ENVIRONMENTAL LAW

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I. INTRODUCTION

This past spring marked the fortieth anniversary of Earth Day, first held on April 22, 1970.[1] As the *Washington Post* reported, the milestone was "cause for celebration—and a mid-life crisis."[2] The reason for celebration was self-apparent: modern environmental regulation, from 1970 to today, gave us healthier air and cleaner water, and preserved cherished wild places. In addition, thanks to the "technology-forcing" design of many major environmental statutes, environmental regulation fueled greater economic prosperity by spurring industrial innovation.[3] As the economists Michael Porter and Claas van der Linde famously articulated, "Firms can actually benefit from properly crafted environmental regulations that are more stringent (or are imposed earlier) than those faced by their competitors in other countries. By stimulating innova-

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1. David A. Fahrenthold & Juliet Eilperin, *Born in 1970, Event Has Cause for Celebration—and a Midlife Crisis*, WASH. POST, Apr. 22, 2010, at C1.

2. *Id.*

3. Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework Is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799, 819 (2008); *see also* Michael E. Porter, *America's Green Strategy*, SCI. AM., Apr. 1991, at 168.

tion, strict environmental regulations can actually enhance competitiveness."[4]

Yet still, there is the angst that comes with a mid-life crisis. It is driven by the fact that today's green advocates, despite the landmark achievements of the last forty years, have so far failed to secure passage of major federal legislation to address the most pressing and critical environmental concern: global warming. Into this legislative vacuum, myriad regulatory efforts and litigation have flowed.

Efforts to address climate change dominate this environmental update and are covered in Part II. Another major area of regulatory and legal activities over the last two years was work related to restoration of the Chesapeake Bay. This is outlined in Part III. Part IV addresses energy exploration on the Outer Continental Shelf ("OCS"). Finally, Part V concludes with a summary of a handful of rulings from federal and state courts, which fall outside the scope of climate, the Bay, or offshore energy development.

II. CLIMATE CHANGE

A National Academy of Sciences report on climate change contains this stark conclusion: "We now have incontrovertible evidence that the atmosphere is indeed changing and that we ourselves contribute to that change. Atmospheric concentrations of carbon dioxide are steadily increasing, and these changes are linked with man's use of fossil fuels . . . . A wait-and-see policy may mean waiting until it is too late."[5] To those following the science on climate change, this report's findings are not all that startling. What may be surprising, however, is the publication date of the study. It was published in 1979, more than a quarter-century before the release of *An Inconvenient Truth*, and well before global warming became a hot-button political issue.[6]

4. Michael E. Porter & Claas van der Linde, *Toward a New Conception of the Environment-Competitiveness Relationship*, J. ECON. PERSP., Fall 1995, at 97, 98 (1995).

5. Verner E. Suomi, *foreword* to CLIMATE RESEARCH BD., ASSEMBLY OF MATHEMATICAL & PHYSICAL SCIS., NAT'L RESEARCH COUNCIL, CARBON DIOXIDE AND CLIMATE: A SCIENTIFIC ASSESSMENT vii, viii (1979).

6. *See* AN INCONVENIENT TRUTH (Lawrence Bender Productions & Participant Productions 2006).

More recently, the 2008 report of the Governor's Commission on Climate Change ("Commission") catalogued a series of climate-related concerns specific to Virginia.[7] The Commission included representatives from the regulated community: Dominion Virginia Power ("Dominion"), Norfolk Southern Corporation, Phillip Morris USA, and Alpha Natural Resources (a coal mining company), among others.[8] Individuals from several conservation organizations, including the Southern Environmental Law Center, the Nature Conservancy, the Chesapeake Bay Foundation, and Wetlands Watch, also served as commissioners.[9] Impressively, despite the wide array of ideological perspectives among its membership, the Commission unanimously adopted its final report, which included Virginia-specific analyses of global modeling data from scientists at George Mason University and elsewhere.[10] These scientists found that Virginia and adjoining areas are expected to see significant warming this century, along with increased precipitation.[11] Specifically, the report noted:

> Sea level rise is a major concern for coastal Virginia, particularly the highly populated Hampton Roads region. . . . [T]he Virginia Beach-Norfolk Metropolitan Statistical Area ranks 10th in the world in value of assets exposed to increase flooding from sea level rise. . . . In Virginia, there are several major military installations located in low-lying areas that will be affected by sea level rise and storm surge. . . . Some of the Chesapeake Bay's "foundation species," such as blue crabs, eelgrass, and oysters, could decline or disappear . . . . Coastal wetlands, a critical habitat for many of the Chesapeake Bay's plants and animals, are being lost as sea levels rise . . . .[12]

The Commission's findings went on to highlight additional impacts to human health, natural systems, and the economy, as weather patterns continue to fluctuate widely from year to year, as predicted by climate models.[13] The report warned that "because

7. GOVERNOR'S COMM'N ON CLIMATE CHANGE, FINAL REPORT: A CLIMATE CHANGE ACTION PLAN 1 (2008), *available at* http://www.deq.state.va.us/export/sites/default/info/documents/climate/CCC_Final_Report-Final_12152008.pdf.

8. *See id*. at app. A; *Commission Members*, GOVERNOR'S COMMISSION ON CLIMATE CHANGE, http://www.deq.state.va.us/info/climatemembers.html (last visited Oct. 30, 2010).

9. *See id.*

10. GOVERNOR'S COMM'N ON CLIMATE CHANGE, *supra* note 7, at 3–5.

11. *Id.* at 4–5.

12. *Id.* at 6–7.

13. *See id.* at 4–11.

the effects of climate change on Virginia will be profound, we cannot wait for the federal government to act."[14]

These findings, buttressed by the conclusions of myriad other scientific reports covering decades of research, highlight the central reality about climate change: we have had plentiful information about the issue for years; what we have lacked is the political will to implement solutions. As detailed below, progress is slowly being made on this front, although gridlock certainly continues.

A. *Federal Legislation*

In the summer of 2009, the prospects for congressional action on major, new climate legislation were high. In June of that year, the U.S. House of Representatives voted to pass the American Clean Energy and Security Act of 2009 ("ACES").[15] The bill was the first comprehensive climate legislation to win passage on the floor of either chamber.[16] Although it was complex, with several corollary programs, the backbone of ACES was a cap-and-trade program for greenhouse gases.[17]

As opposed to command-and-control regulation (wherein regulators require each emitting source to meet precise performance standards), cap-and-trade establishes broad, system-wide targets for the total amount of pollution reductions that are needed, using market forces to find the most economically efficient means of reducing pollution.[18] The basic mechanism creates allowances to emit regulated pollutants based on the target goal for overall pollution reduction.[19] Regulated entities must possess sufficient allowances for all of their emissions in a given year.[20] Sources that are especially efficient can "over control," using fewer allowances

14. *Id.* at 5.

15. *Final Vote Results for Roll Call 477*, http://clerk.house.gov/evs/2009/roll477.xml (providing final vote results for ACES, H.R. 2454); *see* ACES, H.R. 2454, 111th Cong. (2009).

16. *See* Steven Mufson et al., *In Close Vote, House Passes Climate Bill*, WASH. POST, June 27, 2009, at A1.

17. *See id.*

18. *Compare* Christina K. Harper, *Climate Change and Tax Policy*, 30 B.C. INT'L & COMP. L. REV. 411, 422 (2007), *with* Carol M. Rose, *From H_2O to CO_2: Lessons of Water Rights for Carbon Trading*, 50 ARIZ. L. REV. 91, 91–92 (2008).

19. *See* Harper, *supra* note 18, at 423; Rose, *supra* note 18, at 91–92.

20. *See* Rose, *supra* note 18, at 92.

than they need.[21] The owners of these efficient sources can sell their excess allowances to other regulated entities, who would then be allowed to emit more of the regulated pollutant.[22]

Cap-and-trade as a regulatory concept previously enjoyed wide bipartisan support. President George H.W. Bush employed cap-and-trade in 1990, when he signed into law a sulfur dioxide trading program to address the problem of acid rain in the Eastern United States.[23] His son, George W. Bush, expanded cap-and-trade with the creation of the Clean Air Interstate Rule, which established tradeable allowances for sulfur dioxide and nitrogen oxides.[24] Even with regard to global warming pollution, cap-and-trade as a concept has fared well. In 2003, U.S. Senators John McCain and Joe Lieberman brought forth the bipartisan Climate Stewardship Act, which sought to create tradeable allowances of greenhouse gases to establish a market-driven program to reduce emissions.[25]

This year cap-and-trade proved to be a more controversial item, with the House's 2009 legislation on climate passing by a razor-thin margin (219 to 212).[26] The vote split largely on party lines with only eight out of 178 Republicans voting for the bill.[27] ACES proposed to cover emissions of seven distinct pollutants linked to global warming: carbon dioxide, methane, nitrous oxide, hydro-

21. Alice Lidell, *Cap and Trade: Background and Basics*, ICF INT'L (Sept. 19, 2008), *available at* http://www.icfi.com/DOCS/Cap-Trade-Background.pdf; *see* Harper, *supra* note 18, at 423.

