A bi-monthly publication of the Williams Mullen Environmental Law Section.

WILLIAMS MULLEN
Environmental Report

FEDERAL

Court Strikes Down EPA's Clean Air Mercury Rule

Congress amended § 112 of the Clean Air Act in 1990 to establish a process by which EPA would list categories of sources of hazardous air pollutants (HAP) and then specify by regulation the Maximum Achievable Control Technology (MACT) standards for HAP emissions from new and existing sources in these categories. Congress specified a variation on this general approach for electric utility steam generating units (EGUs). It required EPA to conduct a study of the hazards to public health reasonably anticipated to occur as a result of EGU HAP emissions. EPA was required to include EGUs in the HAP source category list and adopt MACT standards for EGUs if the agency "finds such regulation is appropriate and necessary after considering the results of the [health hazards] study."

EPA's Decision to List EGUs

EPA completed the health hazards study in 1998. The study found "a plausible link between anthropogenic releases of mercury from industrial and combustion sources in the U.S. and methylmercury in fish" and that "mercury emissions from [EGUs] may add to the existing environmental [mercury] burden." Based on this study and consideration of alternative feasible control strategies, EPA concluded in 2000 that it was "appropriate and necessary" to issue MACT standards to regulate emissions of HAPs, including mercury, from coal and oil-fired EGUs. EPA noted that EGUs are the largest domestic source of mercury emissions and these emissions pose significant hazards to public health and the environment. As a result, EPA added coal and oil-fired EGUs to its list of source categories for which the agency would promulgate MACT standards pursuant to CAA § 112.

EPA's Change of Heart

After the Bush administration replaced the Clinton administration, EPA had second thoughts about controlling mercury emissions from EGUs using MACT standards. In 2004, EPA proposed two regulatory alternatives — the CAA § 112 MACT approach and an alternative mercury emissions cap and trade program pursuant to CAA § 111. Section 111 requires EPA to establish standards of performance for control of emissions from new sources in various source categories, including EGUs, and requires states to establish standards of performance for existing sources in those categories.

EPA was keen on establishing an emissions cap and trade scheme for mercury control but could not do so under CAA § 112, so the agency relied on CAA § 111 as the legal basis for its alternative emissions cap and trade scheme.

After receiving extensive public comment on the alternative approaches, EPA announced in 2005 that it was choosing the CAA § 111 cap and trade approach in the form of the Clean Air Mercury Rule (CAMR). However, in order to go the § 111 CAMR route, EPA had to "delist" EGUs from the § 112 list of source categories for which the agency would promulgate MACT standards. EPA did just that and then adopted the CAMR under § 111. Several states and environmental groups immediately sued EPA challenging the delisting and the promulgation of the CAMR.

EPA Cannot Simply Reverse Its Listing Decision

In the case before the D.C. Circuit, EPA argued the agency has the inherent authority to reverse its prior decision that regulation of EGUs under § 112 MACT regulations was "appropriate and necessary." The court disagreed, noting that the CAA specifies that EPA "may delete any source category" from the § 112 list only after determining that "emissions from no source in the category or subcategory ... exceed a level which is adequate to protect public health and with an ample margin of safety and no adverse environmental effect will result from emissions from any source." EPA admitted it did not make such a determination for the EGU category, but countered that the listing was wrong in the first place because the EGU "source category ... did not meet the statutory criteria for listing at the time of listing."

EPA Acted Unlawfully

The court engaged in the typical judicial analysis of whether an agency action was "arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." The court held that in the CAA, Congress clearly specified exactly what criteria EPA had to apply in order to delist a source category (see above). Thus, once listed, the only way for EPA to remove the EGU source category from the § 112 list was for EPA to make the delisting determination specified in the Act. The court noted that Congress restricted EPA's ability to "simply reverse" its prior listing decision, saying "Congress, however, undoubtedly can limit an agency's discretion to reverse itself, and in § 112(c)(9) Congress did just that, unambiguously limiting EPA's discretion to remove sources, including EGUs, from the § 112(c)(1) list once they have been added to it." The court ruled that since EPA did not abide by the CAA's delisting requirements, the agency acted unlawfully in delisting the EGU source category.

Court Also Struck Down the CAMR

EPA conceded that if EGUs remain on the § 112 list, the agency cannot substitute the CAMR cap and trade program under § 111 for the MACT standards required under § 112. Since the court struck down the delisting, meaning EGUs remain on the § 112 source category list, the court also struck down the CAMR.

Comment

It is back to the drawing board for EPA on mercury regulation from EGUs. However, rumor has it that EPA has been preparing for this adverse decision by the D.C. Circuit. The court's ruling does not contain any direction to EPA regarding the next course of agency action or the time by which it must act. It is conceivable EPA could try to justify its delisting of the EGU source category from the § 112 list under the delisting criteria specified in CAA § 112(c)(9). However, EPA would have to determine that mercury emissions from no EGU "exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source" in the EGU source category. If EPA thought it could do this, the agency probably would have done so in the first place and not tried the approach of "simply reversing" its prior listing decision. Thus, EPA may have no choice but to abandon its preferred emissions cap and trade approach and promulgate command and control MACT standards for EGU mercury emissions.

New Jersey v. EPA, No. 05-1097 (D.C. Cir. Feb. 8, 2008).

For more information on this topic, please contact the article author, Thomas E. Knauer.

"... in order to go the § 111 CAMR route, EPA had to "delist" EGUs from the § 112 list of source categories ..."

FEDERAL

Congress Considers Clean Water Restoration Act of 2007

In response to the Supreme Court's decision in *Rapanos v. United States*, Rep. James Oberstar (D-Minn.) has introduced a bill to enact the Clean Water Restoration Act of 2007 (the CWRA). The goals of the CWRA are to "re-affirm the original intent of Congress" in enacting the Clean Water Act (CWA), to clearly define "the waters of the United States that are subject to" the CWA, and to "provide protection to the waters of the United States to the fullest legislative authority of Congress under the Constitution." Whether the CWRA actually represents a "restoration" or a substantial modification of the CWA will be the subject of much Congressional debate in 2008.

Background

Section 301(a) of the CWA prohibits the discharge of a pollutant by any person without a permit unless otherwise authorized by the CWA. In relevant part, § 502 of the CWA defines the "discharge of a pollutant" as the addition of any pollutant to "navigable waters" from any point source. "Navigable waters" are "the waters of the United States, including the territorial seas." (Admittedly, not a very helpful definition.)

The extent to which intermittent streams, isolated waterbodies, and other similar features are "waters of the United States" is at the center of the controversy over whether CWRA should be enacted. If such waters are "waters of the United States," then EPA and the U.S. Army Corps of Engineers (the Corps) are authorized to regulate discharges of pollutants into those waters. If not, then EPA and the Corps lack authority to require a permit for discharges into these waters.

Relevant Judicial Decisions

The Supreme Court's decision in *Rapanos* created a substantial amount of confusion about EPA's and the Corps's jurisdiction under the CWA. Five of the nine justices voted to reverse and remand the case for further proceedings, but the court failed to reach a majority view regarding the central issue in the case — how one determines which waters are subject to the CWA. Four of the nine justices held that the CWA extends only to relatively permanent, standing or flowing bodies of water, not to intermittent or ephemeral streams. Justice Kennedy filed a concurring opinion in the case, which held that intermittent and ephemeral streams may be subject to the CWA if they have a "substantial nexus" to navigable waters. The four-justice minority would have deferred to the Corps to determine whether ephemeral and intermittent streams are subject to the CWA.

Justice Kennedy's "significant nexus" test is related to the Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. Corps of Engineers* (*SWANCC*). In that case, a majority of the court held that an isolated, intrastate waterbody was not within the CWA's jurisdiction because the pond at issue was not "navigable in fact," and had no significant connection to a navigable water. While Justice Kennedy's adoption of the significant nexus test in *Rapanos* did not receive support from the other eight justices, his status as the deciding vote in the case has made the significant nexus test an important component of the CWA jurisdictional analysis. The Corps now includes that test as the second step in its jurisdictional determinations. If a waterbody is not a relatively permanent, standing or flowing waterbody, the Corps then determines if the waterbody has a significant effect on water quality within a relatively permanent waterbody. If so, the Corps will then conclude that the water is subject to the CWA.

The Proposed Legislation

The CWRA represents an attempt to simplify this now convoluted jurisdictional analysis by replacing the phrase "navigable waters" in § 502 with the phrase "waters of the United States," and then defining the phrase "waters of the United States" as follows:

> [A]ll waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams *(including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters*, or activities affecting these waters, *are subject to the legislative power of the Congress under the Constitution*.

