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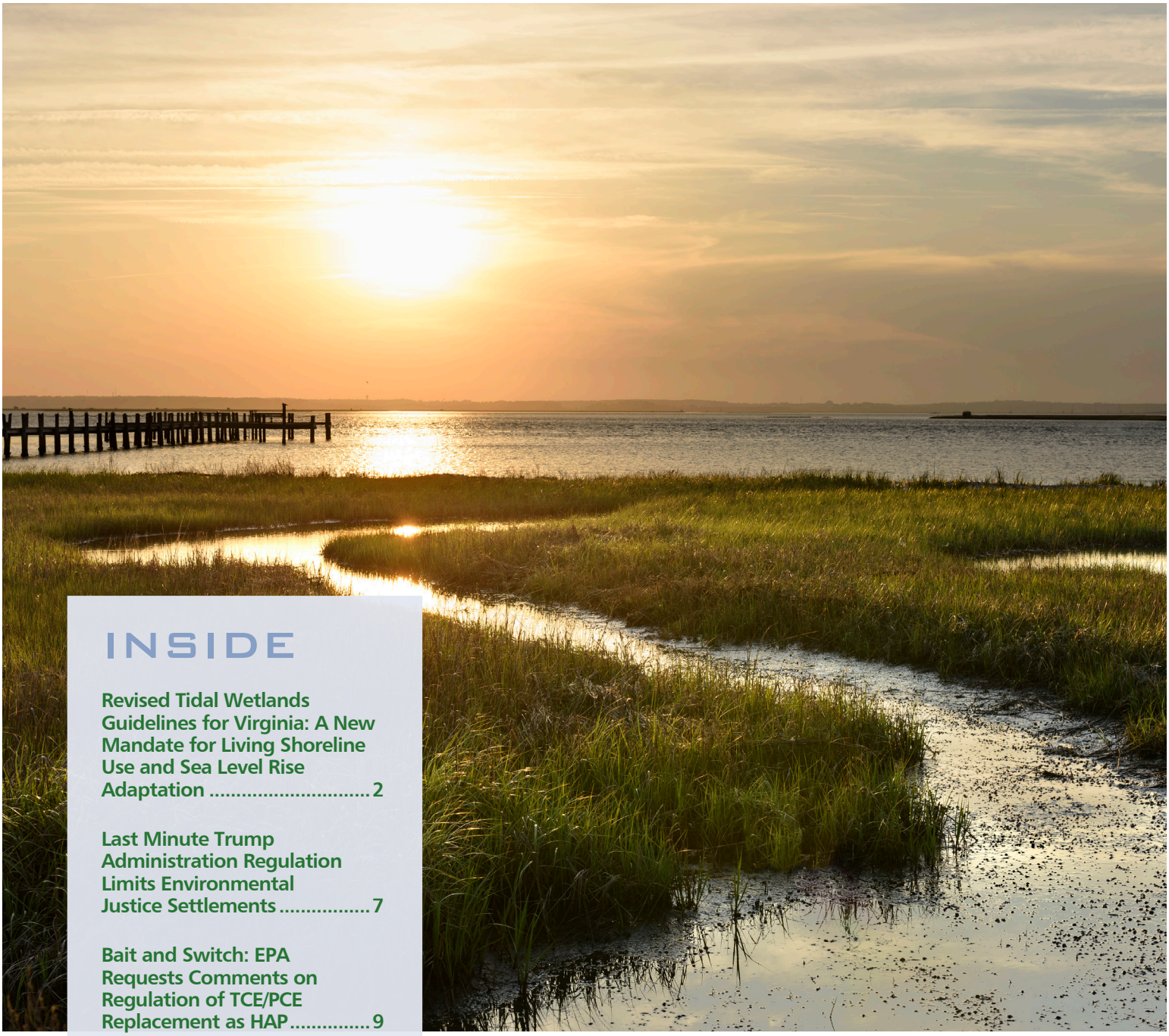

INSIDE

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REVISED TIDAL WETLANDS GUIDELINES FOR VIRGINIA: A NEW MANDATE FOR LIVING SHORELINE USE AND SEA LEVEL RISE ADAPTATION

BY HENRY R. ("SPEAKER") POLLARD, V

Can you still build a bulkhead along the shoreline in coastal Virginia to protect your property? Well, it depends, but now the answer is more likely to be "no." Major changes to how Virginia tidal waterfront property owners and operators can protect their shorelines were recently adopted as part of a revised version of Virginia's Tidal Wetlands Guidelines ("Guidelines") issued by the Virginia Marine Resources Commission ("VMRC"). Driving many of the core changes were a living shoreline use mandate and climate change resiliency objectives contained in Senate Bill 776 ("SB776") passed by the General Assembly last year. While it is still unclear how VMRC and local wetlands boards implementing the revised Guidelines will address the practical and technical concerns raised by the new requirements, the net result is that tidal waterfront owners in Virginia will face a much greater burden when seeking to construct hardened structure improvements (e.g., bulkheads, sea walls, and revetments).

1. SB776's New Mandates and Standards.

The passage of SB776 in the 2020 General Assembly session set three new benchmarks for shoreline management permitting in Virginia. First, it converted the existing statutory preference for use of living shoreline approaches as a means of shoreline management and protection into a mandate for their use, "unless the best available science shows that such approaches are not suitable." Even if a complete living shoreline approach is not suitable based on "best available science," elements of living shoreline approaches must be included in the proposed project "to the maximum extent possible." Id. This mandate is the latest of several legislative steps to incorporate living shorelines into tidal shoreline protection. Indeed, VMRC had developed prior to SB776 a general permit (like a permit-by-rule) to streamline the permitting process for using living shorelines in tidal wetlands and waters. 4 Va. Admin. Code Chaps. 20-1300, 20-1330; See Living Shoreline Laws.

