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Annual Survey of Virginia Law: Environmental Law

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ENVIRONMENTAL LAW

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I. INTRODUCTION

Recent developments in environmental law in Virginia continue to reflect several trends. These trends may be grouped into six general categories: (1) the growing tension between federal environmental mandates and their practical implementation through delegated state programs; (2) the continuing debate over the exact definition of “interstate commerce” and the scope of state authority to regulate in the gray area; (3) the impending deregulation of the electrical energy market; (4) the promotion of sustainable development; (5) the developing schism between state and local land use control; and (6) the evolving nature of administrative law in the environmental context. The following survey discusses changes to the body of environmental law affecting Virginians during 2000–2001 in the context of each of these trends.

II. FEDERAL MANDATES AND DELEGATED STATE PROGRAMS

A number of developments in environmental law during the past year intensified the tension between federal mandates and delegated state programs. At the core of this tension is the impo-

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sition by the United States Environmental Protection Agency ("EPA") of increasingly more stringent standards on media quality and technology through revised regulatory programs (e.g., the Total Maximum Daily Load program), control over and allocation of resources (e.g., NO_x SIP Call), and administrative and judicial enforcement (e.g., new source review enforcement initiatives). In response, the Commonwealth of Virginia is left with the daunting task of implementing these mandates in a way that achieves EPA's goals without stifling the economy, shipping employment out of state or overseas, exhausting state resources, or harming the environment. Ironically, as EPA's command and control of environmental regulation expands, competing state environmental objectives, such as sustainability, become more difficult to achieve. We discuss some of these developments by environmental media.

A. Air

In 2000 and 2001, EPA continued to concentrate significant efforts on reducing air emissions, particularly nitrogen oxide ("NO_x") emissions, through several overlapping programs. EPA promulgated a new eight-hour ozone standard that was the subject of significant litigation in the recently decided *American Trucking* case.¹ It issued a NO_x state implementation plan ("SIP") Call requiring reductions of NO_x emissions from twenty-two states,² along with an overlapping petition from the northeastern states, to reduce NO_x emissions under section 126 of the Clear Air Act.³ Finally, EPA initiated enforcement actions against members of the utility, paper, and oil refining industries in an attempt to require new technologies to reduce NO_x emissions.⁴ Unfortunately, there are significant inconsistencies and redundancies among these various programs, which make them very difficult to implement at the state level.

1. See *Whitman v. Am. Trucking Ass'ns*, 121 S. Ct. 903 (2001).

2. See *Reducing Interstate Ozone Transport*, 63 Fed. Reg. 57,356, 57,356 (Oct. 27, 1998) (to be codified at 40 C.F.R. pt. 51).

3. See *Findings of Significant Contribution and Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport*, 65 Fed. Reg. 2674, 2674 (Jan. 18, 2001) (to be codified at 40 C.F.R. pt. 52, 92).

4. See, e.g., *In re Tennessee Valley Authority*, No. CAA-2000-04-008, 2000 EPA App. LEXIS 25 (EPA Env'tl. App. Bd. Sept. 15, 2000).

1. The Eight-Hour Ozone Standard and *American Trucking*

EPA revised the National Ambient Air Quality Standards (“NAAQS”) for particulate matter (“PM”) and ozone on July 18, 1997.⁵ The new ozone standards are averaged over eight hours, as compared to the old, less stringent, one-hour standards.⁶ Several industries and states (including Virginia) challenged the standards in the United States Court of Appeals for the District of Columbia Circuit.⁷ Virginia’s interest lay in the fact that more of Northern Virginia, Tidewater, and the Richmond and Roanoke metropolitan regions will be classified as not attaining the ozone NAAQS. This, in turn, discourages economic development by prohibiting the production of additional volatile organic compounds, or NO_x emissions, in those areas.

The Court of Appeals remanded, holding that EPA had interpreted the statute in such a way as to have no standards to guide it, violating the “nondelegation” doctrine.⁸ The United States Supreme Court overruled the D.C. Circuit on the nondelegation issue, finding that section 109 of the Clean Air Act—which provides that EPA must establish standards “requisite” to protect the public health allowing for an adequate margin of safety—means that EPA must set NAAQS that are neither “lower [n]or higher than is necessary.”⁹ Therefore, section 109 did not violate the “nondelegation doctrine.”¹⁰ Justice Breyer elaborated in his concurrence that, under this standard, EPA may not refuse to consider “whether a proposed rule promotes safety overall.”¹¹ However, the Court

5. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,653 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,856 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50).

6. 40 C.F.R. § 50.10 (2001).

7. See *Am. Trucking Ass’ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999).

8. *Id.* at 1034. The nondelegation doctrine prohibits agencies from fashioning rules without adequate justification, lest the rule be considered an unconstitutional delegation of legislative power. See *id.* at 1033. The D.C. Circuit determined that EPA acted more like a legislative body when it promulgated the eight-hour standard for the ground-level ozone and the fine standards. *Id.* at 1034. The court also determined that EPA’s promulgation of the coarse PM standard was arbitrary and capricious. *Id.* at 1033–34. The questionable standards were remanded to EPA so that it might develop intelligible principles upon which to base the specific numeric concentrations in its NAAQS for ozone and PM. *Id.* at 1057.

9. *Whitman v. Am. Trucking Ass’ns*, 121 S. Ct. 903, 914 (2001).

10. *Id.*

11. *Id.* at 924 (Breyer, J., concurring).

found that EPA's interpretation of the Clean Air Act relating to implementation of the ozone standard was unreasonable.¹² The Court remanded to the D.C. Circuit for consideration of whether EPA's rulemakings were consistent with this standard and for consideration of other challenges to the NAAQS that were not raised for the Court's review.¹³ The Court also affirmed the D.C. Circuit's decision that EPA could not consider "implementation costs" when setting NAAQS.¹⁴

The Court rejected EPA's argument that questions concerning how it would implement its ozone NAAQS were not "ripe for review,"¹⁵ and rejected as unlawful EPA's attempt to implement its revised ozone NAAQS.¹⁶ The Court directed EPA to develop an ozone NAAQS implementation strategy based upon a "reasonable interpretation" of the so-called "Subpart 2" provision of the Act.¹⁷

The Supreme Court decision did not end *American Trucking*. Because of its decision on the nondelegation issue, the Court of Appeals left unresolved some issues about the ambient standards. Currently, the case is remanded to the Court of Appeals to resolve those issues.¹⁸

2. NO_x SIP Call

On February 12, 2001, Virginia's State Air Pollution Control Board ("SAPCB") proposed revisions to several air regulations that would require owners of large stationary NO_x sources to limit air emissions to a specified level in order to protect public health and welfare.¹⁹ The proposed regulations would make the state version of the NO_x Reasonably Achievable Control Technology ("RACT") rule consistent with the federally approved version and would adopt NO_x controls as may be necessary to address air quality violations.²⁰ The SAPCB perceived the proposed regula-

12. *Id.* at 919.

13. *Id.*

14. *Id.*

15. *Id.* at 915-16.

16. *Id.* at 919.

17. *Id.*

18. *Id.*

19. 17 Va. Regs. Reg. 1641 (Feb. 12, 2001) (to be codified at 9 VA. ADMIN. CODE).

20. *Id.*

tions as an advantage to the general public because air quality will improve with less cost and intrusiveness compared to the NO_x SIP Call.²¹ Cost was considered a key issue because the utility industry would be affected by the proposed regulations and would, in turn, pass the costs on to the consumer in the form of rate hikes.²² Substantively, the proposed revisions would: (1) delete the provision that pertains to the seasonal applicability for the NO_x RACT requirements; (2) delete the provisions that provide an exemption for any steam generating unit, process heater, or gas turbine with a rated capacity of less than 100,000,000 Btu per hour and any combustion unit with a rated capacity of less than 50,000,000 Btu per hour; (3) delete the provisions that provide for an emission allocation system to meet the RACT requirement; (4) add provisions that establish emission standards for nitrogen oxides from electric generating units and nonelectric generating units; (5) add provisions for a NO_x emissions compliance demonstration that allow emissions rate averaging; (6) add provisions for a plan, approved by the SAPCB, that allow the use of banked emissions credits in the NO_x emissions compliance demonstration; and (7) add provisions for early reduction credits to be used in the NO_x emissions compliance plan.²³

3. Vehicle Emissions (Northern Virginia)

On September 25, 2000, the SAPCB repealed regulations for the Control of Motor Vehicle Emissions and for Vehicle Emissions Control Program Analyzer Systems.²⁴ These regulations were repealed because the enhanced motor vehicle emissions inspection program for the Northern Virginia ozone nonattainment area is fully operational.²⁵ On November 20, 2000, the SAPCB announced that it intended to consider amending the regulations for the Control of Motor Vehicle Emissions in Northern Virginia to conform to state law and federal Clean Air Act requirements for the

21. *Id.*

22. *Id.*

23. *Id.*

24. 9 VA. ADMIN. CODE §§ 5-90-10 to -90-310, 5-100-10 to -100-500 (1989) (repealed 2000).

25. *Id.*

testing of emissions from motor vehicles located or primarily operated in Northern Virginia.²⁶

The SAPCB announced also its intent to adopt regulations that establish controls for visible emissions from motor vehicles and to repeal the existing regulations.²⁷ The SAPCB concluded that the current regulations are not consistent with applicable state and federal requirements, statutory provisions, and judicial decisions.²⁸ Most motor vehicles in Northern Virginia are now subject to inspection and maintenance programs that provide for a more stringent level of control of visible emissions and pollutants than those provided for by the current regulations.²⁹ The replacement regulations contain provisions addressing anti-tampering, visible emission standards, commercial and public service motor vehicles, and the import/export of motor vehicles.³⁰

B. *Water*

Developments in the law governing water quality over the past year have followed two disparate tracks. The first track reflects a shift in regulatory priorities, from the traditional focus on controlling pollutant discharges from point sources through the National Pollutant Discharge Elimination System ("NPDES") permitting program, to a new focus on restoring and protecting the ambient quality of receiving waters through a revised and still evolving Total Maximum Daily Load ("TMDL") program. The second track reflects a more mundane updating of state regulations to keep pace with changes in corresponding federal regulations.

1. TMDL Program

a. Background

For decades, point source dischargers, such as publicly owned treatment works and industrial facilities, have been subject to ef-

26. See Notice of Intended Regulatory Action, 17 Va. Regs. Reg. 676 (Nov. 20, 2000).

27. See Notice of Intended Regulatory Action, 17 Va. Regs. Reg. 1252 (Jan. 15, 2001).

28. *Id.*

29. *Id.*

30. *Id.*

fluent limitations imposed through the NPDES permitting program.³¹ However, from the inception of the Clean Water Act, Congress recognized that even with these effluent limitations in place, some waters may not attain or maintain applicable water quality standards. Under section 1313(d), Congress directed states to identify these "impaired" waters and to establish a "total maximum daily load" or TMDL for each impaired water segment "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality."³²

The TMDL concept was written into the original Clean Water Act in 1972. States were required to submit their lists of impaired waters, along with TMDLs for such waters, to EPA by June 26, 1979, and thereafter, "from time to time."³³ However, in the twenty years that elapsed since the initial submission deadline, few TMDLs were actually established for impaired waters. In fact, during this time period in Virginia, no TMDLs were established and submitted to EPA for review.³⁴ As a result of what they perceived to be inordinate delay, environmental groups began suing EPA seeking to compel implementation of the TMDL program.³⁵ To date, there have been approximately forty lawsuits in thirty-eight jurisdictions.³⁶ In at least eighteen of these jurisdictions, including Virginia, the lawsuits have resulted in enforceable schedules for TMDL development.³⁷ Pursuant to a 1999 consent decree with EPA, Virginia must complete over 600 TMDLs by May 1, 2010.³⁸ To date, Virginia has finalized twenty TMDLs.³⁹

31. 33 U.S.C. §§ 1311, 1342 (1994 & Supp. V 1999).

32. *Id.* § 1313(d)(1)(A), (C).

33. *Id.* § 1313(d)(2); see *Am. Canoe Ass'n v. EPA*, 30 F. Supp. 2d 908, 913 (E.D. Va. 1998).

34. *Am. Canoe*, 30 F. Supp. at 913. This accounting was slightly revised in *Am. Canoe Ass'n v. EPA*, 54 F. Supp. 2d 621 (E.D. Va. 1999). "In the nearly twenty years that have elapsed since the initial 1979 deadline, Virginia either has submitted no TMDLs or has submitted a single TMDL for one small tributary in the state, and EPA has never established any TMDL for any of Virginia's waters." *Id.* at 624.

