were to have identified and assigned priorities to all of the "water quality limited segments" or "WQLSs" in the State, which are waters that are not safe and healthy for fish and people. They were to have set "total maximum daily loads," or "TMDLs," and "total maximum daily thermal loads," or "TMDTLs," which is the amount of pollution that can be absorbed before a body of water ceases to meet WQLs. They were to have developed a "continuing planning process" or "CPP," for the State, which is a continually upgraded plan for ensuring that State waters meet WQSs at all times. They were to have set WQSs for all waters, including wetlands.

Unfortunately, these requirements have largely gone unmet in Delaware. Most of the State's waters have not been surveyed. Many impaired waters have not been identified. There are 159 known waters needing TMDLs or TMDTLs, but not a single one has yet been developed. The State has never developed a CPP. There are no water quality standards for wetlands. By and large, EPA has stood by, watching quietly, unwilling to intervene until and unless ordered to do so by a federal court.

In August of 1996, the inevitable happened. The Widener University School of Law Environmental Law Clinic brought suit on behalf of the Sierra Club, the American Littoral Society and the Delaware Riverkeeper Network to restore Delaware's waters. American Littoral Society and Sierra Club v. EPA, (D. Del., 1996) Civ. Action No. 591-SLR. The CWA requirements the lawsuit sought to vindicate, and how EPA agreed to settle the action, are described below.

I. REQUIREMENTS OF THE CWA

The CWA seeks to protect our nation's

waters by requiring states to take certain measures to ensure both that safe and healthy waters not become more polluted and that impaired waters are restored. To meet these objectives, Congress requires the listing and assignment of priorities to impaired waters, the establishment of pollutant load limitations for such impaired waters to ensure that they meet water quality standards, and the development of a plan to comply with such standards for all waters now and in the future. These requirements are examined in the following passages.

A. Congressional Goals in Enacting the Clean Water Act.

Congress enacted the CWA with the express objective of restoring and maintaining the "chemical, physical and biological integrity of the Nation's waters." Congress further recognized two distinct elements necessary to achieving this goal: (1) "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983"; and (2) "programs for the control of non-point sources of pollution be developed

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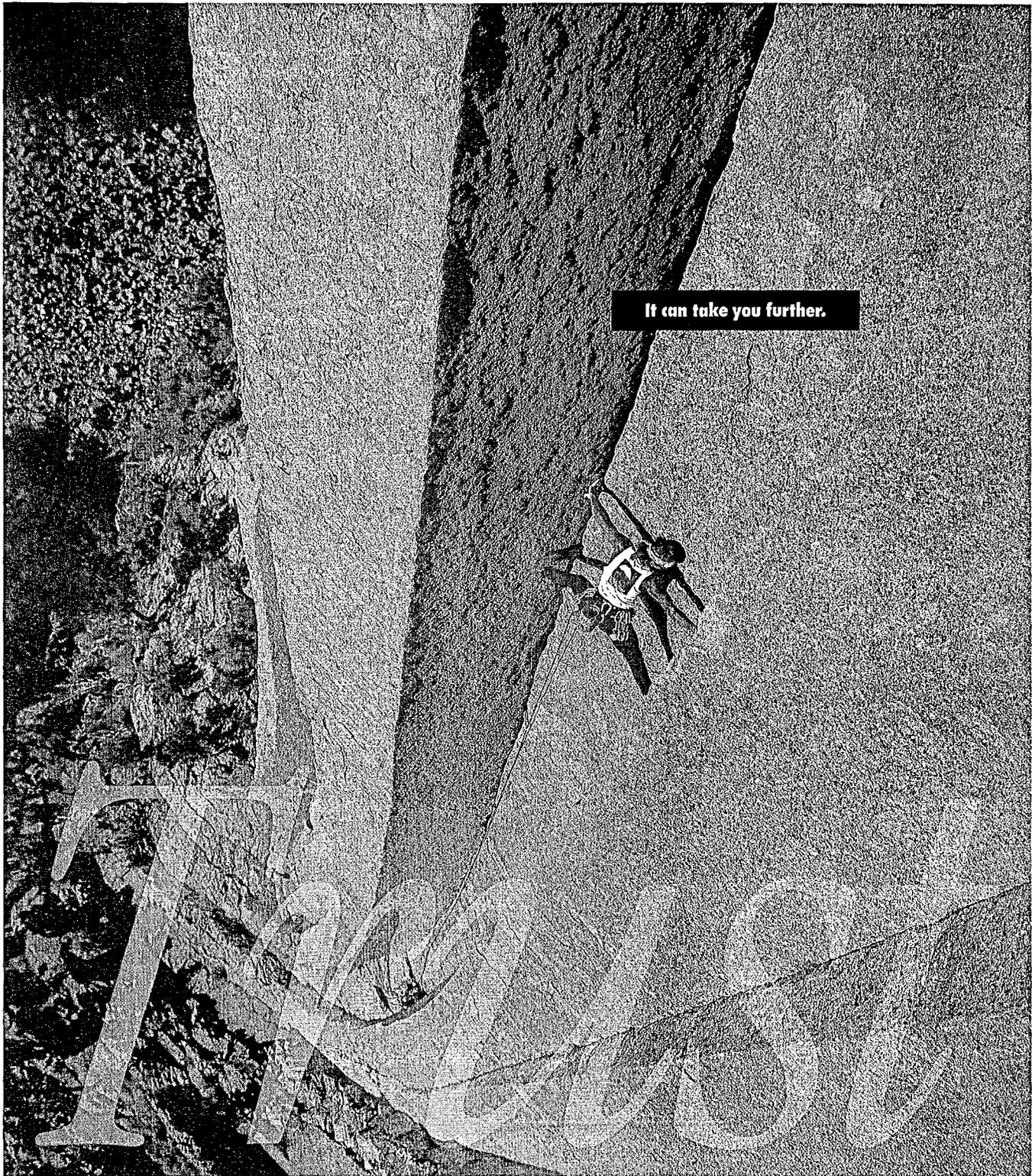
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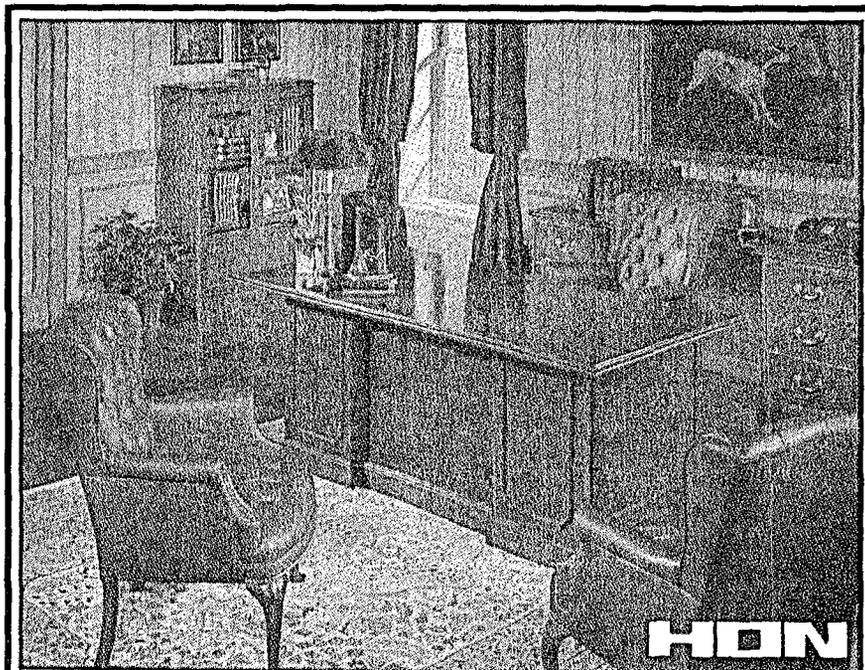
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and implemented in an expeditious manner so as to enable the goals [of the CWA] to be met through the control of both point and nonpoint sources of pollution." The Act's cornerstone provision, section 303, provides the means of achieving the Act's central objectives.