(emphasis added). If the bill is enacted, EPA and the Corps will have authority to regulate discharges into ***any*** surface water within the reach of the federal government's power. Based on the legislative findings contained in the bill and the text of the bill itself, the CWA would be extended to any waterbody that could: (1) affect interstate commerce; (2) serve as habitat for protected species or species that are the subject of international agreements; or (3) affect environmental conditions on federal lands. Notably, the CWRA would also reverse the outcomes of both *Rapanos* and *SWANCC*.

Comment

The CWRA represents more of an expansion of the CWA than a restoration. The CWA has never afforded EPA or the Corps jurisdiction over a waterbody based on either the requirements of international agreements or the potential for a waterbody to affect environmental conditions on federal lands. Though the Corps has attempted to interpret its CWA authority as extending to the limits of the Commerce Clause, courts have been wary of this interpretation and have rejected it as inconsistent with the terms of the CWA. These courts have also questioned — but not decided — whether such a broad delegation of regulatory authority is permissible under the Constitution at all.

The CWRA also raises important questions for states and municipalities. An expansion of federal authority may require states to modify their existing NPDES programs in order to maintain their status as the primary permitting authority. Currently, state programs do not need to address non-jurisdictional waters to gain approval from EPA. State environmental agencies may also face increased numbers of NPDES permit applications, and municipalities may face increased numbers of industrial customers who choose to discharge wastewater to sewer systems rather than obtain an NPDES permit for newly-regulated surface water discharges. In areas where existing regulatory personnel and wastewater treatment facilities are already stretched to their limits, these additional responsibilities and discharges may be too much to bear.

Clean Water Restoration Act of 2007, H.R. 2421 (2007).

For more information on this topic, please contact the article author, Sean M. Sullivan.

WILLIAMS MULLEN

Where Every Client is a Partner®

FEDERAL

EPA's Denial of CAA Waiver Request by California Spurs Lawsuit

For the first time since enactment of the Federal Clean Air Act (CAA) in 1970, the U.S. Environmental Protection Agency has denied a request by the state of California for a waiver of federal preemption of motor vehicle emission standards. EPA's administrator announced his decision on Dec. 19, 2007.

California sought the waiver under § 209 of the CAA, as it had done some 40 times before. But this time it sought the waiver, not for smog-forming pollutants, but rather to enable it to implement and enforce state limits on greenhouse gas (GHG) emissions from new motor vehicles to combat global warming. EPA's decision means California and the 16 other states that have followed its lead are barred from enforcing their new GHG rules for vehicles, unless they win the lawsuit they filed to challenge EPA's denial. The states' rules would require all manufacturers of automobiles, light trucks and SUVs sold in those states to reduce tailpipe emissions of CO_2 by 30 percent no later than 2016.

California had applied for the EPA waiver back in 2005, and it sued EPA to compel a decision in November 2007, but the case had not been heard by the time EPA denied the waiver. EPA's decision came only one day after new federal fuel economy standards were enacted as part of new federal energy legislation. EPA Administrator Stephen L. Johnson stated that the denial was based on the new nationwide fuel efficiency standards. "The Bush administration is moving forward with a clear national solution — not a confusing patchwork of state rules," he said. He distinguished this waiver from prior California requests that EPA had granted almost automatically. Those had related to criteria pollutants predominantly affecting local and regional air quality, as opposed to global concentrations of GHGs. Because GHG emissions are global in nature and vehicle CO_2 emissions affect every U.S. state, California had not exhibited the "compelling and extraordinary" circumstances needed to obtain a waiver.

Background

Section 209(a) of the CAA prohibits states from setting their own emissions standards for new motor vehicles. However, in recognition of California's early auto emissions regulations, which predated the earliest federal standards, and the unique air quality challenges in the state, § 209(b) allows California to adopt its own more-stringent emissions standards, provided it requests and obtains a waiver from EPA. The CAA directs the administrator to grant such requests if the California standards are at least as protective of public health as the federal ones and are based on "compelling and extraordinary" conditions. Once California obtains a waiver, other states with air quality problems may adopt vehicle standards identi-

cal to California's in lieu of the federal standards, provided they allow adequate lead-time. In 2002, California Assembly Bill 1493 required the California Air Resources Board (CARB) to issue regulations to reduce GHGs from motor vehicles (primarily CO_2, but also methane, nitrous oxide, and hydrofluorocarbons) by approximately 30 percent. In 2005, CARB adopted the regulations with a 2009 compliance date and applied to EPA for a waiver.

EPA held up action on the waiver request to await a ruling by the U.S. Supreme Court on whether CO_2 is an "air pollutant" within the meaning of the CAA. After the Court ruled early last year in *Massachusetts v. EPA* that CO_2 is subject to regulation as an air pollutant, EPA held two public hearings on the waiver request and reviewed more than 100,000 written comments it had received. In testimony before a special Congressional committee in June 2007, EPA Administrator Johnson said that EPA would not act on the waiver request until the fall of 2008. In response, California's governor warned that the state would sue to compel EPA to act if the agency had not decided the waiver by Oct. 31, 2007. California then sued on Nov. 8, 2007, but EPA denied the waiver request a little over a month later, before that suit could proceed.

EPA's denial has been highly controversial both inside and outside the agency. According to press reports and draft internal documents leaked by irate lawmakers from California, the denial contravened recommendations of EPA's own legal and technical staff. The denial prompted Congress to initiate investigations of the decision. California Governor Schwarzenegger declared, "California sued to compel the agency to act on our waiver, and now we will sue to overturn [EPA's denial] and allow Californians to protect our environment." The state made good on its governor's promise when, on Jan. 2, 2008, California and 16 other states challenged EPA's denial in the U.S. Court of Appeals for the Ninth Circuit.

Recent Litigation

The lawsuits over California's waiver request to enforce more stringent CO_2 emission standards are part of a tapestry of litigation over U.S. inaction on climate change. In its April 2007 decision in *Massachusetts v. EPA*, the U.S. Supreme Court held that EPA (and therefore the states) had the authority to regulate CO_2 as a "pollutant" under the CAA. In September, the U.S. District Court in Vermont built upon the *Massachusetts v. EPA* decision and upheld Vermont's adoption of California's more stringent CO_2 emissions standards for vehicles, even before EPA's decision on the California waiver request.

The same automobile manufacturers that challenged Vermont's adoption of the California standards had also challenged the California standards themselves in federal court in Sacramento. They argued that California's standards were really fuel economy standards in disguise, and that fuel efficiency standards are exclusively regulated by the Federal DOT Corporate Average Fuel Economy (CAFE) program. The Environmental Policy and Conservation Act (EPCA), which authorizes CAFE standards, expressly prohibits states from adopting or enforcing any law or regulation relating to the fuel economy of new motor vehicles. The U.S. District Court in California rejected the auto manufacturers' claims on Dec. 12, 2007 and held that EPCA does not preempt California's new GHG standards. The court saw no conflict between CAFE standards and California's attempts to protect its residents' health and resources by reducing CO_2 levels. The lengthy opinion was undoubtedly written before EPA's denial of the waiver request. The auto makers have appealed to the Ninth Circuit, the same appeals court where California has challenged EPA's denial.

Comment

California could hardly find a more sympathetic court than the U.S. Court of Appeals for the Ninth Circuit to hear its challenge to EPA's denial of its waiver request. The case is likely to be delayed, however, by preliminary skirmishes over the appropriate court to hear the case. Under the CAA, final EPA actions are appealable in one of the numbered courts of appeals only if EPA's action has effects limited solely to the states within that court's geographic reach. In contrast, actions by EPA that are national in scope may be challenged only in the U.S. Court of Appeals for the D.C. Circuit. We expect the federal government's attorneys to try to move the case from the Ninth to the D.C. Circuit. Perhaps ironically, the fact that 16 other states embraced the California standards may give the government grounds to do just that.

If the Ninth Circuit does reach the substantive issues, its decision should turn on whether EPA's finding that California lacked "compelling and extraordinary" circumstances was arbitrary and capricious. We believe the Ninth Circuit will have no difficulty concluding there is a compelling need for GHG regulation. Therefore, its decision may well depend upon how it interprets the term "extraordinary." If the court finds that the term means unique or

"EPA's denial has been highly controversial both inside and outside the agency."

peculiar to California, as some early legislative history of the CAA suggests, then it could agree with EPA that California's waiver request had not met that criterion, since climate change is a global issue not peculiar to one state. But if the court is unpersuaded by the legislative history and interprets "extraordinary" to mean only unusual or out of the ordinary, global warming would readily qualify.

