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ENVIRONMENTAL LAW

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5-1 INTRODUCTION

5-1.01 Scope

This chapter provides a general overview of many environmental laws that affect local governments. Environmental laws are often technical and complex, and while the design of the basic programs under these laws remains fairly constant, their particular requirements often change. In addressing specific problems, it is essential to refer directly to the applicable statutes and regulations and to confer with the state and federal agencies administering environmental programs to determine what these laws require.

5-1.02 Background

Environmental regulation has been dominated by federal law since Congress enacted the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq. This statute created the Council on Environmental Quality and requires federal agencies to study the environmental consequences of their actions. NEPA requirements are discussed in more detail in section 5-7. In 1970, following the enactment of NEPA, the President created the U.S. Environmental Protection Agency (EPA) by consolidating environmental functions previously scattered among other federal agencies. Since 1970, a host of federal environmental statutes and state counterparts have been created.

5-1.03 Structure of Federal Environmental Programs

Federal environmental statutes generally set minimum national standards and establish a national permit program to be run by EPA or any state that puts parallel programs in place. Virginia has sought and obtained EPA approval to administer almost all federal environmental programs. As a result, Virginia has the primary permit-issuing and enforcement roles under these national programs. This chapter provides information about the Virginia-administered programs unless Virginia has not received delegation of a certain program, in which case the federal program will be discussed.

Although often referred to as “cooperative federalism,” the relationship of the federal and state programs is more accurately described as one of principal and agent: the federal program exerts control by (i) putting conditions on federal grant funds that pay the state agencies’ staffs; (ii) invoking the federal statutory preemption of any state statute or regulation less stringent than federal requirements; and (iii) exercising the power to review and require changes in draft state permits, and to veto any state-issued permit. In addition, EPA retains the power to take direct administrative and judicial enforcement action against any violation of a state-issued permit that has its underlying basis in some provision of federal law.

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5-1.04 Structure of Virginia Environmental Agencies

The Secretary of Natural and Historic Resources is a cabinet-level officer who is responsible to the Governor for the following environmental agencies: Department of Conservation and Recreation, Department of Historic Resources, Marine Resources Commission, Virginia Department of Wildlife Resources,² Virginia Museum of Natural History, and the Department of Environmental Quality. Va. Code § 2.2-215 et seq. The Secretary does not have authority to reverse the policies, regulations, or case decisions of the various citizen boards.

Each major environmental program in Virginia is overseen by a citizen board consisting usually of seven to nine members appointed by the Governor. Though usually not experts, these board members are chosen for their knowledge of, commitment to, or interest in the particular agency's responsibilities. The principal boards are: (1) State Water Control Board (SWCB), (2) State Air Pollution Control Board (SAPCB), and (3) Virginia Waste Management Board (VWMB). The SAPCB and SWCB have traditionally had authority to issue permits and to approve enforcement actions, while the VWMB's authority is limited to approving regulations. In 2022, the General Assembly stripped the SAPCB and SWCB of their permitting and enforcement authority. 2022 Va. Acts ch. 356. These boards depend on staff at the Department of Environmental Quality to develop regulatory proposals for their review and approval. Operating in a similar fashion are the Virginia Marine Resources Commission, the Virginia Soil and Water Conservation Board, and the Department of Wildlife Resources Board.

The day-to-day operations of Virginia's environmental programs are carried out by state agencies staffed with professionals, who implement the directives of their boards or commissions, the Governor and Secretary of Natural and Historic Resources, as well as those duties assigned to them by statute or regulation. An environmental agency's interpretation of, or finding of facts under, a regulation that it has the authority to enforce—including the terms of a permit issued thereunder—is entitled to judicial deference. *S. Appalachian Mountain Stewards v. Red River Coal Co.*, No. 2:14cv24 (W.D. Va. Apr. 14, 2015).

The Virginia Department of Environmental Quality (DEQ), created in 1993, consolidated the staff functions of the Departments of Air Pollution Control and Waste Management and the State Water Control Board under one roof. The individual citizen boards retained their responsibilities following this staff reorganization and no substantive changes in the basic statutes or regulations under which the current agencies work were made by this staff reorganization. However, following decisions by the SAPCB and SWCB that conflicted with DEQ recommendations—including the denial of an air permit for a compressor station related to the Mountain Valley natural gas pipeline—the General Assembly in 2022 stripped the SAPCB and SWCB of their permit-issuing authority. 2022 Va. Acts ch. 356.

DEQ is headed by a Director, who is appointed by and serves at the pleasure of the Governor for a term concurrent with the Governor's. DEQ's Central Office is located in Richmond, with six regional offices around the state from which DEQ staff make inspections, issue permits, and handle enforcement responsibilities.

The elements and organization of DEQ's air, water, waste, and other programs are discussed on its [website](#). In 2020, the goals of addressing climate change and furthering environmental justice were added to DEQ's statutory mission. Va. Code § 10.1-1183.

² The Virginia Department of Game and Inland Fisheries was renamed the Virginia Department of Wildlife Resources in 2020. Va. Code § 29.1-100.1.

5-2 WATER POLLUTION REGULATION

5-2.01 Administration

5-2.01(a) Federal Law

EPA regulates water pollution primarily under the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq. The CWA's goal is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. This goal is implemented through three primary programs: (i) ambient water quality standards, (ii) the National Pollutant Discharge Elimination System permit program (§ 402), and (iii) "pretreatment" requirements for dischargers to publicly owned treatment works.

Although it remains an overarching federal regime, the CWA allows states to assume much of the actual responsibility for setting standards and issuing and enforcing § 402 permits, subject to EPA approval and oversight. To be approved to administer CWA programs, a state must enact laws and promulgate regulations that are at least as stringent as their federal counterparts. It must also back up these statutory authorities with adequate resources to implement them. For a decision extensively discussing the "delicate partnership" between the CWA and the State Water Control Board enforcement thereof, see *Commonwealth v. Blue Ridge Environmental Defense League, Inc.*, 56 Va. App. 469, 694 S.E.2d 290 (2010), *aff'd per curiam*, 283 Va. 1, 720 S.E.2d 138 (2012).

Section 404 of the CWA preserves the historic role of the U.S. Army Corps of Engineers in regulating navigable waters, including the filling of wetlands. The Corps's Section 404 wetlands permit program and the parallel, but only partially overlapping, State wetlands programs, are discussed at sections [5-2.08\(b\)\(2\)](#) and [5-2.08\(b\)\(3\)](#).

5-2.01(b) State Water Control Law

The source of Virginia's authority to administer CWA programs is the State Water Control Law, Va. Code § 62.1-44.2 et seq. This statute creates the State Water Control Board (SWCB), a seven-member citizen board charged with reviewing and approving the regulations developed by DEQ. The scope of the SWCB's jurisdiction is broad; the State Water Control Law regulates all "State waters," defined as "all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands." Va. Code § 62.1-44.3. The DEQ Director and staff carry out the day-to-day duties of the SWCB. Va. Code §§ 62.1-44.14, 10.1-1185. Moreover, following the 2022 legislative changes, the SWCB no longer has permitting authority, but can merely provide "commentary" regarding pending controversial permits, with ultimate decision-making authority resting with DEQ. See 2022 Va. Acts ch. 356, cl. 5.

The State Water Control Law preempts conflicting ordinances enacted by Virginia counties, cities, or towns. A locality may not impose by ordinance an environmental requirement that the SWCB or DEQ has not mandated by permit or regulation. See Va. Code § 62.1-44.6. Pursuant to authority conferred by Va. Code § 15.2-1200, however, a county can require that reports made to the SWCB also be made to the locality. 1995 Op. Va. Att'y Gen. 66.

The CWA and the State Water Control Law also envision an oversight role for localities, allowing localities to regulate certain aspects of the CWA such as stormwater discharges, industrial pretreatment programs, and regulation under the Chesapeake Bay Preservation Act. In this way, many localities are not only regulated by the CWA and the State Water Control Law, but also play a role in administering the laws.

5-2.02 Water Quality Standards and TMDLs

5-2.02(a) Water Quality Standards

The CWA requires states to adopt water quality standards that specify (a) the desired beneficial uses for the state's waters, (b) the minimum ambient criteria or conditions (e.g.,

minimum dissolved oxygen/maximum toxic pollutant concentrations) necessary to support such uses, and (c) an antidegradation policy under which clean streams will be kept pristine. 33 U.S.C. § 1313. States must review and revise their current water quality standards every three years and submit them to EPA for approval. If EPA does not approve the proposed standards, it may, after appropriate notice, determine what standards must apply within the State. Virginia originally adopted water quality standards in the early 1970s and has since revised them many times to regulate new categories of pollutants (e.g., nutrients and heavy metals) or to revise standards in response to updates to EPA's water quality criteria, for which Virginia must obtain EPA approval. These standards affect all dischargers, impose stringent limitations, and have limited, difficult to obtain variance opportunities. See Water Quality Standards, 9 VAC 25-260-10 et seq.

Virginia's Antidegradation Policy provides that all State waters must be assigned to one of three tiers of protection. 9 VAC 25-260-30. First tier waters must meet minimum water quality standards. Second tier waters, whose existing qualities are better than the established standards, cannot be degraded below their existing quality, with limited exceptions specified in the regulations. See *Sierra Club v. State Water Control Bd.*, 898 F.3d 383 (4th Cir. 2018) (deferring to state agency interpretation of its antidegradation policy recognizing that though Tier 2 waters must be maintained and protected, minor, short-term exceedances of existing water quality that do not significantly degrade existing water quality do not violate that requirement). In the third tier, called "exceptional waters," the policy prohibits new pollutant discharges with limited exceptions. Accordingly, the SWCB must notify a locality of a proposal to nominate waters within its boundaries as "exceptional waters." Upon receipt of notice, the locality has sixty days to comment on the consistency of the nomination with the locality's comprehensive plan. Va. Code § 62.1-44.15:4(B). The SWCB also must notify a locality if it determines that a waterway that lies within the locality's boundaries does not meet water quality standards. Va. Code § 62.1-44.15:4(C).

5-2.02(b) Total Maximum Daily Loads (TMDLs)

For "impaired waters"—those identified stream segments that do not meet established water quality standards—the CWA requires EPA and states to establish total maximum daily loads (TMDLs) of pollutants that can be discharged without causing violations of water quality standards. 33 U.S.C. § 1313(d). In *American Canoe Ass'n v. EPA*, 54 F. Supp. 2d 621 (E.D. Va. 1999), the United States District Court for the Eastern District of Virginia approved a consent decree establishing a deadline of 2011 to establish TMDLs for waters designated as impaired at that time.³ Approval was finally achieved in 2020. EPA is authorized to set TMDLs where the state's submissions are not adequate.

TMDLs are developed on a segment-by-segment basis, and the resulting total waste loads are allocated among point and nonpoint sources, with a safety factor to assure compliance with water quality standards. The TMDLs are incorporated into the Water Quality Management Planning Regulation, 9 VAC 25-720-10 et seq. The TMDLs are not subject to judicial review if specified adoption procedures are followed, but are subject to Governor and General Assembly review. Va. Code § 2.2-4006(A)(14). After EPA approval, stakeholders must develop implementation plans to achieve compliance and the SWCB must conform VPDES permits to the resulting individual waste load allocations.

In *American Farm Bureau Federation v. EPA*, 792 F.3d 281 (3d Cir. 2015), the court of appeals upheld the authority of the EPA to set TMDLs where the state fails to do so. This case concerned the EPA-established TMDL for the Chesapeake Bay which lies in parts of seven states, including Virginia. Virginia filed an amicus brief in support of the EPA's position in this case. The Fourth Circuit subsequently held, however, that the EPA has no authority

³ While citizens may not sue the EPA pursuant to CWA § 505 (citizen suit provision) alleging abuse of its discretion in approving water quality standards, they may pursue such a claim under the Administrative Process Act. *Am. Canoe Ass'n v. EPA*, 30 F. Supp. 2d 908 (E.D. Va. 1998).

to set its own TMDLs if a state has made good faith efforts and produced at least some TMDLs, and has a credible plan in place to produce others. *Ohio Valley Envtl. Coal., Inc. v. Pruitt*, 893 F.3d 225 (4th Cir. 2018).

After Virginia failed to set a TMDL for a Potomac River tributary with aquatic life impairment, EPA established a stormwater runoff limit, asserting that flow, and specifically stormwater flow, operated as a surrogate for sediment. In *Virginia Department of Transportation v. EPA*, No. 1:12-cv-775 (E.D. Va. Jan. 3, 2013), a federal district court held that the EPA had exceeded its regulatory authority because flow is not a pollutant. A TMDL must set limits for pollutants, not surrogates for pollutants.

5-2.02(b)(1) Chesapeake Bay Watershed Implementation Plan

Following EPA's issuance of the Chesapeake Bay TMDL, Virginia was required to develop a Watershed Implementation Plan (WIP), designed to accomplish a set of allocation goals identified in the Chesapeake Bay TMDL for nitrogen, phosphorus, and sediment. The purpose of the allocation goals is to restore the health of the Bay and its tidal rivers. DEQ is implementing Virginia's WIP in three phases, which may be monitored on its website: [Watershed Implementation Plans for the Chesapeake Bay](#). The target date for achieving the water quality goals contained in the phase three WIP is December 31, 2025. Va. Code § 62.1-44.119.

The WIP divides actions that must be undertaken by pollutant sector (including agriculture, stormwater, and wastewater) and each sector must assure that actions will be taken in accordance with specific milestones, to achieve designated water quality standards. Actions may include credit exchange programs, implementation of specific technologies, and other approaches. For example, it is contemplated that, once the Chesapeake Bay Program approves dredging as a creditable pollutant removal practice, the SWCB will authorize dredging operations in the Bay watershed as among the methods available to meet pollutant reduction requirements. Va. Code § 62.1-44.15:28.1.

If the Secretary of Agriculture and Forestry and the Secretary of Natural and Historic Resources jointly determine on or after July 1, 2028, that the WIP goals have not been met, additional statutory provisions will become effective, requiring the implementation of nutrient management plans on cropland of fifty acres or greater and livestock stream exclusion for properties with twenty or more bovines. Va. Code §§ 62.1-44.119:1 and 62.1-44.119 through 62.1-44.123.

Notwithstanding other provisions, no regulatory action pursuant to Va. Code §§ 62.1-44.121 and 62.1-44.123 shall be imposed on agricultural practices prior to July 1, 2028, provided that reasonable progress is being achieved and a detailed plan to include full funding as provided under subsection C of Va. Code § 10.1-2128.1 for reaching the needed number of voluntary incentivized practices has been developed. Va. Code § 62.1-44.119:4.

5-2.02(b)(2) The Water Quality Improvement Act

The Water Quality Improvement Act (WQIA) of 1997, Va. Code §§ 10.1-2117 to 10.1-2134.1, creates a statewide funding and technical support program focused on projects addressing point and nonpoint sources of water pollution. Localities are eligible for such support, which includes matching-grants from the Water Quality Improvement Fund and reduced-cost loans issued by the Virginia Resource Authority. Programs give priority to projects aimed at reducing nutrient pollution and to local government grantees/borrowers. DEQ has primary administrative and funding authority over WQIA programs. Under the WQIA, however, the agency must conduct a public comment period and hearing annually, prior to allocating grant funds between point and non-point control programs. Va. Code § 10.1-2129; see 2008 Op. Va. Att'y Gen. 16 (public notice requirements apply to technical assistance grants).

5-2.02(b)(3) Credit Exchange Programs and Nutrient Trading

Virginia's Chesapeake Bay Watershed Nutrient Credit Exchange Program creates a market-based point-source nutrient credit trading program to facilitate point source reductions of nitrogen and phosphorus in the Chesapeake Bay Watershed. The Program also establishes a watershed general permit creating an aggregate load for the Bay watershed. See Va. Code §§ 62.1-44.19:12 to 62.1-44.19:23. Permittees under the general permit may be members of a non-stock corporation named the Virginia Nutrient Credit Exchange Association. The association facilitates the buying and selling of nitrogen and phosphorus credits, and planning to ensure that sufficient credits will be available statewide each year to achieve compliance with the general permit. Individually-negotiated exchanges between dischargers are also permitted.

The Nutrient Credit Exchange Program also provides a foundation for establishing market-based incentives to help achieve nonpoint source reduction goals. Va. Code § 62.1-44.19:12(c). Private sector nonpoint sources meeting baseline requirements may trade any extra phosphorus and nitrogen reductions (nutrient credits) to new or expanding point source facilities in need of such credits. Va. Code §§ 62.1-44.19:15(B); 62.1-44.19:21.2. Nonpoint nutrient credits may also be used to meet construction stormwater permit phosphorous control requirements. Circumstances where trading is allowed are specified by statute, and other circumstances may be approved if specific local water quality considerations are satisfied. Va. Code §§ 62.1-44.15:35(D) and (K); 62.1-44.15:35(B) and (C). DEQ may also acquire and distribute nutrient credits through its Nutrient Offset Fund. Va. Code § 10.1-2128.2.

The SWCB is authorized to develop regulations specifying how nonpoint source nitrogen, phosphorus, and sediment reducing practices can obtain certification of nutrient credits for trading purposes. Va. Code §§ 62.1-44.19:20 through 62.1-44.19:23; 9 VAC 25-900-10 et seq. Sources that may use those nutrient credits include MS4s, construction and industrial stormwater permittees, and confined animal feeding operations. MS4s have also been authorized to acquire sediment credits to meet Bay TMDL pollution reduction requirements. Va. Code § 62.1-44.19:21.1. Only nonpoint nutrient credits generated by the private sector may be transferred. Va. Code § 62.1-44.19:21.2. Localities may generate nutrient credits and request their certification by DEQ, but such certifications may be used only for the purpose of determining whether the project complies with various statutory requirements. *Id.* Localities may also enter into agreements with private sector entities for nutrient credit generating projects on terms and conditions agreed to by the parties. *Id.*

5-2.03 “VPDES” (Discharge) and “VPA” (No-Discharge) Permits**5-2.03(a) Administration**

Consistent with the CWA, water quality standards and TMDLs are implemented in Virginia through Virginia Pollutant Discharge Elimination System (VPDES) permits. Such permits are required for essentially any point source discharge of pollutants to the State surface waters. 9 VAC 25-31-10 et seq.⁴ The VPDES regulation defines “surface waters” broadly to include not only rivers, harbors, and lakes, but also periodically inundated areas such as wetlands. 9 VAC 25-31-10. Federal law separately regulates the direct injection of wastewater to groundwater, but state law authorizes the SWCB to regulate all discharges to state waters, which includes groundwater. Va. Code § 62.1-44.5; see *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403 (4th Cir. 2018) (noting that VPDES permits authorize discharges to “state waters,” which include groundwater, but finding that CWA/VPDES permits which prohibit discharges in “state water” should be interpreted to mean only surface waters; VPDES permit provisions do not apply to pollutants seeping into groundwater for which DEQ imposes separate permitting obligations under a solid waste permit issued under RCRA and

⁴ A state must itself obtain a discharge permit if it is responsible for reclamation of a private site that has forfeited its permit. *W. Va. Highlands Conservancy v. Huffman*, 625 F.3d 159 (4th Cir. 2010).

the Virginia Waste Management Act). Stormwater management regulations are separately discussed in section 5-2.04(a).

The SWCB also issues Virginia Pollution Abatement (VPA) permits for facilities that generate pollutants but do not directly discharge such pollutants to surface waters. 9 VAC 25-32-10 et seq. Virginia regulates these so-called “no-discharge” facilities, including “land application” sites and “closed-loop” operations, because of their potential to discharge pollutants to surface waters, albeit indirectly.⁵

5-2.03(b) Procedures

The Permit Regulation contains provisions detailing the information and materials which must accompany an application for permit. 9 VAC 25-31-100 et seq. The Regulation also enumerates standard conditions imposed by a VPDES permit. See 9 VAC 25-31-190 et seq. For each application, DEQ must prepare a draft permit, fact sheet, and statement of the basis for its proposed decision to issue the permit. It must publish notice of issuance of the proposed permit in area newspapers and receive public comment. DEQ must conduct a public hearing and issue a response to comments, prior to final issuance. 9 VAC 25-31-260 through 25-31-320.

No application for a new individual VPDES permit to discharge sewage, industrial wastes, or other wastes shall be deemed complete unless it contains a statement from the locality in which the facility will be sited that the facility complies with local land use and other ordinances. The locality has thirty days to act on an applicant’s request for statement of compliance or the requirement is deemed waived. Va. Code § 62.1-44.15:3. In addition, the SWCB must notify a locality of an application for a permit or permit modification within its borders (except for permits for agricultural production or aquacultural production activities) and shall make a good-faith effort to notify other localities and riparian property owners within a specified distance from the point of discharge. Va. Code § 62.1-44.15:4(D).

Pursuant to Va. Code § 62.1-44.15:6, the SWCB has promulgated regulations setting a fee schedule to recover part of the costs of processing permit applications. 9 VAC 25-20-10 et seq.

The term of a VPDES permit may not exceed five years. The term of a VPA permit may not exceed ten years. Va. Code § 62.1-44.15(5a). Either can be reopened and modified during its term. An application for permit renewal must be submitted to DEQ at least 180 days prior to permit expiration. 9 VAC 25-31-100(D). If a renewal application is deemed complete, but the SWCB does not reissue the permit before it expires, the term of the permit is administratively extended until reissued. If a complete application is not submitted within the necessary timeframe, the permit expires at the end of its term, rendering continued discharge unlawful and exposing the owner to sanctions.

Permit holders can apply to modify permit terms. An application for minor permit modification is not as detailed as the application for reissuance but is subject to the participation regulations requiring public notice and, subsequently, a hearing if sufficient public interest exists. 9 VAC 25-31-370.

A permittee may transfer a permit to a new owner without public notice, provided that DEQ is provided with advance notice. The transferor and transferee must agree to

⁵ A VPDES permit is required for confined animal feeding operations (CAFOs), to the extent necessary to comply with § 402 of the federal Clean Water Act. Va. Code § 62.1-44.17:1(A1); 9 VAC 25-31-191; see also *Chesapeake Bay Found., Inc. v. Commonwealth ex rel. Va. State Water Control Bd.*, 90 Va. Cir. 392 (City of Richmond Cir. Ct. 2015).

allocate the responsibility for violations occurring both before and after the effective date of the transfer. 9 VAC 25-31-380.

Owners or operators of sewerage systems and sewage treatment works must apply for a VPDES permit before constructing or operating the facility. Va. Code §§ 62.1-44.18, 62.1-44.19.⁶ The implementing regulations are located at 9 VAC 25-790-10 et seq. In *Crutchfield v. State Water Control Board*, 64 Va. Cir. 211 (City of Richmond 2004), the Richmond Circuit Court held that state regulations (9 VAC 25-31-50(c)(9)) requiring assessment of daily pollutant load allocations (essentially, TMDLs), did not apply if the SWCB finds that the proposed discharge will not cause or contribute to a violation of water quality standards. The court also held that the SWCB need not make a specific finding that the discharge would not cause or contribute to a violation. *Crutchfield v. State Water Control Bd.*, 45 Va. App. 546, 612 S.E.2d 249 (2005).

5-2.04 Stormwater Runoff and Erosion (Sediment) Pollution

Authority for regulating pollution that results from stormwater discharges and erosion and sedimentation (E&S) has bounced between DEQ, SWCB, DCR, and the S&SWCB, often with overlapping authority. To more efficiently manage such pollution, the SWCB has been provided the primary regulatory authority over E&S and stormwater runoff. Additional consolidation of the E&S and stormwater statutory provisions were enacted by the 2016 General Assembly; however, the effective date has been delayed until July 1, 2024 (referred to herein as the "Consolidation Effective Date"). Prior to the Consolidation Effective Date, local programs are separately referred to as Virginia Soil and Erosion Control Programs (VЕСP) and Virginia Stormwater Management Programs (VSMP). Following the Consolidation Effective Date, the combined programs are referred to as Virginia Erosion and Stormwater Management Programs (VESMP). Va. Code § 62.1-44.15:27.

DEQ has significant administrative responsibilities over stormwater and E&S regulations. See, e.g., Va. Code §§ 62.1-44.15:27 and 62.1-44.15:32 (after the Consolidation Effective Date, see § 62.1-44.15(19)). DEQ is required to implement a periodic review and evaluation of each VSMP, VЕСP to the end that each VSMP, VЕСP, MS4 Program, and other MS4 permit requirements will be evaluated at least once every five years. Va. Code § 62.1-44.15:38(A) (after the Consolidation Effective Date, see § 62.1-44.15(19)).

5-2.04(a) Stormwater Management

EPA regulations set permit requirements for stormwater discharges from (i) "municipal separate storm sewer systems" or "MS4s"; (ii) stormwater systems associated with industrial activities; and (iii) stormwater discharges that EPA determines contribute to a violation of a water quality standard or are a significant contributor of pollutants to waters of the United States. 40 C.F.R. § 122.26(a). "Industrial activities" include major manufacturing facilities, hazardous waste treatment, storage or disposal facilities, landfills, power generating facilities, and major construction projects. Storm sewers associated with industrial activities include some activities that may be operated by local governments such as landfills, wastewater treatment works, and certain transportation-related facilities. 40 C.F.R. § 122.26(c); 9 VAC 25-151-10 et seq.

5-2.04(a)(1) Permits

The SWCB is the state agency assigned responsibility for regulating and permitting of stormwater discharges caused by MS4s, industrial activities, and land disturbing activities pursuant to the Virginia Stormwater Management Program (VSMP), see section [5-2.04\(a\)\(2\)](#). Va. Code §§ 62.1-44.15:24 through 62.1-44.15:50; see 9 VAC 25-870-10 et

⁶ The General Assembly transferred the authority to regulate the construction and operation of sewage treatment plants from the Department of Health to the State Water Control Board in 2003. 2003 Va. Acts. ch. 614.

seq. for VSMP regulations. Certain localities are also required to operate stormwater programs, see section [5-2.04\(a\)\(2\)](#).

5-2.04(a)(1)(i) MS4 Permits

Permits authorizing discharges from municipal separate storm sewer systems (MS4s) are issued by the SWCB. Va. Code § 62.1-44.15:25. Permits may be issued on a system-wide or jurisdiction-wide basis. 33 U.S.C. § 1342(p). The SWCB issues individual stormwater permits for large MS4s (9 VAC 25-870-380); small MS4s are covered by a general state MS4 permit (9 VAC 25-890-40). For definitions distinguishing a “small” MS4 from “medium” and “large” MS4s, see 9 VAC 25-870-10.

Once coverage is authorized for a small MS4 under a state general permit, the MS4 operator is required to comply with all applicable requirements of the Virginia Stormwater Management Act (Va. Code § 62.1-44.15:24 et seq.) and the Virginia Stormwater Management Program (VSMP) Regulations (9 VAC 25-870), including the requirement for obtaining VSMP approvals.

Virginia Code § 62.1-44.15:2(A)(14) requires the SWCB’s regulations to include a statewide fee schedule for permits for MS4 stormwater systems.

Discharges into municipal stormwater systems are considered discharges into the waters of the United States, and require a VPDES permit to the same extent as direct discharges to surface waters. This requirement applies without regard to the size of the locality or stormwater system in question, or whether that system is subject to permitting. 40 C.F.R. § 122.26(a)(4). If a locality operates an MS4, it has an investigatory right of entry onto any public or private property from which a discharge enters its municipal separate storm sewer system. Va. Code § 62.1-44.15:39.

5-2.04(a)(1)(ii) Land Disturbance Permits

Permits for land disturbing activity are issued by a VSMP authority approved by the SWCB. A VSMP authority may include a locality; state entity, including DEQ; federal entity; or, for linear projects, electric, natural gas, and telephone utility companies, interstate and intrastate natural gas pipeline companies, railroad companies, or water and sewer authorities. Va. Code § 62.1-44.15:24. A VSMP authority may contract with third-party professionals to carry out any and all responsibilities of the VSMP except for enforcement. Va. Code § 62.1-44.15:27(H).

Any locality required to administer a local VSMP program, and any locality that is considering doing so, should review the [Stormwater Management Model Ordinance](#) published by DEQ. The SWCB has established, pursuant to Va. Code § 62.1-44.15:28(A)(5), a statewide fee schedule to cover all costs associated with the implementation of a VSMP related to land disturbing activities of one acre or greater. Local VSMP authorities may retain a percentage of the collected fees.

