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ENVIRONMENTAL LAW

Benjamin A. Thorp IV *

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I. INTRODUCTION

Over the past year, there have been numerous changes in the environmental laws affecting Virginia. This article discusses environmental developments between June 2003 and June 2004. During this period, both Virginia and the federal government were busy addressing issues related to the Clean Air Act (“CAA”), and the United States Court of Appeals for the Fourth Circuit decided two important cases defining the jurisdictional limits of the Clean Water Act (“CWA”). In addition, the Environmental Protection Agency (“EPA”) is currently contemplating changes to the definition of “solid waste” and to the obligations imposed by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”) on purchasers of property. Therefore, there have been significant changes in nearly every field of environmental law in the preceding two years.

II. WATER QUALITY AND PERMITTING

A. *State Developments*

1. General Permits

On April 19, 2004, the State Water Control Board (“SWCB”)

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published final, new storm water general permits¹ for industrial² and construction activities.³ The previous general permits for storm water discharges from industrial and construction activities expired on June 30, 2004; the new general permits are effective on July 1, 2004, and will expire on June 30, 2009.⁴

On July 28, 2003, the SWCB reissued, with amendments, the general permit for ready-mixed concrete plants.⁵ The 1998 general permit expired on September 30, 2003 and the new general permit became effective October 1, 2003.⁶

2. Water Quality and Standards

a. Draft 2004 Virginia Water Quality Assessment

On March 22, 2004, the Department of Environmental Quality ("DEQ") released its Draft 2004 305(b)/303(d) Water Quality Assessment Integrated Report for public review and comment.⁷ Sections 305(b)⁸ and 303(d)⁹ of the CWA, as well as the Virginia Water Quality Monitoring, Information and Restoration Act,¹⁰

1. General permits are permits applicable to defined activities and/or entities. They are designed to reduce the regulatory burden for common activities that are easily regulated.

2. Virginia Pollutant Discharge Elimination System (VPDES) General Permit Regulation for Discharges of Storm Water Associated with Industrial Activity, 20 Va. Regs. Reg. 1889 (Apr. 19, 2004) (codified at 9 VA. ADMIN. CODE §§ 25-151-10, -40 to -370 (2004)) VPDES Industrial Permit.

3. Virginia Pollutant Discharge Elimination System (VPDES) General Permit Regulation for Discharges of Storm Water from Construction Activities, 20 Va. Regs. Reg. 1890 (Apr. 19, 2004) (codified at 9 VA. ADMIN. CODE §§ 25-180-10, -20, -40, -50, -55, -60, (2004)) [hereinafter VPDES ConstructionPermit].

4. See VPDES Construction Permit, *supra* note 3.

5. General Virginia Pollutant Discharge Elimination System (VPDES) Permit for Ready-Mixed Concrete Plants, 19 Va. Regs. Reg. 3331 (July 28, 2003) (codified at 9 VA. ADMIN. CODE §§ 25-193-10, -30 to -70 (2004)).

6. *Id.*

7. See Notice of Availability of and Public Comment on the 2004 305(b)/303(d) Water Quality Assessment Integrated Report, 20 Va. Regs. Reg. 1715 (Mar. 22, 2004). The final report was released in August 2004. See VA. DEPT OF ENVTL. QUALITY, VIRGINIA WATER QUALITY ASSESSMENT, 305(b)/303(d) Integrated Report (2004), available at <http://www.deq.virginia.gov/wqa/pdf/2004ir/2004.pdf> (last visited Sept. 26, 2004).

8. 33 U.S.C. § 1315(b) (2000 & Supp. 2004).

9. *Id.* § 1313(d).

10. VA. CODE ANN. § 62.1-44.19:5 (Repl. Vol. 2001).

require the DEQ to establish and report to the EPA the water quality conditions in the Commonwealth of Virginia. Specifically, this report is used to ascertain the water segments that fail to meet water quality standards and require a Total Maximum Daily Load (“TMDL”).¹¹

b. Amendments to Water Quality Standards

On August 12, 2002, the SWCB published its final revisions to the statewide water quality criteria for ammonia.¹² The EPA approved these revisions on June 24, 2003. The new ammonia water quality criteria went into effect on August 27, 2003.¹³

On August 25, 2003, the SWCB published general revisions to its water quality standards regulations.¹⁴ The purpose of these amendments was to

(i) add new definitions; (ii) modify the mixing zone and antidegradation policies; (iii) update the Table of Parameters with new and revised criteria and a reformatted table; (iv) state that the taste and odor criteria apply at the drinking water intake; (v) move the groundwater standards to a new regulation; (vi) delete and modify special standards; (vii) add a site-specific criterion for copper in Hampton Roads; (viii) update use designations for trout streams and public water supplies; (ix) identify Class VII swamp waters in the Chowan Basin; and (x) rearrange the Middle and Lower James River Basin tables.¹⁵

The EPA approved these amendments on December 11, 2003, and they became effective on February 12, 2004.¹⁶

11. See 33 U.S.C. § 1313(d); see also VIRGINIA WATER QUALITY ASSESSMENT, *supra* note 7, at VII.

12. Water Quality Standards, 18 Va. Regs. Reg. 3289 (Aug. 12, 2002) (codified at 9 VA. ADMIN. CODE §§ 25-260-140, -155 (2004)).

13. Water Quality Standards, 19 Va. Regs. Reg. 3348 (July 28, 2003) (codified at 9 VA. ADMIN. CODE §§ 25-260-140, -155 (2004)).

14. Water Quality Standards, 19 Va. Regs. Reg. 3785 (Aug. 25, 2003) (codified at 9 VA. ADMIN. CODE §§ 25-260-5 to -30, -50, -140, -170, -300, -310, -320, -380 to -450, -470 to -540 (2004)).

15. *Id.*

16. Water Quality Standards, 20 Va. Regs. Reg. 890 (Jan. 12, 2004) (codified at 9 VA. ADMIN. CODE §§ 25-260-5 to -30, -50, -140, -170, -300, -320, -310, -380 to -450, -470 to -540 (2004)).

c. Guidance Manual for TMDL Implementation Plans

In July 2003, the DEQ released the TMDL Implementation Plan Guidance Manual.¹⁷ This manual provides guidance “on developing Implementation Plans (“IPs”) for waters where TMDLs have been completed.”¹⁸ It also addresses the requirements of three EPA guidance documents as well as Virginia’s 1997 Water Quality Monitoring, Information and Restoration Act requirements for IPs.¹⁹

3. Virginia Legislative Developments in 2003 and 2004

During the 2003 General Assembly term, legislation was enacted giving the SWCB and the DEQ sole authority to regulate the construction and operation of sewage treatment plants, effective July 1, 2003.²⁰ The biosolids land application law was amended to require nutrient management plans (“NMP”s) prepared by persons certified by the Department of Conservation and Recreation (“DCR”) for all land application sites.²¹ This law allows the DCR to incorporate site-specific requirements into the permits and requires the DCR’s approval of all NMPs for sites where the permit authorizes land application more than once every three years at greater than fifty percent of agronomic rates, and for “sites operated by an owner or lessee of a Confined Animal Feeding Operation . . . or Confined Poultry Feeding Operation. . . .”²²

Several significant pieces of environmental legislation were enacted between January and June of 2004. These statutory changes included revisions to the permit fees related to water and nonhazardous waste,²³ a law specifying the role of soil and water

17. Virginia Dep’t of Env’tl. Quality, TMDL Implementation Plan Guidance Manual (July 2003), available at <http://www.deq.state.va.us/tmdl/ipguide.html> (last visited Sept. 26, 2004).

18. *Id.*

19. *Id.*

20. Act of Mar. 18, 2003, ch. 614, 2003 Va. Acts 789 (codified as amended at VA. CODE ANN. §§ 32.1-16.4, 62.1-44.3, -44.18, -44.19 (Cum. Supp. 2004)).

21. Act of Mar. 19, 2003, ch. 681, 2003 Va. Acts 902 (codified at VA. CODE ANN. §§ 32.1-164.6, -164.7 (Cum. Supp. 2004)).

22. *Id.*

23. Act of Mar. 31, 2004, ch. 324, 2004 Va. Acts ___ (codified at VA. CODE ANN. §§ 10.1-

conservation districts,²⁴ and a reorganization of Virginia's storm water management programs.²⁵

Effective July 1, 2004, the State Water Control Law ("SWCL") was amended requiring the SWCB to adopt regulations establishing "no discharge zones" to control the discharge of sewage from boats and vessels.²⁶ The SWCL was also amended to require the SWCB to review an application for a Virginia Water Protection general permit for completeness within fifteen days of receiving the application.²⁷ Finally, operators of tank vessels were given guidance regarding the types of oil discharge contingency plans and financial responsibility mechanisms required to be allowed to operate on Virginia waters.²⁸

4. Virginia Administrative Developments in 2003 and 2004

On January 12, 2004, the SWCB published final regulations transferring the responsibility of sewage treatment from the Department of Health to the SWCB.²⁹ The SWCB also published final regulations making numerous changes to the Underground Storage Tank regulations on February 23, 2004.³⁰ On March 8, 2004, they published proposed regulations concerning "Petroleum Underground Storage Tank Financial Responsibility Requirements."³¹ The proposed changes would "require an owner/operator

1322, -1402, -1402.1, -1402.1:1 and 62.-1-44.15:6 (Cum. Supp. 2004)).

24. Act of Apr. 12, 2004, ch. 474, 2004 Va. Acts ___ (codified at VA. CODE ANN. §§ 10.1-104.1, -546.1 (Cum. Supp. 2004)).

25. Act of Apr. 8, 2004, ch. 372, 2004 Va. Acts ___ (codified at VA. CODE ANN. §§ 10.1-603.2, -603.2:1, -603.2:2 to -603.4:1 to -603.9, -603.11 to -603.12:1 to -603.12:7 to -603.13:1 to -603.15, 62.1-44.5 (Cum. Supp. 2004)).