If the Ninth Circuit decides the case on the merits, it will almost certainly (but not necessarily correctly), uphold the states' challenge and reverse EPA. Although it appears this case is ultimately headed to the U.S. Supreme Court no matter the outcome, the timing of a decision against EPA will be an important factor. The solicitor general has effective veto power over the government's ability to seek Supreme Court review. Thus, if the Ninth Circuit's decision is postponed until a new administration takes over, the new solicitor general may choose not to seek Supreme Court review, if EPA loses in the Ninth Circuit. That would mean new California-style vehicle emission standards would become the law in at least 17 states.

For more information on this topic, please contact the article authors, William A. Anderson II and D. Cameron Prell.

FEDERAL

Site Manager's Actions Result in CERCLA Liability

If your company generates hazardous substances or hazardous wastes from its manufacturing processes, be careful about referring to yourself as the person "in charge" or as someone who has responsibility for making decisions about changes at your business. Such comments could lead to personal liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

This factual scenario was before a U.S. District Court judge in New Jersey who found it sufficient to determine that a site manager was an "operator" under CERCLA. The court imposed personal liability on the manager for cleanup costs associated with hazardous waste generated at the manager's electroplating and metal finishing business. Those costs arose when the business was evicted from its facility, leaving behind hazardous waste that EPA was eventually forced to remove.

The determination of exactly who is and who isn't an "operator" under CERCLA requires a fact-intensive inquiry. In *United States v. Bestfoods*, 524 U.S. 51 (1998), the U.S. Supreme Court defined an operator as one who directs the workings of, manages, or conducts the affairs of a business. In particular, liability will attach to those who manage the affairs related to the leakage or disposal of hazardous substances.

In this case, the court held the defendant was an operator because she had the power to take charge of the hazardous waste removal process and use company funds to pay for the removal. Even though the defendant denied responsibility for the waste, the landlord testified that when the defendant was confronted about why the hazardous wastes had not been shipped off-site, the defendant said, "You've got a choice, do you want me to pay you your rent check or do you want me to ship the [waste] out?" The court also noted the defendant had handled all of the regulatory compliance issues at the facility.

Comment

Businesses can protect against CERCLA liability by carefully choosing and clearly designating those employees responsible for the management of hazardous waste and substances. These employees must understand all of the regulatory compliance rules for handling and shipping these materials. Similarly, individual employees who are not directly involved with the management of these materials can protect against CERCLA liability by avoiding becoming "just a little bit" involved. That involvement, as minor as it might seem, could result in someone claiming the employee is an operator. And if the employee is directly involved? The best way for them to protect against CERCLA liability is to manage the materials in the manner required by law, not flaunt the law as the site manager did in the case noted above.

United States v. Tarrant, 2007 WL 1231788 (D.N.J. 2007).

For more information on this topic, please contact the article author, Thomas B. Hodges Jr.

FEDERAL

EPA's General Counsel Discusses New Directions for Environmental Law

Roger R. Martella, Jr., EPA's general counsel, recently spoke to the Environmental Law Section of the District of Columbia Bar Association regarding the future direction of environmental law. We found his speech interesting because it provides insight on what may be on the horizon.

Trends in the Courts

Martella mentioned several recent Supreme Court cases that reflect a change in the judiciary and the public's perspective on the environment. Of particular note were *Massachusetts v. EPA* and *National Association of Home Builders v. Defenders of Wildlife*. In *Massachusetts v. EPA*, the Supreme Court ruled that EPA has authority to regulate emissions of carbon dioxide from automobiles and other mobile sources under the Clean Air Act. In *National Association of Home Builders*, the court deferred to EPA's conclusion that the agency is not required to consider endangered species when it determines whether to approve state NPDES permitting programs.

Martella pointed out that the decision in *Massachusetts v. EPA* is significant because of the court's recognition of the phenomenon of climate change and its instruction to EPA to regulate vehicle emissions that contribute to the phenomenon or, alternatively, provide a reasoned rationale for refusing to do so. The case has resulted in the introduction of numerous bills in Congress to control greenhouse gas emissions, and it has increased pressure on EPA to consider regulating GHG emissions from stationary sources such as power plants. Martella noted that the increasing interest in climate change at the federal level is consistent with the public's growing concern about global warming.

Martella said the decision in *National Association of Home Builders* is important for two reasons. First, the decision provides important guidance to EPA that the Endangered Species Act (ESA) is not a "super-statute" whose requirements trump other environmental laws. Second, the court's deference to EPA regarding the interaction between the requirements of the Clean Water Act (CWA) and the ESA is an instruction to lower courts that the determinations of administrative agencies are entitled to deference during judicial review. (The case came about when EPA concluded it had no discretion to refuse to approve a state NPDES program that met the factors for approval set forth in the CWA. Based on that conclusion, EPA refused to consider the requirements of the ESA in the approval process and refused to consider the effect of approving a state NPDES program on protected species. The court found this to be a reasonable interpretation of conflicting statutory requirements and deferred to EPA's approach.)

The Growing Role of Local Governments

Martella explained that local governments will play a larger role in environmental protection in the coming years due to their proximity to many important environmental issues and their ability to fashion creative solutions. For example, county and municipal governments are traditionally the entities responsible for addressing solid waste disposal. Consequently, local governments will have the ability to encourage resource conservation through recycling programs and alternative disposal methods, such as waste-to-energy plants.

Similarly, local governments are primarily responsible for land use planning, which already includes an environmental component. For example, Virginia municipalities are responsible for enforcing the Chesapeake Bay Preservation Act (CBPA), and counties in coastal North Carolina implement the requirements of the Coastal Area Management Act (CAMA) through their respective land use planning processes. Many municipalities in both states also enforce erosion and sediment control ordinances.

Comment

Williams Mullen has a unique perspective on these matters because Bill Anderson and Sean Sullivan in our environmental group represented parties in both of the cases discussed above. In addition, Williams Mullen attorneys represent owners and operators of waste-to-energy plants, and have great experience with CBPA and CAMA. In our next issue, we will discuss the opportunities and challenges presented by the regulation of GHG emissions, the benefits and burdens of the deference to administrative agencies exhibited in *National Association of Home Builders*, and the pros and cons of increasing the involvement of local governments in environmental protection.

For more information on this topic, please contact the article author, Sean M. Sullivan.

WILLIAMS MULLEN

Where Every Client is a Partner®

FEDERAL

Coast Guard Issues All Appropriate Inquiries Rule

Under the Oil Pollution Act of 1990 (OPA 90), an owner or operator of a "facility" that is the source of a discharge, or has a substantial threat of discharge, of oil into navigable waters or adjoining shorelines or the exclusive economic zone, is liable in most instances for damages and remedial costs resulting from the discharge or threat. Under OPA 90, that person is known as a "responsible party." A "facility" is any structure, group of structures, equipment or device (other than a vessel) which is used for exploring or drilling for, producing, storing, handling, transferring, processing or transporting oil. This includes motor vehicles, rolling stock or pipelines used for one of these purposes.

Congress amended OPA 90 in 2004 by creating an "innocent landowner" defense to liability for those persons who could demonstrate, among other requirements, that before acquiring real property on which a facility is located, they did not know, and had no reason to know, that the oil that was discharged or threatened to discharge was located on, in, or at the facility. Similar to the defense under CERCLA, this defense is established by showing that, before acquiring the real property on which the facility is located, the new owner conducted "all appropriate inquiries" into the property's previous ownership and uses according to "generally accepted good commercial and customary standards and practices."

Congress required the Coast Guard to promulgate regulations establishing the standards and practices for carrying out all appropriate inquiries, and the Coast Guard has now issued a final rule to meet that requirement. The rule applies to persons planning to acquire real property on which a facility is located who choose to take steps necessary to protect themselves from liability should unknown oil be found at the facility after they acquire it.

Scope of the Rule

The Coast Guard's all appropriate inquiries rule does not address the other requirements under OPA 90 which must be met to qualify for the innocent landowner defense. The rule does not apply to real property purchased by a non-governmental entity or non-commercial entity for residential use or other similar uses where an inspection and a title search of the facility and the real property on which the facility is located reveal no basis for further investigation. In those cases, OPA 90 states that the inspection and title search satisfy the requirements for all appropriate inquiries. Also, this rule does not affect existing OPA 90 liability protections for state and local governments that acquire a facility in their role as sovereign governments, such as by foreclosing on a lien for unpaid taxes.

Consultation With EPA

The Coast Guard was required by Congress to consult with EPA to develop these regulations because of the experience EPA gained in establishing standards and practices for conducting all appropriate inquiries under CERCLA. CERCLA's liability provision applies to releases or threatened releases of "hazardous substances," which is defined to exclude most forms of oil.