Although the state only regulates land disturbances larger than one acre, localities, at their option, may regulate and require permits and approvals prior to authorizing land disturbing activities which disturb less than one acre of land. Va. Code § 62.1-44.15:34(C)(4); (after the Consolidation Effective Date, see § 62.1-44.15:34(E)(2)(a)). Approvals for land disturbing activities disturbing less than one acre, but more than 2,500 square feet, are required in areas covered by the Chesapeake Bay Preservation Act, Va. Code § 62.1-44.15:34(E)(2) (see section [5-2.08\(e\)](#)). The development of individual parcels within a residential, commercial, or industrial development must be covered by a stormwater management plan approved for the entire development. Individual lots in new developments, including those developed under subsequent owners, are not considered separate land disturbing activities. Va. Code § 62.1-44.15:28(A)(7) and 9 VAC 25-870-55(A)(1).

5-2.04(a)(2) Virginia Stormwater Management Program (VSMP)

The term “Virginia Stormwater Management Program” (VSMP) refers not to the permits or approvals that may be issued to authorize stormwater discharges or land disturbing activity, but rather to a program designed to manage the quality and quantity of stormwater runoff resulting from land-disturbing activities. A VSMP includes local ordinances, rules, permit requirements, standards and specifications, policies and guidelines, technical materials, and requirements for plan review, inspection, enforcement, and evaluation. Va. Code § 62.1-44.15:24.

All localities that operate MS4s have locally administered stormwater management programs (VSMPs).⁷ Any town, including a town that operates an MS4, may elect to be subject to a county’s VSMP. Smaller localities may opt to administer a VSMP; otherwise, the VSMP will be administered by DEQ. Va. Code § 62.1-44.15:27. These programs are similar to the local Erosion and Sedimentation Control Programs (VESCPs) discussed in section 5-2.04(b), which are also overseen by the SWCB. Localities administering an approved VSMP must issue consolidated stormwater management and erosion and sediment control permits and also must administer them as part of a local MS4 program if applicable.⁸ Va. Code §§ 62.1-44.15:27(E) and 62.1-44.15:49.

Local VSMPs must be consistent with, or more stringent than, the SWCB regulations, though certain procedures must be followed, factual findings made, and justification of the necessity for more stringent ordinances must be reported to the SWCB. Va. Code § 62.1-44.15:33. Localities are granted the authority to adopt and enforce stormwater management ordinances, issue permits, inspect development sites, issue stop work orders, impose civil penalties, and seek judicial enforcement. Va. Code §§ 62.1-44.15:37 and 62.1-44.15:39; 9 VAC 25-60-100 et seq. Certain rural Tidewater localities may adopt a tiered approach to water quantity technical criteria for land disturbance greater than 2,500 square feet but less than an acre. Va. Code § 62.1-44.15:27.2.

Each locality that administers an approved VSMP is required to enact an ordinance that includes provisions for (i) long term responsibility and maintenance for management control devices and techniques and (ii) provisions for the integration of the VSMP with local E&S, flood insurance, flood plain management, and “other programs” requiring compliance prior to authorizing construction (i.e., issuance of a building permit). Va. Code § 62.1-44.15:27. A VSMP authority may contract with qualified third-party professionals to carry out VSMP authority responsibilities, other than enforcement. *Id.*

No person may conduct any land-disturbing activity exceeding local or state acreage thresholds absent VSMP authority approval granted pursuant to a permit application to the VSMP authority that includes any required state VSMP permit registration statement and a stormwater management plan (or, relative to construction of a single family residence, an agreement in lieu of a stormwater management plan).⁹ A locality that is not a VSMP authority must provide a general notice to applicants of the state permit coverage requirement and report all approvals pursuant to the Erosion and Sediment Control Law to begin land disturbance of one acre or greater to DEQ at least monthly.

⁷ Any MS4 locality may adopt an industrial and high-risk runoff program for industrial or commercial facilities. Va. Code § 62.1-44.15:49.1.

⁸ A locality may operate under separate erosion control and stormwater management plans until the SWCB approves its consolidated plan (VESMP). 2016 Va. Acts ch. 68, cl. 3-6.

⁹ A locality may create a local stormwater management fund for the purpose of granting funds to an owner of private property or a common interest community for stormwater management and erosion prevention on previously developed lands. Va. Code § 15.2-2114.01.

The SWCB will administer a VSMP for any locality that does not adopt one. Va. Code § 62.1-44.15:27; see section 5-2.04(c). Following the Consolidation Effective Date, see Va. Code § 62.1-44.15:27.1 for SWCB administration of a VSMP in localities that do not adopt a VESMP.

5-2.04(b) Erosion and Sedimentation Control

5-2.04(b)(1) Erosion and Sediment Control Law

5-2.04(b)(1)(i) Administration

The Virginia Erosion and Sediment Control Law (Va. Code § 62.1-44.15:51 et seq.) is administered by the State Water Control Board (SWCB). Guidelines for erosion and sediment control were developed by the SWCB, which has the duty to require enforcement of these guidelines throughout Virginia. All counties and cities must adopt a Virginia Erosion and Sediment Control Program (VESCP), and towns may opt to adopt their own. Va. Code § 62.1-44.15:54. After the Consolidation Effective Date, any locality that has chosen not to establish a Virginia Erosion and Stormwater Management Program (VESMP), see section 5-2.04(c), must administer a VESCP; however, a town may enter into an agreement with a county to administer the town's VESCP. *Id.*

Every VESCP is required to be integrated with the locality's VSMP and, if applicable, with any local ordinances enacted under the authority of the Chesapeake Bay Preservation Act. Va. Code § 62.1-44.15:27(E)(3). The VESCP is administered by a VESCP authority approved by the SWCB. An approved VESCP authority can be a state entity, including DEQ; a federal entity; a soil and water conservation district; a county, city, or town; or, for linear projects subject to annual standards and specifications, electric, natural gas and telephone utility companies, interstate and intrastate natural gas pipeline companies, railroad companies; or water and sewer authorities. Va. Code § 62.1-44.15:51. A locality's VESCP may be more stringent than the SWCB's regulations if the locality provides the SWCB with an analysis justifying the increased stringency. Va. Code § 62.1-44.15:65. The VESCP regulations may be found at 9 VAC 25-840-10 et seq.

5-2.04(b)(1)(ii) Land-disturbing Activity

Virginia Code § 62.1-44.15:55(A) provides that "no person shall engage in any land-disturbing activity" (subject to exceptions found in Va. Code § 62.1-44.15:51) until he has submitted to the VESCP authority an erosion and sediment control plan, has obtained approval of the plan,¹⁰ and the VESCP authority has obtained evidence of any required VSMP permit coverage.¹¹ The state's VSMP law requires that a locality acting as an approved VSMP authority must adopt an ordinance containing provisions for the integration of the VESCP with the VSMP and other programs requiring compliance prior to authorizing construction, Va. Code § 62.1-44.15:27(E)(3), so that the submission and approval of plans, issuance of permits, payment of fees, and coordination of inspection and enforcement activities will be convenient and efficient for all involved.

Note: for activities subject to the requirement for a VSMP state permit, an applicant is required to prepare a stormwater pollution prevention plan (SWPPP) prior to submitting a state registration statement, and by signing the registration statement the applicant for

¹⁰ If land disturbing activity results from the construction of a single-family residence, or a farm building or structure on a parcel of land with a total impervious cover percentage of less than 5 percent, an agreement in lieu of a plan may be substituted for an erosion and sediment control plan, if executed by the VESCP authority. An "agreement in lieu of a plan" is a contract between the approving authority and the owner that specifies conservation measures that will be taken during construction of the residence, farm building, or structure. Va. Code §§ 62.1-44.15:51 and 62.1-44.15:55.

¹¹ Compare the VSMP requirement that an application seeking approval of a stormwater management plan must include a state VSMP permit *registration statement*. Subsequently, prior to authorizing commencement of any land disturbing activity, the VSMP authority is required to obtain evidence of state VSMP permit coverage. Va. Code § 62.1-44.15:34(A).

the state permit certifies that the SWPPP has been prepared. See *e.g.*, 9 VAC 25-880-50(B)(5). A SWPPP, by definition, includes, among other items, an *approved* E&S plan and an *approved* stormwater management plan. 9 VAC 25-870-10.

"Land-disturbing activity" is defined, for VESCP purposes, as "any man-made change to the land surface which may result in soil erosion from water or wind and the movement of sediments . . . including, but not limited to, clearing, grading, excavating, transporting and filling of land." Va. Code § 62.1-44.15:51.¹² Certain activities (twelve total) are not included within the VESCP definition of "land disturbing activity." Compare the state's VSMP law, which provides that certain activities (eight total) are exempt from regulation. Va. Code § 62.1-44.15:24.

Erosion and sediment control plans must be submitted to the VESCP authority. The plan-approving authority has sixty days to approve or disapprove the plan; however, if the plan is determined to be inadequate, written notice of disapproval, stating the reasons therefor, must be communicated to the applicant within forty-five days. Va. Code § 62.1-44.15:55(B). If the authority takes no action within the specified time period, the plan is deemed approved. Va. Code § 62.1-44.15:55(B). The 2021 General Assembly passed Va. Code § 62.1-44.15:55.1, allowing any locality that does not operate a regulated MS4 or for which DEQ did not operate a VSMP as of July 1, 2020 to opt to have DEQ review erosion and sediment control plans relating to solar projects, including related infrastructure, with a rated electrical generation capacity exceeding five megawatts. DEQ was also provided the authority to adopt a fee schedule to capture 60 to 62 percent of its associated administrative and other costs. This fee is to be paid by the solar project applicant.

No grading, building, or other permit that involves land-disturbing activity can be issued unless such permit application includes an approved erosion and sedimentation control plan and certification that the plan will be followed, and the VESCP authority has obtained evidence of any applicable VSMP permit coverage. Va. Code § 62.1-44.15:57.

A bond, letter of credit, or similar guarantee of performance may be required. *Id.* The amount of security for performance of an erosion and sediment control plan may not exceed the total estimated cost of the appropriate conservation action, plus a reasonable allowance for estimated administrative costs and inflation. Such performance security shall be refunded pro rata as portions of the project are stabilized. *Id.*

There is also a provision for inspections to ensure compliance. Va. Code § 62.1-44.15:58. All plan-approving authorities must report to DEQ a listing of each land disturbing activity for which a plan has been approved by the VESCP. Va. Code § 62.1-44.15:59.

5-2.04(c) Virginia Erosion and Stormwater Management Program (VESMP) (Post-Consolidation Effective Date)

The amendments to Va. Code § 62.1-44.15:24 et seq. established the erosion and stormwater management program (VESMP) for the

effective control of soil erosion and sediment deposition and the management of the quality and quantity of runoff resulting from land-disturbing activities to prevent the unreasonable degradation of properties, stream channels, waters, and other natural resources. The program includes such items as

¹² Compare the definition of "land-disturbing activity" for VSMP purposes, set forth within Va. Code § 62.1-44.15:24: "a man-made change to the land surface that potentially changes its runoff characteristics including clearing, grading or excavation" After the Consolidation Effective Date, the definition will more closely align with that for VESMPs: "man-made change to the land surface that may result in soil erosion *or has the potential to change its runoff characteristics, including* the clearing, grading, excavating, transporting, and filling of land." (emphasis added).

local ordinances, rules, requirements for permits and land-disturbance approvals, policies and guidelines, technical materials, and requirements for plan review, inspection, and enforcement consistent with the requirements of this article.

A locality is required to adopt a VESMP if it operates an MS4 or, as of July 1, 2017, a VSMP. Va. Code § 62.1-44.15:27. Localities that lack an MS4 and in which DEQ administers a VSMP as of the Consolidation Effective Date, must (a) adopt a VESMP, (b) adopt a VESMP with DEQ assistance in reviewing plans and providing recommendations on water quality and quantity criteria, or (c) adopt a VESCP. *Id.*

Towns, including those that operate MS4s, may choose to be subject to their county's VESMP (or VESCP if the county has chosen to operate a VESCP instead of a VESMP). Va. Code § 62.1-44.15:27.

VESMPs must require a permit process, and the submission and approval of stormwater management plans (or in some situations, an agreement in lieu of a stormwater management plan) for land disturbing activity over an area of (i) 10,000 square feet, or (ii) 2,500 square feet if in a Chesapeake Bay Preservation Area. Va. Code § 62.1-44.15:27.

VESMPs must include:

1. requirements for land-disturbance approvals;
2. requirements for plan review, inspection, enforcement, and periodic inspections of stormwater management measures;
3. provisions for fees for regulated land-disturbing activity that does not require permit coverage;
4. provisions for the long-term responsibility for stormwater controls and other water quality and quantity runoff techniques; and
5. provisions coordinating the VESMP with flood plain management and other similar programs.

Land-disturbing activity, defined as a "man-made change to the land surface that may result in soil erosion or has the potential to change its runoff characteristics, including construction activity such as the clearing, grading, excavating, or filling of land" (Va. Code § 62.1-44.15:24), requires VESMP approval. Va. Code § 62.1-44.15:34. The VESMP must determine the completeness of the application within fifteen days and act on the application within sixty days. *Id.*

Separate thresholds and requirements are set out for (i) areas not designated as Chesapeake Bay Preservation Areas (CBPA) (soil erosion control requirements and water quantity technical criteria will apply) and (ii) areas within designated CBPAs (soil erosion control requirements, water quantity, and water quality technical criteria will apply). A locality may lower the thresholds to smaller areas of disturbed land. *Id.* Certain rural Tidewater localities may adopt a tiered approach to water quantity technical criteria for land disturbance greater than 2,500 square feet but less than an acre. Va. Code § 62.1-44.15:27.2.

Local VESMPs must be consistent with, or more stringent than, the SWCB regulations, but justification of the necessity for more stringent ordinances must be reported to the SWCB. Va. Code § 62.1-44.15:33.

5-2.04(c)(1) Small Land Disturbances (Post-Consolidation Effective Date)

Certain activities will not be required to comply with the permit and plan approval requirements of erosion and sediment control programs (e.g., home gardens and landscaping; utility service connections; septic tank installation; etc.). Va. Code § 62.1-44.15:55(F).

5-2.04(d) Compliance

Following the Consolidation Effective Date, the SWCB shall be responsible for reviewing VESMPs and VESCPs for compliance at least once every five years. Va. Code § 62.1-44.15(19). If a locality fails to bring its program into compliance in the timeframe established by the SWCB, the board may issue a special order imposing a civil penalty up to \$5,000 per violation for a maximum of \$50,000 per order, or may, with the consent of the locality, impose civil charges. *Id.*

5-2.05 Resource Management Plans

The Soil and Water Conservation Board oversees the voluntary Virginia Resource Management Planning program. Va. Code § 10.2-104.7 et seq. The plans are designed to encourage farm owners or operators to use best management practices (BMPs) to reduce runoff pollution to local waters. In return for full implementation and maintenance, the plan holder is deemed in compliance with any state nutrient, sediment, and water quality standards, including regulations related to the Chesapeake Bay and all local stream segment TMDLs. The certificate of resource management plan implementation is valid for nine years provided the farmer continues to implement the plan. 4 VAC 50-70-80(F).

5-2.06 Silviculture

The State Forester must develop silvicultural best management practices addressing the prevention of erosion and sedimentation and the maintenance of buffers to protect water quality. Va. Code § 10.1-1105. An owner or operator who commercially harvests timber must notify the State Forester no later than three working days after beginning such an operation. Va. Code § 10.1-1181.2(H).

5-2.07 Agricultural Stewardship Act

The Agricultural Stewardship Act addresses water quality problems caused by agricultural activities. Va. Code § 3.2-400 et seq. The local soil and water conservation district or Commissioner of Agriculture must investigate complaints that an agricultural operation is creating pollution. If the operation is creating or will create pollution, the owner or operator must formulate a corrective plan within sixty days to be completely implemented within such time as the Commissioner determines within eighteen months. The owner or operator must continue the measures specified in the plan and may not change them without notice to the Commissioner.

If the owner fails to submit a plan or begin implementing, complete, or maintain a plan, the Commissioner must issue, after an informal fact-finding conference, a corrective order. If the owner or operator fails to obey the corrective order, the Commissioner can obtain a court order. If the owner or operator does not obey the court order, the Commissioner can enter the land and implement the measures. The Act also provides for penalties. Localities are authorized to enact programs similar to the state program, except that localities may not impose penalties or issue orders. The Act does not apply to activities that have a SWCB permit.

5-2.08 Work in Navigable Waters and Environmentally Sensitive Areas**5-2.08(a) Generally**

Sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 and 403, and 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, require permits from the U.S. Army Corps of Engineers to conduct the following activities: (a) construction of dams and dikes in navigable waters; (b) placement of structures or work in or affecting navigable waters; (c)

discharges of dredged or fill material into waters of the United States; and (d) ocean dumping of dredged material. See 33 C.F.R. Parts 321-324. See also section 5-2.08(b)(2) for a discussion of Army Corps procedures and of how those provisions affect the filling of wetlands. Such permits are required to construct most public water supply and wastewater improvements. See generally, e.g., *Crutchfield v. Cnty. of Hanover*, 325 F.3d 211 (4th Cir. 2003) (upholding Corps's approval of nationwide permits for Hanover County's wastewater treatment plant) (LGA filed an amicus brief); *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58 (4th Cir. 1991) (upholding Corps permit for City of Virginia Beach's Lake Gaston Pipeline Project).

5-2.08(b) Section 401 Certification and Virginia Water Protection Permit

Prior to the issuance of a Corps permit (or any other federal license or permit to conduct an activity "which may result in any discharge into the navigable waters," e.g., a Federal Energy Regulatory Commission hydropower license), the state must issue a "Section 401 certification" stating that the permitted activity will comply with water quality standards and other water pollution regulations in the state. 33 U.S.C. § 1341(a)(1). A Section 401 certification is required for any activity that results in a "discharge into the navigable waters" regardless of whether the discharge includes a pollutant. The Virginia Water Protection Permit (VWPP) serves as the Section 401 certification with respect to these federal permits. See *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746 (4th Cir. 2019) (the state has broad discretion when developing the criteria for their Section 401 Certification). The state can deny a Section 401 certification (or VWPP), which blocks the issuance of any federal license or permit for the same activity. State-imposed conditions in a Section 401 certification must be made conditions of the federal license or permit.

5-2.08(b)(1) Wetlands

Wetlands regulation is subject to overlapping, but not coextensive, jurisdiction of federal and Virginia agencies. The relationship between these programs is unlike the water, air, and waste programs jointly administered by EPA and state environmental agencies, though these same agencies are involved in wetlands regulation. The difference is that the U.S. Army Corps of Engineers (Corps) has been the principal federal agency dealing with improvements to and effects upon navigable waters since the early Nineteenth Century. When Section 404 of the Clean Water Act was enacted in 1972, Congress gave primary regulatory jurisdiction over filling in waters of the United States to the Corps. Due to concerns about the Corps's past disregard for environmental effects, however, EPA was given the authority to veto any Corps-issued permit. The CWA has a provision for approval of a state assumption of the Corps's Section 404 program, but only three states have assumed portions of the Corps's Section 404 role. In Virginia, activities in waters of the United States require separate permits from the Corps and as many as three state agencies. The latter are the SWCB, often acting through its staff at DEQ, the local wetlands board and Virginia Marine Resources Commission where tidal wetlands are involved, and the Virginia Marine Resources Commission for activities in the state-owned bottoms of navigable, tidal, and some nontidal waters when a permit from DEQ is not obtained. For a discussion of the interplay between the state and federal agencies in a long-running permit matter, see *Chesapeake Bay Found., Inc. v. Commonwealth*, No. 1897-12-2 (Va. App. Apr. 22, 2014) (unpubl.).

A locality may not impose wetlands permit requirements duplicating state or federal wetlands permit requirements, or establish provisions related to the location of wetlands or stream mitigation regulated under VWPP or Section 404 permits. However, a locality may determine allowed uses within zoning classifications or approve the siting or construction of wetlands or stream mitigation banks or other mitigation. Va. Code § 62.1-44.15:20(E); see 2015 Op. Va. Att'y Gen. 152 (localities are prohibited from requiring that mitigation efforts for impacts to wetlands or streams be performed within the boundaries of the locality, including via voluntary proffers).

5-2.08(b)(2) Federal Regulation

Section 404 of the Clean Water Act, administered by the Corps, requires a permit prior to the discharge of dredged or fill materials into waters of the United States. 33 U.S.C. § 1344. "Dredged material" is material (e.g., sand or gravel) that is excavated or dredged from the waters of the United States. 33 C.F.R. § 323.2(c). "Fill material" means any material placed in waters of the United States that has the effect of (i) replacing any portion of a water of the United States with dry land or (ii) changing the bottom elevation of any portion of a water of the United States. 33 C.F.R. § 323.2(e); see also *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003) (upholding Corps's interpretation of "fill material").

The term "waters of the United States" has historically been defined broadly in the Corps's regulations to include both tidal and non-tidal wetlands, intermittent streams, and wet meadows, indeed all waters that "could affect" interstate commerce. There have been several attempts at revising the definition of waters of the United States. Because the federal government has only those powers granted by the Constitution, however, and because the Corps's power over such waters is premised on the Constitution's Commerce Clause, the scope of the Corps's jurisdiction over wetlands has been the focus of a great deal of litigation. In fact, the meaning and scope of the Commerce Clause powers of the federal government were originally defined in the context of proposed federal regulation of activities on and in "navigable waters." See, e.g., *Gibbons v. Ogden*, 9 Wheaton 1, 22 U.S. 1 (1824).

Most wetlands are not navigable, so the litigation since 1972 has turned on the wetlands' relationship to navigable waters and interstate waters. See, e.g., *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) (activity in wetland must have substantial effect on interstate commerce or a nexus with navigable or interstate waters); *United States v. Hartsell*, 127 F.3d 343 (4th Cir. 1997) (rejecting argument that CWA applies only to navigable waters, in a case involving discharges into public sewer systems; nexus argument not an issue); *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998) (Corps exceeded its authority by regulating the "fall back" or "sidecasting" of dredged or excavated material at point of removal from the water, also known as Tulloch ditching); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), and 209 F.3d 331 (4th Cir. 2000) (deferring to Corps's interpretation that it has jurisdiction over distant tributaries that are not adjacent or contiguous to navigable waters and over "sidecasting"); *Treacy v. Newdunn Assocs.*, 344 F.3d 407 (4th Cir. 2003) (based on *Deaton*, Corps has jurisdiction over wetlands adjacent to tributaries, however distant they may be from navigable waters); *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 121 S. Ct. 675 (2001) (SWANCC) (where Corps asserted jurisdiction over isolated wetlands, i.e., those lacking a surface connection to navigable waters and used by migratory birds as habitat, the Corps's Migratory Bird Rule held beyond its statutory authority).

In the U.S. Supreme Court case *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208 (2006) the Court divided three ways on whether the Corps's Section 404 jurisdiction reaches wetlands "which lie near ditches or man-made drains that eventually empty into traditional navigable waters." None of the three opinions was supported by a majority of the Court, leaving the question open to considerable doubt and the lower courts in a state of confusion and disarray. Four Justices argued that the decision below upholding the Corps's jurisdiction should be vacated and remanded, and four Justices dissented. In a separate concurrence opinion, Justice Kennedy argued that a water or wetland is within the scope the Corps's jurisdiction if it "possess[es] a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." According to this opinion, "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.*; see also *Cnty. of Maui v. Hawaii Wildlife Fund*,

590 U.S. ___, 140 S. Ct. 1462 (2020) (citing *Rapanos* plurality opinion to support broad reading of CWA and conclusion that pollutants conveyed to navigable waters through groundwater is “functional equivalent” of direct discharge into navigable waters).

The lower federal courts have divided on the meaning and effect of the 4-1-4 *Rapanos* decision. Some courts have held that Justice Kennedy’s concurrence is the controlling opinion, on the ground that it expresses “the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases.” *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007). Others, citing Justice Stevens’s comment that the dissenting Justices would uphold CWA jurisdiction “in all other cases in which either the plurality’s or Justice Kennedy’s test is satisfied,” have held that the Corps has jurisdiction if either of those tests is met. See, e.g., *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006); see also *Precon Dev. Corp. v. U.S. Army Corp of Eng’rs*, 658 F. Supp. 2d 752 (E.D. Va. 2009) (extensive discussion of the split among the circuits), *rev’d and remanded*, 633 F.3d 278 (4th Cir. 2011) (extensive discussion of the Supreme Court’s jurisprudence on wetland regulation and the evidentiary standard necessary to show a significant nexus). On remand, the district court held that a sufficient nexus was proved. *Precon Dev. Corp. v. U.S. Army Corps of Eng’rs*, 984 F. Supp. 2d 538 (E.D. Va. 2013).

In the wake of *Rapanos*, the EPA and the Corps promulgated the Clean Water Rule, attempting to expand the definition of “waters of the United States” and effectively bringing in many additional wetlands under the CWA. The Clean Water Rule covers waters that need “protection in order to restore and maintain the . . . integrity of navigable waters.” 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 40 C.F.R. Parts 110, 112, 116 and 33 C.F.R. Part 328). President Trump issued an Executive Order on February 28, 2017, requiring EPA and the Corps to review the Clean Water Rule, and to publish a proposed rule to rescind or revise the rule. As a result, the “Navigable Waters Protection Rule” (33 CFR Part 328) went into effect on June 22, 2020, as part of the Trump Administration’s efforts to repeal and replace the Clean Water Rule. The Navigable Waters Protection Rule narrows the term “waters of the United States” and thus the extent of federal jurisdiction under the Clean Water Act. The Navigable Waters Protection Rule also eliminates the Clean Water Rule’s “significant nexus” test for a case-by-case determination of the jurisdictional status of certain waters, and instead provides only categories of jurisdictional and non-jurisdictional waters.

In accordance with Justice Scalia’s plurality opinion in *Rapanos*, the Navigable Waters Protection Rule interprets jurisdictional waters as being “relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters.” The final definition includes four categories of jurisdictional waters: (i) the territorial seas and waters capable of being used in interstate or foreign commerce (i.e. traditional navigable waters), (ii) tributaries directly or indirectly contributing surface water flow to traditional navigable waters in a typical year, (iii) lakes and ponds, and impoundments of jurisdictional waters directly or indirectly contributing surface water to traditional navigable waters in a typical year, and (iv) wetlands adjacent to these jurisdictional waters. The Navigable Waters Protection Rule also identifies eleven categories of non-jurisdictional waters, including ephemeral streams (i.e., having flow only in response to precipitation).

There were a number of court challenges to the Navigable Water Protection Rule. In *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021), a federal district court invalidated the Navigable Water Protection rule nationwide, leading the Biden EPA and the Corps to return to the rules in effect prior to the Clean Water Rule and consider developing yet another definition. On January 18, 2023, the EPA and the Corps issued a new definition; however, it soon needed to be revised to conform with the U.S. Supreme Court’s decision in *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023).

The *Sackett* Court formulated a new understanding of the scope of the Clean Water Act's jurisdiction, in that the Clean Water Act's "use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers and lakes.'" *Id.*, citing *Rapanos*. The Court also found that wetlands are part of the waters of the United States if they "have a 'continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands.'" *Id.*, citing *Rapanos*. The Court also rejected the significant nexus test as not consistent with the Clean Water Act. *Id.* Based on ongoing litigation, the EPA's revised definition of "waters of the United States" (conforming to the *Sackett* decision) is being implemented in only twenty-three states. In other states, including Virginia, "waters of the United States" is defined based on the pre-2015 regulations and the *Sackett* decision.

Virginia's definition of "waters of the state" remains intact, so regardless of the federal rules and definition, state permitting is still required, and covers waters that may no longer be considered waters of the United States. Following the *Sackett* decision, the Virginia DEQ issued guidance explaining that it would make its own State Surface Water Determinations to provide clarity and facilitate timely permitting. See June 29, 2023 [Memorandum](#).

