Edmonds Installed as NABE President at Chicago Meeting

Thomas A. Edmonds, executive director of the Virginia State Bar, became president of the National Association of Bar Executives during the organization's annual meeting in Chicago August 4. Left, he poses with his predecessor, Anne Fritz, executive director of the Memphis Bar Association. A contingent of Virginians who celebrated with Edmonds at the gavel-passing ceremony included VSB President Phillip V. Anderson and President-Elect Karen A. Gould (right photo), as well as Robert J. Grey Jr. of Richmond, outgoing president of the American Bar Association. Former VSB President Joseph A. Condo surprised Edmonds by attending with wife Chris and delivering a "roast" speech. Edmonds is the first Virginian to serve as president of NABE, which was founded in 1941 to support excellence and professionalism among executives of mandatory and voluntary bar organizations across the United States. In his inaugural speech, Edmonds said he will ask NABE members to focus in their educational programs during the year ahead on the skills and values required in order for bar executives to be regarded as true professionals by bar association leaders and other bar staff.

Justice Koontz Describes Court's Stance on Lawyer Discipline

Virginia Supreme Court Justice Lawrence L. Koontz Jr. addresses the Virginia State Bar's twenty-fourth Disciplinary Conference, while VSB President Phillip V. Anderson and VSB Bar Counsel Barbara Ann Williams listen. Members of district disciplinary committees, the VSB Disciplinary Board and the judiciary attended the gathering in Charlottesville on July 11. Koontz said the Court, which hears appeals of state bar discipline, always approaches cases of alleged lawyer misconduct with great concern over the implications of taking away a license to practice. He and other justices sympathize with solo practitioners who violate the rules as they face the stresses of work. "Is that something that should be tolerated? No. Is that something that needs to be understood? Yes," Koontz said. The justices appreciate the contributions of volunteers who make the system work, he said. "Aren't we fortunate in Virginia that . . . we've got so many people willing to get involved in these very difficult cases?"

Solo and Small-Firm Practitioner Forum at James Madison University

Chief Justice Leroy R. Hassell Sr. (at microphone) responds to comments and concerns of lawyers who attended the Solo and Small-Firm Practitioner Forum at James Madison University in Harrisonburg on September 21. The program—the second in a series offered free to lawyers by the Supreme Court of Virginia and Virginia State Bar—featured continuing legal education on practice management topics and ended with a town hall meeting moderated by Hassell. With him are (l–r) Justice Cynthia D. Kinser, who led the committee that organized the forum; VSB Counsel Barbara A. Williams; and Thomas A. Edmonds, chief executive officer of the VSB.

IN MEMORIAM

David E. Bass
McLean
July 1946–February 2005

Jeffrey Alan Brandwine
Fairfax
November 1950–May 2005

The Honorable Frederick H. Combs
Tazewell
March 1946–August 2005

Julian Kroh Fite
Tahequah, Oklahoma
January 1945–June 2005

C. Hardaway Marks
Hopewell
January 1921–November 2004

McClanahan Ingles
Gloucester
December 1946–June 2005

James Stuart Keith
Virginia Beach
October 1913–February 2005

Mary Brooke Massie
Bristol
June 1958–July 2004

Paul W. McElhinney
Sanford, Maine
April 1943–December 2004

James Ned Pate
Signal Mountain, Tennessee
May 1940–March 2005

Neal Douglas Peterson
Fairfax
December 1925–January 2005

Howard Curtis Pilson
Stuart
October 1916–July 2004

William C. Preston
Charlottesville
June 1931–July 2005

Walter W. Regirer
Richmond
December 1913–July 2005

James L. Rider
Washington, D.C.
February 1942–April 2005

Gilman P. Roberts Jr.
Norfolk
January 1942–November 2004

Frank W. Rogers Jr.
Roanoke
December 1928–July 2005

Joel S. Shapiro
Virginia Beach
July 1942–June 2005

Thomas Dean Simmons
Houston, Texas
October 1958–August 2005

Kenneth W. Thomas
Shohomish, Washington
January 1923–September 2004

John Joseph Wall
Manassas
February 1953–October 2004

Kenneth Roger Weiner
Fairfax
June 1945–June 2005

Virginia Law Foundation Elects Officers, Directors

John R. Fletcher of Tavss, Fletcher, Maiden & Reed in Norfolk has been elected to a one-year term as president of the Virginia Law Foundation Board of Directors. He has served on the board since 2000.

Other officers elected at the VLF's annual meeting in June are attorneys John A.C. Keith of Fairfax, president-elect; John L. Walker III of Richmond, vice president; C. Breckenridge Arrington of Richmond, secretary; Thomas A. Edmonds of Richmond, treasurer; and Sharon Tatum, the foundation's executive director, assistant treasurer.

Newly elected to serve three-year terms as board members are attorneys Whittington W. Clement of Richmond, Anthony F. Troy of Richmond and Monica Taylor Monday of Roanoke. Elected to second three-year terms are attorney Jon D. Huddleston of Leesburg and lay member Mary Ann Delano of Richmond.

Also at the annual meeting, Arrington was elected to a second term as chair of the VLF's Fellows Council. Retired Judge Paul F. Sheridan of Arlington was newly elected to the Fellows Council.

The VLF is a nonprofit organization that funds law-related service projects in Virginia, to advance the science of jurisprudence and improve and promote the administration of justice. The foundation has bestowed over twenty-one million dollars in grants since its founding in 1974.

Note from the Section Chair

The Virginia State Bar's Environmental Law Section is pleased to present this edition of *Virginia Lawyer*. Environmental issues find their way into many different areas of law, including corporate transactions, the purchase and development of real estate, and worker safety and environmental exposure cases. These issues can be as complicated as addressing air permitting, or remediating and developing contaminated sites, or as simple as underground storage tank notifications to regulatory agencies. The articles in this issue of *Virginia Lawyer* describe some of the most recent developments and important issues in the field—on the federal and state levels.

"Brownfields" are redeveloped former industrial or commercial sites from which some or all of the contamination has been removed. In "When Life Gives You Lemons, Make Lemonade! Risks and Rewards of Brownfields Development in Virginia," Marina L. Phillips and David B. Graham describe the commonwealth's Voluntary Remediation Program for contaminated sites. This program can be a boon to developers willing to pay the costs of remediation to develop important properties and obtain some liability protection.

In "Air In The Balance: Rewriting The Clean Air Act's New Source Review Program," Caleb A. Jaffe describes the New Source Review (NSR) program under the Clean Air Act, the effect of recent important power company cases, and the effect of these cases and changes in the NSR program on Virginia's air regulations. The Clean Air Act can be daunting, but Jaffe provides a very readable analysis of the NSR issues and their possible effect on state law.

Virginia recently had a very severe drought. Water supply planning, which had languished for years, has therefore become an important issue in the commonwealth. James R. Allison and Andrea W. Wortzel analyze the current efforts in "Water Supply Planning: The Regulatory Cup Is Running Over," and discuss these planning programs by local governments across the state.

The importance of the Chesapeake Bay in the lives of Virginians and the commonwealth's commitment to cleaner bay water led the General Assembly to adopt legislation in 2005 concerning watershed permitting and nutrient credit exchange (also known as nutrient trading). In their article, "Nutrient Credit Trading: The New Bay Cleanup Tool," Christopher D. Pomeroy, David E. Evans and Stewart T. Leeth explain recently adopted trading legislation and rules proposed to implement that legislation. Other states will watch how Virginia develops its nutrient trading program.

If you would like to join our section or want to find out more about our activities, please check our Web site at **www.vsb.org**. We welcome new section members and look forward to an exciting, eventful year.

As a final note, I would like to thank the authors in this issue for the time and effort they took to research and prepare their articles. I would also like to extend my hearty thanks to Brooks M. Smith for "herding cats" to get the articles on time and in fine form.

Heather N. Stevenson is an associate with McGuireWoods LLP in Richmond. She is chair of the Virginia State Bar's Environmental Law Section. Prior to her career as a lawyer, Stevenson was an environmental professional in Florida and Virginia for more than ten years. She received a master's degree in environmental management from Duke University and a law degree from the University of Richmond.

Air In The Balance: Rewriting The Clean Air Act's New Source Review Program

by Caleb A. Jaffe

One of the most significant Clean Air Act battles of the last fifteen years is almost over. In December 2002, in response to industry criticisms of the permitting process, the U.S. Environmental Protection Agency (EPA) published changes to the federal regulations on New Source Review (NSR)[1]—a core program of the Clean Air Act. In June 2005, after nearly three years of litigation, the U.S. Court of Appeals for the District of Columbia Circuit announced its ruling on challenges to those reforms. In the meantime, Virginia has been moving forward with its own plans to incorporate some of the federal changes into the state NSR program. The state process should be completed before the end of the calendar year. These milestones mean that for the first time since Congress amended the Clean Air Act in 1990, Virginia's electricity providers, manufacturers, regulators and clean air advocates live in a dramatically new regulatory landscape.