The all appropriate inquiries provisions of OPA 90 and CERCLA are similar in many respects, but are not identical. CERCLA's provision is broader in scope than the provision in OPA. It addresses certain liability defense provisions that are unique to CERCLA, such as those that apply to contiguous property owners and *bona fide* prospective purchasers. While differences between OPA 90 and CERCLA mean they are differences between the Coast Guard's final rule and EPA's final rule, the Coast Guard coordinated with EPA to ensure that the two rules are as consistent as possible within statutory constraints.

ASTM Standard

ASTM E 1527-05, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," is the current industry standard that defines good commercial and customary practice for conducting an environmental site assessment under CERCLA. Both the Coast Guard and EPA agree that ASTM E 1527-05 is the current industry standard and is consistent with Congressional intent. Thus, just as under EPA's rule for CERCLA, persons conducting all appropriate inquiries under OPA 90 are permitted to use the procedures in ASTM E 1527-05 to comply with the Coast Guard's rule. However, use of that standard is not mandatory.

Cost to the Public

The Coast Guard estimates that its rule will add about $55 to the cost of an environmental site assessment to make the ESA compliant with its new all appropriate inquiries rule. The Coast Guard also estimates that nationwide, about 16,600 Phase I ESAs may need to comply with the new rule. Thus, the annual incremental cost of the new rule is about $913,000 nationwide. We think that estimate is extremely low, particularly in light of the many requirements in the rule.

73 Fed. Reg. 2146 (Jan. 14, 2008).

For more information on this topic, please contact the article author, Thomas E. Knauer.

FEDERAL

"Navigable Waters" Reprise

On Feb. 19, 2008, the U.S. Supreme Court denied review and left intact the Ninth Circuit's ruling in *City of Healdsburg v. N. California River Watch* that the city's treatment lagoon is a "navigable water." As we noted previously in the *Williams Mullen Environmental Report*, the result is that the city will be required to have a wastewater discharge permit to discharge into its treatment pond. Notably, the Corps of Engineers had ruled that the pond is not subject to Clean Water Act jurisdiction. River Watch and the Ninth Circuit obviously disagreed. We expect this success by the California organization will inspire groups elsewhere to challenge the use of excavated treatment ponds adjacent to genuinely "navigable waters."

For more information on this topic, please contact the article author, William A. Anderson II.

NORTH CAROLINA

Land Use Controls Proposed for Western North Carolina

Very few counties in the western part of North Carolina have any form of land use planning ordinance to regulate growth. Efforts to enact such ordinances have met heavy resistance for real and irrational reasons. The story goes that when a county tried to implement zoning regulations in the late 1990s, the commissioners were accused of being communists and the county was forced to hire armed guards to protect proponents at board meetings.

The State of North Carolina, for the most part, has stayed out of the fray. There has been reluctance to do anything that would hinder growth and the economic stimulus it creates. Times are beginning to change, though, and communities that previously fought land use regulation seem more inclined to support it as sediment fills streams and the cost of land and homes sky-rockets. That's why the North Carolina General Assembly is now considering a comprehensive bill to regulate development in certain mountain areas. This article reports on the bill and what it is designed to do.

History of Land Use Planning in the Mountains

In the early 1970s, the State of North Carolina considered and in some cases passed a number of far-reaching environmental laws. One of these in North Carolina was the Coastal Area Management Act (CAMA), N.C. Gen. Stat. §§ 113A-100 *et. seq.*, which requires land use planning in 20 coastal counties. CAMA is viewed as the General Assembly's strongest attempt at broad-based land use regulation in the state. However, to view it as a North Carolina initiative is giving it more credit than due. In fact, the law and the required structure of coastal zone planning were mandated for coastal states by the federal Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et. seq.* Thus, in effect, one could argue that North Carolina has never enacted its own comprehensive state land use planning law outside of a federal mandate to do so.

At the same time CAMA was being considered, the General Assembly also considered a corresponding Mountain Area Management Act (MAMA). That law would have required county-wide planning in the western, mountain counties. The plans would have been approved by a designated state agency with the objective of controlling growth to preserve the region and prevent overdevelopment.

MAMA was the mountain version of CAMA, but it was never considered by the General Assembly. CAMA proved very controversial, and the General Assembly session ended before MAMA could be considered and voted upon. MAMA was re-introduced at a later date, but received strong resistance from legislators who believed it would strip people of property rights and allow local governments to intrude into the lives of persons in the counties covered by the law. These beliefs made the bill highly unpopular, and it failed to survive in committee.

In 1983, the General Assembly was successful at enacting the Mountain Ridge Protection Act of 1983. This Act passed because its sponsors were very unhappy about a 10-story condo placed at the top of Little Sugar Mountain in Avery County. As one might expect, the law principally prohibits the building of tall buildings on mountains ridges. Outside of that realm, the law does very little to limit or manage land use and development in the mountain regions.

Impacts of Lack of Comprehensive Planning

The impacts from the absence of a comprehensive land use plan in the western part of North Carolina are hard to miss and are becoming more apparent as the area continues to grow. Mountains are pock-marked with developments and transmission towers. Sedimentation and erosion from development has become a major problem, impacting both streams and lakes. Building on steep land makes sediment difficult to control, and areas stripped of natural vegetation do little to help. Mudslides purportedly are a new and increasing problem.

Critics also claim that new, high-priced developments inflate property values, artificially increase market appraisals and force local residents to pay increased property taxes they cannot afford. Local income levels have not kept pace as traditional industries and businesses in the area have left or no longer exist. According to some, these factors, plus the exorbitant prices being charged for lots and homes, make it extremely difficult for locals to stay on land and in homes they have owned for years.

A Change in Attitude

There are two opposing points of view about legislation mandating comprehensive planning. Those who oppose it argue that zoning deprives citizens of their property rights and that land use regulation harms the construction industry on which many lives depend. Those who support it believe land use controls will avoid degradation of mountain vistas, eliminate spikes in property value and limit harm to the environment. The gap between these viewpoints is narrowing, and even the staunchest property rights, anti-government advocates are beginning to see the need for some form of land use planning and control.

Ordinances to deal with the problems are beginning to be enacted. In 2007, six mountain counties either proposed or passed some type of land use ordinance. These ordinances included steep slope ordinances, ordinances to control density on slopes, and ordinances to limit cleared areas and impervious surfaces within subdivisions. Other proposals sought to impose greater restrictions on condominiums and apartments on mountainsides, require developers to notify neighboring land owners of planned construction, prohibit the cutting of trees for the sole purpose of creating a view, and require wider access roads to subdivisions to make access by emergency vehicles easier.

Safe Artificial Slope Construction Act

Although there has been some movement toward land use ordinances in the mountains, the majority of counties there are not subject to any comprehensive planning process. That may change soon. In the 2008 General Assembly, the legislature will re-consider the Safe Artificial Slope Construction Act of 2007 (SASCA), a comprehensive attempt at land use planning in the mountain region that failed to make it out of committee in 2007. SASCA is not a traditional environmental protection act. The purpose of the law is to protect human safety and property by regulating construction on steep slopes. Steep slopes are slopes of 25 percent or greater or slopes with a slide hazard rating of moderate or high. As a secondary benefit, SASCA will also regulate aesthetics and environmental quality.

Under SASCA, each local government in the mountain region would be required to adopt a steep slope ordinance and submit it for approval to the Sedimentation Control Commission by Aug. 1, 2008. Compliance with the ordinance would be the responsibility of local officials who would be required to inspect all construction sites subject to SASCA.

SASCA would also impose administrative and financial responsibility requirements for developers. The developer would submit to local officials a detailed "artificial slope plan" prior to beginning construction. Among other things, the plan would identify the party conducting the slope construction, the time schedule for completion of the work, and provide maps and material describing different aspects of the work. The plan would be prepared by a professional engineer and be approved by local officials before work could begin. The financially responsible person would be required to ensure that construction is completed and to certify that all SASCA requirements have been met.

Conclusion

Problems from uncontrolled growth have brought about calls for change. This has been happening on a county-by-county basis, but now appears set for broader application if the bill in this year's General Assembly gains any traction. Nevertheless, there is a fair amount of resistance to land use planning in western North Carolina. If the past is any predictor of the future, the bill will not pass. But the fact that it will be considered shows "the times they are a changing."

For more information on this topic, please contact the article author, Kurt J. Olson.

