ENVIRONMENTAL LAW

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I. INTRODUCTION

This article reviews judicial, legislative, and regulatory developments in environmental law from 2008 through the spring of 2009. In addition to developments in the law of Virginia, this article also addresses federal cases and regulatory changes of significance to the Commonwealth.

II. RECENT JUDICIAL DECISIONS

A. *Cases of the Supreme Court of the United States*

The Supreme Court of the United States issued five opinions arising under federal environmental law in its 2008–2009 term, and in several of these cases, deference to federal regulatory agencies figured prominently. Although none addressed questions specifically involving Virginia law, they articulate principles of general applicability to environmental litigation and regulatory programs of the Commonwealth relating to preliminary injunctions, standing to sue, the use of cost-benefit analysis in rulemaking, Superfund liability, and federal wetlands permitting.

1. Preliminary Injunctions

In the first environmental case of the term, *Winter v. Natural Resources Defense Council, Inc.*, the Supreme Court reiterated the standard for issuing preliminary injunctions, focusing particularly on the balance of equities and public interest in the calculus.[1] The case involved the United States Navy's use of "mid-frequency

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1. *See* 555 U.S. ___, 129 S. Ct. 365, 374 (2008).

active" ("MFA") sonar to train sonar operators to detect and track submarines during training exercises conducted off the coast of southern California.[2] The plaintiffs—environmental groups and individuals concerned with protecting the wide variety of marine mammals located in the area where the Navy would conduct its training exercises—alleged that MFA sonar causes serious injury to such animals and sought declaratory and injunctive relief on the grounds that the Navy's training violated the National Environmental Policy Act ("NEPA"), the Endangered Species Act, and the Coastal Zone Management Act ("CZMA").[3] Specifically, the plaintiffs argued that the Navy should have prepared an environmental impact statement ("EIS") pursuant to NEPA, rather than the more limited environmental assessment ("EA") the Navy actually prepared.[4]

The district court granted a blanket preliminary injunction against using MFA sonar during training exercises, finding that the plaintiffs "demonstrated a probability of success" on the merits of their NEPA and CZMA claims, as well as "at least a 'possibility' of irreparable harm to the environment."[5] The Navy filed an emergency appeal to the United States Court of Appeals for the Ninth Circuit, which agreed that injunctive relief was appropriate, but remanded the case to the district court with instructions to issue a narrower injunction that would allow the Navy to conduct some training exercises.[6] The Navy appealed two of the restrictions imposed on the use of MFA sonar in the subsequent injunction issued by the district court and also sought relief from the Executive Branch.[7] The President, acting on the Navy's request, granted an exemption from the CZMA.[8] Additionally, given the "emergency circumstances," the Council on Environmental Quality ("CEQ") authorized the Navy to implement "alternative

2. *Id.* at ___, 129 S. Ct. at 370–71.

3. *Id.* at ___, 129 S. Ct. at 371, 372.

4. *Id.* at ___, 129 S. Ct. at 372, 381.

5. *Id.* at ___, 129 S. Ct. at 372–73.

6. *Id.* at ___, 129 S. Ct. at 373 (citing Natural Res. Def. Council, Inc. v. Winter, 502 F.3d 859, 865 (9th Cir. 2007)).

7. *Id.*

8. *Id.*

arrangements" to NEPA compliance and allowed the Navy to continue its training exercises while employing voluntary mitigation measures.[9]

The Navy filed a motion to vacate the district court's preliminary injunction, which the district court denied.[10] The Ninth Circuit affirmed, finding that (1) there was a question as to whether the CEQ's application of the "emergency circumstances" regulation was lawful, (2) plaintiffs had established a likelihood of success on their NEPA claim, (3) plaintiffs had demonstrated a "possibility" of irreparable harm, and (4) the balance of hardships and consideration of the public interest favored the plaintiffs.[11]

The Supreme Court reversed the Ninth Circuit and vacated the injunction to the extent that the Navy had challenged it.[12] The Court held that the "possibility of irreparable harm" standard applied by the Ninth Circuit in support of the preliminary injunction was too lenient and reiterated that plaintiffs seeking preliminary relief must demonstrate that irreparable harm is *likely* if a preliminary injunction is not issued.[13] Moreover, after reviewing the voluntary mitigation measures the Navy had employed, the Navy's need to conduct training utilizing MFA sonar, and the potential harm to marine mammals, the Court concluded that "the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy."[14] In support of that conclusion, the Court noted that the "lower courts failed properly to defer to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's [southern California] training exercises."[15]

9. *Id*. at ___, 129 S. Ct. at 373–74 (quoting 40 C.F.R. § 1506.11 (2008)).

10. *Id.* at ___, 129 S. Ct. at 374 (citing Natural Res. Def. Council v. Winter, 527 F. Supp. 2d 1216 (C.D. Cal. 2008)).

11. *Id.*

12. *Id.* at ___, 129 S. Ct. at 382.

13. *Id.* at ___, 129 S. Ct. at 375.

14. *Id.* at ___, 129 S. Ct. at 378.

15. *Id.* In a very recent decision, the United States Court of Appeals for the Fourth Circuit significantly tightened the standards that a plaintiff must meet to be entitled to a preliminary injunction, in accordance with the dictates in *Winter*. *See* Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 346–47 (4th Cir. 2009). Under this new, tighter standard, a plaintiff "seeking the preliminary injunction must demonstrate by a clear showing": (1) the plaintiff is likely to succeed on the merits at trial; (2) absent preliminary relief, plaintiff is likely to suffer irreparable harm; (3) the balance of equities tips in plaintiff's favor; and (4) the injunction is in the public interest. *Id.* at 345–46 (internal quotations and citations omitted). All four requirements must be satisfied, and the plaintiff

The Court declined to address the underlining merits of the plaintiffs' case.[16] Commenting that the factors considered above are pertinent to assessing the appropriateness of any injunction, preliminary or permanent, however, the Court cautioned that "it would be an abuse of discretion to enter a permanent injunction, after final decision on the merits, along the same lines as the preliminary injunction."[17]

2. Standing

The next environmental case the Supreme Court decided in the 2008–2009 term, *Summers v. Earth Island Institute*, addressed the issue of whether plaintiff environmental groups had standing to continue to pursue the facial challenge of two regulations of the United States Forest Service ("Forest Service") after settling its as-applied challenge to the same regulations.[18] The regulations at issue[19] exempt certain Forest Service fire-rehabilitation activities and salvage-timber sales from notice, comment, and administrative appeal requirements of the Forest Service Decisionmaking and Appeals Reform Act.[20]

Plaintiffs challenged the two regulations facially and as-applied to the Burnt Ridge Project—a salvage sale of timber on 238 acres of Sequoia National Forest damaged by a fire.[21] Pursuant to the regulations, the Forest Service did not provide public notice of the sale, provide for a period of public comment, or make an appeal process available.[22] Plaintiffs also facially challenged six other Forest Service regulations that were not applied to the Burnt Ridge Project.[23]

The district court granted a preliminary injunction against the sale, and the parties soon settled their dispute over the applica-

bears the burden of proof with respect to each element.

16. *Winter*, 555 U.S. at ___, 129 S. Ct. at 381.

17. *Id.*

18. 555 U.S. ___, 129 S. Ct. 1142, 1147–48 (2009).

19. 36 C.F.R. §§ 215.4(a), 215.12(f) (2008).

20. *Summers*, 555 U.S. at ___, 129 S. Ct. at 1147; *see also* Act of Oct. 5, 1992, Pub. L. No. 102-381, § 322, 106 Stat. 1374, 1419–20 (1992).

21. *Summers*, 555 U.S. at ___, 129 S. Ct. at 1147, 1148.

22. *Id.* at ___, 129 S. Ct. at 1147–48.

23. *Id.* at ___, 129 S. Ct. at 1148.

tion of the regulations to the Burnt Ridge Project.[24] The Forest Service argued that, given the settlement, plaintiffs lacked standing to challenge any of the regulations facially and that the challenge was not ripe.[25] The district court rejected these arguments and adjudicated the merits of plaintiffs' facial challenge to all of the regulations, invalidating five Forest Service regulations and issuing an injunction against their application, effective nationwide.[26] On appeal, the Ninth Circuit determined that the regulations not at issue in the Burnt Ridge Project were not ripe for adjudication due to a lack of case or controversy, but affirmed the district court's determination that sections 215.4(a) and 215.12(f) were contrary to law and upheld the nationwide injunction with respect to them.[27]

The Supreme Court reversed, holding that the plaintiffs lacked standing to facially challenge sections 215.4(a) and 215.12(f) after settlement of their as-applied challenge.[28] The Court noted that Article III restricts the judicial power "to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law," and that the doctrine of standing reflects this limitation.[29] The Supreme Court further noted:

> To seek injunctive relief, a plaintiff must show that he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.[30]

Recognizing that the regulations at issue governed the actions of the Forest Service and did not require or prohibit any action by plaintiffs, the Court stated that under such circumstances, "standing is not precluded, but it is ordinarily 'substantially more

24. *Id.*

25. *Id.*

26. *Id.* (citing Earth Island Inst. v. Ruthenbeck, No. CIV F-03-6386 JKS, 2005 WL 5280466, at *2 (E.D. Cal. Sept. 20, 2005)).

27. *Id.* (citing Earth Island Inst. v. Ruthenbeck, 490 F.3d 687, 696 (9th Cir. 2007)).

28. *Id.* at ___, 129 S. Ct. at 1149–50, 1153. The Court did not disturb the Ninth Circuit's dismissal of the environmental groups' challenge to the remaining regulations, which was not appealed to the Supreme Court. *Id.* at ___, 129 S. Ct. at 1153.

29. *Id.* at ___, 129 S. Ct. at 1148–49.

30. *Id.* at ___, 129 S. Ct. at 1149 (citing Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000)).

difficult' to establish."[31] The Court concluded that the plaintiff environmental organizations had failed to satisfy the injury in fact requirement of standing—the "hard floor of Article III jurisdiction"—because they could not identify any application of the invalidated regulations that threatened imminent or concrete harm to their members' interests after the voluntary settlement of their dispute regarding the application of the regulations to the Burnt Ridge Project.[32]

Additionally, the Court denied the environmental organizations' claim that they had standing to bring their challenge due to the "procedural injury" they suffered because the challenged regulations denied them the ability to comment on certain Forest Service actions and the regulations would continue to deny them this ability in the future.[33] The Court found that a person only has standing to challenge the denial of a procedural right that is granted "to protect *his concrete interests*," thereby establishing injury in fact. [34] This limitation on standing to redress denial of procedural rights is likely to come into play in future environmental cases seeking to challenge agency actions under federal environmental laws.

3. Cost-Benefit Analysis

In *Entergy Corp. v. Riverkeeper, Inc*., the Supreme Court addressed the Environmental Protection Agency's ("EPA") use of cost-benefit analysis in promulgating regulations under section 316(b) of the Clean Water Act ("CWA"),[35] which requires that the location, design, construction, and capacity of cooling water intake structures "reflect the best technology available for minimizing adverse environmental impact."[36] Overturning a decision of the United States Court of Appeals for the Second Circuit, the Court gave deference to the EPA, holding that the agency reasonably viewed section 316(b) as permitting consideration of the

31. *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992)).
32. *Id.* at ___, 129 S. Ct. at 1149–51.
33. *Id.* at ___, 129 S. Ct. at 1151.
34. *Id.* (quoting *Defenders of Wildlife*, 504 U.S. at 572 n.7).
35. 556 U.S. ___, 129 S. Ct. 1498, 1502–03 (2009) (quoting 33 U.S.C. § 1326(b) (2006)).
36. 33 U.S.C. § 1326(b).

technology's costs in setting national performance standards and in providing variances from those standards.[37]

Since 1995, the EPA has promulgated regulations under section 316(b) to regulate operators of industrial power plants that employ cooling water intake structures, which extract water from nearby sources, to cool their facilities.[38] These structures pose threats to aquatic organisms due to "entrainment," which occurs when organisms are drawn up into the intake, or "impingement," which occurs when organisms become trapped against screens and grills intended to keep them from being drawn in.[39] The second phase of regulations the EPA promulgated to implement section 316(b) ("Phase II") set national performance standards for existing facilities that required cooling water intake facilities to reduce the level of impingement and entrainment.[40] However, the agency expressly declined to mandate the adoption of closed-cycle cooling systems or equivalent reductions in environmental impacts.[41] The EPA reasoned that, due to the generally high costs of converting existing facilities to closed-cycle operations and the availability of other technologies that approach the performance of this option, the approach of the Phase II regulations would create substantially similar results at lower cost with fewer implementation problems.[42] The EPA further permitted the issuance of site-specific variances from the national performance standards for facilities that demonstrated either that "the costs of compliance are 'significantly greater than' the costs considered by the agency in setting the standards or that the costs of compliance 'would be significantly greater than the benefits of complying. . . .'"[43]

In remanding the regulations to the EPA, the Second Circuit found the agency's cost-benefit analysis, which "'compare[d] the costs and benefits of various ends, and [chose] the end with the best net benefits,'" impermissible under section 316(b).[44] In a 5-4

37. *Id.* at ___, 129 S. Ct. at 1510.

