REPORT OF THE
JOINT SUBCOMMITTEE STUDYING

Means of Relieving Landowners From Liability Resulting From The Illegal Dumping Of Hazardous Materials On Their Property

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

SENATE DOCUMENT NO. 37

COMMONWEALTH OF VIRGINIA
RICHMOND
1990

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To
The Governor and the General Assembly of Virginia
Richmond, Virginia
March, 1990

I. INTRODUCTION

The 1989 Session of the Virginia General Assembly passed Senate Joint Resolution No. 202, which requested that a joint subcommittee (i) study means of relieving landowners from the extreme liability and financial exposure to which they are subjected when hazardous materials are illegally dumped on their property and (ii) consider the necessity and desirability of providing additional appropriations or other revenues to the Virginia Solid and Hazardous Waste Contingency Fund. A copy of SJR 202 (1989) is attached to this report as Appendix A.

The membership of the Joint Subcommittee, appointed in accordance with SJR 202 (1989), consisted of the following individuals: Senator Elmo G. Cross, Jr., of Hanover (patron of SJR 202); Senator Robert L. Calhoun of Alexandria; Delegate Watkins M. Abbitt, Jr., of Appomattox; Delegate R. Beasley Jones of Dinwiddie; Delegate John A. Rollison III of Prince William; Cynthia V. Bailey, Director of the Department of Waste Management; Richard N. Burton, Executive Director of the State Water Control Board; James W. Garner, Jr., State Forester; and Bernhardt C. Leynes, Jr., Director of the Department of Conservation and Historic Resources.

II. EXECUTIVE SUMMARY

The Joint Subcommittee established pursuant to SJR 202 (1989) held three meetings during the course of its study. At its initial meeting held in Richmond, the Joint Subcommittee was briefed on the current state of the law regarding liability for the illegal dumping of hazardous materials. Testimony was also received from state officials and various interest groups. At its second meeting, which was conducted in Farmville, the Joint Subcommittee held a business meeting and public hearing. During the business meeting, the Joint Subcommittee continued to receive information about liability and defenses to liability under current law, as well as how other states deal with liability issues involved in the illegal dumping of hazardous materials. During the public hearing, numerous corporate representatives, interest groups, and private landowners expressed concern over the liability which might be imposed upon them if they were victimized by the illegal dumping of hazardous materials. The Joint Subcommittee held its third and final meeting in Richmond. At that meeting, the Joint Subcommittee developed the following three recommendations:

1. To increase from $10,000 to $25,000 the maximum civil penalties, civil charges, and criminal fines which may be assessed for the illegal dumping of hazardous waste;

2. To increase from $10,000 to $25,000 the maximum civil penalties which may be assessed for violations of the State Water Control Law; and

3. To include in state law affirmative defenses to liability actions which are similar to the defenses already available under federal law.

These recommendations are in the form of legislation to be introduced at the 1990 Session of the General Assembly and are attached to this report as Appendices B, C, and D.

III. LIABILITY IMPOSED UNDER FEDERAL, STATE, AND COMMON LAW

At its first two meetings, the Joint Subcommittee received detailed briefings regarding the liability which may be imposed on a landowner for the illegal dumping of hazardous materials on his property. This section of the report summarizes the information received by the Joint Subcommittee regarding the liability which may be imposed under federal, state, and common law.

A. Federal Law.

According to congressional reports, technological improvements in manufacturing methods have resulted in the creation of greater amounts of solid and hazardous waste. Most of this waste is disposed of in open dumps or sanitary landfills. It is estimated that 77 billion pounds of hazardous waste are currently produced annually in the United States.

The growing problem of hazardous waste disposal prompted Congress to enact two major pieces of legislation: the Resource Conservation and Recovery Act of 1976 (RCRA) and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA, sometimes know as the "Superfund Law"). While RCRA focuses on the management and regulation of hazardous waste disposal, CERCLA primarily deals with the cleanup of existing hazardous waste sites. Both statutes authorize the federal government to clean up dangerous hazardous waste sites and to bring suit to recover the cleanup costs from the parties responsible for creating the site. To deter violations of these statutes and to finance the necessary cleanup of hazardous waste sites, both statutes contain criminal and civil liability provisions.

The civil liability provisions of CERCLA designate categories of persons (generators, transporters, and disposal site owners/operators) responsible for the creation of hazardous waste sites and subject them to liability for the cleanup costs. The legislative intent behind CERCLA is to hold responsible for cleanup those persons who were involved in creating the hazardous waste and those who profited from its disposal. The scope of liability was contemplated to be extremely broad, including all parties who in some way contributed to the creation or

contamination of the waste site. Courts have imposed liability on landowners for the abatement of hazardous waste on their land based solely on their status as landowners. Under CERCLA, courts have held "innocent" landowners liable for the enormous costs of cleanup, even when those costs exceeded the value of their property. From 1984 through 1985, the average cost of cleanup of a Superfund site exceeded $12 million.

Under CERCLA, the person or company responsible for the contamination, generally referred to as the "potentially responsible party " or "PRP," may be held liable for the entire cost of studies and cleanup activities. In fact, any party that contributed to the contamination of the site can be held liable for the cleanup of the entire site (joint and several liability), no matter how small that party's contribution. Should a responsible party be unwilling or unable to assume the cleanup responsibilities and costs thereof, or if a responsible party cannot be determined or found, Superfund moneys are available for the cleanup. Superfund moneys spent on the cleanup may be collected from a responsible party through subsequent legal action.

Only three defenses to liability exist under CERCLA:

1. An act of God;

2. An act of war; or

3. An act or omission of a third party, provided that the defendant can prove that he exercised due care and took precautions against the foreseeable acts of third parties.

These are affirmative defenses and the defendant bears the burden of proving them. Since the enactment of CERCLA, defendants have rarely been able to avail themselves to the defenses of "an act of God" or "an act of war." By far the most common defense utilized has been the "act or omission of a third party."

The federal law also contains an exemption to liability for landowners under CERCLA if they were "innocent purchasers." To qualify for this exemption, a landowner must prove that he conducted all appropriate inquiry into the prior ownership of the contaminated property in question before he purchased the property. What constitutes "appropriate inquiry" depends on the facts of each case, such as the specialized knowledge of the purchaser involved, the type of transaction (e.g. generally more inquiry is required in a commercial transaction), or the cost of the property (e.g., the price of the property might be so low as to suggest there might be a problem).

When CERCLA was enacted in 1980, experts estimated that 30,000 to 50,000 potentially hazardous waste sites existed in the United States. By June of 1986, the United States Environmental Protection Agency (EPA) had inventoried more than 24,000 of these sites. In 1986, because RCRA and CERCLA had proven inadequate in effectively dealing with the enormous cleanup burden, Congress enacted the Superfund Amendments and Reauthorization Act (SARA). Two of the primary purposes behind SARA were to accelerate response activity and to provide substantial additional funding.

In an effort to strike a greater balance between the need for a comprehensive response to a serious problem while protecting the rights of "innocent" parties, Congress included a provision in SARA which directed the EPA to promulgate regulations for settlements with "de minimus" PRP's. To qualify as "de minimus," a landowner must not have permitted the generation, transportation, storage, treatment, or disposal of any hazardous substance on his property and must not have contributed to the release of hazardous substances. The provision authorizes EPA to promptly settle with "de minimus" PRP's and then require that the bulk of the cleanup costs be borne by those parties primarily responsible for the hazardous condition. Consequently, this provision establishes some correlation between the amount of liability imposed and the relative degree of contribution to the hazardous condition, thereby mitigating the law's otherwise harsh operation of strict, joint and several liability.

B. State Law.

In addition to federal law, Virginia's statutes, regulations, and the common law doctrine of nuisance may operate to place liability on a landowner whose property is the site of illegal dumping of hazardous materials. Virginia Code § 10.1-1408.1 prohibits the disposal of solid waste in open dumps. The section also prohibits any person from owning, operating or allowing an open dump to be operated on his property. Virginia Code § 10.1-1400 defines the term "open dump" as "a site on which any solid waste is placed, discharged, deposited, injected, dumped or spilled so as to create a nuisance or present a threat of a release of harmful substances into the environment or present a hazard to human health."