NORTH CAROLINA

Court Rules No Recovery for Medical Monitoring

For years it has been debated whether North Carolina law allows individuals exposed to contaminated media (*e.g.,* contaminated groundwater) to recover damages in a toxic tort case for fear of increased risk of disease and the costs of medical monitoring. A typical scenario occurs when a drinking water well is contaminated by a nearby underground storage tank and the plaintiff drinks that water for months or even years before finding out it's contaminated. After learning of the contamination, the plaintiff sues the tank owner, arguing that chemicals in the water could impact the plaintiff's health. Although without disease now, the plaintiff will often argue he should be allowed to recover money from the defendant for the risk he will develop cancer and other diseases later, for the mental distress associated with that risk, and for periodic medical monitoring and testing.

In *Curl v. American Multimedia Inc,* the North Carolina Court of Appeals ended the debate. It ruled that under North Carolina law there is no cause of action for these types of damages. The court concluded that recognition of any new cause of action for these damages fell under the province of the legislature. According to the court, whether to allow a cause of action for fear of an increased risk of disease or future medical monitoring presents complex policy questions that, on balance, are better addressed by the legislature, not the courts.

Curl v. American Multimedia Inc, No. COA07-444 (N.C. App. Dec. 18, 2007).

For more information on this topic, please contact the article author, Kurt J. Olson.

VIRGINIA

Virginia General Assembly Considers Environmental Legislation

The 2008 session of the Virginia General Assembly convened on Jan. 8, and is now winding down. This session has focused on the budget, immigration, payday lending and other hot-button issues, but legislators have also been debating and voting on a number of contentious environmental bills. Bills to change Virginia's environmental boards have been the subject of intense negotiation between members of Virginia's business community and environmental organizations. A deal has now been struck on the bills that will allow the Water and Air boards to retain their permitting authority, but sets timeframes for decision-making and requires a written legal basis and justification for board actions. We will have a comprehensive article on the board bills in the next issue of the *Report*.

Senate Bill 234 requiring mandatory reporting of greenhouse gas emissions has been passed by the Senate and is now being considered by the House, with business interests questioning the large projected compliance costs such legislation would entail. House Bill 1230 also sought to require mandatory reporting of greenhouse gas emissions, but it was left in the House Commerce and Labor Committee. That means Senate Bill 234 probably faces a similar fate.

Some of the more significant environmental bills as introduced are discussed below. Many of these bills will be killed or substantially amended by the time you read this article. We will have a follow-up article in the next issue of the *Report* on the fate of all of these bills.

House Bills

HB 18 Consolidation of Environmental Boards (patron: David L. Englin). Amends legislation passed during the 2007 session of the General Assembly to consolidate the existing three citizen boards—the State Air Pollution Control Board, the State Water Control Board, and the Waste Management Board—into one 11-member citizen board. The existing three citizen boards would retain authority over any applications for permits and amendments pending before the end of 2007 until the earlier of action on the application or June 30, 2010.

HB 19 Repeal of 2007 Bill Consolidating Environmental Boards (patron: David L. Englin). Repeals legislation passed during the 2007 session of the General Assembly to consolidate the existing three citizen boards—the State Air Pollution Control Board, the State Water Control Board, and the Waste Management Board—into one 11-member citizen board.

"Bills to change Virginia's environmental boards have been the subject of intense negotiation between members of Virginia's business community and environmental organizations."

HB 211 Virginia Water Protection Permit (patron: Mark L. Cole). Exempts landowners from having to obtain a Virginia Water Protection Permit for construction or maintenance of their farm or stock ponds that may impact wetlands.

HB 233 Dishwashing Detergents (patron: John A. Cosgrove). Bans the use of phosphorus in detergents for household dishwashing machines. Phosphorus is one of the primary sources of water pollution. The bill contains a delayed effective date of July 1, 2010.

HB 360 Nonpoint Source Reduction Funding (patron: David L. Bulova)(companion to SB 513). Authorizes the governor and General Assembly to provide additional funding in excess of the amount deposited in the Water Quality Improvement Fund from a budget surplus to fund nonpoint source pollution reduction activities.

HB 392 Stormwater Ordinances (patron: David L. Bulova). Authorizes localities classified as MS4 stormwater localities to enact ordinances to enforce stormwater permits. The bill would give these localities authority to seek civil charges and injunctive relief, and impose civil penalties. Any person violating the ordinance would be subject to a criminal penalty for a Class 1 misdemeanor.

HB 514 Fossil Fuel Combustion Products Permit (patron: Anne B. Crockett-Stark) (companion to SB 717). Requires any applicant seeking approval for the use of fossil fuel combustion products as structural fill to (i) publish a notice of intent to apply for approval of the project from the DEQ; (ii) hold a public meeting to answer citizens' questions; and (iii) submit minutes of the meeting to DEQ. A permit for use of these products as structural fill may not be issued by DEQ until the applicant has fulfilled these requirements.

HB 528 Chesapeake Bay Preservation Act Ordinance Appeals (patron: Brenda L. Pogge). Allows persons who do not agree with the decision of a local board regarding a local Chesapeake Bay Preservation ordinance 30 days to file an appeal with the circuit court.

HB 555 Wetland Banks (patron: Brenda L. Pogge). Authorizes localities to establish and operate wetlands and stream mitigation banks so long as the banks are operated in accordance with state and federal law. The bill also allows localities to purchase credits from mitigation banks.

HB 643 Air Emissions From Major Stationary Sources (patron: Clarke N. Hogan). Requires operators of major stationary sources of air pollution that have facilities (i) whose stacks do not meet good engineering practices; and (ii) emit one or more of the criteria pollutants to demonstrate compliance with all National Ambient Air Quality Standards by Dec. 31, 2008. If this deadline is not met, then beginning July 1, 2009, DEQ may only issue permits that ensure modeled compliance with all NAAQS.

HB 645 Virginia Water Protection Permit (patron: Clarke N. Hogan). Requires the State Water Control Board, prior to issuing a Virginia Water Protection Permit, to consider the permitted project as part of local or regional water supply plans.

HB 650 Authority of Citizen Boards (patron: Clarke N. Hogan). Provides that the Air Pollution Control Board and the State Water Control Board may delegate their authority to make permitting decisions to the director of DEQ (the authority to issue permits related to waste management is already vested with the director). Either board has the discretion to make a final permitting decision if it finds significant public interest in the permit, substantial and disputed issues within the scope of the board's statutory authority, and that the time required for a public hearing and decision by the board would not create an unreasonable delay. Membership of all three citizen environmental boards would be reconfigured so that the membership of each board—the Air Pollution Control Board, the State Water Control Board, and the Virginia Waste Management Board—includes at least one member from the other two boards.

HB 676 Commission on Climate Change (patron: Kenneth R. Plum). Establishes a Climate Change Commission in the *executive* branch of government to develop a Climate Change Action Plan that: (i) characterizes the quantity and source of greenhouse gas emissions in the Commonwealth; (ii) identifies the potential impacts and effects of increasing atmospheric greenhouse gas concentrations on the state; (iii) identifies actions necessary to prepare for and mitigate the likely consequences of climate change; (iv) quantifies a greenhouse gas reduction target; (v) identifies and evaluates both state and regional climate action plans that address climate change and greenhouse gas emissions; and (vi) identifies economically viable programs, policies, and actions that are needed to meet state targets for reducing greenhouse gas emissions.

HB 689 Combined Sewer Overflow Fund (patron: Shannon R. Valentine). The bill designates funds to be deposited in the Combined Sewer Overflow Fund for use by the cities of Lynchburg and Richmond for the completion of their combined sewer overflow projects in certain years when direct general appropriations to the fund are less than $5 million. Deposits shall neither exceed $5 million per year nor $50 million over 10 years. Any funds shall be divided equally between the cities of Lynchburg and Richmond.

HB 793 Secretary of Natural Resources Strategy to Reduce Greenhouse Gas Emissions (patron: David L. Englin). Requires the secretary to develop a comprehensive plan by Jan. 1, 2010, that, if adopted by the General Assembly, is capable of providing a 30 percent reduction of the 2005 greenhouse gas emissions level by 2025 and an 80 percent reduction of the 2005 greenhouse gas emissions level by 2050.

HB 796 Commission on Climate Change (patron: David L. Englin). Establishes a Commission on Climate Change in the *legislative* branch of government with 11 members to develop a Climate Change Action Plan that: (i) characterizes the quantity and source of greenhouse gas emissions in the Commonwealth; (ii) identifies the potential impacts and effects of increasing atmospheric greenhouse gas concentrations on the state; (iii) identifies actions necessary to prepare for and mitigate the likely consequences of climate change; (iv) quantifies a greenhouse gas reduction target; (v) identifies and evaluates both state and regional climate action plans that address climate change and greenhouse gas emissions; and (vi) identifies economically viable programs, policies, and actions that are needed to meet state targets for reducing greenhouse gas emissions.