38. *Id.* at ___, 129 S. Ct. at 1502–03.

39. *Id.* at ___, 129 S. Ct. at 1516 n.1 (Stevens, J., dissenting).

40. *Id.* at ___, 129 S. Ct. at 1504 (quoting 40 C.F.R. § 125.94(b)(1)–(2) (2008)).

41. *Id.*

42. *Id.*

43. *Id.* (citation omitted) (quoting 40 C.F.R. § 125.94(a)(5)(i)–(ii)).

44. *Id.* at ___, 129 S. Ct. at 1505 (quoting Riverkeeper, Inc. v. EPA, 475 F.3d 83, 98 (2d Cir. 2007)).

decision reversing the Second Circuit, the Supreme Court focused on the second step of the administrative law doctrine derived from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, stating that an agency's *reasonable* interpretation of a statute governs regardless of whether it is the *most* reasonable interpretation.[45] After reviewing the statutory language of section 316(b),[46] the language of parallel provisions,[47] and the historical practice of the EPA in interpreting the statute,[48] the Court concluded that the EPA reasonably interpreted the statutory language and, therefore, "permissibly relied on cost-benefit analysis in setting the national performance standards and in providing for cost-benefit variances from those standards as part of the Phase II regulations."[49]

4. Superfund Liability

In *Burlington Northern & Santa Fe Railway Co. v. United States* ("*BNSF*"), the Supreme Court held that: (1) parties are not liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund")[50] as "arrangers" for the disposal of hazardous waste unless they take intentional steps to dispose of a hazardous substance;[51] and (2) parties at a multi-party Superfund site are not jointly and severally liable if a "reasonable basis" exists to apportion their liability.[52] As a result, the Court upheld the district court's finding that the federal government was responsible for ninety-one percent of the cost of remediating contamination attributable to an agricultural chemical distributor that was no longer in business.[53] The

45. *Id.* (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984) (prescribing a two-step inquiry that courts should conduct when reviewing an agency's construction of a statute: (1) whether Congress has directly addressed the precise question at issue; and (2) if not, whether the agency's interpretation was reasonable)).

46. *See id.* at ___, 129 S. Ct. at 1505–06.

47. *See id.* at ___, 129 S. Ct. at 1506.

48. *See id.* at ___, 129 S. Ct. at 1509.

49. *Id.* at ___, 129 S. Ct. at 1510.

50. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2006).

51. Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. ___, 129 S. Ct. 1870, 1879 (2009).

52. *Id.* at ___, 129 S. Ct. at 1881.

53. *See id.* at ___, 129 S. Ct. at 1882–84.

decision will have broad implications for the cleanup of hazardous waste sites throughout the country.

BNSF presented two questions regarding the payment of remediation costs for the cleanup of a hazardous waste site: (1) whether an entity that delivered pesticides to an agricultural chemical distributor could be required to pay for the cost of remediating the distributor's site pursuant to CERCLA, and (2) whether the Ninth Circuit properly held two companies jointly and severally liable for the entire cost of remediating the site.[54] Given the complexity of the case, a detailed summary of the facts is useful to an understanding of its potential application in future cases in Virginia and elsewhere.

Brown & Bryant, Inc. ("B & B") began operating an agricultural chemical distributor in 1960, purchasing chemicals, like the pesticide D-D, from suppliers, including Shell Oil Company ("Shell").[55] In 1975 B & B expanded its operations, leasing an adjacent parcel of land jointly owned by the Atchison, Topeka & Santa Fe Railway Company and the Southern Pacific Transportation Company (now known, respectively, as the Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company) ("Railroads").[56] While B & B was in operation, many chemicals, including D–D, spilled during transfers and deliveries and, due to D–D's corrosive properties, compromised storage equipment.[57]

Beginning in 1983 both the California Department of Toxic Substances Control ("DTSC") and the EPA investigated B & B's site and found extensive soil and ground water contamination.[58] By 1989 B & B had undertaken some remediation efforts, but had become insolvent, requiring the DTSC and the EPA to exercise their authority under section 104 of CERCLA[59] to clean up the site and spend more than eight million dollars on remediation.[60] In 1991 the EPA ordered the Railroads to remediate a portion of the property, and the Railroads sued B & B in the United States

54. *Id.* at ___, 129 S. Ct. at 1877.
55. *Id.* at ___, 129 S. Ct. at 1874–75.
56. *Id.* at ___, 129 S. Ct. at 1874.
57. *Id.* at ___, 129 S. Ct. at 1875 & n.1.
58. *Id.* at ___, 129 S. Ct. at 1875.
59. 42 U.S.C. § 9604 (2006).
60. *BNSF*, 556 U.S. at ___, 129 S. Ct. at 1876.

District Court for the Eastern District of California—an action that was consolidated with recovery actions by the DTSC and the EPA against Shell and the Railroads.[61]

The district court held that both the Railroads and Shell were potentially responsible parties ("PRP") under Superfund because the Railroads owned a portion of the contaminated site and because Shell had "arranged for" the disposal of hazardous substances through its sale and delivery of D–D to B & B.[62] Although the district court found that the site contamination created a single harm, it ruled that the harm was divisible and therefore did not impose joint and several liability.[63] Based on

> the percentage of the total area of the facility that was owned by the Railroads, the duration of B & B's business divided by the term of the Railroads' lease, and the [c]ourt's determination that only two of three polluting chemicals spilled on the leased parcel required remediation and that those two chemicals were responsible for roughly two-thirds of the overall site contamination requiring remediation—the [district] court apportioned the Railroads' liability as 9% of the Governments' total response cost.[64]

The district court also concluded that Shell was liable for six percent of the total cost of remediation based on estimations of spills of Shell products at the site.[65]

On appeal, the Ninth Circuit upheld the finding that Shell had "arranger" liability under Superfund, although it noted that Shell was not a "traditional" arranger under section 107(a)(3) of CERCLA because it had not contracted with B & B for the disposal of hazardous waste.[66] Relying on the CERCLA definition of "disposal," which includes "leaking" and "spilling" of hazardous substances,[67] the Ninth Circuit found that Shell was liable under a broader theory of arranger liability because even though the purpose of Shell's transaction with B & B was not for the disposal of hazardous waste, disposal was foreseeable because Shell was aware that some leakage of its product was likely during the

61. *Id*.
62. *Id.* (citing 42 U.S.C. § 9607(a)(1)–(3)).
63. *Id*.
64. *Id*.
65. *Id.* at ___, 129 S. Ct. at 1876–77.
66. *Id.* at ___, 129 S. Ct. at 1877 (citing United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 948–50 (9th Cir. 2008)).
67. *Id.* (citing 42 U.S.C. § 6903(3)).

transfer of its chemicals to B & B, and Shell provided advice and supervision regarding the safe transfer and storage of its chemicals.[68]

Regarding apportionment of remediation costs, the Ninth Circuit concurred with the district court's finding that the costs were capable of apportionment based on adequate information, but concluded that the record below did not establish a reasonable basis for such apportionment.[69] Because Shell and the Railroads had the burden of proof regarding apportionment, the Ninth Circuit reversed the district court and held them jointly and severally liable for the government's total remediation costs.[70]

In order to determine whether Shell properly could be held liable as an arranger, the Supreme Court looked to the language of the statute, noting that CERCLA imposes strict liability for environmental contamination upon four broad classes of PRPs set forth in section 107(a), including any person who arranges for disposal, treatment, or transport for disposal or treatment of hazardous substances.[71] Given that CERCLA does not specifically define "what it means to 'arrang[e] for' disposal of a hazardous substance,"[72] the Court gave the term its ordinary meaning and found that "an entity may qualify as an arranger under § [107](a)(3) when it takes intentional steps to dispose of a hazardous substance."[73] The Court held that in order for Shell to be an arranger, it "must have entered into the sale of D–D with the intention that at least a portion of the product be disposed of during the transfer process by one or more of the methods described in § [103](3)."[74] Since the evidence adduced at trial did not support such a conclusion, the Court held that Shell was not liable as an arranger for the contamination.[75]

Having decided that Shell was not liable as an arranger under CERCLA, the Court next addressed whether the Ninth Circuit erred in reversing the district court's apportionment of the Rail-

68. *Id.* (citing *BNSF*, 520 F.3d at 948–50).
69. *Id.* (citing *BNSF*, 520 F.3d at 942).
70. *Id.*
71. *See id*. at ___, 129 S. Ct. at 1878 (citing 42 U.S.C. § 9607 (a)(3)).
72. *Id.* at ___, 129 S. Ct. at 1879 (quoting 42 U.S.C. § 9607(a)(3)).
73. *Id.*
74. *Id*. at ___, 129 S. Ct. at 1880.
75. *Id*.

roads' liability.[76] The Court first noted that neither the Railroads nor the Government cooperated with the district court in "linking the evidence supporting apportionment to the proper allocation of the Railroads' liability."[77] It then reviewed the figures the district court used to calculate liability, including the percentage of total area owned by the Railroads, the duration of B & B's business divided by the Railroads' lease, and the percentage of contamination caused by the chemicals spilled on the Railroads' parcel, and determined "that the facts contained in the record reasonably supported the apportionment of liability."[78] Although the Supreme Court noted that the calculations were imprecise, the fact that the district court had allowed a fifty percent margin of error for calculations persuaded it that the district court's determination of the Railroads' liability was reasonable.[79]

5. Scope of Sections 404 and 402 of the Clean Water Act

Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, the final environmental case the Court decided this term, involved questions of whether the EPA or the Army Corps of Engineers ("Corps") had authority to issue a permit under the CWA[80] for the discharge of mining waste and whether the EPA's performance standards apply to the discharge of fill material.[81] The Court held that (1) discharges of fill material authorized by the Corps pursuant to section 404 of the CWA[82] do not require permits from the EPA under section 402[83] of the statute, and (2) the EPA's performance standards do not apply to discharges of fill material regulated by the Corps under section 404.[84] In reaching its decision, the Court gave deference to a legal interpretation of relevant sections of the CWA and implementing regulations set forth in an internal EPA memorandum.[85]

76. *See id.*
77. *Id.* at ___, 129 S. Ct. at 1881–82.
78. *Id.* at ___, 129 S. Ct. at 1882–83.
79. *See id.* at ___, 129 S. Ct. at 1883.
80. Clean Water Act, 42 U.S.C. §§ 1251–1387 (2006).
81. 557 U.S. ___, 129 S. Ct. 2458, 2463 (2009).
82. 33 U.S.C. § 1344.
83. *Id.* § 1342.
84. *Coeur Alaska*, 557 U.S. at ___, 129 S. Ct. at 2474.
85. *See id.* at ___, 129 S. Ct. at 2473.