In *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 1129, 136 S. Ct. 1807 (2016), the Supreme Court held that the Corps's "jurisdictional determination" (JD) that property contained "waters of the United States" was a final agency action subject to judicial review under the Administrative Procedure Act. As some localities' environmental programs incorporate JDs as part of the permit approval process, this right of appeal may cause a delay in the local approval process.

While this tangle of litigation may be of substantial interest to constitutional scholars, its effects control only the actions of the Corps and EPA. As discussed below, the SWCB and DEQ have authority over all "State waters," which includes "all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands." Va. Code § 62.1-44.3. With respect to matters also subject to Corps's regulation, the state's jurisdiction is not confined to that of the Corps under the CWA. *Treacy v. Newdunn Assocs.*, 344 F.3d 407 (4th Cir. 2003). Avoiding wetlands regulation is therefore extremely unlikely.

There are two types of Corps permits: individual and general. Individual permits are issued by the Corps on a case-by-case basis after fairly extensive procedures. 33 C.F.R. § 323.2(g). General permits, by contrast, approve certain categories of activities, where those activities are "substantially similar in nature and cause only minimal individual and cumulative environmental impacts." 33 C.F.R. § 323.2(h)(1). These "permits-by-rule" simplify the approval process for most routine activities and avoid case-by-case consideration of the bulk of applications.

The permittee under a general permit has no permit document in hand but may receive a verification that proposed activities are covered by a general permit. All conditions specified in the general permit must be followed. There are two types of general permits: "regional" permits, issued for a particular region based on specific regional conditions, and "nationwide" permits, issued on a nationwide basis. The nationwide permits issued every five years continue a long-standing trend of gradually reducing the scope of activities that can be conducted without an individual permit. The current nationwide general permits expire March 14, 2026 (86 Fed. Reg. 2744 (Mar. 15, 2021), 86 Fed. Reg. 73522 (Dec. 27, 2021)). See generally *Crutchfield v. Cnty. of Hanover*, 325 F.3d 211 (4th Cir. 2003) (holding nationwide permit versus individual permit is appropriate for the county's proposed wastewater treatment plant project) (LGA filed an amicus brief). In *Ohio Valley Environmental Coalition v. Bulen*, 429 F.3d 493 (4th Cir. 2005), the Fourth Circuit held that

the Corps may make general permit pre-issuance minimal impact determinations by relying in part on the fact that its post-issuance procedures will ensure that authorized projects will have only minimal impacts. The court also held that the Corps may issue a general permit that contains a requirement of post-issuance individualized consideration or authorization by the Corps and that such post-issuance individualized consideration does not require notice and a hearing.

The Corps's general regulatory policies and permitting procedures are set out in 33 C.F.R. Parts 320 and 325. See *also* 33 C.F.R. Part 331 (Administrative appeal process). In general, Corps permit decisions are governed by a general "public interest" balancing process, which is described in its regulations at 33 C.F.R. § 320.4, and by EPA's § 404(b)(1) Guidelines, which are found at 40 C.F.R. Part 230.

EPA has the power to veto any Section 404 permit. See CWA § 404(c) (33 U.S.C. § 1344(c)); *James City Cnty. v. EPA*, 12 F.3d 1330 (4th Cir. 1993) (upholding EPA veto of municipal water project based solely on adverse environmental considerations, regardless of the absence of any alternative water supply sources). DEQ can veto any Section 404 permit under authority of Section 401 of the Clean Water Act or impose conditions on the permitted activity in a Virginia Water Protection Permit.

5-2.08(b)(3) State Regulation

5-2.08(b)(3)(i) SWCB Regulation

Wetlands are defined as those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas, Va. Code § 62.1-44.3, but they also include many areas that appear "dry" to the untrained observer. Disturbances of non-tidal wetlands are regulated by the SWCB under Va. Code § 62.1-44.15:20 et seq. and regulations promulgated pursuant thereto. This regulatory program is administered by DEQ and is quite similar to the federal Section 404 wetlands program, except that the State's jurisdiction over wetlands is broader than the Corps's federal jurisdiction. *Treacy v. Newdunn Assocs.*, 344 F.3d 407 (4th Cir. 2003).

A VWPP is required to drain, fill, impound, or conduct activities that "cause significant alteration or degradation of existing wetland acreage or functions," even if no federal license or permit (and therefore no Section 401 certification) is required. Va. Code § 62.1-44.15:20(D). Issuance of a VWPP constitutes the certification required under Section 401 of the CWA.¹³ *Id.* The SWCB is required to request localities to provide notice in the location where land records are maintained of the availability of wetland inventory maps maintained by the SWCB as well as the potential VWPP requirements. Va. Code § 62.1-44.15:01(B).

When a VWPP is conditioned upon compensatory mitigation for adverse impact to wetlands, compensation requirements may be met through (i) wetland creation or restoration, (ii) purchase or use of mitigation bank credits pursuant to § 62.1-44.15:23, (iii) contribution to the Wetland and Stream Replacement Fund established pursuant to § 62.1-44.15:23.1,¹⁴ or (iv) contribution to a Board-approved fund dedicated to achieving no net loss of wetland acreage and functions. When used in conjunction with creation, restoration,

¹³ Large natural gas transmission pipelines are the exception, as they require both a VWPP and an Upland Conditions certification to constitute a Section 401 certification. Va. Code §§ 62.1-44.15:20 and 62.1-44.15:80 through 62.1-44.15:84. See also Va. Code §§ 62.1-44.15:37.1 (stormwater) and 62.1-44.15:58.1 (erosion and sediment control), which authorize compliance inspections by DEQ of land-disturbing activities related to such pipelines and grant the Department authority to issue stop work orders if it determines that a substantial adverse impact to water quality has occurred or is likely to occur as a result of the land-disturbing activities.

¹⁴ The Wetland and Stream Replacement Fund has not yet been established by DEQ and the Corps.

or mitigation bank credits, compensation may incorporate (a) preservation or restoration of upland buffers adjacent to wetlands or other state waters or (b) preservation of wetlands. Va. Code § 62.1-44.15:21(B). *But see Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 133 S. Ct. 2586 (2013) (monetary exactions for wetlands can be compensatory takings if they do not meet the nexus and proportionality requirements of *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994)).

Virginia's ability to regulate impacts to non-tidal wetlands was a significant issue considered in 2000, due to a number of factors including *Wilson* and *National Mining*, discussed in section 5-2.08(b)(2). Those cases limited the Corps's authority to regulate certain wetland impacts which, in turn, limited Virginia's authority because the VWPP statute tied the state's jurisdiction to that of the Corps. In response, the General Assembly prohibited excavation in wetlands without a VWPP. Va. Code § 62.1-44.5(A)(2). VWP permits are now required for any activity in tidal or non-tidal wetlands that drains and significantly alters or degrades existing wetland acreage or functions; any filling or dumping; permanent flooding or impounding; or activities that cause significant alteration or degradation of existing wetland acreage or functions. Va. Code § 62.1-44.5(A)(4). DEQ has developed regulations to implement this statute, including amendments to the VWPP regulations and a number of general permits for common activities impacting less than certain threshold levels of wetland acreage and feet of streams, e.g., transportation and utilities projects, mining activities, development projects, and impacts of less than a half-acre. If tidal wetlands are to be dredged, the SWCB may condition its permit upon a demonstration of financial responsibility for the completion of compensatory mitigation requirements. Va. Code § 62.1-44.15(5)(c). Tidal wetlands otherwise remain governed by the Wetlands Act in Title 28.2, Va. Code § 62.1-44.15:21(G), as discussed below.

Applications for projects that require a Virginia Marine Resources Commission permit, an individual Virginia Water Protection Permit under § 62.1-44.15:20, a local wetlands board permit, and/or a Corps of Engineers permit under the Clean Water Act are submitted and processed through a joint application and review process. Va. Code §§ 28.2-1205.1 and 62.1-44.15:5.01. Joint permit application forms are available on the [website](#) of the Norfolk District Corps of Engineers.

5-2.08(b)(3)(ii) Virginia Marine Resources Commission Regulation

The Virginia Wetlands Act is codified as part of Subtitle III of Title 28.2, "Fisheries and Habitat of Tidal Waters." The Wetlands Act regulates dredging and filling in tidal wetlands and is administered by the Virginia Marine Resources Commission (VMRC). Va. Code § 28.2-1300 et seq. Wetlands are classified as "vegetated" or "nonvegetated." Vegetated wetlands are "lands lying between and contiguous to mean low water and an elevation above mean low water equal to the factor one and one-half times the mean tide range at the site of the proposed project" and on which there grow certain specified kinds of vegetation. Nonvegetated wetlands are defined as "unvegetated lands lying contiguous to mean low water and between mean low water and mean high water" and include beaches and tidal sand flats. Va. Code § 28.2-1300.

The Wetlands Act sets out a model "Wetlands Zoning Ordinance" that Tidewater localities may adopt and administer through a local wetlands board. Va. Code § 28.2-1302. If a locality does not adopt the ordinance, the VMRC administers the wetlands program in that jurisdiction. Va. Code § 28.2-1306. Certain activities, if otherwise permitted by law, do not require a permit: (i) construction and maintenance of certain non-commercial structures (e.g., piers); (ii) non-commercial recreation; (iii) agricultural uses; and (iv) maintenance of drainage ditches. Va. Code § 28.2-1302 (see Model Ord. § 3 for full list). *But see Nicoll v. City of Norfolk Wetlands Bd.*, 90 Va. Cir. 169 (City of Norfolk 2015) (grazing and haying of vegetated wetlands do not have to be related to agricultural uses; however mowing grass, without gathering the grass for some productive purpose, is not haying).

In judging a permit application (e.g., for a marina or a fill operation in tidal wetlands), the local wetlands board or VMRC must weigh the “anticipated public and private benefit of the proposed activity” against the “anticipated public and private detriment” in light of the purposes and intent of the policies expressed in the Act. Va. Code § 28.2-1302 (see Model Ord. § 10). A public hearing must be held on any application within sixty days and the decision rendered within thirty days after the hearing. Otherwise, the application is deemed approved. Va. Code § 28.2-1302 (see Model Ord. §§ 6 and 7); see 2015 Op. Va. Att’y Gen. 132 (board may take public comments when conducting business other than permit applications or revocations). The model ordinance includes other procedural requirements that govern applications.

A permit conditioned on mitigation may allow for the purchase or use of credits in a wetlands mitigation bank that meets the criteria in Va. Code § 28.1-1308(C). Other forms of compensatory mitigation are also allowed.

The Act requires VMRC to review decisions of local wetlands boards if (i) the applicant appeals, (ii) the VMRC Commissioner requests the review, or (iii) twenty-five or more property owners in the locality request the review. Va. Code § 28.2-1311. Judicial review is available, pursuant to the Administrative Process Act, Va. Code § 2.2-4000 et seq., to the applicant, any of the property owners who sought VMRC review, or the locality where the wetlands are located. Va. Code § 28.2-1315.

With respect to enforcement, VMRC and chairmen of local wetlands boards have the authority to order on-site inspections and to issue stop-work orders after notice and compliance with statutory procedures. Va. Code § 28.2-1317. A violation of wetlands regulations or of VMRC or local board orders is punishable as a misdemeanor, with each day of violation constituting a separate offense. Va. Code § 28.2-1318.

The 2022 General Assembly amended the scope of VMRC’s jurisdiction such that a VMRC permit is not required in any nontidal waters if the activity obtains a Virginia Water Resources Protection Permit from DEQ. Va. Code § 28.2-1203(A)(9). This eliminated the need to get a permit for these activities from both DEQ and VMRC.

5-2.08(c) Shorelines

The Virginia Marine Resources Commission implements a general permit regulation that authorizes and encourages the use of living shorelines as the preferred alternative for stabilizing tidal shorelines. 4 VAC 20-1300-10 et seq. Indeed, the General Assembly directed VMRC to permit “only living shoreline approaches to shoreline management unless the best available science shows that such approaches are not suitable.” Va. Code § 28.2-104.1(D). If the best available science shows that a living shoreline approach is not suitable, the applicant must incorporate into permitted projects, to the maximum extent possible, elements of living shoreline approaches. *Id.*

The VMRC, in cooperation with the DCR and with technical assistance from the Virginia Institute of Marine Science (VIMS), will develop integrated guidance for the management of tidal shoreline systems as technical guidance for the regulatory entities with authority over shoreline management projects. Va. Code § 28.2-104.1. VIMS developed comprehensive coastal resource management [guidance](#) for local governments. Va. Code § 28.2-1100. Localities in Tidewater must incorporate the guidance in their comprehensive plans. Va. Code § 15.2-2223.2. Loans are available from the Water Facilities Revolving Fund to local governments to establish living shorelines and for local government loan programs to certain small businesses and individuals to facilitate living shorelines. Va. Code § 62.1-229.5.

The Coastal Primary Sand Dune Protection Act, Va. Code § 28.2-1400 et seq., empowers VMRC to “preserve and protect coastal primary sand dunes and beaches and

prevent their despoliation and destruction. Whenever practical, the Commission shall accommodate necessary economic development in a manner consistent with protection of these features.” Va. Code § 28.2-1401(b). The Act defines a coastal primary dune as “a mound of unconsolidated sandy soil which is contiguous to mean highwater, whose landward and lateral limits are marked by a change in grade from 10 percent or greater to less than 10 percent, and upon any part of which is growing [any one or more of certain beach grasses].” Va. Code § 28.2-1400. Any feature resulting from beach replenishment and nourishment is, however, expressly excluded from this definition.

The Dune Act adopts the approach used in the Wetlands Act. A model “Coastal Primary Sand Dune Zoning Ordinance” is part of the Dune Act and may be adopted by a local government and administered by the local wetlands board. Otherwise, VMRC administers the program in that locality. As under the Wetlands Act, the model ordinance sets out a list of uses that are permissible and states that, for all others a permit is required. Va. Code § 28.2-1403. The procedure and standards for the granting of a permit are virtually identical to those in the wetlands ordinance. *See City of Virginia Beach v. Va. Marine Res. Comm’n*, No. 2549-02-1 (Va. Ct. App. Apr. 22, 2003) (unpubl.) (upholding issuance of permit); *see also* 4 VAC 20-440-10 et seq.

5-2.08(d) River Bottoms: Subaqueous Beds

All beds of the bays, rivers, creeks, and shores of the sea within the jurisdiction of the Commonwealth of Virginia are the property of the Commonwealth, unless conveyed by special grant. Va. Code §§ 28.2-1200, 28.2-1200.1. VMRC must issue a permit before one can build, dump, encroach upon, take, or use any materials from the bottoms of such waters (called “subaqueous beds”) and may charge fees for materials taken therefrom. Va. Code § 28.2-1203. This permit authority also applies to the building of wharves, bulkheads, and dredging and filling by owners of riparian lands. A violation of this permit requirement constitutes a Class 1 misdemeanor. *Id.* An expedited permit procedure is available for beach replenishment projects, *see* Va. Code § 28.2-1205.2. The Commonwealth may grant an easement in state-owned bottomlands to a local government for the performance of a governmental activity, such as a flood control project. Va. Code § 28.2-1200.1; 2019 Op. Va. Att’y Gen. 105. However, neither the VMRC nor the Department of Energy¹⁵ may grant an easement or permit allowing, on the beds of any Virginia coastal waters, an oil or gas pipeline or other infrastructure for conveying oil or gas to shore from an offshore oil or gas lease. Va. Code § 28.2-1208(F).

In *Virginia Marine Resources Commission v. Chincoteague Inn*, 287 Va. 371, 757 S.E.2d 1 (2014), the Virginia Supreme Court rejected the holding of the en banc court of appeals, 61 Va. App. 371, 735 S.E.2d 702 (2013), and held that Va. Code § 28.2-1203 does give the VMRC authority over vessels temporarily moored (encroaching) over state-owned bottomland. A restaurant was using a moored barge for extra seating, connected by gangways to the dock and with water and electrical connections. The barge could be easily moved and the restaurant only planned to use the barge four months of the year. The Court held that the Inn could encroach on the bottom land only if it met a statutory exception (it did not), or its use was a public right inherent to the *jus publicum*, defined as the “Commonwealth’s sovereign authority to hold the public domain for the interest or benefit . . . of the public.” The Court noted several public rights such as hunting, fishing, fowling, and oystering and the “right of navigation.” Although the VMRC had conceded that the barge was a vessel, and federal maritime law holds that a vessel is by definition “in navigation,” the Court held that Virginia’s “right of navigation” has a different meaning from the federal rule in that it focuses on active and immediate moving across navigable waters,

¹⁵ Reflecting a shift in emphasis from coal production and mining to the development of renewable energy sources, effective October 1, 2021, the Department of Mines, Minerals and Energy was renamed the Department of Energy.

which definition the floating barge failed to meet. The Court remanded to the court of appeals to address the issue of federal maritime law preemption.

5-2.08(e) Chesapeake Bay Preservation Act

5-2.08(e)(1) Overview

The Chesapeake Bay Preservation Act, Va. Code § 62.1-44.15:67 et seq. (the “Bay Act”), requires local governments in Tidewater Virginia to incorporate certain water quality protection measures into their comprehensive plans, zoning ordinances, and subdivision ordinances. Tidewater is defined to generally include those localities east of the I-95 corridor that lie in the Chesapeake Bay watershed. Va. Code § 62.1-44.15:68. The Bay Act is administered by the State Water Control Board (SWCB). Va. Code § 62.1-44.15:60. The Board’s regulations set forth minimum criteria which local governments must incorporate into their ordinances to comply with the Bay Act. 9 VAC 25-830-10 et seq. Localities have the same authority and responsibilities as set forth in the regulations for VSMP authorities. 9 VAC 25-870-51. See section [5-2.04\(a\)](#). Any local government, even if it is not situated within the Tidewater region, may employ the criteria developed by the SWCB, and may incorporate protection of the quality of state waters into their comprehensive plans, zoning ordinances, and subdivisions, consistent with the provisions of the Bay Act. Va. Code § 62.1-44.15:75. Each locality covered by the Bay Act must publish on its website the criteria and elements adopted by the locality to implement the Bay Act. Va. Code § 62.1-44.15-67(C).

5-2.08(e)(2) Chesapeake Bay Preservation Areas

Local governments must designate and map, in accordance with criteria set out in the regulations, areas containing sensitive lands that are important to water quality. Land use and development must be restricted in these Chesapeake Bay Preservation Areas (Preservation Areas). Preservation Areas are divided into two subcategories according to sensitivity and importance to water quality, with differing levels of restriction on use and development in each.

Resource Protection Areas (RPAs) cover the most sensitive parts of Preservation Areas, primarily lands at or near shorelines, including (i) tidal wetlands, (ii) nontidal wetlands that are connected by surface flow and are contiguous to tidal wetlands or tributary streams, (iii) tidal shores, (iv) other sensitive lands at or near shorelines as necessary to protect water quality, and (v) a buffer area at least 100 feet wide, located adjacent to and landward of the first four components listed above, and along both sides of any perennial stream. 9 VAC 25-830-80. As explained below, buffer areas less than 100 feet wide are allowed in certain circumstances. See *Marble Techs., Inc. v. City of Hampton*, 279 Va. 409, 690 S.E.2d 84 (2010) (city may not use criteria not specified in state regulations to establish RPAs); *Pony Farm Assocs. v. City of Richmond*, 62 Va. Cir. 386 (City of Richmond 2003) (same).

The second category of land within Preservation Areas is the Resource Management Area (RMA). RMAs are subject to less stringent restrictions on use and development, and include land types that, if improperly used or developed, have a potential for degrading water quality or diminishing the functional value of RPAs. These include floodplains, highly erodible soils, highly permeable soils, and nontidal wetlands not included in RPAs.

Local governments have the option to designate Intensely Developed Areas (IDAs) as an overlay on the RMA and RPA designations. IDAs may contain areas of existing development where little of the natural environment remains, and where at least one of the following criteria is met: (i) the area has more than 50 percent impervious surface cover (such as roofs, asphalt etc.), (ii) the area is served by public sewer and water, or (iii) housing density in the area is at least four units per acre. 9 VAC 25-830-100. Redevelopment within IDAs is exempt from the buffer area requirements for RPAs, and is restricted only by certain stormwater management and soil and water conservation criteria.

5-2.08(e)(3) Use and Development Criteria in Preservation Areas

The regulations list eleven general performance criteria, applicable to both RMAs and RPAs, and stricter performance criteria applicable to RPAs only. These criteria are to be adopted by local governments in their land use regulations so that a developer or user of land that is located within a Preservation Area is forced to demonstrate that his proposed use, development, or redevelopment of such land meets the applicable criteria.

The general performance criteria include minimizing disturbance of land and indigenous vegetation; local government imposition of best management practices through maintenance agreements with the owner or developer; for developments disturbing more than 2,500 square feet of land, review for compliance with the local erosion and sediment control ordinances; pumping of septic systems every five years; and, unless grandfathered, provision in new septic systems of enough land for a reserve septic field. Other general criteria relate to stormwater management, agricultural and silvicultural activities, and wetlands permits.

The performance criteria applicable in RPAs severely restrict development in these highly sensitive areas. A water quality impact assessment is required for any proposed development in an RPA, and such development will be allowed only if it constitutes redevelopment or is a water-dependent activity (such as a marina). In general, RPAs must include 100-foot-wide buffer areas landward of the primary RPA elements to maintain vegetation. Alternatively, developers may provide a minimum fifty-foot-wide buffer and best management practices to provide the same protection.

5-2.08(e)(4) Administrative Waivers and Exemptions

Local governments may allow the continued use, but not necessarily the expansion, of structures in existence on the date the local program is adopted. The locality may set up an administrative review procedure to waive or modify the applicable criteria for structures on legal nonconforming lots, provided that in no case shall a net increase in the nonpoint source pollutant load be allowed, and that any development or land disturbance exceeding 2,500 square feet shall comply with all applicable erosion and sediment control requirements. The regulations do not prevent the reconstruction of pre-existing structures that are destroyed by casualty. The construction, operation, and maintenance of certain public utilities, railroads, and certain public roads are exempt from the performance criteria provided that certain mitigation measures are taken.

5-2.08(e)(5) Implementation

The SWCB must monitor local government compliance with the Bay Act and regulations, establish a schedule for achieving compliance and, if needed, ask the Attorney General to enforce compliance. The compliance review must be coordinated where applicable with those being implemented in accordance with the Erosion and Sediment Control Law and the Stormwater Management Control Act and their associated regulations. Va. Code § 62.1-44.15:71 (after the Consolidation Effective Date, see § 62.1-44.15(19)).

5-2.08(e)(6) Chesapeake Bay Accountability and Recovery Act of 2014

Pursuant to the Chesapeake Bay Accountability and Recovery Act of 2014, Pub. L. 113-273, the director of the federal Office of Management and Budget, the Chesapeake Executive Council, and the Chesapeake Bay Commission must work together to create and implement a crosscut budget, which must include detailed information on restoration efforts at the federal, state, and local levels from four fiscal years: the two preceding, the current, and the succeeding year. The first three years of reporting require disclosure of federal and state efforts with funding levels of at least \$300,000; after that, the funding threshold for reporting federal and state efforts is \$100,000.

5-2.09 Pretreatment Regulation

Pursuant to the CWA, EPA has established pretreatment regulations to control discharges of industrial and other non-domestic wastes into publicly owned treatment works (POTWs). 33 U.S.C. § 1317. EPA has promulgated pretreatment standards for existing and new sources of many kinds of industrial wastewaters. The purpose of the pretreatment requirements is to prevent the discharge of any pollutant into POTWs that may “interfere with,” “pass through,” or otherwise be incompatible with the POTW, including the POTW’s chosen method for disposal of residual solids (referred to as “sludge”) from the process.

5-2.09(a) State and Local Pretreatment Programs

The SWCB is responsible for the implementation of the pretreatment program in Virginia. The SWCB’s regulatory program incorporates the national pretreatment standards promulgated by EPA and provides requirements for the implementation of individual POTW programs. 9 VAC 25-31-730 et seq. Owners of larger POTWs (and smaller ones which serve significant industrial sources) are required to establish their own pretreatment programs to enforce pretreatment limitations.

Local governments that operate POTWs usually must adopt Sewer Use Ordinances or a series of contracts or joint powers agreements, which authorize the POTW to deny or condition new contributions of pollutants and set out the requirements for industrial wastewater discharges to the POTW. 9 VAC 25-31-800(F)(1). Many local governments require that industries obtain pretreatment permits prior to discharge. These permits often contain conditions and limitations similar to direct discharge permits (VPDES permits) and may require periodic sampling and analysis of the wastewaters. In addition, local Sewer Use Ordinances usually give the POTW the right to come on-site to inspect and sample the discharge.

5-2.09(b) Standards**5-2.09(b)(1) General Pretreatment Standards**

The SWCB Pretreatment program imposes general standards and specific industrial categorical standards. The general pretreatment standards, referred to as “prohibited discharge standards” (contained in 40 C.F.R. Part 403), apply to all dischargers to POTWs, regardless of the industrial category of the discharger. 9 VAC 25-31-770. To supplement these nationally applicable discharge prohibitions, POTWs must implement a formal pretreatment program with specific limits based on their individual capacities to accept different pollutants. 9 VAC 25-31-800.

5-2.09(b)(2) Categorical Pretreatment Standards

In addition to the general standards, SWCB regulations incorporate by reference EPA’s pretreatment standards for specific categories of industries that discharge into POTWs. 9 VAC 25-31-780. While these regulations apply to non-toxic pollutants as well as the identified toxics (priority pollutants), EPA has concluded that treatment for toxic substances will, in most cases, remove non-toxic pollutants to trace levels. Thus, EPA has not been promulgating additional specific nationwide pretreatment standards for non-toxic substances.

5-2.10 Private Sewage Treatment Plants

Small private sewage treatment plants (1,000 to 40,000 gallons per day discharge capacity) have historically been regulatory problems. Owners of such plants must now file closure plans and submit evidence of financial capability to implement such plans when operations cease. Va. Code § 62.1-44.18:3.

5-2.11 Land Application of Sewage Sludge and Industrial Wastes

DEQ is responsible for the regulation of land application of sewage sludge (sometimes called “biosolids”) and industrial wastes. See *Kelble v. Commonwealth*, 94 Va. Cir. 534 (City of Richmond 2016) (deference to agency).

5-2.11(a) Sewage Sludge

No person may apply sewage sludge to the land without a VPDES permit or VPA permit. Va. Code § 62.1-44.19:3(A); see 9 VAC 25-31-505 et seq.

No application for a permit or variance to authorize the storage of sewage sludge is complete unless it contains certification from the governing body of the locality in which the sewage sludge is to be stored that the storage site is consistent with all applicable ordinances. The governing body must confirm or deny consistency within thirty days of receiving a request for certification. If the governing body does not respond, the site is deemed consistent. Va. Code § 62.1-44.19:3(A).

The regulations include the permitting process (which may include the imposition of special conditions recommended by the Board or the locality), requirements regarding the condition and application of the sludge and the monitoring and reporting in connection therewith, requirements for nutrient management plans, a complaint procedure, and financial responsibility requirements. Va. Code § 62.1-44.19:3. Tilling of the sludge into cropland and provision of buffers around forestland and pastures may be required. Va. Code § 62.1-44.19:3(N) and (O). A certified sewage sludge land applicator must be onsite at all times during land application of sewage sludge. Va. Code § 62.1-44.19:3.1.

A locality may adopt an ordinance that provides for testing and monitoring of such land application within its borders. Va. Code § 62.1-44.19:3(I). The state has a training program for such testers. Va. Code § 62.1-44.19:3(Q). Localities are to be reimbursed for such monitoring costs. Va. Code § 62.1-44.19:3(G). Any locality that has adopted such an ordinance has the authority to order the abatement of any violation of land application of sewage sludge laws and regulations. Va. Code § 62.1-44.19:3.2. DEQ shall, upon the timely request of any individual and at the requester's expense, test any sewage sludge prior to its land application at a specific site. Va. Code § 62.1-44.19:3(J).

Land application of sewage sludge has been very controversial, and some localities have sought control over the practice within their boundaries. In *Blanton v. Amelia County*, 261 Va. 55, 540 S.E.2d 869 (2001), the Virginia Supreme Court ruled that a locality could not ban sewage sludge land application because the state's regulatory requirements occupied the field. Legislation in 2003 which authorized local ordinances for monitoring sludge application activities gave localities more authority, but made it even less likely that localities can exercise control beyond those powers expressly granted.