26. Act of Mar. 31, 2004, ch. 287, 2004 Va. Acts ___ (codified at VA. CODE ANN. § 62.1-44.33 (Cum. Supp. 2004)).

27. Act of Mar. 31, 2004, ch. 293, 2004 Va. Acts ___ (codified at VA. CODE ANN. § 62.1-44.15:5 (Cum. Supp. 2004)).

28. Act of Mar. 31, 2004, ch. 276, 2004 Va. Acts ___ (codified at VA. CODE ANN. §§ 62.1-44.34:15, -44.34:16 (Cum. Supp. 2004)).

29. Sewage Collection and Treatment Regulations, 20 Va. Regs. Reg. 891 (Jan. 12, 2004) (codified at 9 VA. ADMIN. CODE §§ 25-790-10 to -1000 (2004)).

30. Underground Storage Tanks: Technical Standards and Corrective Action Requirements, 20 Va. Regs. Reg. 1505 (Feb. 23, 2004) (to be codified at 9 VA. ADMIN. CODE § 25-580-10, -50, -130, -270, -320).

31. Petroleum Underground Storage Tank Financial Responsibility Requirements, 20 Va. Regs. Reg. 1574 (Mar. 8, 2004) (to be codified at 9 VA. ADMIN. CODE §§ 25-590-10 to -40, -60 to -100, -120, -140 to -210, -260).

to account for other types of self-insured liabilities when using a self-insurance mechanism.”³²

5. Significant Cases Related to Water Quality and Permitting

In *7-Eleven, Inc. v. Department of Environmental Quality*,³³ the Court of Appeals of Virginia held that money paid to settle a lawsuit brought by a neighboring landowner against a “responsible party” for damages caused by a petroleum storage tank release are reimbursable “costs” under the Petroleum Storage Tank Fund statute.³⁴ The court stated that the DEQ must assess the reasonableness of any settlement when it determines the amount of the reimbursement; furthermore, the court noted that the “reasonableness” of a settlement includes an accounting for litigation risk.³⁵ Finally, the court of appeals held that the DEQ erred by considering diminution in value and cost of restoration as the only factors in ascertaining the value of the permanent damages to a third-party’s real property.³⁶

In *Crutchfield v. State Water Control Board*,³⁷ the Richmond City Circuit Court held that title 9, section 25-31-50(C)(9) of the Virginia Administrative Code does not prohibit the SWCB from permitting the discharge of a pollutant to a body of water that does not meet water quality standards for that same pollutant, so long as the discharge agreement will not cause or contribute to a violation of water quality standards in the receiving waterway.³⁸ The court also held, in spite of the regulation’s language, that in determining that a discharge will not “cause or contribute” to a violation of water quality standards, the SWCB is not required to perform a pollution load allocation, nor demonstrate that there are sufficient remaining pollution load allocations in the receiving water to assimilate the additional pollution, nor show that existing dischargers to the water body are subject to compliance sched-

32. *Id.*

33. 42 Va. App. 65, 590 S.E.2d 84 (Ct. App. 2003).

34. *Id.* at 75, 590 S.E.2d at 89.

35. *Id.* at 78, 590 S.E.2d at 90.

36. *Id.* at 82, 85, 590 S.E.2d at 92, 94.

37. 64 Va. Cir. 211 (Cir. Ct. 2004) (Richmond City) (appeal noticed April 21, 2004).

38. *Id.* at 212–13 (interpreting 9 VA. ADMIN. CODE § 25-31-50(C)(9) (2004)).

ules designed to bring the water into compliance with water quality standards.³⁹

B. *Federal Developments*

1. Ambient Water Quality Criteria for the Bay and Its Tributaries

In April 2003, Region III of the EPA published the Ambient Water Quality Criteria for Dissolved Oxygen, Water Clarity and Chlorophyll *a* for the Chesapeake Bay and Its Tidal Tributaries.⁴⁰ The guidance recommends five new designated uses for the Chesapeake Bay and its tributaries: (1) migratory fish spawning and nursery; (2) shallow-water bay grass; (3) open-water fish and shellfish; (4) deep-water seasonal fish and shellfish; (5) and deep-channel seasonal refuge.⁴¹ To assist the Chesapeake Bay states in applying these new designated uses, Region III of the EPA released the Technical Support Document for Identifying Chesapeake Bay Designated Uses and Attainability in August 2003.⁴²

2. Federal Regulatory Developments

On December 22, 2003, the EPA published rules to amend the wastewater regulations for the centralized waste treatment point source category, deleting certain pollutants from those subject to effluent limitations guidelines and standards.⁴³

39. *Id.*

40. U.S. Environmental Protection Agency, Ambient Water Quality Criteria for Dissolved Oxygen, Water Clarity and Chlorophyll *a* for the Chesapeake Bay and Its Tidal Tributaries (Apr. 2003), available at <http://www.epa.gov/region03/chesapeake/baycriteria.htm> (last visited Oct. 4, 2004).

41. *Id.* at x–xi.

42. U.S. Environmental Protection Agency, Technical Support Document for Identifying Chesapeake Bay Designated Uses and Attainability (Aug. 2003), available at <http://www.epa.gov/region03/chesapeake/baycriteria.htm> (last visited Oct. 4, 2004).

43. Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards for the Centralized Waste Treatment Point Source Category, 68 Fed. Reg. 71,014 (Dec. 22, 2003) (codified at 40 C.F.R. pt. 437 (2003)).

III. WETLANDS

A. *State Developments*1. The State Law Component of *Treacy v. Newdunn Associates, L.L.P.*

In *Treacy v. Newdunn Associates, L.L.P.*,⁴⁴ the United States Court of Appeals for the Fourth Circuit addressed the jurisdictional reach of the Virginia Nontidal Wetlands Resources Act (“VNWRA”).⁴⁵ In 2001, without obtaining a permit from either the United States Army Corps of Engineers (the “Corps”) or the State Water Control Board, Newdunn began filling the wetlands on its property.⁴⁶ Both the Corps and the SWCB initiated enforcement actions.⁴⁷ Over the objection of the SWCB, Newdunn removed the SWCB’s enforcement action to federal court, where it was consolidated with the Corps’ federal enforcement action.⁴⁸

The Fourth Circuit first considered whether it had jurisdiction over the SWCB’s enforcement action, which was based on state law.⁴⁹ The court determined that in order for a federal court to have jurisdiction over this action, a necessary element of the state claim must turn on “some substantial, *disputed* question of federal law. . . .”⁵⁰

When it had considered this question, the district court had held that the SWCB’s jurisdiction was coextensive with that of the Corps’, and that this presented a “disputed question of federal law.”⁵¹ The Fourth Circuit held on appeal, however, that jurisdiction under the VNWRA was not coextensive with Clean Water Act jurisdiction.⁵² The court stated that Virginia clearly intended

44. 344 F.3d 407 (4th Cir. 2003), *cert. denied*, *Newdunn Assocs., L.L.P. v. United States Army Corps of Eng’rs*, 2004 U.S. LEXIS 2567 (Apr. 5, 2004).

45. *Id.* at 410–11.

46. *Id.* at 410.

47. *Id.*

48. *Id.*

49. *Id.* at 410–11.

50. *Id.* (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983)).

51. *Id.* at 411.

52. *Id.* at 412–13.

the VNWRA to regulate wetlands not within the jurisdiction of the CWA.⁵³ Therefore, the Fourth Circuit reversed the district court's ruling and held that the federal district court had no jurisdiction over the SWCB's enforcement action.⁵⁴

2. The Chesapeake Bay Preservation Act—*Pony Farm Associates, L.L.P. v. City of Richmond*⁵⁵

The plaintiffs, Pony Farm Associates (“Pony Farm”), own a tract of land located in the City of Richmond, Virginia (the “City”).⁵⁶ The tract contains two streams which merge together on the property.⁵⁷ Pony Farm had a contract with a developer to develop a portion of the property into a retail center.⁵⁸

The Chesapeake Bay Preservation Act (“CBPA”) “requires local jurisdictions, such as the City of Richmond, to protect specific bodies of water, including ‘tributary streams,’” by surrounding them with Resource Protection Areas (“RPAs”).⁵⁹ RPAs are zones in which development is prohibited or restricted.⁶⁰ Prior to 2002, the CBPA “defined a tributary stream as a stream identified as perennial on the United States Geological Survey (“USGS”) 7 1/2 minute topographic quadrangle map.”⁶¹

In March 2002, the City amended the official map, designating RPAs around the streams on Pony Farm's property.⁶² Pony Farm challenged the City's amendment of its official map as not being authorized by the CBPA.⁶³ In its August 6, 2003, decision, the Circuit Court for the City of Richmond reversed the City's RPA designations.⁶⁴ The court held that prior to 2002, the only way a

53. *Id.* at 412.

54. *Id.* at 414.

55. 62 Va. Cir. 386 (Cir. Ct. 2003) (Richmond City).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 386–87; see also VA. CODE ANN. §§ 10.1-2100 to -2116 (Repl. Vol. 1998 & Cum. Supp. 2003).

60. *Pony Farm*, 62 Va. Cir. at 386–87.

61. *Id.* at 387.

62. *Id.* at 388.

63. *Id.*

64. *Id.* at 390.

water body could be considered a tributary stream was if it was indicated as a perennial water body on the relevant USGS map.⁶⁵ The court further held that the 2002 amendments to the CBPA regulations did not salvage the City's decision.⁶⁶ In 2002, the CBPA regulations were amended to allow localities to ascertain the perennial nature of a water body by either using the USGS map or by use of "a scientifically valid system of infield indicators of perennial flow," provided that whatever methodology is used, it must be "adopted into the local program and applied consistently."⁶⁷ The court held that there was no evidence that the City's designation was based on any "scientifically valid system" or that the City's methodology for determining the perennial nature of a water body was "adopted into the local program and applied consistently."⁶⁸

B. Federal Developments

1. The Geographical Jurisdiction of the Clean Water Act after *Solid Waste Agency of Northern Cook County ("SWANCC") v. Army Corps of Engineers*.⁶⁹

a. Judicial Developments

Section 404(a) of the CWA grants the Corps authority to issue permits for the discharge of fill material into "navigable waters."⁷⁰ The CWA defines "navigable waters" as "waters of the United States, including the territorial seas."⁷¹ The Corps has administratively defined "waters of the United States" in a variety of ways that purport to provide the Corps jurisdiction over waters beyond those that are navigable in the traditional sense.⁷²

65. *Id.* at 389–90.

