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

Williams Mullen
Environmental Report

FEDERAL

Water Quality Trading Programs Could be Imperiled by Recent Court Decision

A recent decision by the U.S. Court of Appeals for the Ninth Circuit could have a significant impact on the trading of pollutant credits in connection with obtaining CWA discharge permits. The permit at issue in the case would have allowed a proposed copper mine to discharge wastewater into a creek that did not meet applicable water quality standards (otherwise known as an "impaired water"). EPA had granted the permit because the mine operator had obtained pollutant offsets for the pollutants it wished to discharge. The court, however, held that EPA cannot authorize a new discharge into an impaired waterbody on the basis of pollutant offsets unless the owner or operator of the new discharge satisfies two regulatory criteria in 40 C.F.R. § 122.4(i) *prior* to close of the public comment period on the draft permit. Specifically, the permittee must establish:

1. There are sufficient remaining pollutant load allocations to allow for the discharge; and

2. The existing discharges into the relevant segment of the waterbody are "subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards."

Because EPA had not created a "plan or compliance schedule" to bring Pinto Creek into compliance with the water quality standards, the court concluded that EPA could not issue a NPDES permit for the proposed discharge. The court said that "[t]he objective of [Section 122.4(i)] is not simply to show a lessening of pollution, but to show how the water quality standard will be met if the [permit applicant] is allowed to discharge pollutants into the impaired waters."

Importantly, the court's analysis did not end with the need to establish the two requirements of Section 122.4(i). The decision went on to hold that in order for EPA to be able to issue a NPDES permit for new discharges to an impaired water, permit applicants must be able to demonstrate that all point source - and, if necessary, non-point source — discharges to the waterbody are subject to schedules of compliance. Even though EPA lacks jurisdiction over non-point source discharges, the court held that states can — and must — assume control over those discharges and implement compliance sched-

ules in order for EPA to be able to grant a NPDES permit for discharges into an impaired water. The court also held that *all* point-source discharges must be subject to a plan of compliance to satisfy Section 122.4(i), as opposed to all *permitted* point-source discharges. In other words, if there are unpermitted, point-source discharges into an impaired water, EPA cannot issue a permit authorizing an additional, new discharge into that water until the agency brings the existing dischargers into compliance with the Clean Water Act.

The decision may represent a substantial impediment to the use of EPA's Water Quality Trading Policy (the "Policy") in impaired waters. Under the Policy, EPA allows the owner or operator of a discharge to receive credit for reductions in the total amount of pollutants discharged from another source through a credit trading program. The agency permits such credit trading on the theory that it may be more cost effective to achieve pollutant reductions at one facility than it is at another. In the context of new discharges into an impaired water, credit trading allows a permit applicant to secure reductions in pollutant discharges from other facilities that are sufficient to allow a new facility to discharge into the impaired water without increasing the total pollutant load. As a consequence, overall water quality remains about the same, but it does not necessarily improve.

As noted above, the Ninth Circuit rejected this approach in *Pinto Creek* because it concluded that Section 122.4(i) requires more than simply showing a reduction in pollution within an impaired water. Rather, the permit applicant must demonstrate how the waterbody will still be able to achieve compliance with the water quality standards. Given that EPA and the states have not implemented such far reaching controls and compliance schedules for many impaired waters, the Ninth Circuit's approach raises substantial barriers to obtaining a new NPDES permit for an impaired water.

Comment

While the Fourth Circuit has not adopted a similar interpretation of Section 122.4(i), the decision is troubling given the state of implementation for the Total Maximum Daily Load Program throughout the country. New facilities may find it substantially more difficult, if not impossible, to obtain NPDES permits in industrialized areas. An unintended consequence may be that industries must locate new facilities in previously undeveloped locations to be able to discharge to a receiving water. That outcome would seem to turn the regulatory scheme on its head.

Friends of Pinto Creek v. EPA, 504 F.3d 1007 (9th Cir. 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 Tightens Ozone NAAQS

EPA has issued a final rule adopting more stringent national ambient air quality standards for ozone. The new primary and secondary standards replace the current standards EPA adopted in 1997.

The new primary eight-hour standard is 0.075 parts per million ("ppm"), and the new secondary standard is identical to the new primary standard. The previous primary and secondary standards were identical eight-hour standards, set at 0.08 ppm, but because of EPA's rounding convention, the standard effectively became 0.084 ppm. Thus, areas of the country with ozone levels as high as 0.084 ppm were deemed to have attained the 0.08 ppm standard.

EPA says it based the new NAAQS on the most recent scientific evidence about the effects of ozone. EPA notes that ozone can harm people's lungs, and the agency is particularly concerned about individuals with asthma or other lung diseases, as well as those who spend a lot of time outside, such as children. Ozone exposure can aggravate asthma, resulting in increased medication use and emergency room visits, and it can increase susceptibility to respiratory infections.

