

ENVIRONMENTAL LAW CHAPTER

FOR

WEST VIRGINIA STATE BAR'S

PRACTICE HANDBOOK

December 1, 2007

Linda S. Bouvette, Esquire

WEST VIRGINIA AMERICAN WATER COMPANY

1600 Pennsylvania Avenue

P.O. Box 1906

Charleston, West Virginia 25327

(304) 340-2007

Chapter 19

ENVIRONMENTAL LAW

Linda S. Bouvette

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. FEDERAL OVERSIGHT.....	2
III. WEST VIRGINIA ENVIRONMENTAL REGULATORY ORGANIZATION.....	3
A. Department of Environmental Protection.....	3
B. Appellate Bodies.....	5
C. Other State Agencies.....	5
D. The Private Real Property Protection Act, W. Va. Code §22-1A-1 <u>et seq.</u> (1994).....	7
IV. SOIL.....	7
1. Comprehensive Environmental Response, Compensation and Liability Act, as amended (CERCLA or Superfund), 42 U.S.C. § 9601 <u>et seq.</u> (1980); implemented by 40 C.F.R. Parts 279, 300-311	7
2. West Virginia Hazardous Waste Emergency Response Fund Act (“ERFA”) W. Va. Code §22-19-1 <u>et seq.</u> ; implemented by 33 C.S.R. 26.....	9
3. Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C. § 6901 <u>et seq.</u> (1976); implemented by 40 C.F.R. Parts 240-282	10
4. West Virginia Hazardous Waste Management Act (HWMA), W. Va. Code § 22-18-1 <u>et seq.</u> (1981); implemented by 33 C.S.R. 20.....	11
5. West Virginia Underground Storage Tank Act (USTA), W. Va. Code § 22-17-1 <u>et seq.</u> (1988); implemented by 33 C.S.R. 30	12
6. West Virginia Solid Waste Management Act (SWMA), W. Va. Code § 22-15-1 <u>et seq.</u> (1983); implemented by 33 C.S.R. 1	13
7. West Virginia Voluntary Remediation and Redevelopment Act (VRRRA), W. Va. Code §22-22-1 <u>et seq.</u> (1996); implemented by 60 C.R.S. 3-1 <u>et seq.</u>	13
V. WATER.....	15
1. Clean Water Act (CWA), 33 U.S.C. § 1251 <u>et seq.</u> (1977); implemented by 33 C.F.R. Parts 320-330, 335-338; 40 C.F.R. Parts 104-140, 230-233, 401-471	15
2. West Virginia Water Pollution Control Act (WPCA), W. Va. Code § 22-11-1 <u>et seq.</u> (1964); implemented by 33 C.S.R. 23; 47 C.S.R. 10	16
3. West Virginia Groundwater Protection Act (“GPA”), W. Va. Code §22-12-1 <u>et seq.</u> (1994); implemented by 47 C.S.R. 58.....	20
4. Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f <u>et seq.</u> (1974); implemented by 40 C.F.R. Parts 141-149	21
5. Public Water Systems, W. Va. Code § 16-1-9a (1968); implemented by 64 C.S.R. 3, 4	22
6. West Virginia Dam Control and Safety Act, W. Va. Code § 22-14-1 <u>et seq.</u> (1994); implemented by 47 C.S.R. 34.....	22
7. Rivers and Harbors Act, 33 U.S.C. § 401 <u>et seq.</u> (1973); implemented by 33 C.F.R. Parts 320-330	22
8. West Virginia Streams	23
VI. AIR.....	23
1. Clean Air Act (CAA), 42 U.S.C. § 7401 <u>et seq.</u> (1970); implemented by 40 C.F.R. Parts 50-88	23
2. West Virginia Air Pollution Control Act, (APCA) W. Va. Code § 22-5-1 <u>et seq.</u> (1961); implemented by 45 C.S.R. 1 to 32.....	24

VII. CHEMICAL REGULATION	25
1. Toxic Substance Control Act (TSCA), 15 U.S.C. § 2601 <u>et seq.</u> (1976); implemented by 40 C.F.R. Parts 700-799	25
2. Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 <u>et seq.</u> (1972); implemented by 40 C.F.R. Parts 152-186.....	26
3. West Virginia Pesticide Control Act (PCA), W. Va. Code § 19-16A-1 <u>et seq.</u> (1990); implemented by 61 C.S.R. 12 through 12I	26
4. Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11001 <u>et seq.</u> (1986); implemented by 40 C.F.R. Parts 350, 355, 370, 372.....	27
5. West Virginia Emergency Response and Community Right-to-Know Act (ERCRA), W. Va. Code § 15-5A-1 <u>et seq.</u> (1989); Implemented by 87 C.S.R. 3.....	27
6. Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 <u>et seq.</u> (1970); implemented by 29 C.F.R. Parts 1900-1928	28
7. West Virginia Occupational Safety and Health Act (OSHA), W. Va. Code § 21-3A-1 <u>et seq.</u> (1987); implemented by 42 C.S.R. 15.....	28
8. Hazardous Chemical Substances, W. Va. Code § 21-3-18 (1981); implemented by 42 C.S.R. 4.....	28
9. Hazardous Materials Transportation Act (HMTA), 49 U.S.C. § 5101 <u>et seq.</u> (1975); implemented by 33 C.F.R. Part 156; 46 C.F.R. Parts 30, 38, 147, 148; 49 C.F.R. Part 171	28
10. Hazardous Materials Transportation in West Virginia	29
VIII. ENERGY	29
A. Energy Supply and Environmental Coordination Act (ESECA) of 1974, 5 U.S.C. §§ 791-798; 42 U.S.C. § 1857	29
B. Coal.....	30
1. Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1201 <u>et seq.</u> (1977); implemented by 30 C.F.R. Parts 700-955.....	30
2. West Virginia Surface Coal Mining and Reclamation Act (SCMRA), W. Va. Code § 22-3-1 <u>et seq.</u> (1985); implemented by 38 C.S.R. 2	31
3. West Virginia Abandoned Mine Lands and Reclamation Act (AMLRA), W. Va. Code § 22-2-1 <u>et seq.</u> (1985); implemented by 38 C.S.R. 2D	32
C. Oil and Gas	32
1. Natural Gas Policy Act (NGPA), 15 U.S.C. § 3301 <u>et seq.</u> (1978); implemented by 18 C.F.R. Part 280	32
2. Oil and Gas Laws, W. Va. Code § 22-6-1 <u>et seq.</u> (1985); implemented by 38 C.S.R. 16 to 22	33
3. CoalBed Methane Wells and Units, W.Va. Code §22-20-1 <u>et seq.</u> (1994); implemented by 35 CSR § 3-1 <u>et seq.</u>	33
IX. NOISE	33
A. General.....	33
B. Federal	34
1. Noise Control Act (NCA), 42 U.S.C. § 4901 <u>et seq.</u> (1972); implemented by 24 C.F.R. Part 51	34
X. PRESERVATION	35
1. The Endangered Species Act (ESA), 16 U.S.C. § 1531 <u>et seq.</u> (1973); implemented by 50 C.F.R. Parts 400 to 453.....	35

2.	National Historic Preservation Act (NHPA), 16 U.S.C. § 470 <u>et seq.</u> (1966); implemented by 36 C.F.R. Parts 800 and 1295	35
3.	Wild and Scenic Rivers Act, 16 U.S.C. § 1271 <u>et seq.</u> (1972); implemented by President's Environmental Message 8-2-29; CBQ Memorandum 8-10-80	35
4.	West Virginia Natural Streams Preservation Act, W. Va. Code § 22-13-1 <u>et seq.</u> (1969); no implementing rules on file	35
5.	Forest and Wildlife Areas, W. Va. Code § 19-1A-3 <u>et seq.</u> (1961): implemented by 58 C.S.R. 6.....	36
6.	Protection of Historic and Prehistoric Sites, W. Va. Code § 29-1-8b (1977): implemented by 82 C.S.R. 3	36
7.	National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 <u>et seq.</u> (1969); implemented by 40 C.F.R. Parts 1500-1508	36
	XI. REPORTING REQUIREMENTS.....	37
A.	General.....	37
B.	Reports.....	37
1.	Oil	37
2.	Pollutants into West Virginia Waters	38
3.	Hazardous Substances	38
4.	Hazardous Waste	39
5.	Hazardous Materials	39
6.	Underground Storage Tanks (USTs)	40
7.	Toxic Air Releases.....	40
8.	Coal Mining and Industrial Accident Rapid Response System, SB 247 (passed 1/26/06)	41
	XII. DUE DILIGENCE IN REAL PROPERTY TRANSACTIONS.....	41
A.	Definition.....	41
B.	Sellers	41
C.	Purchasers and Lenders	43
	XIII. CONCLUSION.....	45
	EXHIBIT "A" ENVIRONMENTAL QUESTIONNAIRE	47

I. INTRODUCTION

This chapter provides the general practitioner an overview of state and federal environmental laws, including a special emphasis on those laws that may impact real property transactions.

Most environmental laws attempt to balance the protection of the environment with society's needs for energy, industrial products, agriculture and recreation. Environmental law is also different from other fields of law in that it has such an enormous scope. It covers the spectrum from control of contaminants to preservation of historic places and endangered species. It is also to a large extent based upon natural and physical sciences rather than social policies or value judgments. Therefore, in most instances where an environmental law issue arises, the legal practitioner will need scientific and/or technical assistance.

In general, federal agencies have oversight authority and have rights to review individual permitting activities and to audit the overall nature of the delegated environmental programs being administered by the states, among them the State of West Virginia. Nonetheless, environmental issues frequently arise under State law. Indeed, before enactment of the familiar federal programs, states enacted laws and regulations for the control of pollution. In 1872, for example, the West Virginia Legislature enacted a law prohibiting the pollution of domestic water. While many State laws are based on federal laws and function as federally authorized State programs, the basis for State environmental laws lies in the States' police power, the inherent authority of the sovereign to protect the health and welfare of its citizens. For this reason, State laws may impose more stringent or additional controls for environmental protection. Thus, it is necessary to consider environmental law as a combination of federal and state statutes, regulations, standards, goals, requirements, limitations and enforcement authorities.

Both federal and state environmental laws contain substantial civil and criminal enforcement provisions. Also significant is that, in the absence of federal and state statutes creating private causes of action, many suits involving damage by hazardous substances are brought under common law tort principles. For example, individuals whose property or water sources have been contaminated by substance migration from an adjacent chemical plant may

bring an action for personal injuries or property damage against the plant owner. Also, regulatory agencies often use common law action as well as statutory authority to recover the cleanup costs of hazardous substance contamination of public or private property.

The common law theories most commonly asserted by plaintiffs in environmental tort cases are nuisance, trespass, negligence, *res ipsa loquitur*, strict liability and restitution. Liability for trespass or nuisance involves the issue of whether a defendant has invaded or interfered with a plaintiff's property interest. In the environmental context, trespass and nuisance actions usually concern damages arising from water or soil pollution. Overall, environmental tort cases typically result in protracted, costly litigation, often with millions of dollars at stake. Like statutory actions involving hazardous contamination, environmental tort claims raise novel and difficult legal and scientific issues which keep the law in this area in a state of transition.

Essentially, there are three general sources of environmental liability:

- (1) liability for costs incurred to clean up contaminated property;
- (2) liability for toxic torts, such as injury to persons or damages to property, caused by contamination of property or exposure to hazardous substances; and
- (3) liability for violations of federal, state and local environmental laws, permits and ordinances.

This chapter will address the major federal and state laws in the context of the mediums or subjects they regulate. Each of these environmental areas is subject to extensive and intertwined federal, state and local statutes, regulations and policy directives. Accordingly, this chapter can only serve as an introduction to the perplexing discipline of environmental law and as a starting point for the thorough research necessary to render proper legal advice.