66. *Id.*

67. *Id.* at 389 (quoting 9 VA. ADMIN. CODE § 10-20-80(D) (2002)).

68. *Id.* at 390.

69. 531 U.S. 159 (2001).

70. 33 U.S.C. § 1344(a) (2000).

71. 33 U.S.C. § 1362(7) (2000).

72. Currently, the Corps' regulations define waters of the United States to include,

In the *SWANCC* decision, the Supreme Court of the United States held that use of a completely intrastate wetland as habitat by migratory birds is not alone sufficient to give the Corps jurisdiction over that wetland under the CWA, if the wetland is not hydrologically connected to any traditionally navigable waters.⁷³ The Court held that Congress never intended the CWA to regulate non-navigable, isolated, intrastate waters such as those at issue in the case.⁷⁴

In 2003, the United States Court of Appeals for the Fourth Circuit decided two cases addressing the jurisdiction of the CWA in light of *SWANCC*. In both decisions, the Fourth Circuit limited *SWANCC*'s holding to the particular facts of that case.

In *United States v. Deaton*,⁷⁵ the Corps asserted jurisdiction over wetlands adjacent to a roadside, manmade ditch.⁷⁶ Waters from this ditch flow thirty-two miles, through several other non-navigable watercourses, before reaching the traditionally navigable waters of the Chesapeake Bay.⁷⁷ Without obtaining a Corps permit, Deaton discharged fill material into the wetlands on his property.⁷⁸ The Corps brought an enforcement action and asserted that Deaton's wetlands were within its jurisdiction under the CWA because the wetlands were adjacent to a tributary of traditionally navigable waters—the roadside ditch.⁷⁹

First, the Fourth Circuit addressed the constitutionality of the Corps' regulation, which asserted jurisdiction over tributaries of traditionally navigable waters and held that this regulation was constitutional.⁸⁰ The court then applied the framework established by the Supreme Court of the United States in *Chevron v.*

among other things, traditional navigable waters, tributaries of covered waters, including traditional navigable waters, and wetlands adjacent to covered waters and tributaries. 33 C.F.R. § 328.3(a) (2003).

73. *SWANCC*, 531 U.S. at 173–74; see also Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,216–17 (Nov. 13, 1986) (codified at 33 C.F.R. §§ 328–29 (2002) (defining the migratory bird rule and navigable waters)).

74. *SWANCC*, 531 U.S. at 174.

75. 332 F.3d 698 (4th Cir. 2003), cert. denied, Deaton v. United States, 124 S. Ct. 2088, 2089 (2004).

76. *Id.* at 702.

77. *Id.*

78. *Id.* at 701–02.

79. *Id.* at 703.

80. *Id.* at 705.

*Natural Resources Defense Council*⁸¹ to assess the validity of the Corps' jurisdictional regulation.⁸² The court found that the CWA is ambiguous concerning the geographic reach of its jurisdiction.⁸³ The Corps' interpretation, therefore, was entitled to deference.⁸⁴ It found the Corps' regulation asserting jurisdiction over man-made tributaries of traditionally navigable waterways to be a reasonable interpretation of the CWA.⁸⁵ The Fourth Circuit therefore affirmed the Corps' assertion of jurisdiction.⁸⁶

In *Treacy v. Newdunn*, the most recent Fourth Circuit case to address the post-SWANCC scope of the CWA's jurisdiction, the court held that the Corps had jurisdiction to regulate discharges to wetlands adjacent to non-navigable, manmade tributaries that only intermittently flow into traditionally navigable waters.⁸⁷ The court characterized the SWANCC decision as rejecting only the Corps' jurisdiction over isolated wetlands that have no hydrologic connection to navigable waters.⁸⁸ The court thus rejected Newdunn's argument that manmade ditches should not be characterized as "tributaries" for purposes of the CWA's jurisdiction.⁸⁹

b. Administrative Developments

In January 2003, the Corps and the EPA jointly issued an Advance Notice of Proposed Rulemaking indicating the agencies' intent to promulgate regulations clarifying the definition of "waters of the United States" in light of SWANCC.⁹⁰ These proposed regulations, however, were met with considerable controversy from both developers and environmentalists. On December 16, 2003,

81. 467 U.S. 837 (1984).

82. *Deaton*, 332 F.3d at 708; see also *Chevron*, 467 U.S. at 842.

83. *Deaton*, 332 F.3d at 709-10.

84. *Id.*

85. *Id.* at 712.

86. *Id.*

87. *Treacy v. Newdunn Assocs., L.L.P.*, 344 F.3d 407, 417 (4th Cir. 2003).

88. *Id.*

89. *Id.* at 417.

90. Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (Jan. 15, 2003) (codified at 33 C.F.R. pt. 328 (2002)).

the agencies announced they would not issue new regulations on this matter.⁹¹

2. Wetlands-Related CWA Statutory Amendments

In 2003, the CWA was amended to provide new authorizations to the Secretary of Defense.⁹² The Authorization for Department of Defense Participation in Wetland Mitigation Banks states that

[t]he Secretary of a military department, and the Secretary of Defense with respect to matters concerning a Defense Agency, when engaged in an authorized activity that may or will result in the destruction of, or an adverse impact to, a wetland, may make payments to a wetland mitigation banking program or “in-lieu-fee” mitigation sponsor approved in accordance with the Federal Guidance For The Establishment, Use and Operation of Mitigation Banks.⁹³

IV. AIR

A. *NO_x SIP Call*

On June 17, 2002, Virginia published regulations in response to Phase I of the nitrogen oxides (“NO_x”) State Implementation Plan (“SIP”) Call,⁹⁴ including the addition of title 9, section 5-140, Part I, the NO_x Budget Trading Program.⁹⁵ On July 8, 2003, the EPA conditionally approved Virginia’s NO_x budget trading program, effective August 7, 2003.⁹⁶ The terms of the conditional approval required that Virginia “revise its banking provision to amend the flow control trigger date from 2006 to 2005 and submit the amendment as a SIP revision within one year”—by August 7,

91. EPA and Army Corps Issue Wetlands Decision (Dec. 16, 2003), *available at* <http://www.epa.gov/owow/wetlands/guidance/SWANCC/index.html> (last visited Sept. 27, 2004).

92. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 314, 117 Stat. 1392, 1430–31 (2003) (to be codified at 10 U.S.C. § 2694(b)).

93. *Id.* at 1430–31.

94. Regulations for the Control and Abatement of Air Pollution (Revision YY), 18 Va. Regs. Reg. 2585 (June 17, 2002) (codified at 9 VA. ADMIN. CODE § 5-50 (2002)).

95. *Id.* at 2653–54 (codified at 9 VA. ADMIN. CODE § 5-140-10 to -90 (2002)).

96. Approval and Promulgation of Air Quality Implementation Plans; Virginia Nitrogen Oxides Budget Trading Program, 68 Fed. Reg. 40,520 (July 8, 2003) (codified at 40 C.F.R. pt. 52 (2003)).

2004.⁹⁷ On February 23, 2004, the State Air Pollution Control Board (“SAPCB”) complied, changing the flow control date in the NOx budget trading program from 2006 to 2005.⁹⁸

On February 9, 2004, the SAPCB issued an emergency regulation to implement a 2003 amendment to the Virginia Code authorizing the DEQ to “auction the NOx emissions credits allocated under the NOx SIP call as set asides for new sources,” thus amending the NOx budget trading program.⁹⁹ This amendment identifies the parameters of how an auction will be conducted, and provides that “if an auction is conducted, the current process of requesting and receiving set aside allowances on a pro-rata basis is vacated.”¹⁰⁰ These auctions are limited to “vintage 2004 and 2005 allowances.”¹⁰¹

On April 8, 2004, Governor Mark Warner signed into law Senate Bill 386, which prohibited the Commonwealth from selling, by auction or otherwise, the set asides allocated to new sources of air emissions.¹⁰² Specifically, the law does not “interfere with, apply to, or affect the auction of Virginia’s allocation of nitrogen oxide pollution credits set aside for new sources . . . for the years 2004 and 2005 as authorized by Chapter 1042 of the Acts of Assembly of 2003.”¹⁰³ This law became effective July 1, 2004.¹⁰⁴

After several court challenges,¹⁰⁵ the EPA issued its Final Rule concerning Phase II of the NOx SIP Call on April 21, 2004.¹⁰⁶ This rule established the second phase of the NOx SIP Call by:

97. *Id.* at 40,521.

98. Regulation for Emissions Trading (Rev. H02), 20 Va. Regs. Reg. 1504 (Feb. 23, 2004) (to be codified at 9 VA. ADMIN. CODE § 5-140-550).

99. Regulation for Emissions Trading, 20 Va. Regs. Reg. 1222 (Feb. 9, 2004) (codified at 9 VA. ADMIN. CODE § 5-140-421 (2004)).

100. *Id.*

101. *Id.*

102. S.B. 386, Va. Gen. Assembly (Reg. Sess. 2004) (enacted as Act of Apr. 8, 2004, ch. 334, 2004 Va. Acts 457) (codified as amended at VA. CODE ANN. § 10.1-1322.3 (Cum. Supp. 2004)).

103. *Id.*

104. As stated in the preface of the Advanced Legislative Service, all 2004 acts, unless stated otherwise, take effect on July 1, 2004. Virginia 2004 Advance Legislative Service, Preface (May 2004).

105. See, e.g., *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 463 (2001) (challenging the EPA’s revision of National Ambient Air Quality Standards (“NAAQS”) for Particulate Matter and Ozone).