The dispute in *Coeur Alaska* arose over a recently revived gold mine in Alaska that operates a "froth flotation" mill facility to recover gold from crushed rock.[86] The process creates a waste called "slurry," which is a mixture of rock and water.[87] Rather than pumping the slurry into a tailings pond, the mine owner, Coeur Alaska, proposed to pump approximately 4.5 million tons of slurry over the life of the mine into a twenty-three acre lake near the mine and to discharge lake water into a downstream creek.[88] The proposed discharge would raise the bottom of the lake fifty feet and would affect fish and aquatic life in the lake.[89]

The case presented the question of the scope of authority of the Corps and the EPA over discharges pursuant to sections 404 and 402 of the CWA.[90] The Corps regulates the discharge of dredged or fill material into navigable waters of the United States pursuant to section 404 through the issuance of permits.[91] Regulations implementing section 404 define "fill material" as "material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States."[92] Fill material includes rock and "overburden from mining or other excavation activities,"[93] and "discharge of fill material" refers to the "addition of fill material into waters of the United States," including the "placement of overburden, slurry, or tailings or similar mining-related materials."[94]

Section 402 of the CWA authorizes the EPA to "issue a permit for the discharge of any pollutant" from a point source into waters of the United States except as provided in sections 404 or 318 of the CWA (relating to aquaculture).[95] Under this regulatory program, the EPA or a state, like Virginia, that has been delegated

86. *Id.* at ___, 129 S. Ct. at 2463–64.
87. *Id.* at ___, 129 S. Ct. at 2464.
88. *Id.*
89. *See id.* at ___, 129 S. Ct. at 2464–65.
90. *Id.* at ___, 129 S. Ct. at 2463.
91. *See* 33 U.S.C. § 1344(a) (2006).
92. 33 C.F.R. § 323.2(e)(1) (2008) (Corps regulation); 40 C.F.R. § 232.2 (EPA regulation).
93. 33 C.F.R. § 323.2(e)(2); 40 C.F.R. § 232.2.
94. 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2.
95. *See* 33 U.S.C. § 1342(a)(1).

permitting authority, issues permits with effluent limitations established under section 301 of the CWA[96] for existing sources and performance standards under section 306 of the CWA[97] for new sources.[98] Notable with respect to this case is that the EPA has established standards under both sections 301 and 306 that prohibit discharges of process wastewater from certain new froth flotation mills.[99]

Coeur Alaska obtained a section 404 permit from the Corps to discharge its slurry into the lake and a section 402 permit from the EPA for discharges from the lake impoundment to a downstream creek.[100] Several environmental groups and individuals sued the Corps and some of its officials, arguing that (1) Coeur Alaska should have been required to obtain a section 402 permit from the EPA for the slurry discharges rather than a section 404 permit from the Corps; and (2) regardless of which agency issued the permit, the slurry discharges would violate the EPA's "new source performance standards" prohibiting froth-flotation mines from discharging "process wastewater" that includes solid wastes into navigable waters.[101] Coeur Alaska, as well as the State of Alaska, intervened as defendants.[102]

The United States District Court for the District of Alaska granted the defendants summary judgment, but the United States Court of Appeals for the Ninth Circuit reversed and ordered the district court to vacate the Corps' permit, finding that (1) a section 402 permit was required for the slurry discharges, (2) the Corps lacked authority to issue such a permit under section 404, and (3) the proposed discharge would violate the EPA's new source performance standard.[103]

The Supreme Court reversed the Ninth Circuit's decision, holding that the Corps, not the EPA, has the authority to issue permits for the slurry discharge.[104] Because section 402 authorizes

96. *Id.* § 1311.
97. *Id.* § 1316.
98. *Id.* § 1342.
99. *See* 40 C.F.R. § 440.104(b)(1) (2007).
100. Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. at ___, 129 S. Ct. 2458, 2464–65 (2009).
101. *Id.* at ___, 129 S. Ct. at 2466.
102. *Id.*
103. *Id.* at ___, 129 S. Ct. at 2466–67.
104. *Id.* at ___, 129 S. Ct. at 2467.

the EPA to issue "permit[s] for the discharge of any pollutant," except as provided in section 404, the Court concluded that the CWA prohibits the EPA from issuing permits for fill material that fall under the Corps' section 404 authority[105] and that the slurry discharge constituted fill material under the regulations.[106]

The Court next considered whether the permit issued by the Corps was unlawful because the slurry discharge would violate the EPA's new source performance standard.[107] Noting that the CWA did not expressly address whether the EPA performance standard applies to discharges of fill material regulated by the Corps under section 404, the Court examined the agencies' regulations and found that they did not resolve the issue, as each set of regulations appeared to "stand on its own without reference to the other."[108]

The Court turned to the agencies' interpretation and application of the regulations. It relied on an internal EPA memorandum, which, the Court noted, "though not subject to sufficiently formal procedures to merit *Chevron* deference, is entitled to a measure of deference because it interprets the agencies' own regulatory scheme."[109] The Court found that the internal memorandum resolved the matter, explaining that the performance standard did not apply because the slurry discharge from the mine is regulated under section 404.[110] The Court stated that it would defer to this internal memorandum because it was "not 'plainly erroneous or inconsistent with the regulation[s].'"[111] Five factors informed the Court's decision in this regard: (1) the internal memorandum confined its scope to closed bodies of water like the lake at issue and preserved a role for the performance standards in regulating discharge into surrounding waters; (2) "the [m]emorandum acknowledge[d] that this is not an instance in which the discharger [is attempting] to evade the requirements of the EPA's performance standard;" (3) "the [m]emorandum's interpretation preserves the Corps' authority to determine whether a discharge is in the public interest;" (4) the memorandum does

105. *Id.* (quoting 33 U.S.C. § 1342(a)(1) (2006)).
106. *See id.* at ___, 129 S. Ct. at 2469.
107. *See id.*
108. *Id.* at ___, 129 S. Ct. at 2471–72.
109. *Id.* at ___, 129 S. Ct. at 2473 (citation omitted).
110. *Id.*
111. *Id.* (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)).

not allow toxic pollutants—rather than more innocuous discharges like slurry—to enter navigable waters; and (5) the memorandum reconciles sections 306, 402, and 404 of the CWA.[112] Accordingly, the Court reversed the circuit court's decision and remanded the case for further proceedings.[113]

B. *Cases from the United States Court of Appeals for the Fourth Circuit*

1. Standing

The plaintiff in *Stephens v. County of Albemarle* presented a novel claim that two settlement agreements between the operators of a public landfill—the County of Albemarle, the City of Charlottesville, and the Rivanna Solid Waste Authority—and third parties "unconstitutionally conditioned government benefits on the relinquishment of the third parties' First Amendment rights to speak freely about the landfill, thereby depriving her and her husband of their First Amendment rights to receive information."[114] As a result, the plaintiff claimed that the constitutional violation was the proximate cause of the death of her husband, who was the landfill's manager.[115] He was killed by an explosion sparked by a cutting torch while cutting old oil storage tanks in violation of regulations of the federal Occupational Safety and Health Administration ("OSHA").[116]

The plaintiff argued that two settlement agreements between the defendants and various citizens who lived in the vicinity of the landfill deprived her of information relating to the landfill because the citizens agreed, inter alia, not to make adverse private or public comments about the landfill and to excise language from

112. *Id.* at ___, 129 S. Ct. at 2473–74. The environmental groups argued that the Court should not accord the internal memorandum any deference, noting that the memorandum contradicted the agencies' prior published statements and practice. *Id.* at ___, 129 S. Ct. at 2474. Although the Court considered the environmental groups' arguments, the Court found that the memorandum was not inconsistent with the agencies' published statements, and two instances in which the Corps had issued a section 404 permit authorizing a mine to discharge solid waste as fill material indicated that the memorandum did not contravene established practice. *Id.* at ___, 129 S. Ct. at 2474–77.

113. *Id.* at ___, 129 S. Ct. at 2477.

114. *See* 524 F.3d 485, 486 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 404 (2008).

115. *Id.* at 486–87.

116. *Id.* at 487.

their websites relating to the landfill.[117] She contended that but for these agreements, the settling citizens would have monitored landfill activities, discovered that the OSHA regulations were being violated, and disseminated such information to her and her husband, which would have prevented her husband's death.[118]

The district court granted summary judgment for defendants, but on appeal the Fourth Circuit vacated that ruling and remanded the case for dismissal on the grounds that the plaintiff lacked standing because her allegations of injury were too speculative.[119] The court acknowledged "'that the Constitution protects the right to receive information and ideas from a willing speaker,'" but to have standing to assert that right, "a plaintiff must show that there exists a speaker willing to convey the information to her."[120] While the plaintiff established that at least one of the settling third parties would have been willing to speak about matters covered by the speech restriction, she did not offer any evidence that this speaker would have discussed the landfill with her or her husband in the absence of the agreements.[121] Additionally, plaintiff did not demonstrate any relationship with these third parties to establish an expectation that she would have received whatever landfill information they may have possessed but for the settlement agreements.[122]

2. More on Sections 404 and 402 of the Clean Water Act

Ohio Valley Environmental Coalition v. Aracoma Coal Co. ("*OVEC*") is a West Virginia mining case in which environmental groups challenged the issuance of four permits by the Corps allowing streams to be filled in twenty-three locations in conjunction with surface coal mining operations.[123] Given that surface mining activities in Virginia also typically involve such "valley

117. *Id.* at 488, 490.

118. *Id.* at 490.

119. *Id.* at 490, 493.

120. *Id.* at 491, 492 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969) (internal quotation marks omitted)).

121. *Id.* at 492.

122. *Id.*

123. 556 F.3d 177, 185–87 (4th Cir. 2008).

fill" permits,[124] this case is relevant to mining operations in the Commonwealth as well.

Finding that the permits violated the CWA, NEPA,[125] and the Administrative Procedure Act,[126] the district court rescinded the permits, enjoined all activities under them, and remanded to the Corps for further proceedings.[127] Pursuant to NEPA, the Corps prepared EAs for each permit and concluded "that the permitted activity would not result in significant environmental impacts [due to] the planned mitigation."[128] The district court agreed with the environmental groups that significant individual and cumulative effects of the projects warranted the preparation of EISs under NEPA rather than EAs.[129] Similarly, the district court found that the Corps violated section 404 of the CWA and the Corps' implementing guidelines by failing to determine the adverse individual and cumulative environmental impacts of the permitted actions.[130]

In a subsequent order, the district court held that the stream segments linking the permitted fills to sediment treatment ponds were waters of the United States under the CWA and that the Corps did not have legal authority under section 404 of the CWA to permit discharges from the fills to stream segments.[131] Rather, the district court held that, for the discharges from the fills to the stream segments, the applicants would need to obtain a section 402 permit from the EPA or an EPA-approved state agency. [132] This issue regarding the relationship between sections 404 and 402 of the CWA is similar to the issue addressed later in the year by the Supreme Court in *Coeur Alaska*.[133]

The Fourth Circuit reversed and vacated the district court's rescission of the permits and injunction, and reversed its declaratory judgment.[134] Granting deference to the Corps' interpretation

124. *See* VA. CODE ANN. § 45.1-234(A) (Repl. Vol. 2002).
125. 42 U.S.C. §§ 4321–4370f (2006).
126. 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 4301, 5335, 5372, 7521.
127. *OVEC*, 556 F.3d at 186.
128. *Id.* at 187.
129. *Id.* at 187–88.
130. *See id.* at 188.
131. *Id.*
132. *Id.*
133. *See* discussion *supra* Part II.A.5.
134. *OVEC*, 556 F.3d at 217.

of its regulations that its jurisdiction was limited to affected waters and adjacent riparian areas, the court found that the Corps has "no legal authority to prevent the placement of fill material in areas outside of the waters of the United States" and that any other fill activity was within the exclusive jurisdiction of the West Virginia Department of Environmental Protection, pursuant to its authority under the Surface Mining Control and Reclamation Act.[135] Accordingly, the Fourth Circuit agreed that the Corps did not have sufficient control and responsibility over all aspects of the valley fill projects to require that the Corps consider the environmental consequences beyond the filling of jurisdictional waters of the greater valley fill projects in its NEPA analysis.[136]

The Fourth Circuit also found that for each of the four permits, the Corps had sufficiently supported its mitigated Finding of No Significant Impact under NEPA and its finding of no significant degradation to waters of the United States under the CWA.[137] Noting that the arguments presented by the environmental groups relied heavily upon expert scientific testimony, the court emphasized that once it determined that the Corps' method of assessing the function of streams was not arbitrary and capricious, it should give deference to the Corps' findings: "When presented with conflicting evidence, courts must generally defer to the agency evaluation because 'an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.'"[138]

Similarly, the Fourth Circuit found that the mitigation plans required by the Corps, as well as cumulative impacts analysis, complied with Corps regulations and guidance documents and deferred to the Corps with respect to its conclusion that proposed stream creation measures had a likelihood of success.[139]

Again deferring to the Corps' interpretation of the CWA and its own implementing regulations, the Fourth Circuit reversed the district court's order for declaratory relief, concluding that the stream segments linking the fills to the sediment ponds, together

135. *Id.* at 194.
136. *Id.* at 195, 197.
137. *Id.* at 197, 209.
138. *Id.* at 201 (quoting Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989)).
139. *Id.* at 205–06, 207, 209.

with the sediment ponds, "are unitary 'waste treatment systems,' not 'waters of the United States.'"[140] The court concluded that the Corps' interpretation, which was based on a 2006 letter from the EPA construing its own regulatory definition of waters of the United States and waste treatment systems, was not adopted simply for the purpose of litigation but reflected the fair and considered judgment of both the EPA and the Corps on the issue.[141] Accordingly, the court held that the Corps did not exceed its section 404 permitting authority with respect to permitting the discharge of fill sediment into stream segments that link the fill to sediment ponds downstream.[142]

C. *United States District Court for the Western District of Virginia*[143]

United States v. Savoy Senior Housing Corp. involved the issue of whether a defendant may seek contribution for civil penalties imposed for violations of the CWA.[144] The United States filed a complaint in 2006 against six defendants for illegally discharging dredged or fill material into wetlands without a permit in violation of section 404 of the CWA, as well as illegal discharge of pollutants into waters of the United States without a permit.[145] The Government sought injunctive relief and civil penalties for the alleged violations, which occurred during the construction of a failed development project called the Liberty Village Site ("Site").[146]

Some of the defendants filed a third-party complaint in 2007 against one of the partners in Liberty Village Associates LP that owned the Site.[147] In 2008, one of the defendants filed a second third-party complaint against three new entities and seven indi-

140. *Id.* at 209.

141. *Id.* at 214.

142. *Id.* at 216.

143. The United States District Court for the Eastern District of Virginia did not decide any environmental cases of note during 2008 or the first half of 2009.