II. FEDERAL OVERSIGHT

Federal agencies directly manage federal environmental programs in West Virginia and also monitor and supervise regulatory programs that have been delegated to West Virginia for implementation.

The United States Environmental Protection Agency (“EPA”) administers the following federal programs:

- i. Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. §9601 et seq.;
- ii. Toxic Substances Control Act (“TSCA”), 15 U.S.C. §2601 et seq. (PCBs are a major concern under this Act).

The EPA has oversight of the following regulatory programs delegated to West Virginia:

1. Clean Air Act (“CAA”), 42 U.S.C. §7401 et seq.;
2. Clean Water Act (“CWA”), 33 U.S.C. §1251 et seq. (NPDES program);
3. Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §6901 et seq.; (hazardous waste management);
4. Safe Drinking Water Act (“SDWA”), 42 U.S.C. §300f et seq. (underground injection control program).

The United States Department of Interior administers the Endangered Species Act, 16 U.S.C. §1531 et seq., and its Office of Surface Mining (“OSM”) has oversight of the Surface Mining Control and Reclamation Act 30 U.S.C. §1201 et seq., the implementation of which has been delegated to West Virginia.

The United States Army Corps of Engineers administers the Rivers and Harbors Act, 33 U.S.C. §10, for projects impacting the navigable waters of the United States. It also regulates the dredging and filling of wetlands pursuant to the Clean Water Act, 33 U.S.C. §1344.

III. WEST VIRGINIA ENVIRONMENTAL REGULATORY ORGANIZATION

A. Department of Environmental Protection.

The West Virginia Department of Environmental Protection (“DEP”) is the primary State agency responsible for the management and administration of West Virginia’s

environmental programs. Since it was created in 1991, DEP has been undergoing considerable reorganization. It originally was a subordinate organization of the Department of Commerce, Labor and Environmental Resources. However, in July 1994, that Department was abolished. Three bureaus - Commerce, Employment Programs and Environment - were established directly under the Governor. The DEP then known as the Division of Environmental Protection was one division in the Bureau of Environment, along with the Environmental Quality Board, the Surface Mine Board, the Air Quality Board, the Solid Waste Management Board, the Oil & Gas Inspector's Examining Board and the Shallow Gas Well Review Board.

In 2001, the Bureau of Environment was abolished and the Division of Environmental Protection became the Department of Environmental Protection. Its Director became the Secretary of the new department, answering directly to the Governor. The various boards listed above were transferred to the new department.

DEP is comprised of eight subordinate offices and divisions:

1. The Office of Abandoned Mine Lands and Reclamation manages the reclamation of lands and water affected by mining prior to passage of the Surface Mining Control and Reclamation Act in 1977.
2. The Division of Mining and Reclamation is charged with managing the surface mining and reclamation programs for coal and non-coal mines. It has the authority and responsibility for issuing mining permits and for inspection of sites. It also administers the NPDES program for coal mining operations, the Groundwater Protection Act, and the Dam Control Act.
3. The Division of Air Quality is responsible for permitting, enforcement actions and all other functions pertaining to air quality management.
4. The Office of Oil and Gas monitors and regulates oil and gas exploration, drilling and storage in West Virginia. It administers the registration and bonding of all oil and gas well operators and issues permits for the drilling, plugging and abandonment of wells.

5. The Division of Water and Waste Management is responsible for administering all State statutes pertaining to water quality, including groundwater and all State statutes pertaining to hazardous waste, solid waste and underground storage tank programs in West Virginia. It also has the responsibility under agreements with EPA to carry out the state's responsibilities under CERCLA to perform preliminary assessments for potential Superfund sites, and other responsibilities such as the reporting of hazardous waste generation and final disposition.

6. Division of Land Restoration is responsible for administering all State statutes pertaining to the remediation of land contaminated by industrial and commercial activity and/or disturbed by natural resource extraction.

7. The Office of Administration carries out personnel, property management, administrative and financial management functions for DEP.

8. The Information Technology Office operates DEP's automated data processing systems.

9. The Office of Explosives and Blasting is responsible for administering and enforcing the blasting laws related to surface mining within the state of West Virginia.

B. Appellate Bodies

1. The Environmental Quality Board of the DEP serves as the appellate authority in regard to the following programs:

- a. Water Pollution Control Act, W. Va. Code §22-11-1 et seq.;
- b. Hazardous Waste Management Act, W. Va. Code §22-18-1 et seq.;
- c. Groundwater Protection Act, W. Va. Code §22-12-1 et seq.;
- d. Solid Waste Management Act, W. Va. Code §22-15-1 et seq.;
- e. Underground Storage Tank Act, W. Va. Code §22-17-1 et seq.;
- f. Natural Streams Preservation Act, W. Va. Code §22-13-1 et seq.

2. The Air Quality Board ("AQB") of the DEP, formerly the Air Pollution Control Commission, has the authority to act upon appeals filed by persons who are aggrieved or

adversely affected by actions of the Director of the Division of Air Quality. Unlike the old Air Pollution Control Commission, the AQB has no rulemaking authority.

3. The Surface Mine Board of the DEP ("SMB"), formerly the Reclamation Board of Review, has responsibility for hearing appeals filed by persons who are aggrieved or adversely affected by actions of the DEP Secretary or Division of Mining and Reclamation Director.

C. Other State Agencies

1. Division of Natural Resources ("DNR"), now part of the Department of Commerce, Labor and Natural Resources, previously had administered many environmental regulatory programs. However, in the course of reorganizations of DEP, many of DNR's functions have been transferred to DEP. The principle functions retained by DNR include the management of the State's parks, wildlife and fish resources and the administration of the Public Land Corporation in regard to the issuance of permits and control of activities impacting on stream beds of State waters.

2. The Department of Health and Human Resources regulates environmental programs concerning medical waste, low level nuclear waste, potable water systems, sewage treatment systems, septic tanks and well head protection areas.

3. The Department of Agriculture regulates pesticides and fertilizers in the State.

4. The Division of Highways of the Department of Transportation is involved in environmental management through its requirements for the transportation of hazardous waste and the permitting of salvage yards.

5. The Public Service Commission regulates and makes determinations concerning Certificates of Convenience and Necessity in regard to commercial landfills. It is also involved in the regulation of hazardous and solid waste and transportation by regulated carriers.

6. The Commercial Hazardous Waste Management Facilities Siting Board is responsible for processing applications for certificates of site approval for commercial hazardous waste facilities in the State.

7. The Solid Waste Management Board performs the planning function for solid waste in conjunction with county and regional solid waste authorities. This Board is charged with the responsibility for development of a state-wide solid waste plan. It has the authority to issue grants to solid waste authorities and bonds for construction of solid waste facilities.

8. The Oil and Gas Conservation Commission was under the former Bureau of Environment and had the responsibility for the regulation of the spacing of deep oil and gas wells to provide for the most effective and efficient oil and gas production. It was abolished July 1, 2001.

9. The Shallow Gas Well Review Board has the function of processing petitions and rejections for the relocation, postponement and denial of drilling permits for oil and gas wells located over coal seams.

10. The Oil and Gas Inspectors Examining Board has the responsibility for administering tests for oil and gas inspectors and hearing appeals of inspectors pertaining to disciplinary actions taken by the OOG Chief.

D. Private Real Property Protection Act, W. Va. Code §22-1A-1 et seq. (1994)

This Act establishes a process by which DEP evaluates how its potential administrative actions may affect privately owned real property, although it does not expand the constitutional protections of private real estate rights. Basically, DEP is required to conduct an assessment of health and safety risks posed by the property, a cost-benefit analysis of DEP protective action and an evaluation of feasible alternatives.

In cases of emergency, the assessment may be delayed until the emergency response is completed. Also, if DEP requires that a buffer zone be enacted on private real

property, DEP must prepare a report which identifies the public purpose or policy being served and how the buffer promotes the purpose or policy.

The remedy provision of the Act provides that a real property owner may be awarded attorneys' fees and costs, as well as compensation, if a court determines that DEP failed to conduct the assessment described above, or if DEP conducted the assessment and wrongfully failed to conclude that its action was "reasonably likely to require compensation to be paid to the private real property owner."

IV. SOIL

1. Comprehensive Environmental Response, Compensation and Liability Act, as amended (CERCLA or Superfund), 42 U.S.C. § 9601 et seq. (1980); implemented by 40 C.F.R. Parts 279, 300-311

a. Congress enacted CERCLA on December 11, 1980. This law created a tax on the chemical and petroleum industries and provided broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. Over five years, \$1.6 billion was collected and the tax went to a trust fund for cleaning up abandoned or uncontrolled hazardous waste sites. CERCLA:

- established prohibitions and requirements concerning closed and abandoned hazardous waste sites;
- provided for liability of persons responsible for releases of hazardous waste at these sites; and
- established a trust fund to provide for cleanup when no responsible party could be identified.

The law authorizes two kinds of response actions:

- Short-term removals, where actions may be taken to address releases or threatened releases requiring prompt response.
- Long-term remedial response actions, that permanently and significantly reduce the dangers associated with releases or threats of releases of hazardous substances that are serious, but not immediately life threatening. These actions can be conducted only at sites listed on EPA's National Priorities List (NPL).

The EPA can use the “Superfund” to finance the cleanup of such sites, and then seek reimbursement from the parties responsible for the contamination. Alternatively, the EPA has authority to issue administrative orders to “potential responsible parties” (PRPs) to require the PRPs to conduct the cleanup at their own expense.

b. Certainly, some of the most potentially devastating environmental liability risks arise under CERCLA. This statute may impose retroactive civil liability for cleanup costs on all past and present owners and operators associated with a hazardous waste site. These parties are liable for all costs of remedial action, any other necessary response costs and damages for injury to natural resources. The liability of these parties is joint and several, i.e., any one responsible party can be held liable for all the expenses related to a particular site. Responsible parties are subject to strict liability, without regard to fault. Thus, the buyer of the property, or a person who contributed only a portion of the hazardous waste found at the site, could be held liable for the entire cost of a cleanup.

c. If a release or threatened release of a hazardous substance creates an imminent and substantial danger to public health or to the environment, the federal government can obtain an injunction requiring that action be taken to abate the danger. The EPA can also issue administrative orders requiring abatement actions in such circumstances.

d. CERCLA does provide a defense to cleanup cost liability, most commonly called the “innocent landowner defense”. To prevail with this defense, the landowner must demonstrate that at the time the property was acquired, the landowner did not know nor had no reason to know that the property contained hazardous substances. Furthermore, to establish the “no reason to know” element, the landowner must have undertaken at the time of acquisition “all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.” Obviously, what constitutes an appropriate inquiry will turn on the facts of each case. But, the present practice for commercial property is to have an environmental assessment performed whenever there are indicators of potential hazardous substance contamination. The extent of the assessment, of course, will depend upon the degree and number of indicators.

e. Whenever the United States Government incurs costs in responding under Superfund, a federal lien is imposed on the property in question. Pursuant to section 107(d) of Superfund, if the state has not by law designated an office for the receipt of such notices of lien, the notice of lien shall be filed in the office of the Clerk of the United States District Court for the district in which the real property is located.

f. The West Virginia Superfund Lien Recordation Act, W. Va. Code § 38-10D-1, effective June 1, 1989, designated the Office of the Clerk of the County Commission for the county in which the real property is located as the office for the filing of such notices of Superfund liens. The Clerk is required to record such notice of lien in the Federal Tax Lien Docket. The lien is to be indexed in the name of the person against whom the lien is claimed.

g. Releases of hazardous substances must be reported to the National Response Center if the “reportable quantity” exceeds the stated amount set forth in the regulations. Releases may also have to be reported to state and local agencies under other environmental statutes.