106. Interstate Ozone Transport: Response to Court Decisions on the NOx SIP Call,

(1) Finalizing the definition of [an Electrical Generation Unit] EGU as applied to certain small cogeneration units, (2) Setting the control levels for stationary [internal combustion] IC engines, (3) Excluding portions of Georgia, Missouri, Alabama and Michigan from the NOx SIP Call, (4) Revising statewide emissions budgets in the NOx SIP Call to reflect the disposition of the first three issues above, (5) Setting a SIP submittal date, (6) Setting the compliance date for the implementation of control measures, and (7) Excluding Wisconsin from the NOx SIP Call requirements.¹⁰⁷

States must submit their SIPs, which meet the Phase II NOx budgets, taking into account the other changes affected by this Final Rule, by April 21, 2005;¹⁰⁸ the Phase II compliance date is May 1, 2007.¹⁰⁹

B. *One-Hour and Eight-Hour Ozone National Ambient Air Quality Standards ("NAAQS")*

In 2003, several environmental groups filed suit against the EPA for its failure to designate as "non-attainment" those areas not in attainment for the new eight-hour ozone NAAQS.¹¹⁰ The EPA entered into a consent decree with the various environmental groups requiring the EPA to designate these areas by April 15, 2004.¹¹¹ On June 26, 2003, the EPA took "final action to stay its authority to determine that the 1-hour [NAAQS] for ozone no longer applies in areas that meet that standard."¹¹² The effect of this action was to ensure that the one-hour ozone NAAQS remained in effect pending resolution of the issues surrounding the implementation of the eight-hour ozone NAAQS.¹¹³

On July 14, 2003, the SAPCB proposed a regulation setting a standard for volatile organic compounds ("VOC"s). This regula-

NOx SIP Call Technical Amendments, and Section 126 Rules, 69 Fed. Reg. 21,604 (Apr. 21, 2004) (to be codified at 40 C.F.R. pts. 51, 78, 97).

107. *Id.*

108. *Id.* at 21,632.

109. *Id.* at 21,633.

110. 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, 23,860 (Apr. 30, 2004) (to be codified at 40 C.F.R. pt. 81).

111. *Id.* at 23,860.

112. Stay of Authority Under 40 CFR 50.9(b) Related to Applicability of 1-Hour Ozone Standard, 68 Fed. Reg. 38,160 (June 26, 2003) (codified at 40 C.F.R. pt. 50 (2004)).

113. *Id.*

tion applied to all facilities that (i) are within a stationary source in the northern Virginia, Richmond, Northeastern or Western Emissions Control Area . . . and (ii) are within a stationary source that has a theoretical potential to emit twenty-five tons per year or greater in the northern Virginia, Northeastern or Western Emissions Control Area or 100 tons per year or greater in the Richmond Emissions Control Area.¹¹⁴ On December 29, 2003 the SAPCB amended the regulations applicable to Municipal Solid Waste Landfills.¹¹⁵

On February 3, 2004, the United States Court of Appeals for the District of Columbia vacated the EPA's 2003 conditional approval of SIPs for the greater Washington, D.C. one-hour ozone severe non-attainment area.¹¹⁶ The court found that the SIPs lacked certain statutory requirements.¹¹⁷ Instead of properly incorporating all the required information into their SIPs, Washington, D.C., Maryland, and Virginia simply submitted letters promising to cure the deficiencies by April 17, 2004.¹¹⁸ On April 15, 2004 the EPA took "immediate final action to indefinitely stay, pending completion of judicial review," its conditional approval of three SIPs for the metro D.C. one-hour ozone non-attainment area.¹¹⁹

On February 23, 2004, the SAPCB enlarged the Hampton Roads emissions control area¹²⁰ and added one new VOC and one new NOx emissions control area.¹²¹ The SAPCB also published final regulations applicable to portable fuel containers, solvent cleaning, mobile equipment repair and refinishing, and architec-

114. Standard for Volatile Organic Compounds, 19 Va. Regs. Reg. 3150 (July 14, 2003) (codified at 9 VA. ADMIN. CODE § 5-20 (2004)).

115. Existing Stationary Sources, 20 Va. Regs. Reg. 808 (Dec. 29, 2003) (codified at 9 VA. ADMIN. CODE § 5-40 (2004)).

116. *Sierra Club v. EPA*, 356 F.3d 296, 298 (D.C. Cir. 2004).

117. *Id.* at 299.

118. *Id.* at 300.

119. Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, Virginia; Post 1996 Rate-of-Progress Plans and One-Hour Ozone Attainment Demonstrations, 69 Fed. Reg. 19,937 (Apr. 15, 2004) (to be codified at 40 C.F.R. pt. 52).

120. General Provisions (Rev. G02), 20 Va. Regs. Reg. 1498 (Feb. 23, 2004) (codified at 9 VA. ADMIN. CODE § 5-20-206 (2004)).

121. General Provisions (Rev. C03), 20 Va. Regs. Reg. 1498 (Feb. 23, 2004) (codified at 9 VA. ADMIN. CODE § 50-20-206 (2004)) (adding a Western Virginia Emissions Control Area for VOCs and nitrogen oxides).

tural and industrial maintenance coatings in the northern Virginia emissions control area.¹²² In addition, the SAPCB issued an emergency regulation, effective January 28, 2004, which created an on-road emissions testing program for motor vehicles “in all areas designated nonattainment for the 1-hour ozone air quality standard as of January 1, 2003.”¹²³ This “tailpipe testing” regulation is applicable in approximately ten localities in northern Virginia.¹²⁴

On April 30, 2004, the EPA published its Phase I final rule for implementing the eight-hour ozone NAAQS.¹²⁵ Among other things, this rule designated areas for the eight-hour ozone NAAQS and established a process for transitioning from the 1-hour to the eight-hour ozone NAAQS.¹²⁶

C. *New Source Review / Prevention of Significant Deterioration (“PSD”)*

On December 31, 2002, the EPA published a final rule overhauling the CAA’s New Source Review (“NSR”) regulations.¹²⁷ These regulatory changes were immediately challenged by nine northeastern states,¹²⁸ on March 6, 2003, the D.C. Circuit refused to stay the new rule, but expedited the proceedings.¹²⁹

On October 27, 2003, the EPA issued another revision to the NSR program.¹³⁰ The final rule clarified the existing exclusion of

122. Existing Stationary Sources, 20 Va. Regs. Reg. 1476 (Feb. 23, 2004) (to be codified at 9 VA. ADMIN. CODE § 5-40).

123. Regulations for the Control of Motor Vehicle Emissions in the Northern Virginia Area, 20 Va. Regs. Reg. 1507 (Feb. 23, 2004) (codified at 9 VA. ADMIN. CODE §§ 5-91-20, -160, -180, -750, -760 (2004)).

124. *Id.*

125. 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 (Apr. 30, 2004) (to be codified at 40 C.F.R. pt. 81).

126. *Id.*

127. Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects, 67 Fed. Reg. 80,186 (Dec. 31, 2002) (codified at 40 C.F.R. pts. 51, 52) (2004)).

128. *See* New York v. EPA, No. 02-1387, 2003 U.S. App. LEXIS 26520, at *1 (D.C. Cir. Mar. 6, 2003).

129. *Id.*

130. Prevention of Significant Deterioration (PSD) and Nonattainment New Source

Routine Maintenance, Repair, and Replacement (RMRR) from the requirements of the NSR by defining a category of RMRR activities that are automatically exempt.¹³¹ Under this rule, an equipment replacement activity will be excluded from NSR requirements if it meets the following criteria:

(1) it involves replacement of any existing component(s) of a process unit with component that are identical or that serve the same purpose as the replaced component(s); (2) the fixed capital cost of the replaced component(s), plus the costs of any activities that are part of the replacement activity . . . does not exceed 20 percent of the current replacement value of the process unit; (3) the replacement(s) does not alter the basic design parameters of the process unit or cause the process unit to exceed any emission limitation or operational limitation (that has the effect of constraining emissions) that applies to any component of the process unit and that is legally enforceable.¹³²

The RMRR rule amendments were challenged by the same states challenging the NSR regulations.¹³³ The states sought to consolidate this challenge with their challenge to the December NSR regulations,¹³⁴ moved for a stay of the RMRR rule,¹³⁵ and renewed their request for a stay of the December regulatory changes.¹³⁶ The D.C. Circuit denied the motion to consolidate, but agreed to assign both cases to the same panel.¹³⁷ The court also denied motions to stay the December NSR request and the new RMRR rules request.¹³⁸ The court did, however, expedite the proceedings.¹³⁹

Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Replacement Exclusion, 68 Fed. Reg. 61,248 (Oct. 27, 2003) (codified at 40 C.F.R. pts. 51, 52) (2004)).

131. *Id.*

132. *Id.* at 61,252.

133. *New York v. EPA*, 2003 U.S. App. LEXIS 26520, at *1.

134. *Id.* at *9.

135. *Id.* at *9.

136. *Id.*

137. *Id.* at *9.

138. *Id.*

139. *Id.* at *10.

D. *Virginia Administrative Developments*

On August 11, 2003, the SAPCB published final regulations applicable to small municipal waste combustors¹⁴⁰ and commercial/industrial solid waste incinerators.¹⁴¹ The EPA approved Virginia's commercial/industrial solid waste incinerator plan on May 25, 2004.¹⁴²

On December 1, 2003, the SAPCB published a final regulation correcting a technical error in, and clarifying the meaning of, "initial performance test."¹⁴³ The EPA approved this change on March 15, 2004.¹⁴⁴ Furthermore, on April 19, 2004, the SAPCB published final regulations amending the Control Technology Determinations for Major Sources of Hazardous Air Pollutants.¹⁴⁵

E. *Federal Administrative Developments*

On June 27, 2003, the EPA approved a revision to Virginia's State Implementation Plan ("SIP") concerning Federally Enforceable State Operating Permits.¹⁴⁶ This revision allows Virginia to issue federally enforceable state operating permits for both criteria and hazardous air pollutants.¹⁴⁷

140. Existing Stationary Sources (Rev. K00), 19 Va. Regs. Reg. 3535 (Aug. 11, 2003) (codified at 9 VA. ADMIN. CODE §§ 5-40-6550 to -6810) (2004).

141. Existing Stationary Sources (Rev. J00), 19 Va. Regs. Reg. 3521 (Aug. 11, 2003) (codified at 9 VA. ADMIN. CODE § 5-40-6250 to -6510) (2004).

142. Approval and Promulgation of State Air Quality Plans for Designated Facilities and Pollutants, Commonwealth of Virginia; Control of Emissions from Commercial and Industrial Solid Waste Incinerator Units, 69 Fed. Reg. 29,658 (May 25, 2004) (to be codified at 40 C.F.R. pt. 62).