Hazy Days in the Old Dominion

Today, 4.8 million Virginians—two-thirds of the state's population—live in communities that fail to meet the EPA's minimum air quality standards for protecting human health.[2] Forty-two of Virginia's cities and counties have been designated by the EPA as having unhealthy levels of fine particulate matter, ground-level ozone, or both.[3] These "nonattainment areas" stretch from the Shenandoah National Park to the Chesapeake Bay, and from Washington, D.C., to the North Carolina state line. Electric utilities and other industrial sources are significant emitters of nitrogen oxides and sulfur dioxide, the primary precursors to ground-level ozone and fine particulate matter, respectively.[4]

The health and environmental impacts of Virginia's air pollution problems are astounding. An independent analysis by Abt Associates, a firm frequently employed by the EPA, shows that pollution from coal-fired power plants causes approximately 1,000 deaths, 23,700 asthma attacks, and 140,600 lost work days every year in Virginia.[5] Ozone pollution has turned Shenandoah National Park into the country's third most polluted national park.[6] The respected *Frommer's Virginia* guidebook now warns vacationers against planning a summertime visit to Shenandoah, stating that "high ozone levels frequently create obscuring smog during the summer."[7] Hundreds of square miles of "dead zones" in the Chesapeake Bay—areas with too little oxygen to support a healthy aquatic ecosystem—are linked to excess nitrogen. One-third of that nitrogen pollution enters the bay from the air, with coal-fired power plants as the largest single source.[8]

The economic effects of air pollution are equally troubling. The designation of an area as "nonattainment" often deters business development because of the federal restrictions that accompany this designation. When an area falls into nonattainment, it is prohibited from bringing in new industrial development unless it can provide pollution reduction offsets to counterbalance increases in emissions. With so many cities and counties labeled as nonattainment, Virginia faces limits on economic growth if it does not improve air quality.

In addition to the difficulties for attracting new industry, dirty air also creates problems for maintaining existing businesses. Another Abt Associates study finds that a 25 percent increase in visitation at Shenandoah National Park due to increased visibility could yield as much as thirty million dollars annually in increased sales benefits and tax revenues, and eight hundred jobs for local communities surrounding the park.[9] Ground-level ozone pollution also costs Virginia's farmers up to nineteen million dollarsannually in reduced crop yields of wheat, soybeans, cotton, peanuts and corn.[10] This figure

excludes costs of reduced yields in wine-producing grapes—a burgeoning Virginia industry and one that is particularly vulnerable to ozone damage.

Given the severity of air pollution problems statewide, many public health and environmental advocates maintain that now is the wrong time to relax the air pollution regulations through unproven NSR revisions. To the contrary, the DEQ needs to be given the necessary tools to clean up Virginia's air.

A Brief History of New Source Review

In 1970, a package of congressional amendments gave birth to the modern Clean Air Act. The act outlined the National Ambient Air Quality Standards (NAAQS)—"the attainment and maintenance of which" would be "requisite to protect the public health" while "allowing an adequate margin of safety."[11] To meet these health-based air quality standards, Congress directed the EPA to administer a technology-forcing program of New Source Performance Standards (NSPS), which were designed to improve the environmental performance of pollution sources.

By 1976, however, it had become clear that the NSPS program was failing. Large portions of the country were still unable to attain the minimum requirements set by EPA for the NAAQS.[12] As then-U.S. Senator Edmund S. Muskie, an author of the Clean Air Act, informed his Senate colleagues, "The record to date under the new source performance standards approach has been disappointing."[13] In the face of this disappointment, Congress set about supplementing the NSPS with a new program—New Source Review (NSR). Whereas NSPS had focused on the unit-specific "performance" of each source, the overriding concern for the NSR program would be to maintain or improve air quality within a given geographic area, considering the impact of all emitting facilities together in that area.

The EPA enacted regulations in 1978 to implement the NSR. Those regulations were immediately challenged in the U.S. Court of Appeals for the District of Columbia Circuit Court by a wide array of stakeholders, including major oil, coal and gas interests; electric utilities; manufacturers' representatives; forest products industries; state governments; and environmentalists. The result was an opinion, *Alabama Power, et al., v. Costle,* that spanned nearly ninety pages in the *Federal Reporter*.[14]

Despite its length, breadth and detail, however, the D.C. circuit's ruling did not end all disputes related to the application of NSR. Litigation related to the enforcement of the 1980 regulations has now lasted more than a quarter century, with the courts still divided on how to resolve some of the most pertinent issues. While the Fourth Circuit has required the EPA to interpret "modification" identically in both the NSR and NSPS regulations,[15] the D.C. circuit has allowed the term to be defined differently within the two programs, observing that "the regulatory definitions in the NSPS and PSD programs already differed at the time of the 1977 [Clean Air Act] amendments."[16]

In December 2002, the EPA promulgated the first major overhaul of the NSR regulations since the revisions following the D.C. circuit's 1979 decision in *Alabama Power*, sparking another round of litigation.[17] The agency justified the changes as necessary to streamline the regulatory process, provide greater certainty of when NSR would be triggered, and allow increased flexibility to meet the necessary requirements. Although the regulated community applauded the EPA for its efforts, environmentalists, public health advocates and state regulators were not so enthusiastic. Critics of the December 2002 rules noted that the EPA dramatically expanded exemptions to NSR, failed to include essential record keeping and enforcement mechanisms to ensure that the process was not abused, and employed an unorthodox new method for calculating emissions increases. They maintain that these revisions would effectively repeal key portions of the Clean Air Act by giving industry substantial leeway to avoid NSR requirements in perpetuity.

The D.C. Circuit's Ruling on the 2002 NSR Revisions

Citing failings in the federal rule, several citizens' groups and states' attorneys general challenged the 2002 changes in the D.C. Circuit Court of Appeals.[18] The D.C. Circuit responded by striking down three major portions of the EPA regulations: the Clean Unit exemption, Pollution Control Projects and a record keeping exemption for facilities believing that they would have "no reasonable probability" of triggering NSR.[19] At the same time, the court cautiously deferred to the EPA on designing a Plantwide Applicability Limit program and calculating a facility's baseline emissions.

The Clean Unit exemption would have allowed a unit to qualify for "Clean Unit" status if the operator installed state-of-the-art emissions controls under the act, or controls that would have been "comparable to" what the act required. The Clean Unit designation would have remained in effect for ten years, and could have been renewed after expiration. The benefit to the operator would have been that once a unit was certified as "clean," the operator could make unlimited modifications without triggering NSR—even if those modifications resulted in substantial increases in pollution. The court struck down this exemption, finding that it "contravene[d] the plain meaning of the [Clean Air Act] because it measures 'increases' in terms of Clean Unit status instead of actual emissions."[20]

The court also struck down the exemption for Pollution Control Projects (PCPs), which the EPA had defined as projects that reduce the emissions of one regulated pollutant, but increase emissions of a second pollutant. If the project, taken as a whole, could produce a net environmental benefit, then the EPA would have allowed the project to avoid NSR requirements, despite the emissions increase. The D.C. circuit, again relying on the plain meaning of the statute, held that the PCP exemption was unlawful. The court said, "EPA lacks authority to create an exemption from NSR by administrative rule."[21]

The final exemption struck down by the court would have allowed operators maintaining that they had "no reasonable possibility of a significant net emissions increase" to avoid keeping any "records at all—neither the data on which they based their projections nor records of actual emissions going forward."[22] The court found this record-keeping exemption to be arbitrary and capricious, and remanded the provision to the EPA for further consideration. The court observed, "If EPA actually knew which sources had no 'reasonable possibility' of triggering NSR, these sources would obviously have no need to keep records. The problem is that the EPA has failed to explain how, absent record-keeping, it will be able to make that determination."[23] The EPA had argued that it could use its enforcement authority to ensure compliance with NSR. The court saw the obvious flaw in this reasoning: "EPA certainly has such inherent enforcement authority, but even inherent authority depends on evidence."[24]

Noting the great deference owed an agency implementing a highly "technical and complex" regulatory scheme, the court did find that two major aspects of the 2002 revisions were permissible interpretations of the Clean Air Act.[25] Specifically, the court found that the EPA is entitled to define "net emissions increase" using a five or ten year look-back period to establish a unit's baseline, preproject emissions. Additionally, the court found that Plantwide Applicability Limits were also permissible.