Localities, as part of their zoning ordinances, may restrict the storage of sewage sludge based on health and safety-related criteria, and may require that a special use permit or special exception be obtained to begin the storage of sewage sludge, including within any area of the locality that is zoned as an agricultural district of classification. Va. Code § 62.1-44.19:3(R). However, no local ordinance may restrict the storage of sewage sludge on a farm, if the sludge is being stored for a period of forty-five days or less and solely for land application on that farm. *Id.*; ¹⁶ see also 2002 Op. Va. Att'y Gen. 67 (locality cannot require that a conditional use permit be obtained prior to applying or storing sewage sludge; decided under prior law); accord, *O'Brien v. Appomattox Cnty.*, 213 F. Supp. 2d 627 (W.D. Va. 2002) (preliminary injunction against county granted), *aff'd*, No. 02-2019 (4th Cir. July 24, 2003); 293 F. Supp. 2d 660 (W.D. Va. 2003) (summary judgment for plaintiff); *Synagro-WWT, Inc. v. Louisa Cnty.*, No. 3:01cv00060 (W.D. Va. July 17, 2001). Common law claims for damages against sludge disposal entities are not barred. See *Wyatt v. Sussex Surry, LLC*, 74 Va. Cir. 302 (Surry Cnty. 2007).

¹⁶ See Chapter 28, Blight and Nuisance, section 28-3.07, for a discussion of nuisances related to agricultural operations.

5-2.11(b) Industrial Wastes

VPA permits are used to authorize the land application of industrial wastes. 9 VAC 25-32-30. A locality may adopt an ordinance that addresses the testing and monitoring of the land application of industrial wastes. If a locality has adopted such an ordinance, a fee established by the SWCB must be paid by the applier to DEQ for deposit into the Sludge Management Fund. A locality may request reimbursement from the SWCB for testing and monitoring if the person employed by the locality to undertake such tasks has been trained pursuant to a DEQ program. Va. Code § 62.1-44.16. Results of any testing and monitoring must be reported to DEQ. Localities that have adopted an ordinance have the authority to order the abatement of any violation of Va. Code § 62.1-44.16 or any permit or certificate issued pursuant to that section. Va. Code § 62.1-44.16:1.

5-2.12 Storage Tank Regulation**5-2.12(a) Underground Storage Tanks (USTs)**

The State Water Control Law, Article 9 (Storage Tanks), provides the authority for the regulation of underground storage tanks holding regulated substances, Va. Code § 62.1-44.34:8 et seq. Such regulations must conform with Subchapter IX of the Resource Conservation and Recovery Act of 1976, as amended (RCRA). DEQ has primary responsibility for administering and enforcing the underground storage tank (UST) regulatory program under regulations promulgated by the Virginia State Water Control Board (SWCB). See 9 VAC 25-580-10 et seq. (Technical Standards and Corrective Action Requirements) and 9 VAC 25-590-250 (UST Regulations—Petroleum Storage Tank Financial Responsibility Demonstration for local government).

5-2.12(a)(1) Applicability

The UST regulations apply to “owners and operators” (hereafter referred to as “owners”) of USTs. The term “underground storage tank” is defined as a tank (or combination of tanks), including piping, that is used to contain “regulated substances” and has at least 10 percent of its volume, including piping, below the surface of the ground.

The term “underground storage tank” excludes any farm or residential tank of 1,100 gallons or less, used for storing motor fuel for noncommercial purposes; tank used for storing heating oil for consumption on premises; septic tanks; pipeline facilities otherwise regulated; and surface impoundments, pits, ponds, or lagoons. The term “regulated substances” includes hazardous materials regulated under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq., and petroleum products, including crude oil, waste oil, and refined products that are liquid at standard temperature and pressure. The term “regulated substances,” however, does not include hazardous wastes regulated as such under Subtitle C of RCRA. Va. Code § 62.1-44.34:8.

5-2.12(a)(2) Technical Requirements**5-2.12(a)(2)(i) Installation Requirements**

Prior to installation of a new UST, the owner must comply with the Virginia Uniform Statewide Building Code, 9 VAC 25-580-50, and must notify DEQ within thirty days after installation. 9 VAC 25-580-70.

5-2.12(a)(2)(ii) Performance Requirements for New and Existing Tanks

New tanks must meet new design and performance standards and have an approved method of leak detection. All “existing tanks” were required to be upgraded to meet new design and performance standards or closed by December 22, 1998. 9 VAC 25-580-60. The term “existing tank system” means a tank system used to contain an accumulation of regulated substances or for which installation was commenced on or before December 22, 1988. 9 VAC 25-580-10.

5-2.12(a)(3) Release Reporting and Corrective Action

UST owners must report within twenty-four hours any release or condition that indicates that a release has occurred. A UST owner must investigate and confirm all suspected releases within seven days. 9 VAC 25-580-210.

The UST owner must take necessary measures to contain the release and mitigate its potential hazards. After taking initial abatement measures, an UST owner must prepare and submit to DEQ a "site characterization" report assessing the site, the potential risks to health and the environment from the release, and remediation efforts that should be undertaken. Depending on the extent of contamination and the potential risks involved, DEQ may require the UST owner to develop and submit a formal corrective action plan for cleanup of the release. 9 VAC 25-580-230 et seq.

5-2.12(a)(4) Closure

If an UST has been taken out of service for twelve months or has not been upgraded to meet required standards, the UST must be closed in accordance with the UST regulations. The owner must obtain a permit and required inspections in accordance with the Virginia Uniform Statewide Building Code. Closure then involves removing the tank from the ground or filling it in place. As part of closure, an UST owner must test the soil in the tank bed to determine whether there has been a release that will require corrective action. The UST owner is required to maintain records for at least three years that demonstrate compliance with the closure requirements. 9 VAC 25-580-310 et seq.

5-2.12(a)(5) Financial Responsibility Requirements

Virginia Code § 62.1-44.34:12 and the Petroleum Underground Storage Tank Financial Responsibility Requirements, 9 VAC 25-590-10 et seq., require owners and operators of USTs to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by an accident or release arising from operation of a UST.

Evidence of financial responsibility may be provided by any combination of insurance, guarantee, surety bond, letter of credit, irrevocable trust fund, qualification as a self-insurer, or the Virginia Petroleum Storage Tank Fund. Va. Code § 62.1-44.34:12(A).

5-2.12(a)(6) Virginia Petroleum Storage Tank Fund

Virginia has established the Virginia Petroleum Storage Tank Fund (Fund) to reimburse owners and operators for taking corrective action and to compensate third parties in amounts in excess of Virginia's financial responsibility requirements up to \$1,000,000. Va. Code § 62.1-44.34:11. DEQ can spend money from this non-lapsing Fund to take action when (1) an UST owner cannot be identified; (2) DEQ determines that immediate corrective action is necessary to protect human health and the environment; or (3) DEQ determines that an UST owner is incapable of taking appropriate corrective action. The state may seek reimbursement for amounts disbursed from the Fund where an UST owner has violated substantive environmental rules or regulations pertaining to USTs.

To obtain reimbursement from the Fund, an UST owner must obtain and carefully follow DEQ's directions for corrective action activities, except that an owner may perform limited corrective action to contain and mitigate the spread of contamination without prior authorization from DEQ.

5-2.12(b) Petroleum Aboveground Storage Tanks (ASTs)

In 1992, the Virginia General Assembly amended the State Water Control Law to provide authority for the regulation of aboveground storage tanks (ASTs). Va. Code § 62.1-44.34:8 et seq. As is the case with the UST program, DEQ has primary responsibility for administering and enforcing the AST program in Virginia.

5-2.12(b)(1) Applicability

Facilities with an individual AST with a capacity that is greater than 660 gallons or multiple tanks with an aggregate aboveground storage capacity of more than 1,320 gallons of petroleum are subject to regulation. Va. Code § 62.1-44.34:15.1. Regulatory requirements increase with storage capacity, e.g., facilities with an aggregate AST storage capacity of greater than 25,000 gallons of oil must have an Oil Discharge Contingency Plan. See 9 VAC 25-91-170. An aboveground tank is defined as “any one or combination of tanks, including pipes, used to contain an accumulation of oil at atmospheric pressure, and the volume of which, including the volume of the pipes, is more than 90 percent above the surface of the ground.” Va. Code § 62.1-44.34:14. A “facility” is defined as “any development or installation within the Commonwealth that deals in, stores or handles oil, and includes a pipeline.” *Id.*

5-2.12(b)(2) Operating Requirements and Performance Standards

The State Water Control Law designates two tiers of ASTs: (1) ASTs at facilities with an aggregate capacity of 1 million gallons or more; and (2) ASTs at facilities with an aggregate capacity of greater than 25,000 gallons but less than 1 million. Virginia’s AST regulations provide operating requirements for existing ASTs in both tiers, and performance standards for ASTs installed, retrofitted, or brought into use after June 30, 1993. 9 VAC 25-91-10 et seq. Variances are available, but the SWCB must send written notice to a locality within thirty days *after* granting a variance to an AST facility. Va. Code § 62.1-44.34:15.1(5).

5-2.12(b)(3) AST Registration

The State Water Control Law requires that operators register their AST facilities with DEQ and the local director or coordinator of emergency services. Va. Code § 62.1-44.34:19.1; 9 VAC 25-91-100.

5-2.12(b)(4) Other Requirements

Each AST facility operator must maintain compliance records for at least five years, Va. Code § 62.1-44.34:19.2(D); allow any official of the locality in which the facility is located or of any other locality within one mile of the facility to enter and inspect its facility at reasonable times and under reasonable circumstances, Va. Code § 62.1-44.34:19.2; demonstrate financial responsibility for taking corrective action and compensating third parties as a condition of operation, Va. Code § 62.1-44.34:15.1; and prepare and obtain DEQ’s approval of an oil discharge contingency plan, Va. Code § 62.1-44.34:15.

5-2.12(b)(5) Virginia Petroleum Storage Tank Fund

The Virginia Petroleum Storage Tank Fund may be used to pay for containment and cleanup of releases from facilities with ASTs. Va. Code § 62.1-44.34:11(A)(2).

5-2.12(c) Chemical Aboveground Storage Tanks

In 2024, the EPA adopted regulations requiring facilities to develop a facility response plan if they (1) maintain onsite any Clean Water Act hazardous substance in an amount that meets or exceeds 1,000 times the Reportable Quantity for that substance; (2) are located within one-half mile of navigable waters or a conveyance to navigable waters; and (3) meet certain substantial harm criteria. 40 C.F.R. Part 118. The plans are due within thirty-six months of the effective date of the rule. 40 C.F.R. § 118.4. During the 2024 General Assembly session, legislation was enacted requiring facilities subject to the EPA’s Clean Water Act Hazardous Substance Worst Case Discharge Planning Regulations to provide the required facility response plan to DEQ within thirty days of EPA approval. Va. Code § 62.1-44.34:30. If a discharge of a hazardous substance from such a facility occurs, immediate notification must be made to DEQ, the local emergency services director or coordinator for the locality in which the discharge occurs and any of any other locality reasonably expected to be affected by the discharge, and the appropriate federal or state authorities. Va. Code § 62.1-44.34:31.

5-2.13 Spills

5-2.13(a) Federal Regulation

Section 1321 of the CWA prohibits the discharge of oil or hazardous substances into or upon navigable waters ("surface waters") of the United States or adjoining shorelines. EPA has promulgated regulations setting forth discharge quantities that may be harmful to the public health or welfare ("reportable quantities"). 40 C.F.R. § 117.3. Any person in charge of a vessel or on-shore facility who has knowledge of a discharge of a reportable quantity of oil or hazardous substance must report such discharge to the appropriate federal agency. 40 C.F.R. § 117.21. (See the [EPA website](#) for spill reporting requirements.) In addition to reporting discharges, owners or operators of certain on-shore and off-shore facilities containing oil must prepare and implement Spill Prevention Control and Countermeasure Plans (SPCC). 40 C.F.R. Part 112.

The Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq., makes owners and operators of facilities from which oil is discharged or which poses the substantial threat of a discharge into or upon navigable waters or adjoining shorelines liable for removal costs and damages. Removal costs include all removal costs incurred by the government under the Clean Water Act or applicable state law and any removal costs incurred by any person for acts consistent with the National Contingency Plan. 33 U.S.C. § 2702(b)(1). Damages may include natural resources, real or personal property damages, damages for loss of subsistence use of natural resources, lost revenues, profits, and earning capacity, and damages for net costs of providing increased or additional public services during or after removal activities. 33 U.S.C. § 2702(b)(2).

5-2.13(b) State Regulation

Virginia Code § 62.1-44.34:18 prohibits the discharge of oil into or upon state waters, lands, or storm drain systems within the Commonwealth. This statute does not encompass the discharge of matter that meets the definition of oil from a solid waste disposal facility into groundwater by means of passive, gradual seepage of leachate and landfill gas; such discharge is solely within the scope of the Waste Management Act. *Campbell Cnty. v. Royal*, 283 Va. 4, 720 S.E.2d 90, 100 (2012). Certain facilities must have an approved Oil Discharge Contingency Plan ("ODCP"). Va. Code § 62.1-44.34:15. Another statute, Va. Code § 62.1-194.1, prohibits unpermitted placement of any object or substance, including oil, that may reasonably be expected to endanger, contaminate, or substantially impair the use or enjoyment of state waters. Violation of this provision is a Class 1 misdemeanor. In addition, Va. Code § 10.1-1429 (within the Virginia Waste Management Act) requires any person who must notify the National Response Center of a hazardous substance release to also notify both DEQ and the chief administrative officer of the local government jurisdiction in which the release occurs. The State Water Control Board promulgated regulations establishing operational requirements that will help prevent unauthorized discharges of oil as required by Va. Code §§ 62.1-44.34:14 to 62.1-44.34:23. See 9 VAC 25-91-10 et seq.; 9 VAC 25-101-10 et seq. The regulations apply to certain aboveground storage tanks, including those containing oil, and tank vessels. Local officials are given increased access to storage facilities to review tank records and are required to receive immediate reports of unauthorized discharges. 9 VAC 25-91-150; Va. Code §§ 62.1-44.34:19 and 62.1-44.34:19.2. Localities are also given clearer authority to recover costs resulting from investigation, containment, and cleanup, including reasonable personnel, administrative, and equipment costs.

5-2.14 Water Resources & Drinking Water Regulation

5-2.14(a) Introduction

This section discusses permit programs that control the withdrawal of water and regulate drinking water systems. Certain surface water and groundwater withdrawals are regulated by DEQ. The Virginia Department of Health regulates drinking water systems through its waterworks permitting program. Va. Code § 32.1-167 et seq.

Virginia's "Policy as to Waters" is expressed by statute and applies to all surface and underground waters. Va. Code §§ 62.1-10 through 62.1-13. The Policy promotes conservation and wise use of the state's waters, prohibits waste of water, and declares that "public water supply uses for human consumption shall be considered the highest priority." Va. Code § 62.1-10.

The General Assembly mandated the development of a comprehensive statewide water supply planning process requiring localities to determine the volume of water needed for beneficial uses, and assess the ability of existing water sources to meet those projected needs. Va. Code § 62.1-44.38. Localities, either individually or as part of a region, must develop water supply plans and update them every five years. The plans detail current and future water supply need, the current and possible additional sources of supply, current and future conservation measures, and alternatives for meeting future demands. The plans must also estimate, using a data-driven method, the risk of water supply shortfalls in each region of Virginia and propose strategies to address those risks. Va. Code § 62.1-44.38(B). In addition, the State Water Control Board must develop regulations designating regional planning areas "based primarily on river basins" and encouraging cross-jurisdictional water resource planning. Va. Code § 62.1-44.38:1.

DEQ reviews these plans for consistency and compliance with the regulation, and seeks comments from the Departments of Health, Conservation and Recreation, Wildlife Resources, and Historic Resources, and the Marine Resources Commission. Information from these water supply plans has been compiled into the [State Water Resources Plan](#).

5-2.14(b) Surface Water Withdrawals

In addition to the VWPP serving as Virginia's CWA Section 401 certification, a VWPP is required for surface water withdrawals of 300,000 gallons per month or more. Va. Code § 62.1-44.15:22; 9 VAC 25-210-10 et seq. See *Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 621 S.E.2d 78 (2005) (upholding SWCB permit for proposed withdrawal from the Mattaponi River by City of Newport News).

The SWCB has authority to limit amounts of water withdrawn and to prohibit withdrawals when instream flow levels drop below minimum levels needed to protect fish, wildlife, and recreation. Most withdrawals in existence on July 1, 1989 are exempt from permitting under this act, unless a CWA Section 401 permit is required to increase the withdrawal. *Id.*

The SWCB may issue an Emergency VWPP for a new or increased withdrawal when it finds that because of drought there is an insufficient public drinking water supply that may result in a substantial threat to human health or public safety. Va. Code § 62.1-44.15:22(C). Mandated state and local conservation measures must be found to have failed or be inadequate. Listed state agencies have five days to comment, but no public hearing is required. Within fourteen days after the issuance of the emergency permit, the permit holder must apply for a standard VWPP. The emergency permit is valid until the SWCB approves or denies the standard VWPP, or one year, whichever occurs first.

The Surface Water Management Areas Act creates a process for managing surface water withdrawals in water short areas. Va. Code § 62.1-242 et seq. The regulatory process is commenced when the SWCB determines that instream values in a designated area are threatened by withdrawals. After the SWCB designates the surface water management area, each existing and new surface water withdrawal must obtain a permit that will impose restrictions upon withdrawals during declared water shortages. A permit is not required if withdrawals in a surface water management area are made pursuant to a voluntary agreement executed in accordance with Va. Code § 62.1-245. Va. Code § 62.1-247. The regulations suggest that riparian rights must yield to permit restrictions, 9 VAC 25-220-130,

but no Virginia case has challenged such restrictions as an uncompensated taking. As of March 2024, no Surface Water Management Area has been designated in Virginia.

5-2.13(b) Groundwater Availability

Under the Groundwater Management Act of 1992, Va. Code § 62.1-254 et seq., the SWCB is responsible for regulating the *quantity* of groundwater withdrawn in those parts of Virginia declared to be groundwater management areas. The two designated groundwater management areas are (1) Eastern Virginia Groundwater Management Area; and (2) the Eastern Shore Groundwater Management Area. 9 VAC 25-600-20. An Eastern Virginia Groundwater Management Advisory Committee considered the best means of implementing a management strategy for groundwater in the Eastern Virginia area and issued a [report](#) in July of 2017 that includes recommendations regarding alternative water source projects, changes in permitting criteria, groundwater banking, data improvements, and funding options. See Va. Code § 62.1-256.1 (expired). The [Advisory Committee](#) was reestablished in 2020 to recommend further statutory, budgetary, and/or regulatory changes to improve groundwater management. Va. Code § 62.1-256.2.

Under the Act, no one may withdraw water from the regulated aquifer within a designated groundwater management area without a statutory exemption or a permit from the SWCB. See *generally* 9 VAC 25-610-10 et seq. (Groundwater Withdrawal Regulations); Va. Code § 62.1-266. The principal exemption is for uses less than 300,000 gallons per month. The Act grants nine other narrow exemptions for relatively minor or temporary uses, and provision is made for special exceptions issued by the SWCB. An exemption in the earlier 1973 Act for agricultural and livestock watering uses was repealed. Private wells must be registered with the SWCB. See *also* Va. Code § 62.1-259.1 (addressing requirements when subdivision plat calls for thirty or more lots to be served by private wells not in the surficial aquifer). No wells may be constructed in a ground water management area for nonagricultural irrigation except in the surficial aquifer, unless DEQ has determined that the quantity or quality of the groundwater in the surficial aquifer is not adequate for the proposed use. Va. Code § 62.1-258.1.

The Act required existing users, who had been grandfathered under the 1973 Act, to obtain permits based on their actual present use, and it allowed these users to obtain permit rights to withdraw any additional quantity justified as needed. New users have always been required to obtain a permit.

The 1973 Act exempted publicly-owned water supply withdrawals from regulation. In 1986, these wells were made subject to the regulation but were grandfathered under certificates of groundwater right that allowed operation at their design capacity ratings. The 1992 Act eliminated grandfathered rights for existing publicly-owned wells and made provisions for permitting both existing and approved, but not yet built, wells based on historical usage rates. In addition, special provision was made for permitting publicly-owned drought relief wells that had been grandfathered under the prior act. New public water supply wells are not given any special preferences.

A permit authorizes the withdrawal, rather than specific wells or pumping equipment. A permittee may use a single well or a system of wells, including a backup well or wells, or other means to make the permitted withdrawal.

5-2.14(c) Drinking Water Regulatory Programs

5-2.14(c)(1) Introduction

While drinking water quality is a priority subject of federal regulation, the principal regulatory role in this arena is played now, as it has been for many years, by the states.

5-2.14(c)(2) Federal Role

Under the federal Safe Drinking Water Act (SDWA), EPA has the responsibility to establish and enforce national standards for drinking water quality. 42 U.S.C. § 300f et seq.

The SDWA applies only to “public water systems” or “waterworks,” which are defined as systems that provide piped water to the public for human consumption and which have at least fifteen service connections or regularly serve at least twenty-five individuals for at least sixty days a year. 42 U.S.C. § 300f(4) and 12 VAC 5-590-10. Exempted from the primary drinking water regulations is any system which meets the following conditions: (i) consists only of distribution and storage facilities; (ii) obtains all of its water from, but is not owned or operated by, a public water system to which the regulations apply; (iii) does not sell water to any person; *and* (iv) is not an interstate passenger carrier (e.g., bus or train). 42 U.S.C. § 300g.

The national primary drinking water standards, codified at 40 C.F.R. Part 141, prescribe the maximum permissible levels of certain contaminants (“maximum contaminant level” or MCL) in water delivered to end users connected to any public water system. 42 U.S.C. § 300g-1. The MCL goals must be set at concentrations “at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety.” The MCL must be set as close as “feasible” to the MCL goal. States, with EPA approval, may grant variances from federal standards to systems that serve from 3,300 to 10,000 persons. 42 U.S.C. § 300g-4.

EPA is required to monitor unregulated pollutants to determine if new contaminants should be added to the list. For newly regulated contaminants, EPA must undertake risk assessment and cost-benefit analyses. 42 U.S.C. § 300g-1.

Local water agencies are required to disclose annually in brief and plainly worded reports to their customers what chemicals and bacteria have been found in the water. They must also give twenty-four-hour public notice when a violation of the regulations poses a significant health risk. 42 U.S.C. § 300g-3.

National secondary drinking water standards control contaminants that affect the aesthetic qualities, e.g., taste and odor, and the public’s acceptance of drinking water. These are guidelines for state use and not federally enforceable.

5-2.14(c)(3) State Role

Under the SDWA, the states may obtain a status called “primacy,” which means the state has primary responsibility to enforce the national requirements. To obtain primacy, a state must have a program authorized by the state legislature to implement and enforce requirements that are at least as stringent as those prescribed under the SDWA. Virginia is a primacy state. If the state fails to enforce these requirements, EPA may do so. *See Trinity Am. Corp. v. EPA*, 150 F.3d 389 (4th Cir. 1998) (even if the state has taken action under the SDWA, EPA retains authority to determine if the state’s actions are sufficient and to otherwise enforce the Act). In addition to ensuring compliance with the MCLs established by EPA pursuant to the SDWA, the Virginia Department of Health (VDH) has been charged with establishing MCLs for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate, as well as other perfluoroalkyl and polyfluoroalkyl substances (PFAS) as the State Board of Health deems necessary, as well as chromium-6 and 1,4-dioxane. Va. Code § 32.1-169. As of July 1, 2021, localities are prohibited from discharging or using class B firefighting foam that contains intentionally added PFAS chemicals for testing or training purposes, with some limited exceptions. Va. Code § 9.1-207.1.

VDH regulates drinking water quality pursuant to the Virginia Public Water Supply Act by issuing permits that require compliance with state standards. Va. Code § 32.1-167

et seq. The VDH has promulgated Waterworks Regulations to guide its regulatory functions under the Public Water Supply Act. 12 VAC 5-590-10 et seq.

The Waterworks Regulations include (1) minimum health and aesthetic standards for “pure water” and for water taken into a waterworks; (2) criteria for the siting, design, and construction of water supplies and waterworks; (3) requirements for inspections and testing of water; and (4) requirements for issuing permits. In addition, the Waterworks Regulations include prohibitions on cross-connections that would cause contamination of the drinking water system.

The VDH must issue a construction permit before any person may construct or modify any water storage, purification, or treatment facilities. Va. Code § 32.1-172. A written operating permit must be issued before such facilities may be put into operation. Operating permits require the permittee to monitor and make reports on the system’s drinking water quality. If the system violates any MCL, the permittee is subject to sanctions and must give public notice and notice to system users of the violation.

The SDWA provides for federal funding of a state revolving fund for grants and low-interest loans to public water systems. 42 U.S.C. § 300j-12.

5-2.14(c)(4) Protection of Groundwater Drinking Sources

There is no comprehensive federal regulation of groundwater, as there is with surface water.¹⁷ Several state and federal statutes, however, do address and regulate groundwater.

The federal SDWA includes three provisions that regulate groundwater quality: (i) the underground injection control program, 42 U.S.C. § 300h-3; (ii) the sole source aquifer provision, 42 U.S.C. § 300h-6; and (iii) the primary and secondary drinking water standards which establish MCLs for public drinking water supplies, 42 U.S.C. § 300g-1. The first establishes a program to regulate point-source discharges into groundwater. The other two relate to the protection of those areas in which surface water percolates down into groundwater zones.

The EPA Administrator may designate an aquifer as sole source, or any person may petition EPA to make a designation. Once an aquifer has been designated a sole source or principal source aquifer (SSA), EPA may review the plans for any project in the SSA area which could potentially contaminate the aquifer. If the Administrator determines that a significant threat to public health would result from contamination of the SSA resulting from a project, federal financial assistance for that project could be denied.

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq., imposes federal regulation over a major source of groundwater pollution: disposal of hazardous wastes. A permittee’s solid waste disposal facility must not adversely affect groundwater quality, and the permittee must monitor aquifers underlying the facility to determine compliance with the national primary drinking water standards and to determine groundwater quality and contaminant levels. 42 U.S.C. § 6925.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or Superfund), 42 U.S.C. § 9601 et seq., authorizes government responses to releases of hazardous substances into the environment as well as cleanup of inactive hazardous waste disposal sites. The Act defines “environment” to include groundwater and drinking water supplies. If the groundwater that is contaminated by a hazardous substance is a source of drinking water, the Superfund Amendment and Reauthorization Act of 1986

¹⁷ But see *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. ___, 140 S. Ct. 1462 (2020) (holding that discharges to groundwater that are the functional equivalent of discharges to surface water are regulated by the Clean Water Act).

(SARA) mandates that groundwater be cleaned up to the “maximum contaminant level goals” established by the 1986 SDWA amendments.

In Virginia, the SWCB has adopted groundwater standards and criteria as part of its water quality standards, 9 VAC 25-280-10 et seq., and conducts or requires sampling at monitoring wells on various regulated sites to monitor groundwater quality. Standards for heavy metals, chlorinated hydrocarbon insecticides, chlorophenoxy herbicides, and radioactivity are applicable statewide, and in many instances they are stricter than drinking water standards. The SWCB has established an antidegradation policy for groundwater that states that the natural quality of the groundwater must be maintained. In addition, for private or public water supply wells within one and one-half miles of any coal ash pond, VDH requires utilities to test for certain constituents. Va. Code § 32.1-176.8:1. Such testing must have been completed once before July 1, 2021, and then annually for each of the five years following DEQ approval of the closure of the pond, and once every five years after that initial five-year period. *Id.*

No application for a new coal ash landfill permit for storing coal combustion residuals in Planning District 8 shall be approved by DEQ if the facility boundary is located within one mile of an existing residential area that is not served by municipal water supply, unless the owner or operator of the coal ash landfill has offered to provide, at its expense, (i) municipal water supply service for such residential area and (ii) any requested service connections for residential properties in existence at the time such permit application is filed. Va. Code § 10.1-1402.05.