Virginia Code §§ 10.1-1402 and 10.1-1406 are also relevant to a discussion of the liability which may attach for the improper disposal of hazardous waste. Virginia Code § 10.1-1402 authorizes the Virginia Waste Management Board to "[t]ake actions to contain or clean up sites or to issue orders to require clean up of sites where solid or hazardous waste, or other substances within the jurisdiction of the Board, have been improperly managed and to institute legal proceedings to recover the costs of containment or clean-up activities from the responsible parties." The section also authorizes the Board to "[c]ollect, hold, manage and disburse funds received for violations of solid and hazardous waste laws and regulations or court orders pertaining thereto. . . for the purpose of responding to solid or hazardous waste incidents and clean up of sites which have been improperly managed, including sites eligible for joint federal and state remedial projects under [CERCLA]. . ., as amended by [SARA]. . ., and for investigations to identify parties responsible for such mismanagement." State law does not define the term "responsible parties."

Virginia Code § 10.1-1406 requires that all moneys received for civil penalties and civil charges assessed for violations of solid and hazardous waste laws, regulations or court orders pertaining thereto, as well as moneys appropriated by the General Assembly, be placed in the Virginia Solid and Hazardous Waste Contingency Fund. Moneys from this fund may be expended for purposes of responding to solid or hazardous waste incidents, including the cleanup of sites which have been improperly managed, and the identification of parties responsible for such mismanagement.

Virginia Code § 10.1-1455 specifies the maximum civil penalties, civil charges, and criminal fines which may be assessed for violations of the Virginia Waste Management Act (§ 10.1-1400 et seq.). Currently, the maximum civil penalty, civil charge, or criminal fine which may be assessed for each day of violation is $10,000. Likewise, Virginia Code § 62.1-44.32 provides that the maximum civil penalty which may be assessed for each day of violation of the State Water Control Law is $10,000.

The common law doctrine of nuisance may also operate to place the burden of cleanup and the costs on "innocent" landowners. Although there are no cases in Virginia directly on point, courts of other states have granted relief and ordered the abatement of a nuisance in cases where the landowner was not proven to have had knowledge of the existence of a nuisance on his property. See Montgomery v. Commonwealth, 306 Ky. 275, 207 S.W. 2d 2729 (1947). However, courts are generally reluctant to award damages when the landowner had no knowledge of the operation of the nuisance. See Tennessee Coal, Iron and R.R. Co. v. Hartline, 11 So. 2d 833 (Ala. 1943). When a landowner does not attempt to abate a nuisance on his property after being notified of its existence, damages may be more properly assessed. Hence, a Virginia court might hold a landowner liable under the doctrine of nuisance for the abatement of a nuisance created by the illegal dumping of hazardous materials, as well as for any damages proximately caused by the nuisance, when it is determined that the landowner, by exercising a reasonable degree of care, could have prevented the dumping activity, or should have become aware of such activity and taken remedial action.

C. Other States' Laws.

No state in the country affords statutory protection to landowners beyond those defenses available under federal law. While some states, such as Minnesota and New Hampshire, have codified the federal defenses to liability into their own statutes, each state that has done so places the burden of proving the defense on the defendant. Other states, such as Virginia and Missouri, set out no defenses to liability in their statutes, although testimony indicated that many of these states are reluctant to impose liability on "truly innocent landowners." While Missouri has never attempted to recover cleanup costs from an innocent landowner, Missouri law requires that contaminated property be listed on a state registry of hazardous waste sites. As a practical matter, this requirement may penalize an "innocent" property owner in terms of the property's resale value. Finally, there are a number of states, such as Iowa, whose laws espouse the philosophy that "if you own the property, you own the problem."

Ten states, including Iowa, maintain no fund for the cleanup of hazardous waste sites. Twenty-six states maintain such funds, but "innocent" property owners in those states may be required to reimburse such funds for moneys expended to cleanup hazardous waste illegally dumped on their property. Of these twenty-six states, six provide that their funds may only be utilized in "emergency" situations. Only fourteen states maintain such funds and never require reimbursement by "innocent" landowners. Two of these fourteen states require that expenditures be made only in "emergency" situations. For a summary of other

states' laws regarding liability placed on "innocent" landowners, as well as the type of financial assistance available in those states to "innocent" landowners, see Appendices E and F.

IV. THE ILLEGAL DISPOSAL OF HAZARDOUS WASTE IN THE COMMONWEALTH

In order to determine how severe the problem of illegal disposal of hazardous materials is in Virginia, the Joint Subcommittee solicited testimony about the number of Superfund sites in Virginia and the frequency of other illegal dumping incidents. In addition, the Joint Subcommittee requested that the Virginia Forestry Association survey its membership to determine the incidence of illegal hazardous material dumping experienced by those individuals. This section of the report summarizes the information gathered by the Joint Subcommittee in its attempt to determine the scope and severity of the problem in the Commonwealth.

A. Superfund and Virginia

Approximately 800 sites nationwide have been placed on the Superfund list of sites targeted for long-term remedial cleanup. Three hundred and seventy-eight more sites face possible listing. If all states were to have the same number of sites listed, each state would contain approximately sixteen sites. However, the majority of Superfund sites are concentrated in the northeast and in other heavily populated and industrial areas. New Jersey, Michigan, New York, and Pennsylvania currently contain the most Superfund sites.

According to the Department of Waste Management (DWM), twenty-one of the Superfund sites currently proposed for listing or listed on the National Priorities List (NPL) are located in Virginia. Five wood-preserving operations, three chemical companies, and five landfills or waste disposal sites are among the Commonwealth's Superfund sites. The twenty-one sites are located in the counties of Albemarle, Buckingham, Chesterfield (2), Culpeper, Hanover, Nelson, Pittsylvania, Roanoke (2), Smythe, Spotsylvania, Suffolk (2), Westmoreland, and York and in the cities of Front Royal, Portsmouth (2), Richmond, and Winchester. Only one of these sites, Mathews Electroplating in Roanoke County, has been cleaned up and officially recommended for delisting. Six sites in the Commonwealth are currently being cleaned up under the emergency removal provisions of CERCLA. Of the 400 to 600 sites in Virginia now under investigation, the DWM estimates that seventy-five will require cleanup. The responsible parties are to bear the costs for cleaning up these seventy-five sites. Testimony indicated that the contamination of twenty-five to thirty sites in Virginia had jeopardized the sale of the property, but that these sites were now being cleaned up, most at the seller's expense. The Joint Subcommittee was informed that in order for the Commonwealth to provide the ten percent portion of the cleanup costs required under federal law for NPL sites, EPA estimates that Virginia will need $3 million during the next biennium.

In Virginia, possible Superfund sites are reported to the EPA or the DWM by other state agencies, concerned citizens, newspaper reporters, local officials or anonymous phone calls. Once a site is reported, EPA or DWM conducts a preliminary assessment of the site. During the initial assessment, staff members

of these agencies often obtain an agreement from the site's owner to handle cleanup privately. However, if it seems that the waste at the site would pose a human health hazard and the site's owner resists taking action, the EPA or the DWM can decide to perform a site investigation. Such an investigation involves taking soil, water, and air samples for extensive laboratory testing. The data collected are used to determine the site's score on the Hazard Ranking System, a complex scoring system designed to evaluate the risks posed to humans and the environment. Sites are placed on the NPL primarily on the basis of these hazard scores.

Once a site is placed on the NPL, an evaluation process is begun to determine how cleanup can best be accomplished. At each site, the EPA or DWM is designated as the lead or support agency. Once the EPA and DWM select a cleanup option, they present that option at a public hearing held in the site's locality. Following the public hearing, a final decision is then reached on the proper cleanup option. The remedial design phase then begins, including the selection of the actual design of the cleanup process and the design of any special equipment which needs to be constructed for the process. Following this step, the remedial action phase begins and the cleanup plan and remedial design are implemented. When the site has been fully cleaned up, the site is recommended for delisting. The entire process, from listing of the site on the NPL through completion of cleanup, requires about six years.

