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Derek A. Yeo

Roy A. Hoagland
William & Mary Law School, rahoagland@wm.edu

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UNITED STATES V. SMITHFIELD: A PARADIGMATIC EXAMPLE OF LAX ENFORCEMENT OF THE CLEAN WATER ACT BY THE COMMONWEALTH OF VIRGINIA

DEREK A. YEO*

ROY A. HOAGLAND†

I. INTRODUCTION

The Commonwealth of Virginia, which has primary enforcement authority with respect to Clean Water Act (CWA or Act)¹ effluent discharge permits in the state,² has failed for many years to take strong enforcement action to ensure compliance with these permits. Virginia had adopted an informal policy of seeking compliance with CWA permits without imposing or pursuing civil penalties for permit violations. Under this lax enforcement policy, the state has been reluctant to penalize dischargers that have repeatedly violated permit conditions over a period of many years. Even when Virginia has obtained penalties for permit violations, the state has failed to recover penalties that dissipate the economic benefit accruing to dischargers from their noncompliance with permit limitations. Virginia's lax enforcement policy has allowed some major dischargers to repeatedly violate their permits without fear of a financial penalty. The result has been the degradation of Virginia's rivers, streams, and waterways. Moreover, this problem has worsened in recent

* Derek A. Yeo, Esq., received his B.A. in Natural Sciences and Archeology from Cambridge University in 1988, and his M.A. in Archeology from Cambridge University in 1991. He received his J.D. from the College of William and Mary School of Law in 1998, and is currently clerking for the Hon. Eric G. Bruggink of the United States Court of Federal Claims.

† Roy A. Hoagland, Esq., is the Virginia Assistant Director for the Virginia office of the Chesapeake Bay Foundation. He is an adjunct professor with the T. C. Williams School of Law clinical program. He currently holds a variety of board and committee positions for national and regional environmental organizations. He obtained his J.D. (with honor) from the University of Maryland School of Law and his B.S. (cum laude) from Dickinson College.

¹ Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. §§ 1251-1387 (1994 & Supp. I).

² See U.S. ENVIRONMENTAL PROTECTION AGENCY, MEMORANDUM OF UNDERSTANDING REGARDING PERMIT AND ENFORCEMENT PROGRAMS BETWEEN THE STATE WATER CONTROL BOARD AND THE REGIONAL ADMINISTRATOR, REGION III ENVIRONMENTAL PROTECTION AGENCY 10-11 (1975) [hereinafter MOU] (on file with WM. & MARY ENVTL. L. & POL'Y REV.).

years following initiatives to downsize and decentralize the Virginia Department of Environmental Quality (DEQ), the state agency responsible for conducting the majority of enforcement tasks relating to Virginia's discharge permit program.³

The weaknesses in Virginia's CWA enforcement program were amply demonstrated in the recent, highly publicized case of *United States v. Smithfield Foods, Inc.*⁴ In *Smithfield*, the United States Environmental Protection Agency (EPA) filed suit against Smithfield Foods, Inc. (Smithfield) in federal district court alleging thousands of violations of Smithfield's permit to discharge effluent into the Pagan River.⁵ EPA filed this action despite the fact that Virginia has primary enforcement authority for discharge permit violations, because it determined that the state had failed to take timely and appropriate enforcement action.⁶ This article argues that *Smithfield* is a paradigmatic example of Virginia's lax enforcement policy, rather than an aberration.

After reviewing the basic structure of the National Pollutant Discharge Elimination System (NPDES) permit program in Part II of this article, Part III discusses the overlapping enforcement roles of the EPA and Virginia under the Virginia permit program. Part IV of the article relates Virginia's failed efforts to enforce the discharge permit in *Smithfield*. In Part V, the article discusses other significant enforcement failures in Virginia in recent years, which suggest that *Smithfield*—although a unique case—is reflective of program-wide enforcement

³ Virginia legislation enacted in 1992 established DEQ on April 1, 1993, by merging four existing Virginia environmental agencies including the staff of the State Water Control Board (SWCB or Board). See VA. CODE ANN. § 10.1-1183 (Michie 1998); JOINT LEGISLATIVE AUDIT & REVIEW COMM'N, COMMONWEALTH OF VA., INTERIM REPORT: REVIEW OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY 11 (1996) [hereinafter JLARC INTERIM REPORT]. Prior to the creation of DEQ, the SWCB alone administered the Commonwealth's water resource management programs, including Virginia's responsibilities under the CWA. See JLARC INTERIM REPORT, *supra*, at 13.

⁴ The district court released a number of opinions in the *Smithfield* case, both prior to and following trial. Of these, three opinions are of particular note and will be discussed in this article. First, on May 30, 1997, the court granted summary judgment for the United States on five of the seven counts in its complaint. See *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 796 (E.D. Va. 1997). Second, on July 16, 1997, the court denied the defendant's motion for reconsideration of the May 30, 1997 order. See *United States v. Smithfield Foods, Inc.*, 969 F. Supp. 975, 984 (E.D. Va. 1997). Third, following a bench trial, the court imposed a civil penalty of \$12,600,000 on the defendants for 5919 days of permit violation. See *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 354 (E.D. Va. 1997).

⁵ See *Smithfield*, 965 F. Supp. at 782-83 & n.18.

⁶ See *id.* at 779.

deficiencies. Finally, in Part VI, this article argues that a recent measure by the Virginia General Assembly, which enables the Director of DEQ to impose civil penalties on permit violators without their consent, is unlikely to remedy the existing problem of lax enforcement and may actually encourage further noncompliance. This article suggests that Virginia must adopt a tougher enforcement policy that seeks to recover, at a minimum, the economic benefit accruing to dischargers from noncompliance with permit conditions. Only by recovering such economic benefit can Virginia effectively deter future noncompliance with discharge permits.

II. THE CLEAN WATER ACT AND THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT PROGRAM

The primary objective of the CWA is to “restor[e] and maintain the chemical, physical, and biological integrity of the Nation’s waters”⁷ In order to achieve this objective, the CWA sets a goal of eliminating the discharge of pollutants into navigable waters,⁸ and an interim goal of “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water” wherever attainable.⁹ To achieve these goals, section 303 of the CWA required states to adopt water quality standards that “protect public health or welfare”¹⁰ and “enhance the quality of water”¹¹ in light of the designated uses of each body of water.¹²

With regard to discharges from point sources,¹³ section 301 of the Act required EPA to promulgate effluent limitations for toxic,¹⁴

⁷ 33 U.S.C. § 1251(a) (1994).

⁸ *See id.* § 1251(a)(1). *See also* Natural Resources Defense Council v. EPA, 16 F.3d 1395, 1399 (4th Cir. 1993) (stating that the CWA requires the reduction and eventual elimination of discharges of pollutants). This goal, enacted as § 101(a)(1) of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 816, called for elimination of such discharges by 1985. *See* 33 U.S.C. § 1251(a)(1).

⁹ 33 U.S.C. § 1251(a)(2). This provision, also enacted in 1972, stated that this interim goal should be achieved by July 1, 1983. *See id.* § 101(a)(2), 86 Stat. at 816.

¹⁰ 33 U.S.C. § 1313(b)(2)(A).

¹¹ *Id.*

¹² *See id.*

¹³ The Act defines a “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . from which pollutants are or may be discharged.” *Id.* § 1362(14).

¹⁴ EPA has designated sixty-five pollutants as toxic pollutants pursuant to authority granted by section 307 of the Act, 33 U.S.C. § 1317. *See* 40 C.F.R. § 401.15 (1998).

conventional,¹⁵ and nonconventional¹⁶ pollutants at varying levels of economic and technical feasibility.¹⁷ Section 402 of the Act established the NPDES permit program, under which EPA or states with EPA-approved programs are authorized to issue permits for the discharge of pollutants.¹⁸ Discharges of pollutants that are not in compliance with such permits are per se unlawful.¹⁹ NPDES permits must incorporate effluent limitations that ensure compliance with the effluent limitations promulgated by EPA pursuant to section 301.²⁰ Permits must also incorporate inspection, monitoring, and reporting requirements consistent with section 308 of the Act,²¹ which requires owners or operators of point sources to sample effluent at regular intervals, report the results of scientific analyses of these samples to either EPA or the EPA-approved state agency, and to maintain records of these reports and the underlying scientific data.²² These reports, which are termed Discharge Monitoring Reports (DMRs),²³ are the primary means by which EPA and state agencies are made aware of discharge permit violations.²⁴ Violations of

¹⁵ EPA has designated five pollutants—biochemical oxygen demand (BOD), total suspended solids (TSS), fecal coliform, pH, and oil and grease—as conventional pollutants. See 40 C.F.R. § 401.16.

¹⁶ Nonconventional pollutants are those pollutants that are not designated as either toxic or conventional pollutants by EPA. Cf. 33 U.S.C. § 1311(b)(2)(F); 40 C.F.R. § 125.3(a)(2)(v). Elements such as chlorine, nitrogen, and phosphorous fall into this category of pollutants. Compare 40 C.F.R. pt. 122, app. D, tbl. II (listing conventional and nonconventional pollutants), with 40 C.F.R. § 401.16 (listing the five conventional pollutants).

¹⁷ See 33 U.S.C. § 1311(b). Section 301 directed EPA to promulgate effluent limitations requiring “best practicable control technology” by July 1, 1977. See *id.* § 1311(b)(1)(A). It also directed EPA to promulgate more stringent effluent limitations requiring application of “best available technology economically feasible” for toxic and nonconventional pollutants, and “best conventional pollutant control technology” for conventional pollutants, no later than March 31, 1989. See *id.* §§ 1311(b)(2)(A), 1311(b)(2)(E), 1317(a)(2). See also 40 C.F.R. § 125.3(a)(2)(ii)-(v) (implementing section 301).

¹⁸ See *id.* § 1342(a), (b).

¹⁹ See *id.* § 1311(a).

²⁰ See *id.* § 1342(a)(3), (b)(1)(A).

²¹ *Id.* § 1318.

²² See *id.* § 1342(a)(3), (b)(2)(B).

²³ See 40 C.F.R. § 122.41(l)(4)(i) (1998).

²⁴ See, e.g., *Sierra Club v. Simkins Indus.*, 847 F.2d 1109, 1115 n.8 (4th Cir. 1988); *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 783 (E.D. Va. 1997) (noting that EPA determined Smithfield’s permit violations from its self-reported DMRs and citing numerous cases in which data submitted in DMRs were the sole basis for determining liability). Section 308 of the CWA authorizes EPA or state agencies to inspect dischargers’ premises and sample effluent discharged from point sources, see 33 U.S.C. § 1318(a)(4)(B), but this option is infrequently used. See *Regulation of Water Quality: Is EPA Meeting Its*

permit effluent limitations reported in DMRs, or failures by dischargers to comply with DMR reporting requirements, subject a discharger to civil liability because the CWA is a strict liability statute.²⁵

Section 402 allows states to operate their own permit programs, provided that such programs are approved by the EPA Administrator.²⁶ The Administrator is required to approve state permit programs unless a state's laws do not grant the state agency which would administer the program the authority to ensure compliance with the core elements of the NPDES program, as set out in section 402(b).²⁷ Included within these core elements is an enforcement provision: state law must authorize the state "[t]o abate violations of the permit program, including civil and criminal penalties and other ways and means of enforcement."²⁸ This provision is designed to ensure that state environmental agencies have the ability to enforce permits issued under state permit programs in the same manner that EPA enforces CWA permits in states where it continues to administer the NPDES program.

Virginia sought authority to administer its own permit program and

Obligations or Can the States Better Meet Water Quality Challenges?, in NINETEENTH ANNUAL CONFERENCE ON THE ENVIRONMENT: FEDERAL VERSUS STATE ENVIRONMENTAL PROTECTION STANDARDS: CAN A NATIONAL POLICY BE IMPLEMENTED LOCALLY? 20, 22 (American Bar Association ed. 1990) (statement of James R. Elder, Director, Office of Water Enforcement and Permits, EPA) [hereinafter Elder statement], reprinted in 22 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,029, 10,031 (1992) (noting that major NPDES facilities are only inspected approximately once a year).

²⁵ Section 301 states that any discharge not in compliance with § 402 "shall be unlawful," 33 U.S.C. § 1311(a), and § 309 authorizes the EPA Administrator to assess an administrative penalty for any permit violation. See *id.* § 1319(g)(1)(A). See also David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can There Not Be a Crowd When Enforcement Authority Is Shared By the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1567-68 (1995) (noting that the CWA "dictates strict liability for all CWA permit violations"). Numerous courts have recognized that the CWA is a strict liability statute, so that any violation of permit limitations subjects a discharger to civil liability. See, e.g., *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1397 (9th Cir. 1995); *Stoddard v. Western Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986).

Violations of permit limitations may also subject a discharger to criminal liability, but to obtain a criminal conviction the government must prove that a defendant acted either negligently or knowingly. See 33 U.S.C. § 1319(c).

²⁶ See 33 U.S.C. § 1342(b). By 1996, EPA had approved forty states to operate their own NPDES programs. See U.S. GENERAL ACCOUNTING OFFICE, WATER POLLUTION: MANY VIOLATIONS HAVE NOT RECEIVED APPROPRIATE ENFORCEMENT ATTENTION 2 (1996) [hereinafter GAO REPORT, APPROPRIATE ENFORCEMENT].

²⁷ See 33 U.S.C. § 1342(b)(1)-(9) (1994).

²⁸ *Id.* § 1342(b)(7). See also 40 C.F.R. § 123.27 (1998) (implementing this provision of the CWA and providing detailed requirements for state enforcement authority).

the EPA Administrator granted this authority on March 31, 1975.²⁹ Pursuant to this authority, Virginia has established the Virginia Pollutant Discharge Elimination System (VPDES), which is similar to the NPDES program administered by EPA.³⁰ Under this program, the State Water Control Board (SWCB or "Board"), acting upon recommendations by DEQ, issues discharge permits and has authority to enforce compliance with these permits.³¹

III. ENFORCEMENT OF THE VPDES PROGRAM IN VIRGINIA

A. Virginia's Primary Enforcement Role

Following EPA approval of a state permit program, section 309 of the CWA provides that the state and EPA have concurrent enforcement authority to address violations of state discharge permits.³² The Act implicitly recognizes, however, that the state has primary enforcement responsibility by conditioning EPA enforcement action under section 309(a)(1) upon the state's failure to take timely and "appropriate enforcement action" after EPA provides the state with notice of the violation.³³ In Virginia, the Memorandum of Understanding between the

²⁹ See MOU, *supra* note 2, at 13.