EPA selected the levels for the final standards after reviewing more than 1,700 peer-reviewed scientific studies about the effects of ozone on public health and welfare, and after considering advice from the agency's external scientific advisors and staff, along with public comment. EPA held five public hearings and received nearly 90,000 written comments.

Ground-level ozone is not emitted directly into the air but rather forms when the ozone "precursor" pollutants nitrogen oxides (NOx) and volatile organic compounds (VOCs) react together in the atmosphere. Power plants, motor vehicle exhaust, industrial facilities, gasoline vapors and chemical solvents are the major man-made sources of these emissions.

EPA estimates that the final standards will yield health benefits valued between $2 billion and $19 billion. Those benefits include preventing cases of bronchitis, aggravated asthma, hospital and emergency room visits, nonfatal heart attacks and premature death,

among others. EPA's Regulatory Impact analysis shows that benefits are likely greater than the cost of implementing the standards. Cost estimates range from $7.6 billion to $8.5 billion to implement the standards.

EPA noted that significant progress has been made in reducing ground-level ozone across the country. Since 1980, ozone levels have dropped 21 percent as EPA, states and local governments have worked together to improve the quality of the nation's air. EPA said it expects improvement to continue as a result of landmark regulations such as the Clean Air Interstate Rule, designed to reduce emissions from power plants in the East, and the Clean Diesel Program, designed to reduce emissions from highway, nonroad and stationary diesel engines nationwide. "America's air is cleaner today than it was a generation ago. By meeting the requirement of the Clean Air Act and strengthening the national standard for ozone, EPA is keeping our clean air progress moving forward," said EPA Administrator Stephen L. Johnson.

The new standards were attacked by both industry and environmental advocacy groups. Clean Air Watch said in adopting the 0.075 ppm standards rather than more stringent primary and secondary standards, Administrator Johnson "ignored the clear advice of [EPA's] own science advisors. [EPA] is compromising public health to save industry money." In contrast, the National Association of Manufacturers said the cost of the new standards are "too high and the benefits too unclear to impose this new burden on America's manufacturers and employees. Moving to a more stringent standard could have a devastating effect on manufacturing employment."

The effective date of the rule is May 27, 2008. Once effective, the rule will trigger a requirement under the CAA for states to submit to EPA their recommendations by June 2009 for designating areas as attainment areas (where the air meets the new NAAQS) or nonattainment areas (where the air does not meet the new NAAQS). EPA will then have until June 2010 to officially designate all areas of the country. After that, states will have until 2013 to submit and have EPA approve their state implementation plans to bring nonattainment areas into attainment and keep them in attainment. Depending on the severity of their nonattainment areas, states will be required to achieve the new NAAQS sometime between 2013 and 2020.

73 Red. Reg. 16436 (March 27, 2008)

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

FEDERAL

From Bad to Worse

As we reported in the March, 2007 issue of the *Report*, Euclid of Virginia, Inc., the operator of 23 service stations in Virginia, Maryland and Washington, D.C., was assessed $3.1 million in civil penalties by an EPA Administrative Law Judge for various UST violations. To put it mildly, the evidence showed that compliance with UST regulations was not a priority for the company. After inspecting 72 USTs at Euclid's service stations, EPA found that the company had not maintained leak detection equipment, had not taken steps to protect its USTs against corrosion, had not kept proper records, and had not maintained financial assurance. The agency tried to get Euclid to correct these deficiencies, and then filed an administrative complaint against the company when it failed to do so.

We're pretty sure Euclid now wishes it had complied. The civil penalty imposed was the largest ever assessed by an EPA Administrative Law Judge for violation of any environmental law. But wait - it gets worse.

Euclid appealed the decision by EPA Administrative Law Judge Carl Charneski to EPA's Environmental Appeals Board. The result? The Board raised the penalty amount to $3.16 million. It ruled against Euclid on almost every issue and then found in favor of a cross-appeal by EPA. The additional $79,262 in penalties was for inventory control violations that the Administrative Law Judge dismissed.

Comment

The moral here is not to get lazy about UST regulatory obligations. Regulatory agencies take these obligations very seriously. UST owners and operators who don't share that sentiment could be in for a very expensive surprise.

Euclid of Virginia, Inc., 13 E.A.D. ___, (RCRA March 11, 2008).

For more information on this topic, please contact the article author, Channing J. Martin.

FEDERAL

CBF Asks EPA to Accelerate Bay Cleanup

The Chesapeake Bay Foundation ("CBF")believes the health of the Chesapeake Bay isn't improving fast enough. On March 17, 2008, it sent a letter to EPA requesting that the agency immediately begin work on a Total Maximum Daily Load ("TMDL") for the Chesapeake Bay. In Dec., Maryland, Virginia and Pennsylvania announced that they were unlikely to meet the goals set under the Chesapeake 2000 Agreement. Under the agreement, if states cannot reach the goals by 2010, EPA must develop a bay-wide TMDL. CBF believes that EPA should start developing the TMDL now instead of waiting until the action is mandated in 2011, after the goals are officially missed.