B. Enforcement and Improper Disposal Incidents in the Commonwealth

Besides performing assessments and evaluations of sites which may become NPL sites, DWM handles three to five incidents annually involving private property owners who are victimized by the illegal dumping of hazardous waste. DWM also investigates twelve to twenty similar incidents which occur annually on business, institutional, or public property (e.g. drums left at landfills, on highway rights-of-way, etc.). Other incidents on highway rights-of-way and in jurisdictions such as Fairfax, Norfolk, Virginia Beach, and Chesterfield may add to these totals, since the Virginia Department of Transportation and those jurisdictions sometimes handle incidents without consulting DWM. DWM figures show that Fairfax has handled five incidents on its own since July 1, 1988; Virginia Beach, six; and Chesapeake, five. DWM is unsure whether the property involved in these incidents was owned by a corporation, private individual, or the public. No matter who eventually handles the incident, usually the local officials, particularly local fire departments, receive the initial notification of an incident. Upon notification, DWM personnel inspect the site. Under the Virginia Hazardous Waste Management Regulations (VHWMR's), the generator of the waste must determine whether the waste is hazardous. If no other party is found to fulfill this role, DWM places this burden on the landowner.

In some cases, the Virginia Department of Emergency Services (DES) may have already sampled the materials as part of a response, thereby partially performing the "generator's " responsibility. DES is responsible for the Virginia Hazardous Material Emergency Response Program. The program utilizes eleven response teams that are based around the state in local fire departments. Ten technically trained hazardous materials officers coordinate and monitor these teams and respond on-scene with the teams. DES provides these teams with the

requisite equipment and training. When a team responds it is reimbursed for equipment used and time spent.

In 1988, DES received a total of 1014 notifications from local governments, the state police,the coast guard and private organizations. Of those 1014 reports, DES completed 136 on-scene responses. On-scene responses are performed only upon request. For the first six months of 1989, DES received 488 notifications and responded to calls regarding private property twenty-seven times. Most of these private property responses concerned petroleum products or illegally dumped barrels whose contents were unknown. When DES discovers illegal dumping, it immediately contacts DWM. DES determines whether or not there is an emergency. If there is no emergency, the local government assumes the responsibility for monitoring the site until DWM arrives. Unlike DWM or the State Water Control Board, DES is not a regulatory agency.

A combination of container markings, testing procedures, and common sense is used to determine the nature of the material deposited. Even if a container is marked, the material must almost always be tested to ensure that it has not been repackaged. Once the nature of the material is determined, the results are checked against criteria contained in the VHWMR's. Under these regulations, the material is deemed hazardous if it meets one of four characteristics (ignitibility, corrosivity, reactivity, or extraction procedure (EP) toxicity) or if it appears on one of the lists contained in the regulations. Even if a material is not technically hazardous, it may have to be disposed of as if it were since landfills have restrictions on materials which they can accept, in addition to the prohibition against accepting hazardous wastes.

Depending on the type of hazardous waste, the material may have to be disposed of outside of Virginia. In Virginia, four companies handle hazardous waste. Two of these companies incinerate certain types of hazardous waste as a fuel source, one company recycles solvents, and one uses certain hazardous metal materials in a fertilizing process. Virginia currently exports its remaining hazardous waste to approximately twenty states, with the largest portion going to a GSX facility in South Carolina.

The cost of hazardous waste testing and disposal varies widely, depending on the type of testing or disposal that may be required. A simple EP toxicity test may cost as little as $250 per sample. More elaborate testing for organic constituents, such as with a gas chromatograph or mass-spectrometer, may cost as much as $1,500 per sample. DWM estimates that the average cost of testing is $500. Sometimes the discarded material can be used by someone else, in which case there is no disposal cost. If the material is simply an ignitible waste which can be burned as part of a fuels program, the cost may be as low as $200 per fifty-five gallon drum. If more difficult materials are involved, such as cyanides, the disposal cost may exceed $1,000 per fifty-five gallon drum for nonemergency handling (emergency handling at least doubles the cost). DWM estimates the average disposal cost for a fifty-five gallon drum to be $500.

DWM reports that in the past year, at least three incidents occurred in which private property owners were victimized by the illegal dumping of hazardous waste. In Chesterfield County, a property owner found drums on his property. In that case, a manufacturer agreed to pay for the disposal, since it had manufactured

the original product. The manufacturer was not the producer of the waste and was therefore not legally obligated to pay. In Nottoway County, a property owner received financial assistance for testing and disposal costs from the local government and the Virginia Solid and Hazardous Waste Contingency Fund. In Pittsylvania County, a property owner bore the entire cost; however, a corporation assisted by offering its services at cost. DWM estimates that the costs of these cleanups totalled $25,000. DWM indicates that at least one other incident occurred in the past year, but that it was not clear whether the wastes found were generated by a person connected with the site. These three incidents are still under investigation by the State Police.

In cases where an "innocent" property owner has been victimized by the illegal dumping of hazardous waste, DWM does not assess civil penalties against the landowner. DWM reports that the party who dumped the materials cannot ordinarily be found, and that DWM has never collected a penalty against such a party. However, in 1980-1982, the Department of Health, DWM's predecessor, found a number of responsible parties who paid approximately $150,000 in cleanup costs. According to DWM, those cases were referred to the police and were not pursued civilly.

C. Survey of Illegal Hazardous Material Dumping Incidents.

As previously indicated, the Joint Subcommittee requested that the Virginia Forestry Association survey its 1900 members in an effort to determine the extent and severity of dumping incidents in the Commonwealth. A copy of the survey and a tabulation of the responses appear as Appendices G and H. The results of the survey did not allow the Joint Subcommittee to draw any conclusion about the extent or severity of the illegal dumping problem in Virginia.

V. FUNDING FOR CLEANUP COSTS

Both federal and state funds exist for the cleanup of hazardous wastes in Virginia. Whether a property owner must reimburse these funds for moneys expended to clean up his property depends on the particular facts of each case.

A. Federal Dollars.

Federal funds may be available for cleanup costs in two situations. According to DWM, if a hazardous waste site is placed on the NPL, Superfund moneys may be expended to clean up the site. Unless the landowner is truly "innocent," he will be required to reimburse Superfund for all expenditures for cleaning up his property. In addition, "emergency removal funds" are also available under Superfund. Responsible parties must provide cleanup costs at "enforcement-lead" sites while at "fund-lead" sites Superfund furnishes the cleanup costs because no responsible party with the ability to pay can be found. At "fund-lead" sites, the state must pay ten percent of the cost, or fifty percent when a municipality is the responsible party. Of those Virginia sites on the NPL, responsible parties to date have provided approximately seventy-five percent of the cleanup costs.

B. State Dollars.

Two state funds are available for paying cleanup costs: the Virginia Solid and Hazardous Waste Contingency Fund and the Disaster Response Fund. In addition, the 1988-1990 Appropriations Act permits the Governor to transfer funds from Disaster Operations to DWM for the remediation of hazardous waste sites.

The Virginia Solid and Hazardous Waste Contingency Fund is comprised of civil penalties collected for violations of the Virginia Waste Management Act. To date, this Fund has never received a General Fund appropriation from the General Assembly. Currently, the Fund's balance is slightly less than $150,000. This represents the highest balance ever maintained in the Fund. Until early 1989, the balance of the Fund had consistently remained in the $30,000 to $60,000 range. Large civil penalties deposited into the Fund during the first few months of 1989 explain the Fund's dramatic increase.

In the past, moneys from the Virginia Solid and Hazardous Waste Contingency Fund have been disbursed to correct health and safety threatening situations. In 1988, $75,000 was expended from the Fund, primarily for stabilizing and removing leaking drums or other illegally dumped materials. Moneys from this Fund, as previously noted, have also been used to assist local governments in cleaning up sites where citizens have been "dumped on" without their knowledge or consent. Finally, some moneys from the Fund have been expended to assist in removing barrels from rivers after major floods. In the last year, DWM's records reflect that moneys from the Fund were used in seven such situations.