2. West Virginia Hazardous Waste Emergency Response Fund Act (“ERFA”) W. Va. Code §22-19-1 et seq.; implemented by 33 C.S.R. 26

ERFA has the purpose of matching CERCLA funding for cleanup of hazardous waste emergencies. ERFA recovers monies for its fund by assessing hazardous waste generator fees on annual tonnages. The Act was amended in 2000 to cover releases of both hazardous wastes and hazardous substances. ERFA is to be used to respond to hazardous waste emergencies and releases of hazardous substances when the director determines that immediate action may prevent or mitigate significant risk of harm to human health, safety or the environment.

3. Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C. § 6901 et seq. (1976); implemented by 40 C.F.R. Parts 240-282

a. RCRA regulates the ongoing generation, transportation, treatment, storage and disposal of hazardous wastes through a permit and “cradle to grave” management system. RCRA also established a program for the management of nonhazardous solid wastes.

b. Using RCRA, the EPA may require that prior contamination be cleaned up as a prerequisite to the issuance of a hazardous waste permit. The EPA also has authority under RCRA to order the owner or operator to conduct monitoring, testing and analysis of hazardous wastes at an operating facility or site when it believes that the existence or release of such wastes “may” present a substantial hazard to human health or the environment. If the facility or site is “not in operation” and the current owner or operator cannot reasonably be expected to know about hazardous waste at the site, the EPA then must go to the most recent owner or operator with such knowledge. RCRA also requires that hazardous wastes be disposed of in prescribed methods through performance standards for operating disposal facilities.

c. If the EPA finds that a present or past handling of hazardous or any solid waste (includes liquids and gases) may present an “imminent and substantial endangerment” to health or the environment, then it may either get a court order or issue its own administrative order for cleanup and other protective measures. The orders may be issued to any past or present owner or operator who has contributed or is contributing to the endangerment.

d. Wastes which are not presently considered by the EPA to be hazardous may be considered as hazardous wastes in the future. For instance, solid waste from the extraction, beneficiation and processing of ores and minerals (including coal) is currently excluded from regulation as a hazardous waste.

e. The 1984 amendments to RCRA created a new section, Subtitle I, to deal with the problems of leaking underground storage tanks (USTs). This law and its implementing regulations established requirements for installation, release detection, spill and overflow prevention, corrosion prevention, reporting and record keeping. Requirements are to be phased in based on the ages of existing USTs. If the USTs are not upgraded by the applicable deadline, they must be permanently closed. Significantly, this regulatory program covers USTs containing petroleum, a substance which is not considered to be a hazardous waste under RCRA or a hazardous substance under CERCLA. The UST requirements contain a separate enforcement order provision which authorizes the EPA to issue an administrative order requiring compliance with any provision of the UST program within a reasonable specified time. The EPA may also issue an order directing an owner or operator to clean up releases of petroleum from leaking

tanks. A considerable risk to a buyer of land containing abandoned and/or closed USTs exists due to the authority of EPA and the authorized State agency to require the owner to assess the excavation zone and go through costly closure procedures “if releases from the USTs may, in the judgment of the implementing agency, pose a threat to human health and the environment.”

f. Subtitle I also requires tank owners and operators to demonstrate their financial ability to take corrective action and compensate third parties for bodily injury and property damage caused by releases arising from tank operations. The financial responsibility may be demonstrated by insurance, a guarantee, a surety bond, a letter of credit, financial test of self-insurance, trust fund, or a State fund or a combination of two or more. In general, the coverage must not be less than \$1,000,000 for each occurrence.

4. West Virginia Hazardous Waste Management Act (HWMA), W. Va. Code § 22-18-1 et seq. (1981); implemented by 33 C.S.R. 20

a. The HWMA embodies and enforces the federal RCRA for hazardous waste management. The Act also regulates infectious wastes as hazardous wastes. The statute provides DEP with authority over the state’s hazardous waste program and to assume regulatory power granted by federal programs such as CERCLA and RCRA. In 1994, the amended state hazardous waste management regulations incorporated by reference the federal hazardous waste regulations, with a few limited exceptions. The HWMA imposes responsibility upon the current owner of a site to conduct monitoring, testing, analyses and reports regardless of whether the current owner caused or contributed to the release or potential release of a hazardous waste, unless the owner could not be reasonably expected to have actual knowledge of the presence of hazardous waste or of its potential for release. If ordered, the monitoring and analyses may be very costly and could be required over several years.

b. The criminal and civil penalty provisions of the HWMA apply to ongoing treatment, storage or disposal of hazardous waste, rather than to past acts. However, the statute enables the State to commence an action in circuit court to restrain any person from contributing to the handling, storage, transportation, treatment or disposal of hazardous waste, or to issue orders as necessary to protect public health and the environment. Therefore, there is a risk that

the new owner, by failing to abate the contamination from a disposal area, would be held liable as contributing to the disposal.

c. The HWMA requires the seller or lessor of real property to disclose in the instrument of conveyance or lease the fact that the property or its subsurface was used for the storage, treatment or disposal of hazardous waste during the seller's tenure or during a previous tenure if the seller has actual knowledge of such use. DEP regulations interpreting this statute require deed and lease disclosure that the property was used as a permitted hazardous waste treatment, storage or disposal facility. Likewise, if the buyer intends to use the property as a permitted facility for storage, treatment or disposal of hazardous waste, the buyer is required at the time of conveyance or within 30 days prior thereto to provide the seller with specific information concerning this usage.

d. The HWMA requirements are supplemented by DEP regulations which require the submission to both the local zoning authority and the Chief of the Office of Waste Management of a survey plot showing specific locations of waste disposal and the type, location and quantity of hazardous waste disposed therein.

5. West Virginia Underground Storage Tank Act (USTA), W. Va. Code § 22-17-1 et seq. (1988); implemented by 33 C.S.R. 30

a. The UST Act authorizes DEP to regulate USTs. The Act enforces the federal RCRA and provides for specified installation, corrosion protection, leak detection and monitoring of all USTs and requires UST owners and operators to demonstrate financial responsibility. DEP also can require the owner or operator of a UST to take corrective action with respect to any releases of petroleum from the UST if the DEP determines such action is necessary to protect human health and the environment. It is unsettled as to whether a current owner would be held responsible for releases occurring before his ownership. The risk is high; however, that DEP would issue the order to the current owner and leave it up to the current owner to seek reimbursement from the prior owner or operator.

b. The UST Act requires the seller of real property to disclose in the instrument of conveyance the fact that such property contains a UST. This requirement only

applies to a seller who owned the property at the time the UST was actively used or sellers with actual knowledge of the existence of a UST.

6. West Virginia Solid Waste Management Act (SWMA), W. Va. Code § 22-15-1 et seq. (1983); implemented by 33 C.S.R. 1

a. The SWMA transferred jurisdiction over the management of solid waste from the Department of Health to DEP (at that time DNR), and provided a comprehensive program for managing solid nonhazardous waste which the Legislature declared was a public nuisance and danger to the people.

b. In 1988, extensive revisions were made to the Act providing for the permitting of landfill operations, waste disposal fees and civil and criminal penalties for unauthorized dumping by the passage of the Comprehensive Solid Waste Act. In fact, this Act made private open dumps illegal and required county governments to devise solid waste management plans.

c. The 1988 revisions also added permit approval requirements for commercial solid waste disposal facilities based on a classification system and imposed assessment fees. The DNR director also was required to issue regulations to encourage recycling.

d. SWMA requires site approval permits for all solid waste disposal facilities. Requirements were also established for bonding, establishment, construction, installation, operation and abandonment of any facility that processes, recycles or disposes of solid waste. A closure assistance program also was created to provide funds for the closure of landfills not in compliance with regulatory requirements by specified statutory deadlines.

7. West Virginia Voluntary Remediation and Redevelopment Act (VRRRA), W. Va. Code §22-22-1 et seq. (1996); implemented by 60 C.R.S. 3-1 et seq.

a. The VRRRA was enacted in 1996 to promote the remediation and development of contaminated or potentially contaminated properties meeting the definition of “brownfield.” In order to qualify as a brownfield, a site has to be an industrial or commercial property which is abandoned or not being actively used by the owner as of July 1, 1996, and

cannot be the subject of an enforcement order of a federal or state environmental or regulatory authority. Those sites that meet the definition of brownfield are eligible for low cost loans to assist with the expense of site assessment and remediation.

b. This program is based upon the Legislature's findings that abandonment or under use of contaminated or potentially contaminated industrial sites results in inefficient use of public facilities and services and increases the pressure for development of uncontaminated pristine land. Since existing industrial areas frequently have transportation networks, utilities and an existing infrastructure, it can be less costly to redevelop existing industrial areas than to relocate infrastructure for industrial areas at pristine sites. The Legislature further found that the existing legal structure creates uncertainty regarding the legal effect of remediation on liability, and this uncertainty served as a further disincentive to productive redevelopment of brownfields. The VRRRA program provides financial incentives to entice investment in brownfield sites. It establishes limitations on liability under environmental laws for those persons who remediate sites in accordance with the applicable standards and provides a fund to assist entities in meeting the financial requirements for remediation. The program also provides limited confidentiality in the form of protection of trade secrets.

c. The program has two procedural tracks. The first track is for the applicant who is a person who did not cause or contribute to the contamination of the property. The second track applies to a person who did cause or contribute to the contamination of the property so long as the released contamination which is subject to remediation is not created through gross negligence or willful misconduct.

d. An individual with contaminated property will enter into a Voluntary Remediation Agreement ("VRA") with the WVDEP. During the time period the Agreement is in effect, no enforcement action can be taken against the party. The VRA sets forth the parties' agreement as to remediation of a particular site, identifying the areas of contamination, the level of contamination and the remediation methods. Any remediation work must be done under the supervision of a Voluntary Remediation Specialist licensed by the WVDEP.

e. Remediation standards provide for the adequate protection of human health and the environment relative to the current and reasonably anticipated future uses of the

site while incorporating site-related information, to the extent practicable, which may allow a more cost-effective site remediation based on identified site risks. De Minimis standards for both industrial and residential use are provided. Once those levels are achieved, a certificate of completion may be issued by the WVDEP.

f. Once all the work agreed to be performed in the Agreement has been completed and the levels of contaminants are below the De Minimis levels set forth in the regulation, a Certificate of Completion may be issued. The certificate relieves the individual of liability to the state for the release that caused the contamination that was the subject of the voluntary remediation, and in most circumstances, the state may not institute any civil, criminal or administrative action arising from the release and resulting contamination. Further, the individual shall not be subject to citizens suits or contribution actions with regard to the contamination that was the subject of the VRA.

g. Any limitation on the use of the property that is required in order to meet applicable standards is contained in a land use covenant recorded in the county in which the property is located. The use restrictions may include prohibiting the use of the property for residential purposes or imposing maintenance of engineering or institutional controls. The covenant will state whether residential or non-residential exposure assumptions were used to comply with the site-specific remediation standard. The VRA places a duty on county assessors in that if an assessor of any county becomes aware of a change in use of the remediated property from non-residential to residential, the assessor has a duty to check the land record of the county to ascertain if the land-use covenant appears to have been violated. Should it appear that a violation has occurred; the assessor is required to notify the DEP director of the suspected violation. Also, if any citizen becomes aware of a change of property use from non-residential to residential, the citizen may check the land record of the county to ascertain if the land-use covenant appears to have been violated and may notify the DEP director in writing. The DEP director is then required to investigate and proceed with any necessary enforcement action.