In the letter, CBF vice president Roy Hoagland said, "It is time, past time, for the EPA to exert its role as the enforcer and protector of the nation's waters under the Clean Water Act to develop a strong, enforceable, bay-wide TMDL. And it should do so now, given the existing admission of failure of the current program."

Comment

EPA does not move quickly, and 2011 is a good ways off. Consequently, we don't expect the agency will develop a bay-wide TMDL anytime soon. Nevertheless, CBF is probably right. Despite the best efforts of all involved, it looks like it will be very difficult to meet the goals of the Chesapeake 2000 Agreement by 2010.

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

NORTH CAROLINA

Coastal Resources Commission Proposes Changes to Setback Requirements for Ocean Hazards Area

At its January 2008 meeting, the North Carolina Coastal Resources Commission (the "commission") proposed changes to its existing General Use Standards for Ocean Hazard Areas. These proposed changes will significantly alter the setback requirements in these areas, particularly in areas that have received large-scale beach renourishment. After the public has an opportunity to comment on these proposed changes, the commission will take final action.

Background

North Carolina has long regulated Ocean Hazard Areas in an attempt to minimize the loss of property and life resulting from hurricanes and other significant storm events. It has done so through land use restrictions and setback requirements. Under the existing setback rules, the commission measures required setbacks from the "vegetation line" (the first line of stable, natural vegetation upland of the surf-zone) or the "measurement line" (an artificial setback line for areas without vegetation). Currently, if the erosion rate in an area is less than two feet per year, new construction must be setback at least 60 feet from either the vegetation line or the measurement line. In areas where the erosion rate is two feet per year or more, new construction must be setback from the either vegetation line or the measurement line by a distance that is at least 30 times the long-term annual erosion rate.

The Proposed Rules

The proposed rules would significantly alter the ocean hazard setback requirements and impose additional restrictions on development in these areas. The new setback requirements would depend on the size and type of the building and the dune structure in the area where development is proposed. A building of less than 5,000 square feet would require a setback of the greater of either 60 feet or 30 times the shoreline erosion rate – fairly similar to the existing rules. On the other hand, for a building greater than 100,000 square feet, the proposed rules would require a setback of the greater of either 170 feet or 85 times the shoreline erosion rate - a substantial increase in the required setback. In addition, no portion of any new development would be allowed to extend oceanward of the required setback distance, including cantilevered, knee-braced, or other structures that typically extend oceanward of their pilings.

The proposed rules would also have significant implications for highly developed areas that have received large-scale beach fill. If the changes are adopted, development setbacks in these areas will likely be measured from the vegetation line that existed *one year prior to the onset of construction* (the "static vegetation line"). The proposed rules reflect the commission's opinion that beach renourishment represents a temporary solution to erosion and that newly placed sand is

likely to erode at least as quickly as the original beach. As a result, the proposed rules require developers to calculate setbacks based on the conditions at the site prior to development, as opposed to the more favorable conditions that might exist immediately after completion of a renourishment project.

The proposal provides a limited exception to this policy that will allow a government or a community to apply for a "static line exception" where a development could comply with setback requirements from the vegetation line, but not the static vegetation line. In order to apply for the static line exception, the community must be able to demonstrate a "long-term commitment to beach fill," which includes a professionally prepared beach fill plan for a period of at least 30 years, evidence of the existence of sufficient sand to meet the project's needs, and proof of sufficient financial resources. Even if the commission grants this exception, there are still a host of other conditions that would apply to the development.

Those who plan to develop property along the North Carolina coast should keep a close watch on these proposed rules, as they may significantly restrict development along the North Carolina waterfront in the future.

15A NCAC 07H .0306

For more information on this topic, please contact the article authors, Sean M. Sullivan or Carrie Anne Orlikowski.

NORTH CAROLINA

North Carolina Increases Penalties for CAMA Violations

Those who seek to develop along North Carolina's coast without first obtaining the necessary permits can expect increased penalties to be assessed against them for their actions. Effective Feb. 1, 2008, the Coastal Resources Commission (the "commission") amended its regulations so that violations of North Carolina's Coastal Area Management Act ("CAMA") carry stiffer civil penalties. The new penalties vary based on whether the violation involves major development versus minor development and whether the project was eligible for a permit. The changes represent the first increase in penalties since 1983.

For cases involving major development (development that requires another federal or state permit, that involves drilling or excavation to obtain natural resources, that involves construction of buildings greater than 60,000 square feet in size, or that involves the disturbance of more than 20 acres of land), the new penalties are as follows:

- Where a permit for the development was available from the commission, but the developer failed to apply for it, the penalty is two times the relevant CAMA permit application fee, plus investigative costs.

- Where the commission could not have issued a permit for the development at all, the violator will be assessed the relevant permit application fee and investigative costs, as well as a penalty of up to $10,000 (up from a maximum of $2,500).

- If the commission determines that the violation was willful or intentional, the penalty amount is doubled, and it must be at least $2,000. However, the total penalty may not exceed $10,000 for each violation.