22. Doremus & Hanemann, *supra* note 3, at 8–7; Rose, *supra* note 18, at 92.

23. *See* 42 U.S.C. § 7651 (2006).

24. Clean Air Interstate Rule, 70 Fed. Reg. 25,162 (May 12, 2005). The Clean Air Interstate Rule was struck down as unlawful by the U.S. Court of Appeals for the D.C. Circuit. North Carolina v. EPA, 531 F.3d 896, 901 (D.C. Cir. 2008). The decision did not dampen EPA's enthusiasm for cap-and-trade. It has now proposed a new transport rule that continues to preference cap-and-trade as a pollution control model. *See* Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 75 Fed. Reg. 45,210, 45,210, 45,215 (proposed Aug. 2, 2010).

25. S. 139, 108th Cong. tit. III (2003). The McCain-Lieberman bill ultimately failed by a vote of 43–55 on the Senate floor, but was nevertheless seen as an important step forward by the environmental community, since it was the first time that a cap-and-trade climate bill made it to the floor of the United States Senate for a vote. *See Summary of the Lieberman-McCain Climate & Stewardship Act of 2003*, PEW CENTER OF GLOBAL CLIMATE CHANGE (Oct. 20, 2003), http://www.pewclimate.org/policy_center/analyses/s_139_summary.cfm.

26. Final Vote Results for Roll Call 477, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, http://clerk.house.gov/evs/2009/roll477.xml (last visited Oct. 30, 2010) (providing final vote results for ACES, H.R. 2454).

27. *Id.*

fluorocarbons, perfluorocarbons, sulfur hexafluoride, and nitrogen trifluoride.[28] It would have required a 17% reduction (below 2005 levels) in emissions of these greenhouse gases by 2020, a 42% reduction by 2030, and an 83% reduction in emissions by 2050 from covered entities.[29] In general, ACES considered large industrial installations that emitted more than 25,000 metric tons of carbon dioxide equivalent (CO_2e) per year as covered entities.[30]

Today, increasing partisan rancor stymied progress on this legislation. A recent analysis of the U.S. Senate describes a deliberative body that is positively Kafkaesque: "[S]enators these days direct much of their creative energy toward the manipulation of arcane rules and loopholes, scoring short-term successes while magnifying their institution's broader dysfunction."[31] Thus, despite passing in the House more than a year ago, ACES has not moved forward in the Senate.[32]

The current inaction on climate change stands in bold contrast to the efforts of the 91st Congress, which passed the Clean Air Amendments of 1970 ("Amendments") to the Clean Air Act.[33] In the Senate, Republican Howard H. Baker, Jr. of Tennessee and Democrat Edmund S. Muskie of Maine co-sponsored the Act.[34] President Richard M. Nixon, who signed the Amendments into law, delivered the following comments to commemorate the signing ceremony:

> This is the most important piece of legislation, in my opinion, dealing with the problem of clean air . . . and the most important in our

28. ACES, H.R. 2454, 111th Cong. §§ 1, 711(a) (2009).

29. *Id.* § 703(a)(2)–(4).

30. *Id.* § 700(13)(F)(ii). The Environmental Protection Agency ("EPA") defines a "carbon dioxide equivalent" as a means of comparing emissions of pollutants based upon their global warming potential. One actual ton of a pollutant with a high global warming potential translates into several tons of that pollutant as measured in CO_2e. *Id.* § 700(10). For example, one ton of methane converts to 19.1 tons of CO_2e. *See* U.S. EPA Greenhouse Gas Equivalencies Calculator, http://www.epa.gov/cleanenergy/energy-resources/calculator.html (last updated Mar. 23, 2010).

31. George Packer, *The Empty Chamber*, NEW YORKER, Aug. 9, 2010, at 39.

32. Carl Hulse & David M. Herszenhorn, *Democrats Call Off Climate Bill Effort*, N.Y. TIMES, July 22, 2010, at 15A.

33. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. § 1857 (2006)).

34. 116 CONG. REC. 1302 (1970); *see also* 116 CONG. REC. 32,920 (1970).

> history. . . . How did this come about? . . . It came about by a bipartisan effort represented by the Senators and Congressmen who are here today in acting."[35]

Unlike some bipartisan products, lawmakers did not water down the Amendments. Among its more radical features was the creation of a citizen suit provision.[36] Prior to this section's enactment, if a President failed to enforce a law, the public's only recourse was at the ballot box.[37] The citizen suit provision transformed this relationship, extending the concept of public participation to the enforcement process.[38] If the President failed to act to enforce the law, citizens could now do it for him.[39] Drafted with Republican and Democratic cooperation, and signed into law by Richard Nixon, this important but controversial provision is a useful signpost for seeing just how far collegiality has fallen in the United States Senate over the last forty years.[40]

B. *Federal Regulation*

Although the legislative process has slowly crept along, a mandate from the Supreme Court of the United States compelled the Environmental Protection Agency ("EPA") to respond.[41] As a result, there have been significant regulatory advancements to address climate change, namely: (1) a finding that climate change endangers public health and welfare (the "Endangerment Finding"), (2) regulations to reduce greenhouse gas emissions from mobile sources, (3) regulations to reduce greenhouse gas emissions from stationary sources, and (4) a determination on timing

35. Presidential Statement on Signing the Clean Air Amendments of 1970, 7 WEEKLY COMP. PRES. DOC. 11 (JAN. 4, 1971).

36. Clean Air Amendments of 1970, Pub. No. L. 91-604, § 304, 84 Stat. 1706, 1706–07 (codified at 42 U.S.C. § 7604 (2006)).

37. Adam Babich, Comment, *Citizen Suits: The Teeth in Public Participation*, 25 ENVTL. L. REP. 10,141, 10,142 (1995) (promoting the theory that before citizen suits, "administrative decisionmakers [were] not directly answerable to the voters").

38. 116 CONG. REC. S32,926 (1970).

39. Sarah C. Rispin, *Cooperative Federalism and Constructive Waiver of State Sovereign Immunity*, 70 U. CHI. L. REV. 1639, 1645 n.33 (2003).

40. *See* Anne Applebaum, . . . *And Manners*, WASH. POST, Dec. 3, 2003, at A29.

41. Massachusetts v. EPA, 549 U.S. 497, 534–35 (2007); *see* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324, 25,396–97 (May 7, 2010) (to be codified at various parts of 40 and 49 C.F.R.) (citing Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1)).

to implement these various programs. Each of these developments is detailed below.

1. The Endangerment Finding

The first regulation, essential to triggering all of the other actions, is the Endangerment Finding, which follows a remand from the Supreme Court in *Massachusetts v. EPA*.[42] In that case, "a group of States, local governments, and private organizations" challenged EPA's contention that it lacked authority under the Act to regulate greenhouse gas pollution from motor vehicles.[43]

The case turned on an interpretation of Clean Air Act § 202(a), which requires that the EPA must regulate, for mobile sources, "emission[s] of any air pollutant . . . which in [its] judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare."[44] The Act further specifies, "All language referring to effects on welfare includes, but is not limited to, effects on . . . weather, visibility, and climate."[45]

The Court sided with the challengers, ruling that "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant.'"[46] The Court directed the EPA on remand to exercise its judgment under § 202 and determine the extent to which greenhouse gases do (or do not) endanger public health or welfare.[47] The Court cautioned, however, that the use of the word "judgment" in § 202 was "not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits."[48]

In sum, the ruling in *Massachusetts v. EPA* required the EPA to either make an Endangerment Finding or provide a vigorous defense of its failure to do so.[49] The Agency issued its final deter-

42. 549 U.S. at 534–35; Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,496.

43. *Massachusetts v. EPA*, 549 U.S. at 505.

44. Clean Air Amendments of 1970 § 202(a); 42 U.S.C. § 7521(a)(1) (2006 & Supp. II 2008).

45. Clean Air Act, 42 U.S.C. § 7602(h) (2006).

46. *Massachusetts v. EPA*, 549 U.S. at 532, 534.

47. *Id.* at 506, 533.

48. *Id.* at 532–33.

49. *Id.* at 534–35.

mination on the Endangerment Finding on December 15, 2009, and concluded that "[t]he evidence concerning adverse air quality impacts provides strong and clear support for an endangerment finding."[50]

The Ohio Coal Association and Peabody Energy Company, among other industry-related parties, filed petitions for reconsideration with the EPA on the Endangerment Finding, questioning the scientific basis for human-induced climate change.[51] Joining the coal industry were the Attorneys General of Virginia and Texas.[52] On July 29, 2010, the EPA announced its denial of those petitions, stating:

> After a comprehensive, careful review and analysis of the petitions, EPA has determined that the petitioners' arguments and evidence are inadequate, generally unscientific, and do not show that the underlying science supporting the Endangerment Finding is flawed, misinterpreted by EPA, or inappropriately applied by EPA. The science supporting the Administrator's finding that elevated concentrations of greenhouse gases in the atmosphere may reasonably be anticipated to endanger the public health and welfare of current and future U.S. generations is robust, voluminous, and compelling. The most recent science assessment by the U.S. National Academy of Sciences strongly affirms this view.[53]

> EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. . . . We need not and do not reach the question whether on remand EPA must make an endangerment finding. . . . We hold only that EPA must ground its reasons for action or inaction in the statute.