143. General Definitions, 20 Va. Regs. Reg. 590, 593 (Dec. 1, 2003) (codified at 9 VA. ADMIN. CODE § 5-10-20) (2004).

144. Approval and Promulgation of Air Quality Implementation Plans; Virginia; Revisions to Regulations for General Compliance Activities and Source Surveillance, 69 Fed. Reg. 12,074 (Mar. 15, 2004) (to be codified at 40 C.F.R. pt. 52).

145. Hazardous Air Pollutant Sources (Rev. J03), 20 Va. Regs. Reg. 1877 (Apr. 19, 2004) (codified at 9 VA. ADMIN. CODE §§ 5-60-120 to -180) (2004).

146. Approval and Promulgation of Air Quality Implementation Plans and Approval Under Section 112(l) of the Clean Air Act; Virginia; State Operating Permit Program, 68 Fed. Reg. 38,191 (June 27, 2003) (codified at 40 C.F.R. pt. 52 (2003)).

147. *Id.* at 38,192.

On March 15, 2004, the EPA approved another Virginia SIP revision request.¹⁴⁸ This revision updated Virginia's regulations concerning "applicability, compliance, testing, and monitoring to be consistent with Federal requirements."¹⁴⁹

On June 3, 2003, the EPA issued a Notice of Proposed Rule-making proposing "to list n-propyl bromide as an acceptable substitute for ozone-depleting substances, subject to use conditions."¹⁵⁰

Three weeks later, on June 23, 2003, the EPA published a final rule clarifying "which portions of the existing national emission standards for hazardous air pollutants ("NESHAPs") contain authorities that can be delegated to State, local, and tribal agencies."¹⁵¹ The EPA published a final rule adding the ozone-depleting substance chlorobromomethane "to the list of substances subject to production and consumption controls under the Clean Air Act" on July 18, 2003.¹⁵² On July 25, 2003, the EPA concurrently published both a notice of proposed rule and a direct final rule concerning the production, importing and exporting of methyl bromide.¹⁵³

Concurrent therewith, the EPA also published both a direct final rule and a proposed rule amending the Occupational Safety and Health Administration ("OSHA") citation required by the CAA for labeling containers of asbestos waste materials.¹⁵⁴

148. Approval and Promulgation of Air Quality Implementation Plans; Virginia; Revisions to Regulations for General Compliance Activities and Source Surveillance, 69 Fed. Reg. 12,103 (Mar. 15, 2004) (to be codified at 40 C.F.R. pt. 52).

149. *Id.*

150. Protection of Stratospheric Ozone: Listing of Substitutes for Ozone-Depleting Substances—n-Propyl Bromide, 68 Fed. Reg. 33,284 (proposed June 3, 2003) (codified at 40 C.F.R. pt. 82 (2004)).

151. Clarifications to Existing National Emissions Standards for Hazardous Air Pollutants Delegations' Provisions, 68 Fed. Reg. 37,334 (June 23, 2003) (codified at 40 C.F.R. pt. 63 (2004)).

152. Protection of Stratospheric Ozone: Phaseout of Chlorobromomethane Production and Consumption, 68 Fed. Reg. 42,884 (July 18, 2003) (to be codified at 40 C.F.R. pt. 82).

153. Protection of Stratospheric Ozone: Ban on Trade of Methyl Bromide with Non-Parties to the Montreal Protocol, 68 Fed. Reg. 43,930 (proposed July 25, 2003) (to be codified at 40 C.F.R. pt. 82); Protection of Stratospheric Ozone: Ban on Trade of Methyl Bromide with Non-Parties to the Montreal Protocol, 68 Fed. Reg. 43,991 (July 25, 2003) (to be codified at 40 C.F.R. pt. 82).

154. National Emission Standards for Hazardous Air Pollutants for Asbestos, 68 Fed. Reg. 54,790 (Sept. 18, 2003) (to be codified at 40 C.F.R. pt. 61); National Emission Stan-

On October 8, 2003, the EPA published a final rule promulgating NESHAPs for emissions from site remediations.¹⁵⁵

On January 12, 2003, the EPA issued a final rule promulgating "Performance Specification 11 (PS-11): Specifications and Test Procedures for Particular Matter Continuous Emission Monitoring Systems at Stationary Sources, and Procedure Z: Quality Assurance (QA) Requirements for Particulate Matter Continuous Emission Monitoring Systems at Stationary Sources."¹⁵⁶

On January 30, 2004, the EPA published a proposed rule requiring coal- and oil-fired utility units to meet hazardous air pollutant standards reflecting maximum available control technology ("MACT").¹⁵⁷ This action was based on a concern over mercury and nickel emissions from coal- and oil-fired electric utilities.¹⁵⁸ The EPA also included in this proposed rule a co-proposal to implement a cap-and-trade program for mercury under the CAA's hazardous air pollution provisions, section 112.¹⁵⁹

On March 5, 2004, the EPA published a final rule creating NESHAPs for stationary combustion turbines.¹⁶⁰ The pollutants of concern include formaldehyde, toluene, benzene, and acetaldehyde.¹⁶¹

dards for Hazardous Air Pollutants for Asbestos, 68 Fed. Reg. 54,794 (proposed Sept. 18, 2003) (to be codified at 40 C.F.R. pt. 61).

155. National Emission Standards for Hazardous Air Pollutants, 68 Fed. Reg. 58,172 (Oct. 8, 2003) (codified at 40 C.F.R. pt. 63).

156. Amendments to Standards of Performance for New Stationary Sources; Monitoring Requirements, 69 Fed. Reg. 1786 (Jan. 12, 2004) (to be codified at 40 C.F.R. pt. 60).

157. Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 69 Fed. Reg. 4652 (proposed Jan. 30, 2004) (to be codified at 40 C.F.R. pts. 60, 63).

158. *Id.*

159. *Id.*

160. National Emission Standards for Hazardous Air Pollutants for Stationary Combustion Turbines, 69 Fed. Reg. 10,512 (Mar. 5, 2004) (codified at 40 C.F.R. pt. 63 (2004)).

161. *Id.*

V. WASTE

A. *New Defenses from CERCLA Liability—The EPA’s “All Appropriate Inquiries” Rule*

One of the most significant developments during 2004 was the EPA’s draft “all appropriate inquiries” rule (“AAI Rule”), developed under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA” or “Superfund”). In January 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act (“Brownfields Amendments”),¹⁶² which made several amendments to CERCLA.¹⁶³ Subtitle B of the Brownfields Amendments, titled “Brownfields Liability Clarifications” revised the existing “innocent landowner” defense to liability under CERCLA,¹⁶⁴ and created two new defenses: one for “bona fide prospective purchasers” of contaminated properties (“BFPPs”),¹⁶⁵ and one for owners of real property that is “contiguous to or otherwise similarly situated with respect to” property owned by others, and that “is or may be contaminated by a release or threatened release of a hazardous substance from” the other property (“contiguous property owners”).¹⁶⁶

A notable change was the requirement that persons claiming any of these defenses carry out “all appropriate inquiries” into historical uses and ownership of the property to determine the possibility of contamination with hazardous substances prior to acquiring ownership of the property.¹⁶⁷ Congress directed the EPA to promulgate, no later than January 11, 2004, regulations establishing “standards and practices” for performing “all appro-

162. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 102, 115 Stat. 2356 (2002) (codified at 42 U.S.C. §§ 9601-9607 (2000 & Supp. 2002)) [hereinafter *Brownfields Amendments*]; see also Lisa Spickler Goodwin, *Annual Survey of Virginia Law: Environmental Law*, 37 U. RICH. L. REV. 117 (2002) (discussing the Brownfields Amendments).

163. 42 U.S.C. §§ 9601-9675 (2000 & Supp. 2002).

164. Brownfields Amendments, *supra* note 162, § 223, 115 Stat. 2372 (codified at 42 U.S.C. § 9601(35) (2000 & Supp. 2002)) (amending CERCLA §101(35)).

165. Brownfields Amendments, *supra* note 162, § 222, 115 Stat. 2370 (codified at 42 U.S.C. § 9601 (2000 & Supp. 2002)) (amending CERCLA § 101(40)).

166. Brownfields Amendments, *supra* note 162, § 221, 115 Stat. 2368 (codified at 42 U.S.C. § 9607(q) (2000 & Supp. 2002)) (amending CERCLA § 107).

167. CERCLA § 101(35)(B)(i), 42 U.S.C. § 9601(35)(B)(i) (2000 & Supp. 2002).

priate inquiries.”¹⁶⁸ Until the EPA could create these regulations, Congress required persons purchasing property after May 31, 1997, to carry out “all appropriate inquiries” using an industry standard practice established by the American Society for Testing and Materials (“ASTM”).¹⁶⁹

The EPA created a stakeholder committee and used the negotiated rulemaking process to develop a draft of the AAI Rule.¹⁷⁰ After a series of meetings, the committee produced the “Draft Final Consensus Document” (“Draft AAI Rule”) which will be the basis for the AAI Rule.¹⁷¹

There are several significant differences between the detailed requirements of the Draft AAI Rule and the ASTM Standard. These differences include the qualifications for environmental professionals, which governmental records must be searched, how far back in time property history research must go, which specific records must be searched, use of previously-conducted environmental assessments and reports, visual property inspections, and interviews of the property owner and occupants.¹⁷²

168. CERCLA § 101(35)(B)(ii), 42 U.S.C. § 9601(35)(B)(ii) (2000 & Supp. 2002).

169. CERCLA § 101(35)(B)(iv), 42 U.S.C. § 9601(35)(B)(iv) (2000 & Supp. 2002). Congress originally required the use of ASTM Standard Practice E1527-97, entitled “Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process.” *Id.* After the publication of this requirement the ASTM updated and republished the standard as ASTM 1527-00. Clarification to Interim Standards and Practices for All Appropriate Inquiry under CERCLA, 68 Fed. Reg. 24,888 (May 9, 2003) (to be codified at 42 C.F.R. pt. 312). The EPA explained that either version of the standard was acceptable to perform “all appropriate inquiries” until the EPA released the required new regulations. *Id.*

170. Establishment and Meeting of the Negotiated Rulemaking Committee on All Appropriate Inquiry, 68 Fed. Reg. 16,747 (Apr. 7, 2003) (codified at 40 C.F.R. pt. 1 (2004)); Notice of Intent To Negotiate Proposed Rule on All Appropriate Inquiry, 68 Fed. Reg. 10,675 (Mar. 6, 2003). More detailed information regarding the Negotiated Rulemaking Committee on All Appropriate Inquiry may be found at <http://www.epa.gov/swerosps/bf/regneg.htm> (last visited Sept. 27, 2004).