HB 822 Phosphorous Prohibition in Dishwashing Detergents (patron: Harvey B. Morgan). Bans the use of phosphorus in detergents for household dishwashing machines. Phosphorus is one of the primary sources of water pollution. The ban would take effect on Jan. 1, 2010.

HB 824 Water Quality Information (patron: Harvey B. Morgan). Designates the secretary of Natural Resources as the lead secretary with the responsibility to coordinate technical assistance, information and training so that consistent water quality data is provided to the public.

HB 837 Dam Break Inundation Zones (patron: Beverly J. Sherwood). Provides localities with the authority to address development occurring in dam break inundation zones. The bill directs developers to assist dam owner with required upgrades and requires additional disclosure and notification procedures for dam owners.

HB 976 Single Lot Development; Stormwater Management (patron: Stephen C. Shannon). Provides that the developer of a single lot shall provide stormwater management where substantial redevelopment of such lot is proposed. "Substantial redevelopment" is deemed to occur when land-disturbing activities occur on more than 15 percent of the square footage of any single lot.

HB 1083 Submission of Environmental Impact Report on Major State Projects (patron: Terrie L. Suit). Exempts counties, cities and towns from submission of environmental impact reports on highway construction, reconstruction and improvement projects estimated to cost more than $1 million.

HB 1116 Environmental Impact Reports (patron: Watkins M. Abbitt, Jr.)(companion to SB 43). Requires an environmental impact report be submitted for any major state construction project that will cost $1 million or more. The current threshold amount requiring such a report is $100,000.

HB 1195 Department of General Services; Green Buildings Act (patron: Brian J. Moran). Requires all major facility projects of state agencies to be constructed to meet the U.S. Green Building Council Leadership in Energy and Environment Design (LEED) silver certification standard, unless granted an exemption by the director of the Department of General Services. Such projects will not be required to obtain official LEED certification. Application of the requirement will be phased in over the next three years based on the square footage of the project. The provisions of the bill do not apply to construction projects of public school districts. The bill also requires the use of compact fluorescent light bulbs in state-owned and occupied buildings by Jan. 1, 2010.

HB 1230 Mandatory Reporting of Greenhouse Gas Emissions (patron: Margaret G. Vanderhye) (companion to SB 234). Requires that the State Air Pollution Control Board adopt regulations requiring the reporting of greenhouse gas emissions from stationary sources. The regulations would apply only to those sources that emit more than a *de minimis* amount of greenhouse gases and that are already required to report emissions of other air pollutants. The board is also authorized to adopt regulations that require these same parties to report greenhouse gas emissions from fleets of motor vehicles. Beginning in 2008, the Virginia Department of Transportation is required to provide DEQ with data necessary to maintain a greenhouse gas emissions inventory for individual road segments throughout the Commonwealth.

HB 1259 Environmental Impact Reports (patron: John M. O'Bannon, III). Requires any county, city or town to submit an environmental impact report in connection with a highway construction, reconstruction or improvement project only when such project costs $500,000 or more.

HB 1332 Department of Environmental Quality Authority to Issue and Enforce Air and Water Permits (patron: R. Steven Landes)(companion to SB 423). Vests the authority to issue and enforce permits (including general permits), licenses and certificates related to air and water pollution with the Director of DEQ.

HB 1355 Sewage Treatment Plants (patron: David L. Bulova). Provides that whenever the governing body of a locality or a combination of governing bodies of two or more localities is expanding or upgrading a sewage treatment plant, the facility shall be expanded or upgraded so that it has the capability to accept and treat the sewage from all onsite sewage disposal systems which are not adequately served by another approved disposal site, located in the locality or combination thereof to be served by such plant. Certification of this capability shall be provided to DEQ prior to the approval of any state certificate to construct.

HB 1408 Eligibility for Betterment Loans (patron: Charles D. Poindexter). Directs the Board of Health and the director of DEQ to develop procedures for qualifying the owners of failing septic tanks, underground storage tanks and contaminated dry cleaning stores for betterment loans to be provided by private lenders.

HB 1437 Conservation of Trees during Land Development (patron: David L. Bulova). Provides that certain localities may, by ordinance, require conservation of trees during the development process.

HB 1466 Environmental Impact of Renewable Energy Electric Generating Facilities (patron: Stephen C. Shannon)(companion to SB 321). Requires DEQ to evaluate information provided by state agencies with expertise in natural resource management regarding the potential environmental impacts of a proposed renewable energy electric generating facility. The department is required to coordinate the development of consensus recommendations to address the facility's potential adverse environmental impacts. The recommendations shall identify specific measures, including additional site studies, to mitigate or minimize these adverse environment impacts.

HB 1548 Recyclable Construction and Demolition Debris (patron: Harvey B. Morgan). Prohibits publicly-owned landfills from accepting three or more tons of construction and demolition debris per hauler trip if there are recycling facilities available in the area or there is a construction and demolition landfill in the area.

HB 1552 Erosion and Sediment Control Plan (patron: L. Scott Lingamfelter). Allows any person creating and operating stream restoration banks in more than one jurisdiction to file general erosion and sediment control specifications for stream restoration banks annually with the Virginia Soil and Water Conservation Board.

HB 1567 Nonpoint Source Pollution; Commercial Lawn Care Providers (patron: Dave W. Marsden). Expands an existing training program for nutrient management training to include a voluntary program for commercial providers of lawn care or landscaping services to reduce nonpoint source pollution. Businesses that employ at least one individual trained and certified under a nutrient management program are eligible to receive a "Friend of the Bay Award."

HJ 109 Cost of Investment in High-Carbon-Emitting Generation Study (patron: David L. Englin). Directs the Joint Legislative Audit and Review Commission to study the potential economic impact to the Commonwealth of further investment in high-carbon-emitting generation facilities, such as the power plant proposed for Wise County, if the federal government were to adopt a carbon tax, a cap-and-trade program, or other system to regulate the emission of greenhouse gases. The commission is to provide recommendations for investment in electricity generation that would enable the Commonwealth to maximize its future financial and economic position. Recommendations may include consideration of varying fuel sources, emission control technology, and demand-side management.

HJ 169 Study Policies to Reduce the Negative Impacts of Plastic Bags on the Environment; report (patron: William K. Barlow)(companion to SJ 82). Requests DEQ to convene stakeholders meetings to discuss and report on potential legislative actions that would mitigate the negative effects of improperly disposed of plastic bags on the Commonwealth's environment.

Senate Bills

SB 43 Environmental Impact Reports (patron: Yvonne B. Miller)(companion to HB 1116). Requires state authority to submit an environmental impact report for projects where the land acquisition or construction costs are greater than $1 million. Currently, environmental impact reports must be submitted for projects where the land acquisition or construction costs are greater than $100,000.

SB 49 Zoning Ordinances and Districts (patron: Mary Margaret Whipple). Provides that zoning ordinances and districts shall be drawn and applied with reasonable consideration for the protection of land, water and air from harmful discharges, emissions and other releases.

SB 50 Purpose of Zoning Ordinances (patron: Mary Margaret Whipple). Provides that zoning ordinances shall be designed to give reasonable consideration to protecting the land, water and air from harmful discharges, emissions and other releases.

SB 135 Application of Fertilizers (patron: Richard H. Stuart). Requires a commercial applicator of fertilizers to obtain a soil analysis of the property on which s/he is applying a fertilizer and make

that analysis available to the customer at the time the bill is paid. The bill provides a civil penalty of $500 for not providing the customer with the analysis.

SB 196 Storage of Hazardous Materials (patron: Mark R. Herring). Permits localities to prohibit the initiation of storage of hazardous materials in floodplains five stream miles upstream of an intake for a public water supply. However, the provisions of this bill shall not apply to: (i) operations of the Virginia Department of Transportation or its contractors concerning the construction, reconstruction, or maintenance of highways; or (ii) any Department of Defense facilities and operations.

SB 234 Mandatory Reporting of Greenhouse Gas Emissions (patron: Mary Margaret Whipple)(companion to HB 1230). Requires that the State Air Pollution Control Board adopt regulations for the reporting of greenhouse gas emissions from stationary sources. The regulations would apply only to those sources that emit more than a *de minimis* amount of greenhouse gases and that are already required to report emissions of other air pollutants. The board is also authorized to adopt regulations that require these same parties to report greenhouse gas emissions from fleets of motor vehicles. Beginning in 2008, the Virginia Department of Transportation is required to provide DEQ with data necessary to maintain a greenhouse gas emissions inventory for individual road segments throughout the Commonwealth.

