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REGULATION OF PFAS IN WASTEWATER PERMITS: RECENT GUIDANCE AND RULEMAKING ACTIONS BY EPA

BY: RYAN W. TRAIL

A recent rulemaking from EPA seeks the assistance of industry and the public in developing new effluent limitation guidelines to regulate per- and polyfluoroalkyl substances ("PFAS") in wastewater discharges from facilities manufacturing or formulating these compounds. PFAS are a group of chemical compounds found in a wide array of consumer and industrial products and are widespread and persistent in the environment. Evidence has shown continued exposure to PFAS above certain levels may lead to adverse health effects. For several years EPA and the states have studied the impact of PFAS on human health and the environment and have worked toward regulation of the compounds.

EPA's March 17, 2021 Advance Notice of Proposed Rulemaking ("ANPRM") requests data and facility information concerning discharges of PFAS from manufacturers in the Organic Chemicals, Plastics and Synthetic Fibers ("OCPSF") point source category. EPA intends to use the data to amend OCPSF wastewater discharge requirements to include PFAS compounds.

The ANPRM comes in the wake of a flurry of PFAS-related regulatory actions taken by EPA beginning in 2019. In February, 2019, after numerous stakeholder meetings, EPA issued a PFAS Action Plan, identifying primary challenges facing the regulation of PFAS and set forth planned and ongoing actions by EPA. Challenges identified in the action plan included the need for more robust, validated, and codified sampling and laboratory analytical methods, more toxicity data and exposure information to set proper cleanup levels, and more study of effective treatment and remediation methods. One action item in the PFAS Action Plan was to "identify industrial sources that may warrant further study for potential regulation through Effluent Limitation Guidelines and Standards ("ELG")." Following issuance of the Action Plan, EPA conducted a PFAS Multi-Industry Study, which gathered a range of information about PFAS manufacturers and formulators, as well as the potential discharges of PFAS from these facilities.

In November, 2020, EPA issued guidance to its regional permit writers, instructing them to find ways to "address" PFAS in wastewater discharges "while the CWA framework for potentially regulating PFAS discharges pursuant to the NPDES program is under development." Acknowledging there is no regulatory basis for placing numeric PFAS limitations in NPDES Permits yet, this *Interim Strategy for PFAS in Federally Issued NPDES Permits* suggests permit writers include monitoring requirements in permits of facilities where "PFAS are expected" in wastewater discharge. First, to determine whether PFAS are expected, EPA suggests there is no need for existing data from the facility showing PFAS are actually in the wastewater discharge. Monitoring requirements may be included if data from "similar facilities"

show PFAS in wastewater. Second, the guidance suggests these monitoring requirements be drafted such that they only become effective at some future unknown date, when sampling methodologies are approved. Both of these strategies should be troubling to permittees.

The ANPRM is simply EPA's next step in achieving its goal set in the Action Plan and more clearly articulated in the *Interim Strategy.* It requests additional information from PFAS manufacturers and formulators and seeks public review and comment on the information and data collected to date. PFAS manufacturers are those facilities that produce PFAS compounds. Formulators include facilities, which are the primary customers of PFAS manufacturers; those using PFAS to produce commercial or consumer goods (e.g. weather-proof caulking) or using PFAS as an intermediary in the production of consumer goods (e.g. grease-proof coating for a pizza box). The ANPRM asks PFAS manufacturers and formulators to provide EPA information including the identity and location of other facilities believed to be PFAS manufacturers or formulators; descriptions of manufacturing processes (process flow diagrams); data on specific compounds produced or used, production volumes, and customer information; identification of waste streams containing PFAS; current wastewater treatment and management practices used; planned facility changes related to PFAS production or use; and information on analytical methods used.

EPA plans to use the information gathered in response to the ANPRM to draft a Notice of Proposed Rulemaking for the OCPSF category. Once EPA establishes a scientific basis for measuring PFAS in wastewater and develops defensible effluent limitations, regulation of PFAS in wastewater permits at all levels will come swiftly. States will use ELGs in establishing state-level effluent limitations, and local publicly owned treatment works ("POTWs") will incorporate them into sewer use ordinances. In anticipation of this, states and POTWs are actively gathering information related to PFAS compounds from industry with state issued NPDES permits and locally issued pre-treatment permits.

Interested facilities and the public should take part in the process. Comments on the ANPRM may be filed through May 17, 2021.