B. *Water Quality Standards and Implementation Plans: Section 303.*

Entitled "Water Quality Standards and Implementation Plans," section 303 of the CWA specifies the efforts that states must make to maintain water quality and eliminate pollution. The section requires states to adopt state WQSs,

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which must subsequently be approved by the EPA. States are then required to review, and when necessary, revise these standards at least once every three years. In accord, EPA and Delaware have spent the better part of the last quarter century developing WQSs to protect the people and wildlife who use Delaware's waters. Delaware's most recent WQSs set numerical, narrative, and anti-degradation requirements to protect swimming, fishing, recreation, drinking, aquatic life support, and other uses.

But setting standards is an exercise in futility unless the standards are actually met. Fortunately, as the United States Supreme Court has noted, section 303 "contain[s] provisions designed to remedy existing water quality violations and

to allocate the burden of reducing undesirable discharges between existing sources and new sources.”

1. Identification of Water Quality Limited Segments

A WQLS is any water that does not meet or is not expected to meet an applicable WQS even after the application of technology-based effluent limitations (required by sections 301(b) or 306), and for which controls on thermal discharges are not stringent enough to assure protection and propagation of indigenous shellfish, fish, and wildlife. All WQLSs within each state must be identified every two years in a “section 303(d) submission.” The section 303(d) submission must comprise all state waters that are exceeding standards because of point, nonpoint, or natural sources of pollution. The section 303(d) submission must then assign priorities to the targeted waters in the order of use and severity of nonattainment. The underlying scientific rationale for its establishment must accompany the submission. It must also “assemble and evaluate all existing and readily available water quality-related data and information” used to develop the WQLS list. Further, it must provide documentation to support any determinations to identify or not to identify any waters as required by either section 303(d)(1) or its implementing regulation. This documentation must include, at a minimum:

- (i) a description of the methodology used to develop the list;
- (ii) a description of the data and information used to identify waters;
- (iii) a rationale for any decision not to use existing and readily available water quality-related data and information as required by 40 C.F.R. 130.7(b)(5); and
- (iv) any other reasonable information requested by EPA.

The section 303(d) submission’s priority ranking must “specifically include the identification of waters targeted for TMDL development in the next two years.” To ensure that the 303(d) submission “identifies” all impaired waters, as required, the state must monitor and assess all state waters. If the state fails to comply with any of these requirements, then EPA must do so.

2. Total Maximum Daily Loads (TMDLs) and Total Maximum Daily Thermal Loads (TMDTLs).

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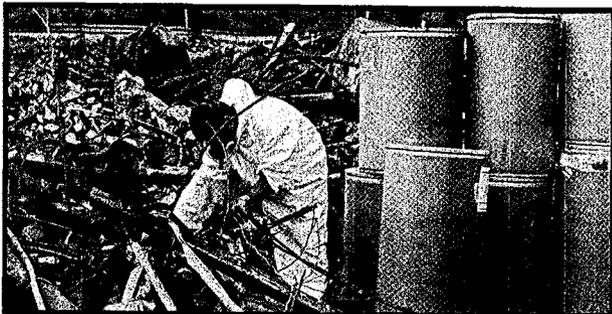
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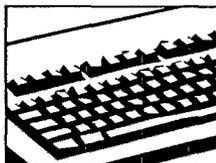
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the state or EPA must develop TMDLs or TMDTLs for each WQLS. TMDLs and TMDTLs are the maximum amount of pollution (including heat) an impaired water can withstand before it no longer attains water quality standards. TMDLs are the sum of individual "wasteload allocations" for point source and "load allocations" for nonpoint and natural sources of pollution. TMDTLs are an estimation of the maximum heat input that a WQLS may tolerate to ensure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Once initially approved, TMDL and TMDTL submissions must then be updated with each 303(d) submission. Once again, if a state fails to develop adequate load reductions, then EPA must do so.

Once TMDLs and TMDTLs are established, they must be incorporated into NPDES permits. CWA and its regulations prohibit the issuance of an NPDES permit if it will cause or contribute to non-compliance of WQSS. Moreover, EPA regulations prohibit the issuance of any permit if the terms and conditions it contains would fail to ensure compliance with any applicable water quality requirements. Further, new NPDES permits must include conditions meeting effluent limitations and standards under section 303. An existing permit may be modified if information received by EPA indicate that its cumulative effects on the environment are unacceptable. The process for implementing TMDL and TMDTLs must be described in the State water quality management plan.

3. Implementing Water Quality Standards: The Continuous Planning Process.

To integrate all of the activities required by section 303, section 303(e) of the CWA requires a continuous planning process (CPP) to ensure that water quality standards are met. This plan must be submitted to EPA for its approval. The CPP must, inter alia, describe the process for establishing TMDLs and TMDTLs and incorporate the approved TMDLs and TMDTLs to ensure that water quality management is coordinated. After initial approval of the CPP, EPA must "from time to time review each state's approved planning process for the purpose of insuring that the planning process is at all times consistent with the CWA." The CWA and its accompanying regulations prohibit EPA

from approving any CWA permit program for any state which does not have an approved CPP.

III. REQUIREMENTS OF CONSENT ORDER AND AGREEMENT

Following initiation of the above discussed lawsuit in the U.S. District Court of Delaware, the plaintiffs, EPA and the State worked quickly to negotiate an agreement to comply with these requirements. With the assistance of mediator Edwin Naythons – a retired United States Magistrate Judge with a quarter of a century's experience with complex litigation on the federal bench in Philadelphia – the parties reached agreement by May, 1997. They then submitted a proposed Consent Order and Settlement Agreement ("Agreement") to the court for approval. Judge Sue L. Robinson approved and entered the Agreement on August 4, 1997.

The Agreement requires EPA and the State to identify all impaired waters, including waters subjected to habitat degradation from agricultural and urban activities. The Delaware Department of Natural Resources and Environmental Control ("DNREC") (with EPA oversight) will soon be evaluating a river, stream, lake pond or coastal water where you live, swim, fish, or work. EPA must then ensure that the next State's submission of impaired waters, which is due by April 1, 1998, completely considers existing and readily available information.

The Agreement requires that EPA and the State establish TMDLs and TMDTLs for all of the State's WQLSs within nine years. Some TMDLs and TMDTLs will be established sooner and others later. For example, EPA has already proposed a TMDL for the Appoquinimink River. TMDLs for the Nanticoke, Indian, Lower Broad and the Choptank and other waters must be established in 1998. All other TMDLs and TMDTLs for the WQLSs in each of Delaware's five basins (Piedmont, Delaware Estuary, Delaware Bay, Inland Bays and Chesapeake) must be established in accordance with the times specified in the Agreement. EPA and the State must work together to apply TMDLs and TMDTLs to those point and nonpoint sources responsible for contributing the type of pollutant or stressor causing impairment. It also requires that the State develop, and EPA review, a CPP.

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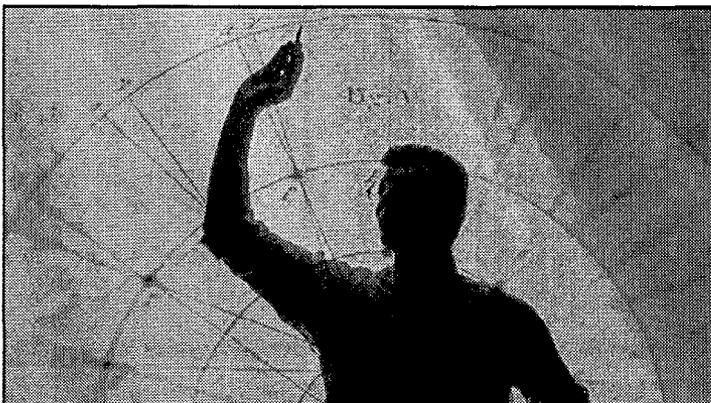


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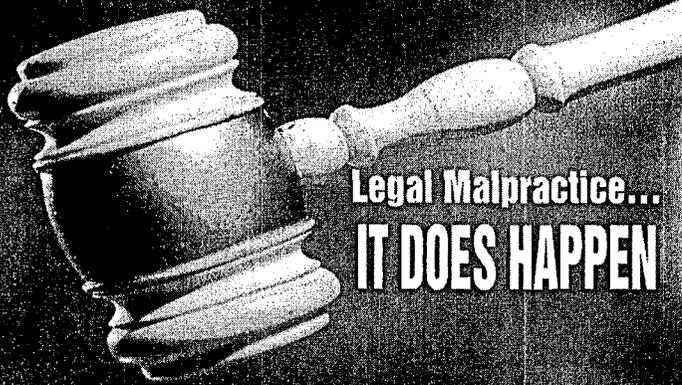
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Other provisions require EPA to evaluate the State's water quality and its water quality programs, address wetlands, and coordinate its activities with federal wildlife agencies. TMDLs and TMDTLs must then be allocated to point and nonpoint sources, and incorporated into the State's CPP.