V. WATER

1. Clean Water Act (CWA), 33 U.S.C. § 1251 et seq. (1977); implemented by 33 C.F.R. Parts 320-330, 335-338; 40 C.F.R. Parts 104-140, 230-233, 401-471

a. The foundation for the control of water pollution was put in place in 1972 when Congress passed the Federal Water Pollution Control Act (FWPCA). In 1977, Congress renamed the FWPCA the Clean Water Act (CWA) and set the basic structure for regulating the discharge of toxic water pollutants into the waters of the United States. The CWA makes it unlawful for any person to discharge any pollutant from a point source into navigable waters without a National Pollution Discharge Elimination System (NPDES) permit. Later amendments to the CWA provided permitting requirements for storm water discharges. The CWA also provided the EPA with the authority to set technology-based effluent standards for industry and water quality-based standards for all contaminants. In 1987, Congress passed extensive amendments to improve water quality, to provide for citizen suits and to provide funding for sewage treatment plants.

b. The CWA provides another area of inherited liability for the buyer of land. The landowner may be liable for cleanup costs for discharges of oil or hazardous substances into the navigable waters of the United States when such discharges are not made pursuant to a NPDES permit. Courts have interpreted the term “navigable waters of the United States” to mean any waterway within the United States. (However, the comparable West Virginia Act, discussed below, expressly covers groundwater.)

c. Under the CWA, owners and operators are specifically liable for civil penalties as well as the government’s actual costs of pollution removal. The CWA imposes liability regardless of fault for cleanup costs up to a limit of \$50,000,000 for onshore discharges. Also, a number of courts, by relying on common law rules of liability, have determined that owners and operators can be held jointly and severally liable for such costs, resulting in one individual being required to pay the entire cleanup cost.

d. “Wetlands” also are protected from disruption or destruction by a special permitting system under the CWA. A permit must be obtained from the U.S. Army Corps of Engineers before discharging any dredge or fill material into the waters of the United States. The State of West Virginia has only approximately 35 square miles of wetlands, so a permit to dredge or fill any of these wetlands may be especially difficult to obtain.

2. West Virginia Water Pollution Control Act (WPCA), W. Va. Code § 22-11-1 et seq. (1964); implemented by 33 C.S.R. 23; 47 C.S.R. 10

a. In 1964, the State Legislature enacted the WPCA to maintain the water quality of the state, to implement the requirements of the federal CWA and to be delegated primary authority to administer and enforce the CWA. The DNR (now DEP) was provided with discharge permitting and management authority.

b. The WPCA, like the CWA, requires the regulating Agency to develop water quality standards for the State, Waterways and effluent limitations to achieve or maintain those standards. Originally the Water Resources Board (now the Environmental Quality Board) was given the authority to establish water standards consistent with federal laws and regulations. In 2005, the authority to establish water standards was transferred to DEP. The principle means for enforcing effluent limitations is through the National Pollutant Discharge Eliminations System (NPDES) permit process. An NPDES permit is required for any “discharge” to the waters of the State, meaning any discharge of a pollutant from a “point source.” The term “point source” is construed broadly and includes any discernable, confined and discrete conveyance, including a pipe, ditch, channel, tunnel, conduit, well, fissure, container or vessel.

c. The WPCA’s provisions could be applied to require a current owner or operator to abate ongoing pollution of the waters of the State resulting from past activities of previous owners/operators. Significantly, the “waters of the State” are defined to include groundwater as well as surface waters. Furthermore, such abatement could possibly, but not necessarily, require remediation of the past pollution. Since the provisions apply to “point sources,” it is not certain that mine drainage would be included.

d. There are no express requirements concerning wetlands in the WPCA, so the federal CWA controls this area of environmental regulation. However, the State must provide water quality certification for any permit issued under the federal CWA.

e. Pursuant to amendments to the CWA a permit is now required for the following discharges of storm water through a point source: (i) discharges that have such permits prior to February 4, 1987; (ii) discharges associated with industrial activity; (iii) discharges from certain municipal separate storm sewer systems; (iv) discharges that EPA

determines to contribute to water quality standard violations; and (v) discharges that EPA determines significantly contribute pollutants to storm water. 40 C.F.R. §122.26(a). EPA defines storm water as “storm water run-off, snow melt run-off and surface run-off and drainage.” 40 C.F.R. §122.26(b)(13).

f. Storm water discharges associated with industrial activity are defined as “the discharge from any conveyance which is used for collecting and conveying storm water and which is directly related to manufacturing, processing or raw materials, or storage areas at an industrial plant.” 40 C.F.R. §122.26(a)(14). Coal mining and oil and gas operations are required to have storm water discharge permits in situations where storm water becomes contaminated by contact with overburden waste materials and other products.

g. Storm water discharge permits may be obtained by an industrial discharger individually or as a member of a group. The DEP has established a general permit available for groups of facilities having the standard industrial code (“SIC”) listed in the general permit. The permit essentially covers discharges from any conveyance used for collecting and conveying storm water and directly related to manufacturing, processing, or storing raw materials at an industrial plant, and discharges from construction sites. The permit also contains provisions for an activity to request a site-specific permit. Other general permits are available for construction activities, etc.

h. Under CWA § 303(d), the regulating authority is required to promulgate Total Maximum Daily Loads (“TMDL”) for the waterways of the State which have not met water quality standards. The TMDL identifies the pollutant for which the water quality standard is exceeded, determines the maximum assimilative capacity of the watershed for that pollutant and from that, the maximum total discharge of that pollutant within the watershed. It then allocates that maximum load among present and future point and non-point source discharges.

i. In addition to establishing water quality standards, the CWA requires States to develop an anti-degradation policy to further protect the State’s water. An initial legislative rule implementing West Virginia’s “anti-deg” policy was filed by the EQB on September 1, 2000 and became effective May 17, 2001. The anti-degradation policies for West Virginia are promulgated at 47 C.S.R. §2-4. The rule establishes four levels of protection to be

assigned to every State's waters, consisting of Tier 1, 2, 2.5 and 3, in order of increasing protection. All waters must meet Tier 1 protection that is, existing uses and water quality necessary to maintain those uses must be preserved. Tier 2 applies to "high quality waters," i.e., those waters currently exceeding water quality standards. This is the default classification. Any new or expanded activity that will cause a "significant deterioration" of water quality must undergo a Tier 2 review process. "Significant deterioration" is defined as that which will decrease a stream's assimilative capacity by 10%. The Tier 2 review includes analysis of alternatives to the proposed activity and socio-economic justification analysis. Tier 2.5 applies to "waters of special concern," including naturally producing trout streams, DEP designated reference streams or streams with a high biological score. No significant deterioration of Tier 2.5 streams is permitted. Finally, Tier 3 streams include streams of "Outstanding National Resource Waters," and applies to streams in West Virginia's five wilderness areas. Streams can be added or upgraded to Tier 3 by a public nomination process. No deterioration is permitted in Tier 3 streams.

A legislative rule was filed and became effective on July 19, 2002, codified at 60 C.S.R. §5, setting forth the rules for implementing the anti-degradation policies. These regulations set forth how DEP would determine the existing uses of the receiving bodies of water and how it would assign a receiving body to a tier. Series 5 also sets forth how the discharges into the variously categorized receiving bodies would be regulated. Generally, a Tier 1 stream that did not meet existing uses would be placed on the 303(d) list for assignment of appropriate TMDL's (see subsection h).

For a Tier 2 stream, a new or expanded point source discharges, subject to an NSPDS permit, that would substantially degrade water quality, would be reviewed to determine whether reasonable and cost-effective alternatives that are less or non-degrading than the proposed activity exist. The NPDES permit applicant must provide an evaluation of alternatives, which address environmental, technical, social and economic factors.

For a Tier 2.5 stream, no activity that causes a significant deterioration is permitted. Existing discharges will be reviewed for significant deterioration upon NPDES permit renewal and may be required to prepare and submit an alternatives analysis. New or

expanded discharges into a Tier 2.5 stream may be allowed if the applicant implements or finances upstream controls of point or non-point sources to offset the new discharges.

For Tier 3 streams, no new or expanded activity which reduces water quality will be permitted. Proposed new or expanded activities will be subject to a technical review to assure water quality will not be degraded

3. West Virginia Groundwater Protection Act ("GPA"), W. Va. Code §22-12-1 et seq. (1994); implemented by 47 C.S.R. §58

a. The Legislature has found that over fifty percent of West Virginia's overall population and over ninety percent of the State's rural population depend on groundwater as a drinking water source. Therefore, the GPA was enacted in 1994 to promote the public policy of maintaining and protecting the State's groundwater so as to support present and future beneficial uses. The Act further strives to maintain and protect groundwater at its existing quality where the existing quality is better than that required to maintain and protect the present and future beneficial uses.

b. Groundwater regulatory agencies are required to take action as may be necessary to assure that facilities or activities within their respective jurisdictions maintain and protect groundwater at existing quality, where the existing quality is better than that required to maintain and protect the State's standards of purity and quality. DEP is designated as the lead agency for promulgating standards of purity and quality for groundwater and for groundwater protection.

c. Where a person establishes to DEP that (i) measures necessary to preserve existing quality are not technically feasible or economically practical and (ii) a change in groundwater quality is justified based upon economic or societal objectives, the DEP Director may allow for a deviation from such existing quality. The GPA exempts a number of activities from its requirements. These activities include those directly involved in coal extraction and earth disturbing activities; groundwater within areas of geologic formations which are site specific to the production or storage zones of crude oil or natural gas and which are utilized for the exploration, development or production of crude oil and natural gas; and injection zones of

Class II or III wells permitted pursuant to the statutes and rules governing the underground injection control program.

d. Under regulations promulgated by DEP, facilities subject to the groundwater protection regulations include all “industrial establishments”. As defined in the regulations, “industrial establishment” means “any mill, factory, tannery, paper or pulp mill, mine, colliery, breaker or mineral processing operation, quarry, refinery, electric power generating facility, well, and each and every industry or plant or works, or activity in the operation or process of which industrial wastes, sewage or other wastes are produced.” 47 C.S.R. §58-2.7. In addition, DEP reserves discretion under the regulations to apply its groundwater protection requirements to any facility or activity that may adversely affect groundwater and that is not regulated by another groundwater regulatory agency.

e. Each facility covered by the new regulations must develop a comprehensive groundwater protection plan (“GPP”). New facilities must develop a GPP prior to construction.

f. In general, a GPP must contain a comprehensive survey of all activities that may affect groundwater quality and must also specify the groundwater protection practices that will be utilized to minimize disturbances to groundwater. Upon review of a GPP, DEP may require amendments or modifications to assure adequate protection of the groundwater.

4. Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f et seq. (1974); implemented by 40 C.F.R. Parts 141-149

In the SDWA, Congress federalized regulation of drinking water systems and required the EPA to set national standards for levels of contaminants in drinking water. The SDWA also required all owners and operators of public water systems to comply with primary health standards.

a. A major regulatory program established by the SDWA is the Underground Injection Control (UIC) program. The UIC program is intended to “prevent underground injection which endangers drinking water sources.” Underground injection means the placement of fluids underground by well injection. Among the wells covered are wells which inject fluids

in connection with conventional oil or natural gas production, for enhanced recovery of oil or natural gas, and for the extraction of minerals. The key to the UIC program is the prohibition of any underground injection which is not authorized by a permit or by rule. Furthermore, no UIC permit may be issued, and no UIC rule may be promulgated, authorizing underground injection that would endanger drinking water sources. Under the SDWA, underground injection “endangers drinking water sources if it may contaminate underground water which supplies (or reasonably can be expected to supply) a public water system.” A land purchaser who contemplates using injection wells for oil, gas or mineral extraction operations runs the risk of permit denial depending on the proximity of an aquifer which has the potential to be used as a source for a public drinking water system.

b. Wells authorized by EPA must comply with requirements covering reporting, plugging and abandonment, financial responsibility, casing, operating and monitoring.

c. The SDWA contains an “imminent and substantial endangerment” section which gives the EPA broad authority to protect public health from a contaminant which is present in or is likely to enter a public water system or an underground source of drinking water. The SDWA is very useful to the EPA in addressing groundwater problems which do not involve pollutants listed as hazardous wastes under RCRA or hazardous substances under CERCLA, such as petroleum.