144. (*Savoy II*), No. 6:06cv00031, 2008 U.S. Dist. LEXIS 79017, at *2 (W.D. Va. Oct. 7, 2008).

145. United States v. Savoy Senior Hous. Corp. (*Savoy I*), No. 6:06cv031, 2008 U.S. Dist. LEXIS 17850, at *3 (W.D. Va. Mar. 6, 2008) (discussing alleged violations of the CWA).

146. *Id.*

147. *Savoy II*, 2008 U.S. Dist. LEXIS 79017, at *2–3.

viduals for contribution and negligence.[148] The district court concluded that the third-party complaint failed to allege any facts supporting the contention that any of the defendants were involved in the development of the Site or the deposition of materials into wetlands or streams on the Site.[149]

Beyond addressing the failure to plead facts that could support a contribution claim against any of the third-party defendants, the district court also determined that the CWA does not permit a private party to seek contribution for civil penalties that may be imposed for CWA violations.[150] The district court noted that with respect to a federal statute, a right to contribution arises only through (1) the express or implied creation of a right of action by Congress or (2) creation of a common law right of contribution by federal courts.[151] It then concluded that there is no express or implied right of action for contribution under the CWA and that federal courts consistently have refused to create a federal common law right of contribution.[152] Then, the district court rejected the third-party plaintiff's argument that his contribution claim arose under Virginia law rather than federal common law and found that the savings clause of the CWA applies on its face to the citizen suit provision of the statute and does not purport to authorize contribution claims.[153]

Accordingly, the district court refused to allow the third-party plaintiff to rely on Virginia's contribution statute and denied his motion for leave to file the third-party complaint.[154] Ultimately, a consent decree was negotiated between the Government and defendants that imposed a civil penalty, required the restoration of certain areas on and adjacent to the Site, and required the funding of off-site mitigation through the purchase of credits from regional stream and wetland restoration banks.[155]

148. *Savoy I*, 2008 U.S. Dist. LEXIS 17850, at *3–4, 7–9.
149. *Id.* at *10.
150. *Id.* at *26.
151. *Id.* at *17 (quoting Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 638 (1981)).
152. *Id.* at *17–18.
153. *Id.* at *18, 24–25.
154. *Id.* at *24–25, 26.
155. Notice of Lodging Proposed Consent Decree, 74 Fed. Reg. 2101 (Jan. 14, 2009).

D. *Virginia Cases*[156]

1. What Constitutes a Materials Recovery Facility?

Frederick County Business Park, L.L.C. v. Virginia Department of Environmental Quality involved the question of what type of facility requires a permit as a "materials recovery facility" ("MRF") pursuant to the Virginia Solid Waste Management Regulations.[157] The regulations define an MRF as "a solid waste management facility for the collection, processing and recovery of material such as metals from solid waste or for the production of a fuel from solid waste."[158]

The Supreme Court of Virginia granted deference to the Virginia Department of Environmental Quality's ("DEQ") interpretation of its regulations in upholding the agency's determination that a facility was an MRF rather than a recycling center and that it therefore required a permit under the regulations.[159] Plaintiff planned to collect construction waste primarily from new residential construction sites, transport the materials to its facility, and separate the materials that could be recycled from the materials that would need to be disposed of at a permitted landfill.[160] It estimated that approximately seventy percent of the materials sorted at the proposed facility would be recyclable.[161] Plaintiff maintained that it was a recycling facility and brought suit challenging the DEQ's determination that the facility required a per-

156. Note that two unreported Court of Appeals of Virginia cases involving environmental issues were decided in 2008 and 2009. *See* State Water Control Bd. v. Captain's Cove Util. Co., No. 2375-07-1, 2008 Va. App. LEXIS 375 (Ct. App. Aug. 5, 2008) (unpublished decision) (upholding State Water Control Board decision to deny VPDES permit for sewage treatment plant); Mirant Potomac River, LLC v. Commonwealth, No. 2067-08-2, 2009 Va. App. LEXIS 287 (Ct. App. June 23, 2009) (unpublished decision) (holding that challenged regulation of the State Air Pollution Control Board establishing cap and trade program for nitrogen oxide was *ultra vires*). Petitions for appeal were filed in both cases. Unpublished court of appeals opinions have no precedential value unless the Supreme Court of Virginia denies a petition for appeal and the grounds for the denial can be discerned from the four corners of the court's order. Sheets v. Castle, 263 Va. 407, 412, 559 S.E.2d 616, 619 (2002). Given the potential significance of the *Mirant* case, the disposition of the petition for appeal merits close monitoring.

157. 278 Va. 207, 209, 677 S.E.2d 42, 43 (2009) (citing 9 VA. ADMIN. CODE §§ 20-80-10 to 20-80-730 (2004)).

158. 9 VA. ADMIN. CODE § 20-80-10.

159. *Frederick County Bus. Park*, 278 Va. at 210, 212, 677 S.E.2d at 44–45.

160. *Id.* at 209, 677 S.E.2d at 43.

161. *Id.*

mit as an MRF because it would receive "'mixed wastes for on-site processing into recyclable and unrecyclable fractions.'"[162]

Both the circuit court and court of appeals ruled for the DEQ, finding that the record supported the agency's factual finding that thirty percent of the materials that would be brought to the proposed facility would not be recyclable and, therefore, that the DEQ's finding that the facility met the regulatory definition of an MRF was not arbitrary or capricious.[163] On appeal to the Supreme Court of Virginia, the plaintiff continued to argue that the facility was a recycling facility exempt from permitting requirements per Virginia Code section 10.1-1408.1(J)[164] and that the materials that would be separated at the facility fell within exemptions to the regulatory definition of solid waste under the Virginia Solid Waste Management Regulations.[165] The DEQ countered that construction waste falls within the definition of solid waste and the sorting of construction waste into recyclable material and solid waste is an activity that falls squarely within the regulatory definition of an MRF.[166] Additionally, the DEQ stressed that thirty percent of the material sorted at the facility will be non-recyclable construction waste that must be disposed of at a permitted disposal facility.[167]

The supreme court upheld the lower courts, applying a "substantial evidence" standard[168] and reiterating the bedrock principle that, in a case involving an interpretation within the specialized knowledge of an agency vested by the General Assembly with discretion to interpret and apply regulations, a court will reverse an agency decision "only for arbitrary or capricious action that constitutes a clear abuse of the agency's delegated discre-

162. *Id.* at 209–10, 677 S.E.2d at 44 (quoting 9 VA. ADMIN. CODE § 20-80-10)).

163. *Id.* at 210, 677 S.E.2d at 44 (citing Frederick County Bus. Park, LLC v. Va. Dep't of Envtl. Quality, 52 Va. App. 40, 52, 660 S.E.2d 698, 704 (Ct. App. 2008)).

164. Under the statute, no permit is required for recycling facilities or "for temporary storage incidental to recycling." VA. CODE ANN. § 10.1-1408.1(J) (Cum. Supp. 2009). This provision defines "recycling" as "any process whereby material which would otherwise be solid waste is used or reused, or prepared for use or reuse, as an ingredient in an industrial process to make a product, or as an effective substitute for a commercial product." *Id.*

165. *Frederick County Bus. Park*, 278 Va. at 210, 677 S.E.2d at 44.

166. *Id.* (quoting 9 VA. ADMIN. CODE § 20-80-10).

167. *Id.* at 210–11, 667 S.E.2d at 44.

168. VA. CODE ANN. § 2.2-4027 (Repl. Vol. 2008 & Supp. 2009) (stating that a court must uphold an agency's factual findings if the record contains substantial evidence supporting those findings).

tion."[169] The court noted that DEQ has statutory authority to regulate, supervise, and control solid waste management activities, and, with respect to plaintiff's facility, the DEQ had to reconcile and harmonize various provisions relating to recycling and solid waste management because no statute or regulation squarely addressed the requirements for a facility that handles both recyclable and non-recyclable materials.[170] The supreme court concluded that the DEQ's conclusion was not arbitrary or capricious because to adopt plaintiff's interpretation would require exemption from permitting requirements for any solid waste management facility that receives some materials that will be separated for recycling or reuse.[171]

2. Standing

In *Chesapeake Bay Foundation, Inc. v. Commonwealth ex rel. Virginia State Water Control Board*, the Court of Appeals of Virginia reversed the dismissal for lack of standing of an environmental group's petition appealing the extension and modification of a Virginia Water Protection Permit ("VWP Permit") previously issued to the City of Newport News for the construction and operation of a reservoir in King William County.[172] The court found that the group did allege facts that, when accepted as true for purposes of surviving demurrer and together with all reasonable inferences flowing from them, sufficiently established that the extension of the VWP Permit caused an actual or imminent injury to the group.[173]

The VWP Permit at the center of the case was originally issued in 1997 by the State Water Control Board ("Water Control Board") to the City of Newport News ("City") for the construction and operation of a reservoir.[174] The VWP permit, which was set to expire in December 2007, authorized the destruction of 437 acres of wetlands; required compensatory wetlands mitigation through the creation of new wetlands at a two to one ratio; required pro-

169. *Frederick County Bus. Park*, 278 Va. at 211, 677 S.E.2d at 44–45 (citing VA. CODE ANN. § 2.2-4027 (Repl. Vol. 2008 & Supp. 2009)).

170. *Id.*, 677 S.E.2d at 45.

171. *Id.* at 212, 677 S.E.2d at 45.

172. 52 Va. App. 807, 812, 667 S.E.2d 844, 847 (Ct. App. 2008).

173. *Id.*

174. *Id.* at 813, 667 S.E.2d at 847–48.

tection of minimum instream flows in the Mattaponi Reservoir; and required various studies and plans relating to habitat evaluation, wetland mitigation, and ecosystem and salinity monitoring.[175] Plaintiffs and others filed a state court challenge to the issuance of the original VWP Permit, which they lost.[176]

In 2005 the Corps issued the City a section 404 permit, and the plaintiffs and other parties challenged the issuance of the permit in federal court.[177] Because delays caused by the state and federal litigation would prevent completion of construction of the reservoir and completion of the required studies before its expiration in December 2007, the City requested a five-year extension of the VWP Permit.[178] Although the DEQ had recommended that the Water Control Board grant the extension, the board denied the City's request, at which point the City filed a petition for a formal administrative hearing.[179] While that petition was pending, the city manager wrote a letter requesting that the Water Control Board reconsider its denial and grant a permit extension only to allow the City to complete the required plans and studies.[180] The city manager stated that the City would agree to a condition prohibiting construction of the reservoir under the extension.[181] The Water Control Board accepted the request, granting a "modification" of the permit and an extension until December 2010 unless a complete application for reissuance of the permit was submitted by that date.[182]

Plaintiff filed a request for a formal hearing in front of the Water Control Board, a notice of appeal, and then a petition for appeal of the issuance of the modified permit.[183] The federal suit challenging the section 404 permit also was pending when plaintiff filed its petition for appeal.[184]

175. *Id.* at 813–14, 667 S.E.2d at 848.
176. *Id.* at 814, 667 S.E.2d at 848.
177. *Id.*
178. *Id.* at 815, 667 S.E.2d at 848.
179. *Id.*
180. *Id.* at 815–16, 667 S.E.2d at 848–49.
181. *Id.* at 816, 667 S.E.2d at 849.
182. *Id.* at 816–17, 667 S.E.2d at 849. If a complete permit renewal application, including a final mitigation plan, was submitted by December 21, 2010, the permit would expire on December 21, 2012.
183. *Id.* at 817, 667 S.E.2d at 849.
184. *Id.* at 814, 667 S.E.2d at 848.