Virginia’s solid waste program imposes extensive and rigorous monitoring requirements at landfills and other regulated solid waste disposal sites to protect groundwater quality. Likewise, DEQ imposes requirements in VPDES and VPA permits for, e.g., wastewater treatment lagoons and spray irrigation of treated wastewaters, to protect groundwater quality. Virginia has not adopted regulations prohibiting or permitting the underground injection of substances. Through its Water Resources Policy, however, the SWCB has declared that it is contrary to policy to discharge pollutants into deep groundwater aquifers. 9 VAC 25-390-30.4(E).

5-3 SOLID AND HAZARDOUS WASTE REGULATION

5-3.01 RCRA

5-3.01(a) Solid Waste

5-3.01(a)(1) Administration

5-3.01(a)(1)(i) Federal Law

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq., establishes a framework for federal, state, and local management of solid waste. Under RCRA, EPA has established minimum performance standards for solid waste disposal facilities. The criteria for the standards are based on those necessary to protect human health and the environment. Virginia’s regulatory program, described below, embodies the federal requirements.

5-3.01(a)(1)(ii) State Law

The Virginia Waste Management Act (VWMA) governs solid waste management and empowers the Virginia Waste Management Board, a citizen board, to supervise and control waste management activities in the Commonwealth. Va. Code § 10.1-1400 et seq. DEQ administers these programs on a day-to-day basis. Solid Waste Management Regulations are found at 9 VAC 20-81-10 et seq. Virginia’s Solid Waste Management Regulations include provisions governing coal combustion residuals (CCR), including permitting, operation, and closure of landfills and surface impoundments that receive CCR. 9 VAC 20-81-800 et seq.

Under Virginia law, the passive, gradual seepage of leachate and landfill gas into groundwater is governed exclusively by the VWMA. *Campbell Cnty. v. Royal*, 283 Va. 4, 720

S.E.2d 90 (2012) (rejecting application of Oil Discharge Law) (amicus brief filed by LGA); *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403 (4th Cir. 2018) (coal ash ponds are not point discharges governed by the CWA).

Each locality is responsible for the management of solid waste within its jurisdiction. Unless part of a regional plan, each locality must develop and implement its own local solid waste management plan to provide for proper disposal or reuse of all solid waste generated within its jurisdiction. DEQ provides technical assistance for solid waste planning. Plans must provide for recycling 25 percent of the locality's solid waste. Va. Code § 10.1-1411. DEQ's regulations for Solid Waste Management Plans are found at 9 VAC 20-130-10 et seq.

Localities are also authorized to adopt specific ordinances (1) regulating the siting of solid waste management facilities within their boundaries, Va. Code § 15.2-929; (2) requiring the separation of solid waste for recycling, Va. Code § 15.2-937; (3) directing solid waste to facilities with which the locality has an agreement reserving capacity, Va. Code § 15.2-931; and (4) limiting the use of a locality's owned or maintained receptacles to the disposal of garbage and other solid waste that is generated within the boundaries of the locality, Va. Code § 15.2-928.

5-3.01(a)(2) Permits

Persons who operate solid waste disposal facilities must obtain a permit from DEQ. Va. Code § 10.1-1408.1.¹⁸ The Waste Management Board promulgated regulations establishing a permit fee assessment system pursuant to Va. Code §§ 10.1-1402.1, 10.1-1402.2, and 10.1-1402.3; 9 VAC 20-90-10 et seq. The categories of facilities that require permits include sanitary landfills, industrial waste landfills, inert landfills, debris or demolition landfills, resource recovery facilities, transfer stations, incinerator and any use, reuse, or reclamation of coal combustion byproduct in a flood plain. See 9 VAC 20-81-10 et seq. and 9 VAC 20-85-10 et seq. A permit modification is not required if the facility intends to upgrade its equipment and demonstrates that the proposed changes will improve energy efficiency and reduce pollution. Va. Code § 10.1-1408.1(E).

The permit application process for a new solid waste management facility generally includes (1) certification by the governing body of the locality where the facility would be located that the facility will be consistent with all local ordinances (Va. Code § 10.1-1408.1(B)(1)); (2) certification by the governing body of the locality where the facility would be located that the proposed facility is consistent with the applicable local or regional solid waste management plan or that the solid waste management planning unit has initiated the process to revise the plan to include the facility (Va. Code § 10.1-1408.1(B)(9)); (3) a disclosure statement (defined in Va. Code § 10.1-1400) by the applicant; and (4) a detailed review of the proposed facility, including a public hearing. Va. Code § 10.1-1408.1. The governing body of the locality where the facility would be located has 120 days in which to certify compliance or non-compliance. Va. Code § 10.1-1408.1(B)(1). Pursuant to Va. Code § 10.1-1408.1(D)(1), DEQ must hold a public hearing in the affected locality prior to the issuance of a permit for any new or expanded solid waste management facility.¹⁹ Furthermore, if the applicant proposes to locate the facility on property not governed by a zoning ordinance, the governing body must hold a public hearing prior to making the

¹⁸ See *Frederick Cnty. Bus. Park, LLC v. Va. Dep't of Env'tl. Quality*, 278 Va. 207, 677 S.E.2d 42 (2009) (recycling facility required to have solid waste permit where 30 percent of materials non-recyclable).

¹⁹ The Director, before issuing a permit for a new solid waste management facility, must make an explicit determination that the statutory factors are addressed, with a degree of particularity that demonstrates a substantive consideration of the statutory factors. The Director's determination must appear on the face of the agency record. *Browning-Ferris Indus. v. Residents Involved in Saving the Env't.*, 254 Va. 278, 492 S.E.2d 431 (1997); see also *Chesapeake Bay Found., Inc. v. Commonwealth*, No. 1897-12-2 (Va. Ct. App. April 22, 2014) (unpubl.).

determination that the facility is consistent with all local ordinances. Va. Code § 10.1-1408.1(B)(3).

In *Aegis Waste Solutions v. Concerned Taxpayers of Brunswick County*, 261 Va. 395, 544 S.E.2d 660 (2001), taxpayers contended that DEQ was without authority to consider a landfill application complete or to issue a permit where the application allegedly included three parcels of land not owned by the applicant and these parcels were not covered by the local government's certification pursuant to Va. Code § 10.1-1408.1(B)(1). The crucial question was whether DEQ had included the three parcels in the permit issued. Taxpayers argued that whether DEQ acted within the scope of its authority was a question of law. The Supreme Court held, however, that this was a question of fact. The Court found substantial evidence in the agency record upon which DEQ, as the trier of facts, could reasonably find that the parcels were not included in the application or permit.

An applicant that proposes to operate a new sanitary landfill or transfer station must document its efforts to obtain public comment, including published notice and a meeting. In addition, if the applicant is a local government or authority, a citizens' advisory group must be formed to assist with site selection. The public hearing and notice requirements do not apply to the local government if the new facility is to be on land on which a municipal sanitary landfill is already located. Va. Code § 10.1-1408.1(B)(4) & (5).

No permit for a new or expanded solid waste facility shall be issued until DEQ has found that (i) the health, safety, and the environment, present or future, would be protected, (ii) there is a need for increased capacity and sufficient infrastructure exists to handle it, (iii) public interests will be served, (iv) the increase is consistent with any existing daily disposal limits, and (v) additional capacity is consistent with regional and local solid waste management plans, as certified by the local governments. These requirements do not apply to captive industrial non-hazardous waste facilities. Va. Code § 10.1-1408.1(D). DEQ must conduct an expanded landfill siting review and certain sitings in environmentally sensitive areas are prohibited. Va. Code §§ 10.1-1408.4 and 10.1-1408.5. In December 2021, the Virginia Attorney General opined that, before DEQ may issue a permit for a new solid waste landfill, it must first address environmental justice concerns in accordance with the Virginia Environmental Justice Act, Va. Code § 2.2-234 et seq. 2021 Op. Va. Att'y Gen. 89.

The Board's authority to regulate the road transportation of nonhazardous waste has been repealed in light of the holding in *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir. 2001) that the regulations were an unconstitutional burden on interstate commerce.

5-3.01(a)(3) Standards

Virginia's Solid Waste Management Regulations (SWMR), 9 VAC 20-81-10 et seq., contain specific design, construction, operation, and closure criteria for solid waste disposal facilities. Virginia Code §§ 10.1-1410.2 and 10.1-1413.2 provide for landfill post-closure monitoring and maintenance and a Landfill Clean-up and Closure Fund.

New or expanded landfills built primarily to accept out-of-jurisdiction municipal solid waste (MSW) must have sufficient disposal capacity for Virginia localities in accordance with their solid waste management plans. The permit must require that disposal capacity be made available to localities that choose to contract for and reserve such disposal capacity in the facility. Va. Code §§ 10.1-1408.1(B)(6) and 10.1-1408.1(P).

To obtain a permit for new or expanded municipal solid waste landfill, a non-governmental applicant must procure a host agreement from the locality that covers (i) the amount of financial compensation, if any, to be paid to the host locality, (ii) daily travel routes and traffic volumes, (iii) the daily disposal limit, (iv) the anticipated service area of

the facility, and (v) authority for the locality to inspect incoming waste. Va. Code § 10.1-1408(B)(7). A local government owner and operator applicant must provide DEQ with items (ii), (iii), and (iv). Va. Code § 10.1-1408.1(B)(8). Virginia Code § 10.1-1408.1(B)(9) requires a certification by the local government or solid waste planning unit that a proposal for a new or expanded facility is consistent with the applicable local or regional solid waste management plan developed and approved pursuant to § 10.1-1411 or that the process to revise the solid waste management plan to include the new or expanded facility has been initiated. See *Va. Dep't Env'tl. Quality v. East End Landfill, LLC*, No. 0384-15-2 (Va. Ct. App. Oct. 27, 2015) (unpubl.) (DEQ's processing of an application is not contingent on the solid waste management planning unit *continuing*, versus *initiating*, the process to revise the plan).

Legislative proposals relating to installation of landfill gas collection systems to control odors have been proposed in recent General Assembly sessions. See HB 1358 (2016); HB 1600 (2017). In response, DEQ formed a Landfill Odor Workgroup to establish a procedure for the agency to respond to odor complaints; assess health risks associated with odors from landfills; and set triggers for increasing monitoring and odor response. In 2019, DEQ issued [Odor Guidance](#) for Solid Waste Management Facilities that establishes standard procedures for DEQ staff and solid waste facility operators to follow in response to odor complaints. DEQ Land Protection and Revitalization Guidance Memo No. LPR-SW-2019-01 (Sept. 20, 2019).

Operators of sanitary landfills, including local governments, must show that they are financially capable of assuming the costs of all activities associated with closure, post-closure monitoring, and corrective action. Va. Code § 10.1-1410; 9 VAC 20-70-10 et seq. (Financial Assurance Regulations for Solid Waste Facilities).

Solid waste management facilities not equipped with a liner system approved by DEQ pursuant to a permit issued after October 9, 1993, are not allowed to continue accepting waste. Va. Code § 10.1-1413.2. Certain captive non-hazardous industrial waste landfills and construction and demolition debris landfills are exempted from this prohibition. Va. Code §§ 10.1-1408.1(N), 10.1-1413.2.

5-3.01(b) Hazardous Waste

5-3.01(b)(1) Administration

5-3.01(b)(1)(i) Federal Law

The generation, transportation, treatment, storage, recycling, and disposal of hazardous wastes are comprehensively regulated under federal and state law. At the federal level, the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. § 6901 et seq., provides "cradle-to-grave" regulation of hazardous wastes. The term "hazardous waste" is defined at 42 U.S.C. § 6903 and in the federal regulations at 40 C.F.R. Part 261.

RCRA directed EPA to promulgate regulations pertaining to (i) the identification and listing of hazardous wastes, 40 C.F.R. Part 261; (ii) the generation and transportation of hazardous waste, 40 C.F.R. Parts 262-263; and (iii) the permitted treatment, storage, and disposal of hazardous wastes, 40 C.F.R. Parts 264 and 265.

5-3.01(b)(1)(ii) State Law

The Waste Management Board and DEQ have responsibility for regulating hazardous wastes, subject to EPA's review and approval. The Virginia Waste Management Act, Va. Code § 10.1-1400 et seq., is the State's authority for administering these hazardous waste programs, and the state laws and regulations have been conformed closely to their federal counterparts. DEQ has the responsibility for carrying out the tasks of waste management in the Commonwealth. As administered by DEQ and EPA, this is the most prescriptive of all

environmental regulatory programs, with a rule for almost every circumstance and little room for agency discretion.

5-3.01(b)(2) Permits

RCRA and the Virginia Waste Management Act require a permit for the treatment, storage, and disposal of hazardous waste. A permit is not required by Virginia law for the transportation of hazardous waste; however, any person transporting hazardous waste (and any person generating, providing storage, treatment, or disposal of such waste) is required to report such activity to DEQ. 42 U.S.C. § 6925 and Va. Code § 10.1-1426. The term "hazardous waste" is defined in Va. Code § 10.1-1400. DEQ must annually compile and publish a list of all hazardous waste sites permitted to dispose of hazardous waste or in corrective action related to the disposal of hazardous waste. Va. Code § 10.1-1186.1:1.

5-3.01(b)(3) Standards

RCRA requires EPA to promulgate regulations governing (i) the construction and operation of all types of hazardous waste management facilities (HWMFs); (ii) labeling, "manifesting," and transporting hazardous wastes, including in many instances hazardous materials destined for reuse or recycling; (iii) financial responsibility of owners and operators of HWMFs; and (iv) "closure" of HWMFs to protect the environment after sites are no longer in use. 42 U.S.C. §§ 6922 through 6924. The Virginia Hazardous Waste Management Regulations are virtually identical to the federal regulations. Va. Code §§ 10.1-1426 through 10.1-1429 and §§ 10.1-1450 through 10.1-1454; 9 VAC 20-60-12 et seq.

5-3.01(b)(4) Spills

RCRA governs, among other things, the disposal of hazardous waste into or onto any land or water, including groundwater. The term "disposal" encompasses accidental spills, which must be reported to DEQ. 42 U.S.C. § 6903(3).²⁰

5-3.02 Comprehensive Environmental Response, Cleanup and Liability Act**5-3.02(a) Federal Law**

The "Superfund" law, as amended in 1986 by the "Superfund Amendments and Reauthorization Act" (SARA) and the Brownfields Revitalization and Environmental Restoration Act, PL 107-118, incorporates under one statute federal authority for responding to and cleaning up releases of "hazardous substances" into the environment, whether intentional or accidental, whether a one-time occurrence, such as a spill, or a continuing hazard, such as the leaking of hazardous waste from an abandoned landfill.

Superfund defines the term "hazardous substance" broadly to include any substance designated as hazardous or toxic pursuant to:

- Section 311(b)(2) of the Clean Water Act.
- Section 103 of Superfund.
- Section 3001 of the Resource Conservation and Recovery Act.
- Section 307(A) of the Clean Water Act.
- Section 112 of the Clean Air Act.
- Section 7 of the Toxic Substances Control Act.

Excluded from the definition of "hazardous substance" are petroleum, petroleum products, natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel. Petroleum storage and spills are regulated under other federal and state laws.

²⁰ Notifications must be reported to the Virginia Emergency Operations Center (1-800-468-8892) or the appropriate DEQ Regional Office.

As Virginia does not have a stand-alone CERCLA statute, EPA administers CERCLA in Virginia.

5-3.02(b) National Contingency Plan (NCP)

The NCP is the “blueprint” guiding EPA’s response to hazardous waste sites. 40 C.F.R. Part 300. The plan details methods for discovering and investigating sites where hazardous substances have been released, methods for remedying that release, and criteria for determining appropriate response activities. The NCP provides two types of responses: short-term or “removal actions,” and long-term or “remedial actions.” 40 C.F.R. §§ 300.415 and 300.435. Only sites listed on the National Priorities List (NPL) can use Superfund money for a long-term cleanup. 42 U.S.C. § 9605. The SARA provisions reflect a strong bias in favor of remedial actions and require that short-term actions be integrated into long-term cleanup solutions. 42 U.S.C. § 9621(b).

5-3.02(c) Liability

CERCLA holds the following parties liable for the cost of cleanup: (i) the current owner or operator of a facility at which hazardous substances have been deposited; (ii) any prior owner or operator of such a facility if hazardous substances were deposited there during their ownership or operation; (iii) any transporter who took hazardous substances to such facility; and (iv) any person whose hazardous substances were deposited at such facility. These parties are known as “Potentially Responsible Parties” or PRPs. Liability is strict, joint, and several. 42 U.S.C. § 9607. See *PCS Nitrogen Inc. v. Ashley II of Charleston*, 714 F.3d 161 (4th Cir. 2013), for a case extensively discussing the imposition of liability on PRPs. See also *Consolidation Coal Co. v. Ga. Power Co.*, 781 F.3d 129 (4th Cir. 2015) (a “party does not ‘intend to dispose’ of a hazardous substance solely by selling a product to a buyer who at some point down the line disposes of a hazardous substance that was within the product”); *Crofton Ventures L.P. v. G&H P’ship*, 258 F.3d 292 (4th Cir. 2001) (owner during period substance leaked into property is responsible party even though no evidence owner placed substance on property); *but cf. Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 129 S. Ct. 1870 (2009) (PRPs can avoid joint and several liability if a “reasonable basis” to apportion liability exists); *Dixon Lumber Co. v. Austinville Limestone Co.*, 256 F. Supp. 3d 658 (W.D. Va. 2017) (as CERCLA is silent as to successor liability, courts must apply common law rules). Liability for brownfields may be different, depending on a number of factors. See section 5-3.02(d).

In 2020, the U.S. Supreme Court held that even “innocent” landowners are PRPs and, accordingly, must gain EPA approval before undertaking any remedial action on privately-owned property within a Superfund site. *Atl. Richfield Co. v. Christion*, 590 U.S. ___, 140 S. Ct. 1335 (2020). However, the Court also held that CERCLA does not bar state courts from hearing landowner claims arising under state common-law doctrines such as nuisance or trespass, even if the state law claim seeks different or more extensive remedial work than that proposed by the EPA.

A unit of state or local government has no liability as “owner or operator” where it acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government acquires title by virtue of its function as sovereign. However, this exclusion is not available if the unit of government caused or contributed to the release. 42 U.S.C. § 9607(20)(D).

Courts have held that a locality that sends common household waste to a contaminated landfill is potentially liable for cleanup costs under CERCLA. See *B.F. Goodrich Co. v. Murtha*, 754 F. Supp. 960 (D. Conn. 1991), *aff’d*, 958 F.2d 1192 (2d Cir. 1992), *on remand*, 840 F. Supp. 180 (D. Conn. 1993); *Transp. Leasing v. California*, 32 E.R.C. 1499 (C.D. Cal. 1990). In both decisions, the courts expressly rejected the argument that household waste is excluded from the CERCLA definition of a “hazardous substance.”

5-3.02(d) Brownfields and Relief from Liability**5-3.02(d)(1) Federal Law**

Public Law 107-118, the Small Business Liability Relief and Brownfields Revitalization Act, amends CERCLA to provide limitations on liability for landowners that qualify as "bona fide prospective purchasers," "contiguous property owners," or "innocent landowners." The Act also provides grants to eligible entities (including local government units and redevelopment agencies) for inventorying, characterizing, assessing, remediating, and planning related to brownfield sites. The Act defines a "brownfield site," with exceptions, as real property, the expansion, redevelopment, or reuse of which is complicated by the presence or potential presence of a hazardous substance or pollutant. It includes within such definition a site that is (1) contaminated by a controlled substance; (2) contaminated by petroleum or a petroleum product excluded from the CERCLA definition of "hazardous substance" that is determined to be of relatively low risk, that is a site for which there is no viable responsible party and which will be cleaned up by a person not potentially liable, and that is not subject to a specified order under the Solid Waste Disposal Act; or (3) mine-scarred land.

Determining whether one qualifies as a "bona fide prospective purchaser," "contiguous property owner" or an "innocent landowner" is determined on a case-by-case basis. However, the qualifications can generally be described as follows:

"Bona fide prospective purchasers" are those who acquired ownership after January 11, 2002, and the purchaser must (i) establish that all disposal occurred before the person acquired the property, (ii) have made "all appropriate inquiry" into the previous uses and ownership of the property and learned of the contamination, (iii) provide all required notices with regard to discovery or release of hazardous substances, (iv) exercise appropriate care with respect to hazardous substances including stopping any continuing release, preventing future releases and preventing or limiting exposure to previously released hazardous substances, (v) cooperate with any cleanup or restoration activities and certain requests for information, (vi) use the land in accordance with any land use restrictions or other institutional controls used in connection with the response to the contamination, and (vii) not be a potentially liable party or affiliated with a potentially liable party through familial, contractual or corporate relationships. 42 U.S.C. § 9601(40). While the Act provides limitations on liability, the United States retains a lien against the property for its unrecovered response costs in cases where the property's fair market value has increased above that which existed before a cleanup response action was taken. 42 U.S.C. § 9607(r).

The "contiguous property owner" provisions limit liability for a person who owns property adjacent to a source of contamination (which he does not own and for which he is not responsible) that is affecting his property. The contiguous property owner must (i) provide all required notices with regard to discovery or release of hazardous substances, (ii) take reasonable steps to stop any continuing release, prevent future releases and prevent or limit exposure to hazardous substances on or from his property, (iii) cooperate with any cleanup or restoration activities and certain requests for information, and (iv) use the land in accordance with any land use restrictions or other institutional controls used in connection with the response to the contamination. In addition, the owner must have, at the time it acquired the property, conducted "all appropriate inquiry" and not know or have reason to know that the property was or may be contaminated. If the owner knew or had reason to know of the contamination, he may not qualify for the contiguous owner exemption but still may qualify as a bona fide prospective purchaser if he meets the requirements of that definition. 42 U.S.C. § 9607(q).

"Innocent landowners" fall into three categories: (1) those who acquire property without knowledge of the contamination, after conducting all appropriate inquiry; (2) governmental entities acquiring property through escheat, other involuntary transfers, or eminent domain; and (3) inheritors of contaminated property. 42 U.S.C. § 9601(35)(A)(i-iii). These landowners must also provide full cooperation with cleanup efforts, comply with

and not interfere with land use or other controls used in connection with the contamination, exercise due care with regard to the contamination, and take precautions against foreseeable acts of third parties and the foreseeable consequences of the acts of third parties. 42 U.S.C. § 9601(35)(A)(i-iii) and 42 U.S.C. § 9607(b)(3)(a) and (b).

The standard practices for “all appropriate inquiry” have evolved over time. Consequently, the exact procedure for completing “due diligence” for a property transaction varies based on the date of property acquisition. Under the original Superfund Law (42 U.S.C. § 9601 (1980)), in order to be exempt from liability, the purchaser, at the time he or she acquired the facility, could not have known or had reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility. 42 U.S.C. § 9601 Sec. 35(A)(i). EPA’s reauthorization of the 1980 CERCLA regulation issued in 1986 required “all appropriate inquiry into the previous uses and ownership of the property consistent with good commercial and customary practice.” 42 U.S.C. § 9601 Sec. 35(B). In 1993, the American Society for Testing and Materials (ASTM) issued the first national consensus standard attempting to define procedures for “good commercial practice.” ASTM E1527-93. This standard practice was revised by ASTM in 1994, 1997, 2000, 2005, 2013, and 2021. In 2001, EPA promulgated Public Law 107-118, the Small Business Liability Relief and Brownfields Revitalization Act, amending CERCLA and requiring that EPA define “All Appropriate Inquiry.” 40 CFR Part 312. The AAI final rule was published in the *Federal Register* on November 1, 2005 (70 Fed. Reg. 66070) and went into effect on November 1, 2006. The AAI Rule was amended on September 15, 2017 (82 Fed. Reg. 43310).

The AAI rule is a performance-based test of whether a purchaser has obtained the information necessary while the various ASTM standard versions are prescriptive, meaning that certain inquiries must be made but there is no overt requirement to obtain information. The Brownfields Act established that the ASTM E1527-05 standard practice was consistent with the AAI process. ASTM’s 2013 modifications to the E1527 standard, and ASTM standard practice E2247-16 (“Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property”), were also deemed by EPA to be consistent with the AAI process. In November 2021, ASTM approved a new version of ASTM E1527, ASTM E1527-21. EPA issued a rule on March 14, 2022 (87 Fed. Reg. 14174), adopting ASTM E1527-21, and the rule was set to become final on May 13, 2022, if no adverse comments were received by April 13, 2022. Because EPA received numerous adverse comments on the new standard, it withdrew the final rule on May 2, 2022 (87 Fed. Reg. 25572). EPA published a Final Rule for Standards and Practices for All Appropriate Inquiries on December 15, 2022 (87 Fed. Reg. 76578) which became effective on February 13, 2023. In the Final Rule, EPA again accepted ASTM E1527-21 as being compliant with the AAI process. Additionally, the Final Rule provides for continued use of the prior ASTM E1527-13 standard, but only until February 13, 2024. In the Final Rule, EPA also notes that while the ASTM E1527-21 standard may be compliant with the AAI process, it is not an EPA regulation and its use is not required for compliance with the AAI Rule.

Consequently, each iteration of rulemaking and standard development re-defined the process of conducting “all appropriate inquiry” for the period until the next new rule or standard was adopted. Prior to 1986, there was no defined process. From 1986 until 1993, the process was haphazard and based on what consultants thought the process should be. From 1993 until 2006, the various versions of the ASTM standards were predominant. Beginning in 2006, the EPA AAI rule defines the processes for providing “all appropriate inquiry.”

The intent of the AAI process is to obtain sufficient information about the history of the property being acquired to provide a reasonable understanding of whether it is or may have been contaminated by past activities. The general course of inquiry includes: (a) interviews of past and present owners and occupants of the property; (b) review of historical

sources of information such as chain of title documents, aerial photographs, historic published maps, and other land use records; (c) search for recorded environmental cleanup liens or activity and use limitations related to environmental conditions; (d) review of federal, state, and local government records; (e) visual inspection of the property by an appropriately trained professional; (f) specialized knowledge or experience of the purchaser; (g) relationship of the purchase price to the value of the property if the property were not contaminated; (h) commonly known or reasonably ascertainable information about the property; and (i) the degree of obviousness of the presence or likely presence of contamination.

The Act also provides additional deference for cleanups conducted under a state program by precluding in most circumstances subsequent federal enforcement under CERCLA sections 106(a) or 107(a). States are required to maintain and update at least annually a public record of sites in order for sites cleaned up under a state program to be eligible for funding or for the bar on enforcement.

5-3.02(d)(2) State Law

Virginia enacted the Brownfields Restoration and Land Renewal Act (2002), Va. Code §§ 10.1-1230 through 10.1-1237, primarily to implement the federal Act. The law regarding the state's voluntary remediation program is also set forth within this Act; see section [5-3.02\(e\)](#).

Virginia's definition of brownfields and its limitations on liability are very similar to those in the federal Act. Consistent with the federal Act's proscriptions, the DEQ Director is authorized to limit the liability of lenders, innocent purchasers or landowners, *de minimis* contributors, or others who have grounds to claim limited responsibility for containment or cleanup that may be required under the state's environmental laws.

The Virginia Attorney General opined that a locality's purchase of contaminated property through a delinquent tax sale would be an involuntary acquisition such that the liability protection as an innocent landowner provided by Va. Code § 10.1-1432(C)(v)(b) would apply. 2004 Op. Va. Att'y Gen. 29. The innocent landowner protection in this circumstance should be equally applicable under federal law as the Attorney General relied on EPA guidelines to reach his state law conclusion.

5-3.02(e) Virginia's Voluntary Remediation Program

The voluntary remediation section of the state Brownfields and Land Renewal Act, Va. Code § 10.1-1232, allows persons who own, operate, have a security interest in, or enter into a contract for the purchase of, contaminated property to clean up any hazardous substances, hazardous wastes, solid wastes, or petroleum products deposited or released upon their property and receive limited immunity from enforcement actions upon completion of the remediation. The voluntary remediation program applies only in those cases where no federal or state agency or court has taken jurisdiction or required a cleanup. Va. Code § 10.1-1232(A) and 9 VAC 20-160-30. This Virginia enactment was prompted by Congress's passage of the Brownfields Revitalization and Environmental Restoration Act of 2001, 42 U.S.C. § 9628(b)(1), which created a safe harbor from federal Superfund enforcement for sites being cleaned up under conforming state response programs.²¹ Because participation

²¹ In addition to this provision, the statute also created safe harbors for innocent landowners, prospective purchasers, and neighboring property owners, including the standard for conducting "all appropriate inquiry" of site conditions that is a precondition to acquiring such safe harbor protections. See P.L. 107-118, 115 Stat. 2356 et seq. The details of the EPA's "all appropriate inquiry" rule are discussed above.