Pursuant to Virginia Code § 44-146.18:1, DES administers the Disaster Response Fund, which was established in 1984 to provide moneys for emergency response situations. This revolving fund is available for many of the same or similar projects as is the Virginia Solid and Hazardous Waste Contingency Fund. In fact, on some occasions DES and DWM have shared cleanup costs. However, if DES utilizes moneys from the Disaster Response Fund, DES is required to recover the sums expended from the party responsible for the incident.

VI. COMMENTS AND CONCERNS OF INTERESTED PARTIES

During the course of its study, the Joint Subcommittee received testimony and written comments from numerous parties concerned about the liability placed on "innocent" landowners who are victimized by the illegal dumping of hazardous materials. All parties providing testimony or comments to the Joint Subcommittee, including private citizens and representatives of industry, local government, and private interest groups, voiced concerns that under current law an innocent landowner could be held responsible for another party's illegal and intentional act of dumping hazardous materials on the landowner's property. Comments such as "[t]he law should recognize and clearly differentiate between the perpetrator of a crime and the victim of a criminal act even when the primary concern of the state is with the public and environmental health" typified opinions expressed to the Joint Subcommittee. To a person, each individual who addressed the Joint

Subcommittee requested legislation which would afford some liability protection for innocent landowners who are victimized by illegal dumping. Many persons suggested that in addition to liability protection, tougher sanctions and penalties are needed for illegal dumpers. They also urged the Joint Subcommittee to provide more funding for cleanup costs by raising civil penalties.

Many of the persons who testified were owners of large rural tracts who felt particularly susceptible to liability resulting from illegal dumping. They indicated that the extent of their land holdings or the fact that they were "absentee landowners" makes it virtually impossible and economically impractical to secure their properties from the threat of illegal dumping. They testified that by the time they would discover that they had been victimized by illegal dumping, it would be impossible to discover who had placed the hazardous materials on their property. Therefore, unless they simply left the hazardous materials on their property or illegally moved the dumped materials to another person's property, they would be stuck with the cost of cleanup. In addition, the Joint Subcommittee was informed that such landowners might suffer a loss of resale value, delay in being able to sell the property, a loss of usable land, groundwater contamination, legal expenses and the "aggravation" of having to deal with EPA.

A number of corporate representatives testified about the amount of cleanup costs which their companies had incurred as a result of being victimized by illegal dumping. None of the illegal dumping incidents to which they referred had occurred in Virginia. However, they predicted that as states such as South Carolina begin to refuse to accept hazardous waste from Virginia, the cost of disposal will continue to rise, which will provide further incentive to break the law and dispose of such waste illegally.

Finally, the Joint Subcommittee's attention was called to legislation passed by the General Assembly in 1989 which provides defenses to liability for landowners in an effort to open up more lands in the Commonwealth for public recreational use. Testimony indicated that opening up such properties for public access would only make landowners that much more susceptible to illegal dumping.

VII. FINDINGS OF THE JOINT SUBCOMMITTEE

The Joint Subcommittee finds that the maximum civil penalties, civil charges, and criminal fines which may be assessed for each day of violation under Virginia's Waste Management Act are less than those of other states and the federal government. Were such maximum civil penalties, civil charges and criminal fines to be increased to $25,000, they would be more in line with those of other states and the federal government. Such an increase would also further deter the commission of violations of the Virginia Waste Management Act and might provide additional revenues to the Virginia Solid and Hazardous Waste Contingency Fund which could be used to assist innocent landowners in paying for the cost of cleaning up hazardous materials which have been illegally dumped on their property.

In addition, the Joint Subcommittee finds that maximum civil penalties for violations of the State Water Control law should also be increased to further deter the commission of such violations. The illegal dumping of hazardous materials may certainly degrade the quality of the state's surface water and groundwater.

Finally, the Joint Subcommittee finds that although the Commonwealth could not permissibly increase liability protection for landowners beyond those protections currently afforded under federal law (CERCLA), such landowners should be protected from liability under state law in the same degree as they are protected under federal law. Consequently, innocent landowners capable of proving an affirmative defense under CERCLA should not be held liable under state law for cleanup costs when they are victimized by the illegal dumping of hazardous materials on their property.

VIII RECOMMENDATIONS OF THE JOINT SUBCOMMITTEE

At its final meeting, the Joint Subcommittee developed the following three recommendations:

1. That the maximum civil penalties, civil charges, and criminal fines which may be assessed for each day of violation of the Virginia Waste Management Act be increased from $10,000 to $25,000;

2. That the maximum civil penalty which may be assessed for a violation of the State Water Control Law be increased from $10,000 to $25,000; and

3. That the same defenses to liability under CERCLA be made available under state law in actions relating to civil liability for the cleanup and costs associated therewith of a site upon which solid or hazardous waste has been improperly managed.

See Appendices B, C, and D for legislation implementing the Joint Subcommittee's recommendations.

Respectfully submitted,

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IX. APPENDIX GUIDE

1989 SESSION

SENATE JOINT RESOLUTION NO. 202

Establishing a joint subcommittee to study means of relieving landowners from liability resulting from the illegal dumping of hazardous materials on their property.

Agreed to by the Senate, February 23, 1989
Agreed to by the House of Delegates, February 21, 1989

WHEREAS, many landowners in the Commonwealth are subject to the illegal depositing of trash and debris on their property without their knowledge or consent; and

WHEREAS, this debris may contain materials which are or could be classified as toxic or hazardous substances; and

WHEREAS, current law holds a landowner responsible for the removal and clean-up of hazardous waste found on his property, even if it was illegally deposited without the landowner's knowledge or consent; and

WHEREAS, the proper removal, clean-up and testing of hazardous substances is both expensive and time consuming; and

WHEREAS, the moneys currently contained in the Solid and Hazardous Waste Contingency Fund are inadequate to cover the clean-up costs of landowners who have been victimized by the illegal depositing of hazardous wastes upon their property; and

WHEREAS, this tremendous liability and resulting expense is unfair to innocent landowners and can lead to the restriction of public access to lands for purposes of hunting, fishing and other recreational activities for which there is a great demand; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That a joint subcommittee be established to study means of relieving landowners of the extreme liability and financial exposure to which they are subjected by the illegal dumping of hazardous materials upon their property. As part of the study, the joint subcommittee shall consider the necessity or desirability of providing additional appropriations or other revenues to the Solid and Hazardous Waste Contingency Fund. The joint subcommittee shall be composed of nine members as follows: two members of the Senate Committee on Agriculture, Conservation and Natural Resources, to be appointed by the Senate Committee on Privileges and Elections; three members of the House Committee on Conservation and Natural Resources, to be appointed by the Speaker; and the Director of the Department of Waste Management, the Executive Director of the State Water Control Board, the State Forester of the Department of Forestry and the Director of the Department of Conservation and Historic Resources.

The joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 1990 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for processing legislative documents.

The indirect costs of this study are estimated to be $11,490; the direct costs of this study shall not exceed $6,980.

D 11/27/89 Heard C 12/11/89 ljl

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact § 10.1-1455 of the Code of Virginia, relating to penalties for the violation of provisions of the Virginia Waste Management Act.

Be it enacted by the General Assembly of Virginia:

1. That § 10.1-1455 of the Code of Virginia is amended and reenacted as follows:

§ 10.1-1455. Penalties and enforcement.--A. Any person who violates any provision of this chapter, any condition of a permit or certification, or any regulation or order of the Board shall, upon such finding by an appropriate circuit court, be assessed a civil penalty of not more than ~~$10,000~~ $25,000 for each day of such violation. All civil penalties under this section shall be recovered in a civil action brought by the Attorney General in the name of the Commonwealth.

B. In addition to the penalties provided above, any person who knowingly transports any hazardous waste to an unpermitted facility; who knowingly transports, treats, stores, or disposes of hazardous waste without a permit or in violation of a permit; or who knowingly makes any false statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of hazardous waste program compliance shall be guilty of a felony and shall be punished by confinement in the state correctional facility for one year or, confinement in jail for not

more than twelve months and a fine of not more than ~~$10,000~~ $25,000 for each day of violation, either or both.