Recommendations from the PFAS NPDES Regional Coordinators Committee, Interim Strategy for PFAS in Federally Issued NPDES Permits, EPA Memorandum, (November 22, 2020)

Clean Water Act Effluent Limitations Guidelines and Standards for the Organic Chemicals, Plastics and Synthetic Fibers Point Source Category, Advanced Notice of Proposed Rulemaking, 86 Fed. Reg. 14560 (March 17, 2021)

ENVIRONMENTAL JUSTICE IS A TOP PRIORITY

BY: JESSIE J. O. KING

When environmental lobbyists are asked to discuss the topics to watch for 2021-2022, the answer almost always includes one broadly encompassing topic: Environmental Justice. While the term "Environmental Justice" or "EJ" is not new, until recently it has appeared to be more of a politically correct buzz word than a movement effecting any real and consistent changes in regulators' approaches to environmental decision-making. However, President Biden brought new life to the concept by issuing an executive order establishing a White House Environmental Justice Advisory Council ("WHEJAC") immediately upon taking office. Members of Congress followed the President's lead by proposing a new law to create and fund $18-20 million annually over the next four years to support certain community environmental justice initiatives and research. State environmental regulatory agencies, including the South Carolina Department of Health and Environmental Control ("SC DHEC"), have taken heed of the federal movement and are also promising to ramp up their EJ programs in the coming years. Virginia has announced similar efforts.

What is Environmental Justice?

According to EPA's website, EJ is "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income

with respect to the development, implementation and enforcement of environmental laws, regulations and policies." As a result of the EJ definition, EPA (and other state agencies involved with the environment) are required to do two things when making regulatory permitting or enforcement decisions: treat sensitive communities fairly by not requiring them to bear a disproportionate share of negative consequences, and meaningfully involve members of these communities in those regulatory decisions.

History of Environmental Justice

EPA formed the Office of Environmental Justice ("OEJ") in 1992 to provide educational, scientific, and financial support to communities experiencing disparate impacts to health and the environment. The concept gained momentum in 1994 when President Bill Clinton signed an executive order directing each federal agency to make Environmental Justice part of its mission "by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States." Clinton's Executive Order created deadlines for an interagency advisory council led by EPA and engaging seventeen other federal agencies to identify environmental justice communities and environmental impacts, and to form strategies to address and prevent disproportionately negative impacts to their health and surrounding environment. Biden is now bringing back this type of approach to these issues.

The 2021 WHEJAC Agenda

The WHEJAC, unlike the interagency advisory group created by Clinton, is a multi-agency group which includes representatives from the offices of the Attorney General, the Departments of Agriculture, Commerce, Defense, Energy, Health and Human Services, Housing and Urban Development, Interior, Labor, and Transportation and, of course, EPA. It also includes White House officials to help keep the movement on task, including the head of the White House Council on Environmental Quality, the Climate Advisor, and the Director of the Office of Science and Technology Policy. Many believe this shift is intended to, and will, ensure more accountability and real progress, to be measured by specific metrics listed in the Biden Executive Order itself.

In fact, during the WHEJAC's first meeting in March, White House officials stressed a change in the way EJ will be promoted and tracked. In the past, EPA has taken the lead in directing EJ initiatives at the 17 other federal agencies. Some agencies have done little by way of EJ policy changes, and EPA's attempts to lead and facilitate have been difficult and reportedly ineffective. Biden's new WHEJAC directed the council to focus on specific tasks including:

- Updating Clinton's 1994 Executive Order,
- Providing guidance on developing climate and economic justice screening tools,
- Strengthening enforcement for environmental violations,
- Preventing disproportionate environmental impacts on underserved communities,
- Creating community notification programs with real-time environmental pollution information, and
- Developing an environmental justice enforcement strategy with the Department of Justice to address systemic environmental violations and contamination.

These action items will directly impact the regulated community, allowing the public to review technical

information in real-time, seemingly without Quality Assurance/Quality Control protective procedures in place, and mandating enhanced enforcement strategies.

SC DHEC's Call to Action

South Carolina has been slowly enhancing its response to the Environmental Justice movement. Focus on EJ in our state began in 2004 and 2005, with attention to increased public engagement and participation, especially in EJ Communities. In 2007, the state legislature responded, passing a law creating the SC Environmental Justice Advisory Committee to study and consider the impact of certain state agencies' policies and practices in economic development and revitalization on Environment Justice. From 2008-2017, SC DHEC had met with and provided grants and technical assistance to EJ Communities. More recently, in 2018, SC DHEC and community organizations met and published these EJ "Guiding Principles":

- Routine consideration of EJ Communities in decision-making,
- Proactive development and strengthening of relationships with EJ Communities by sharing information, providing technical assistance and identifying resources,
- Promoting Partnerships between EJ Communities and other stakeholders,
- Encouraging and facilitating capacity building and problem solving within EJ Communities, and
- Strengthening DHEC's leadership with the goal of sustaining EJ within the agency.