5. Public Water Systems, W. Va. Code § 16-1-9a (1968); implemented by 64 C.S.R. § 3, § 4

This statute authorized the Department of Health (now the Bureau of Health) to provide surveillance of public drinking water, including bottled water, and to prescribe by regulation maximum contaminant levels and minimum sampling and testing requirements. The Act also gave Bureau of Health representatives a right of entry to any part of a public water system.

6. West Virginia Dam Control and Safety Act, W. Va. Code § 22-14-1 et seq. (1994); implemented by 47 C.S.R. § 34

a. This Act designates DEP as the State agency responsible for implementing the Act in regard to dams associated with the exploration, development, production, storage and recovery of coal and oil and gas.

b. Under this statute, a dam is defined as any artificial barrier or obstruction which is either (a) 25 feet or more in height and capable of impounding 15 or more acre-feet of water; or (b) six feet or more in height and capable of impounding 50 or more acre-feet of water. The statute makes it unlawful for any person to place, construct, enlarge, alter, repair, remove or abandon any dam without first obtaining a certificate of approval. DEP has published specific criteria for the construction of dams.

7. Rivers and Harbors Act, 33 U.S.C. § 401 et seq. (1973); implemented by 33 C.F.R. Parts 320-330

This federal law concerns obstructions placed in the navigable waters of the United States. It requires the approval of the United States Army Corps of Engineers prior to construction of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structure.

8. West Virginia Streams

The West Virginia Public Land Corporation (PLC) is vested with title to the State's public lands except for those lands for which title is specifically vested by law in other State agencies. W. Va. Code § 20-1A-1(c) (1989). In Campbell Brown & Co. v. Elkins, 141 W. Va. 801, 93 S.E.2d 248 (1956), the West Virginia Supreme Court of Appeals ruled that the beds of navigable streams constitute public lands. Thus, approval of the PLC is required before activity affecting a stream bed can be undertaken. Such activities include dredging and construction of pipelines, culverts, fords, low water bridges and docks. The PLC regulates stream beds through a permitting system.

VI. AIR

1. Clean Air Act (CAA), 42 U.S.C. § 7401 et seq. (1970); implemented by 40 C.F.R. Parts 50-88

a. The CAA, which was extensively amended in November 1990, regulates both stationary and mobile (i.e., motor vehicle) sources of air pollution. Stationary sources, such as industrial facilities, are regulated according to state implementation plans for the achievement of federally established National Primary and Secondary Ambient Air Quality Standards ("NAAQS") for six pollutants: suspended particulates, sulfur dioxide, nitrogen oxides, ozone, carbon monoxide, and lead. Federal emission limits, called new source performance standards (NSPS), apply to new or substantially modified industrial sources. One risk that exists for a property purchaser under the CAA is that if the state fails to meet NAAQS in a particular geographic area, construction of major industrial facilities could be curtailed and federal highway funding could be jeopardized.

b. The EPA also directly regulates emissions of hazardous air pollutants. To date, the EPA has established numerous National Emission Standards for Hazardous Air Pollutants (NESHAPs), including asbestos. Therefore, a significant risk exists for a buyer of property on which buildings constructed prior to 1978 are located. (The EPA banned the use of all asbestos material in interior building construction in 1978.) Any asbestos-containing materials (those containing more than one percent by weight asbestos) when disturbed or when found to be friable, must be handled in a controlled manner and within the scope and guidelines of the EPA as well as several state and local bodies. The CAA authorizes civil penalties of up to \$25,000 per day per violation under a concept of strict or no-fault liability.

c. Occupational Safety and Health Administration (OSHA) regulations define worker protection requirements, medical surveillance and work practices for asbestos removal projects. OSHA also has authority in the area of worker exposure to airborne asbestos. OSHA standards do not apply to building occupants whose exposure to airborne asbestos dust would be involuntary.

2. West Virginia Air Pollution Control Act, (APCA) W. Va. Code § 22-5-1 et seq. (1961); implemented by 45 C.S.R. 1 to 32

a. The West Virginia APCA was enacted to prevent and control air pollution. It was enacted nine years before the federal Clean Air Act and was amended in 1977 to assure air quality in accordance with federal law. The Air Pollution Control Commission (APCC) was

created as the State agency to develop, implement and enforce air pollution control regulations. In 1994, statutory amendments transferred all rulemaking authority to DEP, which issues air regulations and permits and further implements the Act through its Division of Air Quality (“DAQ”). The APPC, now the Air Quality Board, has only appellate review authority.

b. The APCA sets forth the statutory scheme for the control, prevention, and abatement of “statutory air pollution.” The term “statutory air pollution” means and is limited to “the discharging into the air by the act of man of substances (liquid, solid, gaseous, organic or inorganic) in a locality, manner and amount as to be injurious to human health or welfare, animal or plant life, or property, or which would interfere with the enjoyment of life or property.” W. Va. Code §22-5-2(6).

c. In addition to promulgating regulations, DEP’s Division of Air Quality (“DAQ”) is responsible for the enforcement of State air pollution control laws and the daily administration and enforcement of the air control program. DAQ issues permits for the construction, modification or relocation of stationary sources of air pollution under 45 C.S.R. § 13. DAQ has 180 days after receipt of a complete application to issue a construction or modification permit.

d. West Virginia’s national ambient air quality standards (NAAQS) are basically the same as the federal standards. However, consultation with DAQ is recommended in dealing with any permit, modification or relocation application.

e. In April, 1994, DAQ revised its regulation on emission standards for hazardous air pollutants to adopt and add existing federal standards. 45 C.S.R. § 15. DAQ also has promulgated regulations to prevent and control the emissions of toxic air pollutants by requiring the application of best available technology. 45 C.S.R. § 27.

f. DAQ is responsible for issuing “permits for construction and major modification of major stationary sources of air pollution for the prevention of significant deterioration.” 45 C.S.R. 14. Generally, these regulations require that all major sources obtain a permit, called a PSD permit, before constructing or relocating in an area designated as an attainment area.

g. In accordance with the CAA amendments of 1990, the APCA was amended in 1992 to require operating permits for stationary sources of air pollutants. W. Va. Code §22-5-12. The implementing regulations promulgated by DAQ prescribe procedures, including time limitations, for obtaining permits. 45 C.S.R. § 30. Significantly, a complete application submitted by the deadline will be deemed to be in compliance with the requirements of the APCA until a permit is issued. Many categories of stationary sources will be required to obtain such operating permits. The permit applications are complex, cumbersome and require considerable technical information. Once a permit has been issued, the source must certify compliance with the permit conditions and all applicable regulations on an annual basis and also must submit monthly self-monitoring reports similar to those required under the NPDES program.

VII. CHEMICAL REGULATION

1. Toxic Substance Control Act (TSCA), 15 U.S.C. § 2601 et seq. (1976); implemented by 40 C.F.R. Parts 700-799

- a. This Act generally regulates the manufacture and commercial distribution of hazardous chemical products. TSCA specifically requires that chemical consumer products be tested for possible toxic effects prior to manufacture.

- b. TSCA contains provisions specifically governing polychlorinated biphenyls (PCBs). EPA regulation requires that substances with PCB concentrations in excess of 500 parts per million must be incinerated, and substances with PCB concentration levels between 50 and 500 parts per million must be incinerated or landfilled in an RCRA-permitted facility. Electrical equipment that is in service and contains PCBs must be labeled and regularly inspected. While TSCA's imminent hazard provision may be used to compel PCB cleanups, EPA's normal practice has been to use other federal statutes, such as CERCLA, RCRA and the Clean Water Act, to impose liability. Thus, the buyer of property on which transformers containing PCBs have been abandoned has a substantial risk of being liable for the entire PCB cleanup cost under these strict liability statutes.

2. Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq. (1972); implemented by 40 C.F.R. Parts 152-186

a. FIFRA regulates the registration, distribution, use and possession of pesticides. All pesticides used in the United States must be registered with the EPA, and all commercial users are required to register when purchasing pesticides.

b. Land that once was used for extensive timber production or farming could have considerable pesticide residue in the soil or may contain abandoned pesticide containers. FIFRA authorizes the EPA to issue written removal orders to anyone controlling or possessing pesticides that the EPA determines may be in violation of FIFRA. Of course, if the pesticides are also considered to be hazardous wastes, then cleanup can be ordered under CERCLA or RCRA.

3. West Virginia Pesticide Control Act (PCA), W. Va. Code § 19-16A-1 et seq. (1990); implemented by 61 C.S.R. §§ 12 through 12I

a. This Act passed by the legislature in the Regular Session of 1990 repealed the Pesticide Use and Application Act, W. Va. Code § 19-16B-1 et seq. (1975), and consolidated it into the Pesticide Act, W. Va. Code § 19-16A-1 et seq. (1961), thereby forming a new law.

b. Under the new Act, the Commissioner of the Department of Agriculture continues to have authority to regulate and license the use and application of pesticides. The Act regulates the labeling, sale, distribution and application of pesticides and the licensing of all persons applying or distributing pesticides.

c. The Act also prohibits the storage or disposal of any pesticide or pesticide containers in such a manner as to cause injury to humans, vegetables, crops, livestock, wildlife, beneficial insects or to pollute any waterway in a manner harmful to any wildlife therein. This prohibition creates a potential liability for a land purchaser for cleanup costs resulting from pesticide damage or abandoned pesticide dump/storage sites. Civil and criminal sanctions are provided for violations of the Act.

4. Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11001 et seq. (1986); implemented by 40 C.F.R. Parts 350, 355, 370, 372

a. The EPCRA requires companies that use hazardous chemicals to comply with extensive reporting requirements. One of the major objectives of this Act is to provide a

basis for each community to develop a chemical emergency preparedness and planning program that suits its individual needs and provides the public with the identity, quantity, location and properties of hazardous substances in the community, as well as data on annual releases of certain chemicals into the environment.

b. Under EPCRA, each state must designate a State Emergency Response Commission (SERC) and a Local Emergency Planning Committee (LEPC) for each SERC district. Facilities with more than threshold quantities of extremely hazardous substances on the EPA's list must submit notices to the LEPC and SERC, must appoint representatives to cooperate in emergency planning, and must issue notices of release. The LEPC must prepare emergency response plans with assistance from the Superfund response system and other federal emergency management agencies.

c. EPCRA requires facilities that have one or more of the listed extremely hazardous substances to so notify LEPC/SERC and requires immediate reports to LEPC and SERC of an accidental release of chemicals above the relevant reportable quantity.

5. West Virginia Emergency Response and Community Right-to-Know Act (ERCRA), W. Va. Code § 15-5A-1 et seq. (1989); Implemented by 87 C.S.R. 3.

a. This Act basically authorizes the State to fulfill its obligations under the federal EPCRA. Under the Act, the State Emergency Response Commission (SERC) was created and authorized to supervise the preparation of emergency response plans and through the Office of Emergency Services to provide information to state citizens in accordance with the federal EPCRA. The SERC has designated each county in West Virginia to be a LEPC.

b. The Act does not provide for the implementation of any requirements more stringent than the federal EPCRA. No enforcement provisions are provided in the Act.

6. Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 et seq. (1970); implemented by 29 C.F.R. Parts 1900-1928

a. OSHA was enacted by Congress for the major purpose of ensuring worker and workplace safety. The Occupational Safety and Health Administration, a division of the

United States Department of Labor, oversees OSHA and enforces federal standards in all the states.

b. Many of OSHA's regulatory requirements, especially those dealing with hazard communication and the preparation and distribution of material safety data sheets (MSDS), have merged with the EPA requirements. OSHA standards for permissible exposure levels for chemicals in the workplace and categories of hazardous chemicals are now a part of the basis for reporting requirements under the Emergency Planning and Community Right-to-Know Act.