C. The Board is authorized to issue orders to require any person to comply with the provisions of any law administered by the Board, the Director or the Department, any condition of a permit or certification, or any regulations promulgated by the Board or to comply with any case decision, as defined in § 9-6.14:4, of the Board or Director. Any such order shall be issued only after a hearing with at least thirty days' notice to the affected person of the time, place and purpose thereof. Such order shall become effective not less than fifteen days after mailing a copy thereof by certified mail to the last known address of such person. The provisions of this section shall not affect the authority of the Board to issue separate orders and regulations to meet any emergency as provided in § 10.1-1402.

D. Any person willfully violating or refusing, failing or neglecting to comply with any regulation or order of the Board or the Director, any condition of a permit or certification or any provision of this chapter shall be guilty of a Class 1 misdemeanor unless a different penalty is specified.

Any person violating or failing, neglecting, or refusing to obey any lawful regulation or order of the Board or the Director, any condition of a permit or certification or any provision of this chapter may be compelled in a proceeding instituted in an appropriate court by the Board or the Director to obey such regulation, permit, certification, order or provision of this chapter and to comply therewith by injunction, mandamus, or other appropriate remedy.

E. Without limiting the remedies which may be obtained in this section, any person violating or failing, neglecting or refusing to

obey any injunction, mandamus or other remedy obtained pursuant to this section shall be subject, in the discretion of the court, to a civil penalty not to exceed ~~$10,000~~ $25,000 for each violation. Each day of violation shall constitute a separate offense. Such civil penalties may, in the discretion of the court assessing them, be directed to be paid into the treasury of the county, city or town in which the violation occurred, to be used to abate environmental pollution in such manner as the court may, by order, direct, except that where the owner in violation is the county, city or town itself, or its agent, the court shall direct the penalty to be paid into the state treasury.

F. With the consent of any person who has violated or failed, neglected or refused to obey any regulation or order of the Board or the Director, any condition of a permit or any provision of this chapter, the Board may provide, in an order issued by the Board against such person, for the payment of civil charges for past violations in specific sums, not to exceed the limit specified in subsection E of this section. Such civil charges shall be instead of any appropriate civil penalty which could be imposed under subsection E.

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D 12/6/89 Heard T 12/7/89 ljl

SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact § 62.1-44.32 of the Code of Virginia, relating to penalties for violations of the State Water Control Law.

Be it enacted by the General Assembly of Virginia:

1. That § 62.1-44.32 of the Code of Virginia is amended and reenacted as follows:

§ 62.1-44.32. Penalties.--(a) Any owner who violates any provision of this chapter, or who fails, neglects, or refuses to comply with any special final order of the Board, or final order of a court, lawfully issued as herein provided, shall be subject to a civil penalty not to exceed ~~$10,000~~ $25,000 for each violation within the discretion of the court. Each day of violation shall constitute a separate offense.

Such civil penalties may, in the discretion of the court assessing them, be directed to be paid into the treasury of the county, city, or town in which the violation occurred, to be used for the purpose of abating environmental pollution therein in such manner as the court may, by order, direct, except that where the owner in violation is such county, city or town itself, or its agent, the court shall direct such penalty to be paid into the state treasury.

In the event that a county, city, or town, or its agent, is the owner, such county, city, or town, or its agent, may initiate a civil action against any user or users of a waste water treatment facility

to recover that portion of any civil penalty imposed against the owner proximately resulting from the act or acts of such user or users in violation of any applicable federal, state, or local requirements.

(b) Any owner, his agent, or contractor, who willfully or negligently violates any provision of this chapter, or who fails, neglects or refuses to comply with any special final order of the Board, or final order of a court, lawfully issued as herein provided, or who knowingly makes any false statement in any form required to be submitted under this chapter or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall be fined not less than $100 nor more than $25,000 for each violation within the discretion of the court. Each day of violation shall constitute a separate offense.

(c) For the purpose of this section, the term "owner" shall mean, in addition to the definition contained in § 62.1-44.3, any responsible corporate officer so designated in the applicable discharge permit.

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SENATE BILL NO. ..... HOUSE BILL NO. .....

A BILL to amend and reenact § 10.1-1406 of the Code of Virginia, relating to the Virginia Solid and Hazardous Waste Contingency Fund.

Be it enacted by the General Assembly of Virginia:

1. That § 10.1-1406 of the Code of Virginia is amended and reenacted as follows:

§ 10.1-1406. Virginia Solid and Hazardous Waste Contingency Fund.--A. For the purposes of responding to solid or hazardous waste incidents, clean-up of sites which have been improperly managed, and identification of parties responsible for such mismanagement, there is hereby established the Virginia Solid and Hazardous Waste Contingency Fund.

B. This fund shall be a revolving fund consisting of moneys received for civil penalties and civil charges assessed for violations of solid and hazardous waste laws or court orders pertaining thereto pursuant to subdivisions 18 and 19 of §§ 10.1-1402 and 10.1-1455 and moneys appropriated by the General Assembly. These moneys shall be deposited by the Comptroller to the Virginia Solid and Hazardous Waste Contingency Fund to be appropriated for the purposes stated above as the General Assembly deems necessary.

C. Where fund moneys are expended for cleaning up, stabilizing, or neutralizing a hazardous waste site, the Department shall have a lien on the real property on which such site is located, if the real

property is owned by the party or parties determined by the Department to be responsible for mismanaging the site. Such lien shall be in an amount sufficient to cover the reasonable cost of taking the remedial action necessary to clean up, stabilize, or neutralize the site, and of identifying the party or parties responsible. Within one year after completing the clean up, stabilization or neutralization of the site, the Department shall file in the office of the clerk of the circuit court of the county or city in which the property is located, a memorandum of lien identifying by name and address the owners of the property to which the lien is to apply, a description of the property, and the amount and basis of the claim. The Department shall serve a copy of the memorandum of lien on each owner as soon as practicable after the memorandum is recorded. The clerk in whose office the memorandum is filed shall record and index the lien in the manner provided by § 43-4.1 in the name of both the Department and the owner or owners of the property affected. Such lien shall be effective immediately upon recordation and indexing but shall be subject to the rights of any person with an interest in the affected property which is a matter of record in the city or county in which the affected property is located, at the time such lien is recorded.

D. Where the property is subject to a credit line deed of trust under § 55-58.2, the Commonwealth shall give notice to the lender as in the case of a judgment.

E. Any party having an interest in real property against which a lien has been filed as provided in this section may petition the circuit court of the city or county in which the lien is recorded to determine the validity of the lien and whether the amount thereof is reasonable. After notice to the Commonwealth, the court shall hold a

hearing and determine the validity of the lien and whether the amount thereof is reasonable. If the court finds that the lien is invalid, it shall order that it be removed from record. If the court finds that the amount of the lien is excessive, it shall order an appropriate reduction. In any such proceeding, the burden shall be upon the Commonwealth to prove both the validity of the lien and that the amount thereof is reasonable.

F. No person shall be liable under the provisions of subdivision 18 of § 10.1-1402 for cleanup or to reimburse the Virginia Solid and Hazardous Waste Contingency Fund if he can establish by a preponderance of the evidence that the violation and the damages resulting therefrom were caused solely by:

1. An act of God;

2. An act of war;

3. An act or omission of a third party other than an employee or agent of the defendant, or other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (i) he exercised due care with respect to the hazardous waste or hazardous substance concerned, taking into consideration the characteristics of such hazardous waste or hazardous substance, in light of all relevant facts and circumstances and (ii) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

4. Any combination of subdivisions 1 through 3 of this

subsection. For purposes of this subsection, the term "contractual arrangement" shall have the meaning ascribed to it in 42 U.S.C. § 9601(35).