For cases involving minor development (all other types of development), the new penalties are as follows:

- In cases where the developer could have obtained a permit from the commission, but failed to apply for one, the penalty is twice the relevant permit application fee plus the com mission's investigative costs.

- In cases where the commission could not have issued a permit for the project, the penalty is equal to the applicable permit application fee, the commission's investigative costs, and an additional amount, not to exceed $1,000.

- If the commission determines that a minor development violation was willful or intentional, the penalty amount is doubled, but the total penalty still may not exceed $1,000 for each violation.

Finally, for cases in which a developer fails to cease illegal activities and/or fails to restore a damaged area, the commission may treat the violation as continuing and may assess an additional penalty for each day the violation continues.

"...the commission may treat the violation as continuing and may assess an additional penalty for each day the violation continues..."

Persons who are engaged in development along the North Carolina Coast should take care that their activities are properly permitted and should comply with the terms of any permits issued. Failure to do so has just gotten more expensive.

15A NCAC 07J .0409

For more information on this topic, please contact the article authors, Sean M. Sullivan or Carrie Anne Orlikowski.

VIRGINIA

Drive To Regulate GHG Emissions Sputters in Virginia General Assembly

At first, the drive toward greenhouse gas ("GHG") emission regulation appeared to be accelerating in Virginia. The Governor's Commission on Climate Change held its first meeting. The 2008 session of the General Assembly saw the introduction of more than ten climate change related bills. Virginia joined The Climate Registry, a multi—state effort to provide a consistent GHG estimation and reporting program. All of this activity came on the heels of the Virginia Energy Plan which calls for a reduction in greenhouse gas emissions through greater use of renewable fuels and energy efficiency.

The momentum stalled, however, when the House of Delegates rejected all of the climate change bills that addressed GHG emissions. While some of Virginia's leaders believe climate change is a problem that needs to be addressed through legislation now, that feeling is far from unanimous. This article examines the current state of Virginia's actions on climate change.

The Commission

Governor Tim Kaine is leading the charge against climate change. On Dec. 21, 2007, the governor signed Executive Order 59 which established the Governor's Commission on Climate Change (the "commission"). The commission's goal is to prepare a Climate Change Action Plan (the "Plan") which lays out a course of action to reduce Virginia's GHG emissions by 30 percent by 2025, bringing emissions back to 2000 levels.

The commission is comprised of 32 individuals from around the Commonwealth. The members include representatives from the General Assembly and local government, scientists, economists, land use experts, environmental organizations and business. Various sectors of the business community are represented, including energy, transportation, manufacturing, development and agriculture. The commission is chaired by Secretary of Natural Resources L. Preston Bryant, Jr. The senior advisor to the governor on energy policy and the secretaries of transportation and commerce and trade will serve as ex officio members.

The commission's plan is to accomplish the following:

- Inventory the amount of and contributors to Virginia's existing GHG emissions as well as determine projected emissions through the year 2025;
- Evaluate the expected impacts of climate change on Virginia's natural resources, the health of its citizens, and the major aspects of Virginia's economy, including the agriculture, forestry, tourism and insurance industries;
- Identify how Virginia can prepare for the likely consequences of climate change;
- Identify the actions required to achieve the 30 percent reduction goal; and
- Identify how other states, regions and the federal government are approaching the issue.

The first meeting of the commission was held on Feb. 1, 2008. During the meeting, members were sworn in and heard presentations on the Virginia Energy Plan and a proposed work plan. The Virginia Energy Plan, issued in September 2007, first recommended GHG reductions and the return of emissions to 2000 levels by 2025. It espoused electricity conservation, renewable portfolio standards and reduced gasoline usage as potential tools to reach those levels. The energy plan also recommended formation of the commission and mandatory GHG emissions reporting.

The work plan was adopted by the commission as the plan was proposed except for the addition of two discussions on a cost/benefit analysis of GHG reduction strategies. This may preview future disputes among stakeholders because many opponents of mandatory GHG emission reductions focus on the high costs versus the speculative benefits. The commission's work plan calls for seven more meetings. Each meeting will focus on a different policy area and will allot time for public comments. The meetings culminate in November 2008, when the commission will present its recommendations and findings.

Legislation

Climate change bills kept legislators, business interests and environmental organizations busy during this year's General Assembly. For the most part, however, the bills died in the thickets of House parliamentary procedure without even a vote on the floor. Sen. Mary Margaret Whipple (D-Arlington) and Del. Margaret G. Vanderhye (D-McLean) introduced companion bills that required mandatory reporting of GHG emissions from stationary sources such as coal-fired power plants. The bills also directed VDOT to cooperate with DEQ to maintain a GHG inventory for roads. During committee hearings, concerns were raised about the potential costs of compliance as well as the possibility of future contradictory federal regulation. The bills were consolidated and approved by the Senate, but failed to pass the House Commerce and Labor Committee.