Finally, in 2020, DHEC formed a workgroup to assess four national EJ challenges identified by EPA: (1) water, (2) lead, (3) air and (4) hazardous waste. DHEC appears to be following EPA's lead and moving toward an approach to EJ that works parallel to the federal initiatives.

What to Expect

The demand for environmental justice reform has been growing for years and is gaining momentum due to the change in federal leadership and the push for states to keep up. For the regulated community including manufacturers, developers, or farmers, this likely will mean higher scrutiny on permitting decisions including air and indirect and direct water discharges. It also means more inspections and enforcement regarding compliance with these and other permits, as well as hazardous waste generation, management and disposal. Most of all, this means more public participation in all aspects and phases of the regulatory permitting, enforcement, and pollution cleanup processes and heightened consideration of comments received from community leaders. Those in the regulated community with the time and resources would be wise to engage community leaders themselves early in the permitting or compliance process, to allow for early identification and problem-solving of community members' concerns with environmental impacts.

Tackling the Climate Crisis at Home and Abroad, Executive Order 14008 (January 27, 2021)

CLIMATE STRATEGIES NOW!

BY: JOHN M. "JAY" HOLLOWAY, III

The convergence of climate change policy, massive spending on breakthrough advances in renewable energy sources (e.g., solar, on- and off-shore wind) and energy storage technology, complete upgrades to electricity infrastructure, and commitments from industry to reduce CO2 emissions, require that manufacturing and all other industry develop real climate strategies now. Industry can no longer stay under the radar; front-facing true strategies must be implemented in each industry sector and company-wide. Legal advice will supplement these efforts.

Thus far, the Biden Administration is seeking carbon reductions and a national climate change strategy and policy through investment in technology improvement in partnership with industry to achieve real and permanent CO2 emissions reductions. While advanced and effective CO2 reduction technology is likely decades away, partnership with industry is the only way to achieve climate policy goals. Thousands of renewable and other low CO2 projects are underway. Aggressive development of energy sources that emit CO2 well below traditional

levels of CO2 per Kw/hr of electricity are the only way to achieve technology improvement without customers and ratepayers paying for all associated costs. On the industry side, reductions in CO2 emissions per MMBtu/hr of steam and other energy accomplished through efficiency improvements and enhanced maintenance must also be part of any national climate strategy supported by government investment and industry expertise. Customers should not foot these bills either.

In my view, lasting CO2 and other GHG reductions can only be made by- bringing government support to cutting-edge engineering, science, and manufacturing technology. I view it unlikely that carbon markets, other carbon taxes, or stringent new legal and regulatory requirements can achieve real, permanent CO2 emissions reductions. Increasing the price of electricity or energy only will significantly increase consumer energy costs. Utilities can generally recover these costs through increases in rates. Industry can possibly raise prices on goods. Most of these costs, however, will be absorbed by industry. Climate strategies must take such challenging and potentially flawed policies, laws, and regulations head-on.

On his Inauguration Day, President Biden issued Executive Orders making climate change a central focus of all aspects of federal domestic and international policies and actions. Large portions of the Covid Relief Package, the Infrastructure bill, and the proposed budget contain unprecedented investments to address climate change. The current proposed 2022 federal budget contains tens of billions of dollars for climate change measures. The budget package includes $1.9 billion to the Energy Department devoted to the electricity grid, $8 billion for clean energy technologies, $7.4 billion for science and $1 billion to fund a new department named Advanced Research Projects Agency for Climate. The door is open if industry is allowed to and can step through.

Why Climate Strategies?

Why should industry devote the significant time and resources required to develop a climate strategy? The answer is real business opportunities. Traditional industry will bear the cost of the climate change investments through electricity rate increases, new regulatory requirements applicable to manufacturing, and additional challenges to electricity and natural gas reliability. An easy first step is to aggressively look at the development of renewable and low carbon technology projects either as a company or as a participant with other parties. Direct access to renewable and low carbon electricity will allow industry to be less dependent on utility electrical service by sourcing electricity directly from the project. There are also significant tax credits, renewable electricity credits, and other carbon offsets that can be monetized and provide a direct return on investment.