7. West Virginia Occupational Safety and Health Act (OSHA), W. Va. Code § 21-3A-1 et seq. (1987); implemented by 42 C.S.R. 15

This Act adopts and implements the federal OSHA. It also provides that the Commissioner of the Division of Labor may develop standards where no federal standards exist or where more stringent standards are deemed advisable.

8. Hazardous Chemical Substances, W. Va. Code § 21-3-18 (1981); implemented by 42 C.S.R. 4

This state statute requires the Commissioner of Labor to establish and maintain a list of chemical substances hazardous to the health of employees. It also requires any employer of ten or more employees using or producing such listed chemicals to post a prescribed warning notice in the work area. Exempt from these requirements are coal mines, coal mining or processing plants, and any agricultural or horticultural activity.

9. Hazardous Materials Transportation Act (HMTA), 49 U.S.C. § 5101 et seq. (1975); implemented by 33 C.F.R. Part 156; 46 C.F.R. Parts 30, 38, 147, 148; 49 C.F.R. Part 171

a. This law was enacted to provide protection against the risks to life and property inherent in the transportation of hazardous materials in commerce. A major purpose of the Act was to develop a consolidated and coordinated program under the Secretary of Transportation for the regulation of the movement of hazardous materials in commerce and to replace haphazard conflicting state regulations. The Act specifically preempts all inconsistent state and local regulations.

b. The HMTA applies to any person who transports or causes to be transported in commerce any hazardous material or to anyone who manufactures containers to be used in the transportation of hazardous materials.

c. A variety of enforcement measures is available under the HMTA to ensure compliance, including civil and criminal penalties, compliance orders, injunctions and imminent hazard orders.

d. The EPA and the Department of Transportation (DOT) have a published agreement which sets forth how the two agencies will jointly implement the hazardous waste regulations. Basically, under the agreement, the DOT is to concentrate primarily on hazardous waste transporters, whereas the EPA is to concentrate on generators and hazardous waste facility owners/operators.

10. Hazardous Materials Transportation in West Virginia

a. Under the HWMA, W. Va. Code § 22-18-7, the Commissioner of Highways is provided with the authority to promulgate regulations governing the transportation of hazardous wastes upon the roads and highways of the state. The Public Service Commission is provided similar authority regarding the transportation of hazardous waste by railroad in the state.

b. The rules and regulations promulgated by these two agencies must be consistent with applicable rules and regulations of the federal DOT which govern both interstate and intrastate transportation of hazardous waste.

c. Regulations governing the transportation of hazardous waste by rail are contained in 150 C.S.R. § 11, and those for highways are contained in 157 C.S.R. § 7.

VIII. ENERGY

A. Energy Supply and Environmental Coordination Act (ESECA) of 1974, 5 U.S.C. §§ 791-798; 42 U.S.C. § 1857

a. This Act established a means for providing assistance in meeting the essential needs for fuels in a manner consistent with existing national commitments to protect and improve the environment.

b. The Federal Energy Administrator (FEA) was granted authority to: (1) prohibit certain major fuel-burning installations from burning natural gas or petroleum products as their primary energy source; (2) require that certain power plants in the early planning process be designed and constructed to be capable of using coal as their primary energy source; and (3) allocate coal to any power plant or major fuel-burning installation that has been prohibited by an FEA order from burning natural gas or petroleum products as its primary energy source.

c. This Act also provides that no action taken under the Clean Air Act shall be deemed a major federal action significantly affecting the quality of the human environment within the meaning of the National Environment Policy Act (described infra).

B. Coal

1. Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1201 et seq. (1977); implemented by 30 C.F.R. Parts 700-955

a. This statute regulates both conventional surface mining operations and surface effects of underground mining. It also prohibits any person from conducting a coal mining facility operation without a permit from the state or federal government. The permit application must include such items as a description of the mining method of operation, drainage control and reclamation plans, and a study of probable hydrologic consequences. Once an application is approved, the operator must furnish a performance bond.

b. SMCRA also provides for an abandoned mine reclamation fund. The monies may be used for restoration of land and water resources adversely affected by past coal mining, including restoration of abandoned surface mine areas, sealing and filling deep mine entries, and treatment of pollution created by coal mine drainage. This fund does not provide complete protection to a buyer of used mining property because the funds used for the above purpose cannot exceed \$3,000,000 of the funds made available to the state. Also, lands and water eligible for reclamation and drainage abatement expenditures are those which were

affected by coal mining operations abandoned prior to August 3, 1977, and for which there is no continuing reclamation responsibility under state or other federal laws.

c. SMCRA contains a provision which specifically states that the Act does not supersede or modify other federal environmental or mining laws such as CERCLA and the Clean Water Act. In fact, compliance with SMCRA is not a defense to a CERCLA violation. If the mining operation is operating pursuant to a Clean Water Act permit, however, the release may be exempt under CERCLA as a federally permitted release to the extent of permit conditions. A major risk to an owner of property containing abandoned coal mines is that an order may be issued pursuant to the Clean Water Act to take actions to abate acid mine drainage which may threaten a public water source where SMCRA funds are insufficient or not available.

d. Another concern for the owner of coal rights is that surface areas may be designated as unsuitable for surface coal mining if, among other things, the mining will affect fragile or historic lands where mining operations could result in significant damage to important historic, cultural, scientific and aesthetic values and natural systems.

2.. West Virginia Surface Coal Mining and Reclamation Act (SCMRA),
W.Va. Code § 22-3-1 et seq. (1985); implemented by 38 C.S.R. § 2

a. The West Virginia SCMRA was enacted to permit the State to assume authority as the primary regulatory agency for surface coal mining operations within its borders under the federal SMCRA. The West Virginia SCMRA requires permits for almost all “surface mining operations,” which encompasses not only coal extraction through surface mining methods but preparation plants and certain surface impacts incident to an underground coal mine such as face-up areas, water treatment ponds, and ventilation shafts.

b. As in the federal SMCRA, the State Act contains provisions for designating areas unsuitable for surface mining operations. Such a designation may be made if the operations could result in significant damage to historic, cultural, scientific and aesthetic values and natural systems or affect renewable resource lands, including significant aquifers and aquifer recharge areas, rivers protected under the federal Wild and Scenic Rivers Act, or places included in the National Register of Historic Places or National Register of Historic Landmarks.

c. The West Virginia SCMRA requires coal operators to replace the water supply of other property owners who obtain all or part of their water supply for domestic, agricultural or industrial purposes from an underground or surface source, where such supply has suffered contamination, diminution or interruption proximately caused by such surface mining operation. This provision creates a potential risk of liability to a current operator for contamination caused by a previous operator.

d. In 1997, the West Virginia legislature revised the definition of surface mining, at W.Va Code § 22-3-3(u) to exclude coal removal incidental to excavations associated with private construction from SMCRA requirements. However, the West Virginia Supreme Court of Appeals ruled in 2001 that this exclusion was preempted and superseded by the federal statute. See DX Excavating v. DEP, 209 W. Va. 406; 549 S.E.2d 280, 2001 W.Va. Lexis 15. Thus, this statute, even though currently part of the West Virginia Code, has no legal effect.

3. West Virginia Abandoned Mine Lands and Reclamation Act (AMLRA), W. Va. Code § 22-2-1 et seq. (1985); implemented by 38 C.S.R. § 2D

a. This Act authorizes discretionary expenditures from the State reclamation fund for the restoration of land and water adversely affected by past surface coal mining operations. The expenditures, when made, must be in accordance with a specified priority list in the statute and only in connection with mining operations abandoned prior to August 3, 1977, and for which there is no continuing reclamation responsibility. Thus, there is no guarantee to a purchaser of abandoned mine property that reclamation funds will be used for any given restoration situation.

b. The Act also declares that one of its purposes is to provide additional and cumulative remedies to abate pollution of the waters of the State, and nothing in the Act shall alter any right of action of riparian owners to suppress nuisances or to abate any pollution or to recover damages. In other words, the reclamation fund, even if utilized, would not prevent the property purchaser from being successfully sued for damages caused by ongoing acid mine drainage.

c. Under certain circumstances a lien may be filed against the reclaimed land in an amount equal to the increase in its value as a result of the reclamation.

C. Oil and Gas

1. Natural Gas Policy Act (NGPA), 15 U.S.C. § 3301 et seq. (1978); implemented by 18 C.F.R. Part 280

This Act provides for a single national market for gas sales, eliminating the distinction between jurisdictional and non-jurisdictional sales. The Act also provides a national price ceiling for gas to be escalated with inflation, with special provisions for gas sold under existing intrastate contracts, sales under rollover contracts, high cost natural gas, and stripper well natural gas. The NGPA also regulates pricing of natural gas to industrial users in order to insulate residential consumers from price increases and provides presidential authority to allocate gas in emergencies.

2. Oil and Gas Laws, W. Va. Code § 22-6-1 et seq. (1985); implemented by 38 C.S.R. § 16 to 22

- a. This State statute created an Office of Oil and Gas under DEP and authorized its director to perform any and all acts necessary to carry out the federal National Gas Policy Act. It also vests the primary rulemaking authority for oil and gas in DEP.

- b. Oil and gas wells are regulated by a permitting process. A permit must be obtained prior to commencing any "well work." The statute also provides that it is unlawful for any person to conduct activities which are subject to the requirements of the statute unless he holds a water pollution control permit allowing pollutants emanating from any point source to flow into the "waters of the State." The definition of "point source" includes wells. The statute further establishes a rebuttable presumption that, in any action for contamination or deprivation of a fresh water source or supply within 1,000 feet of the site of drilling for an oil or gas well, such drilling or well was the proximate cause of the contamination or deprivation. Thus, the purchaser of property with abandoned gas and oil wells faces a potential risk of being ordered to take action to abate pollution of water (including groundwater). The oil and gas reclamation fund may or may not be used in this regard, depending upon the discretion exercised by the director of DEP.

3. CoalBed Methane Wells and Units, W.Va. Code §22-20-1 et seq. (1994); implemented by 35 CSR § 3-1 et seq.

a. The production of coalbed methane gas is regulated by W.Va. Code §22-20-1 et seq., and requires consent of the coal owner and notice to the surface and gas owners before wells can be drilled. Protests from interested parties are heard by the Coalbed Methane Review Board which is directed to consider whether the drilling will make future mining of the coal less safe or less productive.

IX. NOISE

A. General

a. Noise is recognized as a form of environmental pollution and as a factor in environmental quality. Generally, noise has been regulated by state and local governments through the exercise of police power to protect the public's health and safety. The common law also provided a right of action for excessive noise in the forms of public and private nuisance, negligence and trespass actions, and inverse condemnation and takings actions for governmentally generated noise.

b. The federal government began regulation of noise by controlling aircraft noise under the Federal Aviation Act of 1958. Regulation was further expanded to include occupational noise hazards under the Occupational Safety and Health Act of 1970 and manufactured products under the Noise Control Act of 1972.

B. Federal

1. Noise Control Act (NCA), 42 U.S.C. § 4901 et seq. (1972); implemented by 24 C.F.R. Part 51.

a. The Act defines "environmental noise" as "the intensity, duration and the character of sound from all sources." The federal government is provided with the power to regulate major noise sources in interstate commerce which require national uniform treatment. Congress delegated to EPA the responsibility for administering the Act and for publishing regulations for each product identified as a major noise source necessitating emission standards. Primary responsibility for noise abatement, however, is left in the hands of state and local governments. The Act also contains a provision that no State or political subdivision may adopt

any regulation which limits noise emission from new products in a way which is not identical to regulations promulgated by EPA, if applicable.

b. The Act also sets forth labeling requirements. It authorizes the EPA to identify any product which emits noise and, by regulation, to require that notice be given to the prospective purchaser on the level of noise that the product will emit. Citizen suits are authorized against anyone, including the federal government, who violates any of the Act's requirements. Civil and criminal penalties also are provided. (West Virginia does not have a specific statute addressing noise pollution.)