The Agreement aims to be flexible. Its requirements will be integrated with the programs that already have good potential to work well in the State. For example, the Agreement provides for its integration with the State's commendable and forward-looking whole-basin management approach.

The Agreement has specific deadlines that may be enforced in federal court if needs be. Thus far EPA and the State have met the Agreement's deadlines. Besides establishing a TMDL for the Appoquinimink, EPA has conducted its comprehensive assessment of the State's water quality program. It has developed guidance regarding the use of data and information including biological and habitat indicators.

DNREC is contributing to EPA's compliance efforts. It has entered into a Memorandum of Understanding with EPA to effectuate compliance. It has published its own TMDL Implementation Program. It has developed an approach to have the Agreement coordinated with the State's much vaunted Whole Basin Management Plan. It has provided technical assistance to EPA's efforts to develop a TMDL for the Appoquinimink. It is developing its inaugural CPP.

Despite the marginal successes of the CWA, water quality in Delaware remains in jeopardy, but the Agreement provides the needed tools to restore the State's polluted waters. Within a decade the State's impaired waters should be cleaner. Federally protected species should be better conserved. Our tax dollars should be put to more effective use. People and aquatic life who use the State's waters should be better protected. Both the State's environment and its economy should be better sustained.

These are merely the first steps in a long journey. Certainly, the journey's success depends on EPA's and the State's commitment to meeting the requirements of the Agreement and the CWA. But its success will also be influenced by personal, community and political will. I believe we are all up to the journey. ♦

Because of constraints of space, we are unable to print the author's extensive footnotes. They will be made available upon request to the publisher.



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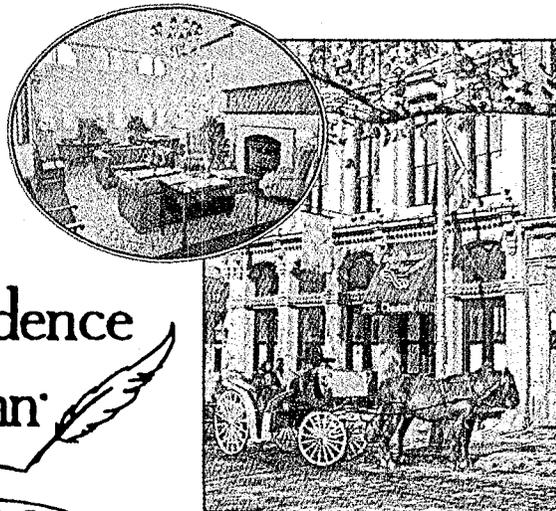


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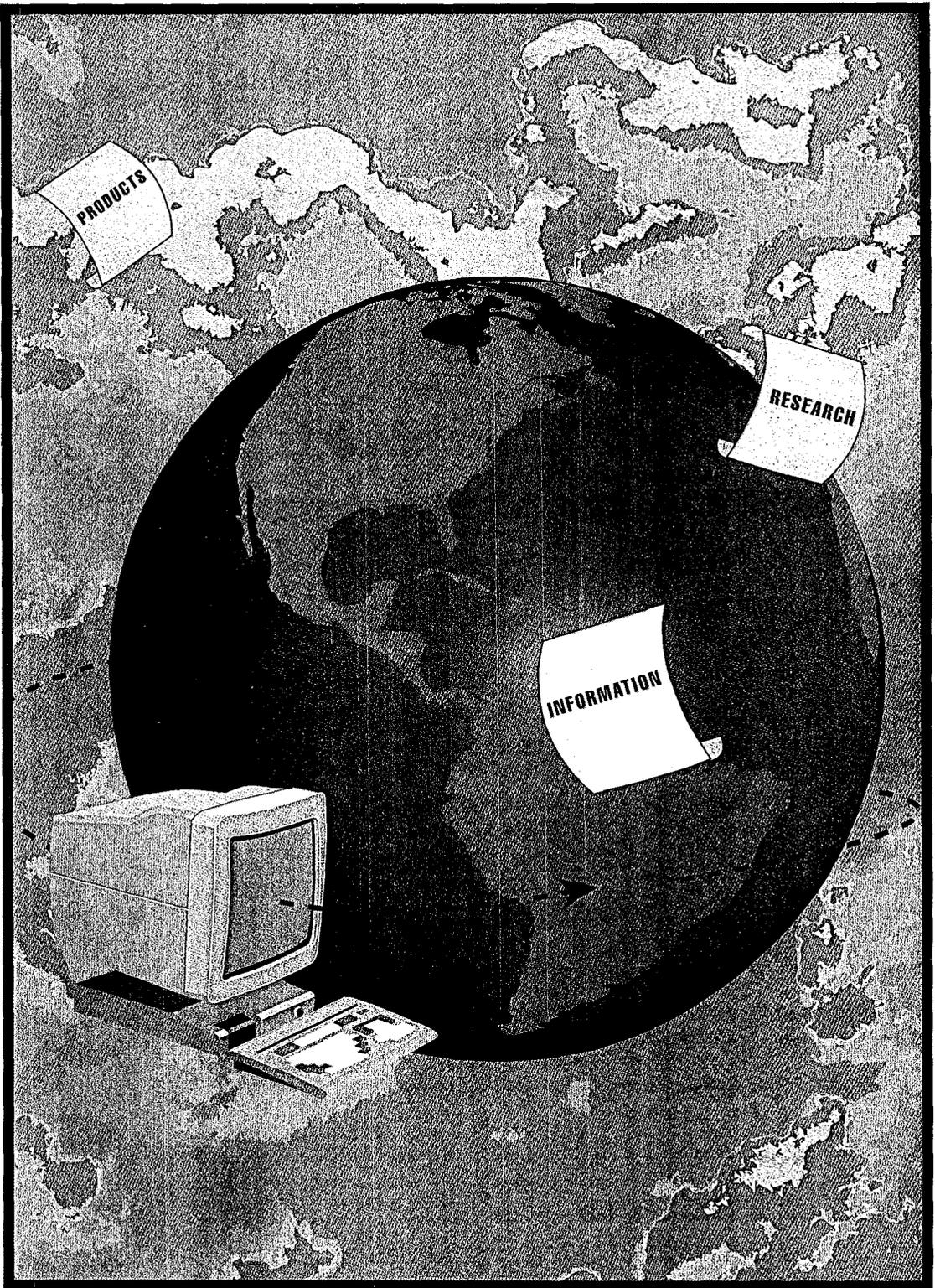
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By David McGurgan



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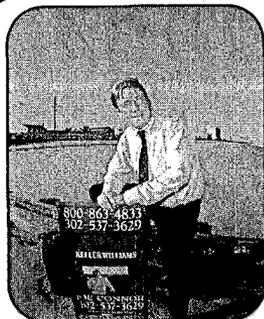
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Continued from page 44

begin to do their own research." Finally, the book is poorly edited and is replete with typographical and other errors.

Chase's basic premise is easily grasped: the course of history is dictated by – what else? – the then-prevalent means of production, and legal systems are mere "superstructures" atop those underlying economic determinants. As is typical of CLS adherents, Chase maintains that the "letter of the law" is always ambiguous: "Any law – whether in a constitution, statute, judicial decision, or administrative order – can be separated from the written text in which it is given form." To Chase, the law of whatever historical period he is describing always serves the dominant interests of the property owners, and significant legal change is always accompanied by violence.

Chase posits four discrete stages of American legal history: precapitalist, capitalist, state capitalist and global capitalist. (Do I hear an echo?) The first stage ended in roughly the early 19th Century with the development of true market economies. The second period featured the triumph of northern industrialists over

southern agrarian interests in the Civil War. The third phase coincided with the emergence of a regulated, wartime economy from the Progressive Era through the Second World War. Finally, the current "global capitalist" stage – in which nation-states become almost irrelevant, if not outright obstacles to transnational legal business – began sometime after the Kennedy administration and has continued to date. Chase summons a process of Hegelian dialectic – the concept of "creative destruction" – to explain the forces of historical change. Chase understands Hegel better than he understands America.