35. See TMDL Lawsuit Information, available at <http://www.epa.gov/owow/tmdl/lawsuit1.html> (last modified July 19, 2001).

36. See *id.*

37. *Id.*

38. See *Am. Canoe Ass'n v. EPA*, 138 F. Supp. 2d 722, 730 (E.D. Va. 2001).

39. See TMDL Development Information, available at <http://www.deq.state.va.us/tmdl/tmdlrpts.html> (last visited Oct. 1, 2001).

Although the requirements of section 303(d) appeared straightforward after the first wave of lawsuits placed the program "back on track," implementation remains the subject of significant controversy. This controversy came to a head with EPA's promulgation of the "New TMDL Rule" in the summer of 2000.⁴⁰

b. Federal TMDL Regulatory Program

EPA promulgated regulations designed to implement section 303(d) of the Clean Water Act in 1985 and revised them in 1992.⁴¹ On July 13, 2000, EPA issued comprehensive revisions to these regulations.⁴² Assuming these revisions take effect as drafted, they will significantly alter the scope of the section 303(d) regulatory program.⁴³ Although a comprehensive analysis of the differ-

40. Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43,586 (July 13, 2000) (to be codified at 40 C.F.R. pts. 9, 122-24, 130) [hereinafter New TMDL Rule].

41. See Surface Water Toxics Control Program and Water Quality Planning and Management Program, 57 Fed. Reg. 33,049 (July 24, 1992) (codified at 40 C.F.R. § 130.7).

42. See New TMDL Rule, *supra* note 40.

43. See *id.* This assumption originally hinged on action taken by Congress shortly before EPA issued the New TMDL Rule. As a rider to an appropriations bill, Congress barred EPA from spending any 2000 or 2001 fiscal year funds on the implementation of the New TMDL Rule. Fiscal Year 2001 Military Construction Appropriations Bill, Pub. L. No. 106-246, 114 Stat. 567 (2000). Because of this Congressional action, the New TMDL Rule will not take effect, at the earliest, until thirty days after the date on which Congress allows EPA to implement the regulation. New TMDL Rule, *supra* note 40, at 43,660. The effective date of the New TMDL Rule, as well as the scope of that rule, have become further obscured by regulatory action recently initiated by EPA. On August 9, 2001, EPA published a proposal to delay by eighteen months the effective date of the New TMDL Rule and to revise the date on which states are required to submit their next list of impaired waters from April 1, 2002, to October 1, 2002 (except Georgia, where EPA is required by court order to take action on the state's 2002 list by October 1, 2001). 66 Fed. Reg. 41,817, 41,817-18 (Aug. 9, 2001). In this proposal, EPA acknowledged the controversy generated by the New TMDL Rule and indicated that the proposed delay would enable EPA to reconsider some of the choices made in that rule. *Id.* at 41,818. In particular, EPA noted that voluntary reconsideration of the rule may result in revisions that would resolve at least some of the issues raised in pending litigation over the New TMDL Rule. *Id.* (That litigation includes at least ten petitions filed by states, industrial and agricultural groups, and environmental organizations, pending before the United States Court of Appeals for the District of Columbia Circuit in a consolidated proceeding styled, *Am. Farm Bureau Fed'n v. Whitman*, No. 00-1320 (D.C. Cir. filed July 18, 2000)). Given the continued criticisms of the New TMDL Rule, on July 16, 2001, EPA also asked the court of appeals to stay all lawsuits concerning the new rule for eighteen months to allow EPA to review and revise the rule. See Press Release, EPA, *Whitman Pledges to Improve Impaired Waters Rule* (July 16, 2001), available at <http://www.epa.gov/owow/tmdl/defer>.

ences between the existing and new regulations would likely yield a number of issues (both small and large), this article identifies five critical differences with potentially far-reaching impacts.

First, the New TMDL Rule radically expands the definition of TMDL. Under existing regulations, a TMDL is defined as the sum of the greatest amount of loadings from point sources (designated as the wasteload allocation or "WLA"), nonpoint sources, and natural background (these latter two, collectively designated as the load allocation or "LA") that a waterbody can receive without violating water quality standards.⁴⁴ Conversely, under the New TMDL Rule, the term is defined to encompass not only this maximum allowable loading or cap, but also specific load allocations for each point source and nonpoint source, an allowance for reasonable growth and an implementation plan.⁴⁵

The implementation plan must provide a description of actions necessary to implement the TMDL so that the waterbody attains and maintains water quality standards.⁴⁶ The adequacy of the implementation plan will be assessed by EPA under its concept of "reasonable assurance," which essentially ensures that the plan will indeed be implemented.⁴⁷

Second, the New TMDL Rule alters several critical milestones in the TMDL development process. As discussed above, states must first identify impaired waters and then establish TMDLs. Under the existing regulations, states must submit to EPA both their lists of impaired waters and their methodologies for these listing decisions.⁴⁸ Under the new rule, states will be required to

44. 40 C.F.R. § 130.2(f)-(i) (2000). This definition is supplemented in 40 C.F.R. § 130.7(c)(1) (2000), which provides that a TMDL must also reflect seasonal variations and a margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. *Id.*

45. New TMDL Rule, *supra* note 40, at 43,662.

46. *Id.* at 43,668.

47. *Id.* at 43,598. In this portion of the preamble, EPA proceeds to discuss its belief "that it has the authority to require the demonstration of reasonable assurance as part of the implementation plan." *Id.* Further,

[t]o approve a TMDL, EPA believes it is necessary to determine whether a TMDL is in fact established at a level necessary to attain water quality standards. For EPA to determine that the TMDL will implement water quality standards, there must be a demonstration in the TMDL of reasonable assurance that the TMDL's load and wasteload allocations will be implemented.

Id. The definition of "reasonable assurance" will be set forth at 40 C.F.R. § 130.2(p). *Id.* at 43,597.

48. 40 C.F.R. § 130.7(b)(6) (2000).

submit these methodologies to EPA at least two years before they submit their actual lists.⁴⁹ Moreover, the timing for the submission of these lists has been changed from every two years under the existing regulations, to every four years under the new rule.⁵⁰ Perhaps most significantly, the New TMDL Rule affects the milestones for TMDL implementation. Under the existing regulations, states are required to develop a priority ranking for all listed waters requiring TMDLs and to identify waters "targeted for TMDL development in the next two years."⁵¹ Under the new rules, states must develop a prioritized schedule for establishing TMDLs no later than ten years from the date the waterbody is listed.⁵²

Third, the New TMDL Rule changes the scope of the listing process by expanding the bases on which states must identify impaired waters. Under the existing regulations, states are required to identify waters for which effluent limitations and other pollution control requirements are not stringent enough to implement applicable water quality standards.⁵³ Under the new rule, the scope of the impaired waters list is expanded considerably to include: (1) waterbodies impaired by pollutants or pollution from any source (including point sources, nonpoint sources, storm water sources that are not subject to NPDES permitting, ground water, and atmospheric deposition); (2) waterbodies for which biological information indicates impairment; (3) waterbodies that are impaired solely by nonpoint sources; and (4) waterbodies that are not maintaining designated or more protective existing uses that were attained on or after November 25, 1975.⁵⁴

Fourth, the New TMDL Rule adds an enforcement backdrop that is not included in the existing regulations. Under this backdrop, EPA must establish a TMDL if a state has not made substantial progress in establishing the TMDL in accordance with its

49. New TMDL Rule, *supra* note 40, at 43,665.

50. Compare 40 C.F.R. § 130.7(d) (2000), with New TMDL Rule, *supra* note 40, at 43,667.

51. 40 C.F.R. § 130.7(b)(4) (2000).

52. New TMDL Rule, *supra* note 40, at 43,666. States may extend this schedule by no more than five years if they explain to the EPA that, despite expeditious actions, establishment of all TMDLs is not practicable. *Id.*

53. 40 C.F.R. § 130.7(b)(1)–(3) (2000). "Applicable water quality standards" is defined to refer to any water quality standards established under section 303 of the Clean Water Act, including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements. *Id.* § 130.7(3).

54. New TMDL Rule, *supra* note 40, at 43,665.

approved schedule.⁵⁵ "Substantial progress" is defined to mean that the state has established a TMDL not later than the end of the one-year period during which it was scheduled to be established.⁵⁶ EPA must establish the TMDL within two years of the date on which a state fails to make substantial progress.⁵⁷

Finally, the New TMDL Rule alters the procedure by which states may modify their impaired waters lists. The existing regulations do not expressly provide for such modifications between listing cycles, which means that states must wait for the next listing deadline in order to make changes to their existing lists (e.g., to delist waterbodies that are no longer identified as impaired). Under the new rule, 40 C.F.R. § 130.29, modifications may occur at any time. Under this section, however, a listed waterbody may only be removed from the list if new data or information indicates that the waterbody is attaining and maintaining applicable water quality standards.⁵⁸

Although the New TMDL Rule is scheduled to take effect on October 31, 2001, a proposal recently issued by EPA would delay the effective date until April 30, 2003.⁵⁹ As part of this eighteen-month delay, EPA has indicated that it will reconsider and possibly change the New TMDL Rule.⁶⁰ The scope and effect of the New TMDL Rule is also subject to a lawsuit initiated by numerous point source and nonpoint source petitioners in the United States Court of Appeals for the District of Columbia Circuit.⁶¹ The D.C. Circuit is currently considering motions filed by the petitioners regarding the disposition of the lawsuit pending EPA's reconsideration of the New TMDL Rule. The court may decide to stay the lawsuit entirely, as EPA and several of the petitioners have requested, or to sever and allow litigation to proceed on certain issues, as other petitioners have requested. As of the writing of this article, critical issues associated with the New TMDL Rule, including when and if it will take effect, remain in flux. Despite this uncertainty over the future scope and effect of the federal TMDL program, one aspect remains certain from the first

55. *Id.* at 43,669.

56. *Id.*

57. *Id.*

58. *Id.* at 43,666–67.

59. 66 Fed. Reg. 41817, 41822 (Aug. 9, 2001).

60. *Id.* at 41819–20.

61. *Am. Farm Bureau Fed'n v. Whitman*, No. 00-1320 (D.C. Cir. filed July 18, 2000).

wave of lawsuits—states will be required to devote substantial resources to the development of TMDLs for impaired waterbodies over the next decade and beyond, a daunting task that is compounded by the current uncertainty over the “rules of the game.”⁶²

c. Virginia Implementation and Response

(1) Procedural Regulations

The Virginia Department of Environmental Quality (“DEQ”) recently initiated a rulemaking to enhance the Virginia TMDL program.⁶³ The rulemaking is expected to address the public participation process for TMDL development, procedures for submission of proposed TMDLs to EPA for approval, subsequent adoption of TMDLs by the State Water Control Board (“SWCB”), and inclusion of TMDLs (including implementation plans) in water quality management plans.⁶⁴ The rulemaking is expected to repeal all existing water quality management plans, many of which are obsolete, but nonetheless are still included in the Virginia Administrative Code.⁶⁵

(2) Water Quality Standards Amendments

Of the several hundred waters slated for TMDL development in Virginia, at least forty-six were identified as impaired due to natural conditions.⁶⁶ To better address this type of natural impairment, the SWCB revised the state’s water quality standards regulation.⁶⁷ Under the revision, naturally low dissolved oxygen

62. Unless and until the New TMDL Rule takes effect, the existing 1992 regulatory program will remain in place to govern the TMDL process. However, state regulators, regulated entities, environmental groups, and interested citizens will need to pay close attention to the pending regulatory and litigation developments to ensure that resources are not unnecessarily or errantly allocated to obsolete TMDL program requirements.

63. Notice of Intended Regulatory Action, 17 Va. Regs. Reg. 496–97 (Nov. 6, 2000) (to be codified at 9 VA. ADMIN. CODE § 25-720-10).

64. *See id.*

65. *See id.*

66. *See* VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, TOTAL MAXIMUM DAILY LOAD PROGRAM: A TEN YEAR IMPLEMENTATION PLAN 2-5 (Nov. 1, 2000) [hereinafter TMDL Report].