As noted, industry can partner with renewable and storage developers and governmental entities like the new Advanced Research Projects Agency for Climate to develop and sell state-of-the-art technology that can make significant and sustainable reductions

in CO2 and GHG emissions. In particular, battery storage appears to be the key technology that must be improved if net-zero or zero carbon electricity generation will ever be achieved.

Corporate Leadership

Large corporations, many of whom produce electricity and fossil-fuels, and others that are very large energy consumers, are adopting and promoting pro-climate change promises. The Center for Climate and Energy Solutions recently issued an open letter committing to true CO2 reductions from each of its member companies:

> The United States has made important strides – emissions are down, and clean energy is up. With the election of a new President and Congress, we now have a critical opportunity to significantly strengthen these efforts. We stand ready to work with stakeholders on all sides and with our elected leaders to seize this moment and achieve ambitious, durable climate solutions.
>
> Amazon • Bank of America • BASF Corporation • BHP • bp • Cargill Carrier Corporation • The Chemours Company • Citi • Danone North America • Dominion Energy • Dow Inc. DSM DTE Energy • DuPont • Edison International • Entergy Corporation Exelon Corporation • Ford Motor Company • General Motors • Goldman Sachs • Google • HP Inc. • IBM Intel Corporation • Johnson Controls • JPMorgan Chase • LafargeHolcim • Microsoft Corporation • Morgan Stanley • National Grid • Nestlé • NRG Energy, Inc. • Ørsted Offshore, North America • PG&E Corporation• PSEG • Schneider Electric • Shell TOTAL • Trane Technologies PLC • Unilever United States • Walmart

Obviously, these types of promises are goals at best. Further, every company and industry must look at all factors associated with plans for internal climate measures. Examples could be on-site solar, efficiency upgrades of all kinds, production of low carbon fuels that can be used or sold, new technologies or use of carbon offsets.

Climate strategies should also include the development and reporting of sustainability programs, disclosure of carbon emissions, and commitments to Environmental Social & Governance ("ESG") measures. These efforts provide objective measures of a company's or industry's commitment to climate and other environmental issues. Integral to these measures is the ability to ensure that goods made in the United States are compared on an equal basis with goods made in higher CO2 emitting countries by higher emitting manufacturers. Third party rankings of the strength of corporate ESG and Sustainability Programs provide other objective measures that can be utilized in climate strategies to compete with countries and corporations that do not have these measures or score much lower on ESG, Sustainability, and CO2 emissions rankings.

Biden weaves climate crisis throughout his budget outline, Roll Call (April 21, 2021)

LIABILITY FOR INVALID STATE AGENCY PERMIT DECISIONS: IS THE REGULATED PARTY LEFT HOLDING THE BAG?

BY: CHANNING J. MARTIN

Regulated parties who comply with their permit sometimes get an unwelcome surprise. They meet with their state agency, make full disclosure about their discharges or emissions, and then the state agency makes decisions about how to regulate the discharges or emissions, including what type of permit to issue. Sometimes the state agency gets it wrong, and then citizen groups sue. In that instance, one in which the regulated party relied on the state agency and did what it was told to do, does the regulated party win or lose? That depends on the facts, but there are at least two

cases, including one just decided by the Fourth Circuit, that give hope to regulated parties that find themselves in this position. These cases were decided under the Clean Water Act ("CWA"), but the principles and rationale apply equally to enforcement cases under other environmental laws.

In Southern *Appalachian Mountain Stewards v. Red River Coal Co.,* the issue was whether underdrains at the defendant's facility were point sources that required a NPDES permit. The facts showed EPA had delegated authority to issue NPDES permits to Virginia's Department of Mines, Minerals and Energy's Division of Mined Land Reclamation ("DMLR"), and that DMLR also had the ability to issue permits under the Surface Mining Control and Reclamation Act ("SMCRA"). When DMLR renewed the facility's combined NPDES/SMCRA permit, it determined that the underdrains did not need to be regulated as point sources under the NPDES permit. Citizens groups sued and argued the defendant was violating the CWA by discharging pollutants without a NPDES permit.

The district court noted this was not a case where the regulatory authority knew nothing about the underdrains. The court recited evidence showing that DMLR made a conscious decision not to regulate the underdrains under the NPDES portion of the permit because DMLR believed that monitoring the underdrain effluent under the SMCRA portion of the permit was sufficient. The court found this decision was legally incorrect and held the underdrains were point sources. The issue then before the court was whether the CWA permit shield applied. Under the CWA, a discharger is shielded from liability if it complies with its NPDES permit, but its discharge nevertheless fails to meet water-quality standards. There is no permit shield under the Surface Mining Act. That meant the court had to consider whether a discharger who is shielded from liability under the CWA can still be held liable under equivalent Surface Mining Act standards.