In the petition, the plaintiff challenged the process by which the Water Control Board modified and extended the permit and also requested that the circuit court set aside the extension and remand to the board to reinstate its denial of the extension, conduct a formal hearing regarding the extension, and comply with the requirements of the Administrative Procedure Act, the State Water Control Law, and applicable regulations.[185] The Commonwealth and the City demurred, arguing that plaintiff lacked standing because it suffered no harm from the extension.[186] Plaintiff responded that the manner in which the Water Control Board reconsidered its denial of the permit extension inflicted procedural harm sufficient to establish Article III standing.[187]

Focusing on the fact that the permit extension did not allow the City to undertake any actions that it otherwise could without a permit, the circuit court agreed that plaintiff did not have standing because it did not show that it had suffered an actual or imminent injury.[188] The circuit court did not address the other two prongs of Article III standing—causation and redressability.[189]

The court of appeals reversed the dismissal of the petition, finding that plaintiff had alleged sufficient facts to establish standing to sue in its own right as well as in a representational capacity.[190] First, the court concluded that plaintiff had sufficiently alleged injury in fact relating to the Board's reconsideration of its denial of the extension and the fact that the modified and extended permit did allow construction or site preparation for construction to the extent necessary to complete the studies and plans required by the permit.[191] With respect to the latter, the court noted that the petition alleged that the activities would destroy natural resources and impair the aesthetic value of the affected rivers as educational resources.[192]

Relying on the same two points, the court of appeals also concluded that plaintiff had sufficiently pleaded causation.[193] The

185. *Id.* at 817, 667 S.E.2d at 849.
186. *Id.*, 667 S.E.2d at 849–50.
187. *Id.* at 818, 667 S.E.2d at 850.
188. *Id.* at 819–20, 667 S.E.2d at 850–51.
189. *Id.* at 822 n.2, 667 S.E.2d at 852 n.2.
190. *Id.* at 829, 833, 667 S.E.2d at 855, 857.
191. *Id.* at 824, 667 S.E.2d at 853.
192. *Id.* at 825, 667 S.E.2d at 853.
193. *Id.* at 827–28, 667 S.E.2d at 854–55.

court noted that, although revocation of the VWP Permit would not necessarily force the Corps to revoke the section 404 permit, it might be a factor for the Corps to consider in deciding whether to revoke or modify the federal permit.[194] Finally, the court concluded that the plaintiff alleged sufficient facts supporting a finding that a favorable decision by the court would likely redress the alleged injury.[195] The court of appeals found that setting aside the modified permit and requiring "sufficient process," such as a formal hearing, would redress plaintiff's allegation of harm.[196] Additionally, the court noted that, even though the City may have undertaken the activities authorized by the permit even in its absence, the City had conceded that it would not likely do so in the absence of the extension.[197] The court of appeals concluded by finding that essentially the same alleged facts supported the plaintiff's standing to sue on behalf of its members in a representational capacity, given the additional allegations that some of its members were affected individually because they used the natural resources that would be harmed by activities authorized by the modified and extended permit.[198]

The Commonwealth filed a petition for appeal to the Supreme Court of Virginia, which granted review in April 2009.[199] The limitation on standing for procedural injuries articulated last term by the Supreme Court of the United States in *Summers*[200] could come into play in the Supreme Court of Virginia's consideration of this appeal. As of September 2009, a decision is pending.[201]

194. *Id.* at 828, 667 S.E.2d at 855.

195. *Id.* at 828–29, 667 S.E.2d at 855.

196. *Id.* at 829, 667 S.E.2d at 855.

197. *Id.*

198. *Id.* at 831–33, 667 S.E.2d at 856–57.

199. Appeals Granted, http://www.courts.state.va.us/courts/scv/appeals/082384.html (last visited Oct. 11, 2009). The appeal has been assigned Case No. 082384. *Id.*

200. *See* discussion *supra* at Part II.A.2.

201. *See* Appeals Granted, http://www.courts.state.va.us/courts/scv/appeals/home.html (last visited Oct. 11, 2009). However, Newport News officials recently decided to terminate the King William County reservoir project, potentially raising questions of mootness. *See Reservoir Fight Ends on Peninsula*, VA. PILOT, Sept. 26, 2009, at 6.

III. 2008–2009 LEGISLATIVE DEVELOPMENTS IN VIRGINIA[202]

A. *2008 Legislative Session*

1. Most "Green" Legislation Failed to Pass

The 2008 Session of the Virginia General Assembly marked the introduction and failure of numerous "green" initiatives. Several bills relating to climate change were introduced, but none passed. For example, House Bill 793 would have required the Secretary of Natural Resources to develop a comprehensive plan by January 1, 2010, to reduce 2005 greenhouse gas emission levels by thirty percent by 2025 and eighty percent by 2050.[203] House Bill 1230 would have required the State Air Pollution Control Board to adopt regulations requiring the annual reporting and verification of direct emissions of greenhouse gases from any stationary source that emits more than a de minimis amount of greenhouse gases on an annual basis and otherwise is already required to report emissions of air pollutants.[204] Senate Bill 446 would have mandated that, by July 1, 2020, a minimum of twenty percent of the electric energy sold by suppliers to retail customers in Virginia must be generated from renewable generation energy sources.[205]

Senate Bill 447 would have required the design of all major building projects of state agencies on state-owned land to meet the standards of the U.S. Green Building Council's Leadership in Energy and Environmental Design ("LEED") Building Rating System or the Green Building Initiative's Green Globes building rating system.[206] The General Assembly, however, did enact legislation expanding the definition of energy-efficient buildings that may be classified as a separate class of real property for tax purposes to include buildings that meet performance guidelines or standards under the Green Globes building rating system, LEED, EarthCraft House program, or Energy Star program.[207]

202. There have been no major changes to federal environmental statutes during this period.

203. H.B. 793, Va. Gen. Assembly (Reg. Sess. 2008).

204. H.B. 1230, Va. Gen. Assembly (Reg. Sess. 2008).

205. S.B. 446, Va. Gen. Assembly (Reg. Sess. 2008).

206. S.B. 447, Va. Gen. Assembly (Reg. Sess. 2008).

207. Act of Mar. 4, 2008, ch. 288, 2008 Va. Acts 431 (codified as amended at VA. CODE

2. Significant Environmental Bills Enacted

The 2008 General Assembly passed an Act establishing a uniform permit issuance process for the Air Pollution Control Board and the Water Control Board.[208] After issuing a public notice of a pending permit action, a public hearing must be held if at least twenty-five people have requested a hearing and the director of the DEQ finds that the issues raised are germane to the permit action and are not inconsistent with state or federal laws.[209] Each board is required to act on the permit within ninety days of the close of the comment period unless the applicant agrees to an extension of the time period.[210] When the Board decides to adopt the recommendation of the DEQ regarding a permit application, it "shall provide in writing a clear and concise statement of the legal basis and justification for the decision reached."[211] If the board deviates from the DEQ recommendation, it must, "in consultation with legal counsel, provide a clear and concise statement explaining the reason for the variation and how the [b]oard's decision is in compliance with applicable laws and regulations."[212] Additionally, the Act increases the membership on the Air Pollution Control Board from five to seven members and changes a qualification of the members so that no member can be a current employee of an entity subject to a permit or enforce-ment order of the Air Pollution Control Board.[213] Qualifications for membership on the Water Control Board and the Virginia Waste Management Board are also changed to require that the members, by their education, training, or experience, be knowledgeable of water quality or waste management, respectively, and must be fairly representative of public health, conservation, business, and agriculture.[214]

ANN. § 58.1-3221.2(A), (C) (Cum. Supp. 2008)).

208. Act of Mar. 11, 2008, ch. 557, 2008 Va. Acts 828 (codified at VA. CODE ANN. § 10.1-1322.01 (Cum. Supp. 2008); *id.* § 62.1-44.15:02 (Cum. Supp. 2008)).

209. VA. CODE ANN. § 10.1-1322.01(C)(1)–(3) (Cum. Supp. 2009); *id.* § 62.1-44.15:02(C)(1)–(3) (Cum. Supp. 2009).

210. *Id*. § 10.1-1322.01(N) (Cum. Supp. 2009); *id.* § 62.1-44.15:02(N) (Cum. Supp. 2009).

211. *Id.* § 10.1-1322.01(P) (Cum. Supp. 2009); *id.* § 62.1-44.15:02(P) (Cum. Supp. 2009).

212. *Id.* § 10.1-1322.01(P) (Cum. Supp. 2009); *id.* § 62.1-44.15:02(P) (Cum. Supp. 2009).

213. Act of Mar. 11, 2008, ch. 557, 2008 Va. Acts 828 (codified as amended at VA. CODE ANN. §§ 10.1-1301, 10.1-1302 (Cum. Supp. 2008)).

214. *Id.* (codified as amended at VA. CODE ANN. § 10.1-1401(A) (Cum. Supp. 2008); *id.* § 62.1-44.9(A) (Cum. Supp. 2008)).

The General Assembly also passed an Act to amend Virginia Code section 62.1-44.15:21, creating an exemption from the requirement to obtain a VWP Permit for impacts to state waters (including wetlands) caused by the construction or maintenance of farm or stock ponds and impoundments that do not fall under the authority of the Virginia Soil and Water Conservation Board.[215] As discussed in Part IV, *infra* regarding regulatory developments, in October 2008 the DEQ issued guidance to interpret this exemption.

With respect to stormwater pollution, local governments classified as MS4 stormwater localities are now authorized to enact ordinances to enforce stormwater permits.[216] Such localities may enforce the permits through civil charges and penalties and injunctive relief.[217] Any person who willingly and knowingly violates the ordinance is subject to prosecution for a Class 1 misdemeanor.[218]

Finally, the General Assembly passed two Acts to amend Virginia Code section 10.1-1188 to increase the threshold project cost triggering the requirement of preparation of an environmental impact report for a major state project.[219] The first Act requires the preparation of an environmental impact report in connection with the acquisition of an interest in land for the construction of a state facility, including the construction of a new facility or expansion of an existing facility undertaken by any state agency, if the cost is $500,000 or more.[220] The threshold amount requiring such a report under the prior statute was $100,000.[221] Similarly, the second Act sets a $500,000 threshold for requiring the preparation of an environmental impact report for any state or local highway construction, reconstruction, or improvement project.[222]

215. Act of Mar. 3, 2008, ch. 244, 2008 Va. Acts 361 (codified as amended at VA. CODE ANN. § 62.1-44.15:21(14) (Cum. Supp. 2008)).

216. VA. CODE ANN. § 10.1-603.14:1(A) (Cum. Supp. 2009).

217. *Id*.

218. *Id*. § 10.1-603.14:1(B) (Cum. Supp. 2009).

219. Act of Feb. 28, 2008, ch. 45, 2008 Va. Acts 43 (codified as amended at VA. CODE ANN. § 10.1-1188(A) (Cum. Supp. 2008)); Act of Mar. 3, 2008, ch. 225, 2008 Va. Acts 337 (codified as amended at VA. CODE ANN. § 10.1-1188(A) (Cum. Supp. 2008)).

220. Act of Mar. 3, 2008, ch. 225, 2008 Va. Acts 337 (codified as amended at VA. CODE ANN. § 10.1-1188(A) (Cum. Supp. 2008)).

221. VA. CODE ANN. § 10.1-1188(A) (Supp. 2007).

222. Act of Feb. 28, 2008, ch. 45, 2008 Va. Acts 43 (codified as amended at VA. CODE ANN. § 10.1-1188(A) (Cum. Supp. 2008)).

B. *2009 Legislative Session*

Notwithstanding (or perhaps because of) the failure of numerous bills relating to climate change in the 2008 Session of the General Assembly, Governor Kaine launched "Renew Virginia" in December 2008, which is an initiative to promote renewable energy, create green jobs, and encourage environmental protection.[223] Also in December 2008, the Governor's Commission on Climate Change ("Commission") issued its final report ("Final Report").[224] The Commission, which Governor Kaine established in December 2007 with Executive Order 59, was charged with assessing the likely impacts of climate change on Virginia's natural resources, economy, and public health and with proposing strategies to meet the Governor's goal of reducing greenhouse gas emissions in Virginia by thirty percent of projected 2025 levels.[225]

The Final Report offered roughly one hundred recommendations, some of which can be implemented by the executive, some requiring new legislation by the General Assembly, and some that only the federal government can establish.[226] Recommendations included actions aimed at reducing greenhouse gas ("GHG") emissions, increasing energy efficiency, improving transportation system efficiency, and increasing the percentage of electricity generated by emissions-free sources.[227] Other recommendations focused on steps the Commonwealth should take to prepare for and adapt to impacts of climate change that are likely and unavoidable, such as educating the public and reviewing "state agency and local government authority to account for climate change in their actions."[228]

Such recommendations, coupled with Renew Virginia and the Virginia Energy Plan, served as the platform for the passage of several bills related to climate change, renewable energy, and

223. Press Release, Office of the Governor Timothy M. Kaine, Governor Kaine Announces Review Virginia Initiative (Dec. 11, 2008), *available at* http://www.governor.virginia.gov/MediaRelations/NewsReleases/viewRelease.cfm?id=832.

224. L. PRESTON BRYANT, JR., GOVERNOR'S COMM'N ON CLIMATE CHANGE, FINAL REPORT: A CLIMATE CHANGE ACTION PLAN 1 (Dec. 15, 2008), http://www.deq.virginia.gov/export/sites/default/info/documents/climate/CCC_Final_Report-Final_12152008.pdf.

225. *Id*.

226. *See id*. at 12–38.

227. *Id*. at 8, 15, 21.

228. *Id*. at 32–33, 38.

other renewable resources in the 2009 General Assembly Session, many of which create financial or regulatory incentives to encourage desired activities. The following is a summary of some of the most significant bills enacted.