67. *See* Final Regulations, 17 Va. Regs. Reg. 2380 (Apr. 23, 2001) (to be codified at 9 VA. ADMIN. CODE § 25-26-55).

concentrations, as determined by the SWCB, do not constitute a violation of water quality standards.⁶⁸ The revision will not become effective until thirty days after notice of EPA approval is published in the *Virginia Register*.⁶⁹ DEQ will likely request EPA to approve the removal of the forty-six waters listed as a result of natural conditions during the next listing cycle.⁷⁰

In addition, seven of the waters slated for TMDL development, including the Chesapeake Bay and its tidal tributaries, were identified as impaired due to excessive nutrient levels.⁷¹ These waters are subject to the 2000 Chesapeake Bay Agreement, and as a result, EPA has agreed to a ten-year moratorium on the development of a nutrient TMDL for these waters.⁷² The moratorium is designed to give the partners to the 2000 agreement an opportunity to continue their cooperative nutrient reduction efforts.⁷³ Under the 2000 agreement, the goal is for these waters to meet applicable water quality standards, and in turn, be eligible for delisting by 2010.⁷⁴ If this goal is not achieved, a TMDL must be issued by May 2011.⁷⁵

Regulators are contemplating other changes to the state's water quality standards. A draft proposal for changes to bacteria, recreational use, and ammonia standards was presented to the SWCB on June 12, 2001. In addition, a Notice of Intended Regulatory Action was published on January 29, 2001, reflecting the

68. *Id.*

69. *Id.*

70. See TMDL Report, *supra* note 66, at 2-5. As discussed, the deadline for the next submission of lists to EPA is currently set for April 1, 2002, but may be delayed until October 1, 2002, under a proposal recently issued by EPA. See discussion *supra* note 43.

71. See TMDL Report, *supra* note 66, at 2-6.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* Actions to improve water quality in the Bay and its tributaries are guided by the Chesapeake Bay Tributary Strategies, developed in accordance with Chapter 5.1 of Title 2.1, Article 2 of the Virginia Code. *Id.* at 2-10. Pursuant to the 2000 agreement, the state's existing tributary strategies must be revised in 2002 to identify the nutrient reduction actions necessary to meet water quality standards by the 2010 deadline. *Id.* The Bay and its tributaries are not the only waters with excessive nutrients. On May 8, 2001, the SWCB amended 9 VA. ADMIN. CODE §§ 25-26-350, -400 to designate Stony Creek and its tributaries in Shenandoah County as a nutrient enriched waterbody. Final Regulations, 16 Va. Regs. Reg. 2178 (May 8, 2000). After the effective date of this new designation, certain municipal and industrial dischargers will be required to restrict their phosphorus discharges pursuant to the SWCB's companion regulation set forth in 9 VA. ADMIN. CODE §§ 25-40-10 to -60. See *id.*

SWCB's intent to pursue multiple proposed amendments to the standards that were identified by EPA in connection with the 1997 triennial review.⁷⁶

2. VPDES Permit Program

On August 28, 2000, the SWCB amended the VPDES permit regulation so it would conform with changes in the federal NPDES program and the state water control law.⁷⁷ These amendments reflect: (1) new application requirements for Publicly Owned Treatment Works ("POTW") and other treatment works treating domestic sewage; (2) revisions to the standards for use and disposal of sewage sludge; (3) revised storm water discharge regulations; and (4) permitting requirements for discharges of treated sewage into impoundments and releases of waters from impoundments that are regulated by VPDES permits.⁷⁸

On February 6, 2001, the SWCB again amended the VPDES permit regulation to reflect changes in the federal NPDES program, including the repeal of the federal effluent guideline regulation for the Builders Paper and Board Mills industrial category.⁷⁹ The SWCB also finalized several clerical amendments designed to eliminate redundant or unnecessary regulatory language, clarifying procedures, and correct typographical errors.⁸⁰

C. Waste

After almost twenty years of separate federal and state hazardous waste regulations, which led to delays in implementing federal mandates at the state level, on September 19, 2000, the Virginia Waste Management Board ("VWMB") promulgated hazardous waste management regulations that incorporate, by reference, text from Title 40 of the Code of Federal Regulations into

76. Notice of Intended Regulatory Action, 17 Va. Regs. Reg. 1442, 1442 (Jan. 29, 2001) (to be codified at 9 VA. ADMIN. CODE § 20-260-5).

77. Virginia Pollutant Discharge Elimination Permit Regulation, 16 Va. Regs. Reg. 3252, 3252 (Aug. 28, 2000) (to be codified at 9 VA. ADMIN. CODE § 25-31-10).

78. *Id.*

79. Final Regulations, 17 Va. Regs. Reg. 2076 (Mar. 12, 2001) (to be codified at 9 VA. ADMIN. CODE § 20-170-10).

80. *Id.*

the Virginia regulations.⁸¹ This was part of a move, first taken in February 1999, to adopt various portions of Title 40 by reference⁸² in an attempt to ensure consistency with the federal Resource Conservation and Recovery Act program.⁸³

D. *State Regulation Beyond Federal Mandate*

The General Assembly's concern about confusion in the federal wetlands program and the proliferation of so-called Tulloch ditching⁸⁴ has resulted in a new state nontidal wetlands program. Similarly, federal agencies continue to search for a solution for the impact suffered as a result of Tulloch ditching.

1. Virginia Regulation of Wetlands

In accordance with changes to Virginia Code section 62.1-44.15.5, the SWCB was required to promulgate regulations effecting the Virginia Water Protection Permit Program.⁸⁵ Through this program, general permits are developed to streamline the permit process and to protect Virginia's wetlands resource.

As proposed, the Virginia Water Protection Permit Program establishes four types of general permits including: (1) those for activities causing wetland impacts of less than one-half an acre;⁸⁶ (2) those for facilities and activities of utilities and public service companies;⁸⁷ (3) those for Virginia Department of Transportation

81. See Notice of Intended Regulatory Action, 17 Va. Regs. Reg. 132, 132 (Oct. 9, 2000) (to be codified at 9 VA. ADMIN. CODE § 20-60-10).

82. Final Regulations, Va. Regs. Reg. 1158 (Jan. 18, 1999) (to be codified at 9 VA. ADMIN. CODE).

83. See 40 C.F.R. § 271.4 (2000).

84. In its proposed wetlands regulations, the SWCB defined Tulloch ditching as a method used to "actively drain wetlands without adding fill to the wetlands." Proposed Regulations, 17 Va. Regs. Reg. 1921, 1922 n.1 (Feb. 26, 2001) (to be codified at 9 VA. ADMIN. CODE § 25-210-10).

85. See VA. CODE ANN. § 62.1-44.15:5(D) (Cum. Supp. 2000) ("The Board shall develop general permits for such activities in wetlands as it deems appropriate."). The Virginia Water Protection permit provisions of the code were enacted by the 2000 General Assembly (S.B. 648 and H.B. 1170). These regulations were finalized on July 16, 2001, with an effective date of October 1, 2001. See Final Regulations, 17 Va. Regs. Reg. 3315 (July 16, 2001) (to be codified at 9 VA. ADMIN. CODE § 25-660-10).

86. Proposed Regulations, 17 Va. Regs. Reg. 1946 (Feb. 26, 2001) (to be codified at 9 VA. ADMIN. CODE § 25-660-10).

87. *Id.* at 1955.

("VDOT") or other linear transportation projects;⁸⁸ and (4) those for impacts caused by development activities.⁸⁹

The regulations will reduce the impact to isolated wetlands that may otherwise be permissible in light of delays in promulgating a federal successor to the Tulloch Rule⁹⁰ and the limitations placed on federal agency jurisdiction over wetlands by the United States Supreme Court's decision in *SWANCC*.⁹¹ In addition, the regulations require increased reporting of impacts to wetlands in order to track the SWCB's goal of no net loss of wetland acreage or function.⁹²

As the proposed regulations are currently structured, the permitting process for individuals who want to alter the physical and functional properties of wetlands will be as follows: (1) DEQ will make sure that no net loss of wetland acreage and function due to the physical or functional alteration proposed by the permit applicant, and within this determination, DEQ will decide whether wetland mitigation is required;⁹³ (2) an applicant must submit a complete application, including a delineation of the wetland, maps, and drawings of the property, information about the property owner, the purchase of the project, a timeline for the project, information on how it impacts the wetlands, a description of how impacts have been avoided and/or minimized to the maximum extent practicable, and a summary of all compensatory mitigation being proposed,⁹⁴ and, (3) the applicant must pay an application fee of between \$200 and \$3,000, depending on the size of the wetland project.⁹⁵

The proposed regulations prohibit: dredging, filling, or dis-

88. *Id.* at 1968.

89. *Id.* at 1982.

90. The problems the United States Army Corps of Engineers ("Corps") and EPA have had in promulgating a new rule defining the term "discharge of dredged material" are discussed in Part II.D.2. of this article.

91. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *see also* discussion *infra* Part III.A. While the General Assembly required the SWCB to promulgate regulations before the Supreme Court decided *SWANCC*, some of the regulations have been effective in filling the void created by the Supreme Court's decision that impacts what waters remain within the jurisdiction of the federal government.

92. Virginia Water Protection Permit Program Regulation, 17 Va. Regs. Reg. 1921, 1921-25 (Feb. 26, 2001) (to be codified at 9 VA. ADMIN. CODE).

93. *Id.* at 1922.

94. *Id.*

95. *Id.*

charge of a pollutant into or adjacent to a surface water; excavation in wetlands; draining activities that may degrade existing wetland acreage or function; the filling of dumping into wetlands; permanent flooding or impounding of wetlands; and any alteration or degradation of existing wetland acreage or functions.⁹⁶

Certain activities excluded from the permitting process include: (1) discharges of dredged or fill material that have been authorized by a regional or nationwide permit obtained from the Corps for which water quality certification has been granted as of October 1, 2001 (under section 401 of the Clean Water Act); (2) normal residential gardening, lawn, and landscape maintenance; (3) normal agricultural and silvicultural work; (4) certain discharges authorized by a VPDES or Virginia Pollution Abatement ("VPA") permit; (5) maintenance of currently serviceable structures including transportation and utilities structures; and (6) the construction of temporary sedimentation basins on a construction site.⁹⁷

Interestingly, the Virginia General Assembly enacted House Bill 2292 and Senate Bill 1243, which advances the date on which the comprehensive nontidal wetlands regulatory program becomes effective for linear transportation projects of the VDOT.⁹⁸ Originally, these projects were not to be impacted by the new program until October 1, 2001. The effective date was moved up to August 1, 2001, when the Governor approved the bill on March 20, 2001.

2. Attempts by EPA and the Corps to Redefine Regulated Activities—Federal Rule on Dredged Material

On April 16, 2001, EPA announced that it would leave in place a Clinton Administration rule that revised the definition of dredged material in order to regulate activity in wetlands.⁹⁹ This

96. *Id.* at 1929.

97. *Id.* at 1929–30.

98. H.B. 2292, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 20, 2001, ch. 464, 2001 Va. Acts 450) (codified as amended at VA. CODE ANN. §§ 62.1-44.5, -44.15, -44.15:5 (Repl. Vol. 2001)); S.B. 1243, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 20, 2001, ch. 435, 2001 Va. Acts 418) (codified as amended at VA. CODE ANN. §§ 62.1-44.5, -44.15, -44.15:5 (Repl. Vol. 2001)).

99. Press Release, Environmental Protection Agency, Administration Endorses Rule to Protect America's Wetlands (Apr. 16, 2001), available at <http://www.epa.gov/>

rule expands protection for wetlands with no change from the version originally published on January 17, 2001.¹⁰⁰

EPA has indicated that the regulatory definition of "discharge of dredged material" will close a loophole that has permitted the destruction of 20,000 acres of wetlands and the channeling of 150 miles of streams in the last two years without environmental review.¹⁰¹ Much of the lost 20,000 acres was in North Carolina and Virginia.¹⁰² The new rule will require developers to obtain permits under the Clean Water Act before carrying out any earth-moving activities that were previously protected from regulation.¹⁰³

The final rule amends section 404 of the Clean Water Act's regulations defining discharges, which have not regulated the ditching and draining of wetlands since a federal court threw out a provision known as the Tulloch Rule.¹⁰⁴ The Tulloch Rule had required a Clean Water Act permit for dredging activities through its regulation of excavation and dredging in wetlands by defining incidental fallback from dredging operations a discharge into U.S. waters.¹⁰⁵

The Clinton Administration rule defines the "discharge of dredged material" as that which results from "the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States . . . unless project-specific evidence shows that the activity results in only incidental fallback."¹⁰⁶ The rule defines "incidental fallback" as "the redeposit of small volumes of dredged material that is incidental to excavation activ-

owow/wetlands/dredgedmat/pressrel.html.

100. Douglas Jehl, *EPA Supports Protections Clinton Issued for Wetlands*, N.Y. TIMES, Apr. 17, 2001, at A1 (referencing rule published at 66 Fed. Reg. 4550 (Jan. 17, 2001)). The Clinton Administration rule modified the definition of "discharge of dredged material" promulgated to respond to federal litigation over the Tulloch Rule. See 64 Fed. Reg. 25,120 (May 10, 1999); see also *Am. Mining Congress v. U.S. Army Corps of Eng'rs*, 951 F. Supp. 267 (D.D.C. 1997), *aff'd*, *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998).