In the final analysis, there is little to distinguish Chase's work from that of Marxist historians. Although he pays lip service to its other purported functions, the law for Chase remains primarily a utilitarian device to cement the economic power of ruling elites. Strikingly, the book lacks any coherent analysis of the genius of the United States Constitution, a document that has spanned and survived each of Chase's "four stages" with relatively few changes.

To be sure, Chase despairs when contemplating the current "global capitalist" age of American legal history. In the final pages of the book, he invokes

William Greider of *Rolling Stone* magazine (did he even go to law school?) by issuing a call for mass resistance against the uncertainties of the world economy:

If citizens do not fight back now, "offshore politics" may obviate existing legal structures – either formally through treaty agreements, or informally, through the delegation of power by national government to international trade commissions.

And there we have Chase's worldview in a nutshell: a Sixties-style cry for class-based political action.

Mr. Chase's approach to history is ultimately cynical. By relying on a strictly economic analysis, Chase virtually ignores the significance of individual jurists' contributions to American legal development; the evolution of precedent; and the rule of *stare decisis* that has given American law stability, continuity, and predictability for over 200 years. Chase's book is helpful only as a psychological mirror of the CLS mindset. It has little else to commend it. ♦

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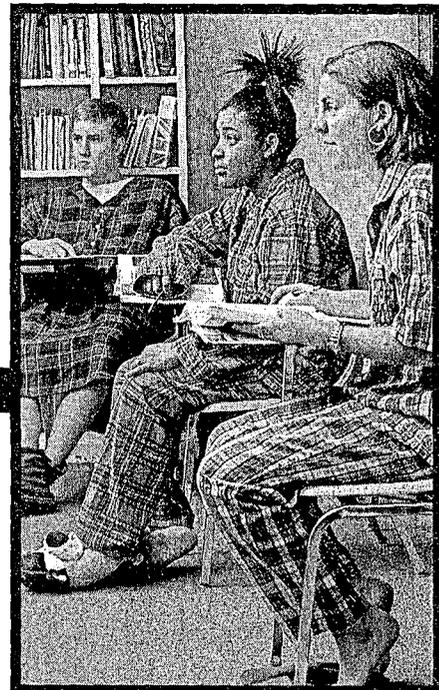
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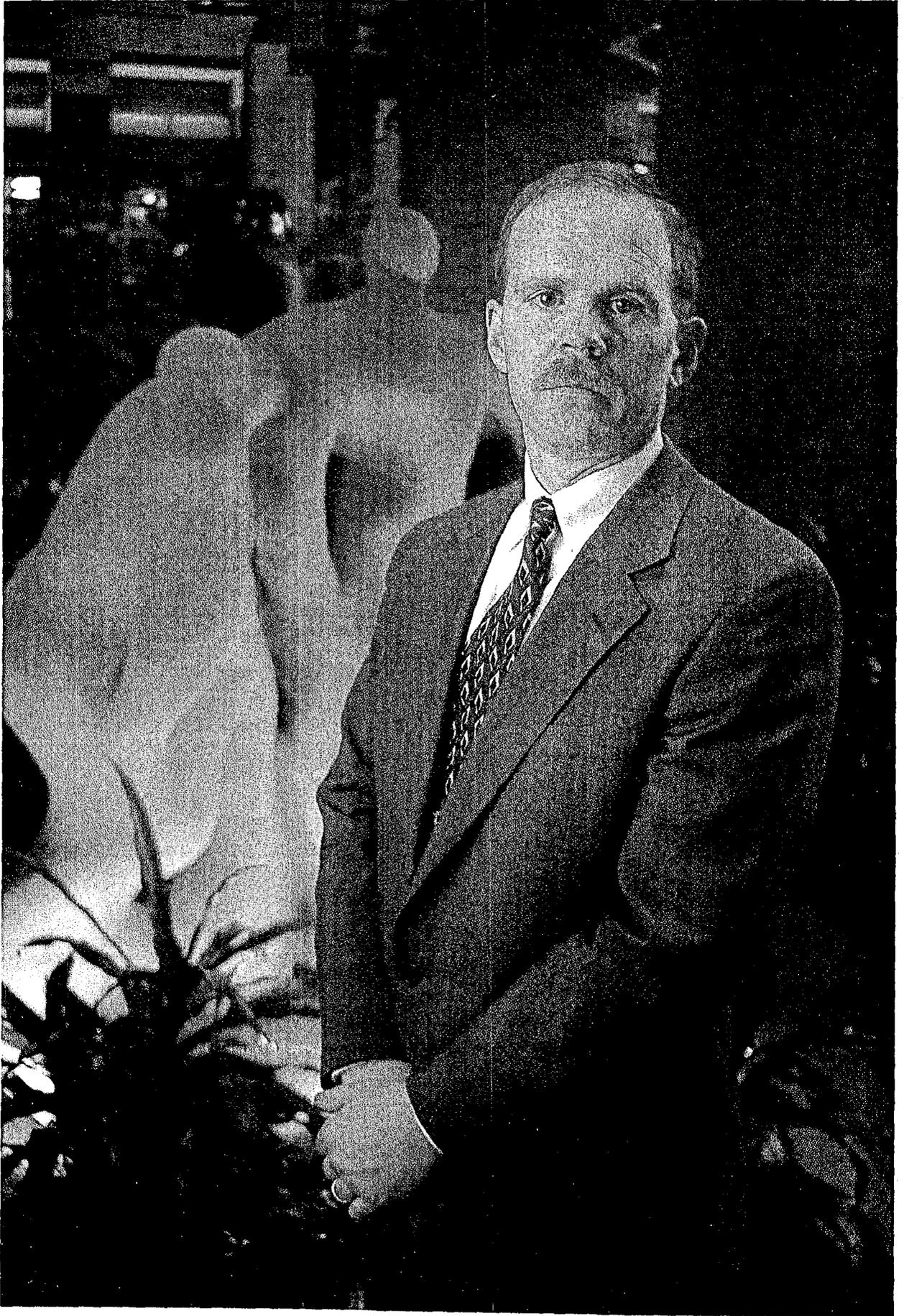
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Richmond L. Williams

CORPORATE PERSPECTIVES ON ENVIRONMENTAL POLICY AND REGULATION

I was first exposed to the arcane world of environmental law in the mid-1980s when I became Head of the Delaware Attorney General's Environmental Unit. Environmental cleanup programs under federal programs such as Superfund¹ or RCRA² were in their infancy. At that time waste water regulation was the only reasonably mature program. My primary focus was enforcement. Delaware needed to enforce existing standards and fill the many gaps in statutes and regulations, which we believed hindered effective enforcement. It was a time when very few understood the science of evaluating the risk of exposure to pollutants.

I was introduced to the business perspective when I left the Attorney General's Office and went into private practice in 1988. This gave me an appreciation of how business interests can be affected by the manner in which state and federal agencies choose to achieve the goals of protecting the environment. I began to understand how prescriptive requirements not only were unnecessarily expensive but could be both over-broad and under-inclusive. Some businesses and activities were heavily regulated, while others were hardly affected. Under such regulations "success" was not measured by whether a requirement benefited the environment at all, benefited the environment enough, or was the most cost effective way to achieve a defined goal of benefiting the environment. Success was measured by how many checks could be placed on the checklist in an inspection report. This is still the approach to fostering compliance under many programs today.

When I joined Hercules Incorporated I became wholly immersed in the environmental issues of a large, global chemical manufacturing corporation. My practice has touched on virtually all environmental issues facing the corporation. I have engaged in ongoing efforts to maintain compliance with applicable regulations, developing responses to potential enforcement situations, litigation over cleanup costs with the U.S. Government and private parties, and efforts to provide input

on environmental policy issues.

My general observation is that compliance with requirements of the environmental regulatory programs is accepted as an important part of our corporation's overall business objectives. At one time industry resisted intrusive regulation, and some corporations only grudgingly complied (under threat of enforcement). Today, for most members of industry it is simply a fact of life.

However, industry is quite frustrated with the failure of the regulatory system to keep up. Today, this system generally stifles innovation and prohibits more cost effective methods of achieving environmental protection goals. Our ability to identify and measure individual components of waste streams has improved significantly since the mid-1980s, as has our ability to assess environmental risks. These advances enable us to tailor pollution abatement activities to reduce the risk to the public, while also reducing the cost of abatement. There is still room to improve in industry. These improvements can best occur by refocusing regulatory programs to enable industry to reduce real risk in a flexible manner.