171. Negotiated Rulemaking Committee (Draft) Final Consensus Document (Dec. 5, 2003), available at <http://www.epa.gov/swerosps/bf/aa/draftreglangfinal.pdf> (last visited Sept. 27, 2004).

172. Compare Negotiated Rulemaking Committee (Draft) Final Consensus Document, *supra* note 170, with ASTM Standard Practice E1527-00, “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process (2003), available at <http://www.astm.org/cgi-bin/SoftCart.exe/DATABASE.CART/PAGES/E1527.htm> (last visited Sept. 27, 2004).

B. *Federal Regulations Promulgated as Final*

1. Clarification of Recycled Used Oil Management Standards

As part of a settlement agreement, the EPA issued a final rule clarifying when used oil contaminated with polychlorinated biphenyls ("PCBs") is regulated under the RCRA used oil management standards and when it is not;¹⁷³ that mixtures of conditionally exempt small quantity generator ("CESQG")¹⁷⁴ waste and used oil are subject to the RCRA used oil management standards irrespective of how that mixture is to be recycled; and that the initial marketer of used oil that meets the used oil fuel specification need only keep a record of a shipment of used oil to the facility to which the initial marketer delivers the used oil.¹⁷⁵ This rule became effective September 29, 2003.¹⁷⁶

2. Applicability of Federal Hazardous Materials Transportation Regulations to Loading, Unloading, and Incidental Storage

On October 30, 2003, the Research and Special Programs Administration of the United States Department of Transportation ("RSPA") issued a final rule "clarifying the applicability of the Hazardous Materials Regulations ("HMR") to specific functions and activities, including hazardous materials loading and unloading operations and storage of hazardous materials during transportation."¹⁷⁷ By definition, waste that meets the EPA's definition of "hazardous waste" is regulated by RSPA as "hazardous material" and is subject to detailed requirements for classifying, pack-

173. See Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Requested Used Oil Management Standards, 58 Fed. Reg. 26,420 (May 3, 1993) (codified at 40 C.F.R. pts. 261, 264, 265, 271, and 279) (1993).

174. CESQGs are those generators that generate, by site, a total of no more than 100 kilograms of hazardous waste, and less than one kilogram of acutely hazardous waste in any given calendar month. 40 C.F.R. § 261.5 (2003).

175. Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Recycled Used Oil Management Standards, 68 Fed. Reg. 44,659 (July 30, 2003) (to be codified at 40 C.F.R. pts. 261, 279).

176. *Id.*

177. Applicability of the Hazardous Materials Regulations to Loading, Unloading and Storage, 68 Fed. Reg. 61,906 (Oct. 30, 2003) (to be codified at 49 C.F.R. pts. 171, 173, 174, 175, 176, 177, 178).

aging, marking, labeling, paperwork, loading, transportation, incident response and employee training.¹⁷⁸ The new rules go into effect on October 1, 2004.¹⁷⁹

3. Hazardous Materials Incident Reporting Requirements

RSPA also issued a final rule “revising the incident reporting requirements of the Hazardous Materials Regulations and the hazardous materials incident report form, DOT Form F 5800.1.”¹⁸⁰ “The major changes adopted in this final rule include: collecting more specific information on the incident reporting form; expanding reporting exceptions; expanding reporting requirements to persons other than carriers; reporting undeclared shipments of hazardous materials; and reporting non-release incidents involving cargo tanks.”¹⁸¹ The new reporting rules are effective July 1, 2004.¹⁸²

4. EPA Approval of Virginia’s Financial Assurance Regulations for the Municipal Solid Waste Landfill Permitting Program

The EPA issued a determination that Virginia’s financial assurance regulations for solid waste landfills¹⁸³ are adequate to ensure compliance with the federal criteria,¹⁸⁴ meaning that Virginia’s Municipal Solid Waste Landfill permitting program is now fully approved.

178. 49 C.F.R. § 171.8 (2003) (defining “hazardous material”).

179. Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage, 68 Fed. Reg. at 61,906.

180. Hazardous Materials: Revisions to Incident Reporting Requirements and the Hazardous Materials Incident Report Form, 68 Fed. Reg. 67,746 (Dec. 3, 2003) (to be codified at 49 C.F.R. pt. 171).

181. *Id.*

182. *Id.*

183. Financial Assurance Regulations for Solid Waste Disposal, Transfer and Treatment Facilities, 9 VA. ADMIN. CODE § 20-70-10 to -290 (2004).

184. Virginia: Approval of Financial Assurance Regulations for the Commonwealth’s Municipal Solid Waste Landfill Permitting Program, 68 Fed. Reg. 57,824 (Oct. 7, 2003) (to be codified at 40 C.F.R. pts. 239, 258). The federal criteria are defined at 40 C.F.R. §§ 258.70 to .74 (2003).

5. THE EPA Final Approval of Virginia's RCRA Subtitle C Program Revisions

On March 13, 2003, the EPA issued an immediate final rule giving final approval to Virginia's Resource Conservation and Recovery Act ("RCRA") Subtitle C regulatory program.¹⁸⁵ Under RCRA, individual states may apply to the EPA for approval of the state's regulatory scheme for management of hazardous waste to apply in lieu of equivalent federal regulations.¹⁸⁶ Once approved, the state must continue to update its regulations as necessary to assure that the state-imposed requirements are "consistent" with and "equivalent" to the otherwise-applicable federal standards.¹⁸⁷

The EPA received some negative comments on the direct final rule and withdrew its approval on May 2, 2003.¹⁸⁸ Because the negative comments focused only on those portions relating to the "hazardous waste lamps" rule, the EPA finalized approval of all the other proposed revisions to Virginia's hazardous waste program in a final rule published June 20, 2003.¹⁸⁹

The EPA will respond to those negative comments received on Virginia's proposed Hazardous Waste Lamps rule and publish a final decision regarding its authorization in a separate action.

C. Federal Regulations Proposed

1. Revisions to the Definition of Solid Waste

The EPA regulates certain wastes as "hazardous waste" under the authority of Subtitle C of RCRA.¹⁹⁰ RCRA authorizes the EPA to define those wastes which are subject to regulation.¹⁹¹ To be regulated as a hazardous waste, a material must first meet the

185. Virginia: Final Authorization of State Hazardous Waste Management Program Revision, 68 Fed. Reg. 11,981 (Mar. 13, 2003) (codified at 40 C.F.R. pt. 271 (2003)).

186. Resource Conservation and Recovery Act § 3006(b), 42 U.S.C. § 6926(b) (2000).

187. *Id.*

188. Virginia: Final Authorization of State Hazardous Waste Management Program Revision, 68 Fed. Reg. 23,407 (May 2, 2003) (codified at 40 C.F.R. pt. 271 (2004)).

189. Virginia: Final Authorization of State Hazardous Waste Management Program Revision, 68 Fed. Reg. 36,925 (June 20, 2003) (codified at 40 C.F.R. pt. 271 (2004)).

190. 42 U.S.C. § 6901-31 (2000).

191. 42 U.S.C. § 6921 (2000).

EPA's definition of "solid waste."¹⁹² The current definition of solid waste originated with a final rule issued on January 4, 1985.¹⁹³

On October 28, 2003, the EPA proposed revisions to the definition of "solid waste, hoping to identify certain recyclable materials as not "discarded," and thus not subject to regulation as wastes under RCRA Subtitle C.¹⁹⁴ "The proposed rule would also establish specific regulatory criteria for determining whether or not hazardous secondary materials are recycled legitimately."¹⁹⁵

These proposed revisions are the most significant changes to the EPA's definition of solid waste since the current definition was finalized in 1985. Should this proposal be finalized, it will only have effect in states not currently authorized to implement their own RCRA Subtitle C waste identification regulations.¹⁹⁶ The EPA and the regulated industry will strongly urge state agencies to make similar revisions to state programs.¹⁹⁷

2. Dyes and Pigments Production Wastes

On November 25, 2003, the EPA proposed to list specified wastes from the production of certain dyes, pigments, and FD&C colorants as hazardous wastes under RCRA.¹⁹⁸ These newly listed wastes would be identified with the waste code K181.¹⁹⁹ Additionally, the EPA proposed to designate these wastes as hazardous substances subject to the Comprehensive Environmental Re-

192. 40 C.F.R. § 261(a) (2003).

193. Hazardous Waste Management System; Definition of Solid Waste, 50 Fed. Reg. 614 (Jan. 4, 1985) (codified at 40 C.F.R. pts. 260, 261, 264, 265, 266 (2003)).

194. Revisions to the Definition of Solid Waste, 68 Fed. Reg. 61,558 (Proposed Oct. 28, 2003) (to be codified at 40 C.F.R. pt. 260, 261); Proposed Revisions to the Definition of Solid Waste—Extension of Comment Period, 68 Fed. Reg. 74,907 (proposed Dec. 29, 2003) (extending the comment period to February 25, 2004).

195. Revisions to the Definition of Solid Waste, 68 Fed. Reg. at 61,558.

196. *Id.* at 61,590.

197. *Id.*

198. Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Dyes and/or Pigments Production Wastes; Land Disposal Restrictions for Newly Identified Wastes; CERCLA Hazardous Substance Designation and Reportable Quantities; Designation of Five Chemicals as Appendix XVIII Constituents; Addition of Five Chemicals to the Treatment Standards of F039 and the Universal Treatment Standards, 68 Fed. Reg. 66,164 (proposed Nov. 25, 2003) (to be codified at 40 C.F.R. pts. 148, 261, 271, 302).