101. 66 Fed. Reg. at 4569.

102. *Id.*

103. *Id.*

104. See *Nat'l Mining Ass'n v. U. S. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 (D.C. Cir. 1998) (invalidating the Tulloch Rule and noting that the Corps and EPA were overreaching in their regulation of wetlands under the Clean Water Act).

105. 58 Fed. Reg. 45,008 (Aug. 25, 1993).

106. Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 66 Fed. Reg. 4550, 4575 (Jan. 17, 2001).

ity . . . when such material falls back to substantially the same place as the initial removal."¹⁰⁷

A challenge was brought by the National Association of Homebuilders ("NAHB").¹⁰⁸ NAHB alleged that EPA had defined incidental fallback too narrowly and had tried to assert jurisdiction over all removal in wetlands, which is contrary to the legislative intent of the Clean Water Act; the NAHB sued in federal court on February 6, 2001, to have the rule overturned.¹⁰⁹

III. INTERSTATE ISSUES

As EPA moves to mandate additional controls on daily activities, states move to protect their interest in implementing such controls. The tension between state interests and EPA interests has resulted in interstate commerce issues moving to the forefront of environmental regulation. This is most notable in the areas of wetlands regulation, air emissions, and disposal of waste.

A. *Jurisdiction of the Clean Water Act—Migratory Bird Rule Case*

In *Solid Waste Agency of Northern Cook County ("SWANCC") v. United States Army Corps of Engineers*,¹¹⁰ the United States Supreme Court overturned the Corps' migratory bird rule because it was not fairly supported by the Clean Water Act.¹¹¹ The migratory bird rule was a legal interpretation made in a 1986 Federal Register notice.¹¹² In that notice, the Corps stated that EPA has "clarified" that section 404 of the Clean Water Act reaches waters that "are or would be used as habitat by birds protected by Migratory Bird Treaties, or . . . other migratory birds which cross state

107. *Id.*

108. *See* Nat'l Ass'n of Homebuilders v. U.S. Army Corps of Eng'rs, No. 1:01 CV 00-274 (D.D.C. filed Feb. 6, 2001).

109. *Id.* (seeking to invalidate the Tulloch Rule and noting that the Corps and EPA were overreaching in their regulation of wetlands under the Clean Water Act).

110. 531 U.S. 159 (2001).

111. *Id.* at 162.

112. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 (Nov. 13, 1986).

lines.”¹¹³ This interpretation of the regulation gave the Corps and EPA jurisdiction over “other waters,” including waters that could affect interstate or foreign commerce by their use, degradation, or destruction.¹¹⁴ In reviewing whether the migratory bird rule gave the Corps jurisdiction over isolated mudflats located on land that several local Chicago area governments intended to use as the site of a landfill, the Supreme Court held that jurisdiction under the Clean Water Act could not be exerted over a body of water solely on the basis that such water was used by migratory birds.¹¹⁵ Instead, the Court concluded that there must be a hydrological and ecological connection to navigable waters of the United States in order to create a sufficient nexus to establish federal jurisdiction over a water body.¹¹⁶

Unfortunately, the *SWANCC* decision does not answer several important questions: (1) What degree of “nexus” (hydrological or ecological) to a navigable water is necessary to create jurisdiction?; (2) how far upstream must one go before a trickle of water is no longer a “tributary” of a downstream navigable water?; (3) could Congress amend the Clean Water Act so that it applies to any water used by birds or wildlife without violating the boundaries set by the Commerce Clause?; and (4) to what extent can the federal agencies use the Endangered Species Act to accomplish the results achieved by the migratory bird rule?¹¹⁷

B. *Transport of Air Emissions*

In a challenge to EPA’s volatile organic compounds (“VOCs”) emission limitations for architectural coatings, including paints, the D.C. Circuit determined that EPA can establish a national rule for VOCs because emissions in attainment areas may contribute to air pollution in adjoining nonattainment areas.¹¹⁸

113. *Id.* at 41,217.

114. 33 C.F.R. §§ 230.3 (s)(3), 328.3(a)(3) (2001).

115. *SWANCC*, 531 U.S. at 171–72.

116. *Id.* at 176 (Stevens, J., dissenting).

117. See James N. Christman, Remarks at the Richmond Bar Association Environmental Law Section Spring CLE and Section Annual Meeting (May 10, 2001).

118. *Allied Local and Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 76 (D.C. Cir. 2000).

C. Transportation of Waste

1. Federal Litigation Over Virginia's Attempts to Limit the Importation of Out-of-State Trash

On June 4, 2001, in *Waste Management Holdings, Inc. v. Gilmore*,¹¹⁹ the Fourth Circuit held that four of five statutory provisions enacted by the General Assembly to limit the growth of large regional landfills and to curtail the influx of municipal solid waste from New York and other states¹²⁰ violated constitutional restrictions on state action.¹²¹ Three of the four provisions were held to unlawfully discriminate against interstate commerce, while the fourth provision was preempted by federal law covering the same subject.¹²² The fifth provision, which limited the height of waste containing shipping containers carried by barges on Virginia waterways, was not struck down by the Fourth Circuit.¹²³ On that claim, the Fourth Circuit held that the state presented enough evidence to justify a trial on whether double stacking waste containers posed an unreasonable burden on interstate commerce.¹²⁴ The court held that although it was not certain whether the cap on the amount of waste was discriminatory in effect, there was no dispute that the cap on out of state waste had a discriminatory purpose.¹²⁵

Having determined that all five provisions were discrimina-

119. 252 F.3d 316 (4th Cir. 2001).

120. The statutory provisions were: (1) a cap on the amount that any landfill in Virginia may accept. VA. CODE ANN. § 10.1-1408.3 (Cum. Supp. 2001); (2) a requirement that the Virginia Waste Management Board promulgate regulations governing the loading of municipal solid waste by barge, ship, or other vessel, as well as the loading or unloading of such waste. *Id.* § 10.1-1454.1(A) (Cum. Supp. 2001); (3) a prohibition against commercial transport of hazardous or nonhazardous solid waste by ship, barge, or other vessel upon the navigable waters at the Rappahannock, James, and York Rivers. *Id.* § 10.1-1454.2 (Cum. Supp. 2001); (4) a prohibition against landfill operators accepting municipal solid waste from a vehicle with more than three axles, unless the waste transporter provides certification that the waste is free of substances not authorized for disposal in the Commonwealth. *Id.* § 10.1-1408.1(Q) (Cum. Supp. 2001); and (5) a requirement that the Virginia Waste Management Board develop regulations governing the commercial transport of municipal solid waste by vehicles with four or more axles. *Id.* § 10.1-1454.3(A), (D) (Cum. Supp. 2001).

121. *Waste Mgmt. Holdings*, 252 F.3d at 323.

122. *Id.* at 349.

123. *Id.*

124. *Id.* at 344.

125. *Id.* at 336.

tory, the court then examined whether the health and safety concerns raised by the Commonwealth were valid reasons for the legislation, and whether less discriminatory alternatives had been available.¹²⁶ Ultimately, the court held that, with respect to three of the provisions, the Commonwealth failed to show the non-existence of alternatives that would be less burdensome on interstate commerce.¹²⁷

2. Transportation of Solid Waste and Regulated Medical Waste

While the *Waste Management* decision raised questions regarding the Commonwealth's interstate approach to curbing the importation of waste, the Virginia Waste Management Board ("VWMB") and the General Assembly continue to invent different ways to attack the perceived problem. For example, on January 15, 2001, the VWMB promulgated regulations for the management of medical waste¹²⁸ that: (1) set forth guidelines for permitting facilities receiving solid waste and regulated medical waste from ships, barges, or other vessels transporting such wastes upon the waters of the Commonwealth; (2) govern the commercial transportation, loading, and off-loading of solid waste and regulated medical waste by ship, barge, or other vessel upon waters of the Commonwealth; (3) establish a permit-by-rule requirement for facilities receiving solid waste and regulated medical waste and prescribed a specific siting design, construction, and operational standard for receiving facilities; (4) establish a registration requirement that would include fees for any vessel seeking to transport such wastes within the waters of the Commonwealth; and (5) establish specific design, construction, and operational standards for the vessels and the containers on the vessels.¹²⁹

On February 6, 2001, shortly after the promulgation of the final regulations, the VWMB suspended the regulatory process to allow for an additional comment period on the changes made to the regulations.¹³⁰ It is unlikely that these regulations will be re-

126. *Id.* at 343-45.

127. *Id.*

128. Transportation of Solid Medical Wastes on State Waters Regulations, 17 Va. Regs. Reg. 1297 (Jan. 15, 2001) (to be codified at 9 VA. ADMIN. CODE § 20-170-10).

129. *Id.*

130. Final Regulations, 17 Va. Regs. Reg. 2076 (Mar. 12, 2001) (codified at 9 VA. ADMIN. CODE § 20-170-10).

promulgated in light of the Fourth Circuit's recent decision on interstate trash.¹³¹

The General Assembly took aim again this year at out-of-state transporters of municipal solid waste. Senate Bill 1318 will allow local governing bodies to adopt ordinances to regulate commercial motor vehicles used to transport municipal solid waste by prohibiting parking at locations other than those specified and by requiring leak-proof construction of their cargo compartments.¹³² VWMB would define "municipal solid waste" in the regulation.¹³³ Penalties may be no more stringent than those allowed for traffic infractions (fine up to \$200).¹³⁴

In addition to Senate Bill 1318's grant of authority to localities, the General Assembly also sought to send a message to Congress. Senate Joint Resolution 325 sought to memorialize Congress to enact legislation providing for a reasonable limitation on the amount of municipal solid waste that a state must accept from another state.¹³⁵ However, it was not passed.

D. *Interstate Riparian Rights*

An important case regarding Virginia's riparian rights on the Potomac River was recently decided in a Maryland State Court.¹³⁶ The Fairfax County Water Authority ("FCWA"), for some time, has sought to obtain authorization to construct an off-shore intake for the withdrawal of water from the Potomac River to benefit the residents of Northern Virginia. The case was before the Maryland Department of Environment ("MDE") because the Potomac River is within the boundaries of Maryland.¹³⁷ MDE sought judicial review of a decision issued by its final decision maker that ordered the Maryland Water Management Administration to

131. *See Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir. 2001).

132. S.B. 1318, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 19, 2001, ch. 356, 2001 Va. Acts 329) (codified at VA. CODE ANN. § 46.2-1304.1 (Cum. Supp. 2001)).

133. *Id.*

134. *Id.*

135. S.J. Res. 325, Va. Gen. Assembly (Reg. Sess. 2001).

136. *In re Fairfax County Water Auth. Potomac River Intake*, Civ. A. No. 24C00006014, slip op. (Md. Cir. Ct. Apr. 10, 2001) (Baltimore City).

137. *Id.* at 1. Interestingly, Maryland owns the river from shore to shore under a 1632 land grant from King Charles I. Virginia claims that a 1785 Potomac River Compact gives it and its citizens the right to use water from the Potomac River.

issue a permit to FCWA for construction of a drinking water intake in the middle of the Potomac River.¹³⁸ The court determined that FCWA was not required to prove that there was no practicable alternative to withdrawing water from the Potomac River.¹³⁹ It also determined that the final decisionmaker's findings of fact were supported by substantial evidence.¹⁴⁰ The court stated that: (1) off-shore water is the preferred raw water source; (2) an off-shore intake would reduce the risk to the public from cryptosporidium; and (3) an intake 725 feet from the shore was not wasteful.¹⁴¹ Accordingly, MDE's petition for judicial review of its own decision was dismissed.¹⁴²

An original jurisdiction case filed in 2000 before the United States Supreme Court regarding an interpretation of several compacts between Virginia and Maryland over the use of the Potomac is currently pending.¹⁴³

IV. REGULATING CONSTRUCTION OF NEW POWER GENERATING FACILITIES

During the 2000–2001 time frame, the Virginia General Assembly and the DEQ focused on “pending electrical deregulation.” This focus was influenced by ongoing power shortages in California and the recognition that stringent environmental regulation has played a significant role in creating that chaotic situation.

A. *New Legislation*

The General Assembly passed two bills that affect the construction of new electricity generating facilities. Senate Bill 1386 requires the State Air Pollution Control Board (“SAPCB”) to revise its banking and trading credits regulations applicable to the electric power industry.¹⁴⁴ Those revisions are intended to foster

138. *Id.*

139. *Id.* at 10.

140. *Id.* at 16.

141. *Id.*

142. *Id.* at 21.

143. *Virginia v. Maryland*, 530 U.S. 1201 (2000) (order granting leave to file a bill of complaint).