Before a construction project at a facility triggers NSR, there must be a "net emissions increase." This is because Congress has defined an NSR-triggering "modification" to be "any . . . change in . . . a stationary source *which increases the amount of any air pollutant emitted* . . . ."[26] To determine whether there has been an increase in the "amount of any air pollutant emitted," the operator calculates its plant's emissions before a change—what is known as its baseline emissions—and compares that baseline to the predicted future emissions after the change. Under the old rule, the baseline would be set using emissions data from the two years immediately proceeding construction of a project to determine the baseline figures for all measured pollutants. The EPA changed the rule to allow power plants—known as electric utility steam generating units (EUSGUs)—to select the highest polluting two-year period out of the last five years of operation preceding the change.[27] For other types of industrial sources—non-EUSGUs—operators would be able to select the highest polluting consecutive two years from the last decade of operation. The new rule also allows sources to use different baseline periods for different pollutants. The D.C. circuit concluded that the Clean Air Act "is silent on how to calculate such 'increases' in emissions," and held that the EPA's revised definitions were reasonable interpretations of this ambiguous statutory term.[28]

The D.C. circuit also deferred to the EPA on the creation of a Plantwide Applicability Limit, or PAL. As the name suggests, this exemption allows an operator to obtain a plantwide permit, instead of obtaining multiple, unit-specific permits for a single plant. (One power plant or industrial facility is typically composed of multiple major emissions units.) The court observed that environmental petitioners had not challenged "EPA's authority to establish a PAL program" in theory, but had instead focused their arguments on a claim that the EPA acted arbitrarily and capriciously in designing this specific PAL exemption.[29] The court followed its analysis on the "net emissions increase" issue, noting again that the Clean Air Act was "silent on how to calculate emissions increases."[30]

Virginia's Proposed Changes

The Virginia State Air Pollution Control Board, with the assistance of the Department of Environmental Quality (DEQ), is in the process of deciding whether to incorporate any or all of the 2002 federal rule changes into the state's regulations on New Source Review. Because of the Clean Air Act's emphasis on "cooperative federalism," Virginia does not have to follow the federal lead.[31] On the contrary, the state is free to develop its own program so long as the state plan is at least as stringent as the federal regulations. In an effort to address Virginia's unique air quality and enforcement needs, the DEQ has proposed several important modifications to the federal rule changes. While the draft revisions proposed by the DEQ would add exemptions that make it more likely sources will be able to avoid NSR despite undertaking projects that significantly increase pollution, they are nevertheless better tailored to meet Virginia's needs than the EPA's federal program.

For example, the DEQ has proposed changes to the definition for "net emission increase" that would move Virginia away from the current method of using the two-year period immediately preceding a change to establish baseline emissions.[32] Instead, the DEQ would limit the look-back period for EUSGUs and non-EUSGUs alike to five years.[33] This five-year look back would also apply to the Clean Unit, PCP and PAL exemptions. As stated above, the federal rule now allows EUSGUs to select the highest twenty-four-month emissions period in the previous five years, while permitting non-EUSGUs to look back ten years.[34] Studies of the emissions histories of major pollution sources subject to NSR suggest that limiting the look-back period for all sources to five years will significantly limit the potential quantity of pollution increases that could result from changes to facilities without triggering NSR.[35] In addition, the DEQ would maintain the current state requirement that sources use the same baseline period for all regulated pollutants[36] rather than allow sources to vary baselines in order to capture the highest two years of emissions for each pollutant as permitted in the federal rule.[37] Finally, the DEQ would add basic common-sense preconstruction notice, record-keeping, reporting and enforcement provisions absent from the federal rules. The DEQ deems these requirements as necessary to ensure compliance with the NSR program for the same reasons the D.C. circuit found the absence of notice and record-keeping requirements in the federal rule to be arbitrary and capricious. Ultimately, the State Air Pollution Control Board will have to decide whether to final-

ize the DEQ's draft changes. The D.C. circuit's ruling in *New York v. EPA*, of course, will affect the board's final decision. The Clean Unit and PCP exemptions, for example, will almost certainly need to be deleted from the Virginia program. The board is expected to consider all of these issues at its December 2005 meeting.

The Importance of NSR to Virginia's Air Quality

As explained at the outset of this article, nearly five million Virginians live in areas that fail to meet EPA's health-based air quality standards. New Source Review has a critical role to play in addressing this and other related problems. NSR is unique in that it is a proactive environmental program, giving states the ability to assess potential impacts of new pollution sources before they are constructed, and to ensure that sources can be accommodated within an area's overall plan for maintaining or achieving healthy air. The DEQ recognizes the importance of NSR, and as a result is now seeking more effective tools than those provided in the 2002 federal rule.[38] For the first time in decades, a major new regulatory scheme is on the horizon. ⚖

Endnotes:

1 The New Source Review program has two components: the Prevention of Significant Deterioration and Nonattainment New Source Review programs. These programs are referred to throughout collectively as NSR.

2 69 *Fed. Reg.* 23858, 23940-41 (Apr. 30, 2004); 70 Fed. *Reg* 944, 1010-12 (Jan. 5, 2005); 2004 Population Estimates—Virginia—County," *available at* www.census.gov.

3 69 *Fed. Reg.* at 23940-41; 70 Fed. Reg. at 1010-12.

4 Based on the 2002 emissions profile, the DEQ calculates that Virginia sources emit 473,075 tons of nitrogen oxides each year, 38 percent of which come from power plants and other industrial sources. Virginia sources emit 328,402 tons per year of sulfur dioxide, almost all of which—93 percent—are attributable to point sources. *See* Virginia Emissions Inventory Briefing, State Air Pollution Control Board (June 22, 2005).

5 Clean Air Task Force, *Dirty Air, Dirty Power: Mortality and Health Damage Due to Air Pollution from Power Plants* (June 9, 2004).

6 National Parks Conservation Association, *Code Red: America's Five Most Polluted National Parks* (June 2004).

7 *Frommer's Virginia*, at 144 (7th Ed. 2004).

8 Chesapeake Bay Foundation, Fact Sheet, "Reduce Power Plant Pollution—Pass The 'Four Pollutants' Bill," *available at* www.cbf.org.

9 Clean Air Task Force, *Out of Sight: Haze in Our National Parks* (Aug. 24, 2000).

10 Southern Environmental Law Center, *Where Are We Growing? Land Use and Transportation in Virginia,* at 17 (2002).

11 42 U.S.C. § 7409(b)(1), CAA § 109(b)(1).

12 *See Natural Resources Defense Council v. Gorsuch,* 685 F.2d 718, 721 (1982) (noting that by 1976, it had become "clear that many regions of the country had failed to attain the primary NAAQS within the statutory deadline" set by the 1970 Act), rev'd on other grounds, *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

13 123 Cong. Rec. 18,022 (June 8, 1977).

14 636 F.2d 323 (D.C. Cir. 1979).

15 *Duke Energy Corp.,* ___ F. 3d ___ , No. 04-1763 (4th Cir. June 15, 2005).

16 *New York v. EPA*, __ F.3d ___, No. 02-1387, slip. op. at 25 (D.C. Cir. June 24, 2005). *Compare also United States v. Alabama Power Co.*, No. 01-152-VEH (N.D. Ala. June 3, 2005) (requiring the EPA to interpret the term "modification" identically in both NSPS and NSR regulations), *with United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829 (S.D. Ohio 2003) *and United States v. Southern Indiana Gas & Elec. Co.*, 245 F. Supp. 2d 994 (S.D. Ind. 2003) (allowing the EPA to interpret "modification" differently in NSPS and NSR).

17 In December 2003, the EPA also finalized changes to the Equipment Replacement Rule. These 2003 changes relate to one exemption from NSR that would allow an operator to avoid installing pollution controls if a modification could be labeled "routine maintenance, repair, and replacement." The "routine maintenance" exemption has long been a part of the NSR process, but the EPA dramatically expanded it in 2003. According to EPA officials with decades of experience, a project would traditionally qualify for the "routine maintenance" exemption if its total cost was within 0.75% of the generating unit's value. *See* Bruce Barcott, "Up In Smoke: The Bush Administration, the Big Power Companies, and the Undoing of 30 Years of Clean-Air Policy," *New York Times Sunday Magazine*, at 73 (Apr. 4, 2004). Thus, on a $1 billion facility, an operator could reasonably spend $7.5 million a year on modifications and still qualify for the "routine maintenance" exemption. In its December 2003 rule, the EPA expanded this ceiling by more than 26 times, to 20 pecent of a facility's value. Under the expanded rule, an electric utility could spend $200 million a year on so-called "maintenance" that would significantly increase pollution—without triggering the requirements of the Clean Air Act.

18 In a separate action, these same petitioners also challenged the EPA's 2003 rulemaking. Implementation of that rule has been stayed by the D.C. Circuit and, therefore, has not been sent out to the states for consideration.