³⁰ See 9 VA. ADMIN. CODE §§ 25-31-10 to 25-31-940 (West Supp. 1998).

³¹ See *id.* §§ 25-31-370, -910. Following approval of a state permit program, the CWA requires EPA to suspend issuance of permits in that state. See 33 U.S.C. § 1342(c). EPA, however, retains authority to enforce compliance with state-issued permits if the state fails to take "appropriate enforcement action." *Id.* § 1319(a)(1). See also *infra* notes 63-66 and accompanying text (describing what types of actions are inappropriate).

³² Section 402(b) conditions approval of a state permit program upon a state's statutory authority to enforce compliance with state-issued permits. See 33 U.S.C. § 1342(b)(7). Section 402(i), however, states that "[n]othing in this section shall be construed to limit the authority of the [EPA] Administrator to take action pursuant to section 1319 of this title." *Id.* § 1342(i). Thus, EPA retains enforcement authority even in states with approved permit programs. See Elder statement, *supra* note 24, at 21, reprinted in 22 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,029, 10,029.

³³ See *id.* § 1319(a)(1). This provision requires EPA to notify the violator and the state of the violation, and then to issue a compliance order or initiate a civil action if the state fails to take "appropriate enforcement action" within 30 days of the notice. *Id.* Section 309(a)(1) thus "recognizes that states having a qualified permit program possess primary enforcement responsibility with regard to their permits, while the EPA serves 'as a backstop.'" William L. Andreen, *Beyond Words of Exhortation: The Congressional Prescription for Vigorous Federal Enforcement of the Clean Water Act*, 55 GEO. WASH. L. REV. 202, 218 (1987). In contrast, § 309(a)(3) provides that EPA may issue a compliance order or initiate a civil action for noncompliance with a state-issued permit

Board and EPA explicitly states that the Board (staffed and administered by DEQ)³⁴ is the “primary enforcement agency,”³⁵ with EPA assuming “a strong supporting role.”³⁶ The Memorandum of Understanding emphatically states that “[a]ll enforcement matters will be undertaken and expeditiously completed by the State Water Control Board,”³⁷ but then, in the same paragraph, reserves the EPA’s authority to take direct enforcement action under section 309.³⁸

Virginia’s primary enforcement authority is shared between DEQ and its SWCB and the Office of Attorney General (OAG), with DEQ taking the lead role.³⁹ In administering the State Water Control Law⁴⁰ in conjunction with the SWCB, DEQ may choose to take the following enforcement actions with regard to permit violations:

1. Issue a notice of violation (NOV) which puts the violator on notice of the permit violation but does not impose any civil penalty on the violator;
2. Recommend that the Board issues a Special Order directing the violator to comply with the terms of its permit or to take steps to achieve compliance;⁴¹
3. Issue a Special Order enjoining further violations of permit conditions for up to one year, which may include a civil penalty of

without providing prior notification to the violator or the state. See 33 U.S.C. § 1319(a)(3); Andreen, *supra*, at 218.

³⁴ Following its creation in 1993, DEQ took over the administration of the VPDES program. See *supra* note 3 and accompanying text. Although the staff of SWCB are now employees of DEQ, the SWCB remains a semi-independent body because the seven board members are independently appointed. See JLARC INTERIM REPORT, *supra* note 3, at 13. The SWCB retains plenary authority to approve all enforcement actions recommended by DEQ. See 9 VA. ADMIN. CODE § 25-31-910; JOINT LEGISLATIVE AUDIT & REVIEW COMM’N, COMMONWEALTH OF VA., REVIEW OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY 76 (1997) [hereinafter JLARC REPORT].

³⁵ MOU, *supra* note 2, at 2.

³⁶ *Id.*

³⁷ *Id.*

³⁸ See *id.* (“The foregoing shall not be construed to limit the authority of the [EPA] Regional Administrator to take action pursuant to Section 309 or 504 of the Act.”).

³⁹ See JLARC REPORT, *supra* note 34, at 75. The Virginia General Assembly has authorized DEQ to administer the VPDES program, including enforcement of VPDES permits. See VA. CODE ANN. § 10.1-1186 (Michie 1998) (granting DEQ the general power to “[i]mplement all regulations as may be adopted by . . . the State Water Control Board”).

⁴⁰ VA. CODE ANN. §§ 62.1-44.2 to -44.34:28.

⁴¹ The Board has authority to issue injunctive Special Orders. See *id.* § 62.1-44.15(8a).

not more than \$10,000;⁴²

4. Recommend that the Board issues a Special Order imposing a civil penalty for past permit violations—subject to a limitation of \$25,000 per day of violation and the consent of the violator to the amount of the penalty;⁴³
5. Recommend that the Board refer the case to OAG to initiate a civil action in state court;⁴⁴
6. Recommend that the Board refer the case to the appropriate Commonwealth Attorney's office to prosecute a criminal action in state court.⁴⁵

DEQ thus has a wide range of enforcement alternatives available to it, though most of these alternatives are subject to approval by the SWCB, or the willingness of the OAG or Commonwealth's Attorneys to act on the referrals, or both. Of course, DEQ also has the option of taking no action.

In order to determine whether to take any enforcement action, DEQ follows a NOV point system.⁴⁶ Under this system, DEQ auditors first review DMRs submitted by permittees to identify permit violations.⁴⁷

Violations are then assigned points values based on the seriousness of the violation.⁴⁸ If a permittee accrues four or more points within any six-month period, the case is referred to DEQ's enforcement staff for action pursuant to one of the alternatives listed above.⁴⁹ Generally, DEQ negotiates a consent order with the violator which requires remedial action to address the permit violations.⁵⁰

⁴² See *id.* §§ 10.1-1182, -1186. On April 17, 1996, Governor George Allen approved House Bill 1008, which granted DEQ this authority. See H.B. 1008, 1996 Leg., Reg. Sess., 1996 Va. Acts ch. 1005. This authority became effective on July 1, 1996.

⁴³ The SWCB has authority to issue Special Orders assessing civil penalties "with the consent of any owner who has violated . . . any condition of a permit." VA. CODE ANN. § 62.1-44.15(8d). Penalties are subject to a limit of \$25,000 per violation, and "[e]ach day of violation of each requirement shall constitute a separate offense." *Id.* § 62.1-44.32(a).

⁴⁴ Penalties imposed by Virginia courts pursuant to civil actions brought by OAG are also subject to the \$25,000 limitation for each day of violation for each permit limitation. See *id.*

⁴⁵ A willful or negligent violation of a permit limitation is classed as a misdemeanor; a knowing violation is classed as a felony. See *id.* §§ 62.1-44.32(b), (c).

⁴⁶ See JLARC REPORT, *supra* note 34, at 76.

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *id.*

B. *EPA's Enforcement Role*

Although the CWA recognizes approved states as the primary enforcers of the NPDES permit program, EPA retains its enforcement authority even in these states.⁵¹ In Virginia, the Memorandum of Understanding explicitly recognizes EPA's authority to take direct enforcement action, notwithstanding DEQ's role as the primary enforcement agency.⁵² The enforcement options available to EPA are set out in section 309 of the Act. Under this section, EPA may:

1. Notify a permit violator and the state of the permit violation and then, if the state fails to commence appropriate enforcement action within thirty days, either issue an order directing the permittee to comply with its permit or refer the matter to the Department of Justice (DOJ) to file a civil action in federal district court;⁵³
2. Directly issue a compliance order to the permittee or refer the matter to DOJ to commence a civil action;⁵⁴
3. Assess a Class I administrative civil penalty of up to \$25,000, after consultation with the state and an informal hearing;⁵⁵
4. Assess a Class II administrative civil penalty of up to \$125,000, after consultation with the state and a formal hearing on the record;⁵⁶
5. Refer the matter to DOJ for prosecution of criminal charges.⁵⁷

Moreover, EPA is not generally barred from taking enforcement action even after Virginia has initiated or completed its own enforcement action. Section 309(g), which authorizes EPA to issue administrative penalties, states that a permittee is not subject to a court-imposed civil

⁵¹ See 33 U.S.C. § 1342(i); *supra* notes 33-38 and accompanying text.

⁵² See MEMORANDUM OF UNDERSTANDING, *supra* note 2, at 10.

⁵³ See 33 U.S.C. § 1319(a)(1).

⁵⁴ See *id.* § 1319(a)(3).

⁵⁵ See *id.* § 1319(g)(1), (2)(A). A Class I civil penalty may not exceed \$10,000 per violation, in addition to the overall \$25,000 maximum penalty per order. See *id.* § 1319(g)(2)(A).

⁵⁶ See *id.* § 1319(g)(1), (2)(B). A Class II civil penalty is subject to a limitation of \$10,000 per day of violation in addition to the overall \$125,000 maximum limit per order. See *id.* § 1319(g)(2)(B). The formal hearing required by § 309(g)(2)(B) must comply with the procedures of section 554 of the Administrative Procedure Act, 5 U.S.C. § 554. See 33 U.S.C. § 1319(g)(2)(B).

⁵⁷ Section 309(c) provides varying levels of criminal penalties for negligent or knowing violations of permit conditions. See 33 U.S.C. § 1319(c).

penalty if EPA or an approved state is pursuing an administrative action against the permittee.⁵⁸ This provision bars EPA from filing civil actions for damages where an approved state is "diligently prosecuting" the violator under a state law provision comparable to section 309(g).⁵⁹ Aside from this one provision, there is no other statutory bar to an EPA enforcement action either concurrent with, or subsequent to, a state enforcement action. EPA may thus "overfile" an ongoing or completed state *civil* enforcement action by referring a case to DOJ for litigation in federal court or by assessing an administrative civil penalty against the permit violator.⁶⁰ Alternatively, if an approved state is diligently prosecuting an *administrative* action against the violator, or has recovered a penalty from the permittee by means of an administrative penalty, EPA may overfile solely by assessing an administrative penalty.⁶¹

Although it possesses this broad authority to overfile in approved states, EPA rarely asserts this authority for two reasons. First, EPA has stated as a matter of policy that it will only take such action in narrowly limited circumstances in deference to the primary enforcement responsibility of approved states.⁶² The principal reason for direct EPA enforcement is the failure of an approved state to take "timely and

⁵⁸ See *id.* § 1319(g)(6)(A).

⁵⁹ See *id.* § 1319(g)(6)(A)(ii). In the only decision to date that has considered whether Virginia's law is comparable to § 309(g), the district court in *Smithfield* held that Virginia's law did not meet this test, at least as of the last Special Order issued by the SWCB in that case. See *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 777, 795 (E.D. Va. 1997).

⁶⁰ Compare *Enforcement of Environment and Public Works: Hearings Before the Senate Comm. on Env't and Pub. Works*, 105th Cong. 161 (1997) [hereinafter *Senate Overfiling Hearing*] (statement of Hon. Steven Herman, Assistant Adm'r, Office of Enforcement and Compliance Assurance, EPA) ("Federal overfiling is the initiation of a Federal enforcement action, either administrative or civil, following a State enforcement action.") with Elder statement, *supra* note 24, at 21, reprinted in 22 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,029, 10,030 ("Overfiling occurs where the state has taken enforcement action that we find so grossly deficient that we step in and file our own federal *civil* action." (emphasis added)). This article will use the more expansive definition provided by Assistant Administrator Herman.

⁶¹ Section 309 bars federal overfiling by means of civil actions where the state law is "comparable" to section 309(g). See 33 U.S.C. §§ 1319(g)(6)(ii), (iii). But see Hodas, *supra* note 25, at 1589 (noting that EPA is unlikely to issue an administrative penalty if the state enforcement action has abated the pollution).

⁶² See OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING, EPA, POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS 21 (1986) [hereinafter *POLICY FRAMEWORK*] (on file with the WM. & MARY ENVTL. L. & POL'Y REV.).

appropriate enforcement action.”⁶³ This may occur if the state fails to “mov[e] expeditiously to resolve the permit violation,”⁶⁴ or “if remedies are clearly inappropriate to correct the violation, if compliance schedules are unacceptably extended, or if there is no appropriate penalty or other sanction.”⁶⁵ The term “inappropriate penalty” is narrowly defined as one that is “grossly deficient after considering all of the circumstances of the case and the national interest.”⁶⁶ Second, EPA lacks the resources to bring direct enforcement actions in approved states very often. Under the CWA, EPA is responsible for enforcement of the NPDES permit program in the ten non-approved states⁶⁷ and for overseeing state enforcement in the forty approved states.⁶⁸ With these existing responsibilities, EPA simply lacks the resources to bring many direct enforcement actions in approved states.⁶⁹

Overfiling by EPA is therefore a “rare event.”⁷⁰ This is especially true in Virginia, where EPA declined to overfile in federal court for the ten-year period prior to 1991.⁷¹ For policy and fiscal reasons, EPA prefers to coordinate enforcement with an approved state so that only one government agency pursues an enforcement action.⁷²

As a practical matter, EPA relies upon data submitted to it by approved states to determine the existence of permit violations which may require direct enforcement action. EPA regulations require approved states to submit quarterly noncompliance reports (QNCRs) listing

⁶³ *See id.*

⁶⁴ *Id.* at 22.

⁶⁵ *Id.* at 22-23.

⁶⁶ *Id.* at 23.

⁶⁷ *See* 33 U.S.C. § 1342(b)(7) (1994). These ten states are: Alaska, Arizona, Idaho, Louisiana, Maine, Massachusetts, New Hampshire, New Mexico, Oklahoma, and Texas. *See* GAO, APPROPRIATE ENFORCEMENT, *supra* note 26, at 2 n.6.

⁶⁸ *See* 33 U.S.C. § 1319(a)(2).

⁶⁹ *See* POLICY FRAMEWORK, *supra* note 62, at 21; Hodas, *supra* note 25, at 1587.

⁷⁰ *Senate Overfiling Hearing*, *supra* note 60, at 161 (statement of Steven Herman). In the twelve months prior to June 1997, DOJ filed only two CWA overfiling cases on behalf of EPA. *See id.* at 67 (statement of Lois Schiffer, Assistant Attorney General, Env't and Natural Resources Div., DOJ). In Fiscal Year 1996, EPA overfiled only on four occasions; and in the prior two fiscal years EPA overfiled in eighteen cases. *See id.*

⁷¹ *See* Letter from David S. Bailey, Director, Virginia Office, Environmental Defense Fund, to Dr. Eileen Choffnes, Senate Committee on Governmental Affairs 3 (Aug. 12, 1991) [hereinafter Bailey Letter], reprinted in *Management Deficiencies in Environmental Enforcement: “Forceless Enforcement”*: Hearings Before the Senate Comm. on Governmental Affairs, 102d Cong. 249 (1991) [hereinafter *Senate “Forceless Enforcement” Hearing*].