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Appendix E

A Summary of Other State's Laws Regarding The Liability of "Innocent" Landowners

ALABAMA

Alabama's law makes no provision for "innocent" landowners. Not until 1988 (Bill Number 88-859) did the state establish a state superfund. This new fund is similar to EPA's Superfund and received an initial appropriation of state funds in the amount of $100,000. According to administrative personnel in Alabama, whether a landowner in that state is held responsible for cleanup and the costs thereof depends in large part on the magnitude of the cleanup project required. Where cleanup costs are relatively small ($2,000 or less), it is likely that the landowner will be "encouraged" to pay for the cost of cleanup, whether or not he is "innocent."

ALASKA

Alaska's law makes no provision for "innocent" landowners. Although a fund is maintained by the state, its purpose is not to assist "innocent" landowners in paying for cleanup costs. All responsible parties may be required to reimburse the fund for cleanup costs expended.

ARIZONA

Arizona's law affords no added protection for "innocent" property owners. The state maintains a Hazardous Waste Trust Fund which is composed of fees assessed against hazardous waste generators. Moneys from this Fund are used to clean up state-owned sites. Arizona's Hazardous Waste Management Fund is funded by appropriations and is only utilized for emergency situations.

ARKANSAS

Arkansas' law affords no added protection to "innocent" landowners. The state relies totally on the criteria for determining liability under RCRA and CERCLA. Two state funds are utilized to clean up hazardous waste. In 1985, the Emergency Action Response Fund was established to provide a source of moneys to be used during emergency situations involving hazardous waste (i.e. for cleanups resulting from train wrecks or other emergency disasters). This fund has a cap of $150,000 and is comprised of civil penalties collected from air and water polluters.

A second fund, known as the Arkansas Remedial Action Trust Fund, was also established in 1985 and acts as the state's superfund. Should a property owner request financial assistance from this Fund, a public hearing is held to determine whether state funds should be expended. If it is determined that funds should be expended, the property is then placed on a priority clean up list. Revenues for this fund are derived from fees assessed against hazardous waste generators. Once the Emergency Action Response Fund reaches its cap, all civil penalties collected from air and water polluters are placed in the Remedial Action Trust Fund. This trust fund is also utilized to provide state matching funds for the federal Superfund program.

CALIFORNIA

California's law incorporates the CERCLA definition of "responsible party." Therefore, liability may be placed on the owner or operator of the property. No protection of "innocent" landowners is provided by law. However, in the case of "midnight dumping", an "innocent" property owner may receive emergency funds from the Hazardous Waste Accounts (HWA's) if the situation can be classified as an emergency. The HWA's are funded through the Hazardous Substance Cleanup Bond Act of 1984, and average a balance of $300,000.

COLORADO

Colorado's law provides no additional protection for "innocent" landowners. The state does maintain an Emergency Response Fund, but its minimal balance prohibits its use at this time.

CONNECTICUT

The Connecticut Property Transfer Act protects "innocent" property purchasers from liability for cleanup costs of existing sites if the purchaser did not know or had no reason to know of the contamination prior to purchasing the property. However, the Connecticut Code provides that one who "maintains the property" may be considered a responsible party. If a landowner is able to prove his innocence, normally moneys from the state's Superfund will be used to pay for the costs of cleanup.

DELAWARE

Delaware law provides no protection from liability for "innocent" landowners. No state superfund is available to pay for cleanup costs.

FLORIDA

Although Florida law has no provisions which protect "innocent" landowners, the Department of Environmental Regulation is only required to seek reimbursement of cleanup costs from "a person or persons at any time causing or having caused the discharge." Florida maintains two funds which may be used to pay for cleanup costs. The Water Quality Assurance Trust Fund is composed of moneys from (i) an annual transfer of interest funds from the Florida Coastal Protection Trust Fund, (ii) a monthly transfer of the interest from the State Water Pollution Control Trust Fund, and (iii) excise taxes levied, collected and credited to the Water Quality Assurance Trust Fund. Moneys from this fund are expended for emergencies and other actions authorized and carried out by the Department of Environmental Regulation. Moneys from a second fund known as the Inland Protection Trust Fund are used to respond to emergency petroleum contamination incidents. It is comprised of moneys received for penalties, judgments, loans and other fees and charges, as well as a $5 million loan from the Florida Coastal Protection Trust Fund.

GEORGIA

Georgia's law provides no added protection for "innocent" property owners. Georgia maintains a limited fund known as the Hazardous Waste Management Fund, which is comprised of civil penalties collected for environmental violations.

HAWAII

Unless a responsible party can be found, Hawaii's law requires the landowner to pay for the costs of cleanup. Hawaii maintains no state fund to cover cleanup costs. Hawaii relies solely upon the federal law and regulations adopted thereunder.

IDAHO

Idaho's law provides no protection from liability for "innocent" landowners. The state maintains no fund to assist with cleanup costs and unless federal dollars are available through EPA, the cost falls on the responsible party, which may be the landowner.

ILLINOIS

Illinois' law provides no protection from liability for "innocent" landowners. The state looks solely to the federal law and regulations adopted thereunder.

INDIANA

Indiana's law provides no protection from liability for "innocent" landowners. However, in all cases involving "innocent" private landowners, and sometimes for "innocent" commercial landowners depending on their financial situation, the state will pay the costs incurred in searching for the responsible party.

IOWA

According to administrative personnel, in their state "if you own the property, you own the problem." Iowa maintains no fund to assist with cleanup costs if federal dollars are unavailable.

KANSAS

Although Kansas law contains no definition of "innocent" landowner, should state inspectors determine that the landowner is "innocent" of any involvement with the contamination of the site, he is not held liable for cleanup costs. Kansas' Environmental Response Fund contains a subaccount known as the Hazardous Waste Cleanup Fund, which is used to assist "innocent" landowners with cleanup costs. This subaccount is funded by appropriations and has never contained a balance in excess of $300,000.

KENTUCKY

Kentucky's law affords no protection from liability for "innocent" landowners. The state is in the early stages of creating a fund to pay cleanup costs.

LOUISIANA

Louisiana adhears to federal law and regulations in determining who is liable for cleanup costs. However, decisions regarding the liability of "innocent" landowners are made on a case by case basis. Should no responsible party be found and it be determined that the landowner is "innocent", Louisiana's Hazardous Waste Emergency Cleanup Fund can be used to pay for the cleanup costs, provided the situation is determined to be an emergency.

MAINE

Maine's law provides that lienholders, owners and operators may be considered responsible parties. Maine does maintain a bond account from which funds may be expended to cleanup sites, but a responsible party may be required to reimburse this fund.

MARYLAND

Maryland's law includes a definition of "responsible party," as well as exclusions from that definition. However, their law contains no provisions which are comparable to the federal § 107B defense. Maryland maintains a small state superfund which is utilized to pick up cleanup costs in excess of federally provided funds. The funds current balance is slightly greater than $2 million, although $7.5 million in bond sales are authorized. A property owner may be required to reimburse the fund for any cleanup expenditures made from it.

MASSACHUSETTS

Massachusetts law provides that owners or operators of sites may be held liable "without regard to fault." However, the law does provide certain defenses which "innocent" landowners may use [Chapter 21E, § 5(c)]. Should a landowner be able to establish a defense to liability, cleanup funds are provided by the state out of the general tax fund.

MICHIGAN

Although Michigan law provides no protection for an "innocent landowner," if no other responsible party can be found and the site is determined to be an "orphan site," cleanup may be performed at state expense if the property is not used for commercial purposes. State money to cleanup sites located on an "innocent" property owner's land comes from Michigan's Water Resources Act Fund. The state also maintains an Environmental Response Fund, which may only be used in emergency situations.

MINNESOTA

Minnesota's law provides that liability shall not attach to landowners who had no involvement in the hazardous waste release and did not know or could not reasonably have been expected to know that a "hazardous substance was located on his property." There is no reference to private, residential-type landowners. Any person held jointly and severally liable has a right at trial to have the liability apportioned.

MISSISSIPPI

Mississippi's law provides no protection for "innocent" landowners. Currently the state has no superfund, but many times will expend moneys from the Emergency Contingency Fund to pay for the costs of cleanup while the search for a responsible party is conducted. This fund is administered by the Executive Office. A bill to create a state superfund has been prefiled for consideration during the next legislative session. Mississippi's Environmental Protection Council, composed of twelve legislators, is currently considering the liability problems faced by "innocent" landowners.