The safe harbor from EPA action is not absolute. EPA may take enforcement action, despite the fact that the site is participating in, or has successfully completed, the VRP process where: (i) DEQ

in the program is at the discretion of the applicant, once entered in the program, there is no compulsion to complete the program and a participant may elect to drop out at any time. If the participant drops out of the program, he or she will not have the limited liability protections available.

Each participant in the Voluntary Remediation Program must submit to DEQ a Voluntary Remediation Report consisting of a site characterization, a risk assessment including an assessment of risk to surrounding properties (as appropriate), a remedial action work plan, a demonstration of completion, and documentation of public notice provided in accordance with 9 VAC 20-160-120. Each component of the Voluntary Remediation Report must satisfy the requirements of 9 VAC 20-160-70. Specifically, for the risk assessment, proposed remediation levels must be consistent with site-specific risk-based remediation standards established by DEQ in cooperation with the participant. Va. Code § 10.1-1232(A)(1); 9 VAC 20-160-90. Such standards must take into account human health and environmental concerns, considering current and future use scenarios for the property. 9 VAC 20-160-90. Remediation levels may be derived from the three-tiered approach provided in 9 VAC 20-160-90. All investigation testing must be performed in accordance with "Test Methods for Evaluating Solid Waste," USEPA SW-846, revised April 1998, or other methods approved by DEQ. 9 VAC 20-160-70.

Upon completion of remediation, the participant must submit to DEQ as part of its Voluntary Remediation Report a detailed summary of the performance of the remediation implemented at the site, the total cost of the remediation, and sampling results demonstrating that the established site-specific remedial objectives were achieved, or that other criteria for completion of remediation were satisfied. 9 VAC 20-160-70. In addition, the demonstration of completion must certify compliance with any applicable regulations pertaining to activities performed at the site. DEQ must then issue the participant a certification of satisfactory completion of remediation at the proper conclusion of the cleanup. 9 VAC 20-160-110.

The issuance of a certification of completion by DEQ provides the participant immunity to future enforcement actions under the Virginia Waste Management Act, the State Water Control Law, the State Air Pollution Control Act, or other applicable law. Va. Code § 10.1-1232; 9 VAC 20-160-110. Immunity is limited to site conditions at the time of issuance as those conditions are described in the Voluntary Remediation Report. Immunity also is conditioned upon satisfactory performance by the participant of all obligations required by DEQ under the program and upon the veracity, accuracy, and completeness of the information submitted by the participant. 9 VAC 20-160-110. Furthermore, the certificate may be revoked by DEQ at any time if conditions at the site, unknown at the time of issuance of the certificate, pose a risk to human health or the environment or if the certificate was based on information that was false, inaccurate, or misleading.

5-3.02(f) Uniform Environmental Covenants Act

Virginia Code §§ 10.1-1238 to 10.1-1250 establish the Environmental Covenants Act. The Act's purpose is to provide clear rules for perpetual real estate interests—an environmental covenant—to regulate the use of brownfield land when real estate is transferred from one owner to another.

asks for EPA assistance; (ii) EPA determines that contamination has migrated across state lines; (iii) despite responses already taken, EPA determines that the release presents "an imminent and substantial endangerment to public health or welfare or the environment" and additional response actions are likely needed; and (iv) EPA determines, after consulting DEQ, that information not known to DEQ shows that site contamination or conditions present a threat requiring further response action. See 42 U.S.C. § 9628(b)(1)(B).

5-3.02(g) Spills

CERCLA, as amended by SARA, 42 U.S.C. § 9601 et seq., regulates spills of hazardous substances. CERCLA does not regulate releases of petroleum, petroleum products, natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel. CERCLA requires that any release of a hazardous substance in quantities equal to or greater than the reportable quantity (other than a federally permitted release) be reported *immediately* to the National Response Center. 42 U.S.C. § 9603(a).²²

The Emergency Planning and Community Right-To-Know Act of 1986 discussed below requires the owner or operator of a facility that either produces, uses or stores a hazardous substance to immediately notify the State Emergency Response Commission²³ and the local emergency planning committee if there is a release of a listed hazardous substance (other than a federally permitted release) that exceeds the reportable quantity established for that substance and results in exposure to persons off-site. 42 U.S.C. § 11004; 40 C.F.R. § 355.40(a). Substances subject to this notification requirement include those substances on EPA's list of extremely hazardous substances as well as those hazardous substances subject to the emergency notification requirements under CERCLA. The notification must include information necessary to assess the health risks associated with the release and to respond to the release. After the initial notification, a follow-up notification must update the information provided in the initial notice and include additional information relating to response actions, health risks, and medical advice, where appropriate.

5-3.03 Title III of the Superfund Amendments and Reauthorization Act: The Emergency Planning and Community Right-to-Know Act**5-3.03(a) Federal Law**

Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA Title III) is also known as the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA). This statute was expressly designed to help protect localities and "first responders," like firemen, from hazardous substances present at industrial facilities and other sites within the community. States and localities are required to develop chemical emergency preparedness programs, and receive and disseminate information on hazardous substances present at facilities within local communities.

EPCRA has four major components: (1) emergency planning (§§ 301-303); (2) emergency release notification (§ 304); (3) community right-to-know reporting (§§ 311-312); and (4) toxic chemical release inventory reporting (§ 313). Each component has its own facility and chemical substance reporting requirements. The information submitted by facilities allows states and localities to become aware of and prepare to deal with these chemical hazards.

5-3.03(b) Threshold Planning Quantities

EPA has promulgated a list of extremely hazardous substances and the "threshold planning quantities" for these substances. 40 C.F.R. Part 355. The latter are quantities which, when exceeded at a facility, trigger EPCRA's emergency planning requirements.

5-3.03(c) Emergency Planning Framework

EPCRA directs the Governor to appoint a State Emergency Response Commission. 42 U.S.C. § 11001. In Virginia, the Commission is known as the Virginia Department of Emergency Management (VDEM) (formerly the Virginia Emergency Response Council). Va. Code § 44-146.18. VDEM supervises and coordinates local emergency planning activities and

²² Information about reporting a hazardous substance release is available [here](#) at EPA's website.

²³ In Virginia, the notification must be given to the Virginia Department of Emergency Management (VDEM) at 1-800-468-8892.

establishes procedures for receiving and processing requests from the public for information about the existence and location of hazardous chemicals and extremely hazardous substances. Va. Code § 44-146.34 et seq. VDEM has designated emergency planning districts within the state. *Id.*

VDEM has appointed members to a local emergency planning committee (LEPC) for each emergency planning district. *Id.* Owners and operators of facilities subject to the emergency planning requirements must designate a facility emergency coordinator who will participate in the local emergency planning process. 42 U.S.C. § 11003(d).

5-3.03(d) Notice Required of Covered Facilities

The owner or operator of a covered facility is required to notify VDEM of its covered status. VDEM must in turn notify the EPA administrator of all covered facilities within Virginia. 42 U.S.C. § 11002. In addition, if a facility ever becomes a covered facility, the owner or operator must notify VDEM within sixty days after becoming subject to the emergency planning requirements.

5-3.03(e) Emergency Plans

EPCRA Section 303 obligates each LEPC to prepare an emergency plan for responding to releases of hazardous substances within its boundaries. Owners and operators of covered facilities must notify the LEPC of any “relevant changes” occurring at these facilities as changes occur and, upon request, must provide information to the LEPC necessary for developing and implementing the emergency plan. 42 U.S.C. § 11003.

5-3.03(f) Emergency Release Notification Requirements

EPCRA Section 304 requires immediate notification to the applicable LEPC and VDEM of certain releases of extremely hazardous substances and other hazardous substances requiring notice under CERCLA Section 103(a). The notice must include the information necessary to assess the health risks associated with the release and to respond to the release. After the initial notice, a written follow-up emergency notice is required as soon as practicable. 42 U.S.C. § 11004. See [Appendix A](#), outlining EPCRA Reporting Requirements.

5-3.03(g) Additional Reporting Requirements

5-3.03(g)(1) SDS

In addition to the emergency planning and release notification requirements, EPCRA requires any owner or operator of a facility that is required by the Occupational Safety and Health Act (OSHA) to prepare or have available Safety Data Sheets (SDSs, formerly known as Material Safety Data Sheets or MSDSs) (informational forms describing the hazards presented by chemicals) for the chemicals used or produced at the facility, to submit these SDSs, or a list of chemicals covered by the SDSs, to VDEM, the applicable LEPC, and the local fire department. Within three months after commencement of use or production of another chemical, the facility must send the SDS to these agencies. 42 U.S.C. § 11021 (§ 311).

5-3.03(g)(2) Emergency and Hazardous Chemical Inventory Forms

Facilities required by OSHA to have SDSs must also prepare and submit an Emergency and Hazardous Chemical Inventory Form to the same entities described above on an annual basis. 42 U.S.C. § 11022 (§ 312). This form describes “Tier I” information, including the types, amounts, and location of chemicals at the facility. The reports must be submitted to the VDEM, LEPC, and the local fire department by March 1 of each year. More specific “Tier II” information, showing the types, amounts, location, manner of storage, and whether the facility elects to have location information withheld from the public, may also be required.

5-3.03(g)(3) Toxic Chemical Release Forms

Facilities in Standard Industrial Classification (SIC) Codes 20-39 (the “manufacturing sector”), with ten or more full-time employees, which manufacture, process, or otherwise

use certain listed toxic chemicals in excess of the threshold amounts established for reporting must submit a Toxic Chemical Release Inventory Reporting Form on each toxic chemical subject to the requirements. 42 U.S.C. § 11023 (§ 313). The form must be submitted by July 1 of each year to EPA and the VDEM. *Id.*

5-3.03(h) Federal Compliance With EPCRA

On August 3, 1993, [Executive Order 12856](#) was issued, requiring federal facilities that manufacture, process, or otherwise use listed toxic chemicals to comply with EPCRA reporting requirements. LEPCs can now obtain information from federal facilities operating within their jurisdictions. The Order also called for changes in the procurement of hazardous substances and requires federal facilities to work with neighboring communities to develop local emergency response plans.

5-4 AIR POLLUTION REGULATION

5-4.01 Administration

5-4.01(a) Federal Law

The Clean Air Act (CAA or Act), 42 U.S.C. § 7401 et seq., regulates emissions of airborne pollutants from stationary and mobile sources. EPA must promulgate national ambient air quality standards (NAAQS) to protect public health and welfare. Each state must develop and administer an EPA-approved state implementation plan (SIP) that consists of numerous regulations designed to attain and maintain compliance with the NAAQS. EPA regulations and guidance establish the minimum requirements that SIPs must contain to satisfy the states' CAA obligations. States may always establish more stringent requirements than the Act requires. If EPA determines that a state has failed to submit an adequate SIP, then EPA must promulgate a Federal Implementation Plan (FIP) within two years of EPA's determination unless the state corrects the deficiency before a FIP is issued. In *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 134 S. Ct. 1584 (2014), the EPA had declared certain states' SIPs to be inadequate and imposed a FIP on the states with specified emission budgets. The Court held that the EPA was not required to give the states an opportunity to meet the emissions budgets with their own plans. Information regarding Virginia's SIP is available [here](#).

The primary goal of the CAA is compliance with NAAQS throughout the United States. These standards express the pollutant concentrations that EPA has determined "may reasonably be anticipated to endanger public health or welfare." "Primary" ambient air quality standards are set at levels, including an adequate margin for safety, that will protect public health. "Secondary" ambient air quality standards are set at levels that will protect the public welfare from "any known or anticipated adverse effects associated with the presence of such air pollutant."

NAAQSs have been established for six pollutants, which are referred to as the "criteria" pollutants: (1) particulate matter (e.g., soot, diesel exhaust); (2) sulfur oxides; (3) carbon monoxide; (4) ozone²⁴; (5) nitrogen dioxide; and (6) lead. In addition, six greenhouse gases (GHG), including carbon dioxide, are regulated under the Act, following a holding by the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438 (2007), that GHGs fall within the Act's general definition of an air "pollutant" and a finding

²⁴ Ozone is a "triatomic" form of oxygen, i.e., O₃, which is a major component of smog. It is formed through interactions of volatile organic compounds, nitrogen oxides, and certain weather conditions. At ground levels it is a serious irritant. In the upper atmosphere, ozone forms naturally and has beneficial effects.

by EPA that GHGs endanger the public health and the public welfare.²⁵ 74 Fed. Reg. 66496 (Dec. 15, 2009).

The CAA created the concept of air quality control regions (AQCRs). Virginia's seven AQCRs are classified as "attainment," "nonattainment," or "unclassifiable" for each criteria pollutant. EPA has the responsibility for making all final classifications. EPA is constantly revising ambient air standards for ozone and large and small particulate matter (PM). The status of the areas may be monitored on the [Current Air Quality and Forecast](#) page of DEQ's website. These efforts have resulted in a great deal of litigation and further administrative proceedings.²⁶

There are two important preconstruction permitting programs applicable to new major sources and to major modifications or existing sources. The first—called the Prevention of Significant Deterioration (PSD) program—is designed to preserve clean air in areas that meet applicable NAAQS standards (called "attainment areas"). Any proposed major new or modified source in such an area must obtain a permit requiring installation of best available control technology (BACT) for the relevant pollutants and comply with permit limitations that will ensure that its emissions will not significantly degrade existing air quality or cause a violation of the NAAQS for any criteria pollutant. 42 U.S.C. §§ 7470 to 7479.

In *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 134 S. Ct. 2427 (2014), the Court held that parts of EPA's attempt to regulate GHGs were not authorized by the Clean Air Act. EPA had tried to require PSD permits and Title V permits (discussed in section [5-4.02\(b\)](#)) for all sources that emitted quantities of GHGs in excess of "tailored" limits different from limits specified in the Act. This would have radically expanded the number of sources subject to such permitting. The Court did, however, allow EPA to compel existing PSD-permitted sources to comply with BACT emission standards for GHGs. The Attorney General has opined that the State Air Pollution Control Board is legally authorized to regulate GHG emissions, including establishing a statewide cap on GHG emissions for all new and existing fossil fuel electric generating plants. 2017 Op. Va. Att'y Gen. 189.

The second permit program is also pollutant-specific and applies in so-called "nonattainment" areas, that is, areas where one or more NAAQS is not met. A permit is required before construction can commence on any new or modified major stationary

²⁵ EPA has also proposed a rule, called the "[Clean Power Plan](#)" (CPP), designed to cut carbon dioxide emissions from existing coal plants by as much as 30 percent compared to 2005 levels by 2030. The Supreme Court stayed implementation of the plan until disposition of the challenges to the legality of the rule. On March 28, 2017, President Donald Trump signed an Executive Order on Energy Independence (Exec. Order No. 13,783, 82 Fed. Reg. 16093) calling for a review of the Clean Power Plan. The CPP was repealed in June 2019 and replaced by the [Affordable Clean Energy](#) (ACE) rule. 84 Fed. Reg. 32520. ACE regulates sources of CO₂ emissions directly by requiring efficiency improvements at coal-fired plants. On January 19, 2021, the D.C. Circuit vacated the ACE rule and remanded to EPA. *Am. Lung Ass'n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021). Thereafter, the Supreme Court held that section 111(d) did not authorize EPA to cap carbon dioxide emissions from existing coal plants. *West Virginia v. EPA*, 597 U.S. 697, 142 S. Ct. 2587 (2022). As such, there is currently no CAA section 111(d) regulation for GHG emissions from electric generating units.

²⁶ The D.C. Circuit Court of Appeals vacated the revised PM-10 standard, holding that EPA's justification for the use of PM-10 as an indicator for coarse particles was arbitrary. *Am. Trucking Ass'n v. EPA*, 175 F.3d 1027, 1054-55 (D.C. Cir. 1999). Following the court's rejection of the 1997 revisions to the PM-10 standard, the Agency reinstituted its original PM-10 NAAQS promulgated in 1987. 52 Fed. Reg. 24634 (July 1, 1987). In 2001, the Supreme Court overturned other portions of that D.C. Circuit decision which had held that EPA's revisions of the NAAQSs for ozone and particulate matter constituted an unconstitutional delegation of legislative authority. At the same time, in a decision that had major implications for the future of regulation under the Clean Air Act, the high Court held that the Act prohibited EPA from considering costs of compliance when setting NAAQSs. *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 121 S. Ct. 903 (2001).

source. The source must conduct a comprehensive analysis of its location and project alternatives and install lowest achievable emission rate (LAER) control technology. In addition, the source must procure emission reductions from existing sources in the area to offset its emissions. 42 U.S.C. §§ 7501, 7503.

5-4.01(b) State Law

Virginia's Air Pollution control laws are set forth within Va. Code § 10.1-1300 et seq. These statutes provide authority for Virginia's implementation of the federal Clean Air Act. Prior to 2022, the State Air Pollution Control Board (SAPCB or Board) was authorized to (i) promulgate rules and regulations abating, controlling, and prohibiting air pollution; (ii) grant local variances; and (iii) institute enforcement suits for violations of its rules, regulations, and orders. In 2022, much of this authority was transferred from the citizen board to DEQ. 2022 Va. Acts ch. 356; Va. Code § 10.1-1307. The Board is still authorized to promulgate regulations, but DEQ is responsible for permitting decisions and may grant local variances. The Board may only offer comments to DEQ's proposed decisions regarding controversial permit applications.²⁷

The Clean Energy and Community Flood Preparedness Act of 2020 requires DEQ to participate in a cap-and-trade action program to reduce carbon emissions from electric power generators. Va. Code § 10.1-1329 et seq.

On January 1, 2021, Virginia joined ten mid-Atlantic and New England states in auctioning emissions allowances through the Regional Greenhouse Gas Initiative. DEQ, jointly with several other agencies, must prepare an annual report regarding the yearly reduction in emissions. Va. Code § 10.1-1330(D). The statute provides that revenue generated from the sale of the allowances will be distributed as follows: 45 percent will be used to assist localities affected by flooding; 50 percent to support low-income energy efficiency programs; and 5 percent to cover administrative expenses. Va. Code § 10.1-1330(C).

On January 15, 2022, Executive Order 9 (titled "Protecting Ratepayers from the Rising Cost of Living Due to the Regional Greenhouse Gas Initiative") was issued, directing a repeal of the CO2 Budget Trading Program. On July 31, 2023, a final regulation was published that repealed the CO2 Budget Trading Program regulations (9 VAC 5-140). The CO2 Budget Trading Program repeal regulation became effective on December 31, 2023. The repealing regulation included a transition provision (9 VAC 5-140-6445), directing each affected facility to place the allowances needed to meet its remaining compliance obligation into its compliance account as soon as practicable but no later than March 1, 2024, so that the allowances can be deducted from the account to meet the full control period obligation. The repeal was immediately challenged by environmental groups in Fairfax County Circuit Court; the lawsuit was subsequently transferred to Floyd County Circuit Court and remains pending as of March 2024. A key question in the litigation is whether the Board and DEQ had authority to withdraw from the CO2 Budget Trading Program by regulation.

Beginning in 2022, the Department of Energy must conduct and publish "a comprehensive statewide baseline and projection inventory of all greenhouse gas (GHG) emissions" and update the inventory every four years thereafter. Va. Code § 10.1-1307.04. The report must show changes in GHG emissions relative to year 2010 GHG emissions. *Id.*

²⁷ A "controversial" permit is a permitting action that requires a public hearing for: (1) the construction of a major source or major modification at an existing source; (2) a new fossil fuel generating facility with a capacity greater than 499 megawatts; (3) a new fossil fuel-fired compressor station used to transport natural gas; or (4) major modifications to a fossil fuel-fired compressor station used to transport natural gas; or public hearings on permitting actions granted by DEQ. Va. Code § 10.1-1184.1(A).

5-4.02 Permits

5-4.02(a) Construction and Modification Permits

The PSD permit program applies to the construction or major modification of major stationary sources in attainment and unclassifiable areas. A stationary source is "major" if it is in one of the twenty-eight source categories listed in the Act and has the potential to emit 100 tons per year (tpy) or more of a regulated pollutant. A source in a non-listed source category is "major" if its potential emissions are 250 tpy or greater.

A "major modification" of an existing major stationary source consists of either a physical change or a change in the method of operation that results in a "significant" emissions increase at the source. For a change to constitute a "major modification," the proposed "project" (physical or operational change) must cause a significant emissions increase in any regulated air pollutant. 9 VAC 5-80-1110.²⁸ Certain changes are exempt from PSD review, including routine maintenance, repair, and replacement, an increase in production rate, an increase in operating hours, and the use of certain alternative fuels. *Id.* (definition of "modification"). A modified permit is not required if the facility demonstrates that proposed changes will improve energy efficiency and reduce pollution. Va. Code § 10.1-1322.

The nonattainment new source review (NSR) permit program applies to major stationary sources and major modifications that locate in or affect nonattainment areas. Virginia's nonattainment NSR rules for major sources are in 9 VAC 5-80-2000 et seq. (Article 9 of Virginia's air permitting regulations).

Major source nonattainment permitting involves a control technology review for every nonattainment pollutant, and the source must install LAER technology for each nonattainment pollutant. LAER is defined as the lowest emission limitation that has been achieved by any source of the same category or required by any state's SIP for that type of source. In addition, the source must obtain emission reduction credits of the nonattainment pollutant from other sources to "offset" the proposed increase from the applicant's source or modification. The quantity of offsets must generally be greater than the amounts of the applicant's emissions, so that the state can demonstrate reasonable further progress toward achievement of the NAAQS.

In addition to the major new source review programs, Virginia administers a separate permit program for minor sources which it calls its "minor NSR program." Virginia completely revamped its minor NSR program in 2002, adopting regulations commonly referred to as "Article 6." 9 VAC 5-80-1100 et seq.²⁹ The earlier rule looked at uncontrolled emissions from an individual emissions unit at a source. The new rule looks at the source's unrestricted potential to emit. Because the exemption levels in the new rule are so low, almost every new source or modification is large enough to require a minor NSR permit.

5-4.02(b) Operating Permits

Sources constructed before March 17, 1972, and not modified thereafter, were once grandfathered from permit requirements and called "existing sources." However, Title V of

²⁸ In 2012, regulations were adopted that converted the permit program from a permit applicability approach for modifications that looks at the net emissions increase due to or directly resulting from the physical or operational changes from all affected units to an approach that only looks at emissions increases from new and modified emissions units. Instead of applicability based on the net emissions increase from all the source-wide emissions changes due to or directly resulting from the physical or operational change, the program bases permit applicability on the emissions increases from only those emissions units that undergo a physical or operational change in the project. See 29:3 Va. R. Oct. 8, 2012.

²⁹ The rules are organized as "Article 6" within the State's air permitting regulations at 9 VAC 5, Chapter 80.

the 1990 Clean Air Amendments requires operating permits for all major sources, so each such “existing” major source (generally with annual emissions of any pollutant greater than 100 tons per year) must have an operating permit that lists all federally enforceable requirements (emission limits, monitoring, recordkeeping etc.) applicable to it. EPA regulations specify the details that each federal operating permit must contain. 40 C.F.R. Part 70. The permittee must annually certify the status of the source’s compliance with each applicable requirement contained in that permit. Virginia has adopted regulations to carry out this program. See 9 VAC 5-80-50 et seq. for the federal operating permits program; see *also* 9 VAC 5-40-5800 et seq. (municipal solid waste federal permit). The federal operating permit for electric utility steam generating units incorporates not only all of the requirements addressed under Title V of the 1990 Amendments to the CAA but also all requirements for an acid rain permit under Title IV of those Amendments. 9 VAC 5-80-360 et seq.

A number of states, including Virginia, also have developed state operating permit programs, commonly called FESOPs (federally enforceable state operating permits). See 9 VAC 5-80-800 et seq. A state operating permit program provides an administrative mechanism to impose a source-specific requirement in the absence of a regulation of general applicability and/or to address a special compliance problem arising from the emissions of a particular source. Consequently, the scope and contents of a state operating permit are usually much less than the detailed criteria that must be addressed by a federal “Title V” permit. For example, by accepting a cap on its emissions with a state operating permit in order to attain minor source status, a source that would otherwise be a major source can avoid being subject to the federal operating permit program. Such capped sources are referred to as “synthetic minor” sources. State operating permits also are used to implement emissions trading requirements, to combine multiple permits for a source into a single permit, and to establish a source-specific emission standard, or other requirements necessary to implement federal or state air pollution control law.

5-4.03 Nonattainment Areas

Most areas in Virginia have achieved attainment except for Northern Virginia. The status of Virginia regions may be monitored on the DEQ website [here](#). Several of these areas participate in an EPA program, [Ozone Advance](#), which encourages areas to establish a voluntary Action Plan for the reduction of ozone precursor emissions to the atmosphere. These Action Plans have two main purposes. First, the programs within the plans help areas to maintain healthy air quality. Second, the plans may act as guides to help these areas make further improvements in air quality and get a head start on complying with any future NAAQS.

Ozone is harmful to human health, and its precursors—volatile organic compounds (VOCs) and oxides of nitrogen (NO_x)—are regulated to minimize ozone formation at or near ground level. PM-2.5 (small particles with a diameter less than or equal to 2.5 microns) also causes significant respiratory health effects. Within nonattainment areas, most sources of these pollutants cannot be constructed or modified unless the total of each nonattainment pollutant emitted in the area is reduced. Any new or modified source must control these pollutants at the LAER, and also must “offset” its emissions of each pollutant by procuring the reduction of a greater quantity of emissions from other sources in the area. Such offsets are usually obtained either by paying other sources (who would not otherwise be required to reduce applicable emissions) to give up the right to emit those pollutants or by paying the costs to install pollution control equipment on those other sources to reduce their relevant emissions.

Virginia’s SIP must mandate that all existing “major” sources of a nonattainment pollutant install reasonably available control technology (RACT) for that pollutant. In the context of ozone nonattainment regulation, the emissions level that constitutes a “major” source is a function of the nonattainment classification of the subject area (marginal,

moderate, serious, severe, or extreme). See, e.g., 42 U.S.C. § 7511a(b)(2). In addition, the Clean Air Act also requires that stationary sources emitting sufficient amounts of VOCs or NO_x in severe ozone nonattainment areas must pay a substantial fee to DEQ if the area fails to attain the ambient air quality standard for ozone by the applicable attainment date established pursuant to the Clean Air Act. 42 U.S.C. § 7511d; see also Va. Code § 10.1-1316.1.

5-4.04 Good Neighbor Provision

States downwind from pollution emitting facilities located in other states face the problem of nonattainment status, due to emissions over which they have no control authority. The CAA's "Good Neighbor Provision" requires a state's SIP to prohibit in-state sources from emitting any air pollutant in amounts which will contribute significantly to downwind states' nonattainment or interfere with maintenance of any EPA-promulgated NAAQS. 42 U.S.C. § 7410(a)(2)(D)(i). In practice, this is an extremely difficult determination as the nonattainment of downwind states results from the collective and interwoven contributions of upwind states. Moreover, as the pollutants are transported, they change in nature (e.g., from NO_x and sulfur dioxide (SO₂) to ozone and particulate matter).

To implement the Good Neighbor Provision, the EPA adopted what is commonly known as the "Transport Rule" or the Cross-State Air Pollution Rule (CSAPR), which curtails NO_x and SO₂ emissions of twenty-eight upwind states to achieve downwind attainment of three different NAAQS. Using a two-step approach, the EPA first exempts from regulation any upwind state that contributes less than one percent of the three NAAQS to any downwind state. The remaining states are then subject to a "control" analysis. Determining that upwind states' emission reductions based on proportionality of contribution to downwind states' pollution was impractical to implement, the EPA required upwind states to reduce their emissions based on a cost-effectiveness approach to pollution controls, i.e., it determined the cost threshold of pollution controls that maximized the effectiveness of those controls. EPA then gave upwind states an emissions "budget" that represented the quantity of pollution an upwind state would produce in a given year if its in-state sources implemented all pollution controls available at the chosen cost thresholds. In other words, the upwind states must implement all controls that the EPA determines to be cost effective until the upwind states' contribution to all downwind states' nonattainment is eliminated. The Supreme Court upheld the EPA's implementation of the Good Neighbor Provision as an agency's reasonable interpretation of ambiguous statutory language under the deference standard of *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984). *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 134 S. Ct. 1584 (2014).