Id.

50. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1).

51. Ohio Coal Association, Petition for Reconsideration and Withdrawal of EPA's Endangerment and Cause or Contribute Finding for Greenhouse Gases Under Section 202(a) of the Clean Air Act (Feb. 12, 2010), *available at* http://www.epa.gov/climatechange/endangerment/downloads/Petition_for_Reconsideration_The_Ohio_Coal_Association.pdf; Peabody Energy Company, Petition for Reconsideration, (Feb. 11, 2010), *available at* http://www.epa.gov/climatechange/endangerment/downloads/Petition_for_Reconsideration_Peabody_Energy_Company.pdf.

52. Commonwealth of Virginia *ex rel.* Ken Cuccinelli, II, Petition for Reconsideration of Endangerment and Cause or Contribute Finding for Greenhouse Gases Under Section 202(a) of the Clean Air Act, (Feb. 16, 2010), *available at* http://www.epa.gov/climatechange/endangerment/downloads/Petition_for_Reconsideration_Commonwealth_of_Virginia.pdf; State of Texas, Petition for Reconsideration of Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, (Feb. 16, 2010), *available at* http://www.epa.gov/climatechange/endangerment/downloads/Petition_for_Reconsideration_State_of_Texas.pdf.

53. *Denial of Petitions for Reconsideration of the Endangerment and Cause or Contri-*

2. Mobile Source Regulations

Having made its Endangerment Finding, the EPA was compelled by statute to develop regulations to reduce emissions of greenhouse gases from mobile sources.[54] The EPA delivered on this obligation with a final rule, jointly promulgated by the EPA and the National Highway Traffic Safety Administration ("NHTSA") on May 7, 2010.[55] The rule governs light-duty vehicles produced during the model years ("MY") 2012 to 2016.[56]

The new regulations prescribe fleet-wide average CO_2 emission standards for passenger cars and light trucks, measured in grams of CO_2 per mile.[57] The EPA also established standards for tailpipe emissions of two other greenhouse gases, nitrous oxide and methane, also measured in grams per mile.[58] NHTSA, in coordination with the EPA's efforts, finalized new Corporate Average Fuel Economy ("CAFE") standards, expressed in the more familiar unit of miles per gallon.[59]

The EPA and NHTSA regulations concurrently ratchet down the allowable fleet-wide CO_2 emissions to 250 grams per mile and lift the CAFE level to 34.1 mpg by MY 2016.[60] To smooth this transition, the rule establishes a CO_2/CAFE credit-trading program for vehicle manufacturers, grants additional credits for flex and alternative fueled vehicles, and provides greater flexibility in CO_2/CAFE accounting for manufacturers with limited product lines who otherwise would find difficulty meeting the requirements.[61]

bute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, EPA, http://epa.gov/climatechange/endangerment/petitions.html (last visited Oct. 30, 2010).

54. Clean Air Act § 202(a), 42 U.S.C. § 7521 (a)(1) (2006 & Supp. II 2008). ("The Administration *shall* by regulation prescribe . . . standards applicable to the emission of any air pollutant" if, in the Administrator's judgment, that pollutant endangers public health or welfare) (emphasis added).

55. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600).

56. *Id.*

57. *Id.* at 25,329–30, 25,396.

58. *Id.* at 25,421.

59. *Id.* at 25,329–30.

60. *Id.*

61. *Id.* at 25,339, 25,340.

3. Stationary Source Regulations

The EPA's mobile source regulations have important implications outside of the automobile realm. This is because of a related Clean Air Act requirement for large, stationary sources.[62] The Prevention of Significant Deterioration ("PSD") program mandates that "[n]o major emitting facility . . . may be constructed . . . unless . . . the proposed facility is subject to the best available control technology for each pollutant *subject to regulation* under this chapter."[63] A "major emitting facility" is a large stationary source of air pollution, such as a coal-fired power plant, manufacturing facility, or other large industrial operation.[64] The term "subject to regulation" refers to the regulation of a given pollutant in any other Act program, such as the mobile source program.[65] Thus, if the Act regulates greenhouse gases for motor vehicles,[66] they automatically become "subject to regulation" for stationary sources as well.

In addition, the Act's Title V permitting program for stationary sources is triggered as well.[67] While the PSD program requires permits for the preconstruction and construction phases of a project, the Title V program requires day-to-day operating permits once facilities are built and in use.[68]

Regulation of greenhouse gases within the PSD and Title V programs raises its own unique set of issues. The PSD program defines a "major emitting facility" as a source with the potential to emit more than 250 tons per year of a regulated pollutant.[69] For the Title V program, the trigger is 100 tons per year.[70] As CO_2 is produced in far larger amounts than traditionally regulated pollutants, the EPA has determined it would create an unworkable administrative burden to enforce the stationary source require-

62. *See* 42 U.S.C. § 7475(a)(4) (2006).

63. *Id.* (emphasis added).

64. *Id.* § 7479(a) (2006).

65. *Id.* § 7475(a)(4), (e) (2006).

66. *See id.*; Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. at 25,329–30.

67. 42 U.S.C. § 7475(a)(1)–(2), (e)(3)(C) (2006); 42 U.S.C. §§ 7661, 7661a (2006).

68. *Id.* § 7661a(b)(5)(E).

69. *Id.* § 7479(1) (2006).

70. *Id.*

ments at the 100 and 250 tons-per-year levels.[71] The EPA estimated that without some sort of regulatory relief, over six million sources would require permitting under Title V, as opposed to the 14,700 permits currently issued.[72] A major coal-fired power plant, for example, emits several million tons of heat-trapping carbon-dioxide a year.[73] Thus, out of administrative necessity, the EPA has finalized its so-called Tailoring Rule, meant to "tailor" the PSD and Title V programs to work efficiently for greenhouse gas regulation.[74]

The tailoring rule operates in two phases. From January 2, 2011 to June 30, 2011, the program applies only to those sources already subject to PSD and Title V for other non-greenhouse gas pollutants that would emit 75,000 tons per year or more of greenhouse gases (measured cumulatively in CO_2e).[75] The second phase begins on July 1, 2011 and runs to June 30, 2013, and would bring in any new source that emits 100,000 tons per year or more of greenhouse gases, regardless of whether it triggered PSD for other pollutants.[76] Modifications of existing sources would trigger greenhouse gas regulation if they led to an increase in emissions of at least 75,000 tons per year of CO_2e.[77] The EPA has committed to a third phase of the program, taking over on July 1, 2013.[78]

4. Timing of EPA Climate Regulations

A critical question is when will the rubber meet the road? When will these mobile and stationary source regulations go into

71. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516–17 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

72. *Id.* at 31,536.

73. Rex Bowman, *Wise Power Plant Wins Approval*, RICH. TIMES-DISPATCH, June 26, 2008, at A1; *see* Application of Virginia Electric and Power Company, Commonwealth of Va. State Corp. Comm'n, PUE-2007-00066, Testimony of David A. Schlissel, at 43 (Nov. 2, 2007), *available at* http://www.deq.state.va.us/export/sites/default/info/pdf/vchec/selc/Exhibit_17.pdf (discussing the administrative record for the PSD Permit of Dominion Virginia Power's Virginia City Hybrid Energy Center, a coal fired power plant in Wise County, which includes estimates of carbon dioxide emissions of 5.37 million tons per year).

74. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,578.

75. *Id.* at 31,596.

76. *Id.*

77. *Id.*

78. *Id.*

effect? Generally, a regulation becomes "effective" on the date it is published in the Federal Register.[79] With the mobile source regulation described above, the effective date traditionally would have been May 7, 2010, which was when the final regulation was promulgated.[80] The EPA, however, chose to delay the effective date of implementation for its climate change initiatives.[81] As a result, the Agency determined the effective date would be January 2, 2011, the date on which automobile manufacturers can begin marketing vehicles as MY 2012.[82] This date triggers the start of the stationary source program as well.[83]

5. Climate Change Litigation in Virginia

The EPA's suite of greenhouse gas proposals has already drawn challenges in court. On February 16, 2010, Virginia Attorney General Ken Cuccinelli filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, challenging the EPA's Endangerment Finding.[84] Norfolk-based Wetlands Watch, a nonprofit organization dedicated to preserving and protecting Virginia's wetland resources, intervened in defense of the EPA.[85] Relatedly, the Attorney General proposed a novel use of the Virginia Fraud Against Taxpayers Act to investigate the research of climate scientists who worked at the University of Virginia.[86] The university responded by filing a separate action in the Albemarle County Circuit Court, seeking to set aside the Attorney General's request as unlawful.[87] Dozens of the uni-

79. Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004, 17,016 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71).

80. Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25,396–400 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600).

81. *Id.* at 17,019.

82. *Id.* at 17,007.

83. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,521–22 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

84. Petition to Review of the Commonwealth of Virginia *ex rel.* Kenneth Cuccinelli, II, Virginia v. EPA, No. 10-1036 (D.C. Cir. Feb. 16, 2010).

85. *Wetlands Watch Takes Legal Action on Climate Change*, WETLANDS WATCH (Mar. 18, 2010), http://www.wetlandswatch.org/SLR_SELC_WW_suit_031810.asp.