144. S.B. 1386, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 24, 2001,

competition in the industry, encourage construction of new, cleaner generating facilities, provide new sources with set-asides of five percent of their emissions for the first five years and two percent per year thereafter, and provide an initial allocation period of five years.¹⁴⁵

Second, Senate Joint Resolution 467 directs the Legislative Transition Task Force ("LTTF"), established under the Virginia Electric Utility Restructuring Act, to study procedures applicable to the construction of new electricity generation facilities in the Commonwealth.¹⁴⁶ The LTTF is to recommend amendments, as necessary, to the Commonwealth's administrative and regulatory procedures that will facilitate the approval of construction permits to ensure a sufficient capacity to generate electricity, which in turn will provide a competitive market for electricity in the Commonwealth without lessening necessary environmental considerations, including siting and air quality impacts.¹⁴⁷ The LTTF must report its findings and recommendations to both the Governor and the 2002 Session of the General Assembly.¹⁴⁸

B. *Proposed Statutes*

Two bills were proposed in the 2001 General Assembly that would have impacted electric facilities if enacted. First, proposed House Bill 2759 would have required the State Corporation Commission ("SCC") to "consider the impact of nitrogen oxide emissions, if any, from the proposed [electric] facility . . . prior to approv[ing] construction of the facility."¹⁴⁹ The SCC also would have had to evaluate the cumulative impact of NO_x emissions of all facilities, proposed and existing, in an air quality control region.¹⁵⁰ The proposed bill would have required public disclosure of any report on the environmental impact of a proposed facility prior to any public hearing held in the approval process.¹⁵¹ Also,

ch. 580, 2001 Va. Acts 681) (codified as amended at VA. CODE ANN. § 10.1-1322.3 (Cum. Supp. 2001)).

145. *Id.*

146. S.J. Res. 467, Va. Gen. Assembly (Reg. Sess. 2001).

147. *Id.*

148. *Id.*

149. H.B. 2759, Va. Gen. Assembly (Reg. Sess. 2001).

150. *See id.*

151. *See id.*

the SCC could not approve the construction of any facility that would result in a violation of NAAQS.¹⁵²

The second piece of legislation that failed was proposed Senate Bill 1030.¹⁵³ It provided that:

for the purposes of the [SAPCB's] Prevention of Significant Deterioration ("PSD") permit program, and [its] operating permit program established pursuant to . . . the federal Clean Air Act, the term "major stationary air pollution source" includes any stationary source or group of stationary sources within a one-mile radius of each other that (i) generate, transmit, or distribute electric services and (ii) emit or have the potential to emit fifty tons per year or more of nitrogen oxides.¹⁵⁴

The bill would have also required that major stationary source applicants demonstrate that they have "obtained nitrogen oxides emission reduction credits, allowances or offsets in a ratio of 1.2:1 from a source within the Commonwealth" before being issued a permit.¹⁵⁵

C. *Cooling Water Intake Program*

Federal water quality regulations have historically focused on wastewater discharges. However, under a newly reinvigorated program, such regulations will also target the intake of raw water for cooling purposes.

As a result of litigation initiated by a group of environmental organizations,¹⁵⁶ EPA is developing a series of new rules implementing section 316(b) of the Clean Water Act. Section 316(b) requires that the "location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact."¹⁵⁷ The major potential environmental impacts of cooling water intake structures are impingement and entrainment of aquatic organisms. EPA proposes to define impingement as "the entrapment of aquatic organisms on the outer part of an intake structure or

152. *See id.*

153. S.B. 1030, Va. Gen. Assembly (Reg. Sess. 2001).

154. *Id.*

155. *Id.*

156. *See Cronin v. Browner*, 90 F. Supp. 2d 364 (S.D.N.Y. 2000).

157. 33 U.S.C. § 1326(b) (1994).

against a screening device during periods of intake water withdrawal.”¹⁵⁸ Entrainment would be defined as “the incorporation of fish, eggs, larvae and other plankton with intake water flow entering and passing through a cooling water intake structure and into a cooling water system.”¹⁵⁹

Many electric utility and manufacturing facilities use cooling water drawn from surface waters and thus may be subject to new section 316(b) rules. The United States District Court for the Southern District of New York recently approved changes to a phased rulemaking schedule proposed by the parties after lengthy negotiations.¹⁶⁰ Phase I of the rules applies to all “new” facilities—that is, those that commence construction after the effective date of the rule. EPA proposed the Phase I rule on August 10, 2000.¹⁶¹ The Phase I rule, if promulgated as proposed, would differ radically from current case-by-case section 316(b) permitting practices. The proposal sets technology requirements based primarily on the location of the facility in relation to the “littoral zone”¹⁶² of the potentially affected water body. Unfortunately, the littoral zone concept may be difficult to apply and will raise as many questions as it attempts to answer. In waters deemed especially productive or sensitive (such as estuaries), the proposal requires a level of protection commensurate with the installation of

158. National Pollutant Discharge Elimination System—Regulations Addressing Cooling Water Intake Structures for New Facilities, 65 Fed. Reg. 49,060, 49,116 (Aug. 10, 2000) (to be codified at 40 C.F.R. § 125.83) [hereinafter Water Intake Rules].

159. *Id.*

160. Amended Consent Decree, *Cronin v. Browner*, 90 F. Supp. 2d 364 (S.D.N.Y. 2000) (No. 93 CIV 0314) [hereinafter Amended Consent Decree].

161. Water Intake Rules, *supra* note 158, at 49,060.

162. EPA proposes to define the “littoral zone” as

any nearshore area in a freshwater river or stream, lake or reservoir, or estuary or tidal river extending from the level of highest seasonal water to the deepest point at which submerged aquatic vegetation can be sustained (i.e., the photic zone extending from shore to the substrate receiving one (1) percent of incident light); where there is a significant change in slope that results in changes to habitat and/or community structure; and where there is a significant change in the composition of the substrate (e.g., cobble to sand, sand to mud). In oceans, the littoral zone encompasses the photic zone of the neritic region. The photic zone is that part of the water that receives sufficient sunlight for plants to be able to photosynthesize. The neritic region is the shallow water or nearshore zone over the continental shelf.

Id. at 49,083–84.

wet recirculating cooling towers, which can reduce flow by seventy to ninety-eight percent.¹⁶³

The comment period on the proposal closed on November 9, 2000, and according to the consent decree, EPA must take "final action" on the rule by November 9, 2001.¹⁶⁴ On May 25, 2001, EPA issued a Notice of Data Availability for the Phase I rule in which it both presented and sought new data on a large number of issues related to the rule.¹⁶⁵ Given this notice and the transition in federal administrations, it is very difficult to predict how EPA intends to adjust its proposal before issuing the final regulation.

In Phase II of the rulemaking, EPA will develop section 316(b) rules for a subset of existing electric utility facilities and non-utility power producers.¹⁶⁶ According to the consent decree, EPA will determine an appropriate intake water flow threshold that will define the scope of the facilities covered under Phase II.¹⁶⁷ The majority of electric utility facilities likely will fall within the scope of Phase II. EPA must propose the Phase II rule by February 28, 2002, and take "final action" on it by August 28, 2003.¹⁶⁸

Phase III of the rule will cover all manufacturing facilities that withdraw cooling water from surface waters, as well as any utility or non-utility power producers not regulated by the Phase II rule.¹⁶⁹ EPA has identified certain manufacturing sectors (including pulp and paper, iron and steel, chemicals, and petroleum refining) as likely to be affected by the rule.¹⁷⁰ These industries have been adamant that EPA make adequate distinctions between process water and cooling water.¹⁷¹ EPA plans to propose

163. *See id.* at 49,087.

164. *See* Amended Consent Decree, *supra* note 160, at 5.

165. Notice of Data Availability; Natural Pollutant Discharge Elimination System—Regulations Addressing Cooling Water Intake Structures for New Facilities, 66 Fed. Reg. 28,853 (May 25, 2001).

166. *See* Amended Consent Decree, *supra* note 160, at 4.

167. *Id.*

168. *Id.* at 5–6.

169. *Id.* at 4–5.

170. *See* Science Application International Corporation, Preliminary Regulatory Development: Section 316(b) of the Clean Water Act, Background Paper 2: Cooling Water Use for Selected U.S. Industries (Sept. 30, 1994), at 7.

171. American Forest and Paper Association, Comments Regarding Proposed Rule Pertaining to CWA Section 316(b) Regulation of Cooling Water Intake Structures for the New Facilities (Nov. 9, 2000), at 23–30.

the Phase III rule on June 15, 2003, and take "final action" on the rule by December 15, 2004.¹⁷²

Until issuance of the final Phase II and Phase III rules, existing facilities should not be affected by section 316(b) developments. In December 2000, EPA headquarters issued a guidance letter reminding states and regions to review permit renewal applications for section 316(b) implications.¹⁷³ The letter, however, also stated that the Phase I rule did not apply to existing facilities and should not be used as guidance for establishing section 316(b) limitations for existing facilities.¹⁷⁴

V. SUSTAINABLE DEVELOPMENT

Over the past year, many environmental programs have targeted sustainable development. Sustainable development has been articulated as the use of resources so as to "meet[] the needs of the present without compromising the ability of future generations to meet their own needs."¹⁷⁵ Much of the work in this area is concerned with stemming the tide of urban sprawl and promoting urban recycling. Also, there is an evolving recognition that it is necessary to reexamine "command and control" environmental regulatory schemes to ensure that their rigidity does not deter sustainable development.

A. Corps Suspension of ASP-18

In 1987, the Norfolk District of the Corps adopted Abbreviated Standard Permit 18 ("ASP-18"), which functioned as a streamlined individual permit for activities having "minimal environmental consequence."¹⁷⁶ On January 25, 2001, the Friends of the Earth and the Forest Conservation Council sued the Corps seek-

172. Amended Consent Decree, *supra* note 160, at 6.

173. Memorandum regarding the Implementation of Section 316(b) in National Pollutant Discharge Elimination System Permits from Michael B. Cook, Director, Office of Wastewater Management, Environmental Protection Agency, to Water Division Directors, Regions I-X, State NPDES Directors 1 (Dec. 28, 2000) (on file with author).

174. *Id.* at 2.

175. WORLD COMM'N ON ENVT. AND DEV., OUR COMMON FUTURE 43 (1987).

176. See United States Army Corps of Engineers Norfolk District, Department of the Army Abbreviated Standard Permit (87-ASP-18) (ASP-18 was reissued in 1992 and 1997.).

ing to invalidate ASP-18 for the Corps' failure to comply with the National Environmental Policy Act.¹⁷⁷ The Corps has voluntarily suspended use of ASP-18 indefinitely and is considering actions to replace it.

B. *Brownfields Redevelopment*

One popular way to encourage sustainable development has been to create incentives whereby industry confronts urban sprawl through the redevelopment of formerly used industrial sites. The revitalization of these former industrial sites, or brownfields, is encouraged on the federal, state, and local level.

1. Federal Legislation

On April 25, 2001, the United States Senate passed legislation that would spur cleanup and redevelopment of contaminated industrial sites.¹⁷⁸ The measure would authorize \$200 million annually to fund assessment and cleanup activities of brownfields, an increase from the \$90 to \$92 million that has been spent annually over the last few years.¹⁷⁹ Of the \$200 million, \$150 million would be authorized to fund assessment activities, and \$50 million would go toward cleanup measures.¹⁸⁰ Also, the legislation would amend the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to protect innocent landowners and prospective purchasers or developers of brownfields from Superfund liability.¹⁸¹

Under the Brownfields Act, EPA could step in during a cleanup or issue a so-called "reopener" if: (1) a state asks for federal help; (2) EPA determines that contamination has or might migrate across state lines; (3) new information is discovered about the level of contamination at the site; or (4) EPA finds there is an

177. *Forest Conservation Council v. United States Army Corps of Eng'rs*, No. 1:01CV00162 (D.D.C. filed Jan. 25, 2001).

178. *See* Brownfields Revisitation and Environmental Restoration Act of 2001, S. 350, 107th Cong. (2001) [hereinafter *Brownfields Act*].

179. *See id.* § 128.

180. *See id.*

181. *Id.* CERCLA is codified at 42 U.S.C. §§ 9601–9675 (1994 & Supp. V 1999).