⁷² *See Senate Overfiling Hearing*, *supra* note 60, at 4 (statement of Lois Schiffer).

permittees that are in significant noncompliance with permit conditions.⁷³ Significant noncompliance⁷⁴ can arise from failure to comply with permit effluent limitations, reporting requirements, or compliance schedules, or failure to comply with compliance schedules, reporting requirements, or other conditions in enforcement orders.⁷⁵ Once a permittee appears on an approved state's QNCR, EPA begins to track the state's actions to achieve compliance.⁷⁶ If the permittee does not come into compliance, EPA may then act if the state fails to take timely and appropriate enforcement action.⁷⁷

IV. *SMITHFIELD* AS THE PARADIGMATIC EXAMPLE OF VIRGINIA'S LAX ENFORCEMENT POLICY

A. *Background to the Smithfield Case*

1. *Smithfield's Operations*

Smithfield has operated hog slaughtering and processing facilities in the town of Smithfield, Virginia, for more than forty years. Smithfield operates two hog processing and packing plants in Smithfield—the Smithfield Packing Company, Inc. (Smithfield Packing) and Gwaltney of Smithfield, Ltd. (Gwaltney) plants—each of which discharged treated wastewater through an “outfall”⁷⁸ into the Pagan River, a tributary of the

⁷³ See 40 C.F.R. § 123.45(a) (1998).

⁷⁴ Although the term is not defined in EPA regulations, it encompasses all Category I noncompliance as defined in those regulations. See *id.* § 123.45(a)(E)(2)(ii); Telephone Interview with Leonard Nash, Office of Compliance and Enforcement, Water Protection Div., EPA Region III (Feb. 23, 1998) [hereinafter Nash Interview].

⁷⁵ See 40 C.F.R. §§ 123.45(a)(2)(ii)(A)-(D). To be classified as significant noncompliance, violations of permit *effluent* limitations must exceed the criteria set out in an appendix to the EPA regulations. See § 123.45 app. A. Under these criteria, significant noncompliance occurs if (1) the level of a Group I pollutant exceeds the monthly average permit limitation by 40% or more at least twice in a six-month period; (2) the level of a Group II pollutant exceeds the monthly average permit limitation by 20% or more at least twice in a six-month period; or (3) the level of any pollutant exceeds the monthly average permit limitation by any amount at least four times in a six-month period. See *id.*; GAO REPORT, APPROPRIATE ENFORCEMENT, *supra* note 26, at 3. Group I pollutants correspond approximately with conventional and nonconventional pollutants, and Group II pollutants are roughly equivalent to toxic pollutants. Compare 40 C.F.R. § 123.45, app. A, with §§ 401.15, 401.16. See *supra* notes 13-17 and accompanying text.

⁷⁶ See *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 778 (E.D. Va. 1997).

⁷⁷ See *id.*

⁷⁸ An outfall is essentially a large pipe that allows transport of wastewater directly into

James River.⁷⁹ Wastewater from the plants eventually flowed into the Chesapeake Bay. In June 1996, the Gwaltney plant was connected to the Hampton Roads Sanitation District (HRSD) public water treatment system,⁸⁰ and in August 1997, the Smithfield Packing plant was similarly connected.⁸¹ Today neither plant discharges wastewater into the Pagan River.⁸² Prior to these connections, the plants discharged wastewater into the Pagan River pursuant to a succession of VPDES permits.⁸³

2. *The Problem: Pollution of the Pagan River*

The Pagan River is a relatively shallow estuary that is used by the public for a variety of recreational uses, including boating, fishing, crabbing, hunting, and swimming.⁸⁴ Prior to the connection to the HRSD system, the wastewater discharged by the Smithfield plants contained significant levels of phosphorous, nitrogen, and fecal coliform, among other pollutants.⁸⁵ The high levels of these three pollutants in the Pagan River have had serious environmental effects. In 1970, the Virginia Department of Health condemned the river for shellfish harvesting due to the high level of fecal coliform present in the river.⁸⁶ The Department subsequently has revised and extended this ban on at least sixteen occasions and it remains in effect today.⁸⁷ As a result of the continuing

some body of water.

⁷⁹ See *Smithfield*, 965 F. Supp. at 772-73. Smithfield acquired the Gwaltney plant from ITT-Continental Baking Company on October 27, 1981 and assumed responsibility for wastewater discharged from the facility. See *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 306 (4th Cir. 1986), *vacated on other grounds*, 484 U.S. 49 (1987).

⁸⁰ See *Smithfield*, 965 F. Supp. at 773.

⁸¹ See *Smithfield Foods Ends Waste Discharges*, WASH. POST, Aug. 8, 1997, at B3.

⁸² See *id.*

⁸³ See *Gwaltney*, 791 F.2d at 306; *Smithfield*, 965 F. Supp. at 774, 776.

⁸⁴ See *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 344 (E.D. Va. 1997).

⁸⁵ See *id.* at 345-47.

⁸⁶ See *id.* at 347; DEP'T OF ENVTL. QUALITY, COMMONWEALTH OF VA. & DEP'T OF CONSERVATION & RECREATION, COMMONWEALTH OF VA., VIRGINIA WATER QUALITY ASSESSMENT FOR 1996 AND NON-POINT SOURCE POLLUTION WATERSHED ASSESSMENT REPORT: 305(B) REPORT TO EPA AND CONGRESS, app. F, at F-5 (1996) [hereinafter 305(B) REPORT].

⁸⁷ See 305(B) REPORT, *supra* note 86, at F-5. Although Smithfield asserted at trial that discharge from the Town of Smithfield's wastewater treatment plant was a more significant source of fecal coliform pollution of the Pagan River than its plants, see *Smithfield*, 972 F. Supp. at 347, the district court noted that "based on flow, fecal coliform levels coming from defendants were five times the levels coming from the Town of Smithfield." *Id.* Perhaps

high fecal coliform levels, principally from the Smithfield plants, Virginia currently lists an almost three-mile long section of the river as "impaired," with a priority rank of "high."⁸⁸ According to this report, "[t]he major source of impairment on the Pagan River is the discharge from the Smithfield Foods wastewater treatment facility."⁸⁹ In 1997, American Rivers, Inc., one of the nation's leading river conservation organizations, listed the Pagan River as one of the twenty most threatened rivers in the country because of these high levels of fecal coliform.⁹⁰

Phosphorous and nitrogen are nutrients that, if present in large quantities, can cause eutrophication⁹¹ and destroy submerged aquatic vegetation (SAV).⁹² The Pagan River is eutrophic and contains no significant stands of SAV.⁹³ In addition, EPA's Chesapeake Bay Program has designated the river as severely stressed with regard to phosphorous.⁹⁴ Following presentation of expert testimony in the *Smithfield* case, the district court concluded that the high levels of phosphorous and nitrogen in the Pagan River are caused in major part by wastewater discharged from the Smithfield plants.⁹⁵ The court further concluded: "[M]ost of defendants' Permit discharge exceedances clearly had a *severe and significant impact on the water quality of the Pagan River*, in light of their

most significantly, the court also noted that fecal coliform levels in the river peaked in the vicinity of the Smithfield Packing outfall, not at the outlet from the town's treatment plant. *See id.*

⁸⁸ VIRGINIA DEP'T OF ENVTL. QUALITY, 1996 303(D) TOTAL MAXIMUM DAILY LOAD PRIORITY LIST I-98 (1996).

⁸⁹ *Id.*

⁹⁰ *See* AMERICAN RIVERS, INC., NORTH AMERICA'S MOST ENDANGERED AND THREATENED RIVERS OF 1997 35 (1997).

⁹¹ "Eutrophication is the over stimulation or overproduction of organic carbon in an estuary. Excessive nutrient loadings stimulate productivity of algae, which decreases sunlight to plants, and causes increased algae growth on plants and increased turbidity." *Smithfield*, 972 F. Supp. at 344.

⁹² *See id.* at 345. "SAV is a critical component of the ecosystem. It has tremendous habitat value, as there are generally more fish, crabs, and benthic (bottom-dwelling) organisms in habitats with SAV than in habitats without SAV." *Id.*

⁹³ *See id.* at 346. On EPA's eutrophication index, "the Pagan River scores a 5 on a scale of 1 to 5, with 5 being the most eutrophic." *Id.*

⁹⁴ *See id.* at 345.

⁹⁵ The court noted that Smithfield was responsible for "approximately 87% of phosphorous entering the Pagan River" in the period between December 1991 and February 1997, *see id.* at 345 n.12, and that Smithfield's nitrogen loadings "comprised approximately 63% of the nitrogen entering the Pagan River during this time period." *Id.* at 345 n.13. Although Smithfield is not the sole cause of the eutrophication of the river, the district court found that it clearly contributed to this condition. *See id.* at 346.

frequency and severity. The *harm to the environment and the risk to human health* caused by defendants' numerous effluent limit violations are *serious . . .*"⁹⁶

B. *The Smithfield Case*

Virginia's enforcement in the *Smithfield* case can only be understood in light of the history of the permits issued by the SWCB to Smithfield, the failure of Smithfield to comply with the conditions of these permits, and the subsequent concerted, though unsuccessful, attempts by Virginia to modify these permits.

1. *Smithfield's Discharge Permits*

Smithfield operated the Smithfield Packing and Gwaltney plants under a succession of discharge permits, but the only two permits at issue in *Smithfield* were the permits issued on May 13, 1986,⁹⁷ and January 3, 1992.⁹⁸ Both permits contained effluent limitations for a number of pollutants, including fecal coliform, total Kjeldahl nitrogen (TKN), chlorine, oil and grease, pH, biological oxygen demand (BOD), and total suspended solids (TSS).⁹⁹

On January 4, 1990, the SWCB modified the 1986 Permit to include an effluent limitation for phosphorous so that the permit would comply with Virginia's Policy for Nutrient Enriched Waters, which Virginia had promulgated in 1988.¹⁰⁰ EPA approved this permit modification, as required by EPA regulations implementing the CWA and

⁹⁶ *Id.* at 347-48 (emphasis added).

⁹⁷ See *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 774 (E.D. Va. 1997).

⁹⁸ See *id.* at 776. The 1986 Permit (and later the 1992 Permit) covered discharges from both Smithfield facilities. See STATE WATER CONTROL BOARD, COMMONWEALTH OF VIRGINIA, A SPECIAL ORDER ISSUED TO SMITHFIELD FOODS, INC., at 1 [hereinafter 1986 SPECIAL ORDER] (on file with the WM. & MARY ENVTL. L. & POL'Y REV.). Prior to 1986, Smithfield held a separate permit for each facility, see *id.*, because Smithfield acquired the Gwaltney plant in 1981 and assumed responsibility for compliance with the prior owner's permit. See *supra* note 79 and accompanying text.

⁹⁹ Cf. *Smithfield*, 965 F. Supp. at 779, 780 n.16 (noting that the United States' complaint and brief alleged violations of permit limitations for these pollutants). The permits also required Smithfield to monitor wastewater discharged from the outlets at prescribed intervals, report the results of wastewater sampling in DMRs submitted to DEQ, and retain all sampling and analysis data for three years. See *id.* at 774.

¹⁰⁰ See *id.* at 774.

the Memorandum of Understanding.¹⁰¹ The phosphorous limitation in the modified permit did not take effect immediately, however; the modified permit included a construction schedule for improvements to the Smithfield treatment plants which required full compliance with the effluent limitation within three years—by January 4, 1993.¹⁰² The phosphorous limitation and January 4, 1993 compliance date were carried over into the 1992 permit.¹⁰³ The 1992 Permit also added effluent limitations for three additional pollutants—ammonia-nitrogen, cyanide, and chemical biological oxygen demand (CBOD)—and required Smithfield to achieve compliance with these new limitations by May 13, 1994.¹⁰⁴ Aside from the January 1990 modification of the 1986 Permit, there were no other modifications to the 1986 or 1992 Permits.¹⁰⁵

2. Permit Violations

The United States alleged numerous violations of effluent limitations and reporting requirements in its complaint in the *Smithfield* case.¹⁰⁶ At trial, EPA submitted copies of Smithfield's DMRs, establishing that Smithfield was liable for 5919 days of violation of

¹⁰¹ See *id.* EPA regulations allow the Director of DEQ to modify a VPDES permit for a number of enumerated causes if he or she complies with 40 C.F.R. § 124.5(c). See 40 C.F.R. § 122.62 (1997). Section 124.5(c) requires the Director to prepare a draft permit incorporating the proposed modifications. See *id.* § 124.5(c)(1). The Director must then submit the draft permit to the EPA Regional III Administrator for approval following an opportunity for a public hearing. See *id.* §§ 124.6, 124.15. Virginia, therefore, is not authorized to modify VPDES permits without approval by EPA.

Similar provisions are included in the Memorandum of Understanding. It states that the SWCB will grant NPDES permits "only after objections of the Regional Administrator have been resolved to the mutual satisfaction of both parties." See MOU, *supra* note 2, at 7. It also notes that permit modifications are subject to the same objection procedures. See *id.* at 2.

¹⁰² See *Smithfield*, 965 F. Supp. at 774. The modified permit set four construction milestones and a final deadline for compliance with the phosphorous limitation. See *id.* The first two construction milestones required Smithfield to initiate design of improvements to its wastewater treatment plants within 30 days of January 4, 1990, and to submit construction plans to the Board within 90 days after the first milestone. See *id.* The latter two construction milestones were to be triggered by the Board's approval of these plans. See *id.*

¹⁰³ See *id.* at 777.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.* at 790.