MISSOURI

Although Missouri's law provides no protection for "innocent" landowners, no attempt has ever been made in that state to place liability on a property owner who was not involved in the illegal dumping. The only "sanction" enforced against innocent property owners is placing their property on a register of contaminated sites, which may affect the property's resale value. The Hazardous Waste Remedial Fund, which consists of tax revenues, is available to pay for the cleanup of emergency situations. This fund is relatively small and expenditures from it are usually made for emergency "midnight dumping" incidents.

MONTANA

Montana provides no additional protection from liability for "innocent" landowners, as the state exclusively follows the federal definition of "responsible party." In 1983, Montana established its own state superfund.

NEBRASKA

Although Nebraska's law provides no definition of an "innocent" landowner, agency personnel indicate that there is a great deal of "enforcement flexibility." Should no other responsible party be found besides the landowner, moneys for cleanup costs can be provided from the state's general funds.

NEVADA

Nevada's law provides no protection for "innocent" property owners. The state maintains a fund which may be tapped to provide cleanup costs in emergency situations. The law requires that "compensation for cleanup costs must be sought from any person who is responsible for the accident or spill, or who owns or controls the hazardous waste or the area used for the disposal of the waste."

NEW HAMPSHIRE

§ 147-B:10-a of the New Hampshire Code provides that "there shall be no liability under...[state law] for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of hazardous wastes or hazardous materials, and the resulting damages were caused solely by:... III. An act or omission of a third party other than an employee, agent or independent contractor of the defendant, if the defendant establishes by a preponderance of the evidence that he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and that he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." Consequently, New Hampshire's law does provide some protection from liability for an innocent landowner, although the burden of proof rests with the landowner to establish his "innocence." New Hampshire maintains a nonlapsing, revolving special fund know as the Hazardous Waste Cleanup Fund, moneys from which can be used for the cleanup of nonqualifying CERCLA sites.

NEW JERSEY

Although New Jersey law provides that a purchaser of contaminated land who does not contribute to the problem may not be held liable for cleanup costs, the state's highest court has ruled that ownership or control over property at the time of discharge will suffice to hold the owner liable for hazardous discharge. [State Dept. of Environmental Protection v. Ventrol Corp., 94 N.J. 473, 468 A.2d 150 (1983)]. The court came to this conclusion because New Jersey's law provides that any person who has discharged a hazardous substance or who is in any way responsible for the hazardous substance shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs. If no responsible party can be found, the New Jersey Spill Contamination Fund is used to pay for the cleanup costs.

NEW MEXICO

New Mexico's law provides no protection for "innocent" landowners. A Hazardous Waste Emergency Fund is available for costs incurred in emergency responses.

NEW YORK

New York's law provides no protection for "innocent" landowners. However, a Commissioner attempts to apportion liability, including the liability of landowners. Although New York's definition of "responsible party" includes landowners, there is prosecutorial discretion not to prosecute where a landowner is truly "innocent."

NORTH CAROLINA

North Carolina's law provides no protection for "innocent" landowners. Under North Carolina's Inactive Sites Program, "innocent" landowners are not held responsible for cleanup, but are encouraged to do so at their own expense, especially if they are interested in prompt action. The state does maintain a fund, but in 1987 the fund was completely depleted after cleaning up one site at a cost in excess of $300,000.

NORTH DAKOTA

North Dakota's law relies completely upon the federal definition of "responsible party" and therefore provides no additional protection from liability for "innocent" landowners.

OHIO

Ohio's law provides no protection for "innocent" landowners. The Ohio Code provides that pre-cleanup agreements for cleanup cost reimbursement are required of owners of the land or facility where cleanup is necessary. State law prohibits the state from initiating cleanup until this agreement is signed by the owner. The Hazardous Waste Clean-up Fund is used by the state for cleanup costs and consists of fines and penalties assessed for various environmental infractions.

OKLAHOMA

Oklahoma relies on the common law theory of nuisance to establish landowner liability. Therefore, if an owner is obviously without fault, he may avoid liability. The Controlled Industrial Waste Fund is available for cleanup costs in emergency situations where the site is ineligible for federal dollars.

OREGON

Oregon law relies on the federal definition of "responsible party" and therefore provides no additional protection from liability for "innocent" property owners. If a landowner has what amounts to an acceptable federal defense to liability, he is eligible to receive cleanup cost assistance from the state's Hazardous Substance Remedial Action Fund subaccount established in 1989. The new subaccount is funded by bonds repaid through revenues derived from three fees: a solid waste tipping fee, a petroleum delivery and withdrawal or import fee, and a hazardous substance fee. These three fees may each generate up to $1 million annually.

PENNSYLVANIA

Pennsylvania recently enacted the Hazardous Sites Cleanup Act, which provides new liability determination criteria. The Act calls for joint and several liability and provides for nonbinding arbitration if necessary. Under this Act, a landowner may avoid liability if he can demonstrate that he (i) acquired the property after contamination, or (ii) took precautions against contamination. Under the Act, a responsible party may be liable for treble damages.

RHODE ISLAND

Rhode Island's law provides no additional protection from liability for "innocent" landowners. The state's Emergency Response Fund is available for emergency situations only.

SOUTH CAROLINA

South Carolina law follows the federal definition of "responsible party." The state maintains a Hazardous Waste Contingency Fund which is comprised of revenues generated by hazardous waste disposal fees. The current balance of this fund is $4.2 million.

SOUTH DAKOTA

South Dakota's law follows the federal definition of "responsible party." Therefore, no additional protection from liability is afforded to "innocent" landowners. Moneys from the Cost Recovery Fund are only available to pay for the cost of cleanup in emergency situations.

TENNESSEE

Landowners are considered potentially responsible parties under Tennessee's law. However, the state's Attorney General has sole authority to apportion costs and has on occasion found that innocent landowners should not be responsible for these costs. A hazardous waste disposal fee assessed against generators provides revenues which are placed in the states superfund, and moneys from this fund are available for cleanup operations.

TEXAS

Under Texas' law, a landowner is always considered a potentially responsible party, and has a duty to diligently attempt to find the responsible party. In cases of "midnight dumping" where a responsible party cannot be found, cleanup moneys are available from the Texas Spill Response Fund, which is comprised of general revenues. The state also has its own superfund.

UTAH

Utah's law follows the federal definition of "responsible party." Agency personnel indicated that "innocent" landowners liability is usually not an issue in their state due to the large amount of federally owned land. The state maintains no fund to pay for cleanup costs.

VERMONT

Vermont's law follows the federal definition of "responsible party" and therefore provides no additional protection from liability for "innocent" landowners. All responsible parties are jointly and severally liable. The state maintains two funds which may be used as a source to pay for cleanup costs. The Petroleum Cleanup Fund is comprised of revenues generated by a penny per gallon tax on gasoline and the Contingency Fund is comprised of revenues received from a waste tax levied on generators.

WASHINGTON

In 1989, a referendum was passed in Washington which provides that "innocent" purchasers of property incur no liability when they purchase contaminated property. However, this initiative did not address the issue of who will be responsible for paying the cleanup costs. Agency personnel believe that the state's superfund will be utilized to pay cleanup costs when a purchaser is found to be innocent and no other responsible party can be located.

WEST VIRGINIA

West Virginia's law relies on the federal definition of "responsible party." A landowner is required to search for the responsible party and may be held liable for all cleanup costs. Although authorized by statute, no state superfund has ever been established, nor is one likely to be established in the near future, considering the state's current financial situation.

WISCONSIN

Wisconsin law provides no additional protections from liability for "innocent" landowners. The federal definition of "responsible party" is utilized. The state's superfund is available for cleanup costs, and is comprised of revenues generated by a solid waste tipping fee, a petroleum inspection fee, and a nineteen dollar per ton hazardous waste generator fee. The current biennium balance of this fund is $8 million and this balance is expected to increase to $12 million during the next biennium. The State Environmental Repair Fund may also be used to provide moneys for cleanup costs.