SB 321 Environmental Impact of Renewable Energy Electric Generating Facilities (patron: Frank W. Wagner)(companion to HB 1466). Requires DEQ to consult with other state agencies that have expertise in natural resource management when considering the cumulative impact of new and proposed renewable energy electric generating facilities. Along with such other agencies, the department is to develop a coordinated recommendation providing for any additional site studies necessary to minimize adverse environmental impacts.

SB 322 Renewable Energy Source (patron: Frank W. Wagner). Defines municipal solid waste as a source of renewable energy under the Virginia Electric Utility Restructuring Act.

SB 361 Stream Mitigation Banks (patron: John C. Watkins). Authorizes Henrico County to establish and operate stream mitigation banks so long as the banks are operated in accordance with state and federal law.

SB 378 Reuse and Reclamation of Water (patron: Richard H. Stuart). Requires the State Water Control Board to promote and establish requirements for the reclamation and reuse of all waters of the Commonwealth, including stormwater and wastewater. Currently, the board is only required to evaluate wastewater for reuse. The board is also requested to identify policies, in consultation with the State Water Commission and the Virginia Resources Authority, that provide financial incentives for the construction of improvements allowing increased reclamation and reuse of waters. The board is to recommend the policies in a report presented to the General Assembly and the Governor no later than Dec. 1, 2008.

SB 386 Application of the Chesapeake Bay Preservation Act (patron: Stephen H. Martin). Redefines the localities that are subject to the Chesapeake Bay Preservation Act (CBPA). Currently, the CBPA applies to specifically named counties and cities that are defined as being located within Tidewater, Va. The bill changes the definition of which localities constitute Tidewater, Va. for the CBPA's purposes to include only those localities wholly east of Interstate 95.

SB 413 National Pollutant Discharge Elimination System Permits; Mining Operations (patron: Phillip P. Puckett). Provides for permit fees to be submitted from applicants that discharge waters from mining operations. Applicants will pay $5,000 per discharge point from a major facility and $750 for each other discharge point. In addition, applicants will pay an annual fee of $2,500 for discharge points for major facilities and $250 for other discharge points. Permits will remain valid for five years.

SB 423 Department of Environmental Quality; State Air Pollution Control Board and State Water Control Board (patron: Phillip P. Puckett)(companion to HB 1332). Vests the authority to issue and enforce permits (including general permits), licenses, and certificates related to air and water pollution with the director of DEQ.

SB 488 Conservation of Trees during the Development Process (patron: J. Chapman Petersen). Provides that localities may, by ordinance, require conservation of trees during the development process.

SB 513 Nonpoint Source Reduction Funding (patron: Emmett W. Hanger, Jr.)(companion to HB 360). Authorizes the governor and General Assembly to provide additional funding in excess of the amount deposited in the Water Quality Improvement Fund from a budget surplus to fund nonpoint source pollution reduction activities.

SB 525 Uranium Mining (patron: Frank W. Wagner). Establishes a 15-member executive branch commission to assess the risks and benefits of developing uranium resources in Virginia.

SB 528 Marine Resources Commission; Permits in Emergency Situations (patron: R. Edward Houck). Allows the commissioner to waive the normal permitting requirements during emergency situations if s/he finds it necessary to do so to protect, maintain or repair existing public water, wastewater and other utility systems.

SB 594 Dam Safety (patron: Thomas K. Norment, Jr.). Exempts the owners of historically significant dams that do not present an imminent danger from having to correct deficiencies identified in a dam safety inspection conducted by the Department of Conservation and Recreation.

SB 632 Conservation of Trees During the Land Development Process for Air Quality Improvement (patron: Patricia S. Ticer). Provides that certain localities may, by ordinance, require conservation of trees during the development process.

SB 689 Biofuels Production Incentives; Biodiesel Fuel (patron: John C. Watkins). Expands the definition of biodiesel fuel to include any fuel combustible in a diesel engine that is derived from agricultural products, forest products or other renewable resources.

SB 690 Disbursements from Water Quality Improvement Fund (patron: John C. Watkins). Authorizes DEQ to reimburse localities for the costs of nutrient removal upgrades at publicly-owned treatment works on a monthly basis so long as there is written certification from the grant recipient that the local share of the project costs have been expended.

SB 712 Cap and Trade System for NO_X and SO_2; Nonattainment Areas (patron: Frank W. Wagner). Allows the Air Board to prohibit the purchase of NO_x and SO_2 allowances by electric generating facilities located within specified nonattainment areas, but only if the board finds that: (i) the prohibition will directly and quantifiably reduce ambient concentrations of ozone or $PM_{2.5}$ in the affected nonattainment area; and (ii) there is no other reasonably available approach to achieve a comparable air quality benefit for the Commonwealth.

SB 717 Fossil Fuel Combustion Products Permit (patron: John S. Edwards) (companion to HB 514). Requires any applicant seeking approval for the use of fossil fuel combustion products as structural fill to (i) publish a notice of intent to apply for approval for the project from DEQ; (ii) hold a public meeting to answer citizens' questions; and (iii) submit minutes of the meeting to DEQ. A permit for use of these products as structural fill may not be issued by DEQ until the applicant has fulfilled these requirements.

SB 718 Renewable Energy and Energy Conservation (patron: Linda T. Puller). Requires investor-owned electric utilities to report annually on their efforts to conserve energy. The measure also requires the Virginia Energy Plan to be updated by July 1, 2010, and every four years thereafter. Currently, the Energy Plan is required to be updated in July 2012 and every five years thereafter. The measure also requires utilities to report annually on their efforts to meet the renewable portfolio standard goals, renewable generation overall, and relevant advances in renewable energy generation technology.

SB 748 Alternative Fuels; Net Emissions Increase (patron: Jill Holtzman Vogel). Provides that no permit modifications, trial burns, or other demonstrations are required if the owner of an industrial burner chooses to replace residual oil with processed animal fat, processed vegetable oil or distillate oil. The State Air Pollution Control Board is also required to adopt regulations that: (i) define "net emissions increase" under the minor new source review program as it is currently defined under the major new source review program; and (ii) ensure that the calculation of a net emissions increase under the minor new source review program does not include fugitive emissions from any source in a category that is not required to include fugitive emissions in determining whether the source would be a major stationary source.

SB 752 Brownfields; Public Notice of Voluntary Remediation Plans (patron: Mark R. Herring). Requires DEQ to notify owners of neighboring properties when there is an application to participate in the Voluntary Remediation Program. The owners of neighboring properties will be permitted to participate in a public comment process prior to the adoption of a voluntary remediation plan and demand a public hearing on the department's approval of a voluntary remediation plan or issuance of a certificate of satisfactory completion. Bars the department from issuing any certification of satisfactory completion without the consent of the owners of neighboring properties if any contaminant in groundwater or surface water exceeds a Maximum Contaminant Level established pursuant to the Safe Drinking Water Act.

SJ 82 Study; Policies to Reduce the Negative Impacts of Plastic Bags on the Environment (patron: Frederick M. Quayle) (companion to HJ 169). Requests DEQ to convene stakeholders meetings to discuss and report on potential legislative actions that would mitigate the negative effects of improperly disposed of plastic bags on the Commonwealth's environment.

We will report on the status of these bills in the next issue of the *Report*.

For more information on this topic, please contact the article authors, Channing J. Martin and Thomas B. Hodges Jr.

VIRGINIA

Inspector General Says EPA Needs to Improve Oversight of Nutrient Reductions to the Chesapeake Bay

In response to a request by Sen. Barbara Mikulski of Maryland, EPA's Office of Inspector General (the IG) undertook an evaluation of the progress being made toward reducing loadings of nitrogen and phosphorus to the Chesapeake Bay. Its report entitled *Despite Progress, EPA Needs to Improve Oversight of Wastewater Upgrades in the Chesapeake Bay Watershed* was released on Jan. 8, 2008. This article examines that report and its findings.

Background

In 2000, EPA, Pennsylvania, Maryland, Virginia, and the District of Columbia entered into the Chesapeake 2000 Agreement. Under this agreement, these Bay partners agreed to improve water quality in the Bay and its tributaries so that these waters would be removed from EPA's "impaired waters" list by 2010. That would avoid the need to develop and impose TMDLs for nitrogen and phosphorus for the Bay and its tributaries. The non-signatory Bay watershed states — New York, Delaware, and West Virginia — also agreed to nutrient reduction goals by signing a Memorandum of Understanding with EPA.