¹⁰⁶ See *id.* at 779-80.

effluent limitations since December 1991.¹⁰⁷ The large majority of violations—5112 days of violation—were for exceedances of the phosphorous effluent limitation after the January 4, 1993, compliance date for that limitation.¹⁰⁸ The district court found violations of effluent limitations for eight other pollutants: ammonia-nitrogen (459 days), TKN (200 days), fecal coliform (seventy-two days), TSS (sixty-three days), pH (four days), cyanide (four days), chlorine (four days), and oil and grease (one day).¹⁰⁹ The court also found 1063 days of violation for a number of violations of record keeping and reporting requirements in Smithfield's permit.¹¹⁰ In total, the court found Smithfield liable for 6982 days of violation of its permit since December 1991.¹¹¹

As a result of these violations, Smithfield was subject to a statutory

¹⁰⁷ See *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 341-42 (E.D. Va. 1997). Because the United States filed its complaint in December 1996, see *Smithfield*, 965 F. Supp. at 779, the five-year statute of limitations that governs recovery of civil fines by the government prevented EPA from recovering civil penalties for violations prior to December 1991. See 28 U.S.C. § 2462 (1994). See also *United States v. Banks*, 115 F.3d 916, 918 (11th Cir. 1997) (holding that § 2462 applies to CWA enforcement actions for civil penalties); *United States v. Hobbs*, 736 F. Supp. 1406, 1409 (E.D. Va. 1990) (holding the same); *EPA v. City of Green Forest*, 921 F.2d 1394, 1408 (8th Cir. 1990) ("The statute of limitations for CWA violations is five years."). W. Michael McCabe, EPA's Region III Administrator, commented that, absent this five-year statute of limitations, EPA could have established many more CWA violations. See Ellen Nakashima & Spencer S. Hsu, *EPA Sues Smithfield in Rebuke of Va.*, WASH. POST, Dec. 17, 1996, at B1 (quoting W. Michael McCabe).

¹⁰⁸ See *supra* note 102 and accompanying text. Smithfield claimed that a May 9, 1991, Special Order negotiated with DEQ and approved by the SWCB exempted Smithfield from complying with the phosphorous limitation if Smithfield agreed to connect to the HRSD water treatment system, which Smithfield later did. See *Smithfield*, 965 F. Supp. at 784. See also *infra* notes 147-152 and accompanying text. The district court rejected this claim. See *Smithfield*, 965 F. Supp. at 787-90.

¹⁰⁹ See *Smithfield*, 972 F. Supp. at 341-42. The violations of the ammonia-nitrogen and cyanide effluent limitations occurred after the May 13, 1994 compliance date for these pollutants. See *supra* note 104 and accompanying text. Smithfield claimed that a November 8, 1994, Special Order negotiated with DEQ and approved by the SWCB waived Smithfield's noncompliance with these limitations because Smithfield had earlier agreed to connect to the HRSD water treatment system. See *Smithfield*, 965 F. Supp. at 784. The district court rejected this claim. See *id.* at 787-90.

¹¹⁰ See *Smithfield*, 972 F. Supp. at 342. The majority of these violations—884 days of violation—resulted from the destruction of approximately two years of sampling and analysis records by Terry Rettig, the chief operator of Smithfield's wastewater treatment plants, in July 1994. See *id.* Smithfield was also found liable for submitting DMRs with falsified data (fifteen days) and submitting its 1993 toxics management plan and September 1994 DMR after the deadlines specified in the 1992 Permit (164 days). See *id.*

¹¹¹ See *Smithfield*, 972 F. Supp. at 342.

maximum penalty of \$174,550,000.¹¹² After considering the criteria mandated by section 309(d) of the CWA,¹¹³ the court assessed Smithfield a civil penalty of \$12,600,000.¹¹⁴

3. *Virginia's Enforcement Efforts*

Virginia, acting through DEQ and the SWCB, has a long history of attempts to enforce compliance with the terms of Smithfield's CWA discharge permits.¹¹⁵ On only one occasion, however, has Virginia obtained a civil penalty against Smithfield.¹¹⁶ This is despite the fact that,

¹¹² See *id.* at 343. The CWA provides that each day of violation subjects a permit violator to a civil penalty of up to \$25,000. See 33 U.S.C. § 1319(d) (1994).

¹¹³ See 33 U.S.C. § 1319(d). This provision requires a court to "consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." *Id.*

In considering the seriousness of the violations, the court noted that the effluent violations were "frequent and severe." *Smithfield*, 972 F. Supp. at 344. "On average, defendants exceeded the phosphorous limits by 1055%, fecal coliform limits by 1365%, ammonia limits by 97%, cyanide limits by 168%, oil and grease limit by 114%, and the TSS limit by 63.5%." *Id.*

¹¹⁴ See *id.* at 354.

¹¹⁵ See, e.g., Richard Stradling, *State Sues Smithfield Foods*, DAILY PRESS, Aug. 31, 1996, at A1 (noting that Smithfield's "water pollution problems go back to the mid-1970s, when the state first ordered it to stop violating its pollution permit").

¹¹⁶ In September 1983, the Board referred the Smithfield Packing case to the OAG to initiate a civil suit for violations of the TKN effluent limitation in the company's permit. See DEP'T OF ENVTL. QUALITY, COMMONWEALTH OF VIRGINIA, ENFORCEMENT RECOMMENDATION PLAN app. E (1996) [hereinafter ENFORCEMENT RECOMMENDATION PLAN] (on file with the WM. & MARY ENVTL. L. & POL'Y REV.). Virginia sued Smithfield Packing in the Isle of Wight County Circuit Court and obtained a court order in January 1984 that directed Smithfield Packing to upgrade its wastewater treatment plant and comply with the TKN limitation and other permit conditions by May 1984. See *id.* When the company subsequently violated its permit, and thus failed to comply with the court order, the Circuit Court, in December 1984, assessed a \$40,000 civil penalty against the company for contempt of court. See *id.*; Telephone Interview with John Butcher, Assistant Attorney General for the Commonwealth of Virginia (Mar. 10, 1998) [hereinafter Butcher Interview].

Virginia sued Smithfield Packing after the Chesapeake Bay Foundation gave the state a sixty-day notice of its intention to sue that company and Gwaltney for violations of effluent limitations in their permits, as required by the CWA's citizen suit provision. See 33 U.S.C. § 1365(b)(1)(A) (1994). Virginia elected to sue Smithfield Packing but not to sue Gwaltney. See Butcher Interview, *supra*. The Chesapeake Bay Foundation then filed a citizen suit in federal district court against Gwaltney, alleging violations of effluent limitations for five pollutants. See *Chesapeake Bay Foundation v. Gwaltney of*

according to Virginia, Smithfield has violated its permits on literally tens of thousands of occasions.¹¹⁷

Within the relevant time-frame of the *Smithfield* case—from May 1986, when the SWCB issued the 1986 Permit, until May 30, 1997, the date of the first district court decision in *Smithfield*—SWCB and DEQ have employed a number of enforcement techniques against Smithfield: Special Orders, notices of violation, and the pending civil enforcement action in state court. Each of these enforcement measures will be considered in turn.

a. *Special Orders*

Virginia has entered into at least six Special Orders¹¹⁸ with Smithfield since May 1986 in an attempt to eliminate permit violations. A review of these actions shows, however, that the practice of entering Special Orders did little (if anything) to deter future permit violations and, in fact, probably encouraged further noncompliance by Smithfield. Moreover, Virginia appears to have used Special Orders as a means of

Smithfield, Ltd., 611 F. Supp. 1542, 1544 (E.D. Va. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *vacated*, 484 U.S. 49 (1987). After remand to the district court, the Fourth Circuit affirmed a civil penalty of \$289,822 for violations of the permit's TKN limitation. *See Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 698 (4th Cir. 1989). Therefore, even after an adverse Supreme Court ruling, which prevented the Chesapeake Bay Foundation from suing for wholly past violations, *see Gwaltney*, 484 U.S. at 58-59, the plaintiff recovered a civil penalty more than seven times greater than that recovered by Virginia—in the case that Virginia had deemed to be less worthy of an enforcement action.

¹¹⁷ Virginia presently has a lawsuit pending in the Circuit Court for Isle of Wight County against Smithfield for numerous violations of its 1986 and 1992 Permits. *See, e.g.*, Richard Stradling, *Smithfield Foods Fights Va. Pollution Suit*, DAILY PRESS, Dec. 3, 1997, at C1. In this suit, Virginia has alleged more than 22,000 violations of Smithfield's discharge permits since 1986. *See id.* Virginia Assistant Attorney General John Butcher noted that only six percent of these alleged violations overlap with the 6982 violations established in the *United States v. Smithfield* case. *See id.*

¹¹⁸ "Special Order" is the term used by DEQ and the Board to refer to consent decrees entered into by the SWCB and CWA permittees. These orders are bilateral agreements that bind both parties and are enforceable in state courts. In the past, DEQ has incorporated stipulated penalties into special orders so that violations of compliance schedules set out in a special order subject the permittee to civil penalties specified in the special orders. *See, e.g.*, Letter from John R. Butcher, Virginia Assistant Attorney General, to Thomas L. Hopkins, Director, DEQ 2 (Oct. 1, 1996) [hereinafter Butcher Letter] (noting the incorporation of stipulated penalties in a consent decree entered into with the City of Petersburg). None of the Smithfield Special Orders included a stipulated penalty provision.

relaxing permit conditions without following the procedural requirements mandated by EPA regulations and the terms of the Memorandum of Understanding—most importantly, without seeking EPA approval.

i. *The TKN Limitation*

On May 13, 1986, the day that it issued the 1986 Permit to Smithfield, the SWCB entered a Special Order that “relaxed” the TKN limitation in the 1986 Permit for an indeterminate “interim” period.¹¹⁹ In return for this “relaxed” limitation, Smithfield agreed to submit additional water quality data on the Pagan River by March 31, 1987.¹²⁰ This data would allow the Board to determine whether the more stringent TKN limitation in the 1986 Permit should be reinstated by an amendment to the Special Order.¹²¹

Smithfield did not submit the water quality data by March 31, 1987, or any time that year. On January 25, 1988, almost nine months after Smithfield failed to meet the first data submission deadline, the Board entered into a second Special Order granting Smithfield an extension until October 1, 1988, to submit the required data.¹²² This Special Order also established a compliance schedule for Smithfield if the Board later determined that Smithfield must comply with a TKN effluent limitation more stringent than the interim limitation.¹²³

In a March 1990 Special Order, the Board acknowledged receipt of Smithfield’s water quality data and agreed to provide Smithfield with a

¹¹⁹ See 1986 SPECIAL ORDER, *supra* note 98, at 1. The district court later held that the Special Orders entered into by the Board and Smithfield did not actually revise any effluent limitations in the 1986 or 1992 Permits because such revisions did not comply with the modification procedures set out in EPA regulations. See *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 790 (E.D. Va. 1997). See also *supra* note 101 and accompanying text (describing the federal requirements for the DEQ Director should he wish to modify a VPDES permit).

¹²⁰ See 1986 SPECIAL ORDER, *supra* note 98, at 1.

¹²¹ See *id.* The TKN limitation in the 1986 Permit was based on a mathematical model that derived a more stringent limitation than was present in Smithfield’s previous permits. See *id.*

¹²² See STATE WATER CONTROL BOARD, COMMONWEALTH OF VIRGINIA, AMENDMENT TO A SPECIAL ORDER ISSUED TO SMITHFIELD FOODS, INC. app. A (1988) (on file with the WM. & MARY ENVTL. L. & POL’Y REV.).

¹²³ See *id.* The schedule would require compliance with such more stringent limitation within seventeen months of the Board’s determination that a more stringent limitation was attainable. See *id.*

proposed revised TKN effluent limitation by the following November.¹²⁴ Pending permit re-issuance—Smithfield's permit was due to expire in May 1991¹²⁵—the Board directed Smithfield to comply with the interim TKN limitation.¹²⁶ When the Board addressed this issue in a May 1991 Special Order, it extended the interim TKN limitation until Smithfield either connected to the HRSD water treatment system or completed an upgrade of its water treatment facilities.¹²⁷ Because Smithfield later chose to connect to HRSD,¹²⁸ the effect of these Special Orders was to grant Smithfield an exemption from a Virginia enforcement action for noncompliance with the TKN limitation in the 1986 and 1992 Permits for the entire period from May 1986—the date of issuance of the 1986 Permit—until Smithfield completed its connection to HRSD in August 1997, as long as Smithfield complied with the lower interim TKN limitation.

Although these Special Orders did not modify the permit or bind EPA to their terms,¹²⁹ Smithfield and Virginia may have expected them to serve as *de facto* permit modifications. By the late 1980s, direct enforcement by EPA in approved states had all but ceased.¹³⁰ Moreover, in Virginia, EPA had not overfiled in federal court in the ten-year period prior to 1991.¹³¹ Therefore, when Virginia agreed not to enforce the TKN effluent limitation in Smithfield's permits, both parties may have expected that EPA would not enforce this limitation.

¹²⁴ See STATE WATER CONTROL BOARD, COMMONWEALTH OF VA., A SPECIAL ORDER ISSUED TO SMITHFIELD FOODS, INC. 2 (1990) [hereinafter MARCH 1990 SPECIAL ORDER] (on file with the WM. & MARY ENVTL. L. & POL'Y REV.).

¹²⁵ See *id.* at 1.

¹²⁶ See *id.* at 2.

¹²⁷ See STATE WATER CONTROL BOARD, COMMONWEALTH OF VA., A SPECIAL ORDER ISSUED TO SMITHFIELD FOODS, INC. app. A (1991) [hereinafter MAY 1991 SPECIAL ORDER] (on file with the WM & MARY ENVTL. L. & POL'Y REV.). See also *infra* notes 147-150 and accompanying text (discussing Smithfield's options under the May 1991 Special Order). As provided by this Special Order, the Board required Smithfield to finish upgrading its facilities—if Smithfield chose this route—according to a schedule of unspecified duration to be devised by Smithfield, subject to Board approval. See *infra* note 150 and accompanying text. This option, therefore, allowed Smithfield to extend application of the interim TKN limitation largely at its own whim.

¹²⁸ See *infra* note 152 and accompanying text.

¹²⁹ See *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 788-89 (E.D. Va. 1997).

¹³⁰ See Senate "Forceless Enforcement" Hearing, *supra* note 71, at 113 (statement of David S. Bailey, Director, Virginia Office, Environmental Defense Fund).

¹³¹ See Bailey Letter, *supra* note 71, at 3, reprinted in Senate "Forceless Enforcement" Hearing, *supra* note 71, at 249.

ii. The Phosphorous Limitation

On January 4, 1990, the Board amended the 1986 Permit to include an effluent limitation for phosphorous and a three-year compliance schedule.¹³² At the time of the permit modification, Smithfield had a pending lawsuit in state court in which it was challenging the reasonableness of the phosphorous limitation.¹³³ After the Board proposed modifying its permit, Smithfield threatened to move its operations to North Carolina, which Smithfield contended would not require permittees to comply with a phosphorous limitation.¹³⁴

Shortly thereafter, in March 1990, the Board entered into a Special Order with Smithfield that settled this dispute.¹³⁵ Under this agreement, the Board agreed to "defer commencement"¹³⁶ of the compliance schedule until December 1, 1990.¹³⁷ In return, Smithfield agreed to study the available technologies and costs involved in complying with the phosphorous limitation, study the feasibility of connecting its wastewater system to the HRSD system, and notify the Board whether it intended to connect to HRSD by November 13, 1990.¹³⁸

The district court found that this Special Order deferred commencement of the compliance schedule but did not extend the January 4, 1993 deadline for compliance with the phosphorous limitation.¹³⁹ The court relied primarily on language in the Special Order stating that "Smithfield is further required to attain full compliance with the phosphorous limitation by January 4, 1993."¹⁴⁰ Although at first glance this language appears unambiguously to support the court's finding, an alternative interpretation of the Special Order is that it purported to defer the entire compliance schedule enumerated in the 1990 modified permit, including the final compliance deadline. First, the language of the Special Order quoted by the court arises in the context of a description of the terms

¹³² See *supra* note 100 and accompanying text.