In its analysis, the district court noted that EPA had objected to the draft permit and instructed DMLR that these ongoing discharges must be subject to the NPDES permit. The court also noted that EPA had written to the defendant and put it on notice that

the agency considered it to be in violation of the CWA. Under those facts one would expect the court to determine the defendant violated the CWA, at least under EPA's view of how the permit shield was to be applied. But that's not what the Court ruled. In upholding the permit shield, the court said:

> The undisputed evidence demonstrates that Red River has done what DMLR has told it to do. Red River should be able to rely upon the clear directives of its regulators without being subjected to liability. The EPA disagrees with what DMLR has required, but it would be unfair to place Red River in the middle of a battle between federal and state regulators. The EPA and SAMS are free to take legal action against DMLR, but DMLR is not a party to this litigation. By being completely forthcoming with DMLR and complying with the express terms of this Permit, Red River has met its obligations under the CWA and is entitled to rely on the permit shield. I will therefore grant Red River's Motion for Summary Judgment as to the CWA claim.

The court then went on to hold that the Surface Mining Act's savings clause, which bars construing the Act in any way that would supersede, amend, modify or repeal the CWA, meant that no liability can be imposed under the Surface Mining Act for

conduct that is otherwise shielded from liability under the CWA. The Fourth Circuit affirmed the district court's decision on appeal.

The second case is *Wisconsin Resources Protection Council v. Flambeau Mining Co.,* 727 F.3d 700 (7th Cir. 2013). The issue there was whether the defendant's discharges violated the CWA. The facility at issue discharged stormwater, and the Wisconsin Department of Natural Resources ("WDNR") determined it could do so under a mining permit approved as part of the state's delegated NPDES program. The facts showed that WDNR was authorized by EPA to administer the federal program and issue all NPDES permits within the state. Citizens groups sued, contending the state had erroneously determined that discharges under the mining permit were authorized by the CWA and that the defendant should have known it. The defendant alleged the permit shield applied, but the district court did not agree.

The Seventh Circuit reversed. It made short work of the argument that the defendant "should have known" it was not entitled to rely on what the state had said. It held:

> [W]e need not decide whether the EPA approved this specific provision of Wisconsin's WPDES scheme because, even if Flambeau's permit were legally invalid, we cannot, consistent with the requirements of due process, impose a penalty on Flambeau for complying with what Wisconsin deemed a valid WPDES permit.

Id. at 707. The court rejected the argument that the defendant "should have known" the state did not have authority to do what it did because, according to the plaintiff, applicable regulations made that clear. The court said:

> …[F]orcing a permit holder to establish that the undisputed permitting entity had actual authority to issue the permit, despite a facially valid law authorizing the entity to issue the permit, would vitiate the permit shield. Permit holders would be brought into court to establish not only the validity of their permits, but also the validity of the issuing authority to issue such a permit, requiring permit holders to prove the validity of legislative and regulatory transactions to which they were not parties. This undermines the purpose of the shield provision, which the Supreme Court has stated is to "giv[e] permits finality," *E.I. du Pont de Nemours,* 430 U.S. at 138 n.28.

The court held that the permit shield applied because "[t]o hold otherwise would be inconsistent with the requirements of due process."

These cases give regulated parties hope that, when they rely on their state agencies to make correct decisions, they won't be penalized if the state agency gets it wrong. Any given case, though, is fact-specific, so the holdings in these cases may not have apply in other contexts. The best outcome is for the regulated party, working with the state, to avoid these situations altogether by making sure any permitting decisions made are legally sound before the permit is issued.

Southern Appalachian Mountain Stewards v. Red River Coal Co., 420 F.Supp.3d 481 (W.D. Va. 2019), aff'd 992 F.3d 306 (4th Cir. 2021)

Wisconsin Resources Protection Council v. Flambeau Mining Co., 727 F.3d 700 (7th Cir. 2013).