However, the next big stride in improving environmental quality, particularly with respect to reducing air and water pollution, can only occur by involving everyone who contributes to the problem, through actions that affect individuals in their private lives and those industries that have been subject traditionally to minimal environmental regulation. Individuals and all businesses in our economy must do better at conserving the resources they consume and reducing the waste they create.

With these thoughts in mind I turn to some specific issues that should be addressed to enable business and individuals to maximize their opportunities to improve environmental quality.

I. Environmental Regulations

Environmental regulations that set enforceable standards for business activities are still necessary. What can change is how these standards are determined. Regulations should be constructed around the objective of reducing quantifiable risk to acceptable levels. The determination of how to achieve this goal

¹Also known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, et seq. (as amended).

²Also known as the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901, et seq.

should be based upon science and guided by an openly adopted policy about risk. The risk goal or policy should also be applied evenhandedly. Regulations should not be based upon fear generated by rhetoric. Regulations should be flexible enough to permit different technologies to be used in different applications. To the extent possible, where the regulated entities are not wholly responsible for the environmental impact, they should not be required to provide the entire solution to the problem.

This flexibility does not presently exist in current programs. For example, under Superfund, the statute requires EPA to select remedies that "permanently and significantly reduce the volume, toxicity, or mobility of the hazardous substances, pollutants, and contaminants" over remedies not involving these criteria. 42 U.S.C. §9621(b)(1)³

Although these criteria sound good in the abstract, do they improve environmental quality when actually put into practice? For example, if a hazardous waste site threatens a drinking water supply, an analysis based upon minimizing risk would suggest that any remedial alternative to prevent contamination of drinking water could be selected (i.e., by reducing the long-term risk to acceptable levels). It is often possible to prevent the spread of contamination to the drinking water through "containment" technologies such as "pump and treat." It might be less protective to treat the waste through bioremediation, on-site remediation, or removal of the contaminated materials to a treatment facility, since these solutions might still allow some pollution to migrate from the site. Under Superfund, it is likely that even when "containment" methods prevent the pollution from migrating to the drinking water source and cost less money than "treatment", they may not be selected without "additional requirements" being imposed because the containment methods do not meet the other criteria. The ultimate remedy often becomes treatment or an excessively expensive "cap", plus a containment technology, which, alone, would prevent migration of the contaminants into the groundwater. Ironically, treatment and construction of elaborate caps often cre-

ate *more* overall risk because these additional activities carry greater risks of personal injury and chemical exposure than they eliminate. While this problem is not as common now for municipal landfill sites under Superfund as when the program first started, it is still often encountered at other types of Superfund sites.

Other regulatory requirements often do little to reduce overall risks. In the Clean Water Act⁴, there are regulations that apply to discharges from certain types of industries.⁵ The regulations apply to facilities connected to a municipal sewer system (officially, a Publicly Owned Treatment Works, a/k/a a

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"POTW"). These regulations severely limit the total quantity of certain pollutants the regulated facilities can send to the POTW for treatment. Basically, these industries have to meet the same water quality goals that would apply if they discharged directly into a stream or lake. From an environmental risk perspective, it is not necessary for the waste to be treated twice, which is often the result under this program.

Second, these requirements are not applied evenhandedly. For example, a

large industrial facility discharging millions of gallons of waste water to a POTW (which has the capacity to handle those wastes) may be limited by the regulations to sending in its waste water no more than a few ounces of toluene, a component of gasoline, per day. However, another commercial facility, such as a large auto and truck maintenance facility, connected to the same POTW may be allowed to send many times more of that same chemical in a given day. Regulations should not be based upon who is generating the waste, but upon what the waste contains. Where the POTW is able to treat these materials and fully comply with its permit, there is no environmental reason to impose such restrictions. The only limitations that should apply to companies that discharge to a POTW are those necessary to prevent harm to the POTW's treatment system and prevent it from violating its permit limits.⁶

In these examples, the regulatory goal should be good science used to evaluate the risk to the environment or human health. In these examples, the additional requirements do not improve environmental quality. Unfortunately, the administrators of these programs do not have the flexibility either to fashion requirements designed directly to improve environmental quality or to waive requirements that do not improve it. They often do not set standards based upon the use of good science in the evaluation of the actual benefit of specific requirements. They do not permit different approaches to be taken in different situations to optimize environmental protection. Most importantly, they do not set standards according to appropriate risk goals.

2. Accountability in Decision Making

A regulated party or a concerned citizen has very little opportunity to question a significant governmental environmental decision before it is enforced.⁷ Lack of input into the decision making process often causes citizens and corporations to attempt to influence these issues through the press and political influence. This perceived lack of "due process" creates the impression that these governmental decisions are arbitrary.

³The regulations adopted to implement this provision, known as the National Oil and Hazardous Substances Pollution Contingency Plan or NCP, expands the criteria for remedy selection to nine elements: overall protection of human health and the environment, compliance with ARARS, long-term effectiveness and permanence, reduction of toxicity, mobility, or volume through treatment, short-term effectiveness, and implementability. 40C.F.R. 300.430(f)

⁴33 U.S.C. §1251. et. seq. (as amended).

⁵See Clean Water Act. 33 U.S.C. §1317.

⁶Cf. 40 C.F.R. 403.

⁷As note above, in many programs there is little flexibility in establishing requirements for a specific facility so even permit appeal rights are of limited value.

trary and not based upon fact and reasonable criteria. Generally, these are not situations in which reason and good science prevail. Rather, they create emotionally charged, highly publicized "crises."⁸ Regardless of whether a court would uphold these decisions against a due process challenge, they are perceived by all parties as unfair.

In Delaware, where decisions of the Secretary of the Department of Natural Resources and Environmental Control ("DNREC") are appealable, I believe DNREC decisions are more reasonable, and the decision making process followed is more fair, particularly in comparison to similar programs in states that do not have a clearly defined administrative review process. Unfortunately, most federal programs, such as Superfund, do not have similar procedures.

Critics stress the cost and delay caused by an appeal process. In my opinion, it is reasonable to permit the review before enforcing a decision, which, if wrong,

could result in the waste of hundreds of thousands or millions of dollars to a company like Hercules.⁹ Small businesses and individuals can be dramatically affected where the impact is substantially smaller.

Another criticism of an appeal process is that it might prevent an agency from averting an environmental crisis. In my experience, environmental crises do not occur as often as people expect. Procedures can provide an agency with emergency powers. Here again, the Delaware model is a good example. In the *Formosa Plastics* case, DNREC used its emergency powers to shut down a manufacturing facility for its numerous and ongoing violations of environmental requirements.¹⁰ DNREC was concerned that these violations could result in a threat to public health as a result of the release of vinyl monomer, a carcinogen. The agency used its emergency authority to protect public health and the environment. These procedures allowed emergencies to be addressed

while still allowing adequate "notice and opportunity to be heard" for non-emergency cases.

A decision on a long-term remedy for a contaminated site is not sufficiently urgent to warrant depriving affected parties of a hearing. The cleanup of environmental contamination usually involves the possibility of a future release to the environment or the threat of a long-term risk to public health. It usually takes years to collect the data and evaluate the remedial options. Immediate threats to the environment or public health arising during this time are usually handled through interim measures designed to stabilize the site.

If the state and federal governments uniformly required an opportunity for prior review of significant decisions by parties whose interests would be substantially affected thereby, accountability would be introduced into environmental programs without compromise of environmental quality.

⁸This is by no means the only reason that these issues become "hot potatoes," but the sense of disenfranchisement from the process, lack of education on the issues, and the failure to engage in objective fact finding by use of rational process are significant factors.

⁹In Superfund, aggrieved parties have no right to "pre-enforcement review" of remedial decisions - that is, the remedial action must be performed (and the money spent) before a party can challenge the propriety of the decision.

¹⁰*Formosa Plastics Corp. v. Wilson*, Del.Supr., 504 A 2d 1083 (1986).