¹³³ See *Smithfield*, 965 F. Supp. at 774.

¹³⁴ See *Smithfield Plants May Relocate to N.C.*, RICHMOND NEWS LEADER, Dec. 30, 1989, at 27. Smithfield employed 3000 workers at its two plants in Smithfield and was one of the two largest employers in Isle of Wight County at the time. See *id.*

¹³⁵ See MARCH 1990 SPECIAL ORDER, *supra* note 124, at 1; *Smithfield*, 965 F. Supp. at 774. As a result, the Isle of Wight Circuit Court dismissed Smithfield's action on April 1, 1991. See *id.* at 775 n.6.

¹³⁶ MARCH 1990 SPECIAL ORDER, *supra* note 124, at 2.

¹³⁷ See *id.*

¹³⁸ See *id.* at 1-2.

¹³⁹ See *Smithfield*, 965 F. Supp. at 775 n.4.

¹⁴⁰ *Id.* at 774 (quoting MARCH 1990 SPECIAL ORDER, *supra* note 124, at 1).

of the 1990 modified permit and merely paraphrases the terms of the modified permit.¹⁴¹ Once this statement is placed in context, the Board's deferral of the commencement of the compliance schedule is most logically interpreted as a deferral of the entire schedule.¹⁴² Moreover, there is no mention in the Special Order that Smithfield was subject to a compressed compliance schedule, or how such a compressed schedule would operate.

A reasonable interpretation of the March 1990 Special Order is that the state and Smithfield used it to attempt to defer compliance with the phosphorous effluent limitation by almost eleven months, i.e., until November 1, 1993.¹⁴³ Of course, as the district court later held, the Special Orders did not modify any of Smithfield's permits, and therefore could not extend the compliance schedule.¹⁴⁴ Instead, the March 1990 Special Order served merely as an eleven-month waiver by Virginia of its ability to enforce compliance with the phosphorous compliance schedule in the 1990 modified permit.

In November 1990, the Board entered into another Special Order that deferred commencement of the phosphorous compliance schedule by an additional four months, to March 1, 1991.¹⁴⁵ Again, it appears that the Special Order was an attempt to exempt Smithfield from complying with the phosphorous limitation for a further four months, until March 1, 1994.

Finally, in the May 1991 Special Order, Virginia gave Smithfield the option of either avoiding compliance with the phosphorous limitation entirely or extending its exemption from compliance for an additional period of time.¹⁴⁶ The Special Order directed Smithfield to decide whether to connect to HRSD or to upgrade its wastewater treatment facilities and thereby comply with the phosphorous limitation.¹⁴⁷ Under the first option, Virginia agreed never to enforce compliance with the phosphorous

¹⁴¹ See MARCH 1990 SPECIAL ORDER, *supra* note 124, at 1.

¹⁴² Note, for example, that the Board fixed the milestones in the compliance schedule in reference to the date of the permit rather than by establishing specific dates for each milestone. See *id.*

¹⁴³ See *Smithfield*, 965 F. Supp. at 774. The original construction schedule commenced on January 4, 1990. See *id.* The revised schedule commenced on November 1, 1990. See MARCH 1990 SPECIAL ORDER, *supra* note 124, at 2.

¹⁴⁴ See *Smithfield*, 965 F. Supp. at 790.

¹⁴⁵ See STATE WATER CONTROL BOARD, COMMONWEALTH OF VIRGINIA, AN AMENDMENT TO A SPECIAL ORDER ISSUED TO SMITHFIELD FOODS, INC. 1 (1990) [hereinafter NOVEMBER 1990 SPECIAL ORDER] (on file with the WM. & MARY ENVTL. L. & POL'Y REV.).

¹⁴⁶ See MAY 1991 SPECIAL ORDER, *supra* note 127, at 2.

¹⁴⁷ See *id.*

limitation.¹⁴⁸ If Smithfield elected the second option, the Special Order required it to submit an "approvable schedule"¹⁴⁹ for upgrading its treatment facilities to comply with the permit effluent limitations by August 15, 1991.¹⁵⁰ The Special Order provided no further direction regarding what would be an approvable schedule. By its own ambiguous terms, this requirement deferred compliance with the phosphorous limitation until after a deadline that Smithfield could itself propose. At the very least therefore, the May 1991 Special Order effectively waived enforcement by Virginia of the phosphorous limitation until a time to be chosen by Smithfield.¹⁵¹ However, if Smithfield elected to connect its treatment facilities to HRSD this Special Order would waive Virginia enforcement indefinitely.

On June 7, 1991, Smithfield notified the Board of its decision to connect to HRSD and consequently ceased any attempt to comply with the phosphorous limitation by upgrading its wastewater treatment facilities.¹⁵² Between December 1991 and February 1997, wastewater discharged from Smithfield's two processing plants exceeded the phosphorous limitation in more than two-thirds of these months and violations exceeded the

¹⁴⁸ The district court interpreted the language of the Special Order to require Smithfield to comply with the phosphorous limitation even if it decided to connect to HRSD. *See Smithfield*, 965 F. Supp. at 785-87. The opposite conclusion is a more reasonable interpretation. First, if Smithfield agreed to connect to HRSD rather than upgrade its treatment facilities, it would be impossible for Smithfield to comply with the phosphorous limitation. If this were the case, this option would not be viable—it would expose Smithfield to enormous civil penalties without any countervailing benefit. Yet Smithfield elected to connect to HRSD. *See id.* at 775. Furthermore, the bill of complaint filed by Virginia in its lawsuit against Smithfield did not allege noncompliance with the phosphorous limitation, even though Smithfield violated this condition of its permit more than any other effluent limitation. *See Bill of Particulars, Hopkins v. Smithfield Foods, Inc.* (Isle of Wight Cir. Ct. Mar. 24, 1997) [hereinafter Bill of Particulars]. Clearly, DEQ believed that Smithfield's election to connect to HRSD exempted it from compliance with the phosphorous limitation.

¹⁴⁹ MAY 1991 SPECIAL ORDER, *supra* note 127, at 2.

¹⁵⁰ *See id.*

¹⁵¹ Moreover, the May 1991 Special Order extended the deadline for Smithfield's notification to the Board regarding whether it would connect to HRSD for the second time. The March 1990 Special Order set a deadline of November 13, 1990. *See MARCH 1990 SPECIAL ORDER, supra* note 124, at 2. A week before this deadline, the Board granted an extension until February 15, 1991. *See NOVEMBER 1990 SPECIAL ORDER, supra* note 145, at 1. The May 1991 Special Order further extended this deadline by an additional four months, to June 15, 1991. *See MAY 1991 SPECIAL ORDER, supra* note 127, at 2.

¹⁵² *See Smithfield*, 965 F. Supp. at 775-76.

phosphorous limitation by 1055% on average.¹⁵³ Under the terms of the May 1991 Special Order, Virginia agreed to turn a blind eye to these permit violations.

iii. *The Cyanide, CBOD, and Ammonia Limitations*

In a similar manner, Virginia waived its right to enforce compliance with the effluent limitations in the 1992 Permit for cyanide, CBOD, and ammonia by Special Order. The 1992 Permit incorporated these limitations and a construction schedule for improvements to the Smithfield treatment facilities that would enable Smithfield to comply with them.¹⁵⁴ The schedule required Smithfield to achieve full compliance with the new effluent limitations by May 13, 1994.¹⁵⁵ Smithfield failed to comply with this deadline because it decided to connect to the HRSD system rather than upgrade its treatment facilities as required by the 1992 Permit.¹⁵⁶ After it became clear that Smithfield was in violation of these effluent limitations and would not comply as long as Smithfield discharged wastewater directly into the Pagan River, a practice that was expected to continue for several more years until Smithfield connected to HRSD,¹⁵⁷ DEQ enforcement personnel prepared an Enforcement Action Recommendation which proposed amending the May 1991 Special Order to "exempt [Smithfield] from meeting these limits until they go off line to HRSD."¹⁵⁸ The Recommendation argued that the cost to Smithfield of upgrading its treatment plant would be "prohibitive considering that the discharge will be going to HRSD in two years."¹⁵⁹

¹⁵³ See *Smithfield*, 972 F. Supp. at 343-44.

¹⁵⁴ See *Smithfield*, 965 F. Supp. at 777.

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* at 787; DEP'T OF ENVTL. QUALITY, COMMONWEALTH OF VA., ENFORCEMENT ACTION RECOMMENDATION FOR SMITHFIELD FOODS, INC. 1 (1994) [hereinafter ENFORCEMENT ACTION RECOMMENDATION] (on file with the WM. & MARY ENVTL. L. & POL'Y REV.). This Recommendation noted that Smithfield "informed [DEQ] they would meet these limits by connecting to HRSD and we concurred. At the time (May, 1992), [DEQ] did not realize that the HRSD force main would take so long to complete." *Id.*

¹⁵⁷ See ENFORCEMENT ACTION RECOMMENDATION, *supra* note 156, at 1. DEQ noted that Smithfield "will probably go on-line to HRSD sometime between April, 1996 and February, 1997." *Id.* This estimate was somewhat optimistic considering that the original completion date for the upgrade of the HRSD system, which was required before Smithfield could complete its connection to the system, was December 1996. See *Smithfield*, 965 F. Supp. at 778. HRSD extended this completion date on several occasions. See *id.*

¹⁵⁸ ENFORCEMENT ACTION RECOMMENDATION, *supra* note 156, at 1.

¹⁵⁹ *Id.*

In November 1994, the Board entered into a Special Order that adopted the enforcement action proposed by the DEQ Recommendation.¹⁶⁰

In this Special Order, the Board stated that it agreed "to hold in abeyance"¹⁶¹ the provision in the 1992 Permit which required Smithfield to comply with these effluent limitations by May 13, 1994.¹⁶² Of course, following this 1994 Special Order, Smithfield ceased attempting to comply with these limitations and continued to discharge effluent that violated these permit limitations.¹⁶³ But under the Special Order, Virginia agreed to ignore these violations, regardless of the environmental harm caused by such permit violations and without specifying any deadline for connection of the Smithfield plants to the HRSD system.¹⁶⁴

In sum, by granting Smithfield virtual immunity from state enforcement actions for violations of the TKN, phosphorous, cyanide, CBOD, and ammonia limitations, Virginia's use of Special Orders significantly contributed to Smithfield's ongoing practice of violating effluent limitations in its permits. Given these Special Orders and the seemingly remote possibility of direct EPA enforcement, it is no surprise that Smithfield assumed that it could violate these limitations without liability and acted accordingly.

b. *Notices of Violation*

Virginia's pattern of issuing NOVs also reflected a practice of lax enforcement. Although Virginia's Special Orders attempted to reduce the

¹⁶⁰ See STATE WATER CONTROL BOARD, COMMONWEALTH OF VA., AN AMENDMENT TO A SPECIAL ORDER ISSUED TO SMITHFIELD FOODS, INC. 1 (1994) [hereinafter 1994 SPECIAL ORDER] (on file with the WM. & MARY ENVTL. L. & POL'Y REV.).

¹⁶¹ *Id.*

¹⁶² See *id.* The Special Order noted that Smithfield had agreed to connect to HRSD and that such connection would achieve compliance with the three effluent limitations. See *id.* The rationale for holding these effluent limitations in abeyance appears to have been that, because Smithfield had committed to the expense of connecting to HRSD, it should not also be required to incur the expense of upgrading its treatment facilities. See ENFORCEMENT ACTION RECOMMENDATION, *supra* note 156, at 1. As the district court later noted, however, Virginia did not have the authority to grant Smithfield an exemption from compliance with these effluent limitations without following the modification procedures prescribed by EPA. See *Smithfield*, 965 F. Supp. at 790.

¹⁶³ See *Smithfield*, 972 F. Supp. at 344, 350-51.

¹⁶⁴ See 1994 SPECIAL ORDER, *supra* note 160, at 1-2. The Special Order also declared that Smithfield was no longer required to conduct additional toxicity testing of its wastewater, as required by the 1992 Permit. See *id.* at 2. The Board granted this concession even though it acknowledged that the discharge from Smithfield's processing plants had been found to be toxic. See *id.* at 1.

possibility of noncompliance¹⁶⁵ by eliminating the requirements for compliance with permit effluent limitations for five pollutants—TKN, phosphorous, cyanide, CBOD, and ammonia—the company failed to consistently comply with the remaining effluent limitations in its permit or the “interim” TKN limitation. Between September 1994 and March 1996, DEQ issued nine NOVs to Smithfield, citing violations of permit effluent limitations for oil and grease, fecal coliform, BOD, TSS, and pH, as well as the “interim” TKN limitation adopted in the 1986 Special Order.¹⁶⁶ DEQ issued six NOVs in successive months from September 1994 through February 1995.¹⁶⁷ Despite this record of repeated noncompliance, Virginia never negotiated a civil penalty with the company as a result of these violations.¹⁶⁸

DEQ’s practice of issuing NOVs to Smithfield in response to repeated permit violations failed to bring the company into compliance with the conditions of its permit. With no civil penalty attached to the NOV, and the unlikelihood of enforcement for violations, Smithfield decided not to upgrade its facilities and therefore, continued to violate its permit. The Special Orders exempted Smithfield from complying with

¹⁶⁵ That is, noncompliance with the 1992 Permit, as “modified” by the Board’s Special Orders. Virginia did not consider noncompliance with the conditions of the 1992 Permit to be noncompliance, as long as Smithfield complied with the terms of the Special Orders. *Cf. Smithfield*, 965 F. Supp. at 778 (noting that Smithfield’s repeated violations of its 1992 Permit did not appear on any QNCR prior to 1994 because “Virginia issued consent orders allowing defendants to exceed the limits established in the Permit”).

