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COMMENT: SWCB v. U.S. TITANIUM CORP,
OR "THE CHANCELLOR'S FOOT"

The colorful history of the Courts of Chancery still plagues attempts at responsible environmental protection. Nearly all enforcement of environmental laws and regulations is based on equitable remedies, and thus the environment is at the mercy of the chancellor's discretion. There is a well known statement on the nature of equity from mid-nineteenth century England. "Equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure we call a foot to be the Chancellor's foot. What an uncertain measure this would be! One Chancellor has a long foot, another a short foot, and a third an indifferent foot." (from The Table Talk of John Seidon (1847)).

Here in Virginia, there are a few Chancellor's whose feet are still undersized if not "indifferent." Two examples come immediately to mind. First, a Tidewater Circuit Judge cited *Black's Law Dictionary* when faced with the difficult question of "What is Pollution"? The second, *SWCB v. US Titanium*, is a bit more complex.

A Delaware corporation owned a parcel of land on the Piney River. There was a pile of copperas waste (i.e., a green hydrated ferrous sulfate used in making inks and pigments) on this parcel. Several major fishkills had been caused by runoffs from the copperas, most notably in August 1979 when 26,000 fish were killed by a discharge of copperas into the Piney River. A court of equity in Nelson County ordered removal by December 1977. From 1977 through 1979 numerous promises to the SWCB to comply with the decree were broken by the corporation. The corporation initiated proceedings to amend the 1977 order and place the date of removal as December 31, 1980. During these proceedings, counsel for the State Water Control Board (SWCB) discovered that the corporation's Delaware charter had been revoked in June 1979 for failure to pay taxes. Still all was not lost, as the corporation very responsibly had also obtained a Virginia Charter. But alas, this charter was also revoked for a failure to pay the annual registration fee and for failure to file annual reports in 1978 and 1979.

The SWCB estimated that the cost of removal would reach \$250,000, and asked the court to order that amount paid into an escrow account as this would be the only way to ensure the removal of the copperas from this noncorporation's corporate property.

The request for an escrow account was to guarantee that removal would take place only three years after the court had ordered removal. The Chancellor's "indifferent" foot would only permit relief analogous to the "size" of his foot, i.e., an escrow account of \$50,000 and a date for complying with the 1977 injunction three years late (December 31, 1980). *Commonwealth of Virginia ex rel. State Water Control Board v. United States Titanium Corp.*, Chancery No. 1536 (Cir. Ct. Nelson Co. 1979).

M.J.L.