19 *New York v. EPA*, __ F.3d ___, No. 02-1387, (D.C. Cir. June 24, 2005).

20 *Id.* at 62.

21 *Id.* at 66.

22 *Id.* at 52.

23 *Id.* at 53-54.

24 *Id.* at 55.

25 *Id.* at 33.

26 CAA § 111(a)(4); 42 U.S.C. § 7411(a)(4).

27 The change for calculating baseline emissions for EUSGUs was adopted in the base federal program in 1992, but was never incorporated into Virginia's program.

28 *New York v. EPA*, __ F.3d ___, No. 02-1387, slip op. at 31 (D.C. Cir. June 24, 2005).

29 *Id.* at 57.

30 *Id.*

31 *See* Jonathan H. Adler, "Judicial Federalism and the Future of Environmental Regulation," 90 *Iowa L. Rev.* 377, 384 n.35 (2005).

32 9 *Va. Admin. Code* § 5-80-1710(C) (2004).

33 9 *Va. Admin. Code* § 5-80-1615(C) (Draft Proposal); 9 *Va. Admin. Code* § 5-80-2010(C) (Draft Proposal).

34 67 *Fed. Reg.* 80186, 80247 (Dec. 31, 2002).

35 For example, a study of the emissions history of 169 industrial facilities in North Carolina that qualified as "major" pollution sources under NSR regulations showed that higher baselines resulting from a ten-year look-back period would allow these facilities to increase SO2 emissions by as much as 18,000 tons, VOC emissions by as much as 10,000 tons, and NOx emissions by as much as 7,000 tons, compared to a baseline using a five-year look-back, without triggering NSR. Mays, R., *Evaluation of Potential Air Pollution Increases Under a Revised Baseline Emissions Rule in North Carolina's Proposed Revisions to the New Source Review Program*, Comments of Southern Environmental Law Center, *et al.*, Attachment I, *Proposed Amendments to the Prevention of Significant Deterioration Rule, 15A NCAC 02D.0530, and the Major New Source Review Rule for Nonattainment Areas, 15A NCAC 02D.0531* (Sept. 13, 2004).

36 9 *Va. Admin. Code* § 5-80-1615(C) (Draft Proposal); 9 *Va. Admin. Code* § 5-80-2010(C) (Draft Proposal).

37 67 *Fed. Reg.* 80186, 80247 (Dec. 31, 2002).

38 Statement of Robert G. Burnley, Director, Virginia Department of Environmental Quality, at the State Air Pollution Control Board Meeting, Glen Allen, Virginia (Mar. 2, 2005) (explaining the DEQ's decision to deviate from the federal rule in the Virginia draft regulations).

Caleb A. Jaffe is an associate attorney with the Southern Environmental Law Center, a nonprofit organization dedicated to protecting the natural resources of the south. Jaffe earned a bachelor's degree from Yale University, and a joint law degree and master's degree in history from the University of Virginia, where he was editor in chief of the *Virginia Environmental Law Journal*.

When Life Gives You Lemons, Make Lemonade!

Risks and Rewards of Brownfields Development in Virginia

by Marina Liacouras Phillips and David B. Graham

"The Commonwealth of Virginia supports brownfield redevelopment. Returning contaminated or potential contaminated property to productive use is the intelligent thing to do for businesses and the environment. To make this happen, Virginia has enacted laws that establish supportive programs and provide incentives to persons and businesses to successfully undertake brownfield redevelopment."[1] This quote is taken from the guidance manual issued by the Virginia Department of Environmental Quality (DEQ) to assist its staff in conducting the business of the commonwealth's Brownfields Program. It provides the foundation for a regulatory program that has the unusual privilege of being recognized and respected by environmental protection and business interests alike.

The redevelopment of former industrial or commercial property creates a multitude of benefits—not only will it bring an idle piece of property back into productive use, but it also can protect natural resources by eliminating a source of contamination, take the place of the development of (and, thus, preserve) virgin land and, frequently, reduce urban sprawl. The DEQ's Brownfields Program is intended to promote this redevelopment while limiting the liability for those who undertake it.

We are fortunate to have access to an excellent program. Virginia was recognized for its pioneering brownfields legislation at Brownfields 2004, a conference in St. Louis where the commonwealth was acknowledged as having one of the most innovative statutes in the country. Delegate Terrie L. Suit, a sponsor of this legislation, and Chris M. Evans, DEQ brownfields coordinator, described Virginia's statute and regulatory program at the conference.[2]

How does one take advantage of this program? And, how does one make certain that potential liability is truly limited?

Upon identifying a candidate property, and preferably before purchasing it, the first step should be to evaluate its environmental conditions. This process is known in the regulatory arena as making "all appropriate inquiries," or conducting Phase I and Phase II environmental site assessments.[3] The information gathered during the site assessment phase determines the issues that must be resolved prior to site development. These issues generally fall into two categories: site remediation and limitation of liability. The DEQ's Brownfields Program is designed to resolve both issues.

The Virginia Brownfield Restoration and Land Renewal Act[4] (the "Brownfields Act") establishes mechanisms similar to those created on the federal level by amendments to the Comprehensive Environmental Response, Compensation and Liability Act.[5] Categories of parties to whom liability protection is made available include bona fide prospective purchasers, contiguous property owners, innocent purchasers and those who obtain property through inheritance. The Brownfields Act specifically limits liability for entities that qualify for these categories and no review or written documentation from the DEQ is required in order to obtain this protection. In many cases, though, a financial institution lending money for a transaction or construction will require written proof of its borrower's status. In those cases, the DEQ will issue comfort letters to parties who meet the criteria in a given category.

Since a party can qualify for these categories without incurring any obligation to conduct cleanup activities at the site, these methods of liability protection have a cer-

tain appeal. For sites with minimal environmental issues, this approach works well. Care must be taken not to rely excessively on the protection these mechanisms provide, however, as the protection has some limitations. For example, one of the conditions that must be satisfied in order to qualify for such protection requires that the landowner "exercise appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance."[6] The "exercise of appropriate care" is defined in the questions and answers section of the *DEQ Brownfields Manual* as "taking reasonable steps to stop any continuing release, prevent any future release, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substances." In other words, it is possible that, in order to maintain the liability protection obtained by fitting into a certain category, a landowner may be required to conduct the remediation that he or she thought had been avoided.

Another potential pitfall is that these categories of liability are close to, but not identical, to their federal counterparts. Thus, a landowner may qualify for protection against enforcement on the state level, only to face federal liability. None of these mechanisms protects a landowner against liability for claims made by nongovernmental parties such as neighbors and people who live or work on the property. In some cases, conservative financial institutions may not be satisfied with the level of protection offered by a DEQ comfort letter when contamination remains on the property. To obtain the greatest assurance that liability is limited, a purchaser of a contaminated property should participate in the Voluntary Remediation Program (VRP).[7]

The VRP was authorized by the Brownfields Act.[8] The DEQ promulgated regulations implementing the VRP effective July 1, 2002.[9] The process set forth in the regulations is advertised as a straightforward one by the DEQ. But the process can be daunting. Many of the steps involve making determinations on which reasonable minds can and do disagree.

The first and most important step required of parties wishing to participate in the VRP is the eligibility determination.[10] An applicant must submit information regarding the site to the DEQ. The VRP facilitates site cleanup outside of the DEQ's enforcement authorities. If there is an existing violation of environmental laws on the site, however, the site will not be accepted into the VRP. The DEQ provides amnesty from civil penalties for those who voluntarily disclose violations of state law discovered during an effort to restore a property to productive use. However, such contamination will be addressed through the strict provisions of the solid or hazardous waste regulatory program. The remediation of contaminated sites through the VRP is more flexible.

A definitive statement from the DEQ that there are no issues of regulatory concern on a piece of property being considered for purchase would ease a prospective purchaser's concerns about taking on potential liability. At this time, the only method for obtaining a DEQ determination that there are no violations existing on a particular property is by seeking an eligibility determination through the VRP. The comfort letters described above do not include an opinion stating that no violations exist on the site. They merely state that the limitation of liability will not apply if there is a violation of the federal Resource Conservation and Recovery Act. Historically, it was possible to obtain a letter from a DEQ regional office stating that no violations were evident. Financial institutions, prospective purchasers and their lawyers became accustomed to seeing these letters in conjunction with real estate transfers. To the chagrin of many citizens of Virginia, this sort of written documentation is no longer available.