¹⁶⁶ See Letter from Francis L. Daniel, Director, Tidewater Regional Office, DEQ, to Carl B. Wood, Vice President of Engineering, Smithfield Foods, Inc. 1 (Apr. 8, 1996) (on file with the WM. & MARY ENVTL. L. & POL’Y REV.) [hereinafter April 1996 Daniel Letter]. The Board issued at least one NOV to Smithfield prior to September 1994: In May 1991, the Board issued a NOV for a violation resulting from a “lagoon failure.” Memorandum from David S. Gussman, Senior Enforcement Specialist, Tidewater Regional Office, DEQ, to Harold J. Winer, Compliance and Monitoring Manager, Tidewater Regional Office, DEQ 1 (Apr. 24, 1996) [hereinafter April 1996 Daniel Letter] (on file with the WM. & MARY ENVTL. L. & POL’Y REV.).

¹⁶⁷ See *id.*

¹⁶⁸ The court noted a lack of any evidence that Smithfield had ever paid an administrative civil penalty for any of its permit violations, see *Smithfield*, 965 F. Supp. at 791 n.32, and that none of the Board’s Special Orders ever assessed a civil penalty against the company. See *id.* at 792 n.33. But see ENFORCEMENT RECOMMENDATION PLAN, *supra* note 116, at app. E (“The State Water Control Board agreed to the payment of a \$100 Civil penalty and a \$25,000 contribution to the oil spill emergency fund for violations of the interim limits at Smithfield Packing.”).

Prior to July 1, 1996 DEQ did not have authority to assess civil penalties without the consent of the permittee. See *supra* notes 42-43 and accompanying text.

five effluent limitations in the permit and DEQ had demonstrated no signs of taking any significant enforcement action with regard to violations of the other effluent limitations.¹⁶⁹

c. *Virginia's Civil Action Against Smithfield*

i. *DEQ's Decision to Enforce the 1992 Permit*

The prospect of stronger enforcement by DEQ did not finally become apparent until the spring of 1996, as a result of pressure by EPA for a tougher action.¹⁷⁰ The problems at Smithfield had come to the attention of EPA after DEQ reported Smithfield to be in significant noncompliance with its permit in 1994.¹⁷¹ From that time onward, EPA began to track Virginia's enforcement actions to bring Smithfield into compliance.¹⁷² As Smithfield continued to violate its permit and DEQ repeatedly issued ineffective NOV's, EPA pressured DEQ to justify its weak enforcement response.¹⁷³ After DEQ was forced to issue its ninth NOV in less than two years in March 1996,¹⁷⁴ DEQ's Tidewater Regional Office (TRO) finally decided to initiate stronger action. On April 8, 1996, the Director of the TRO informed Smithfield that it intended to recommend that the Board "consider requesting" a referral to the OAG to initiate a civil suit against the company at the Board's May 22, 1996, meeting.¹⁷⁵ At about the same time, a TRO enforcement specialist prepared an Enforcement Recommendation Plan (ERP) recommending that the Board negotiate a Special Order with Smithfield imposing a civil penalty of \$278,279.¹⁷⁶ This recommendation was based on evidence acquired by DEQ that Smithfield had committed perhaps hundreds of

¹⁶⁹ See *Smithfield*, 965 F. Supp. at 773-78.

¹⁷⁰ See *id.* at 779.

¹⁷¹ See *id.* at 778. For a discussion of the term "significant noncompliance," see *supra* notes 74-75 and accompanying text.

¹⁷² See *Smithfield*, 965 F. Supp. at 779.

¹⁷³ See Memorandum from Amy Clarke, Water Division, DEQ, to Thomas Hopkins, Deputy Secretary of Natural Resources, Commonwealth of Virginia 1 (June 20, 1995) (on file with the WM. & MARY ENVTL. L. & POL'Y REV.). Clarke noted that in a recent meeting with EPA compliance staff, DEQ enforcement staff "defended [their] efforts to cooperate constructively with [Smithfield] to solve their problems." *Id.* At the time of this memorandum, DOJ was investigating a possible criminal prosecution of Terry Rettig, Smithfield's former treatment plant operator. See *id.* at 2.

¹⁷⁴ See April 1996 Daniel Letter, *supra* note 166, at 1.

¹⁷⁵ See *id.* at 2.

¹⁷⁶ See ENFORCEMENT RECOMMENDATION PLAN, *supra* note 116, at 1.

permit violations in the preceding two years. An appendix to the ERP noted that Smithfield had committed fifty-nine violations of effluent limitations (that were enforceable by Virginia),¹⁷⁷ had committed violations of groundwater standards (and continued to violate such standards),¹⁷⁸ and had failed to comply with permit requirements for sampling and analysis, recording of analytical results, record-keeping, reporting, operation of the treatment facility, and quality control.¹⁷⁹ The effluent violations alone were equivalent to 175 days of violation, which subjected Smithfield to a maximum statutory civil penalty of \$4,375,000.¹⁸⁰

ii. *DEQ's Change of Heart*

At the beginning of May, however, DEQ enforcement officials in the Richmond headquarters overruled the TRO's recommendation by issuing a Revised ERP which recommended that no penalty should be assessed against Smithfield.¹⁸¹ The Revised ERP based this conclusion on several grounds. First, and most important, it stated that "absent express reservation of claims, all known claims predating DEQ's execution of the most recent consent order (11/8/94) are merged into the settlement and, in effect, discharged."¹⁸² This legal conclusion reflected the opinion of Virginia Assistant Attorney General John Butcher.¹⁸³ On the basis of this opinion, DEQ believed that any enforcement action had to be justified solely by violations after November 8, 1994.¹⁸⁴

The November 1994 Special Order, however, did *not* exempt Smithfield from liability from all violations prior to the Order. The Order addresses Smithfield's failure to comply with only the cyanide, CBOD,

¹⁷⁷ See *id.* app. D. As noted above, the Board had agreed in a series of Special Orders not to hold Smithfield liable for violations of the phosphorous, TKN, cyanide, CBOD, and ammonia effluent limitations in the 1992 Permit. See *supra* note 118 and accompanying text.

¹⁷⁸ See ENFORCEMENT RECOMMENDATION PLAN, *supra* note 116, app. D.

¹⁷⁹ See *id.*

¹⁸⁰ See *id.* app. C. Appendix C provides an itemized accounting of maximum statutory penalties but erroneously totals the penalty to \$4,037,500. See *id.*

¹⁸¹ See Memorandum from Amy Clarke, Water Division, DEQ, to Harry Kelso, Director, Enforcement Division, DEQ 2 (May 2, 1996) [hereinafter Revised ERP] (on file with the WM & MARY ENVTL. L. & POL'Y REV.).

¹⁸² *Id.* at 1.

¹⁸³ See *id.*

¹⁸⁴ See *id.*

and ammonia limitations, but nothing more.¹⁸⁵ Even if the Special Order waived Virginia's right to seek civil penalties for noncompliance with these three permit limitations prior to the date of the Order, no provision of the Order either expressly or implicitly can be interpreted to extend this waiver to other permit violations. A provision of the Special Order suggests that the contrary is true: "Both the Board and Smithfield understand and agree that this amendment does not alter, modify, or amend any other term or condition of the [May 1991] Order or of the Permit except as specified above."¹⁸⁶ If Virginia wanted to seek civil penalties for past violations of other permit conditions, contrary to Assistant Attorney General Butcher's conclusion, it could have.

Second, the Revised ERP concluded, as a matter of enforcement policy, that Virginia could not proceed against Smithfield in light of its agreement to connect to the HRSD system: "All efforts to date, by Smithfield and the State Water Control Board/DEQ, have been in anticipation of and to facilitate hookup to HRSD. *If that fails*, then DEQ can enforce for failure of Smithfield to comply with the 1991 Consent Order."¹⁸⁷ This policy decision gave Smithfield carte blanche to violate the conditions of its permit without fear of being subject to an enforcement action by the state. Such a policy determination is surely contrary to the letter and the spirit of the CWA and DEQ's enabling statute.¹⁸⁸

Third, the Revised ERP implicitly concluded, again as a matter of enforcement policy, that the violations since November 1994 did not warrant enforcement action.¹⁸⁹ Smithfield had violated its permit on at least eight, and probably as many as eleven, occasions since November 1994; at least six of these violations exceeded the fecal coliform limitation by 400% or more.¹⁹⁰ In light of Smithfield's past history of noncompliance, as evidenced by the requirement for the November 1994

¹⁸⁵ See 1994 SPECIAL ORDER, *supra* note 160, at 1.

¹⁸⁶ *Id.* at 2.

¹⁸⁷ Revised ERP, *supra* note 181, at 2 (emphasis added).

¹⁸⁸ The CWA provides that, "[e]xcept as in compliance with [an NPDES permit issued in compliance with the CWA], the discharge of any pollutant by any person is unlawful." See 33 U.S.C. § 1311(a) (1994). The Virginia statute is just as explicit. It states that one of the purposes for the creation of DEQ was to "promote environmental quality through . . . expeditious and comprehensive . . . enforcement programs." VA. CODE ANN. § 10.1-1183 (Michie 1998).

¹⁸⁹ See Revised ERP, *supra* note 181, at 1.

¹⁹⁰ See ENFORCEMENT RECOMMENDATION PLAN, *supra* note 116, app. C. Three violations are dated November 1994, but it is unclear whether they pre-dated or post-dated the November 8, 1994 Special Order. See *id.* Two of these violations involved violations of the fecal coliform limitation by 1150%. See *id.*

Special Order, these violations justified enforcement action.

At the May 22, 1996 meeting, the Board duly decided not to refer the matter to OAG or to take any enforcement action, and actually directed DEQ not to take any enforcement action against Smithfield before the Board next convened.¹⁹¹ Instead, the Board directed DEQ to meet with Smithfield representatives to try and resolve the matter without resorting to a formal enforcement action.¹⁹² A week after the Board meeting, the TRO sent a letter to Smithfield noting that the proposed enforcement action had been "removed . . . from the agenda of the May 22, 1996, meeting of the State Water Control Board."¹⁹³ The letter requested Smithfield to furnish DEQ with a variety of data and information on their wastewater treatment operations, including fecal coliform and TKN data since August 1, 1994, and cost data relating to the operation of, and improvements to, the treatment plants.¹⁹⁴ Although it did not rule out the possibility of future enforcement action by the state, neither did the letter indicate that such action would arise in the future.¹⁹⁵ The prospect of any enforcement action by Virginia appeared to be remote.¹⁹⁶

¹⁹¹ See *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 779 (E.D. Va. 1997) (quoting the minutes of the Board's meeting).

¹⁹² See *id.* (quoting the minutes of the Board's meeting).

¹⁹³ Letter from Francis L. Daniel, Director, Tidewater Regional Office, DEQ, to Carl B. Wood, Vice President of Engineering, Smithfield Foods, Inc. 1 (May 29, 1996) (on file with the WM. & MARY ENVTL. L. & POL'Y REV.).

¹⁹⁴ See *id.* at 1-2.

¹⁹⁵ The letter required Smithfield to submit the requested data to DEQ by July 1, 1996. See *id.* at 1. DEQ would then "thoroughly evaluate" the information and advise Smithfield of DEQ's "next course of action." *Id.* at 2.

¹⁹⁶ Virginia officials later said that the state was unable to take enforcement at the May 1996 Board meeting because DOJ was still investigating its criminal case against the former manager of Smithfield's water treatment plants. See, e.g., Letter from Becky Norton Dunlop, Secretary of Natural Resources, Commonwealth of Virginia, to the Editor, *The Washington Post*, reprinted in WASH. POST, Dec. 30, 1997, at A18 ("Once the FBI relaxed its 'hold' on Virginia's enforcement case, DEQ aggressively resumed its case."). However, as the discussion in the text demonstrates, DEQ officials decided not to seek a civil penalty against Smithfield because they believed: (1) the company's violations prior to November 1994 could not be punished; (2) Smithfield's decision to connect to HRSD exempted it from enforcement action; and (3) the violations after this date did not warrant enforcement action. See *supra* notes 181-188 and accompanying text. DEQ would not have invested the time and money preparing an Enforcement Recommendation Plan, see *supra* notes 175-180 and accompanying text, nor would it have placed the proposed referral to OAG on the agenda for the May 22, 1996 Board meeting, if it had believed that a criminal investigation precluded a state enforcement action. Clearly, this evidence indicates that DEQ had received notice from EPA or DOJ that it could proceed with its own enforcement action. Electronic mail correspondence between DEQ staff confirms that this was in fact the case.

iii. *DEQ's Second Change of Heart*

Although the Board's decision was not surprising considering DEQ's revised determination that a penalty was not warranted, it almost certainly was a surprise to EPA, and became a factor in EPA's decision in the summer of 1996 to proceed with a direct enforcement action against Smithfield. As the district court stated, "[w]hen it became apparent that the Commonwealth's actions were not resulting in compliance, and the Commonwealth did not intend to seek a civil penalty for the violations, the EPA initiated its own enforcement action."¹⁹⁷ On August 27, 1996, EPA informed DEQ that it had referred the Smithfield case to the Department of Justice (DOJ or "Justice") for a civil enforcement action, and invited Virginia to join in the lawsuit.¹⁹⁸

Virginia reacted quickly to this news. It rejected the invitation to join the federal action and, just three days after learning of the future federal suit, filed a civil action against Smithfield in the Isle of Wight County Circuit Court.¹⁹⁹ In order to do so, DEQ and OAG circumvented the established procedures for enforcement matters. DEQ referred the matter to OAG without preparing a referral file and, most importantly, without submitting a recommendation for referral to the Board for approval (as DEQ had initially planned to do at the May 22, 1996 Board meeting).²⁰⁰ No enforcement staff who had worked on the *Smithfield* case were consulted; the decision was made by DEQ's Director of Enforcement in Richmond and his superiors, who were political appointees.²⁰¹ When the Chairman of the SWCB later asked why the Board had not been consulted regarding the referral, Thomas Hopkins, the Director of DEQ, stated that Virginia acted "to beat the feds" to the courthouse.²⁰²

One DEQ staff member wrote, "[t]he federal gov't has not renewed its request to hold back enforcement action against Smithfield Foods, as today by phone. You should feel free to take any action TRO feels appropriate." Electronic Mail Message from Ralph J. Meyer, Office of Enforcement and Compliance, DEQ, to Harold J. Winer, Compliance and Monitoring Manager, Tidewater Regional Office, DEQ (Feb. 26, 1996) (on file with the WM. & MARY ENVTL. L. & POL'Y REV.).

¹⁹⁷ *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 779 (E.D. Va. 1997) (quoting Lorraine H. Reynolds, Environmental Scientist, EPA).

¹⁹⁸ *See id.*

¹⁹⁹ *See id.*

²⁰⁰ *See* JLARC REPORT, *supra* note 34, at 102-03.