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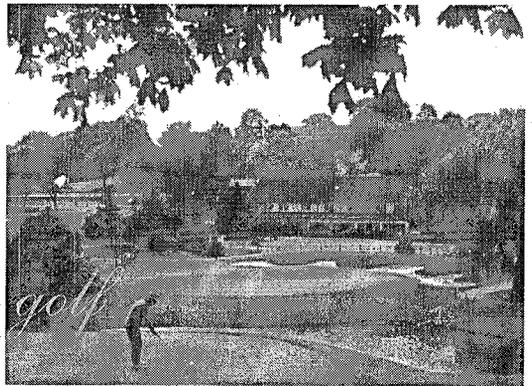
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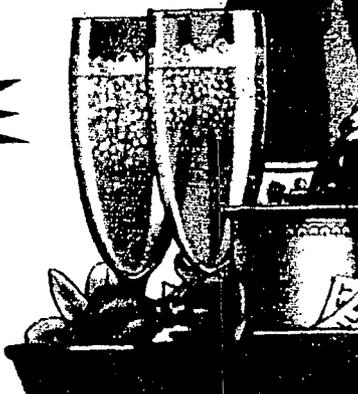
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3. Incentives to Improve the Environment

It may not be popular to discuss more taxes and user fees in today's political climate. However, they cause effective tools to protect the environment if they reflect the "cost to society" of the activity in question. While clear regulatory requirements and consistent, fair enforcement will always be important to maintain and improve environmental quality, the role of taxes and fees in changing behavior with environmental impact should not be ignored. Through taxes and fees, the cost to society of pollution can be, in essence, charged back to the responsible parties. The parties will then curb the behavior responsible for the problem in order to minimize costs.

This approach is particularly unpopular when the tax affects individuals as well as corporations. For example, a substantial amount of the pollution that causes ozone in the lower atmosphere is caused by automobiles. A significant increase in the gasoline tax (e.g., to bring our gas prices in line with those in Europe) would create an economic incentive for individuals and businesses to minimize their use of automobiles. The tax would affect everyone who contributes to the problem. This would improve environmental quality much more than the old style federal programs, such as the "Trip Reduction Program" under the federal Clean Air Act. Under that program, trip reduction requirements were (are) applicable only to employers with more than 100 employees at a location. Trip reduction requires one segment of society to solve a problem to which it is only a small contributor. If America is serious about environmental quality, everyone who contributes to the problem must participate in the solution, as unpopular as that may be.

An example of an opportunity to create incentives that would foster compliance in the business sector without the concerns raised by taxes would be an "audit privilege statute." This type of law prevents the government or private parties from using audit reports as proof of a violation, so long as the facility in question promptly corrects the deficiencies. The law enforcement community sees such laws as improper shields to hide non-compliance, but the regulated community wants the opportunity to identify and correct problems without the use of records created by this process as evidence of past violations. So long as the records of self-evaluation can be used to

prove infractions, facilities in Delaware will have a significant disincentive to conduct such evaluations, which, in turn, will hinder efforts of companies to establish a systematic and effective approach to compliance.

We should be vigilant for opportunities such as audit privilege to encourage effective self-regulation so long as the objective is improvement of environmental quality through increased compliance. The alternative approach, enforcement, is more limited in its ability to get to the heart of the problem, swells the ranks of government employees, and increases the demands on our tax dollars.

Ironically, small business is most significantly affected by our failure to adopt an audit privilege law. Larger corporations often have in-house counsel, sophisticated regulatory compliance programs, and conduct audits at the direction of counsel in order to assess the potential liabilities of the corporation and protect the corporation from them. In most cases, reports and other documents generated by this process would be protected by the attorney-client privilege or work product doctrine.

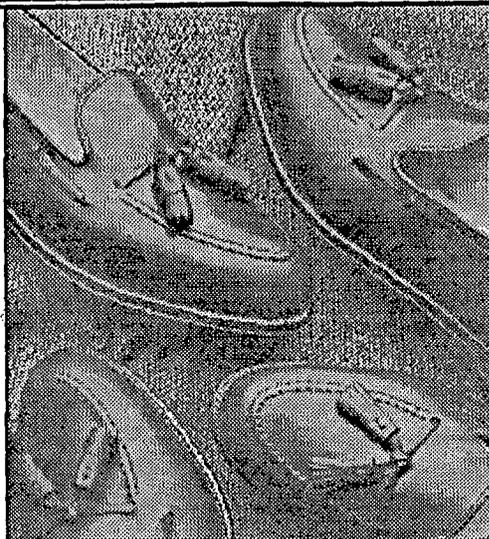
Businesses without internal technical expertise, formal compliance programs, and adequate legal assistance may have a greater need for an objective look at existing practices. However, they are less able to perform compliance evaluations without an audit privilege.

4. Joint and Several Liability

One legal principle that fosters litigation and regularly results in excessive burdens on business (i.e., employers) in our community is joint and several liability in the state and federal remediation statutes. The classic example of an injury giving rise to joint and several liability is that of two hunters who fire simultaneously, injuring a third party, but it is not possible to determine whose bullet caused the harm. In another example, both bullets caused injury, but it is not possible to determine the effect of one bullet as compared to the other. In such cases, it is fair to hold the two wrongdoers jointly and severally responsible for the injury since either party could have caused the entire harm.

But a new wrinkle is added in environmental cases. A party who could not have caused more than a small part of the harm can be held responsible for the entire harm. Parties who may be responsible for the bulk of the harm are not

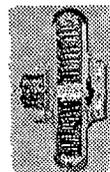
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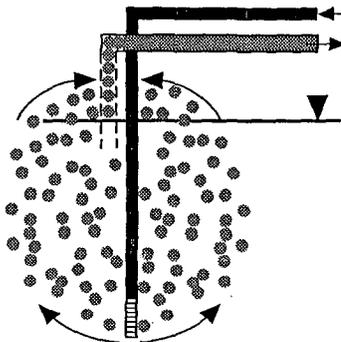
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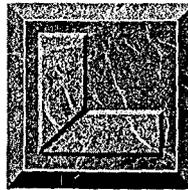
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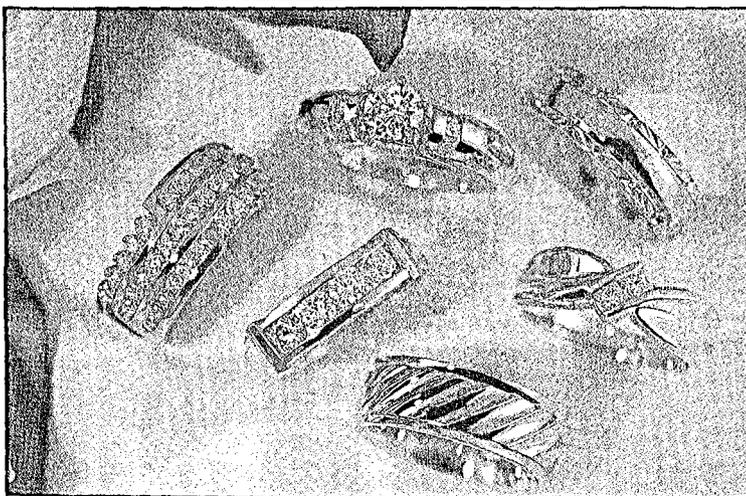
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held accountable, and other parties are left paying for their share. Typically, this occurs in cleanups involving municipal landfills that contain industrial waste. Under the doctrine of joint and several liability, the identified industrial generators may be liable for the entire cleanup costs even though the municipal garbage is responsible for most of the cleanup costs. This unaccounted for share has been referred to in Superfund parlance as the "orphan share." Where the municipal waste contribution accounts for 75% of the cleanup costs, it is grossly inequitable for all of the costs to be foisted upon the industrial generators.

For an individual corporation the situation can become even more inequitable. The generator of a small portion of the waste can be responsible for the entire cleanup even if its "contribution" of waste alone would not have required the entire cleanup which is being conducted. The context in which these claims arise also fosters inequity. No statute of limitations applies to claims under CERCLA or many state remediation statutes until after the remediation costs are incurred. Thus, the allocation of tens of millions of dollars may rest upon evidence in the form of recollections and documents 30, 40, or more years old. Allocations in these cases may be more of the result of accidents of history regarding whether records are preserved or a person's "recollection" of events during the operation of the landfill. This is dramatically different from a tort or contract action in which the claim becomes known at a time when parties have an equal opportunity to gather and preserve evidence.