86. Rosalind S. Helderman, *Cuccinelli Demands Files from U-VA*, WASH. POST, May 4, 2010, at B1.

87. Karen Kapsidelis, *U. Va. Fighting Cuccinelli Demands*, RICH. TIMES-DISPATCH,

versity's law professors have signed a letter applauding the university's challenge, claiming that the Attorney General's use of the fraud statute is a threat to academic freedom.[88] All of these matters remain pending.

The conservation community also initiated one climate-related challenge. In *Appalachian Voices v. State Air Pollution Control Board*,[89] environmental advocates sought the installation of strict, "best available control technology" controls for carbon dioxide for Dominion's new coal-fired power plant in Southwest Virginia, which is currently under construction.[90] The Commonwealth initially issued the PSD permit in *Appalachian Voices* on June 30, 2008.[91] State regulators and Dominion argued that greenhouse gases were not "subject to regulation" under the Act in June of 2008.[92] The Court of Appeals of Virginia agreed that carbon dioxide was not "subject to regulation" at the time the PSD permit was issued in 2008.[93] The court did observe, however, that the state "incorporated into the PSD permit CO_2 mitigation measures offered voluntarily by Dominion."[94] These measures are binding requirements in the PSD permit, and are expected to offset a portion of the coal plant's global warming pollution.[95]

In light of the *Appalachian Voices* ruling, the EPA timing rule (effective January 2, 2011) will control greenhouse gas regulation in Virginia.[96] The first, major new source expected to require a

May 28, 2010, at A1.

88. Letter from Richard Schragger et al., to John O. Wynne, Rector, Univ. of Va. (May 18, 2010), *available at* http://leiterreports.typepad.com/files/letter-to-bov-re-cid-may-18.pdf .com.

89. 56 Va. App. 282, 693 S.E.2d 295 (Ct. App. 2010). Mr. Jaffe, coauthor of this article, was counsel of record for the appellants in this case. The opinions about the decision expressed in this article are solely his personal reflections and are not necessarily the opinions of the clients in that matter or the Southern Environmental Law Center.

90. *Id.* at 286–87, 693 S.E.2d at 297–98.

91. *Id.* at 287, 693 S.E.2d at 297.

92. *Id.* at 287–88, 693 S.E.2d at 298. Virginia has an EPA-approved State Implementation Plan, allowing it to directly control permitting under the Clean Air Act for major stationary sources. *Id.* at 286–87, 693 S.E.2d at 298; *see also* State Air Pollution Control Board, Permits for Stationary Sources, 9 VA. ADMIN. CODE § 5-80 (2008 & Cum. Supp. 2010).

93. *Appalachian Voices*, 56 Va. App. at 294, 693 S.E.2d at 300.

94. *Id.* at 293, 693 S.E.2d at 301.

95. *See id.* at 293–94, 693 S.E.2d at 301.

96. *Id.* at 294–95, 693 S.E.2d at 301; *see also* Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71). In addi-

PSD analysis for greenhouse gases could be Old Dominion Electric Cooperative's proposed Cypress Creek Power Station.[97] Existing sources would be subject to Title V review for greenhouse gases.[98]

III. THE CHESAPEAKE BAY

In June of 2000, the Governors of Virginia, Maryland, and Pennsylvania, along with the Mayor of Washington, D.C., representatives from the EPA, and the Chesapeake Bay Commission, signed the multi-point Chesapeake 2000 agreement.[99] It established several important targets for improving water quality and achieving ecological sustainability by 2010.[100] Unfortunately, the parties did not achieve many of the 2010 goals. Multiple legal challenges related to the failure to clean up impaired waters—including the waters of the Chesapeake Bay—were brought by the American Canoe Association, the American Littoral Society, the Chesapeake Bay Foundation, and the Kingman Park Civic Association, among several other organizations.[101] Consent decrees arising out of these lawsuits now compel both Virginia regulators and the EPA to develop plans to reduce nutrient pollution into the bay by May 1, 2011.[102]

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tion to its ruling on carbon dioxide, the Court of Appeals also rejected a claim regarding regulation of fine particulate matter (known as $PM_{2.5}$ or, more commonly, soot). *Appalachian Voices*, 56 Va. App. at 296, 693 S.E.2d at 302. The court upheld the Department of Environmental Quality's use of coarser particulate matter, PM_{10}, as a "surrogate" for direct control of fine particulate matter. *Id.* at 296, 693 S.E.2d at 302. At the same time, the court noted that "the regulation of $PM_{2.5}$ is in transition," and that new regulations finalized after the permit had been issued to Dominion "provided that the PSD program would no longer use . . . PM_{10} . . . as a surrogate" for $PM_{2.5}$. *Id.* at 297 n.5, 298, 693 S.E.2d at 302 n.5, 303.

97. Scott Harper, *Details Revealed for Proposed Coal Plaint*, VIRGINIAN-PILOT (Norfolk), Mar. 19, 2009, at B2.

98. Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. at 17,023.

99. CHESAPEAKE BAY PROGRAM, CHESAPEAKE 2000 AGREEMENT 13 (June 28, 2000), *available at* http://www.chesapeakebay.net/content/publications/cbp_12081.pdf.

100. *See generally id.*

101. Clean Water Act Section 303(d): Preliminary Notice of Total Maximum Daily Load (TMDL) Development for the Chesapeake Bay, 74 Fed. Reg. 47,792 (Sept. 17, 2009).

102. *Id.* at 47,792; Settlement Agreement, Fowler v. EPA, No. 1:09-CV-005-CKK (D.D.C. May 10, 2010).

The EPA has now moved forward to develop a Chesapeake Bay Total Maximum Daily Load ("TMDL") structure.[103] Generally speaking, the Clean Water Act requires that source-by-source effluent limitations must first be established.[104] If, however, these effluent limitations are not sufficient to meet water quality standards, then states are required to develop TMDLs for each segment of an impaired waterway.[105] The TMDL, therefore, functions on a more holistic level to take into account all factors (waste water, urban stormwater, agriculture, and air deposition) to develop a plan to bring water quality back to healthy levels.[106]

"[M]ajor portions of Chesapeake Bay and its tidal tributaries within Virginia" are listed as "impaired" under § 303(d) of the Act.[107] Thus, the EPA is working to establish TMDLs throughout the bay watershed for nitrogen, phosphorus, and sediment.[108] The EPA "estimates that the Bay TMDL will address up to 92 impaired Bay and tidal tributary segments."[109] The EPA affirmed a commitment to publish a final bay-wide TMDL by December 31, 2010.[110]

As part of the process of working toward a final TMDL, the EPA has requested that the bay watershed states and the District of Columbia develop Watershed Implementation Plans ("WIPs") to address required nutrient and sediment load reductions for the tributary segments within their jurisdictions.[111] Ultimately, the EPA envisions three phases of WIPs. The EPA has requested Phase I WIPs by November of 2010.[112] Phase I begins by assessing

103. Clean Water Act Section 303(d): Preliminary Notice of Total Maximum Daily Load (TMDL) Development for the Chesapeake Bay, 74 Fed. Reg. 47,792.

104. 33 U.S.C. § 1311(b) (2006) (requiring effluent limitations for point sources and publicly owned treatment works).

105. *Id*. § 1313(d).

106. *The Chesapeake Bay TMDL*, VIRGINIA DEQ, http://www.state.va.us/tmdl/chesapeakebay.html (last visited Oct. 30, 2010).

107. Clean Water Act Section 303(d): Preliminary Notice of Total Maximum Daily Load (TMDL) Development for the Chesapeake Bay, 74 Fed. Reg. at 47,792; *The Chesapeake Bay TMDL*, *supra* note 106.

108. Clean Water Act Section 303(d): Preliminary Notice of Total Maximum Daily Load (TMDL) Development for the Chesapeake Bay, 74 Fed. Reg. at 47,792.

109. *Id.* at 47,793.

110. *Id*.

111. Letter from William Early, Acting Reg'l Adm'r, EPA, to The Honorable L. Preston Bryant, Sec'y, Va. Dep't of Natural Res. 1–2 (Nov. 4, 2009), *available at* http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/tmdl_implementation_letter_110409.pdf.

112. *Id*. at 4.

the distribution of targeted pollution reductions to be achieved by each sector and area that drains into one of the identified segments.[113] Tidal jurisdictions, including Virginia, are expected to establish wasteload allocations for all significant point sources at this phase.[114] Work on Phase II WIPs, with more detailed plans for improvement focused on smaller geographic areas, will take place in 2011.[115] In Phase II, jurisdictions will further divide nonpoint source allocations and any aggregated point source allocations into distinct geographic locations.[116] WIPs in Phase II are also expected to identify specific controls and practices that will be implemented by 2017.[117] Phase III will contain refined actions and controls for the 2018–2025 timeframe.[118] This phase will be designed to yield the total reductions necessary to finally restore the bay.[119]

Within each phase, states are expected to establish two-year milestones of specific pollutant reduction controls and actions.[120] The EPA will review the states' proposed milestones to ensure they are sufficient to garner pollution reductions and then determine whether the milestones have been achieved.[121] The EPA outlined numerous consequences for failure to propose adequate milestones, nonattainment of milestones, or other violations of the Bay TMDL.[122] Additionally, as a signatory of the Chesapeake 2000 agreement, the EPA requires Virginia to develop WIP control actions based on "regulations, permits, or otherwise enforceable agreements" to apply to all major sources of pollutants, including nonpoint sources.[123]

113. EPA, *A Guide for EPA's Evaluation of Phase I Watershed Implementation Plans*, 1–2 (Apr. 2, 2010), http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/GuideforEPAWIPEvaluation4-2-10.pdf.