“imminent and substantial endangerment” to human health or the environment at the site.¹⁸²

2. State Studies

The Virginia General Assembly adopted House Joint Resolution 671, which created the Commission on Growth and Economic Development.¹⁸³ The Commission is charged to: (1) examine the ability of the revenue resources to support Virginia’s infrastructure needs with specific attention toward the revitalization of older suburbs and inner-city areas; (2) evaluate the Commission on Virginia’s State and Local Tax Structure’s plan for the twenty-first century; (3) improve the vitality of older industrial communities through the development of abandoned and unused brownfields sites; and (4) construct funding vehicles for open space preservation while considering how individual property rights may be preserved.¹⁸⁴

3. Changes to the Voluntary Remediation Program

DEQ has great discretion over hazardous waste cleanups through the Voluntary Remediation Plan (“VRP”).¹⁸⁵ The VRP program allows participants to voluntarily remediate brownfields property to levels that protect human health and the environment, while minimizing the expense and delay of the remediation process.¹⁸⁶ The VWMB has proposed an amendment to the VRP regulations that will: (1) update the regulations to incorporate current sampling and analysis methodology and to consider alternative technologies; (2) update the definitions section of the regulation; (3) review the requirements for termination participation in the program; (4) delete obsolete language from the regula-

182. Brownfields Act, § 301.

183. H.J. Res. 671, Va. Gen. Assembly (Reg. Sess. 2001).

184. *Id.*

185. VA. CODE ANN. § 10.1-1429.1 (Cum. Supp. 2001); *see also* Virginia Department of Environmental Quality, *Voluntary Remediation Program* at <http://www.deq.state.va.us/waste/vrp.html> (last visited Oct. 19, 2001) (providing additional information on the VRP program).

186. *Id.*

tion; and (5) review the various documents incorporated by reference into the regulation.¹⁸⁷

4. Local Government Use of the VRP

House Bill 1873 expands the VRP for properties owned by local governments.¹⁸⁸ The bill: (1) eliminates the requirement that local governments pay registration fees to voluntarily remediate property; (2) creates the Virginia Voluntary Remediation Fund to encourage the remediation of brownfields through state grants; and (3) provides that the Virginia Water Facilities Revolving Fund will be an available source of funds for local governments in reducing groundwater contamination.¹⁸⁹ The provisions of the bill, with respect to registration fees and the creation of the Voluntary Remediation Fund, will not become effective unless funds are appropriated in the 2001, 2002, 2003, or 2004 budgets.¹⁹⁰

C. *Encouraging Recycling*

Another means of sustainable development is the encouragement of recycling.

1. The Superfund Recycling Equity Act

Some types of recycling, however, had the potential for overwhelming liability under CERCLA. On November 29, 1999, President Clinton signed the Superfund Recycling Equity Act ("SREA").¹⁹¹ The impetus behind passage of SREA was:

(1) to promote the reuse and recycling of scrap material in furtherance of the goals of waste minimization and natural resource conservation while protecting human health and the environment; (2) to create greater equity in the statutory treatment of recycled versus

187. Notice of Intended Regulatory Action, 17 Va. Regs. Reg. 25 (Sept. 25, 2000).

188. H.B. 1873, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 24, 2001, ch. 587, 2001 Va. Acts 687) (codified at VA. CODE ANN. §§ 10.1-1429.1, 10.1-1429.5 (Cum. Supp. 2001), 62.1-229.2 (Repl. Vol. 2001)).

189. *Id.*

190. *Id.*

191. 42 U.S.C. § 9627 (Supp. V 1999).

virgin materials; and (3) to remove the disincentives and impediments to recycling created as an unintended consequence of the 1980 Superfund liability provisions.¹⁹²

SREA provides that persons or entities who “arrange for recycling of recyclable material shall not” be subject to arranger liability under CERCLA.¹⁹³ Under SREA, “recyclable material” includes “spent lead-acid” batteries and “scrap metal.”¹⁹⁴ “[S]crap metal” means bits and pieces of metal parts . . . or metal pieces that may be combined together with bolts or soldering . . . which when worn or superfluous can be recycled, except for scrap metals that the Administrator excludes from this definition by regulation.¹⁹⁵ SREA provides that its protection from CERCLA arranger liability “shall not affect any concluded judicial or administrative action or any pending judicial action initiated by the United States prior to the enactment of” SREA.¹⁹⁶

2. Oil/Radiator Fluid

Similarly, the General Assembly took strides to encourage the recycling of material routinely disposed. Senate Bill 1003 requires DEQ to establish a statewide program to manage used motor oil, oil filters, and antifreeze.¹⁹⁷ Under the program, DEQ must establish a list of collection sites that accept these used products, and provide a recycling education program and additional collection site information on an Internet Web site.¹⁹⁸ The bill further requires retail sellers of these products who do not accept returns of the used products to post a sign giving consumers collection site information.¹⁹⁹ Retailers failing to post this information shall be subjected to a \$25 fine.²⁰⁰ The bill also requires the Division of

192. Pub. L. No. 106-113, div. B § 1000(a)(9), 113 Stat. 1536, 1501A-598 (1999).

193. 42 U.S.C. § 9627(a) (Supp. V 1999).

194. *Id.* § 9627(b).

195. *Id.* § 9627(d)(3).

196. *Id.* § 9627(i).

197. S.B. 1003, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 24, 2001, ch. 569, 2001 Va. Acts 668) (codified at VA. CODE ANN. §§ 2.2-1111 (2001 Repl. Vol.), 10.1-1400, 10.1-1422.6 (Cum. Supp. 2001)).

198. *Id.*

199. *Id.*

200. *Id.*

Purchases and Supply to create procurement preferences for products containing recycled oil and antifreeze.²⁰¹

D. *Encouraging Reuse of Reclaimed Wastewater*

On March 26, 2001, the SWCB initiated a rulemaking regarding the reuse of reclaimed wastewater pursuant to legislation enacted during the General Assembly's 2000 session.²⁰² This legislation required the SWCB to "promote and establish requirements for the reclamation and reuse of wastewater that are protective of state waters and public health as an alternative to directly discharging pollutants into waters of the state."²⁰³ The rulemaking is expected to address

the following six water reuse categories: (1) land irrigation for agricultural, forest, and landscape use; (2) groundwater recharge for certain purposes (e.g., saltwater intrusion control); (3) industrial processes (e.g., cooling, boiler feed, stack scrubbing, and process water); (4) nonpotable urban (e.g., fire protection, street washing, and vehicle washing); (5) environmental (e.g., stream flow augmentation/fishery sustainability); and (6) miscellaneous (e.g., snowmaking, dust control, and construction).²⁰⁴

E. *Tax and Bankruptcy Implications of Growth/Recycling*

The Commonwealth continues, through its agencies, to encourage recycling and redevelopment through tax incentives. The problem exists in the interpretation of many of these tax breaks, however. During the course of this year there were tax credits proposed for recycling, but two courts had to weigh-in in the interpretation of value to attribute to contamination and cleanups.

201. *Id.*

202. *See* Notice of Intended Regulatory Action, 17 Va. Regs. Reg. 2144, 2145 (Mar. 26, 2001) (to be codified at 9 VA. ADMIN. CODE § 5-40-10).

203. VA. CODE ANN. § 62.1-44.15(15) (Repl. Vol. 2001).

204. Notice of Intended Regulatory Action, 17 Va. Regs. Reg., 2144, 2145 (Mar. 26, 2001) (to be codified at 9 VA. ADMIN. CODE § 5-40-10).

1. Recycling Machinery Tax Credits

On November 20, 2000, the VWMB proposed regulations that would modify the existing tax exempt regulations for recycling machinery.²⁰⁵ As proposed, the new regulations eliminate the requirement to notify DEQ of the purchase price of machinery, allow for mobile machinery to be used for the exemption, and clarify which machinery is not included within the exemption.²⁰⁶ These regulations have not yet been promulgated.

2. Tax Implications of Cleaning Up Contaminated Sites

Last year, the Fourth Circuit issued an opinion that addressed whether certain cleanup costs were tax deductible at the federal level.²⁰⁷ The controversy involved a power plant that was located on a parcel of land in Richmond, Virginia, referred to as "12th Street."²⁰⁸ Virginia Power operated the power plant from 1901 until 1973.²⁰⁹ In 1986, Virginia Power, which had been reorganized into a subsidiary of Dominion Resources, Inc. ("DRI"), transferred 12th Street to Dominion Lands, Inc. ("DLI"), a sister company that is in the business of real estate development and operation.²¹⁰ DLI considered donating the property to charity until contamination was discovered.²¹¹ DRI, the parent, determined that the site must be cleaned up before any development could commence.²¹² DRI subsequently began cleanup activities on the site to

205. Proposed Regulations, 17 Va. Regs. Reg. 686 (Nov. 20, 2000) (to be codified at 9 VA. ADMIN. CODE § 20-140-60).

206. *Id.* at 688.

207. *See Dominion Res., Inc. v. United States*, 219 F.3d 359 (4th Cir. 2000), *aff'g* 48 F. Supp. 2d 527 (E.D. Va. 1999).

208. *Id.* at 370.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

protect itself from third-party liability.²¹³ However, the cleanup was not part of a current plan to rehabilitate the property.²¹⁴

DRI argued that such cleanup costs should be tax deductible because the cleanup merely eliminated a hazardous condition, did not increase the value or extend the life of the shut down power station, and was not undertaken in conjunction with a plan to develop the property.²¹⁵ The IRS claimed that the remediation was performed to adapt the property to an alternative use and must be capitalized.²¹⁶ The district court agreed with the IRS, stating that the expenses were incurred in order to place the property into the real estate market and not to keep it in its previous operating condition as a power plant.²¹⁷ Furthermore, the district court indicated that the relevant IRS rule applied only to ongoing businesses and not to a taxpayer who was not operating the power plant.²¹⁸ Finally, the district court held that the remediation expenses significantly increased the property value from the time the property was transferred to DRI to the time the remediation was completed.²¹⁹

The Fourth Circuit stated that it assumed "DLI would be entitled under these circumstances to the same tax treatment as Virginia Power or DRI, even though the asbestos and other contaminants were not placed on the property in the course of DLI's real estate business."²²⁰

3. Bankruptcy Implications of Contaminated Property

Determining the value of contaminated property continues to be a question facing the courts. A Chapter 7 debtor filed a com-

213. *Id.* DRI spent \$2,242,232 on a cleanup of the property, which involved the removal of asbestos-containing materials, sludge, and assorted known and unknown contaminants. *Id.* DRI maintained that it initiated and completed the cleanup to minimize the hazards and liabilities to trespassers and third-parties down river, who could become impacted if the 12th Street site flooded. *Id.*

214. *See Dominion Res., Inc. v. United States*, 48 F. Supp. 2d 527, 549 (E.D. Va. 1999) (noting testimony of a DLI vice-president to that effect).

215. *See Dominion Res.*, 219 F.3d at 370.

216. *Id.*

217. *See id.*

218. *See Dominion Res.*, 48 F. Supp. 2d at 552-53.

219. *Id.* at 553-54.

220. *Dominion Res.*, 219 F.3d at 370 n.5.

plaint for avoidance of a creditor's judgment lien on her home-stead property *In re Blankenship*.²²¹ The court entered judgment in favor of the debtor, and the creditor appealed.²²² The district court held that the \$100 value that the bankruptcy court placed on real property (appraised as having a value of more than \$40,000) was clearly erroneous and required remand for reassessment of lien avoidance claims.²²³ The decision was based on evidence that the property might be environmentally contaminated and that the cost of sampling the property to determine the existence and extent of contamination would be in the range of \$35,000.²²⁴

F. Chesapeake Bay Watershed

1. Legislation

During the 2001 Session of the General Assembly, multiple bills and resolutions were proposed regarding the Chesapeake Bay Watershed. However, no legislation affecting the scope of current laws which protect the Chesapeake Bay Watershed emerged from that session.

Despite the absence of changes to current law, several bills and resolutions adopted during the 2001 Session portend future activity by the General Assembly, the SWCB, and the Chesapeake Bay Local Assistance Department. First, House Joint Resolution 622 requires the Joint Legislative Audit and Review Commission to report on the implementation of the Chesapeake Bay Preservation Act.²²⁵ The Commission's study must include: (1) an examination of the Chesapeake Bay Local Assistance Board's methods and practices in assessing local compliance and in exercising its enforcement authority; (2) a performance audit of local implementation and enforcement of ordinances, including an evaluation of information submitted by the Chesapeake Bay Local Assistance Department; (3) a review of local exceptions and variances for

221. *In re Blankenship*, 258 B.R. 637, 639 (E.D. Va. 2001).

222. *Id.* at 640.

223. *Id.* at 645.