X. PRESERVATION

1. The Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq. (1973); implemented by 50 C.F.R. Parts 400 to 453

This statute prohibits all activities that could constitute a "taking" of an endangered species, including plants. In this regard, a risk is posed to the owner or purchaser of real property should certain portions of land be declared nondisturbable because of a threat to a species on the endangered list, e.g., the snail darter. Eleven species of animals and four species of plants found in West Virginia are listed as endangered. Four species of animals and two species of plants are listed as threatened. One species, the peregrine falcon, was removed from the federal list of threatened and endangered species in 1999 because many populations in the East had recovered as the result of the efforts of numerous state and federal agencies and non-governmental groups. However, this bird is still quite rare in West Virginia.

West Virginia does not have endangered species legislation but does maintain as part of its Wildlife Diversity and Natural Heritage Program, a Natural Heritage Database consisting of a computerized database, backed up with hard copy maps and data, to track the occurrence and status of the State's rare, threatened, and endangered species.

2. National Historic Preservation Act (NHPA), 16 U.S.C. § 470 et seq. (1966); implemented by 36 C.F.R. Parts 800 and 1295.

A major purpose of this statute is to provide properties on the National Register of Historic Places, or properties "eligible" to be so listed, protection from disturbance because of their historic significance.

3. Wild and Scenic Rivers Act, 16 U.S.C. § 1271 et seq. (1972); implemented by President's Environmental Message 8-2-29; CBQ Memorandum 8-10-80.

The policy of this Act is to protect the water quality of selected rivers and the naturalism of their immediate surroundings. The Act specifically provides that mining operations affecting a protected river shall be subject to the regulations of the Secretary of the Interior.

4. West Virginia Natural Streams Preservation Act, W. Va. Code § 22-13-1 et seq. (1969); no implementing rules on file.

Streams designated as "protected streams" by the State Legislature must be preserved in their natural character.

5. Forest and Wildlife Areas, W. Va. Code § 19-1A-3 et seq. (1961): implemented by 58 C.S.R. 6

- a. In regard to liabilities for ownership of forest lands, this Act gives the Division of Forestry authority to recover forest fire fighting costs from the landowner if the negligence of the owner or its agents caused the fire, or if the landowner fails to use all practical means to extinguish a fire caused by trespassers.

- b. Forest owners can be directed by the State to establish control measures whenever the State authorities determine that insect infestation or infection should be declared a public nuisance. There is a special fund to provide monies for this purpose. However, the fund may not adequately compensate an owner of extensive tracts of land with severe insect infestation or disease.

6. Protection of Historic and Prehistoric Sites, W. Va. Code § 29-1-8b (1977): implemented by 82 C.S.R. 3

This statute protects archaeological sites and districts identified by the West Virginia Department of Culture and History on private lands where investigation and development rights have been acquired by the State by lease or contract. The Act prohibits disturbing or developing the sites except with the permission of the Department of Culture and History.

7. National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. (1969); implemented by 40 C.F.R. Parts 1500-1508

NEPA requires all agencies of the federal government to prepare environmental impact statements (EIS) for major federal actions “significantly affecting the quality of the human environment.” While NEPA is directed toward agencies of the federal government, it can have a significant effect on private business operations as well. Property buyers who will need to apply for federal licenses or permits for activities having environmental impacts may find themselves drawn into the NEPA process. For example, a permit from the Army Corps of Engineers to dredge or fill “wetlands” could require an EIS. An EIS is basically a detailed study in which the environmental impacts of the proposed action are identified, alternatives to the proposed action are analyzed, and adverse and mitigating actions are evaluated. There are statutory and regulatory provisions which allow federal agencies to shift the costs of producing the EIS onto the permit applicant. The EIS process also includes requirements for public notice, comments and hearings. Opponents of a project can challenge the EIS as being “inadequate,” thereby severely prolonging the development process.

XI. REPORTING REQUIREMENTS

A. General

a. In addition to the disclosure requirements described supra, federal and state laws require the timely reporting to government agencies of known or suspected spills or discharges of oil, hazardous substances or wastes into the environment. The duty to report unauthorized releases of chemical substances is an independent requirement from any cleanup responsibility. Penalties for noncompliance with reporting requirements can be imposed even if no substantial cleanup is ultimately required. For example, violation of CERCLA’s § 103 reporting requirement can lead to civil penalties of up to \$25,000, with “second tier” fines of up to \$75,000 per day of continuing violations. Criminal sanctions also can be imposed under most federal and state laws. CERCLA even allows awards for information leading to criminal convictions for violations of reporting requirements.

b. The federal reporting requirements also are independent of the parallel state requirements. State requirements can be broader and more stringent.

c. Most reports have to be made immediately and not later than 24 hours *after* the release and should usually include: (a) date, time and location of the release; (b) identity and quantity of substance released; (c) location and source of the release; (d) cause and circumstances of the release; (e) existing or potential hazards (fire, explosion, etc.); (f) personal injuries or casualties; (g) corrective action being taken; (h) measures taken to prevent recurrence; (I) name(s) and telephone number(s) of individual(s) who discovered and/or reported the release; and (j) other unusual circumstances, if any.

B. Reports

(The following list of reports is not all inclusive but covers many of the most significant types of incidents.)

1. Oil. Report any releases of oil.

a. Into the navigable waters of the United States to:

National Response Center
Located at U.S. Coast Guard Headquarters
2100 2nd Street Southwest - Room 2611
Washington, D.C. 20593-0001
(24-hour) (800) 424-8802
(24-hour) (202) 267-2675

b. Into West Virginia waters (includes groundwaters) to:

Division of Water and Waste Management
Department of Environmental Protection
601 57th Street, SE
Charleston, West Virginia 25304
(24-hour) (800) 642-3074 (in state)
(304) 926-0440

2. Pollutants into West Virginia Waters (pollutant means industrial wastes, sewage or other wastes as defined in W. Va.'s Code §22-11-3.) Any spill or accidental discharge of pollutants (no amount specified) must be reported to:

Division of Water and Waste Management
Department of Environmental Protection
601 57th Street, SE
Charleston, West Virginia 25304
(24-hour) (800) 642-3074 (in state)

3. Hazardous Substances

a. Federal. CERCLA requires immediate reports of certain “releases” of hazardous substances (not including petroleum products). The statute incorporates by reference lists of hazardous substances from several other environmental statutes which total about 700 substances. The “reportable quantity” or reporting trigger, ranges from one pound to 5,000 pounds for individual substances, depending upon their hazard characteristics. A “person in charge” immediately upon obtaining knowledge of the release must make a report to the National Response Center, supra.

b. West Virginia. Report same as for oil and also to local fire department/police/emergency services.

4. Hazardous Waste.

a. Federal. A release, fire or explosion of a hazardous waste of a large quantity (more than 1,000 kg/mo.) hazardous waste generator that presents imminent or substantial danger to human health or the environment outside the facility and may warrant evacuation must be reported to appropriate legal authorities and the on-scene coordinator for that geographical region or the National Response Center at (800-424-8802). 40 C.F.R. §265.56(d).

If the release is not going to occur outside the facility but an emergency is imminent or has occurred the coordinator must notify “appropriate state or local agencies with designated response roles if their help is needed” 40 C.F.R. §265.56(a)(2).

Small quantity (100 kg/mo. to 1,000 kg/mo.) generators must report the following conditions: (I) in the event of a fire, the reporter must call the local fire department or attempt to extinguish the fire with a fire extinguisher; (ii) in the event of a fire, explosion or other release that could affect human health outside the facility, or when a spill has reached surface water, the generator must call the National Response Center at 800-424-8802.

b. West Virginia. Large quantity and small quantity generators, as described above, must also make reports to the DEP emergency notification number (800-642-3074).

5. Hazardous Materials.

a. Federal. Transportation-related releases (including loading, unloading, and temporary storage) of hazardous materials as listed in 49 C.F.R. 172.101 must be reported to the National Response Center. A written report also must be submitted on FORM DOT F 5800.1 within fifteen (15) days to:

U.S. Department of Transportation
Research and Special Programs
Administration
Information Systems Manager
Washington, D.C. 20590

b. West Virginia. Report same as for oil and to local fire department/police/emergency services. Also report to Division of Highways, (304) 558-9131.

6. Underground Storage Tanks (USTs)

a. Federal. No requirements to immediately report releases to federal authorities.

b. West Virginia.

(1) Releases or suspected release must be reported within 24 hours to:

Underground Storage Tank Section
Department of Environmental Protection
601 57th Street, SE
Charleston, West Virginia 25304
(24-hour) (800) 642-3074 (in state)
(304) 926-0440

(2) Above ground releases of petroleum from UST spills or overfills must be reported if the release:

- (a) is petroleum and more than 25 gallons; or
- (b) is petroleum and is less than 25 gallons but cannot be cleaned up within 24 hours;
- (c) causes sheen on water surface; or

- (d) is a hazardous substance and the release exceeds the reportable CERCLA quantity. 40 C.F.R. Part 302.

7. Toxic Air Releases

Releases of toxic air pollutants from chemical processing units must be reported to DEP's Office of Air Quality if the release is in excess of the amount listed in 45 C.S.R. 27, Table A. The term "chemical processing unit" is defined as an assembly of reactors, tanks, distillation columns, heat exchangers, vaporizers, compressors, dryers, decanters, and/or other equipment used to treat, store, manufacture or use toxic air pollutants.

A written report must be filed within seven days of the event if fifty pounds or more of any toxic air pollutant was emitted. A report should be made to:

Office of Air Quality
Department of Environmental Protection
601 57th Street, SE
Charleston, West Virginia 25304
(24-hour) (800) 642-3074 (in state)
(304) 926-0440

8. Coal Mining and Industrial Accident Rapid Response System, SB 247 (passed 1/26/06).

The West Virginia Legislature enacted SB 247 which requires the rapid reporting of mining and industrial accidents. W.Va. Code §15-5B-1 et seq. requires the Division of Homeland Security and Emergency Management to establish and operate an official and primary state government twenty-four hour a day communications center for dealing with mine and industrial accidents. The Division of Homeland Security is to report to the Legislature by November 1, 2006, on whether industrial and manufacturing accidents should be included in the reporting requirements.

XII. DUE DILIGENCE IN REAL PROPERTY TRANSACTIONS

A. Definition

The enormous liability and potential for diminution of property values because of contamination by hazardous substances mandates that the parties to a real property transaction

take a very close look at the property involved. There is no statutory or judicial definition of “due diligence” in the context of federal and state environmental laws. Nonetheless, due diligence is generally recognized as taking those actions which are appropriate to identify potential risks, evaluating the nature and severity of the risks and problems, and then developing measures to allocate or reduce those risks.