199. *Id.*

sponse, Compensation, and Liability Act (CERCLA).²⁰⁰ Under CERCLA, any hazardous waste identified under RCRA is automatically included in the CERCLA definition of "hazardous substance."²⁰¹

3. Solvent-Contaminated Wipes

In 2003, the EPA also proposed to modify its hazardous waste management regulations under RCRA for certain solvent-contaminated materials, such as reusable shop towels, rags, disposable wipes and paper towels.²⁰² Specifically, the EPA proposed:

to conditionally exclude from the definition of hazardous waste disposable industrial wipes that are contaminated with hazardous solvents and are going to disposal; and, to conditionally exclude from the definition of solid waste reusable industrial shop towels and rags that are contaminated with hazardous solvents and are sent for laundering or dry cleaning.²⁰³

The EPA has been dealing with the proper management of solvent-contaminated wipes and rags since at least 1985, and it continues to be a common problem causing confusion within the regulated industry.²⁰⁴ The EPA hopes that this new rule will "resolve, at the Federal level, long-standing issues associated with the management of solvent-contaminated industrial wipes. . . ."²⁰⁵

4. CERCLA Reportable Quantity Adjustments for Carbamates and Carbamate-Related Hazardous Waste Streams

CERCLA authorizes and requires the EPA to maintain a list of "hazardous substances," and assign "reportable quantities" ("RQs") to each substance, for purposes of release notification.²⁰⁶

200. *Id.*

201. CERCLA § 101(14), 42 U.S.C. § 9601(14) (2000).

202. Hazardous Waste Management System: Identification and Listing of Hazardous Waste: Conditional Exclusions from Hazardous Waste and Solid Waste for Solvent Contaminated Industrial Wipes, 68 Fed. Reg. 65,586 (proposed Nov. 20, 2003) (codified at 40 C.F.R. pts. 260, 261).

203. *Id.*

204. *Id.* at 65,591.

205. *Id.* at 65,586.

206. CERCLA § 102(a), 42 U.S.C. § 9602(a) (2000 & Supp. 2004).

Unless and until the EPA establishes a specific regulatory RQ for a given substance, a statutory RQ of one pound is imposed.²⁰⁷

The EPA listed several carbamate-related substances as hazardous wastes and CERCLA hazardous substances in 1995.²⁰⁸ Several of these substances were immediately subject to the one-pound statutory RQ.²⁰⁹ The EPA proposed on December 4, 2003, to adjust the individual RQs upwards, so that for most of these substances, the notification requirement would not be triggered for very small releases.²¹⁰

D. Legislative Changes—Virginia

1. The 2003 General Assembly Session

House Bill 1748 concerned loans granted for the purpose of reducing ground water contamination and the risk to the public health from brownfields.²¹¹ The amendment allows the State Water Control Board (“SWCB”) to extend loans from the Virginia Water Facilities Revolving Fund to localities, public authorities, partnerships, or corporations for brownfields remediation activities.²¹²

House Bill 2376 dealt with the cathode ray tube recycling program, requiring the Virginia Waste Management Board to adopt regulations to encourage cathode ray tube and electronics recycling.²¹³ The bill also authorizes localities to “prohibit the disposal of cathode ray tubes in any privately operated landfill within its

207. CERCLA § 102(b), 42 U.S.C. § 9602(b) (2000 & Supp. 2004).

208. Hazardous Waste Management System; Carbamate Production Identification and Using of Hazardous Waste; and CERCLA Hazardous Substance Designation and Reportable Quantities, 60 Fed. Reg. 7,824 (Feb. 9, 1995) (codified at 40 C.F.R. pts. 261, 271, 302 (1995)).

209. *Id.*

210. Reportable Quantity Adjustments for Carbamates and Carbamate-Related Hazardous Waste Streams; Reportable Quantity Adjustment for Inorganic Chemical Manufacturing Processes Waste (K178), 68 Fed. Reg. 67,916 (proposed Dec. 4, 2003) (to be codified at 40 C.F.R. pts. 302, 355).

211. H.B. 1748, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 16, 2003, ch. 407, 2003 Va. Acts 520) (codified at VA. CODE ANN. §§ 62.1-229.2 (Cum. Supp. 2004)).

212. *Id.*

213. H.B. 2376, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 19, 2003, ch. 743, 2003 Va. Acts 1005) (codified at VA. CODE ANN. § 10.1-1425.26 (Cum. Supp. 2004)).

jurisdiction, provided the locality has implemented a recycling program that is capable of handling all cathode ray tubes generated within its jurisdiction."²¹⁴

Senate Bill 965, which addressed waste tire piles and the tire recycling fee, strengthened the ability of the DEQ to clean up the 339 tire piles throughout the state.²¹⁵ The civil and criminal liability provisions of the bill conform to the penalties of other environmental statutes. The bill authorizes the establishment of tire convenience centers to be collection points for the temporary storage of tires.²¹⁶ "To be classified as a convenience center, the collection point shall not receive waste tires from collection vehicles that have collected waste from more than one real property owner."²¹⁷ The amendment exempts Department of Motor Vehicle-licensed salvage yards that are holding fewer than 300 waste tires and convenience centers having up to 1,500 tires from having to obtain a permit from the DEQ.²¹⁸

The statute now imposes a strict liability standard for damages incurred by neighboring property owners and other third parties when a tire pile burns.²¹⁹ Strict liability applies in the case of an unpermitted tire pile of more than 100 tires.²²⁰ Prior to the bill's enactment, strict liability applied only when there were more than 50,000 tires.²²¹ Strict liability would apply to the pile owner when he knows about the pile or if the property owner consented to the disposal of the tires on his property.²²² The amended statute grants the agency the authority to enter the property and remove a tire pile if the owner refuses an order to remove the tires.²²³ Under the legislation, the agency would be able to obtain a lien against the property for the amount expended from the

214. *Id.*

215. S.B. 965, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 16, 2003, ch. 101, 2003 Va. Acts 124) (codified at VA CODE ANN. §§ 10.1-1418.2 to -1418.5, 10.1-1422.3 (Cum. Supp. 2004), 58.1-641 to -642 (Repl. Vol. 2004)).

216. *Id.*

217. *Id.*

218. VA. CODE ANN. § 10.1-1418.2(F) (Cum. Supp. 2004).

219. *Id.* § 10.1-1418.3(B), (C) (Cum. Supp. 2004).

220. *Id.* § 10.1-1418.3(A) (Cum. Supp. 2004).

221. Act of Mar. 16, 2003, ch. 101, 2003 Va. Acts 124 (codified at VA. CODE ANN. §§ 10.1-1418.2 to -1418.5, 10.1-1422.3 (Cum. Supp. 2004), 58.1-641 to -642 (Repl. Vol. 2004)).

222. VA. CODE ANN. § 10.1-1418.3(B) (Cum. Supp. 2004).

223. *Id.* § 10.1-1418.4 (Cum. Supp. 2004).

Waste Tire Fund to clean up the tire pile.²²⁴ To expedite the cleanup of these tire piles, there is a three-year increase in the tire recycling fee from \$.50 per new tire sold to \$1.00.²²⁵

Senate Bill 1137 eliminated the stacking limitation for containers on barges and the prohibition on transporting waste on the Rappahannock, James, and York Rivers.²²⁶ This bill broadens the Board's authority to establish a waste barging fee to fund not only administrative and enforcement costs, but also to fund activities "to abate pollution caused by barging of waste, to improve water quality, or for other waste-related purposes."²²⁷ This bill exempts from regulation recyclable construction demolition debris being transported on state water directly to a processing facility.²²⁸

2. The 2004 General Assembly Session

House Bill 713 allows localities and state agencies to temporarily store household hazardous waste and hazardous waste from small quantity generators if it is "done in accordance with (i) a permit to store, treat, or dispose of hazardous waste . . . or (ii) a permit to transport hazardous waste."²²⁹

Both Senate Bill 365 and House Bill 1350—identical bills—address environmental permit fees applicable to water and non-hazardous solid waste.²³⁰ The newly amended statute assesses a combination of permit application fees, annual fees, and permit maintenance fees that will generate approximately six million dollars for the funding of air, water and waste permit programs

224. *Id.* § 10.1-1418.5(A)–(F) (Cum. Supp. 2004).

225. *Id.* § 10.1-1422.3(B)(3) (Cum. Supp. 2004).

226. S.B. 1137, Va. Gen. Assembly (Reg. Sess. 2003) (enacted as Act of Mar. 22, 2003, ch. 830, 2003 Va. Acts 1145) (codified as amended at VA. CODE ANN. §10.1-1454 (Cum. Supp. 2004)).

227. *Id.*

228. *Id.*

229. H.B. 713, Va. Gen. Assembly (Reg. Sess. 2004) (enacted as Act of Apr. 12, 2004, ch. 442, 2004 Va. Acts 188) (codified at VA. CODE ANN. § 10.1-1426 (Cum. Supp. 2004)).

230. S.B. 365, Va. Gen. Assembly (Reg. Sess. 2004) (enacted as Act of Mar. 31, 2004, ch. 249, 2004 Va. Acts ___) (codified at VA. CODE ANN. §§ 10.1-1322, -1402, -1402.1, -1402.1:1, 62.1-44.15:6 (Cum. Supp. 2004)); H.B. 1350, Va. Gen. Assembly (Reg. Sess. 2004) (enacted as Act of Mar. 31, 2004, ch. 324, 2004 Va. Acts ___) (codified at VA. CODE ANN. §§ 10.1-1322, -1402, -1402.1:1, 62.1-44.15:6 (Cum. Supp. 2004)). The wording of both bills is identical.

at the DEQ.²³¹ The statutes also establish the maximum amounts that the State Water Control Board can charge for processing various types of water permits and the maximum amounts it can assess as a permit maintenance fee on each permit type.²³² In addition, the statutes require the DEQ to evaluate and implement measures to improve the long-term effectiveness and efficiency of its programs.²³³

House Bill 1450, which governs the Virginia Petroleum Storage Tank Fund, limits the exposure of the fund to third-party claims.²³⁴ The amended statute clarifies that the fund can be used to reimburse tank owners for costs they incur relating to third-party damages only in the amount that is reasonable and necessary based upon the actual damage caused by the release.²³⁵

E. *Proposed Regulations—Virginia*

The Virginia Waste Management Board issued a notice of intended regulatory action (“NOIRA”) which modifies the solid waste facility regulations to provide an expedited process for permitting waste piles.²³⁶ The board is proposing to modify the Virginia Administrative Code to provide a permit by rule for waste piles.²³⁷

231. Act of Apr. 12, 2004, ch. 249, 2004 Va. Acts ___ (codified at VA. CODE ANN. §§ 10.1-1322, -1402, -1402.1, -1402.1:1, 62.1-44.15:6 (Cum. Supp. 2004)).