The General Assembly enacted legislation to create incentives for green roof construction. The first Act adds Virginia Code section 58.1-3852, which authorizes localities to enact ordinances creating incentives or providing regulatory flexibility to "encourage the use of green roofs in the construction, repair, or remodelding of residential and commercial buildings."[229] These ordinances may include a reduction in permit fees, a streamlined process for approval of building permits, or a reduction in any gross receipts tax on green roof contractors.[230] The second Act provides similar amendments to Virginia Code sections 15.2-5101 and 15.2-5114 and adds section 15.2-977.[231]

The General Assembly passed legislation that increases the goal for investor-owned incumbent electric utilities to have fifteen percent of their total electric energy sales in the base year from renewable energy sources in calendar year 2025.[232] Previously, one of these utilities could participate in the voluntary renewable energy portfolio standard program if it demonstrated that it had a reasonable expectation of achieving twelve percent of its base year electric energy sales from certain renewable energy sources during the calendar year 2022.[233] A participating utility that meets the new, higher specified percentage goal is eligible for performance incentives that increase the fair combined rate of return on common equity and provide an enhanced rate of return on costs associated with the construction of renewable energy generation facilities.[234]

The General Assembly also amended the Biofuels Production Incentive Grant Program ("Program") to provide a greater incen-

229. Act of Feb. 23, 2009, ch. 17, 2009 Va. Acts ___ (codified at VA. CODE ANN. § 58.1-3852(B) (Repl. Vol. 2009)).

230. VA. CODE ANN. § 58.1-3852(C) (Repl. Vol. 2009).

231. Act of Mar. 27, 2009, ch. 402, 2009 Va. Acts ___ (codified at VA. CODE ANN. § 15.2-977(B) (Supp. 2009)) (codified as amended at VA. CODE ANN. §§ 15.2-5101, 15.2-5114(10) (Supp. 2009)).

232. Act of Mar. 30, 2009, ch. 744, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 56-585.2(B), (D) (Cum. Supp. 2009)).

233. VA. CODE ANN. § 56-585.2(B) (Repl. Vol. 2007).

234. *See id.* § 56-585.2(C), (E) (Cum. Supp. 2009).

tive for "advanced biofuels" that are made from winter cover crops, cellulose, hemicellulose, lignin oil, and algae over those "standard biofuels" made from agricultural feedstocks such as corn.[235] The Program will award a $0.125 per gallon grant for advanced biofuels and a $0.10 per gallon grant for standard biofuels and require the production of one million gallons of biofuels per year for eligibility.[236] The purpose of the amendment evidently is to encourage the development of biofuels that do not affect food supply or feed/food prices.

The General Assembly passed legislation to encourage agricultural waste-to-energy production by excluding farmers who own and operate facilities that use waste-to-energy technology (including methane digesters) to generate electricity from regulation as public utilities, public service corporations, public service companies, or "manufacturers" under any provision of the Virginia Code.[237] To be eligible for the exclusion, a person or entity must obtain at least fifty-one percent of "annual gross income from its agricultural operations and produce[ ] the agricultural waste used as feedstock" in the generation of the electricity.[238] Such electric generators will be permitted to connect to the electric grid in accordance with regulations to be promulgated by the State Corporation Commission.[239]

The Mid-Atlantic Offshore Wind Energy Infrastructure Development Compact ("Compact") was created by the General Assembly in 2009.[240] States that will be parties to the Compact are Virginia, Delaware, Maryland, New Jersey, and New York, and the purposes of the Compact are to (1) "study, develop, and promote coordinated research and planning of the design, construction, utility interconnection, financing, and operation of offshore wind energy infrastructure and operations directly adjacent to the shores of the party states"; (2) coordinate federal, state, and local

235. Act of Feb. 23, 2009, ch. 19, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 45.1-394(A)–(B) (Cum. Supp. 2009)).

236. VA. CODE ANN. § 45.1-394(B) (Cum. Supp. 2009).

237. Act of Mar. 30, 2009, ch. 746, 2009 Va. Acts ___ (codified at VA. CODE ANN. § 1-222.1 (Cum. Supp. 2009); *id.* § 56-265.1 (Cum. Supp. 2009)).

238. VA. CODE ANN. § 1-222.1 (Cum. Supp. 2009); *id.* § 56-265.1(b)(10)(i) (Cum. Supp. 2009).

239. *Id.* § 56-594.1(B) (Cum. Supp. 2009).

240. Act of Mar. 27, 2009, ch. 316, 2009 Va. Acts ___ (codified at VA. CODE ANN. § 2.2-6000 (Supp. 2009)).

government efforts; and (3) seek funding.[241] The compact provides for a board with five representatives from each party state, three of whom are to be appointed by the Governor, one by the Speaker of the House of Delegates, and one by the Senate of Virginia.[242] The measure will take effect upon enactment by Virginia and three of the other named states.[243]

In the same vein, the General Assembly passed an Act to authorize the Marine Resources Commission to lease subaqueous lands to persons or entities that generate "electrical energy from wave or tidal action, currents, offshore winds, or thermal or salinity gradients and transmit energy from such sources to shore" and mandates that any such leases require a royalty.[244] All royalties collected will be appropriated to the Virginia Coastal Energy Research Consortium.[245] The legislation also directs the Marine Resources Commission to "(i) identify 100 acres suitable for use by the Virginia Coastal Energy Research Consortium as a research site; and (ii) determine whether sufficient and appropriate subaqueous lands exist . . . to support . . . [a commercial] offshore [wind farm]" and, if so, offer it for development in a lease auction.[246]

Of the environmental laws enacted in 2009 that do not relate to renewable energy, the Act creating a program for stormwater nonpoint nutrient runoff offsets[247] may be the most significant. This legislation authorizes permit issuing authorities (including any locality that has adopted a local stormwater management program) to allow stormwater permit holders to comply with nonpoint nutrient runoff water quality criteria by acquiring nonpoint nutrient offsets that have been certified under the Chesapeake Bay Watershed Nutrient Exchange Program.[248] The offsets must be in the same tributary as the permitted activity and generated in the same or adjacent eight digit hydrologic unit code, except

241. VA. CODE ANN. § 2.2-6000 (Supp. 2009).

242. *Id*. § 2.2-6000 art. III(A) (Supp. 2009).

243. Act of Mar. 27, 2009, ch. 316, 2009 Va. Acts ___ (codified at VA. CODE ANN. § 2.2-6000, art. IV, cl. 2 (Cum. Supp. 2009)).

244. Act of Mar. 30, 2009, ch. 766, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 28.2-1208(A) (Repl. Vol. 2009)).

245. VA. CODE ANN. § 28.2-1208(C) (Repl. Vol. 2009).

246. *Id.* § 28.2-1208 ed. note (Repl. Vol. 2009).

247. Act of Mar. 27, 2009, ch. 364, 2009 Va. Acts ___ (codified at VA. CODE ANN. § 10.2-603.8:1 (Cum. Supp. 2009)).

248. VA. CODE ANN. § 10.1-603.8:1(A)–(B) (Cum. Supp. 2009).

under limited circumstances.[249] The legislation further states that the

> permit issuing authority may allow the use of nonpoint nutrient offsets when the permit applicant demonstrates . . . that (i) alternative site designs have been considered that may accommodate on-site best management practices ["BMPs"], (ii) on-site [BMPs] have been considered in alternative site designs, . . . (iii) appropriate on-site [BMPs] will be implemented, and (iv) full compliance with postdevelopment nonpoint nutrient runoff compliance requirements cannot practicably be met on site.[250]

The legislation also requires an offset broker to pay the permit issuing authority a fee equal to six percent of the amount paid by the permittee for the offsets.[251]

IV. 2008–2009 REGULATORY DEVELOPMENTS

A. *Federal Regulatory Developments of Particular Significance to the Commonwealth*

1. New Wetlands Compensatory Mitigation Rule

For the past two decades, the Corps and the EPA have focused on three aspects of mitigation: avoidance of destruction, minimization of impacts, and replacement of the wetland resources destroyed due to the permitted fill activity. Prior to promulgation of the compensatory mitigation regulations, the agencies set forth their mitigation policy in various guidance documents, the foundation of which are the Section 404(b)(1) Guidelines and a Memorandum of Agreement between the EPA and the Department of the Army regarding mitigation under those guidelines ("MOA").[252] The MOA articulates, among other things, the "no net loss" policy for compensatory mitigation of wetlands.[253]

In April 2008 the Corps and the EPA jointly promulgated a new wetlands mitigation rule under section 404 of the CWA stat-

249. *Id*. § 10.1-603.8.1(F) (Cum. Supp. 2009).

250. *Id*. § 10.1-603.8:1(D) (Cum. Supp. 2009).

251. *Id*. § 10.1-603.8:1(E) (Cum. Supp. 2009).

252. Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990), *available at* http://www.saw.usace.army.mil/WETLANDS/Policies/epa-moa.pdf.

253. *Id*. at 1.

ing the avoidance, minimization, and compensation principles originally set out in the MOA.[254] The new rule goes well beyond the MOA in an effort to standardize the requirements for various types of mitigation (such as creation of wetlands by a permittee, mitigation banks, or in-lieu fee programs), establish new mitigation performance standards based on the best currently available science, and encourage a watershed-based approach to mitigation.[255] The DEQ recently promulgated guidance on how to apply the new federal mitigation rule to the Virginia Water Protection Program.[256]

The new rule creates a "hierarchy" for mitigation credits, with a preference for mitigation bank credits, followed by in-lieu fee program credits, then permittee-responsible mitigation ("PRM") based on a watershed approach, PRM that is on-site and in-kind and finally PRM that is off-site or out-of-kind.[257] This distinction is based on the Corps' and the EPA's conclusion that fewer and larger mitigation projects are more environmentally beneficial than a multitude of smaller projects, even if those smaller projects are more proximate to the site of the permitted wetland destruction.[258]

Under the new rule, all three types of mitigation must include the same basic twelve components designed to provide higher quality mitigation: (1) objectives, (2) site selection criteria, (3) site protection instruments, (4) baseline information, (5) credit determination methodology, (6) mitigation work plan, (7) maintenance plan, (8) ecological performance standards, (9) monitoring requirements, (10) long-term management plan, (11) adaptive management plan, and (12) financial assurances.[259] The planning and approval process for in-lieu fee mitigation is closely parallel to that for mitigation banks.[260] An Interagency Review Team will review both types of mitigation, and their plans will be subject to

254. Compensation Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594, 19,596 (Apr. 10, 2008) (codified at 33 C.F.R. pts. 325, 332 (2008); 40 C.F.R. pt. 230).

255. *Id*. at 19,594.

256. *See* discussion *infra* IV.B.1.d.

257. Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,628; *see* 33 C.F.R. § 332.3(b)(1)–(6); 40 C.F.R. § 230.93(b)(1)–(6).

258. *See* Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19,629.

259. *Id*. at 19,597; *see* 33 C.F.R. § 332.4(c); 40 C.F.R. 230.94(c).

260. *See* 33 C.F.R. § 332.8(a).

public review and comment.[261] With respect to mitigation by a permittee, the regulations require more planning for mitigation and approval of a final mitigation plan at the time of permit issuance.[262]

The goal of compensation is to replace lost wetland values or functions, not just to replace wetlands acre for acre.[263] The new mitigation regulation provides that mitigation for wetlands losses should provide replacement for functions,[264] taking a watershed approach.[265] Additionally, the new rule applies to stream mitigation as well as wetland mitigation, despite many commenters urging the agencies not to include stream mitigation because of the evolving science relating to it.[266]

Many of the prior policies and guidance for mitigation have been superseded in whole or in part by the new regulation.[267] In addition, it is likely that there will be implementing protocols or other guidance documents forthcoming. Wetlands mitigation, therefore, will remain an area of regulatory development for some time.

2. Application of National Ambient Air Quality Standards to the Commonwealth

In 1997 the EPA adopted an eight-hour ozone National Ambient Air Quality Standard ("NAAQS")[268] under section 109 of the Clean Air Act ("CAA"),[269] and in April 2004 the Agency published a final rule designating areas of the country as either meeting or

261. *Id*. § 332.8(b)(1), (d)(4).

262. *See id*. § 332.4(c)(1).

263. *See id*. § 332.3(f)(1).

264. *Id.* ("[T]he amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions. In cases where appropriate functional or condition assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation is required. If a functional or condition assessment or other suitable metric is not used, a minimum one-to-one acreage or linear foot compensation ratio must be used.").

265. *Id*. § 332.3(c)(1).

266. Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594, 19,596 (Apr. 10, 2008).

267. *See* 33 C.F.R. § 332.1(f).

268. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,894 (July 18, 1997) (codified at 40 C.F.R. § 50.10).