Another bill introduced this session would have created a legislative commission on climate change to compliment the Governor's Commission. The House Committee on Rules passed by this bill indefinitely, a polite way of letting the bill die in committee. A bill to require all major state projects to meet the Green Building Council Leadership in Energy and Environmental Design (LEED) silver certification standard was left in the House Committee on General Laws. The Assembly was able to enact, however, a couple of bills promoting renewable energy, one of which designated municipal solid waste as a form of renewable energy.

Comment

It's only a matter of time before GHG regulation is a reality in Virginia. The only question is whether it will originate from the General Assembly, Congress or both. Many states already track their emissions, and some require mandatory renewable energy portfolio standards for power producers. A number of states have banded together to create regional markets designed to encourage and bring about reductions in GHG emissions. Efforts to reduce GHG emissions are likely to be expensive and complex. Whether the sacrifices made now will halt the negative effects of global warming remains to be seen. At the moment, however, the Virginia General Assembly seems willing to study the matter while waiting to see what kinds of solutions the federal government offers.

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

VIRGINIA

General Assembly Changes Air and Water Board Permitting Procedures

The 2008 Virginia General Assembly has passed legislation transferring certain permitting and enforcement duties of the State Air Pollution Control Board and the State Water Control Board to the director of DEQ. This article discusses the long road to passage of this legislation and what it means to regulated parties.

Background

In March 2007, the Virginia General Assembly passed legislation to consolidate the State Air Pollution Control Board, the State Water Control Board, and the Virginia Waste Management Board into a single 11—member "unified board." The legislation limited the new board's authority to adopting regulations and transferred the permitting and enforcement functions of the Air and Water boards to the director of DEQ. (The director already had permitting and enforcement authority over waste management.)

The bills that culminated in this legislation came under close scrutiny by both environmental and industry groups and were amended several times. The main focus of debate centered on whether there would be a right of appeal from permitting decisions by the director of DEQ. The legislation that ultimately passed allowed these decisions to be appealed to a new five—member Environmental Appeals Board (separate from the 11—member unified board). However, the Appeals Board's determinations were not to be binding on the director.

In the final days before passage of this legislation, some members of the General Assembly decided more time might be needed to fashion workable processes and procedures governing how the new boards and the director of DEQ would carry out their duties. Thus, the General Assembly added a "reenactment clause" to the legislation. This clause meant that the legislation would take effect only if it were passed again, *i.e.*, re—enacted, by the 2008 General Assembly.

In the time between the 2007 and 2008 sessions of the General Assembly, various stakeholder groups had the chance to consider the legislation and marshal support for their positions. Industry strongly favored a unified board with the power only to promulgate regu-

lations. It also favored the transfer of enforcement and permitting powers to the director of DEQ. Environmental advocacy groups wanted the ability to appeal the director's decisions to a board with authority to overturn those decisions.

In discussions among the various stakeholders, a give-and-take ensued that ultimately led the 2008 General Assembly to scrap the unified board legislation passed by the 2007 General Assembly. The concept of a unified board was dead, but all sides seemed to agree that the current system needed changing.

The New Legislation

After intense negotiations among industrial and environmental stakeholders, the 2008 General Assembly passed, and Governor Kaine signed, legislation maintaining the Air, Water and Waste boards as separate entities. The Air Board will be expanded from its present five members to seven members. That means it will have the same number of members as the Water and Waste boards. More importantly, the Air and Water boards retain authority over enforcement and permitting. However, the new law imposes criteria and procedures that the boards must follow when they make permitting decisions.

Public Hearings and Board Consideration

The legislation allows anyone to request a public hearing during the public comment period on a proposed air or water permit action. Upon completion of the public comment period, the director of DEQ then has 30 days to decide whether to conduct a public hearing, or if a public hearing is already mandated by federal or state law, to submit the proposed permit to the board for its consideration following the mandatory public hearing. The legislation requires the director to grant the request for a public hearing if three conditions are met:

(1) There is significant public interest, as evidenced by the receipt of a minimum of 25 individual requests for a public hearing or board consideration;

(2) The request raises substantial, disputed issues relevant to the permit in question; and

(3) The action, *e.g.,* denial of the proposed permit, requested is not on its face inconsistent with, or in violation of, federal or Virginia law.

Even if these conditions are not met, the director can decide, in his own discretion, to conduct a public hearing or submit the proposed permit to the board for consideration.

Within 20 days after the director's decision, the director can request, or a majority of the board on its own can convene, a board meeting to decide whether to grant or deny the request for a public hearing on the permit or for board consideration of the permit. At such a meeting, the board can decide to delegate its authority to take action on the permit to the director.

Board Decision-Making

If the board takes a permit under consideration, it must take final action within 90 days after the close of the public comment period or by a later date agreed to by the applicant and the board or director. In making its decision on the permit, the board must consider:

(1) The verbal and written comments received during the public comment period;

(2) Any explanation of comments previously received during the public comment period made at the board meeting;

(3) DEQ's comments and recommendations; and

(4) Information from DEQ's files.