The DEQ is careful to point out that the "V" in VRP is for "voluntary" and that withdrawal from the program at any time is permitted without penalty. Clever purchasers could consider submitting a request for an eligibility determination, obtaining acceptance into the program—which constitutes a determination that there is no remediation required by law on the property—and then withdrawing. This request could be made prior to purchase, with the purchaser serving as a representative of the seller. Such purchasers might be too clever by half. A conclusion could be drawn that the landowner did not want to do "the right thing" and thus pulled out of the program rather than completing it, leaving a contaminated site for development. In an arena where perceptions are important, a move that could reflect badly on your reputation is generally not worth taking.

Once accepted into the VRP, the participant must prepare a voluntary remediation report, which consists of various subparts including a site characterization report, a remedial action work plan, documentation of public notice and a demonstration of completion. The potential for regulatory flexibility exists during this step. The scope of each element of the voluntary remediation report can and should be discussed with the DEQ's Brownfields Program staff as the steps are initiated. One should consult with the DEQ project officer assigned to a VRP project as the elements of the voluntary remediation report are developed. Although the report's subparts are discussed separately below, development of the separate parts often occurs simultaneously.

These discussions begin with the scope of site characterization. Although the program requires that site characterization include the results of all investigation conducted at the site, it is recommended that the sampling methodology (including constituents to be tested, the testing protocol and the sample locations) all be approved in advance by the DEQ in order to ensure that the DEQ will accept the data. This data will be the basis for the site risk assessment.

The risk assessment is included in the site characterization report and should include an evaluation of the human health and ecological risks posed by any releases discovered on the site.[11] The DEQ Web site includes detailed guidance for the conduct

of risk assessments.[12] The assessment of risks posed by release of contaminants is the most critical element of the VRP process. As the decision regarding site remediation is controlled by the findings of the risk assessment, technical accuracy in its performance is critical. Accuracy is made difficult by the fact that risk assessment is more art than science, and reasonable people frequently disagree on the actual risk posed by a contaminant. Again, consultation with the DEQ project officer and risk assessment scientist is absolutely essential to the success of this stage of the VRP process. Note that this assessment must not only cover people who may ultimately use the property once development is complete, but also workers involved in on-site construction activities.

Once the risk assessment is complete, it can be determined whether remediation is required for the site and the remedial action work plan can be prepared. Remediation goals in the VRP may be established based on either background levels or on risk assessments.[13] If the site meets these goals, the VRP process can be completed without remediation. The exact nature of remediation required is dependent upon the final use of the property. Residential uses invoke more stringent remediation requirements than industrial or commercial uses. The scope of remediation also is dependent upon whether or not the landowner is willing to accept restrictions on the use of the property, such as restrictions on the use of ground water for purposes other than environmental testing. The few paragraphs of this paper devoted to the risk assessment, the establishment of remedial goals, and the selection of a remedial action do not adequately represent the level of time and attention that must be given to this portion of the VRP process.

At this point in the VRP, the site characterization and proposed or completed voluntary remediation must be published for public comment. Proof of thirty-day public notice is required before issuance of the certification of satisfactory completion of remediation, the final step of the VRP process.

Once the DEQ is satisfied that the objectives of the remedial action work plan have been met and that the established cleanup standards for the site have been achieved, the DEQ director can issue the certification of satisfactory completion of remediation. The VRP process is then complete. This certification protects the landowner from prosecution by the DEQ under the Virginia Waste Management Act,[14] the Virginia State Water Control Law,[15] the Virginia Air Pollution Control Law,[16] and other applicable Virginia law. This protection is limited, however, to site conditions at the time of issuance as those conditions are described in the voluntary remediation report for the site. Should additional releases of contaminants not addressed through this VRP process be identified at the site, they must be addressed separately.

The certification of satisfactory completion of remediation runs with the land, so that any future owner of the subject property also receives the benefit of the liability protection the certificate provides. The DEQ has entered into a memorandum of agreement with the U.S. Environmental Protection Agency (EPA) in which the EPA indicated its intent to give deference to the Virginia VRP when identifying enforcement targets.[17] Thus, completion of the VRP can also limit a landowner's liability under federal environmental laws. The certification does not limit liability to third parties, but can be used as evidence of a good-faith effort to protect human health and the environmental in the event a third party claim is filed against a landowner.

There is a financial benefit to conducting a brownfields cleanup, in addition to the obvious increase in value of the property. The Taxpayer Relief Act of 1997 provides a tax benefit.[18] Eligible remediation costs can be claimed as a current expense. Taxpayers can thereby reduce their taxable income by the cost of their eligible cleanup expenses. In the interest of facilitating brownfields remediation, Virginia offers low-interest loans for these projects through the Virginia Resources Authority.

Despite the benefits associated with taking advantage of any of the liability limitation options described above, Virginia's brownfields renewal program could be even more successful. Many landowners are concerned that an irrevocable stigma attaches to their property once they admit that it is contaminated,[19] and thus they are reluctant to participate in a public remedi-

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ation program. Other landowners are concerned that the cost of the steps required to satisfy the DEQ and obtain the certification of satisfactory completion will exceed the ultimate value of the property. But the program is still new and the DEQ's Brownfields Program staff is mounting an impressive marketing campaign to educate the public about brownfields renewal. If the real estate market continues along its current path, this program will develop and thrive in the coming years. ⚖

Endnotes:

1 *Brownfields Land Renewal, Brownfields Manual*, Virginia Department of Environmental Quality, March 12, 2004.

2 *See* Brownfields 2004 proceedings at **www.brownfields2004.org**.

3 Currently, the American Society of Testing and Materials's standards E-1527-2000 and E1527-97 are recognized as the benchmark for the conduct of environmental site assessments. The U.S. Environmental Protection Agency is in the process of codifying assessment standards, published as proposed on August 26, 2004, at 69 Fed. Reg. 52542.

4 *Virginia Code* §§ 10.1-1230 through 10.1-1237.

5 H.R. 2869 entitled the Small Business Liability Relief and Brownfields Revitalization Act. H.R. 2869 amended the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9601 *et seq*. The bulk of the amendment is contained under Title II of the bill—which is called the Brownfields Revitalization and Environmental Restoration Act of 2001.

6 *Virginia Code* § 10.1-1234.

7 In some cases, it is possible to require the former owner of the property to retain responsibility for participation in the VRP, or to create an escrow fund through the purchase agreement holding back some of the purchase price to cover the costs of the new owner's participation.

8 *Virginia Code* 10.1-1232.

9 9 VAC 20-160.

10 9 VAC 20-160-40.

11 9 VAC 20-160-70(A)(1)(a)

12 **www.deq.virginia.gov/ vrprisk/**: The Risk Assessment Guidance was updated on July 11, 2005.

13 9 VAC 20-160-90

14 *Virginia Code* §§ 10.1-1400 *et seq*.

15 *Virginia Code* §§ 62.1-44.2 *et seq*.

16 *Virginia Code* §§ 10.1-1300 *et seq*.

17 Superfund Memorandum of Agreement between the Virginia Department of Environmental Quality and the U. S. Envrionmental Protection Agency, Region III, January 11, 2002.

18 Pub. L. No. 105-34, 111 Stat. 788 (TRA '97).

19 Restrictions on the use of property are generally recorded in the public land records of the county.

SLC *continued from page 44*

Senior Citizens Handbook—The *Senior Citizens Handbook* is the pride and joy of the SLC and the YLC. I recommended that we continue to sponsor this handbook and that we disseminate it to the public in every reasonable way.

Planning Ahead—We will continue to advance the work of past SLC Chair Frank O. Brown Jr. in a program that helps attorneys protect their clients' interests in the event of the lawyer's disability or death.

I am also pleased to report that the Chief Justice of the Supreme Court of Virginia, Leroy Rountree Hassell Sr., is supportive of the SLC. He came to one of our board meetings last year and he recently wrote me in support of Senior Citizens Law Day. He has also increased our budget. He expects big things from the SLC, and we plan to respond accordingly.

We are already planning to promote an initiative by the Chief Justice to improve the involuntary commitment process in Virginia. A conference on the subject will be held on December 8, 2005, in Richmond. (See page 13 in this magazine.)

The SLC Board of Governors is made up of senior lawyers from all over Virginia. Many of them have been leaders in the VSB for years and have reached a point in their lives where they have more time than ever before to give to the improvement of the profession. A number of our board members are judges and have been very active and helpful in our programs. I am excited to be chairing the SLC Board of Governors, and I am looking forward to a productive year. I only hope that I can do half the job my predecessor, Bill Smith, did during his chairmanship. ⚖

Nutrient Credit Trading: The New Bay Cleanup Tool

by Christopher D. Pomeroy, David E. Evans and Stewart T. Leeth

Virginia is emerging as a leader and innovator in the Chesapeake Bay cleanup due to its new watershed permitting and nutrient credit exchange program. This program will touch every locality and wastewater authority and many industries across Virginia's portion of the bay watershed. State Water Control Law amendments will help guide of the next decade of Virginia's bay restoration work.