269. 42 U.S.C. § 7409 (2006).

not meeting the eight-hour ozone NAAQS.[270] The CAA requires areas that have not attained compliance with the NAAQS to implement a number of strategies to comply with the NAAQS by a certain date.[271] In the April 2004 rule, the EPA also created the Early Action Compact ("EAC") program, whereby areas with ozone concentrations that complied with the national one-hour ozone standard and minimally exceeded the eight-hour ozone NAAQS could enter into an agreement to defer designation of the area as nonattainment.[272] To enter an area into an EAC, a state had to pledge to comply with the NAAQS at least two years before the 2007 deadline under the CAA.[273] The benefit of deferring the nonattainment designation is that certain CAA requirements, such as controls on new sources of air emissions and the need for transportation conformity determinations for infrastructure projects, would not apply.[274]

The Roanoke and Winchester areas of Virginia were both enrolled in the EAC program, and, because they met several milestones, the EPA deferred its designation decisions for the two areas until April 15, 2008.[275] In February 2008 the EPA proposed to designate Roanoke and Winchester, along with eleven other EAC areas, as attainment areas for the eight-hour ozone NAAQS, based on the submission of air quality data from 2005, 2006, and 2007 demonstrating that each area had attained the eight-hour ozone NAAQS.[276]

Interestingly, however, in March 2008 the EPA tightened the primary and secondary eight-hour ozone NAAQS—both 0.075 ppm—as compared to the 1997 primary and secondary standards of 0.080 ppm.[277] The EPA stated that it revised the standard due

270. Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards; Early Action Compact Areas with Deferred Effective Dates, 69 Fed. Reg. 23,858, 23,858 (Apr. 30, 2004).

271. *See* 42 U.S.C. § 7502(c).

272. Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards; Early Action Compact Areas with Deferred Effective Dates, 69 Fed. Reg. 23,858, 23875–76 (Apr. 30, 2004) (codified at 40 C.F.R. § 81.300(e)).

273. *See* 40 C.F.R. § 81.300(e)(2)(iv).

274. *See, e.g.*, 42 U.S.C. §§ 7511–7511f (listing additional provisions for ozone nonattainment areas).

275. 73 Fed. Reg. 17,897, 17,899 tbl.1 (Apr. 2, 2008).

276. Final 8-Hour Ozone National Ambient Air Quality Standards Designations for the Early Action Compact Areas, 73 Fed. Reg. 6,863, 6,865 & tbl.1 (proposed Feb. 6, 2008).

277. National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436, 16,436 (Mar. 27, 2008).

to new scientific evidence regarding the adverse health effects of ozone.[278] All states were required to submit recommendations to the EPA by March 2009 regarding designation of areas as attainment or nonattainment for the new standard, and the EPA will have until March 2010 to designate all areas of the country.[279] Since states must submit State Implementation Plans within three years of the adoption of new NAAQS, states must submit plans setting forth strategies to meet the new ozone standard by 2011.[280]

The rule establishing the revised ozone NAAQS is silent with respect to whether EACs will be used again to defer attainment designations.[281] Note that in the February 2008 proposed designation of the Roanoke and Winchester areas as attainment, Winchester was listed as having an eight-hour ozone level of 0.073 ppm and Roanoke was listed as having a level of 0.076 ppm.[282] Accordingly, under the revised standard, Winchester would be in attainment and Roanoke would barely be out of attainment.

Finally, in September 2008 the EPA determined that the entire Commonwealth is in attainment with the 2006 twenty-four-hour standard for fine particulate matter that is smaller than 2.5 micrometers in diameter.[283]

3. The EPA's Proposed Greenhouse Gas Endangerment Finding and Mandatory Reporting Regulation

In *Massachusetts v. EPA*, the Supreme Court of the United States determined that the EPA has legal authority under the CAA to regulate GHG emissions from motor vehicles as air pollutants and remanded to the agency to determine whether GHG emissions endanger public health and welfare.[284] As a result, in April 2009 the EPA issued its Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Sec-

278. *See id*.

279. *Id*. at 16,503.

280. *Id*.

281. 40 C.F.R. § 50.15(a), (b) (2008).

282. Final 8-Hour Ozone National Ambient Air Quality Standards Designations for the Early Action Compact Areas, 73 Fed. Reg. 6863, 6865 tbl.1 (proposed Feb. 6, 2008).

283. *See* 2006 24-Hour $PM_{2.5}$ Standards—Region 3 Designations, http://www.epa.gov/pmdesignations/2006standards/final/region3.htm.

284. 549 U.S. 497, 532, 535 (2007).

tion 202(a) of the Clean Air Act ("Proposed Endangerment Finding").[285] The EPA determined that six GHGs, namely carbon dioxide, methane, nitrous oxide, hydroflourocarbons, perflourocarbons, and sulfur hexafluoride, are air pollutants that can "reasonably be anticipated to endanger public health or welfare."[286] The EPA also determined that the emission of these pollutants from motor vehicles "cause or contribute" to levels of GHG in the atmosphere sufficient to contribute to human-induced climate change.[287] As a result, once the proposed finding is final, under section 202(a) of the CAA, the agency must establish standards for GHG emissions from new motor vehicles.[288]

The Proposed Endangerment Finding was subject to public comment until June 23, 2009, and the EPA will issue proposed regulations for GHG emissions from motor vehicles only after consideration of comments.[289]

Meanwhile, the EPA also issued a proposed rule in April 2009 that would require mandatory reporting of GHGs from all sectors of the economy.[290] If adopted, the rule would require tens of thousands of facilities to summarize and report their GHG emissions on an annual basis.[291] In addition, any entity required to report under the rule would also have to keep records related to their reports and reportable activities for five years.[292] Facilities would be covered by the rule if they emit 25,000 metric tons or more of carbon dioxide ("CO_2") per year or fall into a prescribed industrial sector.[293] This amount of CO_2 is created by burning about thirty mmbtu/hr operating full time, over the course of a year.[294] Affected sectors, which must report regardless of their CO_2 emissions, include: (1) manufacturers of electronics, lime, vehicles, and engines; (2) producers of aluminum, cement, phosphoric acid, nitric acid, and petrochemicals; (3) suppliers of coal, coal-based liquid fuels, petroleum products, natural gas and natural gas liq-

285. 74 Fed. Reg. 18,886 (Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1).
286. *Id*. at 18,887–88.
287. *See id.* at 18,904.
288. 42 U.S.C. § 7521(a)(1) (2006) (citing 42 U.S.C. § 7521(a)).
289. *See* 74 Fed. Reg. 18,886.
290. Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 16,448, 16,448 (proposed Apr. 10, 2009) (to be codified in scattered sections of 40 C.F.R.).
291. *See id*. at 16,448 tbl.1.
292. *Id.* at 16,463.
293. *Id.* at 16,467.
294. *Id.* at 16,469.

uids; and (4) petroleum refiners, coal mines, landfills, and manure management operations.[295]

As drafted, the rule would cover the transportation sector through information provided by vehicle and engine manufacturers and fuel suppliers and would not require reporting from individual or fleet vehicle operators.[296] However, the EPA sought comment on whether it should change this approach.[297] The EPA also requested comment on an unusually wide range of additional questions, including: (1) whether EPA should collect information on electricity purchases;[298] (2) whether vehicle fleet operators should report their emissions (as proposed, they will not);[299] (3) whether biomass fuel suppliers should have to report emissions (as drafted, they will not);[300] (4) what GHGs should be covered by the rule;[301] (5) for several industrial sectors, which of several suggested calculation methodologies should be used and, for some, if emission estimates should be deemed sufficient;[302] (6) whether sources, where feasible, should be required to have continuous emissions monitoring systems;[303] and (7) how the EPA should collect, manage, and disseminate data under the rule.[304] The comment period was open until June 9, 2009.[305] Thus, many of the specifics of the proposed rule remain open to input, discussion, and change.

B. *Virginia Regulatory Developments*

1. Water Regulations (Revised Stormwater Regs.)

a. Revisions to Water Quality Standards

Both section 303(c) of the CWA and the State Water Control Law requires that the Water Control Board adopt, modify, or can-

295. *Id.* at 16,461–62.
296. *See id.* at 16,459.
297. *Id.* at 16,466 n.46.
298. *Id.* at 16,473.
299. *Id.* at 16,466 n.46.
300. *Id.* at 16,466.
301. *Id.* at 16,464.
302. *Id.* at 16,469.
303. *See id.* at 16,453, 16,474.
304. *Id.* at 16,453.
305. *Id.* at 16,448.

cel state water quality standards every three years.[306] In 2008 the Water Control Board undertook this mandated triennial review and adopted several revisions to the standards based on updated scientific data, consultation with an ad hoc advisory committee, and public comments submitted on the proposed regulations.[307] Regulatory changes included: (1) revision of pH criteria and expanded narrative criteria for Class VII swamp waters to reflect that natural quality for dissolved oxygen and pH fluctuate and these fluctuating values are not considered violations of the criteria;[308] (2) numerous revisions to criteria to protect designated uses from impacts of nutrients and suspended sediment in the Chesapeake Bay and its tidal tributaries;[309] and (3) updated human health and aquatic life criteria.[310] Notably, after receiving public comment, the Water Control Board decided *not* to relax the existing 0.8% risk level E. coli bacteria criteria, as it originally had proposed.[311]

b. General Stormwater Permit for Construction Activities

The Water Control Board issued a five-year General Virginia Stormwater Management Program ("VSMP") Permit for Discharges of Stormwater from Construction Activities ("Construction General Permit") on July 1, 2004.[312] The permit regulated "the discharge of stormwater from construction sites that disturb 1 acre or more of land (2,500 sq. feet in Bay Act areas), and from smaller sites that are part of a larger, common plan of develop-

306. 33 U.S.C. § 1313(c) (2006); VA. CODE ANN. § 62.1-44.15(3a) (Cum. Supp. 2009).

307. Virginia Department of Environmental Quality, Reviewing Virginia's Water Quality Standards: An Overview of Proposed Changes, http://www.deq.virginia.gov/info/waterstandards.html (last visited Oct. 11, 2009).

308. Numerical Criteria for Dissolved Oxygen, pH, and Maximum Temperature, 25 Va. Reg. Regs. 2133, 2139 (Feb. 16, 2009) (codified at 9 VA. ADMIN. CODE § 25-260-50 (2009)).

309. Criteria to Protect Designated Uses from the Impacts of Nutrients and Suspended Sediment in the Chesapeake Bay and its Tidal Tributaries, 25 Va. Reg. Regs. 2133, 2163 (Feb. 16, 2009) (codified at 9 VA. ADMIN. CODE § 25-260-285 (2009)).

310. Criteria for Surface Water, 25 Va. Reg. Regs. 2133, 2140 (Feb. 16, 2009) (codified at 9 VA. ADMIN. CODE § 25-260-140 (2009)).

311. *See* State Water Control Bd., Final Regulation Agency Background Document 1, 4 (Sept. 22, 2008), http://www.deq.virginia.gov/wqs/documents/TR_Townhall_form_FINAL_17OCT2008.pdf.

312. Va. Dep't of Conservation & Recreation, Va. Stormwater Mgmt. Program (USMP) Permit Regulations 1 (July 22, 2008), http://www.dcr.virginia.gov/documents/stmorienttac.pdf [hereinafter USMP Permit Document].

ment."[313] The permit "requires operators of such construction sites to implement stormwater controls and develop stormwater pollution prevention plans [("SWPPPs")] to prevent sediment and other pollutants associated with construction sites from being discharged in stormwater runoff."[314]

Effective January 29, 2005, the Virginia Soil and Water Conservation Board ("VSW Board") assumed responsibility for the VSMP;[315] therefore, it was responsible for issuance of a new Construction General Permit before June 30, 2009.[316] A technical advisory committee convened in 2008 to assist the VSW Board with refining and developing permit revisions and coordinating with the EPA and the Virginia Department of Conservation and Recreation ("DCR").[317]

The VSW Board issued an amended Construction General Permit on March 6, 2009, after a vigorous sixty-day comment period.[318] Key components of the revised permit include: (1) adding and revising definitions for such terms as "best management practice," "control measure," "discharge of a pollutant," and "minor modification;"[319] (2) requiring that construction stormwater discharges not cause or contribute to a violation of any applicable water quality standard;[320] (3) mandating that discharges to waters identified as impaired are not eligible for coverage under the permit unless the operator ensures that the discharges do not cause or contribute to a water quality standard violation;[321] and (4) updating the requirements for a SWPPP for a construction site.[322]

313. *Id.* at 4.

314. *Id.*

315. *See* Act of Apr. 8, 2004, ch. 372, 2004 Va. Acts 502, 503–04 (codified at VA. CODE ANN. § 10.1-603.2:1 (Cum. Supp. 2004)); 4 VA. ADMIN. CODE § 50-60-1120 (2009).

316. 4 VA. ADMIN. CODE § 50-60-1120.

317. *See* USMP Permit Document, *supra* note 312, at 1.

318. *See* Virginia Stormwater Management Program (VSMP) Permit Regulations, 25 Va. Reg. Regs. 2838 (Apr. 13, 2009) (to be codified at 4 VA. ADMIN. CODE pt. 50-60).

319. *Id*. at 2839–42 (to be codified at 4 VA. ADMIN. CODE § 50-60-10).