114. Letter from William Early to The Honorable L. Preston Bryant, *supra* note 111, at 4.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 4–5.

120. *Id.* at 5.

121. *Id.*

122. Letter from Shawn M. Garvin, Reg'l Adm'r, EPA, to The Honorable L. Preston Bryant, Sec'y, Va. Dep't of Natural Res. 8–12 (Dec. 29, 2009), *available at* http://www.epa.gov/region03/chesapeake/bay_letter_1209.pdf.

123. Letter from William Early to The Honorable L. Preston Bryant, *supra* note 111, at 2.

The Virginia Department of Environmental Quality and Department of Conservation and Recreation assembled a stakeholder group to assist with the development of Virginia's WIPs.[124] Membership in the stakeholder group includes individuals from the regulated community including officials with the Virginia Manufacturers Association, the Homebuilders of Virginia, and the Virginia Farm Bureau Federation.[125] Also represented are environmental organizations such as the Chesapeake Bay Foundation, the James River Association, the Southern Environmental Law Center, and Wetlands Watch.[126]

In a letter to EPA Administrator Lisa P. Jackson, Virginia Governor Robert F. McDonnell has outlined twelve areas of concern with the EPA's proposal, ranging from the process the EPA has used to develop the TMDL, to the science underlying the various EPA assessments, and the substantive policy provisions expected to be contained within the draft TMDL.[127] For example, Governor McDonnell stated, "Despite significant delays in providing promised data to the states, EPA is holding firm to the December 2010 deadline for the TMDL and state Watershed Implementation Plans."[128] He encouraged the EPA to take the maximum amount of time permitted (until May 2011 under the consent decrees) to finalize TMDL numbers.[129] The governor also took issue with the EPA's proposed enforcement mechanism, arguing that the "EPA threatens to impose harsh consequences on certain source sectors if other sectors are falling behind . . . . This appears to violate fundamental principles of fairness."[130] The governor also requested dramatic increases in federal funding to implement solutions.[131]

Two weeks later, EPA Region 3 Administrator Shawn Garvin sent a letter to the watershed states, reaffirming the EPA's com-

124. COMMONWEALTH OF VA., CHESAPEAKE BAY TMDL PHASE I WATERSHED IMPLEMENTATION PLAN 21 (2010), *available at* http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/VADraftWIPI.pdf.

125. *Id.* at 22.

126. *Id.*

127. Letter from The Honorable Robert F. McDonnell, Governor, Commonwealth of Va., to The Honorable Lisa P. Jackson, Adm'r, EPA 2–4 (June 15, 2010), *available at* http://www.dcr.virginia.gov/soil_and_water/documents/baytmdlgovltr.pdf.

128. *Id.* at 2.

129. *Id.*

130. *Id.* at 3.

131. *Id.*

mitment to the December 2010 timeframe.[132] Administrator Garvin's letter emphasized EPA's position on the importance of maintaining a strong federal-state partnership

> as we work through any remaining differences and show the citizens of the watershed that we can deliver on our commitments, complete a TMDL by the end of 2010, and put forth aggressive, defensible implementation plans that will put in place all necessary actions, by no later than 2025, to fully restore the Bay and tidal rivers—with an interim goal of 60% or more being accomplished by 2017.[133]

The Garvin letter reiterated the EPA's expectations for state WIPs and reemphasized the array of potential federal backstop actions to "'ensure that jurisdictions develop and implement appropriate Watershed Implementation Plans; attain appropriate two-year milestones of progress; and provide timely and complete information to an effective accountability system for monitoring pollutant reductions.'"[134]

Statewide stormwater regulations are also under development in a related effort that will have impacts for the bay. Stormwater runoff from rooftops, roadways, driveways, parking lots, and other impervious surfaces washes a wide array of harmful pollutants into tributaries that eventually make their way to the bay.[135] In 2009, after three years of development and with input from the public and expert advisors, the Virginia Soil and Water Conservation Board adopted comprehensive revisions to the Virginia Stormwater Management Program.[136] The new regulations propose to establish updated statewide phosphorus standards, channel and flood protection criteria, and offsite options to achieve onsite water quality standards.[137] Among the many revisions to the

132. Letter from Shawn Garvin, Reg'l Adm'r, EPA, to The Honorable Doug Domenech, Sec'y, Va. Dep't of Natural Res. 1 (July 1, 2010), *available at* http://deq.virginia.gov/export/sites/default/tmdl/pdf/tmdlloadsltr72010.pdf.

133. *Id.* at 1.

134. *Id.* at 3 (quoting Letter from Shawn Garvin, Adm'r, EPA to The Honorable. L. Preston Bryant, Sec'y, Va. Dep't of Natural Res., *supra* note 122, at 3).

135. *Polluted Runoff (Nonpoint Source Pollution*), *Basic Information*, EPA, http://www.eap.gov/owOw_keep/NPS/whatis.html (last visited Oct. 30, 2010); *Stormwater Runoff*, CHESAPEAKE BAY FOUND., http://www.cbf.org/Page.aspx?pid_491 (last visited Oct. 30, 2010).

136. Notice of Suspension of Effective Date and Extension of Public Comment Period, 26 Va. Reg. Regs. 1876 (Feb. 15, 2010) (to be codified at 4 VA. ADMIN. CODE).

137. *Id.* at 1876–77; *see also* 4 VA. ADMIN. CODE §§ 50-60-10 to -159 (2009) (proposed revisions available at http://www.dcr.virginia.gov/documents/lrpublishedfinalparts1-2and3-february.pdf (last visited Oct. 30, 2010)).

prior regulations were requirements for "no net impact" in phosphorous pollution standards for newly developed lands.[138] On January 14, 2010, however, the Soil and Water Conservation Board suspended the effective date of these new regulations.[139] Legislation enacted by the Virginia General Assembly then further delays the implementation of new stormwater regulations until 280 days after the EPA finalizes the bay TMDL discussed above.[140] If the EPA fails to finalize the bay TMDL, the regulations become effective December 1, 2011.[141] The Virginia Department of Conversation and Recreation initiated an informal review of these stormwater rules with the assistance of an advisory panel, and expects to reissue them for additional public review and comment in early 2011.[142]

Finally, the EPA is assuming responsibility for developing load allocations for atmospheric deposition of nitrogen to the watershed, and these allocations will be incorporated into the overall bay TMDL.[143] Approximately thirty percent of the nitrogen pollution that enters the bay comes from air sources, such as coal-fired power plants, not water discharges.[144]

IV. OFFSHORE ENERGY

For several decades, congressional and presidential moratoria protected the Atlantic seaboard from offshore oil and gas drilling and exploration.[145] From 1982 through Fiscal Year 2008—twenty-

138. VA. CONSERVATION NETWORK, 2010 VA. CONSERVATION BRIEFING BOOK 51–52 (2010), *available at* http://www.vcnva.org/anx/ass/library/45/briefingbook2010.pdf.

139. Notice of Suspension of Effective Date and Extension of Public Comment Period, 26 Va. Reg. Regs. at 1876.

140. Act of Apr. 10, 2010, ch. 370, 2010 Va. Acts ___ (codified as amended VA. CODE ANN. § 10.1-603.3 (Cum. Supp. 2010)); Act of Mar. 11, 2010, ch. 137, 2010 Va. Acts ___ (codified as amended at VA. CODE ANN. § 10.1-603.3 (Cum. Supp. 2010)).

141. *See* ch. 370, 2010 Va. Acts at ___; ch. 137, 2010 Va. Acts at ___.

142. *See generally Bay Total Maximum Daily Load*, *Soil and Water Conservation*, VA. DEP'T OF CONSERVATION RECREATION, http://www.dcr.virgnia.gov/soil_and_water/baytmdl.shtml (last modified Sept. 29, 2010) (outlining Virginia's participation in the EPA's Bay TMDL).

143. Letter from Shawn Garvin, Reg'l Adm'r, EPA to The Honorable Doug Domenech, Sec'y, Va. Dep't of Natural Res., *supra* note 132, at 4–5.

144. Caleb A. Jaffe, *Air in the Balance: Rewriting the Clean Air Act's New Source Review Program*, 54 VA. LAW., Oct. 2005, at 30.