If the board agrees with DEQ's recommendation, it must "provide a clear and concise statement of the legal basis and justification for the decision." If the board's decision "varies from the recommendation of the department," the board must, "in consultation with legal counsel, provide a clear and concise statement explaining the reason for the variation and how the board's decision is in compliance with all applicable laws and regulations."

Comment

The purpose of these new permitting procedures is to provide greater certainty about when and how the Air and Water boards

"Environmental advocacy groups wanted the ability to appeal the director's decisions to a board with authority to overturn those decisions."

make decisions on permit actions. Under the legislation, the Air and Water boards can take control of permitting decisions from the director of DEQ only if a public hearing is mandated by federal or Virginia law. This means, for example, that many of the air permits DEQ issues will not be subject to Air Board consideration. Virginia's regulations governing minor new source review, which EPA has approved into the Virginia SIP, do not require a public hearing prior to the issuance of minor NSR permits. Thus, under the new law, the Air Board cannot consider DEQ's decisions on minor NSR permitting actions.

The new law specifies time-frames for DEQ and the boards to make permitting decisions. The boards cannot require DEQ to transfer authority over a given permit and then wait until it sees fit to take action. Moreover, the new law specifies that the board must thoroughly explain its permitting decision, whether that decision is to accept or reject DEQ's recommendations. The board's "clear and concise statement" explaining its decision is likely to be the launching point for any judicial appeal of the board's action.

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

VIRGINIA

Virginia General Assembly Wrap Up

The 2008 regular session of the Virginia General Assembly adjourned on Mar. 13, 2008. During this session legislators passed bills addressing the budget, payday lending, and a number of environmental issues. The environmental boards bill was reworked to allow the boards to retain their permitting authority. (See the previous article on this bill). Climate change was a hot topic, but bills addressing it were not able to pass muster in the House.

Governor Kaine is now in the process of signing, vetoing or suggesting changes to the legislation that passed. The General Assembly will reconvene on Apr. 23, 2008 to consider overriding any veto or adopting any changes proposed by the governor. Bills that are signed by the governor will become effective on July 1, 2008, unless a different date is specified in the bill. The fate of the more significant environmental bills is discussed below.

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. *Tabled in Committee on Agriculture, Chesapeake and Natural Resources.*

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. *Stricken from the docket by Committee on Agriculture, Chesapeake and Natural Resources.*

HB 211 Virginia Water Protection Permit (patron: Mark L. Cole). Exempts landowners from the requirement to obtain a Virginia Water Protection permit for impacts to state waters caused by the construction or maintenance of farm stock ponds and impoundments that do not fall under the authority of the Virginia Soil and Water Conservation Board. *Passed and signed by the governor.*

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. *Passed and signed by the governor.*

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. *Passed and signed by the governor.*

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. *Passed and signed by the governor.*

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. *Passed by indefinitely in Committee on Agriculture, Chesapeake and Natural Resources.*

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. *Passed and signed by the governor.*

HB 555 Wetland Banks (patron: Brenda L. Pogge). Authorizes localities to establish and operate single-user wetlands and stream mitigation banks so long as the banks are operated in accordance with state and federal law. These single-user banks may only be used by localities for compensatory mitigation where the locality is the permittee. *Passed and signed by the governor.*

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 (NAAQS) by December 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. *Left in Committee on Agriculture, Chesapeake and Natural Resources.*

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. *Tabled in Committee on Agriculture, Chesapeake and Natural Resources.*

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. *Tabled in Committee on Agriculture, Chesapeake and Natural Resources.*

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. *Incorporated into HB 796, which was passed by indefinitely by the Committee on Rules.*

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. *Left in Appropriations Committee.*

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. *Left in Committee on General Laws.*

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. *Passed by indefinitely by the Committee on Rules.*

HB 822 Phosphorous Prohibition in Dishwashing Detergents (patron: Harvey B. Morgan). Bans the use of phosphorus in detergents in for household dishwashing machines. Phosphorus is one of the primary sources of water pollution. The ban would take effect on Jan. 1, 2010. *Incorporated in HB 233 which was passed and signed by the governor.*

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. *Passed and signed by the governor.*

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. *Passed and signed by the governor.*

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. *Stricken from the docket by Committee on Counties, Cities and Towns.*

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. *Incorporated in HB 1259 which was passed and signed by the governor.*

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 $500,000 or more. The current threshold amount requiring such a report is $100,000. *Passed and signed by the governor.*

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. *Left in Committee on General Laws.*

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. *Left in Committee on Commerce and Labor.*

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 is estimated to cost more than $1 million. *Passed and signed by the governor.*