Background

Major portions of the bay and its tidal rivers are classified under the Clean Water Act as "impaired" due to low dissolved oxygen levels and poor water clarity. The low oxygen levels are largely attributable to excess nutrients from "nonpoint" sources (e.g., agricultural runoff and air emissions), and also from point sources (e.g., treated effluent from municipal wastewater treatment plants and factories).

Virginia was compelled to undertake a major effort to restore the bay as a result of two federal legal developments in 1999. First, the U.S. Environmental Protection Agency (EPA) added the bay to Virginia's impaired waters list over the objection of the Virginia Department of Environmental Quality (DEQ). Second, the EPA settled a lawsuit by two citizen groups by entering into a federal consent decree establishing a twelve-year schedule for developing cleanup plans. These plans define Total Maximum Daily Loads (TMDLs) for all of Virginia's waters that were listed as "impaired."

These decisions are controversial. The dissolved oxygen water quality standard on the books at the time was unattainable due to natural conditions, such as the lack of re-aeration in the bay's deep trenches. Any attempt to regulate using the flawed standard would have meant harsh growth restrictions and economic impacts for communities and businesses across Virginia.

These concerns led the six bay states and the District of Columbia, the U.S. Environmental Protection Agency and the tristate Chesapeake Bay Commission to adopt a TMDL transition plan. This transition plan was included in a Chesapeake 2000 Agreement, adopted to guide the restoration of the bay during this decade. Under the plan, new site-specific water quality standards would be developed, followed by the development of TMDL-like tributary strategies to meet those standards. The tributary strategies would be implemented through nutrient limits in Virginia Pollutant Discharge Elimination System (VPDES) permits for point source dischargers and through typically nonregulatory measures for nonpoint sources. Then the Virginia State Water Control Board began to develop implementing regulations.

Proposed Regulations

In 2004, the State Water Control Board issued proposed implementing regulations that would require:

- Enhanced nutrient removal (limit of technology) upgrades by 2010 at 120 "significant" facilities (municipal facilities with a design flow greater than one hundred thousand gallons per day in tidal waters or five hundred thousand gallons per day in free-flowing streams and equivalent industrial facilities) and upon startup at any new or expanding facility.

- Biological nutrient removal (BNR) upgrades for all "nonsignificant" facilities (those with design flows less than the above significance threshold but greater than forty thousand gallons per day, and equivalent industrial facilities) during the first permit term after 2010.

- Requirements to offset any additional nutrient loads associated with new facilities or facility expansions.

The proposed regulations required all point sources to concurrently bid and complete major capital projects. This was widely expected to lead to major shortages of qualified design engineers for advanced treatment facilities, contractors and skilled labor (e.g., instrument and control technicians).

The result would have been dramatically higher bid prices in an environment where many bids on capital projects are already 25 percent higher than engineering estimates. Significantly, this was not necessary because a smaller number of ENR projects initially at the largest facilities could meet the combined point source wasteload allocations (the point source cap).

Citizen Group Law Suits

Meanwhile, the Chesapeake Bay Foundation, a private nonprofit conservation group, launched a litigation initiative that included two circuit court appeals seeking ENR concentration limits in VPDES permits. One suit concerned the town of Onancock's wastewater treatment plant, and the other the Philip Morris plant in Chesterfield County.

At the heart of these appeals was the DEQ's 2004 permitting guidance, which required immediately effective interim mass load limits. The Chesapeake Bay Foundation asserted that the guidance and resulting limits were not stringent enough. At the same time, individual permittees were planning appeals of their own. The limits would have unavoidably resulted in noncompliance for many facilities because—contrary to ordinary permitting practices—the agency was allowing no time to come into compliance.

The bay program might have been tied up in court for years to come. There had to be a better way.

A Legislative Solution

In 2005, Virginia House Bill 2862, and the companion bill in the Senate (Senate Bill 1275) represented an effort to advance the bay cleanup, while avoiding problems that were beginning to surface in the courts. The goal was a practical, cost-effective approach with better prospects for achieving nutrient load reductions in a timely manner.

The legislation would harness market forces through "trading"—a tool already used in Virginia's air pollution control program. Budget considerations made the climate right both for a legislative approach in general and for trading in particular. The General Assembly was grappling with massive funding needs to continue Virginia's successful state-local partnership for point source nutrient control projects. The EPA's estimate that trading could reduce point source upgrade costs for meeting the same water quality standards by two hundred million dollars made trading attractive.

These bills, which easily passed in 2005 with overwhelming bipartisan support, were the result of extensive negotiations among interested parties. In an editorial published on June 4, 2005, in the *Richmond Times-Dispatch*, EPA Assistant Administrator for Water Benjamin H. Grumbles said that Virginia's nutrient credit trading program demonstrates "the power of cooperation and consultation . . . to achieve workable and effective solutions . . . a model not only for the Chesapeake Bay partners but also for watersheds across the country."

Grumbles was referring to the collaboration among the Virginia Association of Municipal Water Agencies (VAMWA)—the lead proponent of the bills—and the Chesapeake Bay Foundation, the Virginia Secretary of Natural Resources and the DEQ. Their mutual efforts led to consensus legislation with wide support.

The resulting legislation, which passed nearly unanimously, amended the State Water Control Law by adding the Chesapeake Bay Watershed Nutrient Credit Exchange Program (Exchange Program). (*See* **http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+CHAP0710+pdf**).

Key Features of the Legislation

The law memorializes the General Assembly's determination that a watershed permit and nutrient credit trading program will assist in meeting the point source cap cost-effectively and as soon as possible, while accommodating continued economic growth and development. The law's features include:

The EPA's estimate that trading could reduce point source upgrade costs for meeting the same water quality standards by two hundred million dollars made trading attractive.

- **Watershed General Permit**—The State Water Control Board will issue a general permit covering all dischargers in early 2006. Controversial interim limits will no longer be issued, and the general permit will supersede interim limits already in effect. The general permit provides an early, uniform "start date" for all facilities, which will not only help make progress sooner, but also enables the level of coordination necessary for trading and sequencing projects to economically achieve and maintain the point source cap.

- **A Practical Approach to Scheduling**—The legislation exchanged the Water Control Board's proposed across-the-board 2010 compliance deadline for a feasible schedule requiring the point source cap to be met "as soon as possible." The board's general permit will include a tentative compliance schedule that accounts for opportunities to minimize costs to the public or facility own-

ers by sequencing multiple projects; the availability of required services and skilled labor; and the availability of funding from the Water Quality Improvement Fund, the State Revolving Fund (SRF) and other mechanisms. Schedule adjustments will be made when permittees submit facility-specific compliance plans nine months after general permit issuance. These plans will propose how and when each facility will be able to meet its individual wasteload allocations (*e.g.,* via treatment and/or trading). Compliance might take about seven to ten years depending upon the level of trading activity.

- **Trading Framework—**The statute expressly recognizes that the permittees may create a Virginia Nutrient Credit Exchange Association (Exchange) to coordinate and facilitate their participation in the Exchange program. While the Exchange cannot assume any of its members' compliance obligations, it will lead technical studies needed to best coordinate treatment plant upgrades and trading activity. Participation in the Exchange, as well as in trading under the Exchange program, is purely optional to the permittee. The law simply extends trading— already used in Virginia's air pollution control program—to regulated parties as an option to help meet permit limits cost-effectively and expeditiously.

- **Annual Compliance Trading—**While trades will be planned and agreed to years in advance, actual trades will be conducted on an annual basis considering facility performance during the calendar year. All trades must be completed by the middle of the following year. If there is a shortage of credits, additional credits may be acquired from the state through the Water Quality Improvement Fund.

- **Owner Bubbles—**There is additional flexibility for multiple facilities under common ownership. At the owner's discretion, wasteload allocations for its multiple facilities can be aggregated and managed collectively. Thus, a single owner can trade loadings among its own facilities with minimal red tape.

- **Offset Protection—**Trading also comes into play when offsetting loads from new facilities or expansions of existing facilities that exceeded their wasteload allocations. The permittee must exercise good faith in attempting to secure offsets from point or nonpoint sources. In the event that offsets are not reasonably available from these sources, offsets may be secured from the state through the Water Quality Improvement Fund in the same manner as year-end compliance credits.

- **Relief for "Non-Significant" Facilities —**Rather than conducting capital upgrades at all smaller facilities, which tend to have very high upgrade costs for little environmental benefit, these facilities will be required to upgrade when it is most convenient and least expensive—at the time of a future expansion.

- **Technology (Concentration) Limits —**The law contains technology requirements for new or increased discharges. New or expanded facilities will be required to install advanced treatment and most will be required to install "limit of technology" controls. Some smaller facilities will be allowed to use biological nutrient removal advanced treatment.