ATLANTIC RICHFIELD COMPANY V. CHRISTIAN – ONE YEAR LATER

BY: RUTH LEVY

Following the United States Supreme Court's decision in *Atlantic Richfield Company v. Christian,* commentators warned the decision would allow a new category of state law actions challenging EPA-approved clean-ups. One year later, *Christian* does not seem to have opened the flood gates to new litigation, but it may serve to narrow federal jurisdiction over environmental clean-ups. In *Christian,* 98 Montana landowners, who were within the boundaries of a Comprehensive

Environmental Response, Compensation, and Liability Act ("CERCLA") Superfund site, brought suit in state court asserting various state law claims related to pollution damage to their property. Part of the damages sought were "restoration" damages, which were meant to restore the landowners' property to its pre-contaminated condition. Under Montana law, a landowner may seek not only tort damages for diminution in property value, but also restoration damages, even if such efforts are greater than those deemed necessary by EPA. Restoration damages are unique to Montana state law (no other states recognize such damages).

The United States Supreme Court, without ruling whether the landowners in *Christian* were entitled to restoration damages, held that CERCLA does not deprive Montana state courts of jurisdiction over plaintiffs' state law restoration claims, and remanded the case back to the Montana state court.

On remand, the Supreme Court of Montana restated the United States Supreme Court's ruling with regard to restoration damages: Atlantic Richfield may be liable for the landowners' remediation beyond what is required under CERCLA, but only if the landowners "first obtain EPA approval for the remedial work they seek to carry out." *Atl. Richfield Co. v. Montana Second Judicial District Court.* Any further remedial action for which Atlantic Richfield may be liable must first be authorized by the EPA as "such action cannot be taken in the absence of EPA approval." *Id.* The Montana Supreme Court then remanded the matter to the Montana District Court for further proceedings on the landowners' claims.

Christian is important not only because of its potential to broaden the ability to challenge an EPA clean-up, but because it defined the scope of federal jurisdiction under CERCLA § 113(b). As the United States Supreme Court held, Section 113(b) of CERCLA, which grants federal courts exclusive jurisdiction over cases "arising under" CERCLA, does not deprive state courts of jurisdiction to hear state law claims for restoration damages, because those claims do not "arise under" CERCLA.

Since *Christian,* the scope of Section 113(b) was addressed by *City of Visalia v. Mission Linen Supply, Inc.,* in which the City of Visalia, California sought a declaration that remediation projects at a contaminated property under a remediation order by the California Department of Toxic Substances Control were subject to certain state law bidding procedures. Relying on *Christian,* the Court held that, because the City of Visalia's complaint did not bring any claims "arising under" CERCLA, Section 113(b) does not strip jurisdiction from the California state courts.

As a result of *Christian*, it remains to be seen whether more state court cases will be brought

seeking environmental clean-ups at Superfund sites, and, as a consequence, whether landowners will seek EPA-approval for remediation claims.

Atlantic Richfield Company v. Christian, 140 S.Ct. 1335 (April 20, 2020).

Atlantic Richfield Company v. Montana Second Judicial District Court, 2020 WL 3432963 (June 23, 2020).

City of Visalia v. Mission Linen Supply, Inc., 2020 WL 25546763 (E.D. CA. - May 20, 2020).

Biden Administration Updates

Please visit https://www.williamsmullen.com/biden-resources for legal updates related to new legislation, policies and initiatives driven by the Biden administration.

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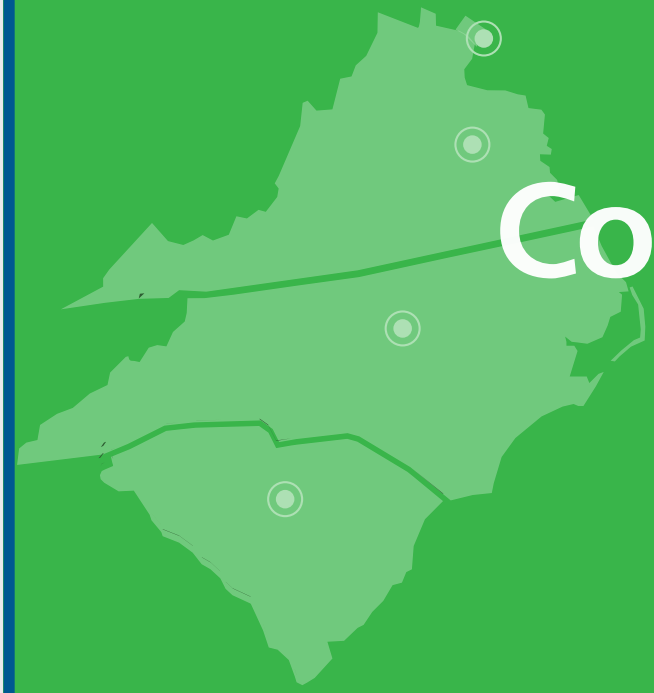

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