HB 1332 Department of Environmental Quality Authority to Issue and Enforce Air and Water Permits (patron: R. Steven Landes)(companion to SB 423). Establishes a uniform permit issuance process for the Air and Water Boards that includes public notice and hearings. Each Board is required to act on the permit application within 90 days of the close of the comment period unless

the applicant agrees to an extension of the time period. The Board's decision must contain a written basis for its decision. The bill also increases membership on the Air Board from five to seven members. A qualification of the Air Board members is changed so that no member can be a current employee of an entity subject to a permit or enforcement order of the Air Board. The qualifications for membership on the Water Board and the Virginia Waste Management Board are changed to require that the members, by their education, training, or experience, be knowledgeable of water quality or waste management, respectively, and shall be fairly representative of conservation, public health, business, and agriculture. *Passed and signed by the governor.*

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. *Passed and signed by the governor.*

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. *Left in Committee on Agriculture, Chesapeake and Natural Resources.*

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. *Passed and signed by the governor.*

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. *Left in Committee on Commerce and Labor.*

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. *Continued to 2009 in Committee on Agriculture, Chesapeake and Natural Resources.*

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. *Passed and signed by the governor.*

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." *Continued to 2009 in Committee on Agriculture, Chesapeake and Natural Resources.*

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. *Left in Committee on Rules.*

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. *Stricken from the docket by Committee on Rules.*

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 $1,000,000. Currently environmental impact reports must be submitted for projects where the land acquisition or construction costs are greater than $100,000. *Passed and signed by the governor.*

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. *Left in House Committee on Counties, Cities and Towns.*

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. *Left in House Committee on Counties, Cities and Towns.*

SB 135 Application of Fertilizers (patron: Richard H. Stuart). Requires the Board of Agriculture and Consumer Services to adopt regulations that certify the competence of the contractor-applicators and licensees who apply any regulated product to nonagricultural property. The regulations are to be in accordance with DCR's nutrient management training and certification program. The board is to consult with DCR and a committee of stakeholders in the development of the regulations. The Board is authorized to impose a civil penalty of up to $250 on any contractor-applicator or licensee who does not comply with the regulations. *Passed, but not yet acted upon by the governor.*

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. *Stricken from the docket in Committee on Agriculture, Conservation and Natural Resources.*

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 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. *Left in House Committee on Commerce and Labor.*

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. *Passed and signed by the governor.*

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. *Passed and signed by the governor.*

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. *Continued to 2009 in Committee on Agriculture, Conservation and Natural Resources.*

SB 378 Reuse and Reclamation of Water (patron: Richard H. Stuart). Authorizes the Virginia Soil and Water Conservation Board to adopt regulations that promote the reclamation and reuse of stormwater in order to protect state waters and the public health and to minimize the direct discharge of pollutants into state waters. *Passed and signed by the governor.*

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 Virginia. The bill changes the definition of which localities constitute Tidewater Virginia for purposes to the CBPA to include only those localities wholly east of Interstate 95. *Stricken from the docket in Committee on Agriculture, Conservation and Natural Resources.*

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 must pay $300 per discharge outfall point. In addition, applicants must pay an annual fee of $300 for each discharge outfall point. *Passed and signed by the governor.*

SB 423 Department of Environmental Quality; State Air Pollution Control Board and State Water Control Board (patron: Phillip P. Puckett)(companion to HB 1332). Establishes a uniform permit issuance process for the Air and Water Boards that includes public notice and hearings. Each Board is required to act on the permit application within 90 days of the close of the comment period unless the applicant agrees to an extension of the time period. The Board's decision must contain a written basis for its decision. The bill also increases membership on the Air Board from five to seven members. A qualification of the Air Board members is changed so that no member can be a current employee of an entity subject to a permit or enforcement order of the Air Board. The qualifications for membership on the Water Board and the Virginia Waste Management Board are changed to require that the members, by their education, training, or experience, be knowledgeable of water quality or waste management, respectively, and shall be fairly representative of conservation, public health, business, and agriculture. *Passed and signed by the governor.*

SB 448 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. *Incorporated into SB 710 which passed and was signed by the governor.*

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. *Passed and signed by the governor.*

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. *Tabled in House Committee on Rules.*

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 he finds it necessary to do so to protect, maintain, or repair existing public water, wastewater, and other utility systems. *Continued to 2009 in Committee on Agriculture, Conservation and Natural Resources.*

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. *Left in Committee on Agriculture, Conservation and Natural Resources.*

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. *Stricken from the docket in Committee on Local Government.*

SB 689 Biofuels Production Incentives; Biodiesel Fuel (patron: John C. Watkins). Expands the definition of biofuels to include neat biodiesel fuel, neat green diesel fuel, and neat ethanol fuel. Biodiesel fuel is redefined as a fuel composed of mono-alkyl esters of long chain fatty acids derived from vegetable oils or animal fats, designated B100, and meeting the requirements of ASTM D6751. Green diesel fuel is now defined as a fuel produced from nonfossil renewable resources, including agricultural or silvicultural plants; animal fats; residue and waste generated from the production, processing, and marketing of agricultural products; silvicultural products; and other renewable resources, and meeting applicable ASTM specifications. *Passed and signed by the governor.*

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. *Passed and signed by the governor*.