Next Steps

The DEQ now is developing the general permit, which it plans to issue in March 2006. The Exchange is developing a trading optimization computer model and conducting a construction management study to determine how quickly new facilities can be constructed without serious shortages, price spikes and delays, in order to meet the point source cap. Using the results of these efforts, regulated entities will have the option of participating in the trading program to help meet their new, more stringent permit limits. The Exchange and the DEQ will soon be disseminating information about the trading program, but in the meantime readers may contact the authors of this article for further information. ⚖

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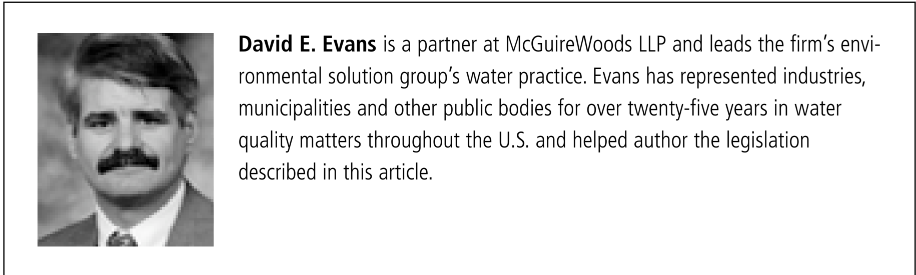
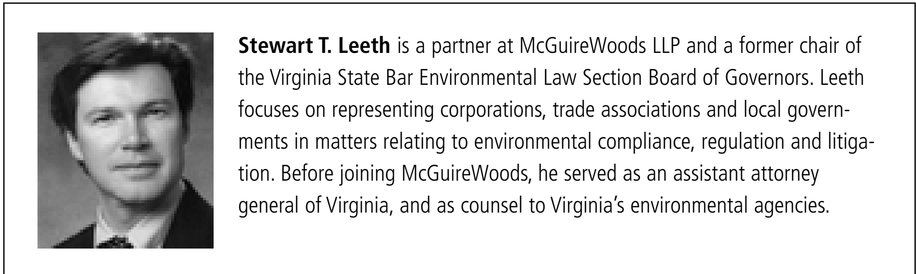
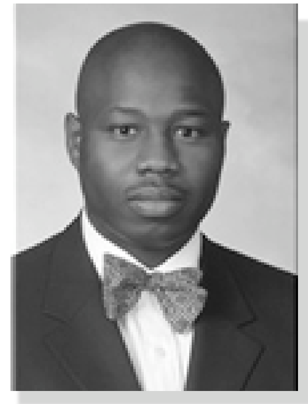


David E. Evans is a partner at McGuireWoods LLP and leads the firm's environmental solution group's water practice. Evans has represented industries, municipalities and other public bodies for over twenty-five years in water quality matters throughout the U.S. and helped author the legislation described in this article.



Stewart T. Leeth is a partner at McGuireWoods LLP and a former chair of the Virginia State Bar Environmental Law Section Board of Governors. Leeth focuses on representing corporations, trade associations and local governments in matters relating to environmental compliance, regulation and litigation. Before joining McGuireWoods, he served as an assistant attorney general of Virginia, and as counsel to Virginia's environmental agencies.

Helping Our Communities Weather the Storms of Life



Adversity has the effect of eliciting talents, which, in prosperous circumstances, would have lain dormant. —Horace

Jimmy F. Robinson Jr., 2005–2006 Young Lawyers Conference President

Hurricane Katrina devastated areas of Alabama, Louisiana, Florida and Mississippi. Hopes and dreams of thousands have been shattered, lives changed forever. We have all been encouraged to give generously to humanitarian agencies helping in the relief efforts. We have witnessed the power of the human spirit as it responds to an unimaginable American tragedy. Nevertheless as lawyers—protectors of human rights and guardians of the American way—we can and must do more. I challenge all who are in a position to do so to volunteer to give pro bono advice and services to those in need who have evacuated the areas impacted by the storm and are relocating to Virginia.

For many victims displaced by Katrina, access to legal services will be a large part of their personal rebuilding efforts. For most, these services will start a normal life. The services that lawyers provide will enforce and protect their rights. Though access to legal rights and protections are important to all, these rights are critical for Katrina survivors who depend on legal entitlements for essential needs such as food, housing, education, clothing and medical care.

There are no words capable of describing the immeasurable damage to property, life and the human spirit that Katrina unleashed. This tragedy offers an opportunity for the legal community to respond to the needs of our fellow Americans. The legal profession can set an example to others in the private sector—as well as provide an opportunity to enhance the reputation of our profession.

The Young Lawyers Conference is no stranger to helping our communities. Last year, my predecessor and friend, Savalle C. Sims, challenged Virginia young lawyers to pick up the baton of service that has been a hallmark of our great profession. Savalle recognized that the rich legacy that lawyers have enjoyed in our society is based on our compassion and service to others. She embraced the accomplishments of our organization and its leaders and paved the way for initiatives designed to meet the needs of our community and profession. Our focus this year is to ensure access to the tools that have in the past and will in the future better our society. I am honored to have the opportunity to lead an organization that is committed to providing access to legal information that can strengthen our communities and better our profession.

This past summer, the YLC board undertook several initiatives to expand our communities' and profession's access to legal information. One task is to partner with the JustChildren program of the Legal Aid Justice Center in Charlottesville, to complete a handbook on youth rights. The handbook will identify and explain the rights of juveniles in three important arenas—schools, police custody and courts. Through this initiative, the YLC hopes to provide a guide to youth and their parents about basic rights and how to protect them.

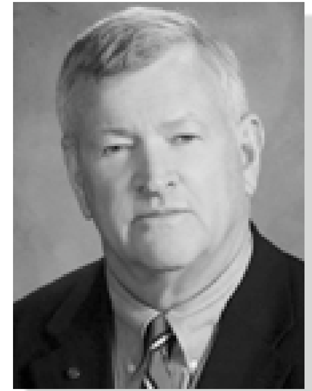
The 2005–2006 initiatives will join the roster of YLC programs that were successful. These programs received awards including several awards in August 2005 from the American Bar Association's Young Lawyers Division. The VSB YLC received second place in the "We the Jury—A View from the Box" program; first place for the Voter Education Pamphlet; first place in the Oliver Hill/Samuel Tucker Prelaw Institute; and first place for the *Docket Call* newsletter. We are proud of these accomplishments that clearly show the YLC's dedication to strengthening our communities and bettering our profession.

I became involved with the YLC to ensure that legal tools are made available to all communities, including those far below the poverty line that resemble the one I was born and raised in. I am so proud to see the tireless efforts of young lawyers across Virginia who, through their volunteer hours and personal contributions, change lives.

For those of you who have not joined our efforts, the YLC stands ready to welcome you into the fold and to share the wonderful rewards that service brings. Our programs are outlined on the YLC's Web page at **www.vayounglawyers.com**. If you are no longer a "young" or new lawyer, I encourage you to support the YLC, to support our programs, to support young lawyers who participate in the YLC and to share the benefits of service with young lawyers in your community.

The YLC board and I hope to meet many young lawyers across the commonwealth. We are planning receptions with our meetings and programs throughout the year. I encourage you to attend, and I look forward to joining you in helping our communities. ⚖

Conference Priorities Include Katrina Response, Senior Citizens Law Day



William T. Wilson, 2005–2006 Senior Lawyers Conference Chair

William B. Smith, our former chairman, reported to you in the last edition of *Virginia Lawyer* about the accomplishments of the SLC during 2004–2005. I am grateful for his work as one of the best chairs of the SLC. His dedication and his accomplishments are much appreciated. I also thank the current members of the board and especially those who rotated off the board: Robert Hunter Manson III, Robert A. Cox Jr., the Honorable James E. Kulp, Patricia Ann Barton, F. Mather Archer, Clarence M. Dunnaville Jr., Carolyn O'Neal Marsh, Thomas F. McPhaul and Colin J. S. Thomas Jr. I also thank Frank O. Brown Jr. for his many contributions and Patricia A. Sliger, our Virginia State Bar liaison. Without their help we could not function.

So much of my thinking recently has been about the people in the Gulf Coast area who were affected by Hurricane Katrina. VSB Executive Director Thomas A. Edmonds has contacted his counterparts in Louisiana and Mississippi about how we can help. I hope that many of our members will volunteer to provide pro bono legal services. Please indicate your willingness on the form that is available on the VSB Web site and in this magazine. Our members also can consider donating to the American Red Cross and the Salvation Army. In addition, The Virginia Bar Association has established a Hurricane Katrina Legal Assistance Fund so that lawyers in affected areas can provide needed legal services and restore their damaged offices and records. Persons and organizations wishing to contribute to the disaster relief effort may send tax-deductible donations to:

The Hurricane Katrina Legal Assistance Fund
c/o The Virginia Bar Association Foundation
701 East Franklin Street, Suite 1120
Richmond, VA 23219

Checks should be made out to "The Virginia Bar Association Foundation" with "Hurricane Katrina Legal Assistance Fund" in the memo line.