Wastewater Facilities Nutrient Loadings

The IG's report found that the largest contributor of nutrients to the Bay is — by far — agriculture. Agriculture contributes 40 percent and 45 percent of the nitrogen and phosphorus loadings, respectively. "Significant" municipal and industrial wastewater treatment facilities contribute only about half as much nitrogen and phosphorus to the Bay watershed as agriculture. Nevertheless, the IG's investigation and report focused only on the progress made to date in reducing nutrient discharges from the 483 significant wastewater treatment facilities in the Bay watershed, 402 of which are municipal facilities. (Another IG report focuses on nutrient loadings from point source discharges of stormwater to the Bay and its tributaries.)

Steps Taken

The IG found that "EPA and its state partners have taken a number of steps to lay the foundation for achieving the 2010 nutrient reduction goals. Water quality standards have been set, nutrient loadings have been allocated, and nutrient limits are beginning to be incorporated into permits." Nevertheless, "EPA acknowledged that the nutrient goals will not be met by 2010." The IG's report notes that based on recent information, EPA "estimated that wastewater facilities will come close to achieving the nutrient reduction goals in 2010." Unfortunately, how close EPA believes these facilities will come to the goals is not set forth in the report because EPA did not provide the IG with this information in time for it to be evaluated. The IG notes wastewater facilities must make significant reductions in nutrient discharges in the three years remaining before the 2010 deadline, and says, "Significant challenges include generating sufficient funding and addressing continuing population growth."

What Can EPA Do?

The IG recommends that EPA do a better job of monitoring progress to ensure wastewater facilities are upgraded on time and that loading reductions are achieved and maintained. The IG recommends "that the EPA Region 3 Administrator work with the states to establish interim construction milestones for priority facilities; monitor milestone and financial funding progress for these facilities, and continue efforts in developing effective and credible water quality trading programs." The IG also said "the Regional Administrator should … have EPA and states continue to evaluate industrial discharges and refine industrial nutrient cap loads where appropriate."

Comment

The IG's report is notably "fluffy" with little real substance to the recommendations. Moreover, EPA oversight isn't the answer. The pace of nutrient reductions to the Bay is driven by hard economic realities. To foster significant, quick nutrient reductions from wastewater facilities, particularly the 402 significant municipal facilities, what is really needed is more money. Unfortunately, that seems difficult to come by from either Congress or state legislatures.

Despite Progress, EPA Needs to Improve Oversight of Wastewater Upgrades in the Chesapeake Bay Watershed (Report No. P-08-0049) (Jan. 8, 2008) found at
http://www.epa.gov/oig/reports/2008/20080108-08-P-0049.pdf

For more information on this topic, please contact the article author, Thomas E. Knauer.

VIRGINIA

EPA Proposes to Designate the Roanoke and Winchester Areas as Ozone Attainment Areas

After EPA adopted the 8-hour ozone NAAQS in 1997, the agency set about to designate all areas of the country as either meeting (attainment) or exceeding (nonattainment) the NAAQS. However, EPA developed a program, the "Early Action Compact" (EAC) program, whereby areas of the country that had ambient ozone concentrations just over the NAAQS could enter into an agreement with EPA that would defer designating the EAC area as nonattainment. To enter an area into the EAC program, the state (and sometimes the localities) had to agree to undertake measures necessary to reduce ambient air concentrations of the ozone precursor pollutants NO_X and Volatile Organic Compounds (VOCs) earlier than might otherwise have been required under the federal Clean Air Act.

DEQ enrolled the Roanoke area (the cities of Roanoke and Salem, and Roanoke and Botetourt counties) and the Winchester area (the City of Winchester and Frederick County) in the EAC program, and EPA deferred its designation decisions for these two areas until April 15, 2008. EPA has now determined from ambient air quality monitoring during 2005, 2006, and 2007 that these two areas meet the 8-hour ozone NAAQS. Thus, EPA proposes to designate them as ozone attainment areas.

Comment

Designation of the Roanoke and Winchester areas as attainment areas is good news for the residents and businesses in these areas. First, the attainment designation indicates the air in these areas has gotten better than it was a few years ago. Second, localities do not want to be designated nonattainment because it hampers economic development, particularly the location of new businesses and the expansion of existing businesses in the area.

However, the success of the Roanoke and Winchester EAC areas to attain the 8-hour ozone NAAQS may be short-lived. EPA is considering lowering the ozone NAAQS from the current level of 0.08 ppm. EPA has expressed a preference for setting the new NAAQS in the range of 0.070 to 0.075 ppm. The 2005-2007 ozone "design value" (the ambient ozone concentration EPA compares to the NAAQS) was 0.076 ppm for the Roanoke EAC area and 0.073 ppm for the Winchester EAC area. If EPA lowers the ozone NAAQS, the Roanoke area and possibly the Winchester area would be in jeopardy of a nonattainment designation. Perhaps if EPA lowers the NAAQS, the agency will once again offer areas an opportunity to enter into early action compacts to avoid nonattainment designation.

73 Fed. Reg. 6863 (Feb. 6, 2008)

For more information on this topic, please contact the article author, Thomas E. Knauer.

GLOSSARY OF ABBREVIATIONS

CAA	Clean Air Act
CAMR	Clean Air Mercury Rule
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
CWA	Clean Water Act
CO_2	Carbon Dioxide
DCR	Department of Conservation and Recreation
DENR	North Carolina Department of Environment and Natural Resources
DEQ	Virginia Department of Environmental Quality
EAC	Early Action Compact
EPA	U.S. Environmental Protection Agency
GHGs	Greenhouse Gases
HAP	Hazardous Air Pollutant
MACT	Maximum Achievable Control Technology
NAAQS	National Ambient Air Quality Standards
NO_x	Nitrogen Oxides
$PM_{2.5}$	Particulate Matter less than or equal to 2.5 micrometers in diameter
PM_{10}	Particulate Matter less than or equal to 10 micrometers in diameter
SO_2	Sulfur Dioxide

About the Williams Mullen Environmental Report Editor

Channing J. Martin, editor, is chair of the Environmental Practice Group at Williams Mullen. He has over 21 years of experience in environmental law and counsels clients on a wide variety of issues. Mr. Martin is past chairman of the Environmental Law Section of the Virginia State Bar and the Richmond Bar Association, and is editor-in-chief of *Trends*, a publication of the American Bar Association's Environment, Energy and Resources Section. He is listed in *The Best Lawyers in America* for environmental law.

804.783.6422, cmartin@williamsmullen.com

About the Williams Mullen Environmental Practice Team

William A. Anderson II has 30 years of experience in environmental law. He focuses his practice on compliance/regulatory counseling, enforcement, permitting, and transactional matters. He has especially broad experience in the chemicals, refining and industrial sectors. Mr. Anderson serves on the editorial board of the *Environmental Liability, Enforcement & Penalties Reporter*. He is listed in *The Best Lawyers in America* and *Washingtonian* for environmental law.

202.327.5060, wanderson@williamsmullen.com

Amos C. Dawson, III has over 32 years of experience in the practice of environmental law and is a former assistant attorney general of the Environmental Protection Section of the North Carolina Department of Justice. He also served as a staff attorney to the North Carolina Coastal Resources Commission. He is listed in *The Best Lawyers in America* for environmental law and a member of the *Business North Carolina* "Legal Elite Hall of Fame."

919.981.4010, adawson@williamsmullen.com

Thomas B. Hodges Jr. provides compliance/regulatory counseling and advises clients on enforcement, permitting, due diligence, litigation and transactional matters. Prior to joining the firm, Mr. Hodges was an environmental consultant with Earth Tech, Inc., specializing in environmental site assessments and remediation projects.

804.783.6584, thodges@williamsmullen.com

Thomas E. Knauer has over 21 years of advising clients on federal and state environmental laws and regulations, including rulemakings, permitting proceedings and enforcement actions involving air emissions, wastewater discharges, and the management of solid and hazardous wastes. He currently serves as counsel to the Air Regulation Subcommittee of the Virginia Manufacturers Association.

804.783.6445, tknauer@williamsmullen.com

Kurt J. Olson represents clients on matters involving all of the major environmental programs including CERCLA (Superfund), RCRA, the Clean Water Act, the Clean Air Act and the corresponding state programs, and has litigated a number of cases arising under these laws. Mr. Olson also has worked extensively in the area of stressed property redevelopment and Brownfields. He is listed in *The Best Lawyers in America* for environmental law.

919.981.4084, kolson@williamsmullen.com

Sean M. Sullivan provides auditing and compliance counseling regarding all of the major federal environmental statutes. He also represents clients involved in toxic tort litigation as well as CERCLA information requests, response actions, and cost recovery actions.

202.293.8141, ssullivan@williamsmullen.com

Editorial inquiries should be directed to Channing J. Martin, Editor, Two James Center, 1021 E. Cary Street, Richmond, VA 23219, 804.783.6422.