²⁰¹ *See id.*

²⁰² *Id.* at 81; Scott Harper, *Smithfield Foods Faces Federal Pollution Lawsuit*, VIRGINIAN-PILOT, Dec. 17, 1996, at A1.

The history of Virginia's reversal is indisputable. In May 1996, less than four months prior to the filing of the bill of complaint, senior DEQ officials had decided that no enforcement action should be taken in the *Smithfield* case.²⁰³ "As late as July 1996, the State had shown no indication of taking enforcement action against [Smithfield], and in fact had indicated that the State did not consider enforcement action necessary."²⁰⁴ By the end of August 1996, however, DEQ believed the need for an enforcement action was so urgent that it justified abandoning the standard procedure of seeking Board approval of a referral to OAG. Yet, in the intervening four-month period, there had been no violations of Smithfield's permit limitations that could justify this reversal.²⁰⁵

Simply put, Virginia's decision to sue Smithfield was a political decision. Having learned that a federal suit was forthcoming, Virginia decided that it wanted to get to court before DOJ.²⁰⁶ Virginia had several possible motivations for its action. Perhaps foremost, Virginia likely expected a state civil action to cause EPA to abandon its direct enforcement action.²⁰⁷ Virginia had achieved this result on at least two prior occasions.²⁰⁸ Virginia may also have been motivated by a desire to improve public perception of its enforcement record even if it could not preclude a federal lawsuit. If Smithfield was going to be sued for CWA violations, which appeared to be inevitable after EPA's announcement on August 27, 1996, Virginia could at least reap some political advantage by

²⁰³ See *supra* note 181 and accompanying text.

²⁰⁴ JLARC REPORT, *supra* note 34, at 93.

²⁰⁵ See Bill of Particulars, *supra* note 148, at exhibit 1.

²⁰⁶ Of course, these actions would be filed in different courts: Virginia's civil action was filed in the Isle of Wight County Circuit Court; the federal civil case was filed in the United States District Court for the Eastern District of Virginia.

²⁰⁷ See Letter from W. Michael McCabe, Region III Administrator, U. S. Environmental Protection Agency, to Thomas C. Hopkins, Director, DEQ 2-3 (Sept. 19, 1996) [hereinafter McCabe Letter]. McCabe stated that "a quick action was taken by the Commonwealth in an attempt to block the federal process." *Id.*

²⁰⁸ In three cases prior to *Smithfield*, EPA had announced that it intended to take direct enforcement action against municipalities that had repeatedly violated CWA permits without any enforcement response by Virginia. See *id.* The three municipalities involved were the City of Petersburg, Clifton Forge, and the Town of South Hill. See *id.* On each occasion, Virginia had initiated an enforcement action upon receiving notice from EPA. See *id.* Moreover, "in each action the Commonwealth made it clear that its motive in pursuing the actions was to forestall federal enforcement." *Id.* In two of these cases (Clifton Forge and City of Petersburg), EPA decided not to pursue an enforcement action out of deference to Virginia's primary enforcement authority. See Butcher Interview, *supra* note 116. Cf. Butcher Letter, *supra* note 118, at 2-4 (discussing the three cases and noting that EPA recovered an administrative penalty from the Town of South Hill).

being seen to take the lead in the case. Whatever Virginia's motivation, it certainly was not motivated by a desire to recover a high civil penalty from Smithfield that would have a deterrent effect on the regulated community.

iv. *Hopkins v. Smithfield Foods, Inc.*²⁰⁹

From the outset of the state lawsuit, Virginia demonstrated its unwillingness to recover a significant penalty from Smithfield. The bill of particulars filed by Virginia to support its bill of complaint listed seventy-two "items" of violation of Smithfield's permits.²¹⁰ Although not specified in this document, Virginia officials stated that these seventy-two "items" corresponded to 22,520 permit violations by Smithfield since May 1986.²¹¹ In this ongoing suit, Smithfield is therefore subject to a maximum statutory civil penalty of \$563 million.²¹² Yet, Virginia only sought a penalty in the "three-quarters of a million to \$2 million range,"²¹³ even though Smithfield has a twenty-year history of permit violations.²¹⁴ Moreover, Virginia officials have expressed a desire to settle the case, presumably for a stipulated penalty less than this amount.²¹⁵ Despite Virginia's intention of reaching settlement, settlement negotiations failed and the case is still pending.²¹⁶

Virginia's lack of genuine desire to obtain a civil penalty against Smithfield may be reflected in the way in which it has conducted this

²⁰⁹ *Hopkins v. Smithfield Foods, Inc.*, No. 96-125, (Isle of Wight Cir. Ct. Mar. 24, 1997)

²¹⁰ See Bill of Particulars, *supra* note 148, at exhibit 1.

²¹¹ See *Virginia Drops Lawsuit Against Smithfield Foods*, WASH. POST, July 10, 1997, at D6. Unlike the federal government, Virginia is not limited by a five-year statute of limitations in civil actions enforcing the CWA. See Butcher Interview, *supra* note 116. See also 28 U.S.C. § 2462 (1994) (stating that a five-year statute of limitations applies to federal civil actions to recover penalties); *supra* note 107 (discussing the application of 28 U.S.C. § 2462 to the CWA).

²¹² Virginia law subjects a permittee to a civil penalty "not to exceed \$25,000 for each violation." VA. CODE ANN. § 62.1-44.32(a) (Michie 1998).

²¹³ Stradling, *supra* note 115, at A1 (quoting Michael McKenna, Director of Policy and Planning, DEQ). In *Smithfield*, the United States sought to recover the maximum statutory penalty available—\$125 million—in light of the five-year statute of limitations that applied to the federal action. See Nakashima & Hsu, *supra* note 107, at B1. It obtained a civil penalty for only roughly 10% of that amount—\$12.6 million. See *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 354 (E.D. Va. 1997).

²¹⁴ See ENFORCEMENT RECOMMENDATION PLAN, *supra* note 116, app. E.

²¹⁵ See Scott Harper, *Va. Sues Smithfield Foods Over Polluting*, VIRGINIAN-PILOT, Aug. 31, 1996, at D1.

²¹⁶ See Butcher Interview, *supra* note 116.

lawsuit to date. First, the bill of complaint filed on August 30, 1996, omitted allegations of late or inaccurate reporting and contained several inaccurate factual allegations.²¹⁷ The Commonwealth had to file an amended bill of complaint on September 20, 1996 that corrected these deficiencies.²¹⁸

Second, on July 9, 1997—only three days into the trial—Virginia was forced to file for a nonsuit, which voluntarily dismissed the case, after the judge ruled that one of the state's expert witnesses could not testify about material included in an amended version of his report that Virginia filed only four days prior to trial.²¹⁹ As a result, Virginia refiled its bill of complaint a few days later and began the lawsuit anew.²²⁰

Virginia's stated objectives for the lawsuit and OAG's litigation errors cast doubt on the seriousness with which the state is pursuing its civil action against Smithfield.

V. SYSTEMIC UNDER-ENFORCEMENT BY VIRGINIA

A. *Examples of Virginia's Failure to Enforce Permits*

Smithfield is only one of a group of chronic polluters that the state has failed to effectively control. The state's long-standing policy has been one of conciliation rather than formal action to ensure compliance.²²¹ Its failure to severely punish other polluters illustrates that the state's actions vis-à-vis Smithfield's violations are the norm. One example of another polluter that the state handled with kid gloves is Allied Signal.

1. *Allied Signal*

Allied Signal is a chemical company with facilities in both Hopewell and Chesterfield, Virginia. On various occasions, Allied has released significant amounts of chemicals into Virginia's waters. Between 1989 and 1991, it was responsible for at least three chemical spills that caused fish kills in the James River. These spills included sulfuric acid, phenol, and cyclohexanone.²²² For these three serious spills, the SWCB

²¹⁷ See *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 779 (E.D. Va. 1997).

²¹⁸ See *id.*

²¹⁹ See *Virginia Drops Lawsuit Against Smithfield Foods*, *supra* note 211, at D6.

²²⁰ See Stradling, *supra* note 117, at C1-2.

²²¹ See JLARC REPORT, *supra* note 34, at 75.

²²² See *id.* at 91.

negotiated a fine of only \$46,000.²²³

Allied continued to damage the state's waters with near impunity. Between August 1992 and January 1996, Allied violated its permits by spilling a total of 43,224 pounds of sulfuric acid, 13,350 pounds of ammonia, and 15,410 pounds of cyclohexanone.²²⁴ The ammonia spills did not reach state waters, but three of the acid spills and the cyclohexanone made their way into a feeder stream and thence into the James River.²²⁵ Virginia took no enforcement action and imposed no fines for these spills.²²⁶

In March and April of 1996 the company was responsible for two more acid spills totaling 13,350 pounds. These spills caused fish kills of at least 2200 fish.²²⁷ In response to these spills DEQ initiated an enforcement action and proposed a \$25,000 fine at the next meeting of the SWCB.²²⁸ The same spills caused EPA to propose a civil penalty of \$125,000, the maximum available under section 309(g)(2).²²⁹

However, the State entered into a consent agreement with Allied four days before the SWCB had its meeting and three days after EPA had mailed a letter to Allied proposing the much higher fine.²³⁰ Because of the nature of the CWA, state action can sometimes function to "preempt" federal action,²³¹ and the EPA suggested that the state had acted quickly in this situation in order to undermine the federal agency's ability to levy a fine.²³² EPA argued that Virginia was "attempting to shield two violators from legitimate federal enforcement."²³³ Despite the State's apparent attempt to protect Allied from the EPA, Leonard Nash of EPA Region III reported that the company paid the federal fine of \$125,000.²³⁴

The history of DEQ's failure to seriously pursue enforcement in the *Allied* case illustrates how the State's lax enforcement may reduce industrial dischargers' incentive to comply with permit limitations, at the expense of Virginia's water resources. Consistent enforcement of permits would prompt measures to ensure fewer violations.

²²³ See *id.*

²²⁴ See *id.*

²²⁵ See *id.*

²²⁶ See *id.*

²²⁷ See *id.*

²²⁸ See *id.* at 94.

²²⁹ See *id.* at 91, 94.

²³⁰ See *id.* at 91.

²³¹ See *id.* at 93.

²³² See *id.* at 94.

²³³ McCabe Letter, *supra* note 207, at 3.

²³⁴ See Nash Interview, *supra* note 74.

2. *Avtex Fibers*

Avtex Fibers was a rayon manufacturing facility in Front Royal, Virginia, and another chronic violator of its discharge permits. Over a period of nine years, from 1980 to 1989, Avtex violated its permits more than 1600 times.²³⁵ The company finally filed for bankruptcy, but not before it seriously damaged Virginia's environment with PCBs, zinc, carbon disulfide, and lead.²³⁶

As early as 1986 EPA had knowledge that PCBs were being mishandled at the Avtex site.²³⁷ That year EPA added the site to the Superfund National Priorities List²³⁸ and signed a consent decree with Avtex that required it to perform extensive investigation into the toxicity of materials held in on-site disposal bins.²³⁹

Not until November 1988, eight years after Avtex began violating its permits did Virginia take any significant enforcement action by suing Avtex for more than 2000 water and air permit violations, seeking \$19.6 million in fines.²⁴⁰ On January 17, 1989, the SWCB obtained a settlement for \$2 million²⁴¹ and a court order requiring Avtex to create a \$5.7 million trust fund to cover plant repairs and cleanup costs.²⁴² However, Avtex continued to violate its permits,²⁴³ forcing the SWCB to seek two separate contempt orders against the company.²⁴⁴ In July 1989 the court imposed a

²³⁵ See U.S. GENERAL ACCOUNTING OFFICE, ENVIRONMENTAL ENFORCEMENT PENALTIES MAY NOT RECOVER ECONOMIC BENEFITS GAINED BY VIOLATORS 7 (1991) [hereinafter GAO REPORT, ECONOMIC BENEFITS].

²³⁶ See *id.*

²³⁷ See Robert LaRussa, *Avtex Hit with Suit Over PCBs*, DAILY NEWS RECORD, Aug. 30, 1989, at 2.

²³⁸ See Cass Peterson, *Superfund Bill Stalls; EPA Adds 244 Sites to Priority-Cleanup List*, WASH. POST, Oct. 3, 1984.

²³⁹ See *Court Holds Federal Government Liable for Cleanup Costs at Virginia Rayon Plant*, 22 Env't Rep. (BNA) 2431 (Feb. 28, 1992).

²⁴⁰ See Laura M. Litvan, *Avtex to Remain Open, Judge Rules*, WASH. TIMES, Sept. 28, 1989, at C3.

²⁴¹ See *Virginia Attorney General Comments on Fines, Penalties Imposed on Avtex*, U.S. NEWswire, Nov. 22, 1989.

²⁴² See D'Vera Cohn, *Avtex to Pay \$7.7 Million for Fines, Repairs; Reopened Front Royal Firm Settles Environmental, Safety Suits*, WASH. POST., Dec. 3, 1988, at B1; *Avtex Agrees to Pay Fines, Cleanup Costs; State to Drop Suit, Allow Plant to Stay Open*, 19 Env't Rep. (BNA) 1668 (Dec. 16, 1988).

²⁴³ See Todd Smith, *Avtex Fined \$6 Million for Polluting*, WASH. TIMES, Nov. 23, 1989, at C1.

²⁴⁴ See *Virginia Attorney General Comments on Fines, Penalties Imposed on Avtex*, *supra*

suspended fine of \$990,000 on Avtex.²⁴⁵

The state also sought to enjoin the company's dumping of PCBs into the Shenandoah River, and in September 1989, the state moved to revoke the company's effluent discharge permit.²⁴⁶ The court revoked the permit in November²⁴⁷ and imposed additional penalties of \$3 million.²⁴⁸ Avtex never paid any of this money, for in February 1990, Avtex filed for Chapter 11 bankruptcy, leaving behind millions of dollars in unpaid fines and cleanup costs.²⁴⁹

Avtex is again illustrative of Virginia's failed policy of conciliation toward polluters.²⁵⁰ Given the seriousness and frequency of the company's violations, the state should have acted promptly and aggressively instead of waiting eight years before pursuing any substantial enforcement action. If the state had promptly pursued and placed economic penalties upon the company for continued violations of its permits, then Avtex would have had to either change its practices or close its doors much earlier, thus greatly reducing the damage to Virginia's environment.

B. *Virginia's Enforcement Compares Poorly to Similar States*

1. *Significant Under-Assessment of Penalties by DEQ*

Civil penalties are a vital component of the CWA.²⁵¹ They serve at least three important goals:

note 241.