EPA issued an update to the Transport Rule in 2016 by establishing Federal Implementation Plans (FIPs) for twenty-two states and requiring ozone season NO_x reductions directly from fossil fuel fired Electric Generating Units. The rule established more stringent emission budgets for the states subject to the rule. It used the same regulatory framework as the Transport Rule. The D.C. Circuit remanded CSAPR to EPA for failure to set a deadline for fully resolving the Good Neighbor obligations of the affected upwind states. *Wisconsin v. EPA*, 938 F.3d 303 (D.C. Cir. 2019). In response to the remand, EPA finalized the cross-state air pollution rule update on April 30, 2021. 86 Fed. Reg. 23054 (Apr. 30, 2021). The rule makes a finding that twelve states, including Virginia, subject to the FIPs established under the CSAPR Update Rule require additional Ozone season NO_x reductions, while EPA found that for nine states the existing CSAPR Update FIPs fully address the interstate transport obligations. Thus, power plants in the twelve states are required to reduce emissions by optimization of existing, already-installed selective catalytic reduction and selective non-catalytic reduction controls beginning in the 2021 ozone season, and installation or upgrade of state-of-the-art NO_x combustion controls beginning in the 2022 ozone season. EPA also adjusted the emission budgets for the twelve states for each ozone

season through 2024. After the 2024 ozone season, no further adjustments would be required.

5-4.05 Hazardous Air Pollutants

Hazardous air pollutants (HAPs) were first regulated by Section 112 of the Clean Air Act of 1970, and Virginia obtained EPA approval to carry out its part of that national regulatory program. 9 VAC 5-60-65. The EPA program established National Emissions Standards for Hazardous Air Pollutants (NESHAPs), but this program proved to be ineffective. In Title III of the 1990 Amendments to the Act, Congress required EPA to establish a program to regulate 188 listed HAPs. Under this program, EPA adopted rules, including emission and work practice standards, applicable to many different categories of stationary sources. These source-category-specific, pollutant-specific standards are generally referred to as Maximum Achievable Control Technology (MACT) requirements. Subject to EPA's approval, a state is authorized to implement the program. Virginia's State Air Pollution Control Board has been authorized to administer the "Title III" program in Virginia. 9 VAC 5-60-95.

EPA set mercury and air toxics (MATS) emission limits for coal and oil-fired electric utility units. Compliance costs were estimated to be \$9.6 billion, while corresponding health benefits would be as little as \$4 to \$6 million dollars per year. EPA later estimated that indirect benefits of \$37 to \$90 billion would accrue but concluded that, in any event, it did not have to consider costs in determining whether its regulation was "appropriate and necessary." In *Michigan v. EPA*, 576 U.S. 743, 135 S. Ct. 2699 (2015), the Supreme Court held that it was unreasonable for EPA to construe "appropriate and necessary" as not requiring a cost-benefit analysis, and reversed and remanded the case.

EPA has promulgated its MACT requirements for industrial, commercial, and institutional boilers. 69 Fed. Reg. 55218 (Sept. 13, 2004) (codified at 40 C.F.R. Part 63, subpart DDDDD). A hierarchy of MACT emission limits is based upon (1) whether the boiler is new/reconstructed or existing, whether the boiler is "large" (greater than ten MMBtu/hr input) or "small," and (3) whether the boiler burns solid fuel, liquid fuel, or gaseous fuel. New/reconstructed boilers burning solid fuel must comply with emission limits for several pollutants including particulate matter (or alternatively "total selected metals"), hydrogen chloride, mercury, and carbon monoxide. Similarly, new/reconstructed boilers burning liquid fuel will need to satisfy emission limits for particulate matter, hydrogen chloride, and carbon monoxide. By contrast, the only existing boilers required to meet MACT emission limits are those large units burning solid fuel. Although the same pollutants are regulated for large existing boilers as for large, new/reconstructed boilers, the emission limits for existing units are less stringent. The compliance deadline for the "Boiler MACT" was September 17, 2007.

However, in June 2007 the D.C. Circuit Court vacated the Boiler MACT. At issue were two MACT regulations—one for industrial/commercial/institutional boilers and one for solid waste incineration units. The court first found that EPA's definition of "solid waste unit" conflicted with the plain meaning of Section 129 of the Act, and it vacated that MACT regulation. Then, because the universe of boilers subject to the Boiler MACT would be much smaller once EPA properly defined the term "solid waste incineration unit," the court found that it had no recourse but to also vacate the boiler rule. *Nat. Res. Def. Council v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007). Although shortly thereafter EPA had advised the states that federal guidance on how to implement MACT for industrial/commercial/institutional boilers would be forthcoming, the issuance of the standards was delayed for years. See *Sierra Club v. Jackson*, 41 ELR 20067 (D.D.C. Jan. 20, 2011). Although some states elected to begin making case-by-case MACT determinations for affected boilers under authority of the so-called "hammer provision" of CAA Section 112(j), Virginia elected to take no action in the absence of EPA direction. [Standards](#) were finally issued in 2011.

5-4.06 Local Issues**5-4.06(a) Local Government Air Programs**

Virginia Code § 10.1-1321 and 9 VAC 5-170-150 authorize local governments to adopt ordinances relating to air pollution. The SAPCB must approve all ordinances, and a local government may not regulate air pollution sources regulated by the state. Any such ordinance must provide for (i) requirements at least as strict as the state regulations; (ii) provision of local resources for enforcement of the local ordinance requirements; and (iii) cooperation and exchange of information between the SAPCB and local government.

5-4.06(b) Local Government Participation

Even where no local air pollution ordinance exists, local governments have the opportunity to participate in many SAPCB decisions. Before the Board promulgates a regulation, grants a variance, or issues a permit for a new major source or a major modification of an existing source, the Board must notify any localities particularly affected and publish notice in a local paper. Va. Code § 10.1-1307.01. In promulgating regulations or approving variances, control programs, or permits, the SAPCB must consider:

1. The character and degree of injury to or interference with safety, health, or the reasonable use of property which is caused or threatened to be caused;
2. The social and economic value of the activity involved;
3. The suitability or unsuitability of such activity to the area in which it is located; and
4. The practicability, in both scientific and economic terms, of reducing or eliminating the emissions resulting from such activity.

Va. Code § 10.1-1307(E). The Fourth Circuit Court of Appeals has interpreted subsections 1 and 3 of this provision as a requirement to undertake an environmental justice analysis. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020). The regulations provide that permit applicants must comply with local zoning ordinances and regulations before receiving a permit. This provision gives local governments indirect influence over SAPCB permit decisions. 9 VAC 5-80-930; 5-80-1230; 5-80-1520; 5-80-1665; and 5-80-2150.

Once provided with notice by a permit applicant, the local government must inform DEQ in writing within forty-five days whether an application is consistent with all local land use ordinances. However, if DEQ fails to receive any government response within that time frame, local government input is waived. Va. Code § 10.1-1321.1.

5-4.06(c) Open Burning

SAPCB regulations 9 VAC 5-130-10 et seq. describe the types of open burning that are prohibited and those that are permissible. The regulations authorize local government regulation of open burning, and provide a model ordinance in 9 VAC 5-130-100. Any local ordinance must be approved by the Board.

5-4.06(d) Local Government-Owned Air Pollution Sources

The following local government-owned sources may have air pollutant emissions subject to regulation by either DEQ or EPA: municipal solid waste (MSW) landfills, electric generating units, boilers, combustion turbines, reciprocating internal combustion engines, off-road diesel generators, publicly owned treatment works, chlorine (or similar disinfectant) storage, gasoline dispensing, site remediation, metal fabrication and finishing, and sandblasting and painting of storage tanks. If any such operation is sufficiently large enough to be subject to emission standards under 9 VAC 5-40-50 and 5-40-60, or if a new

source/modification construction permit originally was required under 9 VAC 5-80, then DEQ, at its discretion, can request that such operations be registered with the state. 9 VAC 5-20-160(A). In addition, DEQ, at its discretion, may require any of these stationary sources to obtain a state operating permit. 9 VAC 5-80-800 et seq. EPA may also have regulatory and enforcement jurisdiction over such sources under the Clean Air Act.

5-4.06(e) Asbestos

The NESHAP regulations apply to asbestos and establish standards for certain uses and activities involving asbestos-containing materials (ACM), including surfacing of roadways, manufacturing, demolition and renovation of buildings, and disposal. 40 C.F.R. § 61.140. With respect to demolition and renovation, the regulations require that ACM, if present in certain amounts, be removed prior to these activities in ways that do not cause the emission of asbestos particles.

Virginia has adopted these federal asbestos regulations by reference. 9 VAC 5-60-60. The Virginia Asbestos NESHAP Act, Va. Code § 40.1-51.23 et seq., gives the Department of Labor and Industry concurrent enforcement authority for these regulations.

Asbestos is a particular problem in places where young people congregate, e.g., schools and day-care centers, because the effects of exposure are usually manifested many decades later. There are special ACM rules for these buildings. Va. Code §§ 2.2-1162 through 2.2-1167 and § 63.2-1811. Local building officials may not issue building permits for renovation or demolition until receipt of certification from the building owner or agent that an inspection has been performed by a licensed asbestos inspector. If ACM has been found, the building owner must certify that appropriate response actions will be undertaken. Buildings for which a building permit was issued after January 1, 1985 (the time from which asbestos was banned) are exempt from asbestos inspections prior to renovation or demolition. Va. Code § 36-99.7.

5-4.06(f) Alternative Fuel Vehicle Conversion Fund

The Alternative Fuel Vehicle Conversion Fund may be used to assist local governments with costs incurred in the conversion of fuel systems in public vehicles, including school buses, to alternative fuels use. Va. Code § 2.2-1176.1 et seq. The Virginia Electric Vehicle Grant Fund was established in 2021 to assist public schools in replacing diesel buses with electric buses and installing the related charging infrastructure. Va. Code § 10.1-1322.5.

5-4.06(g) Commercial Property Assessed Clean Energy Financing Program

Virginia Code § 15.2-958.3 allows localities to create loan programs and to place special assessments to finance renewable energy projects. In 2022, the program was renamed the Commercial Property Assessed Clean Energy (C-PACE) financing program. Va. Code § 15.2-958.3. Localities may authorize contracts to provide the loans or may opt into the statewide C-PACE program administered by a third party on behalf of the Department of Energy. Va. Code § 15.2-958.3(B) and (G). The statute describes eligible projects, including improvements to energy efficiency, water efficiency, renewable energy, resiliency, stormwater management, and electric vehicle infrastructure, that can be made to assessable commercial real estate. *Id.* Localities are authorized to delegate billing, collection, and enforcement to a third party. Va. Code § 15.2-958.3(C).

5-5 RENEWABLE ENERGY

In 2020, the General Assembly declared climate change “an urgent and pressing challenge for Virginia” requiring “[s]wift decarbonization and a transition to clean energy.” Va. Code § 45.2-1705 (previously § 67-100).³⁰ Toward that end, the legislature passed significant

³⁰ In 2021, Title 67 (Virginia Energy Plan) was reorganized. Most sections were moved to the newly created Title 45.2 (Mines, Minerals and Energy); some sections not appropriate for placement in Title 45.2 were moved to other titles of the Code.

measures impacting the energy sector, including the Virginia Clean Economy Act (VCEA), which sets a goal of achieving a net-zero carbon economy by 2045. Among many other provisions, the VCEA requires Dominion Energy Virginia (DEV) and Appalachian Power Company (APCo) to gradually retire all carbon-emitting electric generation units by 2045 and supply 100 percent of their power from renewable sources by 2045 and 2050, respectively. Va. Code § 56-585.5. As part of this transition, the VCEA requires APCo and DEV to petition the Virginia State Corporation Commission (SCC) for approval to construct or purchase 600 megawatts (MW) and 16,100 MW, respectively, of solar or onshore wind generation capacity. *Id.* DEV also must seek SCC approval to construct or purchase up to 5,200 MW of offshore wind generation capacity by 2035.³¹ *Id.* In addition, APCo and DEV must seek SCC approval to construct or purchase 400 MW and 2,700 MW, respectively, of energy storage capacity by 2035. Va. Code § 56-585.5.

Pursuant to the VCEA, the SCC initiated a rulemaking to develop energy storage regulations to achieve the deployment of energy storage facilities required therein. The final regulations require any entity (other than APCo and DEV) to obtain a permit from the SCC to construct and operate an energy storage facility with a capacity of one MW or greater. See 20 VAC 5-335 et seq. The permitting requirements and process closely parallel those for a Certificate of Public Convenience and Necessity issued by the SCC pursuant to Va. Code § 56-580.

The non-utility energy storage permitting requirements stand in stark contrast with the relatively abbreviated permitting requirements for most small renewable energy projects. The General Assembly previously directed DEQ to develop regulations for the construction and operation of “small renewable energy projects.” Such projects include solar and wind projects of 150 MW and less; falling water, wave motion, tidal, or geothermal projects of 100 MW and less; biomass, waste-to-energy, and municipal solid waste (collectively, “combustion”) projects of 20 MW or less; an energy storage facility that uses electrochemical cells to convert chemical energy with a rated capacity of 150 MW or less; or any hybrid project of one of the enumerated projects and an energy storage facility. Va. Code § 10.1-1197.5 et seq. DEQ’s regulations are in the form of permits by rule. The permit by rule for wind projects is found at 9 VAC 15-40-10 et seq. See also *Karr v. Va. Dep’t of Env’tl. Quality*, 66 Va. App. 507, 789 S.E.2d 121 (2016) (construing regulations). The solar permit by rule is found at 9 VAC 15-60-10 et seq., and the combustion permit by rule is found at 9 VAC 15-70-10 et seq.³² Energy storage facilities, as described above, were added to the definition of “small renewable energy projects” through 2021 legislation that required DEQ to promulgate permit by rule regulations for such facilities to become effective by January 1, 2022. 2021 Va. Acts ch. 419. Those regulations can be found at 9 VAC 15-100-10 et seq.

However, if DEQ determines that it is likely a small renewable energy project will have a significant adverse impact on wildlife, historic resources, prime agricultural soils, or forest lands, the applicant must submit a mitigation plan with a forty-five-day public comment period. Va. Code § 10.1-1197.6(B)(8). A “significant adverse impact” is presumed if the project would disturb more than ten acres of prime agricultural soils, more than fifty acres of contiguous forest lands, or forest lands enrolled in a forestry preservation program. *Id.* DEQ, in consultation with relevant agencies, convened an advisory panel to develop regulations regarding criteria to determine if a solar project is likely to cause significant adverse impact to prime agricultural soils or forest lands, and criteria to consider in any plan

³¹ The VCEA created the Division of Offshore Wind to establish the Hampton Roads area “as a wind industry hub for offshore wind generation projects” and otherwise support and develop the offshore wind industry throughout the state. Va. Code § 45.1-161.5:1 (recodified at Va. Code § 45.2-1802).

³² After review and consideration, DEQ determined it was neither necessary nor appropriate to develop a permit by rule for water-related small renewable energy projects.

to mitigate the adverse impact pursuant to 2022 Va. Acts ch. 688. DEQ must adopt final regulations regarding such significant adverse impacts no later than December 31, 2024. *Id.*

For owners or operators of a small renewable energy project that are not utilities regulated pursuant to Title 56 of the Code of Virginia and to whom DEQ has authorized a permit by rule, the SCC does not have jurisdiction to review the project nor condition the construction or operation of the project upon the SCC's issuance of any permit or certificate under Title 56. Va. Code § 10.1-1197.8(A).

Separately, in 2019, the General Assembly passed legislation requiring DEV and APCo to work with the SCC to develop a pilot program for municipal net energy metering. Va. Code § 56-585.1:8. Beginning on December 1, 2020, and for a period of six years, DEV and APCo may credit eligible municipal customers for electricity generated by the municipality's on-site renewable energy facilities in excess of its consumption. The program is currently limited to an aggregate of 5 MW for APCo's customers and 25 MW for DEV's customers. Va. Code § 56-585.1:8(B)(3).³³

The Commonwealth currently supports a variety of alternative and renewable energy projects, largely overseen by the Department of Energy, through various grants from the U.S. Department of Energy.

5-6 ENVIRONMENTAL JUSTICE

In 2020, the Virginia Environmental Justice Act made it the policy of Virginia to promote and implement environmental justice with a focus on fenceline³⁴ and environmental justice communities.³⁵ Va. Code § 2.2-234 et seq. DEQ must incorporate environmental justice policies and enhanced public participation into its regulatory and permitting programs to ensure the fair treatment and meaningful involvement of all people.³⁶ Va. Code §§ 10.1-1183(B)(4) and 10.1-1183(B)(13).

Virginia Code § 2.2-2699.8 et seq. created the Virginia Council on Environmental Justice, with twenty-seven members to advise the Governor regarding policies intended to protect vulnerable communities—particularly low-income communities and communities of color—from the disproportionate impacts of pollution. Va. Code § 2.2-2699.9. Twenty-one members of the Council are appointed by the Governor, and must include representatives of (i) American Indian tribes, (ii) community-based organizations, (iii) the public health sector, (iv) nongovernmental organizations, (v) civil rights organizations, (vi) institutions of higher education, and (vii) communities impacted by an industrial, governmental, or commercial operation, program, or policy. Va. Code § 2.2-2699.10. The Council also includes six ex officio members: the Secretaries of Natural Resources, Commerce and Trade, Agriculture and Forestry, Health and Human Resources, Education, and Transportation. *Id.*

The U.S. Court of Appeals for the Fourth Circuit has ruled that Air Pollution Control Board site suitability provisions under Va. Code § 10.1-1307(E) require the Board to evaluate disproportionate impacts to minority and low-income communities in its permitting

³³ APCo may, in its discretion, raise the aggregate cap to 10 MW.

³⁴ A "fenceline community" is "an area that contains all or part of a low-income community or community of color and that presents an increased health risk to its residents due to its proximity to a major source of pollution." Va. Code § 2.2-234.

³⁵ The Act defines "environmental justice community" as "any low-income community or community of color." Va. Code § 2.2-234.

³⁶ DEQ has added an environmental justice mapping tool to determine whether a project is located in close proximity to an environmental justice community based on the definitions in the Virginia Environmental Justice Act, which can be found here: [VA EJ Mapping Tool](#).

decisions. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020).

5-7 NEPA

5-7.01 Federal NEPA Review

The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., requires an environmental analysis of major federal actions that have the potential to significantly impact the quality of the human and natural environment. 42 U.S.C. § 4332. While NEPA does not mandate a particular outcome, it requires a thorough analysis (also known as “hard look”) of proposed actions, alternatives, and mitigation measures. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 109 S. Ct. 1835 (1989) (NEPA prohibits “uninformed, not unwise, agency action”). This requirement applies not only to federally-conducted projects (e.g., federal water projects) and federally-assisted projects (e.g., interstate highways), but also to most private or public projects that require a federal license or permit (e.g., authorization by the U.S. Army Corps of Engineers for construction of local government water supply reservoir; Federal Energy Regulatory Commission issuance of a license or certificate for a natural gas pipeline).

There are three types of analyses that can be prepared under NEPA. A project that has no significant environmental impact can be subject to the categorical exclusion. In that case, a detailed analysis is not needed. When the project’s environmental impacts are not significant, or when it is unclear whether the impacts are significant, an “environmental assessment” (EA) is prepared. When the EA confirms a lack of significant impacts, federal agency issues a “finding of no significant impact” or “FONSI.” *See Save Our Sound OBX, Inc. v. N.C. DOT*, 914 F.3d 213 (4th Cir. 2019); *Ohio Valley Envtl. Coal., Inc., v. U.S. Army Corps of Eng’rs*, 716 F.3d 119 (4th Cir. 2013). When the project’s environmental impacts are significant, an “environmental impact statement” (EIS) is required. The purpose of the EIS is to promote full disclosure of information on the effects of the proposed project and improve decision-making. A Record of Decision (ROD) is issued following the completion of the EIS. While a project cannot be “segmented,” such that the overall impacts are not considered, a project can be “tiered” so that a portion of a project that has been fully and adequately studied can be approved, with approval of subsequent phases considered later. *Defenders of Wildlife v. N.C. Dep’t of Transp.*, 762 F.3d 374 (4th Cir. 2014); *see also Rio Assocs., L.P. v. Layne*, No. 3:15cv12 (W.D. Va. June 8, 2015) (highway project not impermissibly segmented; extensive discussion of NEPA requirements).

The Council for Environmental Quality (CEQ) is the agency tasked with implementing NEPA. The CEQ’s regulations were first issued in 1978 and were not significantly revised until July 16, 2020. The revised regulations became effective on September 14, 2020. *See Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43357 (July 16, 2020), codified at 40 C.F.R. § 1500 et seq. The revisions codify federal agencies’ existing practices and case law, and make other changes generally intended to speed up many projects subject to NEPA review. The revised regulations applied to projects reviewed after September 14, 2020, but have immediately become subject to several lawsuits in federal courts.³⁷ The federal government has also initiated the rulemaking process to further revise the new regulations. On April 20, 2022, CEQ finalized Phase I of revisions to NEPA regulations, which became effective on May 20, 2022. 87 Fed. Reg. 23453 (Apr. 20, 2022). The revisions generally restored provisions that were in effect before the 2020 revisions. CEQ proposed a Phase II rule, which

³⁷ In *Wild Virginia v. Council on Envtl. Quality*, 56 F.4th 281 (4th Cir. 2022), the Fourth Circuit held that the claim of conservation groups who sought a preliminary injunction seeking to block the rule from taking effect nationwide was not ripe. Most of the other suits challenging the new regulations have been stayed in light of the federal government’s review.

includes provisions relating to how to address environmental justice and climate change, in the required NEPA reviews. 88 Fed. Reg. 49924 (July 31, 2023). The final version of the Phase II rule is expected in 2024.

5-7.02 State Environmental Impact Review

Where an EIS is required for a project in Virginia, DEQ and Virginia's other natural resource agencies review and comment on the draft EIS. DEQ coordinates Virginia's review of NEPA documents pursuant to Va. Code § 10.1-1188. An overview of Virginia's NEPA review process can be found [here](#). Localities can also participate in reviewing and commenting on the NEPA review documents.

Virginia does not have a comparable state NEPA law or program for private projects. Major state projects, defined as those undertaken by any state agency, board, commission, authority, or branch of state government and which cost \$500,000 or more, are subject to a state environmental review process. Va. Code § 10.1-1188. An environmental impact report must be prepared and provided to DEQ. *Id.* DEQ then has sixty days to review and report to the Governor on any environmental impacts of the project. Va. Code § 10.1-1189. The project cannot be funded until the Governor issues a written approval, after reviewing DEQ's report. Va. Code § 10.1-1190.

There are certain exemptions from the requirement, including projects undertaken by industrial development authorities and housing development or redevelopment authorities. Va. Code § 10.1-1188. The Code provides that "branch of state government" includes any county, city, or town, but only in connection with highway projects estimated to cost more than \$2,000,000. *Id.* Projects undertaken by localities costing more than \$500,000 and less than \$2,000,000 must be reviewed by the Department of Historic Resources. *Id.* See [DEQ's Procedures Manual](#) for this environmental impact review process.

5-8 MIGRATORY BIRDS

The Migratory Bird Treaty Act (MBTA) prohibits the take of migratory birds, which includes actions "to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export." 16 U.S.C. § 703. This prohibition extends not only to the migratory birds themselves, but also their nests and eggs. *Id.* There has been a long-running debate at the federal level regarding whether the take prohibition in the MBTA extends to incidental take, which is take that unintentionally occurs as the result of otherwise lawful action. Federal courts are divided on this question (to date, the Fourth Circuit has not opined on the issue). The Obama administration affirmatively took the position that incidental take is prohibited. The Trump administration took the position that incidental take is not prohibited. The Biden administration has reinstated the Obama position, and initiated a rulemaking to codify this position. See 86 Fed. Reg. 54667 (Oct. 4, 2021).

Due to this uncertainty at the federal level, the Virginia Department of Wildlife Resources promulgated a regulatory framework affirming that incidental take of migratory birds is prohibited, but establishing a framework for a permitting program to authorize incidental take. 4 VAC 15-35-10 *et seq.* Under this framework, sector-specific best management practices (BMPs) will be developed. A project that can meet the sector-specific BMPs will qualify for a general permit. *Id.* Projects that cannot meet the sector-specific BMPs will be required to obtain an individual permit, to include project-specific minimization and mitigation measures. *Id.* While the framework has been finalized, the permitting requirements will not take effect until the sector-specific BMPs are established. Sector-specific plans will be developed for commercial projects (including structures planned for government use); industrial projects (including sewage treatment plants); oil, gas, and

wastewater disposal pits; methane or other gas burner pipes; communications towers; electric transmission and distribution lines; wind and solar energy projects; and transportation projects. 4 VAC 15-35-30. Implementation of this program has been put on hold because a rulemaking has been initiated at the federal level to develop an incidental take permitting program for migratory birds. See 86 Fed. Reg. 54667.

5-9 ENFORCEMENT

5-9.01 General Federal Enforcement

Federal environmental statutes generally authorize (i) stop-work orders, exercised either by administrative order or judicial order; (ii) court-imposed civil penalties, which may be imposed for every day of violation before or after any notice of violation; (iii) administratively-imposed civil penalties; (iv) prohibitory and mandatory injunctive relief; and (v) criminal sanctions (including both fines and prison sentences) for each violation. In *Southern Union Co. v. United States*, 567 U.S. 343, 132 S. Ct. 2344 (2012), the Supreme Court held that when a criminal fine is more than “petty,” a jury must find beyond a reasonable doubt the facts that determine the fine’s maximum amount. As is often the case in environmental enforcement, this includes the duration of the statutory violation. Just because an offense is only punishable by a fine does not make it petty; the Court indicated that whether an offense is “petty” is measured by the “severity of the maximum authorized penalty.”

The federal government also has the authority to order the clean up or remediation of properties that have been contaminated through two routes: (i) order the offender to clean up the pollution, which may be required by administrative or judicial order and enforced using sanctions for non-compliance; and (ii) conduct a governmental cleanup with funds available (e.g., the federal Superfund) followed by suits against the responsible parties for reimbursement of funds expended. Compliance orders or restoration work plans are final agency actions subject to judicial review under the APA. *Sackett v. EPA*, 566 U.S. 120, 132 S. Ct. 1367 (2012).

5-9.02 General Virginia Enforcement Program

For all environmental statutes administered by Virginia agencies, Virginia typically takes the lead on inspections and enforcement. EPA has oversight authority, and the ability to overfile if unsatisfied with Virginia’s enforcement efforts, though this is rarely done.³⁸

Each environmental statute includes an enforcement provision specifying the specific enforcement authorities available to respond to violations under that statute. A chart containing the citations to the relevant state agency enforcement authorities is provided as [Appendix B](#). The penalties provided for in the statutes can only be obtained through court action brought by the Attorney General’s office on behalf of the Commonwealth. The Attorney General is also authorized, on behalf of DEQ and individual citizen boards, to intervene in any pending federal court action commenced by the EPA. Va. Code § 10.1-1186.4.