WYOMING

Wyoming's law provides no additional protection from liability for "innocent" landowners. No state funds are available for cleanup unless there is a threat of water contamination, in which case the entire site can be cleaned up with moneys expended from the Water Fund. However, the landowner may eventually be required to reimburse the Fund. The Fund's current balance is just over $2 million, and the moneys contained in the Fund are derived from the sale of bonds.

Appendix F

HAZARDOUS WASTE CLEANUP: STATE FINANCIAL ASSISTANCE

- STATES WHICH PROVIDE NO FINANCIAL ASSISTANCE FOR THE CLEANUP OF HAZARDOUS WASTE: Delaware, Hawaii, Idaho, Iowa, Kentucky, Nebraska, Utah, West Virginia, Wyoming, North Dakota.

  Total = 10

- STATES WHICH MAINTAIN A FUND USED FOR THE CLEANUP OF HAZARDOUS WASTE, BUT WHICH MAY REQUIRE "INNOCENT" LANDOWNERS TO REIMBURSE SUCH A FUND: Alabama, Alaska, California, Georgia, Illinois, Indiana, Maine, Maryland, Mississippi, Missouri, Montana, New Jersey, New York, North Carolina, Ohio, South Carolina, Texas, Vermont, Virginia, Wisconsin. Arizona, Colorado, Nevada, New Mexico, Rhode Island and South Dakota also maintain such funds, but these funds may only be used in "emergency" situations.

  Total = 26

- STATES WHICH MAINTAIN A FUND USED FOR THE CLEANUP OF HAZARDOUS WASTE AND WHICH DO NOT REQUIRE REIMBURSEMENT FROM "INNOCENT" LANDOWNERS: Washington, Tennessee, Oregon, New Hampshire, Minnesota, Pennsylvania, Kansas, Florida, Connecticut, Arkansas, Michigan. Louisiana and California maintain such funds for use only in emergency situations, and Massachusetts provides cleanup cost assistance to "innocent" landowners from its general tax fund.

  Total = 14

Appendix G

SJR 202 HAZARDOUS MATERIAL DUMPING QUESTIONAIRE

1. Have you ever had hazardous materials dumped on your property without your consent? Yes_____ No_____

If your answer to this question was "yes," answer question number 2. If your answer was "no," skip question number 2 and go to question number 3.

2. Please describe the circumstances of this dumping by answering the following (please distinguish between dumping incidents if there have been more than one):

(a) What type of material was dumped (i.e. pesticides, oil, dioxin, etc.)?

_____

_____

_____

(b) How, if at all, was the hazardous material packaged (i.e. left in drums, etc.)?

_____

_____

_____

(c) How much of the hazardous material was dumped (volume)?

_____

_____

_____

(d) Upon your discovery of the dumping, who did you first notify (i.e. police, fire department, etc.)?

_____

_____

_____

(e) If the hazardous material has been removed and the property cleaned up:

i. Who removed the material and cleaned up the property?

_____

_____

_____

ii. Who paid for the cost of removal and cleanup?

_____

_____

_____

iii. How much did the removal and cleanup cost?

_____

_____

_____

3. Do you know of anyone else who has had hazardous materials dumped on their property without their consent? Yes_____ No_____
If your answer was "yes," please provide the following information so that a copy of this questionaire may be forwarded to them:
(a) Their name: _____
(b) Their address: _____
_____

4. (Optional) Your name: _____
_____
_____

Daytime phone number: ( )_____

JOINT SUBCOMMITTEE STUDYING MEANS OF RELIEVING LANDOWNERS FROM LIABILITY RESULTING FROM THE DUMPING OF HAZARDOUS MATERIALS ON THEIR PROPERTY (SJR 202, 1989)

RESULTS OF THE SURVEY OF MEMBERS OF THE VIRGINIA FORESTRY ASSOCIATION CONCERNING ILLEGAL DUMPING OF HAZARDOUS WASTE

At the August 1, 1989, meeting of this subcommittee, the Chairman requested that the Virginia Forestry Association poll its membership to determine the extent of illegal dumping of hazardous waste on "innocent" landowners' property. The VFA polled its approximately 1900 Virginia members and received 56 responses. Only eleven of the responses indicated any dumping of waste. Several responses included materials which are not hazardous waste; however, those materials are included in this tabulation. Some of these non-hazardous waste materials were discovered in conjunction with hazardous waste.

Overall, the landowners who answered this survey complained of open dumping of ordinary trash more than any instances of illegal hazardous waste dumping. The one response which stands out above the others is the report of oil-based residue of printer's ink being dumped in 55 gallon drums. The total amount was over 1,000 gallons. The landowner, in this instance, was able to locate the chemical manufacturer from markings on one of the drums. Although not the responsible party, this manufacturer arranged for private cleanup of the site. The landowner indicated that the cost of this cleanup was in excess of $12,000.

The following is the raw tabulation of the responses to the questionnaire:

1. "Have you ever had hazardous materials dumped on your property without your consent?"

Eleven landowners responded "yes," including one in which the owner purchased property on which hazardous waste (pesticides) had been dumped. The new owner cleaned up the site himself. Forty-five landowners responded "no;" some of these landowners included comments to the effect that the owner would not necessarily know if hazardous materials had been dumped on his land.

2. "What type of material was dumped (e.g., pesticides, oil, dioxin, etc.)?"

Three landowners reported the dumping of pesticides; one reported the dumping of raw sewage; six reported the dumping of ordinary trash, including two reports of furniture; five reported tires; four reported appliances being dumped; one reported the dumping of hydraulic oil; three reported used oil; one reported paints and paint thinners; one reported printer's ink; and one reported an unknown substance. (The sum of materials is greater than the number of affirmative responses due to multiple incidents or multiple materials reported by single landowners.)

3. "How, if at all, was the hazardous material packaged (e.g., left in drums, etc.)?"

In four instances, the material was contained in drums; in one instance, the material was contained in bags; in three instances, the material was uncontained; in two instances, miscellaneous containers were used; and in one instance, there was no answer to this question.

4. "How much of the hazardous material was dumped (volume)?"

The answers to this question ranged from "a truckload" to "over 1,000 gallons" depending on the material which was dumped. In the cases of pesticide dumping, one landowner found "a lot" of empty, unrinsed cans, not much in volume. Another categorized the amount as "large quantities." The third landowner simply responded that empty or partially filled containers were dumped. In the one case of raw sewage, an amount was not stated.

Of the six landowners who reported the dumping of ordinary trash, most answered that it seemed that truckloads had been dumped or that the quantity dumped was unknown. Of the landowners who complained of tires or old appliances, only one indicated a specific amount: over 20,000 tires.

The landowner who reported the dumping of hydraulic oil indicated that the amount was approximately five gallons. The landowners who complained of used oil or paint and paint thinners being dumped did not indicate a specific amount. One response indicated that over 1,000 gallons of printer's ink was dumped.

5. "Who removed the material and cleaned up the property?"

In five of the reported instances, the property owner cleaned up the site. In one instance, the manufacturer voluntarily provided for clean-up of the site. In one instance, it was indicated that the responsible party was located and cleaned up the materials. In one instance, the landowner indicated that no clean-up was necessary because the material was washed off of his property (asbestos). In four instances, there was no answer to this question. (The sum exceeds the eleven instances because of shared clean-up efforts between the parties.)

6. "Who paid for the cost of removal and clean-up?"

In most instances, the property owner paid for the clean up. One response indicated that the manufacturer of the material dumped voluntarily paid for clean-up, while another response stated that the responsible party shouldered the clean-up costs.

7. "How much did the removal and clean-up cost?"

In six cases, the cost was either unknown or the landowner did not provide an answer. In two cases, there was no cost associated with cleanup. In the case where printer's ink was dumped, the landowner indicated the costs were in excess of $12,000. In the case of the large number of tires, the cost was in excess of $30,000. In one of the instances of used oil, the landowner estimated that the clean-up cost was $150.