B. Sellers

a. Sellers obviously desire to pass all potential liability to purchasers and sell the property “as is.” However, under common law, a seller has a duty to disclose facts about the property that are known to the seller and which could be material to the buyer’s decision to purchase the property. The obligation of a seller to disclose facts normally consists of three elements: (1) the materiality of the fact; (2) the seller’s knowledge of the fact; and (3) the obviousness of the fact. Undoubtedly, the presence of hazardous substances on a site will usually be material to a prospective purchaser. To the extent a seller makes appropriate disclosure to the purchaser, the defense of caveat emptor should be available to the seller.

b. Some states, including West Virginia

, have statutory disclosure requirements. As discussed supra, West Virginia requires a seller of land used as a hazardous waste treatment, storage or disposal facility and/or containing underground storage tanks to disclose those facts in a deed or other instrument of conveyance.

c. Sellers cannot avoid liability for contamination to property by transferring the property “as is” because there will always be liability under CERCLA for persons who owned the property at the time of disposal of any hazardous substances.

d. Sellers can reduce their risks by making disclaimers for all warranties, in particular the warranty of merchantability for a particular purpose, and requiring the purchaser to waive all common law and statutory claims for cleanup costs. Sellers should also require the purchaser to acknowledge that the purchaser has had access to the property to conduct an environmental assessment. Additionally, sellers should try to obtain indemnification for cleanup

costs from purchasers, recognizing that the indemnity is only as good as the purchaser's financial ability to support it.

e. If the purchaser demands indemnification from the seller, the seller should negotiate for a time and dollar limit on the indemnification.

f. Since a potential problem can arise in the form of determining the cause of contamination and attributing it to the operations of either the purchaser or seller, the seller should limit the risk of post-transfer liability by obtaining covenants from the buyer. The covenants should include at least the following:

(1) the buyer will use and operate the property in compliance with all applicable health, safety and environmental laws, permits and governmental agency approvals;

(2) the buyer will promptly inform seller and clean up any spills, releases or discharges of hazardous substances on the site;

(3) the buyer will furnish the seller copies of all environmental assessments, reports and test results upon request of the seller; and

(4) the buyer will protect the property against acts or omissions of third parties that might result in releases of hazardous substances on the property.

C. Purchasers and Lenders

a. The first step from the standpoint of a purchaser or lender is to obtain information concerning the current and past uses of the property. An effective means to obtain this information is by having the owner and/or operator complete a questionnaire or a disclosure statement and having an on-site inspection of the property. A typical document for this purpose is provided as Exhibit "A".

b. For most commercial property, an environmental site assessment ("ESA") is usually necessary for due diligence. These ESA's are investigations of the property conducted by environmental engineers. The investigation should consider past and present operations carried out at the site and can include both soil and water analyses as well as review of federal, local and state records regarding facility permits and land use, both at the site and in neighboring

areas. The investigation should consider off-site activities and pollution which could pose an environmental problem at the site. For instance, groundwater contamination could extend onto the site and require remediation there, while pollution both on and off the site could intermingle and pose a problem elsewhere.

c. The scope of the ESA will vary depending upon the purpose of the assessment and the circumstances involved, such as the type of transaction, timing and financial pressures, the uses that are or have been conducted on the site, the extent of contamination of hazardous substances present, and the resulting legal issues involved. At a minimum, the ESA should be conducted in a manner to meet the American Society for Testing and Materials ("ASTM") Standard E1527-05 which is considered to be representative of good commercial and customary practice. Moreover, environmental assessments should be conducted in phases in order to coordinate the scope of the assessment with cost considerations and other factors.

d. The engineering review is generally incorporated into a site assessment report submitted after each phase. Dividing the audit into phases allows the purchaser or lender to evaluate the situation in progressive steps. The report generally provides information about site contamination or releases of contamination into the environment that may trigger the reporting or notification provisions of state or federal laws. The report also usually sets forth conclusions concerning the likely sources and impacts of contamination and recommendations for further action to address such contamination.

e. The purpose of a second phase of a site assessment is to confirm the presence or absence of contamination and to determine the nature and extent of contamination. This phase will involve more detailed use of the environmental consultant and environmental counsel and will involve intrusive sampling. This phase also will be targeted specifically at the areas believed to be contaminated and will generally include the collection and chemical analysis of soil samples and surface and other relevant investigations and analysis. The sampling and analysis process must be undertaken pursuant to EPA and state regulatory agency procedures.

f. If the Phase II assessment reveals a material amount of contamination, then a Phase III likely will be recommended. Groundwater wells may be installed and other testing conducted to develop a site remediation plan. The plan is usually submitted to state

and/or federal regulatory agencies to insure that it is in compliance with all applicable statutory and regulatory requirements.

g. It is generally desirable for the buyer to have the seller assume all liability for past hazardous substances on the property and for the buyer to assume all liability for future activities. In order to achieve this risk distribution, the buyer should obtain representations, warranties and indemnification from the seller. An indemnification is not complete protection because its effectiveness is limited to the seller's willingness and/or ability to fulfill it. The lender should obtain corresponding provisions in the deed of trust granted by the borrower (purchaser). If residential property is the subject of the transaction, then the representations from the seller may suffice.

h. If commercial property is the subject of the transaction, then the purchaser and lender should be especially concerned about the ability to assert the "innocent landowner" defense to a CERCLA cleanup action. In addition to the environmental assessment, discussed supra, the purchaser and lender should insist on representations and warranties in the instrument of conveyance and/or deed of trust that the property has never been used for the generation, treatment, storage or disposal of material amounts of hazardous substances or solid wastes. Alternatively, if the property was so used, then the representation and warranty should be that such operations were conducted in material compliance with all laws regulating hazardous substances and solid wastes.

i. Also of concern are the off-site hazardous substance disposal activities of the seller. EPA considers the purchasers of assets as well as stock to be successors in liability for off-site contamination clean-up costs. If the seller as a "generator" shipped hazardous waste to a Superfund site for disposal, the purchaser of the seller's property may inadvertently buy the CERCLA liability with the property, at least in EPA's view.

j. Other protective measures purchaser and lender may use are:

(1) Price Reduction. The purchaser can negotiate with the seller for a reduction in the price of the property to cover any remediation of identified environmental problems. This measure has limited applicability since it is usually very difficult to accurately

estimate the costs of remediation even when a thorough environmental assessment has been conducted.

(2) Condition Precedent. The purchaser and lender should make receipt of an adequate environmental assessment a condition precedent in the sale or loan agreement. Time limits should be placed on the completion of the assessment and for notification of the results to the other party.

(3) Escrow Account and Bonds. An escrow account or a bond could be required to cover the costs of environmental assessments and/or any remediation of environmental problems.

(4) Transaction Structure. In corporate transactions, the purchase of only assets carries less environmental risk than the purchase of stock. However, as indicated supra, EPA takes the position that a corporation that purchases all the assets of another and carries on the same business is considered to have assumed its liabilities. EPA's position so far has only very limited judicial support. Other measures such as the creation of a wholly owned subsidiary corporation to purchase property with environmental risk may warrant consideration.

(5) Insurance. Obtaining insurance coverage for environmental cleanup costs is extremely difficult. Policies being written today generally include an absolute pollution exclusion and are written on a "claims-made" basis. The few insurance companies that are willing to issue policies covering hazardous substances charge costly premiums. An environmental assessment at the insured's expense is also usually required. A form of self-insurance may be a preferable alternative.

XIII. CONCLUSION

Without a doubt, environmental law is an extremely broad and complex field. Any one of the statutes or subcategories requires volumes to adequately explain the interrelated aspects of permitting, standards and enforcement. Also, because environmental law is so dynamic and pervasive, it affects many other fields of law to some degree. Furthermore, liability under CERCLA and other federal and state environmental laws can be very broad. There is no minimum quantity of a hazardous substance that must be found as a precondition to cleanup cost liability, causation is normally implied, and there are very few defenses to most statutory forms of environmental liability. Accordingly, the general practitioner should at least develop that

level of familiarity with environmental law so as to be able to spot the red flags and then seek assistance as appropriate.

EXHIBIT "A"

ENVIRONMENTAL QUESTIONNAIRE

I. What is the condition of the property?

1. Developed:

- | | |
|------------------|-------------|
| A. Industrial | (SIC _____) |
| B. Manufacturing | (SIC _____) |
| C. Commercial | _____ |
| D. Residential | _____ |

2. Undeveloped:

- | | |
|-----------------|-------|
| A. Abandoned | _____ |
| B. Agricultural | _____ |
| C. Landfill | _____ |
| D. Dumpsite | _____ |
| E. Other | _____ |

II. How was the property used in the past?

1. Time Periods

- | | |
|-------|-----------------|
| _____ | <u>Past Use</u> |
| _____ | Industrial |
| _____ | Commercial |
| _____ | Residential |
| _____ | Undeveloped |
| _____ | Other |

III. What is the proposed use of the property? _____

IV. Are there any adjacent properties from which hazardous substances may have affected or could affect the subject property?

V. Were there any past activities on the property that may have resulted in hazardous substance contamination? _____

VI. Did the on-site inspection of the property and adjacent properties (if possible) reveal the following?

- | | <u>No</u> | <u>Yes</u> | <u>Description</u> |
|----------------------------------|-----------|------------|--------------------|
| 1. Vegetation damage | _____ | _____ | _____ |
| 2. Stained soil, concrete, paint | _____ | _____ | _____ |
| 3. Unusual odors | _____ | _____ | _____ |

- | | | | | |
|-----|---|-------|-------|-------|
| 4. | Oily sheen or discoloration
of surface water | _____ | _____ | _____ |
| 5. | Storage drums | _____ | _____ | _____ |
| 6. | Above or underground
storage tanks | _____ | _____ | _____ |
| 7. | Electrical transformers or
capacitors or other
potential PCB containers | _____ | _____ | _____ |
| 8. | Evidence of asbestos (sprayed
on fireproofing, pipe wrap,
friable ceiling tiles,
acoustical plaster) | _____ | _____ | _____ |
| 9. | Sources of air emissions
(smokestacks, chimneys,
vent pipes) | _____ | _____ | _____ |
| 10. | Evidence of wetlands | _____ | _____ | _____ |
| 11. | Evidence of endangered species | _____ | _____ | _____ |
| 12. | Groundwater wells | _____ | _____ | _____ |
| 13. | Landfills or dumpsites | _____ | _____ | _____ |
| 14. | Sources of energy | _____ | _____ | _____ |
| 15. | Wastewater facilities and
discharge points | _____ | _____ | _____ |
| 16. | Vehicle parking areas | _____ | _____ | _____ |
| 17. | Bodies of water | _____ | _____ | _____ |
| 18. | Refueling facilities | _____ | _____ | _____ |
| 19. | Maintenance and repair
operations | _____ | _____ | _____ |
| 20. | Storage areas for chemicals,
pesticides, insecticides,
herbicides and fertilizers | _____ | _____ | _____ |
- VII. Have there been any environmental audits conducted for the property in the past?

- VIII. Are there any above ground or below ground sources of drinking water located on the property or in the immediate area?

- IX. Have there been any notices to insurance companies concerning claims arising from or in connection with environmental incidents, including spills or releases of hazardous substances on the property? _____
- X. Have any environmental permits for hazardous waste, air pollution, NPDES, etc. and/or mineral exploration or development ever been issued in connection with the property? _____

XI. Have there been any notices of violations or threatened or pending environmental claims or liabilities that have arisen under federal or state environmental, securities or other laws or audit disclosures? _____

XII. Is the property the subject of environmental litigation or regulatory enforcement actions? _____

XIII. Have there been any adverse press reports or other complaints about environmental conditions of the property?

XIV. Is the property near any historic sites, floodplain or other sensitive ecological area? _____

XV. Are there any easements on the property, e.g., pipelines, with potential adverse environmental consequences? _____

XVI. Have there been any contracts with hazardous waste transporters, treatment, storage, disposal or recycling facilities or other third parties in connection with operations conducted on the property?

XVII. Has the property been inspected/tested for:

	<u>No</u>	<u>Yes</u>	<u>Results</u>
1. Radon	_____	_____	_____
2. Urea formaldehyde foam and other sources of formaldehyde	_____	_____	_____
3. Lead paint	_____	_____	_____
4. Lead in drinking water	_____	_____	_____

XVIII. Are historical aerial photographs of the property available?