My belief is that, because of this unfairness and the extremely high stakes, the parties involved in Superfund cases have had to litigate more extensively and aggressively in an attempt to minimize the burden on individual companies. This explains why, by some accounts, 80% of each dollar spent on Superfund goes to litigation expenses and other transaction costs. A fairer system to allocate responsibilities for cleanup costs could significantly reduce transaction costs with no reduction in environmental protection.

These are just some of the concerns that underlie proposals to substitute for the present system a proportionate liability scheme with a publicly funded orphan share.

After nearly 20 years of living under such liability schemes, we have the opportunity to remove much of the inequity in the remediation programs

while still protecting environmental quality. Any changes that increase the fairness of the allocation of costs and the decision making in remedial selection will reduce the pressure to litigate these issues and may depoliticize them – thus freeing up resources to be used for the benefit of society.

5. Federal/State Relations

There is an increasing emphasis on states' rights and self-determination by states in the context of environmental protection. There have been proposals in Congress to delegate substantial discretion to the states in several (now federal) environmental programs including Superfund.

The perceived advantage is that the states are closer to the problem and more responsive to the constituencies. States are better able to conduct the programs in a way that meets the needs of their citizens. They may also be less bureaucratic and more responsive in individual cases.

I recognize the many benefits of the increasing importance of the state roles in environmental regulation. However, I offer a few words of caution so that, in the enthusiasm of the moment, we do not lose sight of other issues important

to environmental quality and the well being of the economy.

The first is maintaining consistency and predictability in environmental laws across the United States. The business that operates in only one state is rare. It is difficult for a business to comply with environmental requirements across the country if each state in which it has facilities has different standards and procedures. Already, it is difficult to keep up with the permutations in programs authorized under the Clean Water Act and RCRA. Further balkanization of environmental standards will increase the burden and cost on corporations with facilities in many locations across the nation.

This problem can be minimized so long as the federal programs retain the authority to define basic standards of protectiveness and the criteria to measure achievement of these standards. Federal programs should also mandate *minimum due process* requirements so that states will follow adequate decision making procedures.

Another issue is the question of experience and science. Not all states can afford to maintain the information base and keep up-to-date with technological developments in order to regu-

late effectively. The federal government can provide leadership and furnish useful scientific knowledge upon which states can rely.

What I hope for is a substantial reduction of federal bureaucracy, while those aspects of nationwide importance are retained and enhanced. I also hope that, with an emphasis on good science and good decision making, state programs will not look like smaller copies of what we have lived with at the federal level for so long.

In conclusion, there are many opportunities to enhance the protection of our environment and public health while reducing the burden on our society. This transition will require a dedication to quality: quality in science and quality in decision making. A significant part of this change is to make the process fairer, both substantively and procedurally.

Finally, any changes should involve an informed, honest, and rational debate about the environmental and health risks which we face and our commitment as a society to use our resources to reduce those risks. This is something we owe to ourselves, our children, and grandchildren. ♦

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W. Michael McCabe

FEDERAL ROLE IN ENVIRONMENTAL PROTECTION

I appreciate the opportunity to share my thoughts about the federal perspective on environmental protection. This always sounds as if I'm speaking from Mount Olympus. Let me assure you that I am not. As you know, I am a longstanding member of this community and a product, so to speak, of the industrial base which shaped our state. My father worked more than 30 years for DuPont, and we were transferred to Delaware in the early '60s. In addition, I consider myself a public servant, with the emphasis on service. I work for the Environmental Protection Agency, and its concern and my concern is how we can best protect public health and the environment while encouraging robust and sustainable economic growth.

The connection between these two goals is clear – if the environment is not healthy, then over the long run, the business climate and productivity will be harmed. We need only look at the long-range effect of environmental oblivion in the former Soviet Union and Eastern Bloc countries where short-term gain destroyed human health and the environment over the long run. The subject of this article is how we can balance these intertwined goals.

It is EPA's responsibility – in fact, our legal mandate – to enforce environmental laws both directly and in partnership with state environmental agencies. The state is responsible for the bulk of inspections, enforcements and compliance assistance that occur in the field. But it is important to note that even in delegated programs, both the state and federal governments have an important role to play in enforcement.

EPA has an enforcement toolbox that can be customized to encourage businesses to comply with environmental laws. These tools include: educating about how to comply with our regulations; encouraging pollution prevention; streamlining regulations; promoting innovation and regulatory flexibility; and of course, traditional enforcement. A strong federal enforcement presence signals in unmistakable language that compliance with environmental laws is important and bulwarks the effectiveness of all other programs that stop short of taking an enforcement action.

Study after study has shown that a clean environment is fully compatible with a competitive business market. In a 1995 Harvard Business Review article, Professor Michael Porter and economist Claas Van der Linde examined the pollution control efforts of 29 chemical plants in the wake of complying with waste reduction regulations promulgated in the 1980s – regulations that the chemical industry lobbyists fought. Of 181 waste prevention activities, just one increased in a production cost. Most required little or no capital outlay. The average effect on product yield was a seven percent increase. For every dollar spent complying, they saved \$3.49. In the final analysis, Porter and Van der Linde concluded that the chemical industry had benefited from pollution control regulations. The earth certainly benefited.

I know that "regulation" is often viewed as a dirty word – the subject of scorn and derision. Let me assure you that we are working to weed out bad regulations and to make the necessary ones user-friendly. How have we responded to the complaint that many of our environmental rules are confusing? We have established five compliance assistance centers.



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These centers will respond to the needs of small businesses for precise, easy-to-use information on ways to comply with environmental laws. Think of this as information tailored for small business. Additionally, EPA is working to increase the public's access to environmental information to the Internet. Our Region III web page had 81,780 hits in the month of November. And let me also assure you that we will continue to work to streamline our regulations where appropriate. We believe that

If the
environment
is not healthy,
then over the
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We need only
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knowledge of enforcement is critical to having a clean environment.

EPA is always willing to work with companies to protect our environment. This makes sense for future generations, and it makes sound business sense today. We understand that good faith efforts to find and fix environmental problems must be encouraged, so our compliance programs are evolving to better meet business needs. Several important programs to accomplish this are Project XL, Self Audit

Policy, Voluntary Remediation Policy, and Brownfields.

Project XL stands for excellence and leadership. This program offers regulatory flexibility in exchange for superior environmental results. Under this voluntary initiative, participating companies can propose plant-specific or industry-wide projects that produce lower-cost environmental results than would have occurred under strict compliance with existing regulations. Region III has established two innovative XL Projects with two chemical companies and is looking for more.

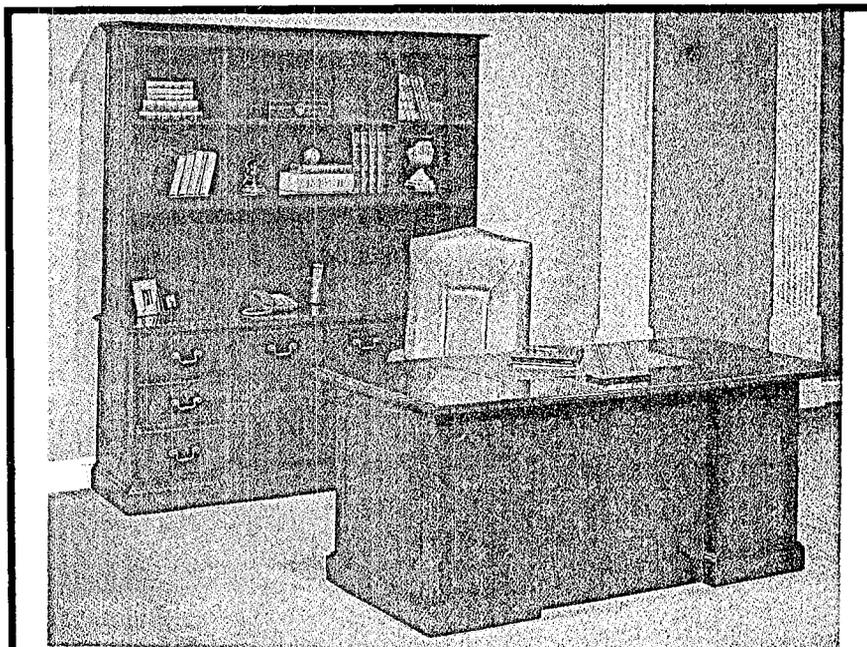
Brownfields is a good example of EPA's commitment to promoting smart

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partnership
agreements are
one method that
EPA uses to
focus scarce
state and federal
resources and
to measure
results in
areas needing
environmental
improvements.**

business opportunities. Brownfields are previously used industrial or commercial properties contaminated with chemical waste. EPA is working to encourage the reuse of these properties, rather than expanding into greenfields.