DEQ has a number of enforcement tools available to it short of court action. Following a hearing (an informal fact-finding conference subject to Va. Code § 2.2-4019), DEQ may

³⁸ While the State has enforcement primacy, the CWA gives the EPA parallel authority—with one exception—to prosecute the same acts as violations of federal law. The exception is CWA § 309(g), 33 U.S.C. § 1319(g), which offers several safe harbors. Under that section, if State enforcement procedures are deemed comparable to those in the CWA and the State has issued an administrative order or taken a judicial enforcement action to address violations, the EPA may not bring an enforcement action for civil penalties. This section does not bar an EPA action for injunctive remedies. See *United States v. Smithfield Foods, Inc.*, 191 F.3d 516 (4th Cir. 1999). Virginia law has been conformed to CWA § 309(g) with respect to only one category of violations, sanitary sewer overflows from municipal sewer systems. Va. Code § 62.1-44.15(8)(f).

issue special orders requiring compliance with air, water, and waste laws, regulations, permits, or case decisions. A special order may include a civil penalty of not more than \$10,000 and must have a stated duration of not more than twelve months. The DEQ Director cannot delegate his authority to impose civil penalties in conjunction with issuance of special orders. Va. Code §§ 10.1-1182, 10.1-1186.

DEQ can also negotiate a consent special order, where a violator voluntarily agrees to a civil charge and to take certain corrective actions. DEQ has adopted a [Civil Enforcement Manual](#) which details its enforcement procedures. The manual also provides media-specific civil charge calculation sheets for use by agency staff in negotiating consent orders. DEQ may approve a “supplemental environmental project” in partial settlement of a civil enforcement action, offsetting a negotiated civil charge.³⁹

The Attorney General is also authorized to bring criminal charges for violations of the Air Pollution Control Law, Waste Management Act, and State Water Control Law, when acting with the concurrence of the local Commonwealth’s Attorney. Va. Code § 2.2-511. Each of these environmental statutes provides for its own criminal penalties.

5-9.02(a) Virginia Environmental Assessment Privilege

To promote voluntary compliance with the environmental laws and regulations, Va. Code § 10.1-1198 creates a qualified privilege for documents prepared during a “voluntary environmental assessment.” Under this provision, no person with information gathered or developed in the course of a voluntary evaluation of activities, facilities, or management systems designed to identify noncompliance with environmental regulations shall be compelled to disclose such information to any State or local agency.

In addition, Va. Code § 10.1-1199 provides qualified immunity against administrative or civil penalties for any person who makes a voluntary disclosure of certain information to a state or local regulatory agency regarding a violation of an environmental statute, regulation, permit, or administrative order. Va. Code § 10.1-1199. This statute is of somewhat limited utility because it does not apply to information that must be reported under a statute, regulation, permit, or administrative order. Further, the statute does not protect that person from any federal enforcement action or bar the institution of a civil action claiming compensation for injury to person or property as a result of the violation. See [Letter](#) of the Virginia Attorney General to Michael McCabe (EPA Region III, Regional Administrator), Jan. 12, 1998.

5-9.02(b) Virginia Environmental Excellence Program

For facilities that have demonstrated a strong compliance record, the Virginia Environmental Excellence Program, Va. Code § 10.1-1187.1 et seq., authorizes approval of alternative compliance methods, including changes to monitoring and reporting requirements and schedules, streamlined submission requirements for permit renewals, the ability to make certain operational changes without prior approval, and other changes that would not increase a facility’s impact on the environment.

5-9.03 Local Enforcement

Localities have been granted enforcement authorities for specific environmental issues.

³⁹ Categories of qualifying projects are listed in the statute. Va. Code § 10.1-1186.2. DEQ has issued an internal policy regarding supplemental environmental projects which provides that (i) the amount paid must consist of at least 25 percent as a penalty, although local governments may be allowed to pay as little as 10 percent as a penalty; (ii) the project must be built near the point of violation; and (iii) any publicity regarding the project must indicate work was done as punishment for a pollution violation. See DEQ [Guidance Document](#).

5-9.03(a) Wastewater Treatment

A locality may establish standards for the use and services of sanitary, combined, and stormwater sewer systems, treatment works, and appurtenances operated and maintained by any locality, including but not limited to implementation of applicable pretreatment requirements pursuant to the State Water Control Law and the Clean Water Act. Such standards may be implemented by ordinance, regulation, permit, or contract of the locality or of a wastewater authority or sanitation district, and violations may be enforced as specified in the statute. Va. Code § 15.2-2122(10).

Permits are the most important method used by a local government to control industrial dischargers to its POTW. 9 VAC 25-31-800. The POTW must have authority to seek injunctive relief and civil or criminal penalties of at least \$1,000 per day per violation from industrial users who violate any pretreatment standards or requirements. 9 VAC 25-31-800(F)(1)(f). Local sewer use ordinances usually include the right to terminate service if a discharger violates its permit or the ordinance. In addition, the SWCB can sue violators of pretreatment requirements for injunctive relief and civil penalties of up to \$32,500 per day of violation. Va. Code §§ 62.1-44.23 and 62.1-44.32.

5-9.03(b) Stormwater

Generally, a locality that is an approved VSMP authority will have all necessary rights of entry, see Va. Code § 62.1-44.15:39, and the same enforcement authority as the SWCB and DEQ. See Va. Code §§ 62.1-44.15:37 (inspections, stop work orders after notice and following an APA hearing or local procedures unless imminent or substantial danger to lands or water or substantial impact to water quality are present), 62.1-44.15:40 (ability to obtain information from owners and applicants), 62.1-44.15:42 (injunctions, see also § 62.1-44.15:48), 62.1-44.15:48 (penalties, consent orders, injunctions) and 62.1-44.15:49 (enforcement authority specific to MS4 localities).

5-9.03(c) Erosion and Sediment Control

Virginia Code § 62.1-44.15:60 authorizes the local VESCP to enter, at reasonable times and under reasonable circumstances, any public or private property to obtain information or conduct surveys or investigations necessary in the enforcement of the erosion and sediment control laws. Localities serving as VESCP authorities may, by ordinance, adopt a uniform schedule of civil penalties, as permitted by Va. Code § 62.1-44.15:54.⁴⁰ Once a violation is discovered, except in certain situations that present imminent danger of harmful erosion, the VESCP authority is required to issue a notice to comply; subsequently, upon a failure to comply with the notice a land disturbing permit may be revoked, a stop-work order issued, and enforcement may be pursued. Va. Code § 62.1-44.15:58.

Additionally, the owner of property that has sustained damage or is in imminent danger of being damaged by a violation of the erosion and sediment control laws may apply for injunctive relief in circuit court provided he has notified in writing the violator and program authority and they have failed to correct the problem within fifteen days. Va. Code § 62.1-44.15:63(C). The aggrieved owner may also notify the VESCP authority that he has suffered pecuniary damage, and this will trigger the requirement for investigation by the VESCP authority of alleged violations. Va. Code § 62.1-44.15:64.

5-9.03(d) Chesapeake Bay Preservation Act

Under the Bay Act, local governments may incorporate certain penalty provisions into their ordinances that protect water quality. Va. Code § 62.1-44.15:74.

⁴⁰ No similar authorization exists within the VSMP law and regulations.

5-9.03(e) Solid Waste

A locality has standing to bring a civil action for improper disposal of solid waste within its jurisdiction, the civil penalty for which is up to \$5,000, plus reasonable attorney's fees. Va. Code § 10.1-1418.1.

5-9.03(f) Public Nuisance

Localities also have authority to compel responsible parties to abate, raze, or remove a public nuisance, including dangerous or unhealthy substances which have escaped, spilled, or been released. Where a public nuisance presents an imminent and immediate threat to life or property, the locality may abate, raze, or remove such nuisance and then bring an action against the responsible party to recover necessary costs to abate any nuisance. Va. Code § 15.2-900.

5-9.04 Citizen Enforcement

Federal environmental statutes generally provide for suits by citizens to enforce applicable statutes and regulations where EPA or a state has failed to take action. See 42 U.S.C. § 7604 (citizen suits under Clean Air Act); 42 U.S.C. § 6972 (citizen suits under Solid Waste Disposal Act); 33 U.S.C. § 1365 (citizen suits under Clean Water Act). These statutes also allow suits against the EPA for failure to perform any non-discretionary act or duty. In *Murray Energy Corp. v. Administrator of EPA*, 861 F.3d 529 (4th Cir. 2017), the Fourth Circuit held that federal courts have jurisdiction over such suits only if the required actions or duties are of a "specific and discrete nature that precludes broad agency discretion." The court thus held it had no jurisdiction over a statutory requirement (42 U.S.C. § 7261(a)) that the EPA continually evaluate the effects of the Clean Air Act administration and enforcement on employment as it found that statute too broad and open-ended. Cf. *Sanitary Bd. of Charleston v. Wheeler*, 918 F.3d 324 (4th Cir. 2019) (EPA decision to approve state's proposed water quality standards discretionary; private parties have right to enforce statutory deadline for EPA's decision, but not to challenge the substance of the decision).

Local governments are considered citizens in the context of these provisions. If neither EPA nor the state takes sufficient enforcement action within a period specified by statute (usually sixty days) after a proper citizen suit notice has been given, the citizen may file suit in federal district court for injunctive relief and, under most statutes, civil penalties. Compliance with the notice provisions of the relevant act is a mandatory condition precedent to the commencement of a suit, although citizen plaintiffs need not list every specific aspect or detail of every alleged violation. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387 (4th Cir. 2011) (in the context of the Clean Water Act). Plaintiffs are required to provide notice as a pre-condition for all claims, even those not discovered until after a suit is commenced. *Historic Green Springs, Inc. v. Louisa Cnty. Water Auth.*, 833 F. Supp. 2d 562 (W.D. Va. 2011).

The statutes usually authorize attorney's fees to prevailing citizen plaintiffs. Virginia has not enacted statutes authorizing citizen's enforcement suits. There is no private cause of action for damages under the State Water Control Law for injury to property caused by a violation of the Act. *Spicer v. City of Norfolk*, 46 Va. Cir. 535 (City of Norfolk 1996). Furthermore, Virginia's Constitution, which requires at Article XI, Section 1 that the Commonwealth "protect its atmosphere, lands, and waters," is not self-executing. *Robb v. Shockoe Slip Found.*, 228 Va. 678, 324 S.E.2d 674 (1985).

5-9.05 Common Law Claims

The federal common law of nuisance was invoked in *Illinois v. City of Milwaukee*, 406 U.S. 91, 92 S. Ct. 1385 (1972), to sustain a claim for abatement of a nuisance caused by interstate water pollution. This decision preceded the enactment of the Federal Water Pollution Control Act Amendments of 1972, which instituted the National Pollutant Discharge Elimination System (NPDES) permit program. A later decision in this long-running interstate dispute held that this statute had established a comprehensive regulatory program which

supplanted federal common law for such pollution problems. See *Milwaukee v. Illinois*, 451 U.S. 304, 101 S. Ct. 1784 (1981).

In *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 131 S. Ct. 2527 (2011), the Supreme Court revisited the federal common law of nuisance in the context of the interstate travel of carbon-dioxide emissions from fossil-fuel fired power plants. The Court held that it was an “academic question” whether private citizens, political subdivisions, or states may invoke that doctrine to abate out-of-state pollution because, in the circumstances before the Court, the Clean Air Act and consequent EPA rulemaking displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. See also *N.C. v. TVA*, 615 F.3d 291 (4th Cir. 2010) (while federal environmental protection statutes do not categorically preempt other means of regulating the environment, the use of the public nuisance doctrine to do so is severely limited); accord *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021) (holding that City of New York was not permitted to utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions, because the Clean Air Act did not authorize the state law nuisance and trespass claims).

5-9.06 Sovereign Immunity for Municipal Facility Designs “Alive and Well”

The Virginia Supreme Court held that a municipality’s redesign of its water treatment plant and its public information campaign regarding temporary risks associated with consuming city water were governmental functions and that sovereign immunity applied to bar claims for personal injury arising from such water consumption. See *City of Chesapeake v. Cunningham*, 268 Va. 624, 604 S.E.2d 420 (2004). More than 200 female water customers had alleged that their pregnancy miscarriages had been caused by trihalomethanes (disinfection byproducts) in the city’s drinking water. The Court characterized the city’s tasks of designing plant improvements to address such water treatment issues as governmental and discretionary, and thus subject to sovereign immunity, whereas the city’s duties to maintain the system would be proprietary, nondiscretionary, and ministerial, and not shielded by sovereign immunity. Likewise, in *Sullivan v. City of Hopewell*, 70 Va. Cir. 134 (Greensville Cnty. 2006), the plaintiff homeowners filed suit against the City of Hopewell after they experienced significant property damage as a result of a poorly maintained sewer. The Virginia Supreme Court held that sovereign immunity did not shield the City from liability due to its negligent operation and maintenance of its sewer system.

5-9.07 “Permit Shield”

If a permit holder discharges pollutants in accordance with the terms of its permit, the permit will “shield” its holder from CWA liability. 33 U.S.C. § 1342(k). The permit shield defense, however, presents questions, including: (1) what comprises the scope or terms of a permit, and (2) does the permit shield bar CWA liability for discharges not expressly allowed by the permit when the holder has complied with the permit’s express restrictions? In *Piney Run Preservation Association v. County Commissioners of Carroll County*, 268 F.3d 255 (4th Cir. 2001), the Fourth Circuit held that 33 U.S.C. § 1342(k) was ambiguous and deferred to EPA’s interpretation that permits cover all pollutants disclosed to the permitting authority during the permit application process. Thus, as long as a permit holder complies with the CWA’s reporting and disclosure requirements, it may discharge pollutants not expressly mentioned in the permit. Such discharges, however, must be reasonably anticipated by, or within the reasonable contemplation of, the permitting authority. The court construed a permit provision that “discharge of pollutants not shown shall be illegal” to be consistent with that interpretation, so that “shown” means disclosed during the permitting process, rather than expressly listed in the permit. In *Southern Appalachian Mountain Stewards v. A & G Coal Corp.*, 758 F.3d 560 (4th Cir. 2014), the court of appeals held that a permittee must have actually disclosed a pollutant in its permit application to avail itself of the permit shield as to that pollutant. The applicant is required affirmatively to disclose after appropriate inquiry its knowledge or lack of knowledge of that pollutant’s presence. See also *Ohio Valley Envtl. Coal. v. Fola Coal Co., LLC*, 845 F.3d 133 (4th Cir.

2017) (nothing in *Piney Run* forbids a state from incorporating water quality standards into the terms of the permit and the permit shield does not apply if those standards are violated, even if the discharge standards are not).

The Resource Conservation and Recovery Act (RCRA), which governs hazardous waste management, has an anti-duplication clause, 42 U.S.C. § 6904(a), which states that its provisions must give way when enforcement would be inconsistent with the Clean Water Act. In *Goldfarb v. Sherrill*, 791 F.3d 500 (4th Cir. 2015), the defendant contended that compliance with its NPDES permit (which incorporated erosion and sediment, stormwater discharge, and response action plans) shielded it from remedial requirements pursuant to the RCRA. The Fourth Circuit held that the district court, which had dismissed the RCRA claim holding that requiring further action would be inconsistent with the CWA permit, must determine that RCRA requirements were “fundamentally at odds” with the CWA permit for the claim to be barred by the anti-duplication provision.

5-10 STANDING REQUIREMENTS

A plaintiff must have standing to take a judicial appeal of the issuance of a permit, the promulgation of a regulation, an agency enforcement decision, or to bring a citizen suit. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130 (1992) (involving a challenge to an Endangered Species Act rule in federal court), the United States Supreme Court held that to meet the standing requirements of Article III of the Constitution, a plaintiff must show that (1) he has suffered an injury in fact; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury would be redressed by a favorable decision of the court.

To satisfy the injury-in-fact requirement, a plaintiff need not prove harm to an identifiable property or financial interest; it is sufficient to establish a cognizable concern that the challenged action would infringe upon his recreational use or aesthetic enjoyment of the environment. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 120 S. Ct. 693 (2000); see also *American Canoe Ass’n v. Murphy Farms, Inc.*, 326 F.3d 505 (4th Cir. 2003); *Piney Run Pres. Ass’n v. Cnty. Comm’rs of Carroll Cnty.*, 268 F.3d 255 (4th Cir. 2001). Such infringement must be (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540 (2016) (“the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact”); *South Carolina v. United States*, 912 F.3d 720 (4th Cir. 2019) (“highly attenuated chain of possibilities” do not establish injury-in-fact); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) (en banc) (allegations of injury based on mere conjecture do not meet the injury-in-fact-requirement).

The plaintiff must also be among those whose use or enjoyment of the environment specifically would be impacted. *Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361 (1972) (the injury in fact requirement precludes those with merely generalized grievances from bringing suit to vindicate an interest common to the general public); *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197 (1975) (addressing the requirements for representational standing). See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387 (4th Cir. 2011) (finding injury in fact sufficiently alleged). With regard to the appeal of a permit, the United States District Court for the Eastern District of Virginia has held that, prior to issuance of the permit, a threatened injury is too remote to confer Article III standing. *Crutchfield v. U.S. Army Corps of Eng’rs*, 230 F. Supp. 2d 687 (E.D. Va. 2002). But see *Mattaponi Indian Tribe v. Commonwealth*, 261 Va. 366, 541 S.E.2d 920 (2001) (Mattaponi Indian Tribe and others had standing to challenge Virginia Water Protection Permit because the permit was a precondition to issuance of a Clean Water Act § 404 permit, even though the regulated activity cannot be undertaken without issuance of a § 404 permit).

The second prong of Article III standing, traceability, requires the plaintiff to demonstrate that the proffered injury will result from the actions of the defendant and not the independent conduct of third parties who are not before the court. Traceability is a question of causation, but the traceability inquiry is not confined to a traditional tort causation analysis. Courts have refused to find traceability where the government had other authority which, though not used, would have independently authorized the same result. Similarly, traceability may not be found where further acts are necessary to cause or complete the injury, the nonoccurrence of which would avoid injury. *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315 (4th Cir. 2002).

Standing's third prong, redressability, requires that it be likely (as opposed to merely speculative) that a favorable decision of the court will redress the plaintiff's injury. See, e.g., *Sierra Club v. State Water Control Bd.*, 898 F.3d 383 (4th Cir. 2018) (to show redressability, plaintiffs "need only demonstrate a 'realistic possibility' that they will obtain that ultimate relief") (quoting *Townes v. Jarvis*, 577 F.3d 543 (4th Cir. 2009)); *Crutchfield v. United States Army Corps of Eng'rs*, 230 F. Supp. 2d 687 (E.D. Va. 2002). In assessing whether an injury would be redressed, the court must apply a "zone of interests" test, asking: (1) is the plaintiff within the scope of parties intended to be protected by the statute; and/or (2) is the alleged injury intended to be prevented or compensated by that statute? In appeals brought pursuant to the federal Administrative Process Act (APA), courts have defined the applicable "zone of interests" not according to the overall purpose of the act (i.e., environmental protection) but by reference to the particular provision of law upon which the plaintiff relies. See, e.g., *Taubman Realty Group Ltd. P'ship v. Mineta*, 320 F.3d 475 (4th Cir. 2003) (alleged devaluation of commercial property due to failure to prepare environmental impact statement did not pass APA zone of interests test because provisions of National Environmental Policy Act did not contemplate redress of economic harm); *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (8th Cir. 2002) (lessee lacked standing to challenge agency decision voiding lease under APA and NEPA because the interests alleged constituted solely economic concerns); compare with *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154 (1997) (irrigation districts had standing to challenge agency decision to curtail deliveries to comply with Endangered Species Act, because ESA citizen suit provision provided that "any person" may commence a civil suit, negating zone of interest test).⁴¹

In Virginia, permit holders or permit applicants have standing to appeal state agency permit actions. Virginia statutes authorize third-party appeals of air, water, and waste permit actions, provided that the plaintiff can show that he meets the three-part test for Article III standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130 (1992). See, e.g., Va. Code § 2.2-4026.⁴² Applying this test, the Virginia Supreme Court held in *State Water Control Bd. v. Crutchfield*, 265 Va. 416, 578 S.E.2d 762 (2003), that riparian landowners had standing to appeal a permit authorizing discharge of treated wastewater from an outfall into the river adjoining their property based on allegations that their recreational use and aesthetic enjoyment of the river would be diminished. Facts sufficient to show standing must be alleged in the pleadings. *Va. Marine Res. Comm'n v. Clark*, 281 Va. 679, 709 S.E.2d 150 (2011), *overruled on other grounds*, *Woolford v. Va. Dep't of Taxation*, 294 Va. 377, 806 S.E.2d 398 (2017). The Court in *Clark* held that plaintiffs challenging a VMRC decision had not sufficiently pled standing when the complaint failed to allege (i) any direct injury; (ii) an immediate pecuniary and substantial interest that would

⁴¹ A sovereign state need not meet all the normal standards for redressability and immediacy to assert standing to challenge a denial of a rulemaking petition. *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438 (2007).

⁴² A person challenging the lawfulness of a regulation based on the failure of the agency to follow required procedure must demonstrate by a preponderance of the evidence the unlawfulness of the regulation. If successful, the court must declare the regulation null and void and remand to the agency. Va. Code § 2.2-4026(B).

be affected; (iii) that a personal or property right was denied; or (iv) that a burden was imposed on them. Mere adjacency to the project at issue was insufficient to confer standing.

A VWPP issued as a CWA Section 401 certification of a federal permit is expressly subject to judicial review under Va. Code § 62.1-44.29. Third parties may seek judicial review if they participated directly in the public comment process and meet that statute's standing requirements, which are based on federal case law interpreting Article III of the U.S. Constitution. *See, e.g., Mattaponi Indian Tribe v. Commonwealth*, 261 Va. 366, 541 S.E.2d 920 (2001) (rejecting argument that opponents of the Newport News King William Reservoir public water supply project lacked standing to sue because issuance of a VWPP did not authorize the project but was merely a preliminary step toward a required Corps permit); *see also Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 621 S.E.2d 78 (2005) (upholding SWCB's issuance of a VWPP for the King William Reservoir project).

Virginia's environmental statutes also authorize representational standing. *Philip Morris, Inc. v. Chesapeake Bay Found.*, 273 Va. 564, 643 S.E.2d 219 (2007). An organization or association has Article III standing to sue on behalf of its members when (a) its members would otherwise have standing to sue in their own right and (b) the interests it seeks to protect are germane to the organization's purpose. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 97 S. Ct. 2434 (1977).⁴³ Prong (a) is met by determining if any of the association's members would meet the *Lujan* standard, discussed above, for individual standing.

An organization or association may have standing to appeal in its own right based on injury to the organization's interests as distinguished from those of its members. In *Philip Morris, Inc. v. Chesapeake Bay Found.*, 273 Va. 564, 643 S.E.2d 219 (2007), the Supreme Court held that allegations that the discharge of nutrients in the river would cause injury in fact to the Foundation's educational and recreational programs was sufficient to establish standing. *See also James River Ass'n v. Commonwealth*, 63 Va. Cir. 602 (City of Richmond 2004) (association had standing to appeal permit on the ground that permitted discharge would adversely affect certain property of and programs conducted by the association); *Mattaponi Indian Tribe v. Commonwealth*, 261 Va. 366, 541 S.E.2d 920 (2001) (Mattaponi Indian Tribe brought suit in its own right based on allegations of injury to tribal property and treaty rights, and not as representative of tribal members).

See also Mirant Potomac River, LLC v. EPA, 577 F.3d 223 (4th Cir. 2009) (because Virginia's Nonattainment Provisions are independently regulated, the plaintiff does not have standing to sue the EPA for approving the state's implementation of the Clean Air Interstate Rule when the alleged injury flows from the Nonattainment Provisions).

In *French v. Virginia Marine Resources Commission*, 64 Va. App. 226, 767 S.E.2d 245 (2015), the Virginia Court of Appeals held that regulatory permits generally do not affect property rights or otherwise adjudicate their merits. Regulatory permits determine only the rights of an applicant with relation to the Commonwealth and the public and cannot affect private rights of action between competing litigants.

⁴³ A third prong—that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit—was held unnecessary in *United Food & Commercial Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 116 S. Ct. 1529 (1996).

5-11 APPENDIX A

APPENDIX A EPCRA REPORTING REQUIREMENTS			
TYPE OF REPORT	TRIGGERING EVENT	RECIPIENT	DEADLINE
Notification of Status as a Covered Facility	Presence of Extremely Hazardous Substances Above the Threshold Planning Quantity (Covered Facility)	- Virginia Emergency Response Council (VDEM) - Local Emergency Planning Committee (LEPC)	Sixty days after becoming a Covered Facility
Notification of Designation of Facility Emergency Response Coordinator	Facility Becomes a Covered Facility	- LEPC	Sixty days after becoming a Covered Facility
Notification of Release of an Extremely Hazardous Substance or CERCLA § 103 Release	Release of Extremely Hazardous Substance or Hazardous Substance above the "Reportable Quantity"	- VDEM - LEPC (CERCLA § 103(a) Releases also reported to National Response Center)	Immediately after Release
Written Follow-up Emergency Notice	Release of Extremely Hazardous Substance or Hazardous Substance above the "Reportable Quantity"	- VDEM - LEPC	As soon as practicable after the Release
SDSs or List of Hazardous Chemicals	Facility required by OSHA to prepare SDS (29 C.F.R. § 1910.1200(g))	- VDEM - LEPC - Local Fire Department	Three Months after First Required to Prepare SDS
Emergency and Hazardous Chemical Inventory Forms	Facility required by OSHA to prepare SDS	- VDEM - LEPC - Local Fire Department	Annually on March 1

Toxic Chemical Release Inventory Forms	Facility has ten or more full-time employees in SIC Codes 20-39 that manufacture process or use listed toxic chemicals	- VDEM - EPA	Annually on July 1
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5-12 APPENDIX B

Reference Guide to Specific Virginia Environmental Enforcement Authorities

Program / Media	Agency Charged with Enforcement Authority	Enforcement Authority
Air	DEQ	Va. Code § 10.1-1309 Va. Code § 10.1-1310 Va. Code § 10.1-1316 Va. Code § 10.1-1320
Solid Waste	DEQ	Va. Code § 10.1-1455
Hazardous Waste	DEQ	Va. Code § 10.1-1455
Wastewater	DEQ	Va. Code § 62.1-44.15(8a)-(8f) Va. Code § 62.1-44.15(11) (fish kill) Va. Code § 62.1-44.15:1.1 Va. Code § 62.1-44.20 Va. Code § 62.1-44.23 Va. Code § 62.1-44.32
Stormwater	DEQ Localities	Va. Code § 62.1-44.15:39 Va. Code § 62.1-44.15:40 Va. Code § 62.1-44.15:42 Va. Code § 62.1-44.15:48 Va. Code § 62.1-44.15:49
Erosion and Sediment Control	DEQ Localities	Va. Code § 62.1-44.15:60 Va. Code § 62.1-44.15:63 Va. Code § 62.1-44.15:64 Va. Code § 62.1-44.15:54 Va. Code § 62.1-44.15:58
Wetlands	DEQ	Va. Code § 62.1-44.15(8a)-(8f) Va. Code § 62.1-44.15:1.1 Va. Code § 62.1-44.20 Va. Code § 62.1-44.23 Va. Code § 62.1-44.32
Drinking Water	VDH	Va. Code § 32.1-174 Va. Code § 32.1-27 Va. Code § 32.1-176
USTs	DEQ	Va. Code § 62.1-44.15(8a)-(8f) Va. Code § 62.1-44.15:1.1 Va. Code § 62.1-44.20 Va. Code § 62.1-44.23 Va. Code § 62.1-44.32 Va. Code § 62.1-44.34:9

ASTs	DEQ	Va. Code § 62.1-44.15(8a)–(8f) Va. Code § 62.1-44.15:1.1 Va. Code § 62.1-44.20 Va. Code § 62.1-44.23 Va. Code § 62.1-44.32
Surface Water Withdrawals	DEQ	Va. Code § 62.1-44.15(8a)–(8f) Va. Code § 62.1-44.15:1.1 Va. Code § 62.1-44.20 Va. Code § 62.1-44.23 Va. Code § 62.1-44.32
Groundwater Withdrawals*	DEQ	Va. Code § 62.1-269 Va. Code § 62.1-270
Oil Spills	DEQ	Va. Code § 62.1-44.34:20
Chesapeake Bay Preservation Act	DEQ	Va. Code § 62.1-44.15:70 Va. Code § 62.1-44.15:71 Va. Code § 62.1-44.23
Silviculture	State Forester	Va. Code § 10.1-1181.2 <i>See Campbell v. Com., Dep't of Forestry</i> , 46 Va. App. 91, 616 S.E.2d 33 (2005).

*Only applies in a Groundwater Management Area.