320. *Id*. at 2850 (to be codified at 4 VA. ADMIN. CODE § 50-60-1130(B)(3)).

321. *Id*. at 2840–50, 2856 (to be codified at 4 VA. ADMIN. CODE §§ 50-60-1130(A), 50-60-1170(H)).

322. *Id.* at 2851 (to be codified at 4 VA. ADMIN. CODE § 50-60-1140).

c. Proposed Revisions to Other Stormwater Regulations

The VSW Board currently is revising Parts I, II, and III of the VSMP regulations with the assistance of another technical advisory committee.[323] The proposed regulations were published on June 22, 2009, which commenced a sixty-day public comment period.[324] As with the revisions to the Construction General Permit, significant public comment is anticipated from environmental organizations as well as the development community.

In summary, the voluminous proposed regulations (1) amend technical criteria applicable to stormwater discharges from construction activities, (2) establish minimum criteria for locality-administered stormwater management programs (qualifying local programs) and local stormwater management programs administered by the DCR, (3) authorize procedures and review procedures for qualifying local programs, and (4) amend the definitions applicable to all of the VSMP regulations.[325]

> With regard to technical criteria applicable to stormwater discharges from construction activities, revised water quality and water quantity requirements are proposed to be included in Part II of the regulations. [Such] requirements include a 0.28 lbs/acre/year phosphorus standard for new development, a requirement that total phosphorus loads be reduced to an amount at least 20% below the predevelopment phosphorus load on prior developed lands, and a requirement that control measures be installed on a site to meet any applicable wasteload allocation. Water quantity requirements include both channel protection and flood protection criteria.[326]

Pursuant to Virginia Code section 10.1-603.3, which requires the establishment of stormwater management programs by localities,[327] the proposed regulations also set minimum criteria and ordinance requirements for qualifying VSW Board-authorized, and DCR-administered local stormwater management programs that include "administration, plan review, issuance of coverage under the [Construction General Permit], inspection, enforce-

323. Virginia Stormwater Management Program (VSMP) Permit Regulations, 25 Va. Reg. Regs. 3793, 3801 (proposed June 22, 2009).

324. *See id.* at 3793.

325. *See id.* at 3796.

326. *Id.*

327. VA. CODE ANN. § 10.1-603.3 (Cum. Supp. 2009).

ment, reporting, and recordkeeping."[328] Additionally, the proposed regulations establish VSW Board procedures for authorizing a locality to administer a qualifying local program.[329]

d. DEQ Guidance Documents

Virginia Code section 62.1-44.15:21 was amended in 2008 to create an exemption from the requirement to obtain a VWP Permit for the construction or maintenance of certain agricultural and silvicultural ponds and impoundments.[330] In October 2008 the DEQ Water Division issued Water Guidance Memo No. 08-2012 to assist agency staff in interpreting and clarifying how applications for such activities should be processed relative to water withdrawal permitting and section 404 permit actions by the Corps.[331] This guidance clarifies that pursuant to the amended statute, to be excluded from permit requirements, a farm or stock pond or impoundment must (1) "be constructed or maintained for normal agricultural or silvicultural activities; and [(2)] be exempt from Dam Safety Regulations, because it has a dam height of less than 25 feet or a maximum impoundment capacity smaller than 100 acre-feet."[332] Water withdrawal from such ponds or impoundments, however, is still subject to permit requirements.[333] The guidance also clarifies the appropriate actions that DEQ should take pursuant to section 401 of the CWA if the pond or impoundment is subject to section 404 permitting requirements.[334]

On March 19, 2009, the DEQ Water Division issued a second guidance memorandum defining how DEQ will support the new wetlands compensatory mitigation rule issued by the Corps and the EPA in 2008[335] when reviewing and accepting compensatory

328. Virginia Stormwater Management Program (VSMP) Permit Regulations, 25 Va. Reg. Regs. 3808, 3819 (proposed June 22, 2009).

329. *Id.* at 3819.

330. *See supra* note 215 and accompanying text.

331. Memorandum from Ellen Gilinsky, Dir., Va. Dep't of Envtl. Quality Water Div., to Reg'l Dirs. 1 (Oct. 1, 2008), http://www.deq.virginia.gov/waterguidance/pdf/082012.pdf.

332. *Id.* at 4–5.

333. *Id.* at 5.

334. *Id.* at 6.

335. Memorandum from Ellen Gilinsky, Dir., Va. Dep't of Envtl. Quality Water Div., to Reg'l Dirs. 1 (Mar. 19, 2009), http://www.deq.virginia.gov/waterguidance/pdf/092004.pdf [hereinafter Water Guidance Memo No. 09-2004]; *see* discussion *supra* Part IV.A.1.

mitigation packages until the Virginia Water Protection Program ("VWPP") can be revised to conform to the federal rule.[336]

The guidance states that the DEQ supports the federal rule and concurs with the preference hierarchy that it sets forth for the various types of compensatory mitigation activities that can be undertaken.[337] The guidance articulates a justification for following the federal rule in implementing the VWPP, focusing on the consistency between the objectives of the two programs, the authority under Virginia law for purchasing mitigation bank credits and in-lieu fee compensation, the use of permittee-responsible on-site and off-site mitigation in areas that lack mitigation bank and in-lieu fee options, and the application of the watershed approach to mitigation under Virginia law.[338] Additionally, the guidance addresses circumstances supporting deviation from the hierarchy preference and recommends actions to reach consensus with the Corps in such instances.[339]

2. Air Regulations

The Air Pollution Control Board took final action on several regulations in late 2008 and early 2009.[340] The most substantive are summarized below.

In late 2008 the Air Pollution Control Board made several revisions to its regulations relating to air permits for stationary sources.[341] The regulations were amended to incorporate additional opportunity for public comment and public hearings[342] mandated by the 2008 legislation discussed above.[343]

336. *See* Water Guidance Memo No. 09-2004, *supra* note 335, at 1.

337. *Id.*

338. *Id.* at 5–7.

339. *Id.* at 7.

340. The Air Pollution Control Board also updated the Hazardous Air Pollutant Sources Regulation, 9 VA. ADMIN. CODE pt. 5-60, to incorporate numerous federal regulations by reference. Hazardous Air Pollutant Sources, 25 Va. Reg. Regs. 2073 (Feb. 16, 2009). The revised regulation also notes federal standards that the Commonwealth is not incorporating, along with a statement that the EPA is responsible for enforcing such standards. *Id.* at 2073.

341. *See* Permits for Stationary Sources, 25 Va. Reg. Regs. 1218 (Nov. 24, 2008) (to be codified at 9 VA. ADMIN. CODE §§ 5-80-1615, 5-80-1695).

342. Public Hearings to Contest Permit Actions, 25 Va. Reg. Regs. 1231, 1235–37 (codified at 9 VA. ADMIN. CODE 5-80-35 (2009)).

343. *See* discussion *supra* Part III.A.2.

Another 2008 revision was to change the applicability test for modifications to minor new stationary sources of air emissions from the "actual-to-potential emissions test" to an "uncontrolled-to-uncontrolled emission rate test."[344] This change involved (1) deleting the definition of "actual emissions," which contained the actual-to-potential test; (2) adding a new definition for "uncontrolled emission rate"; and (3) replacing "actual emissions" with "the uncontrolled emission rate" throughout the regulation.[345] Provisions relating to alternative fuels and air emissions also were revised for consistency with Virginia Code section 10.1-1322.4 "and provide an exception from the requirement to submit the exemption demonstration for certain fuels."[346]

Additionally, the Prevention of Significant Deterioration New Source Review Program ("NSR") was "revised to specify that nitrogen oxides . . . are a precursor of ozone in addition to volatile organic compounds . . . in the definitions of 'major modification' 'major stationary source,' 'regulated NSR pollutant' and 'significant,' and the list of exempted facilities."[347]

In June 2009 the Air Pollution Control Board proposed a fast-track regulation to combine the terms and conditions of all the components of the NSR into one permit.[348] This revision, which went into effect in late July 2009, also reworked exemptions relating to the use of alternative fuels and raw materials in order to comply with a recent statutory amendment to Virginia Code section 10.1-1322.4.[349]

Additionally, in order to be consistent with the EPA's newly revised eight-hour ozone NAAQS,[350] the Air Pollution Control Board amended the regulations to incorporate the federal standard into the state regulation so that the Commonwealth can prepare attainment and maintenance plans and determine whether a new

344. Permits for Stationary Sources, 25 Va. Reg. Regs. 1257, 1258, 1262, 1267 (Nov. 24, 2008) (to be codified in scattered sections of 9 VA. ADMIN. CODE).

345. *Id.* at 1258–59, 1262, 1264, 1267.

346. *Id.* at 1258.

347. Permits for Stationary Sources, 25 Va. Reg. Regs. 1218, 1218 (Nov. 24, 2008).

348. Permits for Stationary Sources, 25 Va. Reg. Regs. 3489, 3490 (June 8, 2009).

349. *Id.* at 3489–90.

350. *See* discussion *supra* Part IV.A.2

source of air emissions will affect compliance with the NAAQS.[351] This revision also added a new standard of 0.15 ppm for lead.[352]

Finally, the Air Pollution Control Board promulgated a regulation applicable to open burning, including model ordinances for localities to adopt to regulate the activity.[353] This regulatory action recodified the Emission Standards for Open Burning as the Regulation for Open Burning and repealed the previous Open Burning Rule.[354]

3. Solid and Hazardous Waste Regulations

The Virginia Waste Management Board has not promulgated or amended any significant new regulations in 2008 through the first half of 2009. It is, however, currently in the process of recodifying the Solid Waste Management Regulation[355] in order to make it more concise and easy for the regulated community and public to follow and to incorporate the Vegetative Waste Management and Yard Waste Regulation.[356] Other proposed revisions include pre-approved alternate liner and cover designs, new standards for centralized sludge treatment facilities, less onerous standards for composting and other types of facilities that are higher up in the waste hierarchy, including a change from full permit to permit-by-rule status for composting facilities, and consolidation of exemptions into one section.[357] The proposed regulation was published in the Virginia Register of Regulations in early July 2009, and the public comment period ended September 4, 2009.[358]

Two other regulatory amendments have completed the Notice of Intended Regulatory Action ("NOIRA") stage in the past year. In 2008 the Board proposed amendments to the Voluntary Remediation Regulations[359] to revise program procedures so that

351. Ambient Air Quality Standards, 25 Va. Reg. Regs. 3297, 3297–302 (May 25, 2009).

352. *Id.* at 3298, 3302.

353. *See* Regulation for Open Burning, 25 Va. Reg. Regs. 2088 (Feb. 16, 2009) (to be codified at 9 VA. ADMIN. CODE pt. 5-130).

354. *Id.* at 2088.

355. 25 Va. Reg. Regs. 4048 (proposed July 6, 2009). The proposed regulatory action would repeal sections 20-80 and 20-101 and adopt section 20-81 of title 9 of the Virginia Administrative Code. *Id.*

356. *Id.* at 4048–49.

357. *See id.* at 4049, 4051.

358. *Id.* at 4048.

359. 9 VA. ADMIN. CODE § 20-160-10 to 20-160-120 (2004).

sites contaminated with hazardous substances can be processed more efficiently to facilitate voluntary clean-up.[360] Such revisions include improving reporting requirements, updating sampling and analysis methods to reflect current technology, and clarifying eligibility, termination, and application requirements.[361] The NOIRA was published in May 2008, and the public comment period ended in July 2008.[362] No further action, however, has been taken on this regulatory revision.[363]

In June 2009 the Board also published a NOIRA on the amendment of the Coal Combustion Byproducts ("CCB") Regulations to include "additional restrictions on the use and placement" of CCB.[364] The Virginia Waste Management Board planned revisions to specify that unamended CCB placed in a one hundred-year floodplain is not exempt from the definition of solid waste or from solid waste permitting requirements.[365] The Virginia Waste Management Board also expressed interest in restrictions on the use and placement of amended and unamended CCB and provisions for public participation on CCB projects.[366]

360. Notice of Intended Regulatory Action, 24 Va. Reg. Regs. 2499 (May 12, 2008).

361. Waste Mgmt. Bd., Notice of Intended Regulatory Action (NOIRA) Agency Background Document 2 (Jan. 31, 2008), http://www.townhall.state.va.us/L/viewstage.cfm?Stageid=4505&display=documents (follow "Documents" tab; then follow "Agency Statement" hyperlink).

362. Notice of Intended Regulatory Action, 24 Va. Reg. Regs. 2499 (May 12, 2008).

363. Va. Dep't of Envtl. Quality, Va. Waste Mgmt. Bd., Voluntary Remediation Regulations, Notice of Intended Regulatory Action, http://www.townhall.state.va.us/L/viewstage.cfm?stageid=4505&display=general (last visited Oct. 11, 2009).

364. 25 Va. Reg. Regs. 3474 (June 8, 2009).

365. *Id.*

366. *Id.*