232. *Id.*

233. *Id.*

234. H.B. 1450, Va. Gen. Assembly (Reg. Sess. 2004) (enacted as Act of Apr. 12, 2004, ch. 485, 2004 Va. Acts 353) (codified at VA. CODE ANN. § 62.1-44.34:11 (Cum. Supp. 2004)).

235. *Id.*

236. Virginia Waste Management Board, Notice of Intended Regulatory Action, 20 Va. Regs. Reg. 189 (Oct. 20, 2003) (codified at 9 VA. ADMIN. CODE § 20-80).

237. *Id.*

F. *Final Regulations—Virginia*

1. Transportation of Solid and Medical Wastes on State Waters: 9 Virginia Administrative Code Section 20-170-10

In 2003, the Virginia Waste Management Board finalized new rules regarding transportation of waste on state waters.²³⁸ The rules set forth guidelines for issuing permits to “facilities off-loading solid wastes and regulated medical wastes from a ship, barge or other vessel transporting such wastes upon the navigable waters of the Commonwealth.”²³⁹ The regulations include certification requirements and continuing performance standards for containers used to transport solid and regulated medical waste by barge or other vessel, and standards for design and operation of both loading and off-loading facilities. Loading facilities are not required to have a permit.²⁴⁰ The rules include a schedule of permit fees and procedures for submitting the fees.²⁴¹

2. Hazardous Waste Management Regulations Immediate Final Rule 2003

The 2003 Immediate Final Rule updated the references for federal hazardous waste management regulations, incorporating changes made to the federal regulations from July 1, 2002 to July 1, 2003, into the Virginia Hazardous Waste Management Regulations.²⁴²

238. Transportation of Solid and Medical Wastes on State Waters Regulations, 19 Va. Regs. Reg. 2829 (June 2, 2003) (codified at 9 VA. ADMIN. CODE §§ 20-170-10 to -60, -80 to -90, -270 to -420 (2004)); Transportation of Solid and Medical Wastes on State Waters Regulations, 20 Va. Regs. Reg. 241 (Oct. 20, 2003) (codified at 9 VA. ADMIN. CODE §§ 20-170-10 to -60, -80 to -90, -270 to -420 (2004)).

239. Transportation of Solid and Medical Wastes on State Waters Regulations, 19 Va. Regs. Reg. at 2829.

240. Transportation of Solid and Medical Wastes on State Waters Regulations, 20 Va. Regs. Reg. at 242.

241. *Id.* at 243.

242. Hazardous Waste Regulations, 20 Va. Regs. Reg. 128 (Oct. 6, 2003) (codified at 9 VA. ADMIN. CODE § 20-60 (2004)).

G. *Judicial Developments*

In *Estes Funeral Home v. Adkins*, the Supreme Court of Virginia invalidated Wise County's ordinance amending its fee schedule for collection of solid waste.²⁴³ The fee schedule at issue imposed a flat fee for households and certain businesses, but established a range of fees for other businesses.²⁴⁴ The court held that there must be a reasonable relation between the prices assessed and the county's legitimate governmental interests of establishing a fair and equitable fee schedule, addressing the increasing quantities of solid waste, and establishing fees that accurately reflect costs.²⁴⁵ The court further held that the record in the case was so devoid of evidence supporting a reasonable relation between the fees and the relevant factors that the matter was not even fairly debatable.²⁴⁶

VI. CONSERVATION AND WILDLIFE

A. *State Developments*

1. Virginia Erosion and Sediment Control Law

In 2003, the laws governing the membership and composition of the Virginia Soil and Water Conservation Board were amended.²⁴⁷ Among other changes, the Board was reduced from twelve to ten members.²⁴⁸ The Erosion and Sediment Control Law was also amended to clarify that shoreline erosion control projects involving land-disturbing activities under the regulatory authority of local wetlands boards, the Virginia Marine Resources Commission, and the U.S. Army Corps of Engineers are not subject to the Virginia Erosion and Sediment Control Law.²⁴⁹

243. 266 Va. 297, 306, 586 S.E.2d 162, 167 (2003).

244. *Id.* at 300, 586 S.E.2d at 163.

245. *Id.* at 304, 586 S.E.2d at 166.

246. *Id.* at 307, 586 S.E.2d at 167.

247. Act of Mar. 16, 2003, ch. 128, 2003 Va. Acts 155 (codified at VA. CODE ANN. §§ 10.1-502, -503 (Cum. Supp. 2004)).

248. *Id.*

249. Act of Mar. 16, 2003, ch. 423, 2003 Va. Acts 533 (codified at VA. CODE ANN. § 10.1-560 (Cum. Supp. 2004)).

Several legislative changes were made to the Erosion and Sediment Control Law in 2004. Personnel of the Department of Conservation and Recreation, who inspect for compliance with the Erosion and Sediment Control Law, and personnel from the DEQ, who inspect for compliance with stormwater management permits, are now required to hold valid certificates of competence of the Erosion and Sediment Control Law.²⁵⁰ The Erosion and Sediment Control Law was also amended so that only those mining activities which are granted permits will be excluded from the definition of "land disturbing activity."²⁵¹

2. Miscellaneous

In 2003, a law was enacted providing that any notice, special order, or emergency special order issued by the State Forester, regarding the conduct of silvicultural activities, shall remain in effect until the State Forester determines that the corrective measures specified therein have been implemented.²⁵²

Also in 2003, a law was passed allowing either national organizations that have been in existence for at least five years with an office in Virginia, or organizations that are registered and in good standing with the State Corporation Commission, to be sole holders of conservation easements if they also meet the other requirements.²⁵³

B. *Federal Endangered Species Act*

In 2003, the federal Endangered Species Act was amended to prohibit the Secretary of the Interior from designating

as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management

250. Act of Apr. 12, 2004, ch. 431, 2004 Va. Acts ___ (codified at VA. CODE ANN. §§ 10.1-561, 62.1-44.15 (Cum. Supp. 2004)).

251. Act of Apr. 12, 2004, ch. 476, 2004 Va. Acts ___ (codified at VA. CODE ANN. § 10.1-561 (Cum. Supp. 2004)).

252. Act of Mar. 21, 2003, ch. 812, 2003 Va. Acts 1126 (codified at VA. CODE ANN. § 10.1-560 (Cum. Supp. 2004)).

253. Act of Apr. 2, 2003, ch. 1014, 2003 Va. Acts 1618 (codified at VA. CODE ANN. § 10.1-1010 (Cum. Supp. 2004)).

plan prepared under section 101 of the Sikes Act . . . , if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.²⁵⁴

VII. ADMINISTRATIVE PROCESS

A. *Legislative Developments*

At the recommendation of the Virginia Code Commission, effective July 1, 2003, the Virginia Administrative Process Act was amended to establish an exemption from certain of its requirements for agency regulations deemed by the Governor to be non-controversial.²⁵⁵

B. *Judicial Developments*

In *Williams Steel Erection Co. v. Department of Labor and Industry*, the Court of Appeals of Virginia addressed the Rules of the Supreme Court of Virginia governing judicial review under the Virginia Administrative Process Act.²⁵⁶ Rule 2A:4 requires that the appellant file a petition for appeal within thirty days after the filing of a notice for appeal.²⁵⁷ The court held that this rule did not bar the trial court from allowing Williams to amend its petition for appeal to include a necessary party more than 30 days after the notice of appeal was filed.²⁵⁸ The court also held that Rule 2A:2 does not deprive the court of jurisdiction when the appellant fails to name a necessary party in the caption of the notice for appeal.²⁵⁹

In *7-Eleven, Inc. v. Department of Environmental Quality*,²⁶⁰ the Court of Appeals of Virginia, en banc, held that the DEQ's in-

254. National Defense Authorization Act of 2004, Pub. L. No. 108-136, § 318, 117 Stat. 1433 (2003) (codified at 16 U.S.C. § 1533(a)(3) (2000 & Supp. 2004)).

255. Act of Mar. 16, 2003, ch. 224, 2003 Va. Acts 236 (codified at VA. CODE ANN. §§ 2.2-4007, -4012 (Cum. Supp. 2004)).

256. 42 Va. App. 814, 595 S.E.2d 45 (Ct. App. 2004).

257. *Id.* at 818, 595 S.E.2d at 48.

258. *Id.* at 820, 595 S.E.2d at 48 (citing *State Water Control Board v. Crutchfield*, 265 Va. 416, 423-24 578 S.E.2d 762, 766 (2003)).

259. *Id.* at 821, 595 S.E.2d at 49.

260. 42 Va. App. 65, 590 S.E.2d 84 (Ct. App. 2003).

terpretation of the Petroleum Storage Tank Fund statute, which is administered by the DEQ, was not entitled to any deference because the sole issue involved a question of statutory interpretation, and not "the substantiality of the evidential support for findings of fact."²⁶¹

VIII. CONCLUSION

In any given year, numerous developments in the field of environmental law are inevitable. This year was no different. There were significant developments concerning wetlands, NO_x emissions, ozone NAAQS, transportation of waste, and the administrative process. Also, significant changes in hazardous and solid waste regulation appeared on the horizon.

The body of law encompassing environmental issues is too large and too diverse to remain static for even a short time. There is every indication that the field of environmental law will continue its rapid development throughout the foreseeable future. Practitioners and business and property owners must constantly strive to remain abreast of these developments. The only certainty is that, when it comes to environmental regulation, there can be no settled expectations.

261. *Id.* at 73, 590 S.E.2d at 88 (quoting *Sims Wholesale Co. v. Brown-Forman Corp.*, 251 Va. 398, 404, 468 S.E.2d 905, 908 (1996)).