145. CURRY L. HAGERTY, CONG. RESEARCH SERV., R41132, OUTER CONTINENTAL SHELF MORATORIA ON OIL AND GAS DEVELOPMENT 1 (2010), *available at* http://www.fas.org/sgp/crs/misc/R41132.pdf.

six consecutive years—Congress prohibited federal spending for oil and gas drilling, exploration, or development in offshore areas along the Outer Continental Shelf of the Atlantic coast through annual restrictions placed on the U.S. Department of the Interior's appropriations.[146] A longstanding presidential moratorium further safeguarded Atlantic coastal areas, beginning with an executive order by President George H.W. Bush in 1990.[147]

The presidential moratorium was ultimately lifted in July of 2008;[148] the congressional moratorium was withdrawn in September of the same year.[149] Efforts to drill off the coast of Virginia soon ignited. The U.S. Department of the Interior Minerals Management Service ("MMS") took the first major regulatory step and began plotting a course to allow for the leasing of drilling rights off the coast of Virginia by 2011.[150] Following the BP oil spill disaster, MMS was reorganized and renamed as the Bureau of Ocean Energy Management, Regulation, and Enforcement ("BOEMRE"), an acronym that Washington insiders have taken to pronouncing as "bummer."[151]

The proposed Virginia lease sale, known as Lease Sale 220, proposes to open up nearly three million acres for oil and natural gas development on a pie-shaped tract adjacent to the mouth of the Chesapeake Bay.[152] The Lease Sale 220 area begins approximately fifty miles off the coast of Virginia, and extends out into the Atlantic Ocean as much as 183 miles.[153] On March 31, 2010,

146. *Id.* at 1, 6.

147. *See* Statement on Outer Continental Shelf Oil and Gas Development, 26 WEEKLY COMP. PRES. DOC. 1006 (June 26, 1990); ADAM VANN, CONG. RESEARCH SERV. RL33404 OFFSHORE OIL AND GAS DEVELOPMENT: LEGAL FRAMEWORK 4 (2010), *available at* http://dh7862-29.wh.intermedia.net/nle/crsreports/10May/RL33404.pdf.

148. Memorandum on Modification of the Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 44 WEEKLY COMP. PRES. DOC. 986 (July 14, 2008); *see* Steven Lee Myers & Carl Hulse, *Bush Acts on Drilling, Challenging Democrats*, N.Y. TIMES, July 15, 2008, at A13.

149. Statement on Signing the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, 44 WEEKLY COMP. PRES. DOC. 1280 (Sept. 30, 2008); *see Congress Allows Offshore Oil Drilling Ban to Expire*, ENVIRONMENT NEWS SERVICE, http://www.ens-newswire.com/ens/sep2008/2008-09-30-091.asp (last visited Oct. 30, 2010).

150. Outer Continental Shelf (OCS), Gulf of Mexico OCS Region, Mid-Atlantic Proposed Oil and Gas Lease Sale 220, 73 Fed. Reg. 67,201, 67,201–03 (Nov. 13, 2008).

151. Al Kamen, *MMS Becomes BOE. Oh, Wait—BOEMRE*, WASH. POST, June 30, 2010, at A15.

152. Outer Continental Shelf (OCS), Gulf of Mexico OCS Region, Mid-Atlantic Proposed Oil and Gas Lease Sale 220, 73 Fed. Reg. at 67,201, 67,205.

153. *Id.* at 67,201.

President Obama and Interior Secretary Salazar announced that the Virginia proposed lease sale would continue as planned but under a revised schedule.[154] The announcement was part of a widespread expansion of oil and gas exploration and drilling off the coasts of Alaska, the Atlantic, and in the Gulf of Mexico.[155]

Supporters of Lease Sale 220 include Virginia Governor McDonnell.[156] Shortly after the election, then-Governor-Elect McDonnell penned a letter to U.S. Secretary of the Interior Ken Salazar in which he insisted that "Virginia is eager to get started" in offshore oil and gas exploration, and pressed the Interior Department to move quickly ahead with the lease sale.[157] Opponents include Maryland Governor Martin O'Malley, whose letter to Secretary Salazar struck a different chord, requesting "that oil and gas leasing be prohibited in the Mid-Atlantic region (Maryland, Virginia, and Delaware)."[158] Governor McDonnell focused on seeking to build Virginia into the "Energy Capital of the East Coast,"[159] whereas Governor O'Malley raised concerns about the potential impact of an oil spill on the "recreational, tourist, and fishing industries" of Maryland's Eastern Shore.[160]

On April 20, 2010, progress on Lease Sale 220 was radically altered by the explosion and loss of the *Deepwater Horizon*, a semi-submersible drilling rig operating in the Gulf of Mexico.[161] The

154. Press Release, Department of Interior, Secretary Salazar Announces Comprehensive Strategy for Offshore Oil and Gas Development and Exploration (Mar. 31, 2010), *available at* http://www.doi.gov/news/pressreleases/2010_03_31_release.cfm (explaining that the lease was scheduled for 2012). A 2008 MMS report indicates that it was originally scheduled for 2011. Outer Continental Shelf (OCS), Gulf of Mexico OCS region, Mid-Atlantic Proposed Oil and Gas Lease Sale 220, 73 Fed. at 67,201.

155. Press Release, *supra* note 154.

156. Letter from The Honorable Robert F. McDonnell, Governor, Commonwealth of Va., to The Honorable Ken Salazar, Sec'y, U.S. Dep't of Interior (Dec. 23, 2009), *available at* http://www.governor.virginia.gov/news/viewRelease.cfm?id12.

157. *Id.*

158. Letter from The Honorable Martin O'Malley, Governor, State of Md., to The Honorable Ken Salazar, Sec'y, U.S. Dep't of Interior 1 (May 27, 2010), *available at* http://www.governor.maryland.gov/documents/100527SalazarLetter.pdf.

159. Press Release, The Honorable Robert F. McDonnell, Governor, Commonwealth of Va., Statement of Governor Bob McDonnell on President's Offshore Energy Plan (Mar. 31, 2010), *available at* http://www.governor.virginia.gov/news/viewRelease.cfm?id=99.

160. Letter from The Honorable Martin O'Malley, Governor, State of Md. to The Honorable Ken Salazar, Sec'y, U.S. Dep't of Interior, *supra* note 158, at 1.

161. Noelle Straub, *Interior Suspends Planned Va. Offshort Oil and Gas Lease Sale,* N.Y. TIMES, May 6, 2010, http://www.nytimes.com/gwire/2010/05/06/06greenwire-interior-suspends-planned-va-offshore-oil-and-73308.html?scp=11&sq=Noelle%20Straub&st=cse; BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION AND ENFORCEMENT, *Deepwater*

enormity of the oil spill disaster that followed is now well known. The federal response to the sinking of the *Deepwater Horizon*, and the tragic loss of eleven lives onboard the rig, quickly demanded the full attention of the U.S. Department of the Interior. On May 6, 2010, the Department announced that, in order to devote its full resources to the Gulf response, public scoping meetings regarding Virginia Lease Sale 220 would be postponed indefinitely.[162]

Shortly after this announcement, The U.S. Department of Defense ("DoD") publicly released a report, expressing concerns about possible interference of Lease Sale 220 with military exercises offshore.[163] The DoD report noted that oil and gas exploration within the vicinity of the Virginia Capes Operating Area ("VACAPES") was of particular concern.[164] VACAPES is a site used for live ordnance release, among other sensitive practices.[165] For these reasons, the DoD report recommended "no oil and gas activity" over seventy-two percent of the area targeted for the Virginia lease sale.[166] Just days after the DoD report was made public, the agency in charge, BOEMRE, canceled the sale.[167] In a short statement in the Federal Register, the BOEMRE explained that, "Cancellation of Sale 220 will allow time to develop and implement measures to improve the safety of oil and gas develop-

Horizon Incident, http://www.boemre.gov/DeepwaterHorizon.htm (last visited Oct. 30, 2010).

162. Press Release, U.S. Dep't of Interior, Interior Announces Postponement of Public Scoping Meetings on Virginia Offshore Oil and Gas Lease Sale (May 6, 2010), http://www.doi.gov/news/pressreleases/Interior-Announces-Postponement-of-Public-Scoping-Meetings-on-Virginia-Offshore-Oil-and-Gas-Lease-Sale.cfm.

163. Rosalind S. Helderman, *Oil Drilling Off Va.'s Shore Would Interfere With Military, Defense Study Says*, WASH. POST, May 19, 2010, at B5.

164. OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE FOR READINESS ET AL., REPORT ON THE COMPATIBILITY OF DEPARTMENT OF DEFENSE (DOD) ACTIVITIES WITH OIL AND GAS RESOURCE DEVELOPMENT ON THE OUTER CONTINENTAL SHELF (OCS) (2010), http://acq.osc.mil/ie/offshore/dod_ocs_rept_02152010_release.pdf.

165. OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE FOR READINESS ET AL., OUTER CONTINENTAL SHELF (OCS): MILITARY ACTIVITIES & FUTURE OIL AND GAS DEVELOPMENT 10 (2010), http://menendez.senate.gov/imo/media/doc/201005DrillingDOD.pdf.

166. *Id*.

167. Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) Cancellation of Oil and Gas Lease Sale 220 in the Mid-Atlantic Planning Area on the Outer Continental Shelf (OCS), 5 Fed. Reg. 44,276 (Jul. 28, 2010).

ment in Federal waters, provide greater environmental protection, and substantially reduce the risk of catastrophic events."[168]

Of course, oil and gas explorations are not the only energy development opportunities off of Virginia's coast. The Virginia Coastal Energy Research Consortium ("VCERC") was established by the Virginia General Assembly[169] to "serve as an interdisciplinary study, research, and information resource for the Commonwealth on coastal energy issues."[170] In April 2010, VCERC released its latest assessment of offshore wind energy potential.[171]

Of particular note is the finding by VCERC that a major offshore wind farm would be cost-competitive, in terms of the equalized cost of energy, with Dominion's Wise County coal plant currently under construction.[172] The report further found that if a per-tonnage price were placed on carbon dioxide emissions, offshore wind resources could actually be cheaper than new coal-fired power.[173] VCERC then identified twenty-five OCS lease blocks, which would not interfere with the DoD's interests or shipping interests, that if developed could provide approximately 3200 megawatts of wind capacity.[174]

V. JUDICIAL DECISIONS OF NOTE

Although developments related to global warming, the Chesapeake Bay, and offshore energy exploration have dominated environmental law in recent months, there have been noteworthy developments outside these three arenas. Some of these recent decisions from the federal and state appellate courts are summarized below.

168. *Id.*

169. VA. CODE ANN. § 67-600 (Cum. Supp. 2010).

170. *Id.* § 67-601.

171. GEORGE M. HAGERMAN, JR. ET AL., VIRGINIA COASTAL ENERGY RESEARCH CONSORTIUM, VIRGINIA OFFSHORE WIND STUDIES, JULY 2007 TO MARCH 2010, FINAL REPORT i (2010), *available at* http://www.vcerc.org/VCERC_Final_Report_Offshore_Wind_Studies_Full_Report_newest.pdf.

172. *Id.* at 3–4.

173. *Id.* at 3.

174. *Id.* at 23.

A. *Supreme Court of the United States*

Although few environmental cases were argued before the Court in 2010, one of the most intriguing was *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.[175] In *Stop the Beach*, an organization representing beachfront property owners brought a takings claim under the Fifth and Fourteenth Amendments to the United States Constitution, challenging the restoration of approximately seven miles of beach pursuant to Florida's Beach and Shore Preservation Act.[176] The land in question "had been eroded by several hurricanes."[177]

Under Florida law, beachfront property owners possess title to the mean high-water line.[178] Land beyond that line is usually publicly owned and, of course, usually under water.[179] State officials proposed a beach restoration project on the state's land that would create a new strip of public beach.[180] The landowners argued that the beach created by the restoration project should accrue to them in order to preserve the private beach access they currently enjoy.[181] They claimed that the planned state project, by creating a new public beach in front of their homes, would effect an unconstitutional taking.[182] The Court disagreed, holding that "[t]he Takings Clause only protects property rights as they are established under state law."[183] Florida law has long held that addition of beachfront by accretion—the slow, imperceptible addition of land over time—belonged to the private landowner.[184] The sudden addition of new land by avulsion, however, accrued to the seabed owner, in this case the state.[185] Since the restoration project was avulsive, the state retained ownership of its formerly submerged land.[186]

175. 560 U.S. ___, 130 S. Ct. 2592 (2010).
176. *Id.* at ___, 130 S. Ct. at 2599, 2600.
177. *Id.* at ___, 130 S. Ct. at 2600.
178. *Id.* at ___, 130 S. Ct. at 2598.
179. *Id.* at ___, 130 S. Ct. at 2597–98.
180. *Id.* at ___, 130 S. Ct. at 2600.
181. *Id.* at ___, 130 S. Ct. at 2610–11.
182. *Id.* at ___, 130 S. Ct. at 2600.
183. *Id.* at ___, 130 S. Ct. at 2612.
184. *Id.* at ___, 130 S. Ct. at 2598.
185. *Id.* at ___, 130 S. Ct. at 2598.
186. *Id.* at ___, 130 S. Ct. at 2611, 2612–13.

Far more controversial than the holding, however, was the discussion that followed. In three separate opinions, the Court engaged in a fascinating debate over the question of whether a claim for a "judicial taking" could have been asserted.[187] A claimed judicial taking could ostensibly arise whenever a traditional takings claim is refused.[188] For example, if a litigant asserts that the state—by legislative or administrative action—has taken her property without just compensation, and she brings that claim to court and loses, her takings claim would generally be thought to have been extinguished.[189] Justice Scalia, however, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, posited, in dicta, that the litigant might have a second bite at the apple—this time against the judicial tribunal that ruled against her.[190] The Justices explained, "It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat. . . . [T]he [T]akings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking."[191]

Justice Kennedy, joined by Justice Sotomayor, disagreed, noting that "no clear authority" exists for the concept of a judicial taking.[192] Justice Kennedy further observed:

> The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is "arbitrary or irrational" under the Due Process Clause. Thus, without a judicial takings doctrine, the Due Process Clause would likely prevent a State from doing "by judicial decree what the Takings Clause forbids it to do by legislative fiat."[193]

Justice Breyer, joined by Justice Ginsburg, also bristled at the plurality's proposed creation of a new judicial takings doctrine.[194]

187. *See id*. at ___, 130 S. Ct. at 2612 (Scalia, J.) (plurality opinion); *id*. at ___, 130 S. Ct. at 2614 (Kennedy, J., concurring in part and concurring in judgment); *id*. at ___, 130 S. Ct. at 2618 (Breyer, J., concurring in part and concurring in judgment).

188. *See id*. at ___, 130 S. Ct. at 2602 (plurality opinion).

189. *See id*. at ___, 130 S. Ct. at 2602.

190. *See id*. at ___, 130 S. Ct. at 2602.

191. *Id.* at ___, 130 S. Ct. at 2601, 2602.

192. *Id.* at ___, 130 S. Ct. at 2614 (Kennedy, J., concurring in part and concurring in the judgment).

193. *Id.* at ___, 130 S. Ct. at 2615 (quoting *id*. at ___, 130 S. Ct. at 2601 (plurality opinion)).

194. *Id.* at ___, 130 S. Ct. at 2618–19 (Breyer, J., concurring in part and conjuring in the judgment).

Anchoring his concurrence in a plea for federalist restraint, Justice Breyer worried that the Court "would invite a host of federal takings claims . . . in matters that are primarily the subject of state law."[195] This, in turn, he contended, would lead federal judges to "play a major role in the shaping of a matter of significant state interest—state property law."[196]

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

In *Piedmont Environmental Council v. Federal Energy Regulatory Commission*, the United States Court of Appeals for the Fourth Circuit entertained a series of challenges to new regulations related to electric transmission line siting.[197] Specifically, the Federal Energy Regulatory Commission ("FERC") promulgated regulations interpreting § 1221 of the Energy Policy Act of 2005.[198] This statutory provision authorized the U.S. Department of Energy to create "national interest electric transmission corridor[s]" and further authorized FERC to issue permits for the construction of new transmission lines within those corridors.[199]

The case raised important federalism considerations, as transmission line siting has historically fallen within the province of state public utility commissions.[200] Given this history, the petitioners argued that the court must apply the "presumption against preemption" in construing the reach of FERC's authority.[201] The court disagreed.[202] "[W]hen Congress has conferred authority upon a federal agency to act in an area of preexisting state regulation, and there is simply a question about the scope of that authority," the presumption against preemption does not apply, and the federal law is interpreted "'without any presumption one way or the other.'"[203] With this standard of review, the court

195. *Id.* at ___, 130 S. Ct. at 2618–19.

196. *Id.* at ___, 130 S. Ct. at 2619.

197. 558 F.3d 304, 309 (4th Cir. 2009).

198. Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440 (Dec. 1, 2006) (codified at 18 C.F.R. pts. 50 & 380).

199. 16 U.S.C. § 824p(b) (2006).

200. *See Piedmont Envtl. Council*, 558 F.3d at 312.

201. *Id.*

202. *Id.*

203. *Id.* (quoting New York v. FERC, 535 U.S. 1, 18 (2002)).

upheld FERC's regulations in part, rejected them in part, and remanded the matter back to FERC.[204]

A separate challenge, implicating the Department of Energy's authority to designate corridors in the first place, is still pending.[205] The Attorney General of Virginia objected to the department's designation of a Mid-Atlantic Area National Interest Electric Transmission Corridor that would cover part of the Commonwealth.[206] Across the nation, similar lawsuits were filed by conservation organizations, state utility commissions, and other interested parties.[207] Although Virginia's action was filed in the Fourth Circuit, it has been consolidated with the other challenges and is now awaiting a decision from the Ninth Circuit Court of Appeals.[208] Oral argument on the matter was heard in Seattle, Washington on June 8, 2010.[209]

C. *Supreme Court of Virginia*

In *Marble Technologies, Inc. v. City of Hampton*, the Supreme Court of Virginia provided an important interpretation of the state's Chesapeake Bay Preservation Act as it relates to the federal Coastal Barrier Resources Act.[210] The state law requires municipalities within the Tidewater region to "incorporate general water quality protection measures into their comprehensive plans, zoning ordinances, and subdivision ordinances."[211] In 2008, the City of Hampton amended its Chesapeake Bay Preservation District to include "'lands designated as part of the Coastal Bar-

204. *Id.* at 320.