EPA's Self Audit Policy seeks to encourage companies to conduct environmental audits of their facilities and voluntarily disclose the findings. Region III has developed a protocol for processing self-disclosed violations in a timely and flexible manner which makes companies eligible for reduced or waived penalties.

The Common Sense Initiative is another new EPA approach to pollution



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prevention, which views environmental management by industry sector rather than by medium (air, water, land). The one participating sector - metal finishing - is a broad group that includes metal finishing companies, trade associations, suppliers, environmental and community groups, organized labor, and state and local governments. These groups have developed ambitious performance goals to promote pollution prevention and environmental management for their industries in exchange for permitting relief.

These programs are at the vanguard

**Those in the
private sector
who invest in
public health and
pollution control
have a right
to expect
enforcement
against unfair
competitors
who ignore
environmental
laws.**

of the next generation of environmental protection. But despite all the innovations, compliance assistance and other business-friendly approaches only work if there is a strong enforcement presence as incentive for businesses that don't want to make the investments necessary to control pollution.

In addition, we are developing new partnerships with states. Performance partnership agreements are one method that EPA uses to focus scarce state and federal resources and to measure results in areas needing environmental improvements. States have used these agreements to identify environmental priorities and target federal funds to track state-specific needs. One of the first performance partnership agreements in the

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country was developed and signed here in Delaware in 1995. We are also currently developing similar documents with Maryland and West Virginia.

What are the benefits of federal enforcement? Clearly, federal enforcement is a big stick to encourage compliance with environmental regulations. Second, it can level the playing field between competing industries. Those in the private sector who invest in public health and pollution control have a right to expect enforcement against unfair competitors who ignore environmental laws. Third, federal enforcement can reinforce environmental compliance where lack of state-enforcement encourages pollution havens, endangering citizens' health and natural resources.

There has been a lot of talk – and some misinformation – about overfiling. That's when the federal government files an enforcement case after the state has formally acted on the same violations. This rarely happens. In 1996, the actual number of overfilings was four cases nationwide. When viewed in the context of hundreds of filings annually, four is statistically insignificant. Locally, a highly publicized overfiling was the Smithfield Foods case in Virginia, which occurred because the Commonwealth of Virginia had not handled the case properly. Virginia, though aware of Smithfield's extensive history of non-compliance with the Clean Water Act, did not require the company – a big polluter – to install the necessary pollution control equipment. Allowing this company to ignore environmental regulations created an unfair advantage for Smithfield over competitors in other states that enforced environmental regulations.

I would like to leave you with a few thoughts. We believe that profitable business is and should be compatible with a clean environment. I note that while we apply our regulations consistently, we are flexible and innovative, and we are always willing to consider alternatives. Enforcement is serious and must be applied fairly and evenly. If federal enforcement is a "stick" and all of the innovative programs discussed above are "carrots," we have learned that without a "stick," it is difficult to get anyone to reach for the "carrot."

We must work together to ensure a clean environment for future generations. Our natural resources are limited. We must use them wisely. Together we uphold the environmental standards that will sustain the future. ♦

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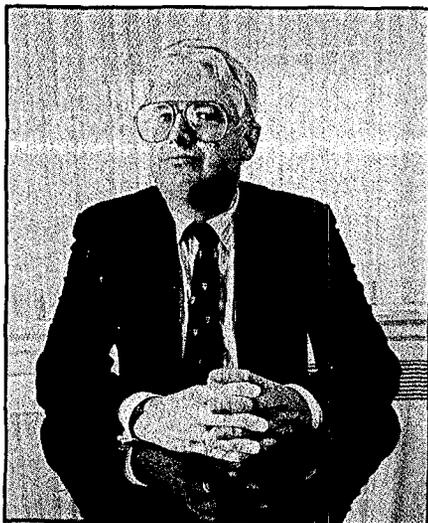
THE DARING NEW 1960'S

Vernon R. Proctor

LAW AND HISTORY. THE EVOLUTION OF THE AMERICAN LEGAL SYSTEM

By Anthony Chase
(New Press, 1997, 219 pp., \$25)

On a lark, I decided to review my complimentary copy of Mr. Chase's work. I did so because I went to law school at or about the time that the "critical legal studies" (CLS) movement was emerging, and I wanted to understand better the way that "crits" approached the law. The opening end flap describes the author as a "leading critical legal theorist" offering "a daring new interpretation of the evolution of the law." Mr. Chase, a law professor at Nova Southeastern University in Fort



Lauderdale, may or may not be a "leading" theorist, but I certainly did not find his "interpretation" particularly "daring" or "new": rather, the theories proceed in lockstep with others of his school.

Before I even read the introduction, I knew that I might be in for a wild ride. First, The New Press, the publisher, described itself as "a not-for-profit alternative to the large, commercial publishing houses currently dominating the book publishing industry."

(Maybe so, but it still wants 25 bucks for the book.) Second, in the acknowledgments, Mr. Chase disclosed that he spent his undergraduate years at the University of Wisconsin – Madison, a veritable petri dish for the American Left. Third, Chase relies heavily, if not worshipfully, upon the scholarship of such socialist icons as Herbert Marcuse, Barrington Moore, and Georg Lukacs (although he manfully tries to shoehorn Richard Posner and Adam Smith into his analysis). Why am I not surprised?

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country was developed and signed here in Delaware in 1995. We are also currently developing similar documents with Maryland and West Virginia.

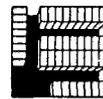
What are the benefits of federal enforcement? Clearly, federal enforcement is a big stick to encourage compliance with environmental regulations. Second, it can level the playing field between competing industries. Those in the private sector who invest in public health and pollution control have a right to expect enforcement against unfair competitors who ignore environmental laws. Third, federal enforcement can reinforce environmental compliance where lack of state enforcement encourages pollution havens, endangering citizens' health and natural resources.

There has been a lot of talk - and some misinformation - about overfiling. That's when the federal government files an enforcement case after the state has formally acted on the same violations. This rarely happens. In 1996, the actual number of overfilings was four cases nationwide. When viewed in the context of hundreds of filings annually, four is statistically insignificant. Locally, a highly publicized overfiling was the Smithfield Foods case in Virginia, which occurred because the Commonwealth of Virginia had not handled the case properly. Virginia, though aware of Smithfield's extensive history of non-compliance with the Clean Water Act, did not require the company - a big polluter - to install the necessary pollution control equipment. Allowing this company to ignore environmental regulations created an unfair advantage for Smithfield over competitors in other states that enforced environmental regulations.

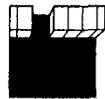
I would like to leave you with a few thoughts. We believe that profitable business is and should be compatible with a clean environment. I note that while we apply our regulations consistently, we are flexible and innovative, and we are always willing to consider alternatives. Enforcement is serious and must be applied fairly and evenly. If federal enforcement is a "stick" and all of the innovative programs discussed above are "carrots," we have learned that without a "stick," it is difficult to get anyone to reach for the "carrot."

We must work together to ensure a clean environment for future generations. Our natural resources are limited. We must use them wisely. Together we uphold the environmental standards that will sustain the future. ♦

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THE DARING NEW 1960'S

Vernon R. Proctor

LAW AND HISTORY. THE EVOLUTION OF THE AMERICAN LEGAL SYSTEM

By Anthony Chase
(New Press, 1997, 219 pp., \$25)

On a lark, I decided to review my complimentary copy of Mr. Chase's work. I did so because I went to law school at or about the time that the "critical legal studies" (CLS) movement was emerging, and I wanted to understand better the way that "crits" approached the law. The opening end flap describes the author as a "leading critical legal theorist" offering "a daring new interpretation of the evolution of the law." Mr. Chase, a law professor at Nova Southeastern University in Fort



Lauderdale, may or may not be a "leading" theorist, but I certainly did not find his "interpretation" particularly "daring" or "new": rather, the theories proceed in lockstep with others of his school.

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