224. *Id.*

225. H.J. Res. 622, Va. Gen. Assembly (Reg. Sess. 2001).

consistency; and (4) an assessment, by both the state and local municipalities, of the current personal and financial resources necessary for the implementation and enforcement of the Act.²²⁶ The resolution also requires the Chesapeake Bay Local Assistance Department to assess the environmental benefits, including implementation costs, of extending the Act to include localities outside "Tidewater Virginia" that are technically within the Chesapeake Bay Watershed.²²⁷ Efforts to directly extend the scope of the Act, without further study or assessment, failed to become law.²²⁸

Second, House Joint Resolution 765 requires the "Virginia Institute of Marine Science, in consultation with . . . appropriate state and federal agencies, local governments, and interested stakeholders, to prepare a management plan for shallow water areas in the Chesapeake Bay and the tidal portion of its tributaries."²²⁹

Third, Senate Bill 1087 requires the Secretary of Natural Resources to submit an annual report on the progress made toward the implementation of the Chesapeake Bay 2000 agreement.²³⁰ The report must include a description of the programs developed by the state and local governments to meet each specific goal as well as an assessment of projected state funding necessary to meet those goals.²³¹

Fourth, House Joint Resolution 627 requires the Department of Conservation and Recreation and the Chesapeake Bay Local Assistance Department to work with the Corps, the City of Virginia Beach, other appropriate federal, regional, and state agencies, citizen and civic groups, the development and environmental communities, watermen, and the fisheries industry to immediately prepare a request for approval of a Lynnhaven River watershed study and to coordinate all state agencies necessary for that effort.²³²

226. *Id.*

227. *Id.*

228. See S.B. 821, Va. Gen. Assembly (Reg. Sess. 2001).

229. H.J. Res. 765, Va. Gen. Assembly (Reg. Sess. 2001).

230. S.B. 1087, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 15, 2001, ch. 259, 2001 Va. Acts 212) (codified at VA. CODE ANN. § 2.2-220.1 (Repl. Vol. 2001)).

231. *Id.*

232. H.J. Res. 627, Va. Gen. Assembly (Reg. Sess. 2001).

Although not limited to the Chesapeake Bay Watershed, the results of the Senate Joint Resolution 438 study²³³ (implementation of local erosion, sediment control, and stormwater management programs) may overlap with the results of the House Joint Resolution 622²³⁴ report on the implementation of the Chesapeake Bay Preservation Act. Similar to Senate Joint Resolution 438's direction to the Commission Studying the Future of Virginia's Environment, House Joint Resolution 622 directs the Joint Legislative Audit and Review Commission to study the implementation of local erosion, sediment control, and storm water management programs, while also assessing the costs of extending the Act to localities outside of "Tidewater Virginia," but still within the Chesapeake Bay Watershed.²³⁵

As discussed above, legislative attempts to expand coverage of the Chesapeake Preservation Act from Tidewater Virginia to include all localities within the Chesapeake Bay Watershed (including those west of Interstate 95) failed during the 2001 session.²³⁶ Other legislative attempts to expand the scope of civil penalties available under the Chesapeake Bay Preservation Act also failed.²³⁷

2. Regulations

On October 9, 2000, the Chesapeake Bay Local Assistance Department issued proposed amendments to its Chesapeake Bay Preservation Area Designation and Management Regulations.²³⁸ These proposed amendments were designed to: (1) achieve greater clarity in all regulatory language; (2) eliminate conflicts and unnecessary redundancies between the requirements in the regulations and those in other related state and federal laws and regulations (e.g., storm water management criteria, erosion and sediment control criteria, septic system criteria, agricultural criteria, and silvicultural criteria); (3) improve vegetative buffer

233. S.J. Res. 438, Va. Gen. Assembly (Reg. Sess. 2001).

234. H.J. Res. 622, Va. Gen. Assembly (Reg. Sess. 2001).

235. *See id.*

236. *See, e.g.*, S.B. 821, Va. Gen. Assembly (Reg. Sess. 2001).

237. *See, e.g.*, S.B. 1256, Va. Gen. Assembly (Reg. Sess. 2001).

238. Proposed Regulations, 17 Va. Regs. Reg. 144 (Oct. 9, 2000) (to be codified at 9 VA. ADMIN. CODE).

area criteria; (4) improve agricultural conservation criteria; (5) add criteria regarding a board/department process to review local program implementation for consistency with the regulations; and (6) accomplish numerous technical amendments necessitated by changes in terminology and numbering protocols.²³⁹ In response to comments received from the public, the Department developed revised draft regulations on June 18, 2001. This revised draft includes additional, substantive changes to the existing regulations. Among these are changes to the redevelopment criteria, the procedures for designating Resource Protection Areas, the stormwater management criteria, the vegetated buffer area criteria, conditions for allowable buffer modifications and encroachments, criteria for granting exceptions, and the process for enforcement on agricultural lands.²⁴⁰

G. *Construction of Best Management Practices ("BMPs")—
Sedimentation Ponds*

On April 18, 2001, DEQ issued guidance on the requirements for permits relating to the applicability of temperature water quality standards to storm water BMPs.²⁴¹ The guidance clarifies the non-applicability of the temperature water quality standards (specifically sections 25-260-50, 25-260-60, 25-260-70, and 25-260-80 of title nine of the Virginia Administration Code) in the absence of a point source thermal discharge.²⁴² According to the guidance, in the absence of a point source discharge of thermal pollution, no temperature limitation should apply to impounded water.²⁴³ The guidance recognizes that temperature increases will likely result across the impoundment due to conditions such as increased sunlight input, decreased shading, decreased turbulence, thermal stratification, etc., but considers the increases to be "natural" and not from the influence of any point source dis-

239. *Id.* at 174.

240. *See* General Notice Regarding Proposed Regulatory Action, 17 Va. Regs. Reg. 3475, 3475-76 (July 30, 2001) (to be codified at 9 VA. ADMIN. CODE).

241. Siting of Storm Water BMPs on Surface Waters and the Application of Temperature Standard to Impoundments, Guidance No. 01-2012 (Virginia Dep't of Env'tl. Quality Apr. 18, 2001).

242. *Id.* at 2.

243. *Id.* at 3.

charge.²⁴⁴ The guidance provides that “no temperature limitations that would apply to the impounded water should be placed in a permit that authorizes or allows the construction of an impoundment or pond.”²⁴⁵

H. *Local Government Control Over Land Use Decisions*

Local government restrictions on activities permitted by the Virginia Department of Health under the state biosolids program were invalidated by the Supreme Court of Virginia in *Blanton v. Amelia County*.²⁴⁶ In that case, farmers who either possessed or had applied for permits for authorized use of biosolids upon their respective farmland filed a complaint for declaratory judgment and injunctive relief against Amelia County, challenging county ordinances that banned the use of biosolids.²⁴⁷ The court held that the local ordinances were inconsistent with the statute authorizing land application of biosolids upon issuance of a permit and with biosolids use regulations promulgated by State Board of Health.²⁴⁸ Consequently, the county ordinances were found to be unenforceable.²⁴⁹ Reiterating the mandate of Virginia Code section 1-13.17,²⁵⁰ the court concluded that local ordinances must conform to, and not be in conflict with, the public policy of the state as embodied in its statutes.²⁵¹

Local government authority over land application of biosolids was partially restored following the *Blanton* decision by the General Assembly during the 2001 Session. Enacted with the Governor’s recommendations, House Bill 2827 allows localities to adopt ordinances that provide for the monitoring of the land application of sewage sludge to ensure compliance with applicable laws and regulations.²⁵² The State Board of Health is required to adopt regulations by July 1, 2003, to govern the collection of fees for the

244. *Id.* at 2.

245. *Id.* at 3.

246. 261 Va. 55, 540 S.E.2d 869 (2001).

247. *Id.* at 58, 540 S.E.2d at 871.

248. *Id.* at 64, 540 S.E.2d at 874.

249. *Id.*

250. VA. CODE ANN. § 1-13.17 (Repl. Vol. 2001).

251. *Blanton*, 261 Va. at 65–66, 540 S.E.2d at 875.

252. H.B. 2827, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Apr. 4, 2001, ch. 831, 2001 Va. Acts 1153) (codified at VA. CODE ANN. § 62.1-44.19:3 (Repl. Vol. 2001)).

land application of biosolids.²⁵³ The fee cannot exceed the direct costs to localities of testing and monitoring the application of sewage sludge.²⁵⁴ The State Board of Health's regulations must include procedures for the collection, retention, and disbursement of fees from a nonreverting fund to localities for monitoring the sewage sludge.²⁵⁵

Local government attempts to regulate and restrict the land application of biosolids continue to surface in the wake of the *Blanton* decision and House Bill 2827. At least two of these attempts have been judicially challenged.²⁵⁶ In the Louisa County case, the court entered an order enjoining the local government from enforcing the challenged restrictions on the land application of biosolids, citing grave and serious questions about the legality of those restrictions.²⁵⁷

VI. ADMINISTRATIVE PROCEDURE IN THE ENVIRONMENTAL CONTEXT

Much of the evolution of administrative procedure in Virginia has historically occurred in the environmental context. Some of the latest developments demonstrate: (1) a move toward dispute resolution in an administrative law context; (2) a closer inspection of agency decisions through judicial review; (3) a step up in agency initiated enforcement; and (4) the prevalent use of time bars, standing, and choice of remedy in resolving administrative law cases.

A. *Dispute Resolution*

Consistent with the nationwide movement toward alternative ways to resolve disputes, the VWMB, SWCB, and SAPCB have each promulgated regulations (effective July 1, 2001) to encour-

253. *Id.*

254. *Id.*

255. *Id.*

256. See *Synagro-WWT, Inc. v. Buckingham County*, No. 3:01CV00061 (W.D. Va. filed May 29, 2001); *Synagro-WWT, Inc. v. Louisa County*, No. 3:01CV00060 (W.D. Va. filed May 29, 2001).

257. *Synagro-WWT*, No. 3:01CV00060, 2001 U.S. Dist. LEXIS 10987, at *22, 25 (W.D. Va. July 18, 2001) (order granting preliminary injunction).

age the fair, expeditious, voluntary, and consensual resolution of disputes by providing an alternative to administrative hearings and litigation.²⁵⁸ The decision to employ dispute resolution is within the sole discretion of the Board.²⁵⁹ As drafted, the regulations provide that the outcome of any dispute resolution procedure does not bind the Board, but the results may be considered by the Board in issuing a permit or promulgating a regulation.²⁶⁰

B. *Judicial Review of Agency Action*

There has been judicial review of agency activities on both the state and federal fronts.²⁶¹ The federal review of occurred on April 24, 2001, when the Fourth Circuit decided *Bragg v. West Virginia Coal Ass'n*.²⁶² It was believed that this case would ultimately resolve whether mountaintop mining of coal could continue in West Virginia, Virginia, and Kentucky. Mountaintop mining operations involve exposing seams of coal for extraction by removing the tops of mountains with explosives.²⁶³ The overfill that comes from that removal is placed in nearby valleys, sometimes filling streams in the process.²⁶⁴

In October of 1999, the United States District Court for the Southern District of West Virginia enjoined the West Virginia Department of Environmental Protection ("DEP") from issuing any further surface mining permits authorizing the disposal of overfill into streams.²⁶⁵ The court indicated that issuing permits

258. Final Regulations, 17 Va. Regs. Reg. 2342 (Apr. 23, 2001) (effective date July 1, 2001) (to be codified at 9 VA. ADMIN. CODE §§ 5-210-10, 20-15-10, 25-15-10 (2001)).

259. *Id.* at 2348.

260. *Id.* at 2342 (regulation summary).

261. The drafters of this article note that the United States Supreme Court has recently entered a decision that may impact the deference that courts afford agency interpretations. *See* *United States v. Mead*, 121 S. Ct. 2164 (2001). *Mead* applied the standard set forth by the court last year in *Christensen v. Harris County*, 529 U.S. 576 (2000), which reexamined whether to give agency interpretations of a statute in opinion letters, policy statements, enforcement guidelines, or agency manuals deference under the Chevron doctrine (*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984)). While the impact of *Mead* and *Christensen* are beyond the scope of this article, the writers note that these decisions may provide fertile ground for those seeking to argue that agencies' informal guidance documents are not entitled to the force of law.

262. 248 F.3d 275 (4th Cir. 2001).

263. *Id.* at 285.