205. Wilderness Soc'y v. U.S. Dep't of Energy, No. 08-71074 (9th Cir. argued June 8, 2010); *see also* National Electric Transmission Report, Order Denying Rehearing, 73 Fed. Reg. 12,959, 12,960 (Mar. 11, 2008) [hereinafter Nat'l Elec. Transmission Report].

206. *See* Nat'l Elec. Transmission Report, *supra* note 205, at 12,959–63 (rejecting petitions for rehearing on both the Mid-Atlantic Area and Southwest Area corridors).

207. *See Wilderness Soc'y*, No. 08-71074 (consolidating twelve associated cases).

208. *See id.* (indicating Commonwealth v. EPA, No. 08-71823, was consolidated on July 29, 2008).

209. *Id.*

210. 279 Va. 409, 412, 690 S.E.2d 84, 85 (2010) (comparing the Chesapeake Bay Preservation Act, VA. CODE ANN. §§ 10.1-2100 to -2115 (Repl. Vol. 2008 & Cum. Supp. 2010), with the Coastal Barrier Resources Act, 16 U.S.C. §§ 3501–3510 (2006 & Supp. III 2009)).

211. VA. CODE ANN. § 10.1-2100(A) (Repl. Vol. 2006 & Cum. Supp. 2010).

rier Resources System [under federal law]'" that were not otherwise protected.[212]

The plaintiffs, who were landowners within the newly amended preservation district, challenged the ordinance as exceeding the locality's authority under the Chesapeake Bay Preservation Act and as violative of the Dillon's Rule.[213] Thus, the question presented to the court was "whether the General Assembly expressly or impliedly authorized the City to use as a criterion for [protecting resources under the state Chesapeake Bay Preservation Act] whether particular land is included in the Coastal Barrier Resources System pursuant to the federal Act."[214] The court found that neither state law, nor the implementing regulations from the Chesapeake Bay Local Assistance Board, authorized localities to designate protected areas "based on criteria established by the federal government."[215] Rather, a locality's "designations must be based on criteria established by the [state's Chesapeake Bay Local Assistance] Board."[216]

D. *Court of Appeals of Virginia*

1. Representational Standing

Chesapeake Bay Foundation v. Commonwealth ex rel. Virginia State Water Control Board, the Court of Appeals of Virginia considered when an organization may assert representational standing.[217] Representational standing is permissible under Article III of the U.S. Constitution,[218] and is adopted in certain situations under Virginia law by statute.[219] The doctrine allows an organization to proceed with litigation on behalf of its membership if: (1)

212. *Marble Technologies*, *Inc.*, 279 Va. at 412, 414, 690 S.E.2d at 85, 86 (quoting Coastal Barriers Resources Act, 16 U.S.C. §§ 3501–3510 (2006 & Supp. III 2009)).

213. *Id.* at 415, 690 S.E.2d at 86.

214. *Id.* at 418, 690 S.E.2d at 89.

215. *Id*. at 420, 690 S.E.2d at 90.

216. *Id.*

217. 56 Va. App. 546, 549, 695 S.E.2d 549, 551 (Ct. App. 2010).

218. *See* Vt. Agency of Natural Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 773–74 (2000).

219. *See, e.g.*, VA. CODE ANN. § 62.1-44.29 (Cum. Supp. 2010). ("[A]ny person who has participated . . . in the public comment process . . . is entitled to judicial review . . . if such person meets the standard for obtaining judicial review . . . pursuant to Article III of the United States Constitution."); *id.* § 10.1-1318(B) (Repl. Vol. 2006 & Cum. Supp. 2010) (same standard for review of decisions of the State Air Pollution Control Board).

at least one of its members would otherwise have had standing to sue in his or her own right, (2) the interests the organization seeks to defend are "germane to the organization's purpose," and (3) the matter does not require "the participation of individual members in the lawsuit."[220]

The Chesapeake Bay Foundation ("CBF") challenged the issuance of a permit by the Virginia State Water Control Board ("Board") for "the development of a residential and commercial project immediately adjacent to the public Stumpy Lake Nature Preserve."[221] The Board countered that CBF lacked standing to pursue the claim because, although CBF itself had participated during the public comment period before the Board, the organization had failed to allege that any individual members of the organization had participated.[222] By statute, participation in the administrative process is a necessary prerequisite to challenging the Board's permitting decision in circuit court.[223]

The Board argued that in order to meet the first prong of the representational standing test—that the individual members would have standing to sue in their own right—CBF needed to show that at least one of those members had exhausted her administrative remedies on her own behalf.[224] The court rejected the Board's argument as "add[ing] an additional prong to the Article III . . . requirements" for representational standing.[225] The court further explained that under the statute, "any *party* seeking judicial review must participate in the public comment process. . . . [F]or an association to seek review, it must participate . . . . If an individual seeks judicial review, that individual must participate . . . ."[226] Because CBF, as an organization, participated in the administrative process, the organization had standing to bring the appeal.[227] Whether an individual member participated was irrelevant, since no member was a named party to the

220. *Chesapeake Bay Found.*, 56 Va. App. at 551–52, 695 S.E.2d at 552 (quoting Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)), *superseded on other grounds by*, United Food & Commercial Workers Union Local 751 v. Brown Group, 517 U.S. 544 (1996).

221. *Id.* at 549, 695 S.E.2d at 551.

222. *Id.* at 550, 695 S.E.2d at 551.

223. *See* § 62.1-44.29 (Cum. Supp. 2010).

224. *Chesapeake Bay Found.*, 56 Va. App. at 554, 695 S.E.2d at 553.

225. *Id.*

226. *Id.*, 695 S.E.2d at 554 (emphasis added).

227. *See id.* at 556, 695 S.E.2d at 554–55.

litigation.[228] The matter was remanded to the circuit court for further proceedings on the merits of CBF's claims.[229]

2. Standard of Review and Deference Owed to an Expert Agency

Another major decision to come from the Court of Appeals of Virginia in 2010 was *Commonwealth ex rel. Virginia State Water Control Board v. Blue Ridge Environmental Defense League*.[230] A coalition of environmental organizations, including the Blue Ridge Environmental Defense League, successfully challenged a permit issued by the Board to Dominion for its North Anna Nuclear Power Station.[231] Virginia has authority to issue National Pollutant Discharge Elimination System ("NPDES") permits pursuant to a delegation from the EPA under the Act.[232] As a result, Virginia issues Virginia Pollutant Discharge Elimination System ("VPDES") permits that meet the requirements of state water pollution control law and the federal NPDES program.[233]

All parties agreed that heated water discharged from the power plant was a "pollutant" under both federal and state water law.[234] Where they disagreed, however, was on the manner in which that pollutant must be regulated.[235] The environmental coalition argued that the discharge of heated water from the nuclear power station into a waste heat treatment facility required a separate permit.[236] The Board countered that it interpreted the applicable regulations to allow the waste heat treatment facility to fall under a "waste treatment system exception."[237]

The environmental groups prevailed in the circuit court.[238] On appeal, the Board argued that the lower court had "erred in the standard of review it applied with respect to [the Board's] inter-

228. *See id*.
229. *Id*., 695 S.E.2d at 555.
230. 56 Va. App. 469, 694 S.E.2d 290 (Ct. App. 2010).
231. *See id*. at 474, 694 S.E.2d at 293.
232. *Id*. at 476 n.5, 694 S.E.2d at 294 n.5 (citing 33 U.S.C. § 1342(b), (c)(1) (2000); 40 C.F.R. § 122(a)(2) (2009)).
233. *Id*. at 485, 694 S.E.2d at 298 (citations omitted).
234. *See id*. at 476 n.3, 694 S.E.2d at 294 n.3 (citing 33 U.S.C. § 1362(6) (2006)); VA. CODE ANN. § 62.1-44.3 (Cum. Supp. 2010)).
235. *See id*. at 475–76, 694 S.E.2d at 293–94.
236. *Id*., 694 S.E.2d at 293.
237. *See id*. at 477, 694 S.E.2d at 294.
238. *Id*.

pretation of its own regulations."[239] The court of appeals sided with the Board, reaffirming that courts are to "give special weight to the agency's interpretation of its own regulation, and interfere only if its interpretation is arbitrary or capricious constituting a clear abuse of its delegated discretion."[240] With this standard of review in mind, the court of appeals reversed the circuit court's ruling and found that the Board's permitting decision was entitled to deference and should be left undisturbed.[241]

VI. CONCLUSION

This environmental law update is by no means exhaustive. Since the *Law Review*'s last update, there have been several important legal, regulatory, and statutory developments in the environmental field and it would be impossible to summarize them all. What we hope to have accomplished, instead, is to provide an overview of the major changes that are driving the arena at the public policy level. As we have explained, the greatest movement is happening around work related to climate change, Chesapeake Bay preservation, and offshore energy exploration. Developments in these three areas are quickly evolving and should be monitored closely over the coming years.

239. *See id*. at 479, 694 S.E.2d at 295.

240. *Id*. at 483, 694 S.E.2d at 297 (citing Johnston-Willis, Ltd. v. Kenley, 6 Va. App. 231, 243–44, 359 S.E.2d 1, 8 (Ct. App. 1988)).

241. *Id*. at 489–90, 694 S.E.2d at 300–01.