At our meeting of the SLC on September 22, 2005, I proposed the following programs for the coming year:

Senior Citizens Law Day—I asked the board of governors to adopt a program whereby the SLC will ask every Virginia bar association to promote a Senior Citizens Law Day. The Alleghany-Bath-Highland Bar Association conducted such a program on May 24, 2005, and it was very successful. We had one hundred in attendance in the circuit courtroom. Eight members of the bar and bench, including a general district judge, served on a panel that explained the *Senior Citizens Handbook*, which is produced and distributed by the SLC and the Young Lawyers Conference (YLC). I was impressed by how attentive the audience was and how hungry they were for this information. I believe that senior citizens and others in Virginia want and need this information.

Nursing Homes and Assisted Living Facilities—I also proposed that we examine these institutions to identify ways we can improve them. The Virginia General Assembly is trying to improve the institutions where senior citizens do not receive proper medical care and treatment. I plan to contact chairs of key committees in both the Virginia House of Delegates and Senate to ask them to speak to our board about these problems.

Hospital-Acquired Staph Infections—Almost everyone I know has a family member or friend who has acquired a staph infection at a hospital, nursing home or assisted living facility. Recent articles in the *Chicago Tribune* revealed a nationwide staph infection problem. Until recently, the General Assembly left the problem to hospitals and doctors to solve. At the last session of the General Assembly, however, Delegate Harry R. "Bob" Purkey of Virginia Beach advanced a bill that requires hospitals to report staph infections. But reporting does not kick in until July 1, 2008. I do not understand the delay. The U.S. Centers for Disease Control and Prevention has been working on this problem for a long time, but it has done so quietly without advising the public of the problem's magnitude. Hospitals have been asked to participate in several studies on a voluntary basis. This is a problem that needs legislation, and it needs that attention fast. Appropriate hygiene in hospitals and in recovery rooms can go a long way toward solving the problem.

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RISK MANAGEMENT CORNER

Lawyer-to-Lawyer Fee-Splitting Arrangements

by John J. Brandt

Prior to a 2000 change in Virginia's Rules of Professional Conduct, an attorney could not ethically receive a fee for referring a client to another attorney unless the referring attorney participated in the work effort and remained responsible to the client. Now, a Virginia attorney may ethically participate in a "division of fees" for doing nothing other than referring a client to another lawyer. Furthermore, an attorney no longer assumes ethical responsibility for the lawyer accepting the referral. As might be expected, there are certain conditions which must be met. The applicable disciplinary rule is Rule 5(e) which reads as follows:

A division of a fee between lawyers who are not in the same firm may be made only if:

- The client is advised of and consents to the participation of all the lawyers involved;
- The terms of the division of the fee are disclosed to the client and the client consents thereto;
- The total fee is reasonable; and
- The division of fees and the client's consent are established in advance of the rendering of legal services, preferably in writing.

In reviewing Legal Ethics Opinion 1739, which analyzed 5(e), the Committee on Legal Ethics reasoned that the change was made to "encourage referrals under appropriate circumstances by not requiring the lawyer making the referral to automatically assume ethical responsibility for all of the activities of the other lawyers involved in the arrangement."

So, if Joe Client comes to Attorney Smith with a serious bodily injury case and wishes Smith to represent him, Smith may decide to refer Joe to Lawyer Jones—which before the rule change seemed counterintuitive to lawyers who were interested in a contingent fee for a good case. However, Attorney Smith—particularly if he is concerned about his own competency to handle a sizable bodily injury case—now can refer the case to Lawyer Jones, who has extensive experience in bodily injury cases, and it becomes a win-win-win situation: Joe Client obtains a top-flight attorney; Attorney Smith avoids the ethical hurdle of not competently representing a client (Rule 1:1); and Lawyer Jones earns a fee. Attorney Smith also achieves monetary success by receiving a referral fee and is not required to perform any legal services for the client. Furthermore, he has no ethical responsibility for the new lawyer's conduct in representing Joe Client. Thus, Smith may earn as much as fifty percent for simply referring a client to another attorney.

There are four conditions which must be met to pass the disciplinary rules' muster: Joe Client must agree, preferably in writing, to the roles of the lawyers; to the fee-splitting; to the reasonableness of the overall fee; and in advance to the legal work. Typically, this agreement is memorialized in the new attorney's representation agreement; i.e., "Joe Client agrees that his 33 1/3 percent contingent fee to Lawyer Jones will be divided: 25 percent to Attorney Smith and 75 percent to Lawyer Jones, to be paid after the case settles or results in a plaintiff's verdict/judgment which is eventually paid by the defendant or his/her insurer."

There can be pitfalls. Attorney Smith should be cautious to refer Joe Client to a very competent attorney. If not, Attorney Smith is exposed to a potential civil lawsuit. Perhaps it is better for Attorney Smith to refer Joe Client to three possible attorneys who all agree in advance to a division of fees. This way, the final choice of lawyers is Joe Client's and not Attorney Smith's. In a contingency fee case, such as Joe Client's matter, if Lawyer Jones loses the case, Attorney Smith obtains no referral fee at all because of Rule 7.3(d).

If you decide to seek a referral fee, nothing in the disciplinary rules limits you to plaintiff bodily injury cases. You may seek a referral fee for a traffic case referral; the defense of a contract action; or the prosecution of a divorce action.

Of course, nothing in the rules requires that Attorney Smith be compensated in some way for referring Joe Client to a good lawyer. Some attorneys are pleased to be able to find a competent and well-qualified attorney for their client and ask no referral fee. They are happy if the new attorney is knowledgeable and does his or her best for the client. In such a case, Attorney Smith hopes Joe Client will feel well-represented and will retain Smith for continued representation on other matters which Attorney Smith feels comfortable handling.

The new disciplinary rule seems to send this message: Always refer a client to another attorney if you feel inadequate and you believe another lawyer can better represent your client. You are entitled to a "referral fee," as described above, for using good judgment, and it becomes a win-win-win situation for the client and attorneys.

Notice for Petition of Reinstatement

Pursuant to Part 6, Section IV, Paragraph 13.I. of the Rules of the Supreme Court of Virginia, ***William McMillan Powers*** *petitioned the Court on January 27, 2005, for reinstatement of his license to practice law. A hearing will be held before the Virginia State Bar Disciplinary Board on Friday, October 28, 2005, at 9:00 A.M. in the Lewis F. Powell Jr. United States Courthouse, Tweed Courtroom, 1100 East Main Street, Fourth Floor, Richmond, Virginia. After hearing evidence and oral argument, the board will make factual findings and recommend to the Court whether the petition should be granted or denied. The board seeks information about Mr. Powers's fitness to practice law. Written comments or requests to testify at the hearing may be submitted to Barbara S. Lanier, Clerk of the Disciplinary System, 707 East Main Street, Suite 1500, Richmond, Virginia 23219 or email clerk@vsb.org. Letters will become a matter of public record.*

WILLIAM MCMILLAN POWERS

Address: 3209 Granada Road, Portsmouth, VA 23703
License Date: May 15, 1976
Revocation Date: June 26, 1992

Mr. Powers's license to practice law was revoked on June 26, 1992. He surrendered his license after pleading guilty to felony bank fraud. The United States District Court for the Eastern District of Virginia accepted his guilty plea and sentenced him to twelve months in prison. The criminal information charged that Mr. Powers made false, fictitious, and fraudulent representations on Disclosure and Settlement Statements to obtain 100 percent financing from a lending institution for town houses that he and a business partner sold. Mr. Powers circumvented lending practices prohibiting 100 percent financing by submitting sales contracts with inflated purchase prices and falsely representing that buyers had made cash down payments on the houses. In order to persuade the lender that lease income would cover monthly principal and interest payments on loans, he created false leasing agreements reflecting monthly lease incomes ranging from $615 to $675, when he knew that the houses were actually leased for lesser amounts. As settlement agent for the transactions, he certified statements that falsely inflated the sales prices, reflected cash down payments that were never made, and did not disclose that cash proceeds from the transactions were remitted directly back to him. The information charged that the false representations ultimately resulted in foreclosure proceedings. A previous petition for reinstatement was rejected by the Court in 1999, on the unanimous recommendation of the Virginia State Bar Disciplinary Board. In his recent petition, Mr. Powers states that he has been employed as a paralegal in the same law firm for thirteen years, and he has been involved in numerous public service activities in his community.