SB 710 Conservation of Trees during Land Development (patron: Patricia S. Ticer). Provides that certain localities may, by ordinance, require conservation of trees during the development process. *Passed and signed by the governor.*

SB 712 Cap and Trade System for NOx and SO2; Nonattainment Areas (patron: Frank W. Wagner). Allows the Air Board to prohibit the purchase of NOx and SO2 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 PM2.5 in the affected nonattainment area; and (ii) there is no other

reasonably available approach to achieve a comparable air quality benefit for the Commonwealth. *Continued to 2009 in Committee on Agriculture, Conservation and Natural Resources.*

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. *Tabled in House Committee on Agriculture, Chesapeake and Natural Resources.*

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. *Passed. governor has proposed amendments.*

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 fish oil, processed vegetable oil, distillate oil, or any mixture thereof in place of the same quantity of residual oil to fire industrial boilers. The Air Pollution Control Board is also required to adopt regulations containing certain provisions that clarify the process of emissions calculations under the minor new source program. *Passed and signed by the governor.*

SB 752 Brownfields; Public Notice of Voluntary Remediation Plans (patron: Mark R. Herring). Requires the Department of Environmental Quality to provide written notice of an application for a voluntary remediation plan to any person who owns a property that abuts or lies within 100 feet of the boundary lines of the subject property or who owns a property that is identified as contaminated by a release on the subject property. Notice must also be published in a newspaper of general circulation. A public comment period of at least 30 days shall follow the issuance of notice. *Continued to 2009 in Committee on Agriculture, Conservation and Natural Resources.*

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. *Stricken from the docket in Committee on Rules.*

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

VIRGINIA

Virginia Court Denies CWA Contribution Claim

If sued by the U.S. for wetlands violations, can you file a lawsuit against others seeking to recover a portion of any penalties assessed? Can you successfully claim they, too, were involved and should therefore have to "chip in"? Not in Virginia. That's the ruling of the U.S. District Court for the Western District of Virginia in a case brought by a developer against a number of third parties.

The case arose when the U.S. sued Jacob Frydman, Savoy Senior Housing Corp., and others alleging that they failed to obtain wetlands permits before beginning construction of a subdivision in Lynchburg, Va. Eighteen months after the suit was filed, Frydman asked the court to allow him to file a third-party complaint against the current property owner, the county that issued building permits for the development, and several other companies and organizations that owned property in the vicinity or that were involved with the development.

The third-party complaint that Frydman asked to file argued that if any civil penalties were assessed against him in the government's Clean Water Act case, then all of those he named as defendants in his third-party complaint should share in those costs through contribution under Virginia Code § 8.01-34.

The U.S. opposed allowing the complaint to be filed for a variety of reasons, not the least of which was that the law does not recognize a claim for contribution under these circumstances. The court agreed. It held, "the CWA contains no express provision allowing for contribution, and the federal courts have held that no private remedy should be implied to remedy CWA violations." Frydman asserted that his claim for contribution arose under Virginia law, not federal common law, and said this meant the rulings of these other courts did not apply. But the court found that there were "a host of cases … which stand for the proposition that where no right to contribution is provided by federal statutory or common law, a party

may not engraft a state law contribution claim upon the federal statutory scheme."

Comment

What's the upshot of this case? It is that a violator cannot seek to recover a portion of any Clean Water Act penalties it is forced to pay from others. This does not mean, however, that the alleged violator gets left holding the bag if others, in fact, contributed to the violation. In determining the amount of penalties to be assessed, the law allows a court to consider such factors as justice may require, including the conduct and actions of other parties involved.

We doubt we have heard the last of this decision. An appeal to the U.S. Court of Appeals for the Fourth Circuit seems likely.

U.S. v. Savoy Senior Housing Corp., No. 06-031 (W.D. Va. Mar. 6, 2008).

For more information on this topic, please contact the article author, Channing J. Martin.

VIRGINIA

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

After EPA adopted the eight-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 NOx and 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 Apr. 15, 2008. EPA has now determined from ambient air quality monitoring during 2005, 2006, and 2007 that these two areas meet the eight-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 eight-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.

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

GLOSSARY OF ABBREVIATIONS

CAA	Clean Air Act
CAMA	Clean Area Management Act
CWA	Clean Water Act
DCR	Department of Conservation and Recreation
DEQ	Virginia Department of Environmental Quality
EPA	U.S. Environmental Protection Agency
GHGs	Greenhouse Gases
NAAQS	National Ambient Air Quality Standards
NO_X	Nitrogen Oxides
NPDES	National Pollutant Discharge Elimination System
RCRA	Resource Conservation and Recovery Act
TMDL	Total Maximum Daily Load
UST	Underground Storage Tank
VOCs	Volatile Organic Compounds

About the Williams Mullen Environmental Report Editor

Channing J. Martin, editor, is chair of the Environmental Practice Group at Williams Mullen. He has over 23 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

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.