²⁴⁵ See LaRussa, *supra* note 237, at 2.

²⁴⁶ See D'Vera Cohn, *Avtex Shuts Va Plant; Cleanup Set*, WASH. POST, Nov. 11, 1989, at B1.

²⁴⁷ See Robert LaRussa, *Virginia Pulls the Plug on Avtex Permit*, WOMEN'S WEAR DAILY, Nov. 10, 1989, at 19.

²⁴⁸ See *Virginia Attorney General Comments on Fines, Penalties Imposed on Avtex*, *supra* note 241.

²⁴⁹ See GAO REPORT, ECONOMIC BENEFITS, *supra* note 235, at 7.

²⁵⁰ Richard Hembra of the U.S. General Accounting Office, cited *Avtex* as an outstanding example of failed state enforcement. See *EPA's Penalties May Not Recover Economic Benefits Gained by Violators*, *Hearing Before the Senate Comm. on Governmental Affairs*, 1991 Legis., Spec. Sess. (1991), reprinted in U.S. GENERAL ACCOUNTING OFFICE, *EPA'S PENALTIES MAY NOT RECOVER ECONOMIC BENEFITS GAINED BY VIOLATORS* 5-6 (1991) (Statement of Richard L. Hembra, Director of Environmental Protection Issues, Resources, Community, and Economic Development Division, U. S. General Accounting Office).

²⁵¹ See JLARC REPORT, *supra* note 34, at 77. See generally U.S. ENVIRONMENTAL PROTECTION AGENCY, *POLICY ON CIVIL PENALTIES* (1984) (describing the three purposes of civil penalties: deterrence, fairness to regulated community, and resolution of environmental problems) [hereinafter EPA PENALTY POLICY].

1. Deterrence of future violations by eliminating the economic benefits of non-compliance;
2. Retribution based on the seriousness of the violation, extent of prior violations, and good-faith efforts to comply with the permits; and
3. Fair and consistent treatment of regulated industries by maintaining a competitive balance.²⁵²

Despite these important functions, the SWCB imposes fines that are both far fewer in number and of lesser severity than the fines in Virginia's neighboring states.²⁵³ The JLARC study compared Virginia's civil penalty assessments with eleven states²⁵⁴ and found that for the years 1992 through 1996, Virginia assessed the least in civil penalties of any of the states, approximately \$597,000, with one year—1996—going as low as \$4000.²⁵⁵ Mississippi was the next to the lowest with \$792,000 in penalties; even its lowest year—1996—was over eight times that of Virginia at \$33,000. In contrast, Georgia, in the same time period, assessed over \$16 million with its annual figures never dipping below \$4 million—a rate 4000 times higher than Virginia's lowest annual figure.²⁵⁶ In addition, there has also been a decline in the average fine in Virginia, from a high of \$10,000 in 1992 to below \$2000 in 1996.²⁵⁷ Even in enforcement actions, the state remains reluctant to assess civil penalties. Of 123 enforcement actions in 1993, the SWCB assessed penalties in only twenty-eight cases (thirty-four percent), and of 109 actions in 1995, the SWCB assessed penalties in only six cases (six percent).²⁵⁸

The low level of penalty assessment, again, reflects Virginia's attitude toward industry and enforcement—encouragement rather than punishment. DEQ's policy is to negotiate consent orders without the use of civil penalties whenever possible.²⁵⁹ This policy is so entrenched that

²⁵² See GAO REPORT, *ECONOMIC BENEFITS*, *supra* note 235, at 3; JLARC REPORT, *supra* note 34, at 77.

²⁵³ See JLARC REPORT, *supra* note 34, at 79 tbl. 11.

²⁵⁴ The eleven states surveyed are: Georgia, Pennsylvania, South Carolina, Florida, Tennessee, Alabama, North Carolina, Kentucky, West Virginia, Maryland, and Mississippi. See *id.*

²⁵⁵ See *id.*

²⁵⁶ See *id.*

²⁵⁷ See JLARC REPORT, *supra* note 34, at 77-8.

²⁵⁸ See McCabe Letter, *supra* note 207, at 1.

²⁵⁹ See John H. Cushman Jr., *Virginia Seen as Undercutting U.S. Environmental Rules*, N.Y. TIMES, Jan. 19, 1997, at 22.

the JLARC report suggested that the DEQ's enforcement staff feared that their jobs would be in danger if they recommended penalties against the regulated community.²⁶⁰

Although Virginia has a relatively low level of reported major dischargers listed as being in Significant Non-compliance (SNC),²⁶¹ Virginia's lack of SNCs does not completely explain the low level of fines collected. Although the state ranked twelfth in terms of the number of permitted dischargers in violation, with only twenty, all of those dischargers violated effluent standards, while in other states SNCs crossed the spectrum of water violations (i.e. scheduling and reporting violations).²⁶² For states with effluent violators in SNC, Virginia ranked twenty-seventh.²⁶³ Even this poor ranking, however, may be generous to the Commonwealth. Public interest group research ranked Virginia very low in every measure of SNC.²⁶⁴

Discrepancies in rankings may stem from differences in reporting,²⁶⁵ and the DEQ's practice of not listing a permittee as being in SNC if that permittee has entered into an agreement to reduce pollution. DEQ did not list Smithfield on its SNC list for 1995-96,²⁶⁶ presumably because the company had agreed to the Special Order the DEQ had issued. Similarly, DEQ removed Allied Chemical from its 1995 list even though that company continued to exceed its permit limitations.²⁶⁷

²⁶⁰ See JLARC REPORT, *supra* note 34, at 82.

²⁶¹ See GAO REPORT, APPROPRIATE ENFORCEMENT, *supra* note 26, at 20-21.

²⁶² See *id.*

²⁶³ See *id.*

²⁶⁴ The U.S. Public Interest Research Group (U.S. PIRG) ranked all fifty states for five different measures of SNC for the period of January 1995 through March 1996. This research, based on EPA's Permit Compliance System, an electronic database, shows that Virginia is ranked 39th in terms of percentage of major facilities in SNC, 26th in terms of number of industrial facilities in SNC, 36th in terms of percentage of major industrial facilities in SNC, 27th in terms of number of major municipal facilities in SNC, and 34th in terms of percentage of major municipal facilities in SNC. See TODD ROBINS, U.S. PUBLIC INTEREST RESEARCH GROUP, DIRTY WATER SCOUNDRELS: STATE-BY-STATE VIOLATIONS OF THE CLEAN WATER ACT BY THE NATION'S LARGEST FACILITIES app. III (1997) [hereinafter PIRG REPORT].

²⁶⁵ U.S. PIRG data may have been skewed by Virginia's failure to report all of its data to EPA's Permit Compliance System. See *id.* app. V. Virginia's DEQ "affirmatively contacted PIRG and furnished [supplemental] data . . . derived from the state's own Quarterly Non-Compliance Reports." *Id.* This additional data evidently intended to indicate that Virginia's water program is not as lax as PIRG's rankings would indicate.

²⁶⁶ See PIRG REPORT, *supra* note 264, app. V.

²⁶⁷ See JLARC REPORT, *supra* note 34, at 91.

2. *Significant Under-Prosecution of Civil Suits in Virginia*

Referrals from the DEQ to the OAG have declined sharply in recent years.²⁶⁸ From the year 1989 in which the DEQ referred thirty cases to the OAG, there was a steady decline to the years 1995 and 1996, in which there was a total of one referral.²⁶⁹ This decline is significant for various reasons. First it reflects the agency's overly solicitous attitude toward permittees. Secondly, it illustrates that the lack of a credible threat of civil litigation limits the agency's ability to negotiate strict fines against the regulated community.²⁷⁰ With the exception of *Smithfield*, the OAG has been reluctant to litigate environmental cases.²⁷¹ And as this article makes clear, it is more likely that political concerns dictated the OAG's litigation efforts in *Smithfield* than did a policy shift toward stronger enforcement.

3. *DEQ's Failure to Take Action against Municipalities and State Agencies*

The DEQ's stance on non-compliant municipalities fits the pattern of its lax enforcement record. Even when municipalities are chronic violators of their discharge permits, the DEQ avoids enforcement actions in favor of conciliation.²⁷² The agency has an unwritten rule that only the most egregious permit violations are to be prosecuted.²⁷³ The JLARC report noted one instance in which "[a] town ha[d] a long record of noncompliance with its permit limits. It received a Notice of Violation almost every month for permit violations between April of 1990 and December of 1995,"²⁷⁴ yet by "November 1, 1996, no formal enforcement action had been taken."²⁷⁵

Similarly, DEQ is reluctant to pursue enforcement standards against other state agencies.²⁷⁶ Examples abound. One state facility was dumping ash from scrubbers into a creek without any permit, and the DEQ recommended that the facility apply for a permit and that it stop the

²⁶⁸ See *id.* at 104.

²⁶⁹ See *id.*

²⁷⁰ See *id.*

²⁷¹ See *id.* at 105-6.

²⁷² See *id.* at 85.

²⁷³ See *id.*

²⁷⁴ *Id.* at 86.

²⁷⁵ *Id.*

²⁷⁶ See *id.* at 106.

dumping and clean up the creek.²⁷⁷ The facility, however, continued its permitless dumping and subsequently reneged on a compliance agreement it signed with DEQ.²⁷⁸ DEQ took no formal action, and instead negotiated yet another agreement, one that required essentially the same actions that the non-compliant agency had flaunted in the first place.²⁷⁹

Another state agency was in non-compliance because of its wastewater treatment plant.²⁸⁰ In 1988 the DEQ entered into an agreement with that agency which required it to "upgrade its wastewater treatment plant and to construct a pipeline to transport the effluent."²⁸¹ But four years later, the agency had still not satisfactorily upgraded its facility or constructed the pipeline.²⁸² DEQ responded by giving it an extension until 1994.²⁸³ In August of 1996 the DEQ gave that agency yet another extension, one that required that the agency be in compliance by 1997.²⁸⁴ Thus, a nine-year period had passed and still the agency remained in non-compliance.

All of these examples highlight the fact that Virginia's record of under-enforcement crosses all boundaries. Simply stated, the Commonwealth does not enforce its water quality protection laws.

VI. RECOMMENDATIONS

In 1996, the General Assembly passed a law that added to the DEQ's ability to fine violators.²⁸⁵ The law allows the DEQ to unilaterally fine violators up to \$10,000.²⁸⁶ The DEQ should forcefully use this new power; however, it should do so only when the economic advantage the violator has gained is less than the \$10,000 fine limit. In other cases, DEQ should turn the enforcement over to the OAG to secure a larger and more commensurate fine. This new power will only be effective if Virginia alters its historic policy of seeking to ensure compliance through persuasion rather than enforcement. If Virginia, through the DEQ,

²⁷⁷ See *id.* at 107.

²⁷⁸ See *id.*

²⁷⁹ See *id.*

²⁸⁰ See *id.*

²⁸¹ *Id.*

²⁸² See *id.*

²⁸³ See *id.*

²⁸⁴ See *id.*

²⁸⁵ See Acts of Apr. 17, 1996, Va. Acts ch. 1005 (codified at VA. CODE ANN. §§ 10.1-1182, -1186 (Michie 1998)).

²⁸⁶ See VA. CODE ANN. § 10.1-1182.

continues to eschew strong enforcement actions, then a new fine will not provide any measure of deterrence; the potential loss of \$10,000 will not change a company's actions if it does not believe the fines will be levied.

Accordingly, in concert with this new power to fine, the DEQ should establish a policy of active enforcement, with an emphasis on the recovery of economic benefits of non-compliance. The DEQ should focus on economic benefit and refer to the OAG cases in which the economic benefit of non-compliance is more than \$10,000. DEQ must strive to make non-compliance economically disadvantageous. Moral questions aside, there is little disincentive to pollute if the economic punishment DEQ pursues or obtains is less than the cost of compliance.²⁸⁷ Furthermore, as previously noted, fines also serve a retributive purpose, and DEQ should keep that function in mind when deciding what course of action to choose.

To establish a more active policy of enforcement, the DEQ should also refer substantially more cases to the OAG for enforcement. Chronic violators can best be deterred with the significant penalties available only through civil prosecution. Even one-time violators, however, should be subject to fines that reduce their economic incentive for non-compliance. Accordingly, in almost every case in which an economic benefit in excess of \$10,000 accrues to a polluter, the DEQ should refer the case to the OAG to recoup that benefit. Of course, it is incumbent upon the OAG to adopt a concurrent aggressive attitude towards litigation and enforcement. As *Smithfield* evidences, Virginia's OAG needs to assess and pursue enforcement actions not on the basis of politics, but rather on the basis of natural resource protection.

Finally, the General Assembly should raise the limit of DEQ's unilateral authority to fine violators to at least \$25,000 per violation.²⁸⁸ This amount is the limit of the agency's present authority when it has the

²⁸⁷ Cf. EPA CIVIL PENALTY POLICY, *supra* note 251 ("Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if it had obeyed the law."); JLARC REPORT, *supra* note 34, at 77 ("First, penalties have a valuable deterrent effect that can encourage the regulated community to anticipate, identify, and correct violations. Second, penalties are also important to reduce any competitive advantage that one pollution source might receive from noncompliance."); GAO REPORT, ECONOMIC BENEFITS, *supra* note 235, at 1 (asserting that "penalties should serve as a deterrent to violators and should ensure that regulated entities are treated fairly and consistently . . .").

²⁸⁸ These changes should allow the agency to fine a violator for multiple violations with the same order instead of limiting the order to one fine level. EPA's class II authority is a \$125,000 fine, and that would be reasonable per violation state parallel.

violator's consent;²⁸⁹ and beyond its practical effects, a new limit could also send a strong philosophical message to the regulated community. That message would be that the state is serious about ensuring that the waters of Virginia are protected, and that the state will no longer require the consent of a violator to apply severe punishment.

The *Smithfield* case should send a signal to Virginia. Although the company no longer discharges into the Pagan River, its years of discharging have severely damaged a precious state resource. Furthermore, the case highlights the failure of the Commonwealth's conciliatory approach to permit compliance. *Smithfield* should prompt a reevaluation of the state's enforcement policy, and Virginia should align its policy with the law, and with the state's constitutional²⁹⁰ and DEQ's statutory mandate²⁹¹ to protect the waters of the Commonwealth.

²⁸⁹ See VA. CODE ANN. §§ 62.1-44.15, 62.1-44.32(a).

²⁹⁰ See VA. CONST. art. XI.

²⁹¹ See VA. CODE ANN. §§ 10.1-1183.