264. *Id.*

265. *Id.* at 288.

violated DEP's non-discretionary duties under the Surface Mining Control and Reclamation Act ("SMCRA").²⁶⁶

On appeal, the director of the DEP argued that he could not be sued in his official capacity because he was protected under the Eleventh Amendment of the United States Constitution.²⁶⁷ The plaintiff, on the other hand, argued that the *Ex parte Young* exception to sovereign immunity applied in this case because Congress authorized citizen suits against "[s]tate officials who have the responsibility to comply with SMCRA and federally-approved state programs under the Act."²⁶⁸

The court held that applying that exception to sovereign immunity under the SMCRA would frustrate the federal interest in that statute.²⁶⁹ "[T]he citizen-suit provision explicitly authorizes a compliance action 'against . . . the appropriate State regulatory authority,' but only 'to the extent permitted by the eleventh amendment to the Constitution.'"²⁷⁰ The court noted that the citizen suit language actually preserves a state's sovereign immunity.²⁷¹ Similarly, the Fourth Circuit rejected the coal companies' claim that the district court lacked subject matter jurisdiction to enter a consent decree approving the settlement of several of the plaintiffs' claims against the DEP.²⁷²

The Fourth Circuit decision was interpreted by the original district court judge to require him to dismiss a case against West Virginia regarding the bonding provisions of SMCRA even though the law "has been ignored and violated."²⁷³ That judge indicated that the results of the Fourth Circuit decision would impose "immense state liability."²⁷⁴

Three cases have addressed judicial review of DEQ activities within the Commonwealth. In the first of these, Residents Involved in Saving the Environment, Inc. ("RISE") appealed a trial

266. See *Bragg v. Robertson*, 72 F. Supp. 2d 642, 663 (S.D. W.Va. 1999).

267. *Bragg*, 248 F.3d at 287.

268. *Id.* at 290.

269. *Id.* at 298.

270. *Id.* at 298 (quoting 30 U.S.C. § 1270(a)(2) (1994)).

271. *Id.*

272. *Id.* at 298-99.

273. *W. Va. Highlands Conservancy v. Norton*, 147 F. Supp. 2d 474, 481 (S.D. W.Va. 2001).

274. *Id.*

court decision upholding the issuance of a landfill permit in King and Queen County by DEQ.²⁷⁵ RISE asserted that the Director of DEQ had not complied with Virginia Code section 10.1-1408.1(D).²⁷⁶ Specifically, it asserted that there was no evidence in the record of an explicit determination or finding that the facility poses no substantial present or potential danger to human health and the environment.²⁷⁷ The trial court and the appellate court agreed that the director considered a variety of facts in forming his decision to issue the permit, including the record, the applicable Act and regulations, the permit application, the record of the public hearing, the comments made by local government and the public, and the recommendations of DEQ staff.²⁷⁸

Next, in a recent case before the Supreme Court of Virginia, DEQ's conclusions on solid waste landfill permitting were upheld.²⁷⁹ The case was brought by an association of landowners that sought review of DEQ's issuance of a landfill permit for failure to obtain a proper local government certification for all parcels owned by the landfill operator.²⁸⁰ The trial court upheld DEQ's decision to grant a landfill permit, while the court of appeals reversed that decision entering final judgment.²⁸¹ The supreme court, in providing a step-by-step guide to reviewing agency conclusions on landfill permitting, held that the evidence in the record supported the finding that certain parcels not certified by local government were not included in the landfill permit, and thus the permit was valid.²⁸²

The last review of a DEQ decision occurred in a case involving an oil company's excavation of soil that was removed and incinerated without prior notice to DEQ.²⁸³ The soil contained minimal contamination, presented no risk of fire, explosion, or vapor hazard, and was removed as part of site reconstruction rather than

275. *Residents Involved in Saving the Env't, Inc. v. Dept. of Env'tl. Quality*, No. 3103-99-2, 2000 Va. App. LEXIS 547, at *2 (Ct. App. July 25, 2000) (unpublished decision).

276. *Id.*

277. *Id.* at *4-5.

278. *Id.* at *5.

279. *Aegis Waste Solutions, Inc. v. Concerned Taxpayers of Brunswick County*, 261 Va. 395, 544 S.E.2d 660 (2001).

280. *Id.* at 398, 544 S.E.2d at 661.

281. *Id.*

282. *Id.* at 406, 544 S.E.2d at 666.

283. *Holtzman Oil Corp. v. Commonwealth*, 32 Va. App. 532, 529 S.E.2d 333 (Ct. App. 2000).

for environmental considerations.²⁸⁴ DEQ concluded that the excavation and incineration of the soil, done in connection with removal of underground petroleum storage tanks, was not a corrective action necessary to protect human health and the environment.²⁸⁵ Consequently, DEQ determined that the company was not entitled to reimbursement of its excavation and incineration costs from the Petroleum Storage Tank Fund.²⁸⁶ The court of appeals held that the actions of DEQ were consistent with applicable regulations, supported by evidence in record, and were not arbitrary and capricious.²⁸⁷

C. Enforcement

1. Authority to Participate in Federal Environmental Litigation

The 2001 Virginia General Assembly enacted House Bills 2330²⁸⁸ and 2602²⁸⁹ and Senate Bill 1297,²⁹⁰ which provide that, in addition to the authority of SAPCB, SWCB, VWMB, and the Director of DEQ, to bring actions in the courts of the Commonwealth to enforce any law, regulation, case decision, or condition of a permit or certification, the Attorney General is authorized, on behalf of such Boards or the Director, to intervene in any action pending in a federal court to resolve a dispute already being litigated in that court by the United States through the EPA.²⁹¹

2. Authority to Independently Prosecute Environmental Violations

In March 2001, the Supreme Court of Virginia addressed dual

284. *Id.* at 538, 529 S.E.2d at 336.

285. *Id.* at 536, 529 S.E.2d at 335.

286. *Id.* at 536, 529 S.E.2d at 336.

287. *Id.* at 545, 529 S.E.2d at 340.

288. H.B. 2330, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 13, 2001, ch. 174, 2001 Va. Acts 121) (codified at VA. CODE ANN. § 10.1-1186-4 (Cum. Supp. 2001)).

289. H.B. 2602, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 24, 2001, ch. 610, 2001 Va. Acts 750) (codified at VA. CODE ANN. §§ 15.2-4816 to -4828 (Cum. Supp. 2001)).

290. S.B. 1297, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 13, 2001, ch. 166, 2001 Va. Acts 112) (codified at VA. CODE ANN. § 10.1-1186.4 (Cum. Supp. 2001)).

291. See Va. H.B. 2330; Va. H.B. 2602; Va. S.B. 1297.

federal and state enforcement under the Clean Water Act.²⁹² At issue were alleged NPDES permit violations by Smithfield Foods.²⁹³ EPA had prevailed in its enforcement action against Smithfield in federal court in 1997.²⁹⁴ Shortly thereafter, Smithfield filed a plea of res judicata in an independent enforcement action brought by SWCB in state court.²⁹⁵ The state trial court sustained Smithfield's plea in bar, and, on appeal, the Supreme Court of Virginia affirmed the trial court's decision.²⁹⁶ According to the court, the interests of EPA and SWCB in enforcing the terms of Smithfield's permit were so identical that the legal right advanced by EPA in the federal action was the same legal right that the state sought to vindicate.²⁹⁷ The court noted that its conclusion was consistent with *Harmon Industries, Inc. v. Browner*,²⁹⁸ a case in which the Eighth Circuit concluded that res judicata applied to an action filed by EPA to enforce provisions of another federal environmental statute, RCRA.²⁹⁹ The *Smithfield* decision is likely to increase coordination between EPA and the states in response to Clean Water Act violations.

D. *Statute of Limitations*

The Clean Air Act does not specify a statute of limitations for bringing an enforcement action. Therefore, courts look to the general federal statute of limitations.³⁰⁰ The general limitation for civil penalties is five years from the date when the claim first accrued.³⁰¹ For the first time in the Fourth Circuit, a Maryland district court recently addressed the application of this limitation period to the new source review permit context.³⁰² The court held that such permits were construction permits; that any violation

292. *State Water Control Bd. v. Smithfield Foods, Inc.*, 261 Va. 209, 542 S.E.2d 766 (2001).

293. *Id.* at 213, 542 S.E.2d at 768.

294. *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769 (E.D. Va. 1997), *aff'd*, 191 F.3d 516 (4th Cir. 1999), *cert. denied*, 531 U.S. 813 (2000).

295. *State Water Control Bd.*, 261 Va. at 212, 542 S.E.2d at 767.

296. *Id.*

297. *Id.* at 215-16, 542 S.E.2d at 770.

298. 191 F.3d 894 (8th Cir. 1999).

299. *See State Water Control Bd.*, 261 Va. at 216-17, 542 S.E.2d at 770.

300. *See, e.g.*, *United States v. Westvaco Corp.*, 144 F. Supp. 2d 439 (D. Md. 2001).

301. *See* 28 U.S.C. § 2462 (1994 & Supp. V 1999).

302. *Westvaco*, 144 F. Supp. 2d at 440-41.

that may have occurred commenced upon construction of the project for which a permit was allegedly required; and that such a violation was not a continuing violation for statute of limitation purposes.³⁰³ The court held that preconstruction permit violations occur only at the time of the construction or modification.³⁰⁴ Therefore, the government's claims were barred because they commenced more than five years after the construction was completed.³⁰⁵

E. Remedies

The scope and magnitude of criminal penalties under the Clean Water Act were recently addressed by the Fourth Circuit in *United States v. Hong*.³⁰⁶ In earlier proceedings, the defendant was found guilty on thirteen counts of negligently violating pre-treatment requirements, and as a result, was fined \$1.3 million and sentenced to thirty-six months in prison.³⁰⁷ On an initial appeal, the district court affirmed the conviction and the sentence, but reduced the fine based on its interpretation of the United States Sentencing Guidelines.³⁰⁸

The Fourth Circuit reached three significant conclusions when presented with the case on appeal. First, it concluded that the defendant was a "responsible corporate official" under section 309(c)(6) of the Clean Water Act.³⁰⁹ Second, it concluded that the sentence was not "cruel and unusual" under the Eighth Amendment, but rather, was proportionate to the multiple violations committed by the defendant.³¹⁰ Third, the fine reduction by the district court was incorrect, and therefore, the court remanded the case for reimposition of the initial fine.³¹¹ The district court believed that the maximum penalty that could be assessed against the defendant for each count was \$25,000, as provided

303. *Id.* at 443-44.

304. *Id.* at 444.

305. *Id.*

306. 242 F.3d 528 (4th Cir. 2001).

307. *Id.* at 530.

308. *Id.*

309. *Id.* at 532.

310. *Id.*

311. *Id.* at 533-34.

under section 309(c)(1) of the Clean Water Act.³¹² The government, on the other hand, argued that the alternative fine statute, 18 U.S.C. § 3571, permitted the court to assess a maximum penalty of \$100,000 per violation.³¹³

The Fourth Circuit agreed with the government. In its words: “[Section] 3571 provides that the maximum possible fine for a Class A misdemeanor of the type committed by Hong is \$100,000 unless the statute of conviction—here, 33 U.S.C. § 1319(c)(1)—specifically precludes application of the alternative fine provision. Section 1319(c)(1) does not specifically preclude application of § 3571.”³¹⁴ The decision in *Hong* underscores the exposure that defendants may face for criminally negligent violations of the Clean Water Act.

F. Citizen Standing

The Supreme Court of Virginia recently ruled on citizen standing issues in the case of *Mattaponi Indian Tribe v. Commonwealth*.³¹⁵ In that case, appellants appealed SWCB’s issuance of a Virginia Water Protection permit (“VWP permit”) for a proposed water supply reservoir project that also required permits from the Corps.³¹⁶ The state claimed that appellants lacked standing to mount the appeal because the alleged injury was not fairly traceable to the decision of the SWCB, but rather, was the result of independent action by the Corps.³¹⁷ The supreme court disagreed, ruling that appellants had standing to appeal the permit decision.³¹⁸ According to the court, the VWP permit, “while a condition precedent to issuance of the [Corps] permit, had its own existence, [was] separate from the Corps permit, and could cause injury” independent from the Corps permit.³¹⁹ As a result, the

312. *Id.* at 533.

313. *Id.*

314. *Id.* at 533 n.5.

315. 261 Va. 366, 541 S.E.2d 920 (2001).

316. *Id.* at 375, 541 S.E.2d at 924.

317. *Id.*

318. *Id.* at 376, 541 S.E.2d at 925.

319. *Id.* at 377, 541 S.E.2d at 926.

court reversed the judgments and remanded the case for trial on the merits.³²⁰

VII. CONCLUSION

The body of environmental law affecting Virginians evolved rapidly and with significant change in the past year, with no immediate end in sight. Inasmuch as the developments discussed in this article remain subject to that trend, the authors caution their readers to stay current. In the prescient words of Norman Williams, author of the reigning six-volume treatise on American Land Planning Law,³²¹ "read, digest, and inwardly ponder, but don't believe a word of it."³²²

320. *Id.* at 378, 541 S.E.2d at 926.

321. See NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, *AMERICAN LAND PLANNING LAW* (2000).

322. Norman Williams, Jr., Professor of Law, Vermont Law School, Comments to Vermont Law School Land Use Law Class (Fall 1994).