Second, SB776 also changed Va. Code § 28.2-1301.B expressing VMRC's duty to ensure the preservation and protection of tidal wetlands "while accommodating necessary economic development." This provision now also requires VMRC "to ensure the protection of shorelines and sensitive coastal habitats from sea level rise and coastal hazards." Mechanisms contemplated by statute to accomplish these directives include VMRC's "guidelines and minimum standards." See Va. Code § 28.2-1301.

Third, SB776 addressed in similar terms the role of local wetlands boards for many Tidewater Virginia localities that act as the initial decision-maker for shoreline management projects, subject to appeal to the VMRC. When implementing local tidal wetland protection ordinances, these local boards now must account for sea level rise and coastal hazards in the same manner as VMRC and otherwise follow VMRC's guidelines and standards in this regard when reviewing permit applications for such projects. Va. Code §§ 28.2-1303, -1307 & -1308. Now that the Guidelines have been revised and issued, the living shoreline mandate also pertains to local wetlands board review of shoreline protection projects. Therefore, local wetlands boards will be compelled to determine if "best available science" demonstrates that a living shoreline approach is not suitable and, if not, require shoreline elements to be implemented "to the maximum extent possible."

2. Guidelines Revisions.

a. Updated Tidal Wetland Science and Jurisdictional Clarification.

The revised Guidelines first set out a modified framework for distinguishing between nonvegetated tidal wetlands and vegetated tidal wetlands and their respective functionalities, clarifying VMRC's jurisdictional authority over each, and describing how alterations to each affect their functionality and warrant mitigation,

and potential mitigation options for each set of impacts. Guidelines at 4-6.

b. **Accounting for Sea Level Rise and Climate Change.** Nodding to SB776's requirement to incorporate sea level rise and climate change into tidal wetlands protection standards, the revised Guidelines now expressly incorporate sea level rise and climate change considerations into the requirements for any shoreline alteration. Any shoreline alteration project must now:

- be designed and constructed to mitigate coastal hazards including storm-level hydrological energy that may reasonably be expected over the useful life of the project, and
- be functionally resilient and structurally designed to endure the impacts of sea level rise using the 2017 National Oceanic and Atmospheric Administration ("NOAA") Intermediate-High scenario projection curve or, in the future, any updated projection based on the best available science and selected through the Coastal Master Plan process.

Guidelines at 9. Therefore, such projects must now *mitigate* the effects of coastal hazards generally, not just resist storm-level hydrological energy, as previously had been required. "Useful life" is now defined as "the average amount of time in years that the project is estimated to function when installed properly and routine maintenance is practiced." Id.

Furthermore, as noted above, shoreline alteration projects must now be designed to withstand projected seal level rise based on the 2017 NOAA Intermediate-High scenario. That scenario predicts that sea levels will rise at the Sewell's Point tide gage in Norfolk, Virginia by almost 2.5 feet between 2020 and 2050 and by 6.7 feet between 2020 and 2100. For projects with a long useful life, factoring in sea level rise based on such projections may change the design and costs significantly.

Interestingly, the final revised Guidelines also cross-reference pending amendments to the Virginia Chesapeake Bay Preservation Act ("CBPA") regulations addressing coastal resiliency activities and requirements within 100 feet of regulated waters (including tidal waters). (See our March 2021 newsletter for a review of the proposed CBPA regulation amendments; we will cover the final CBPA regulatory amendments in a separate article once they are finalized.) For example, the revised Guidelines prohibit permitting a project when the relevant locality determines the project does not comply with the local CBPA ordinance or CBPA regulations promoting "coastal resilience and adaptation to sea level rise and climate change."

c. **Living Shoreline Mandate.** Operative language in the revised Guidelines incorporating the statutory mandate for living shoreline approaches to shoreline management is found in several places, including the provisions addressing allowable impacts to tidal wetlands. Reflective of statutory policy balancing protection of tidal wetlands with economic development and riparian property rights, waterfront project-related scenarios with impacts to tidal wetlands may now be permitted only to:

Gain access to navigable waters by:

- Commercial, industrial, and recreational interests for which it has been clearly

justified that waterfront facilities are required and the interest is water dependent;

- Owners of land adjacent to waters of navigable depth or waters which can be made navigable with only minimal adverse impact on the environment.

Protect property from significant damage or loss due to erosion or other natural causes*, provided that only living shoreline approaches are used unless the best available science shows that such approaches are not suitable*."

Guidelines at 7-8 (emphasis added to show new living shoreline mandate text). Even if a project falls into one of these "permittable" scenarios, there are other conditions and design standards that must be met before a permit can be issued, including those for the avoidance and minimization of adverse impacts on neighboring properties, water quality, and habitat. The revised Guidelines still assert these conditions and prohibitions reflect a recognition of "riparian rights and reserve the shoreline for those uses or activities that require water access." Id. at 8. However, as discussed below, from a tidal waterfront owner's perspective, the latest revisions to the Guidelines further restrict, if not eliminate in many cases, traditional riparian owner options to protect residential and commercial waterfront uses from erosion and storm surges.

Living shorelines can serve as cost-effective and multi-functional shoreline protection alternatives to hardened improvements to shorelines like bulkheads, revetments, groins, and jetties. Living shorelines also have been demonstrated to help create, supplement, and maintain tidal wetlands, to mitigate water quality impacts from development, and to minimize recurrent flooding impacts. Therefore, they can be a viable means of controlling erosion, addressing climate change impacts to shorelines, and improving shoreline habitat and water quality. Some owners and operators are finding opportunities for the use of living shorelines where appropriate along the shore to complement hardened structures, achieving a hybrid result.

Despite their potential benefits, significant practical challenges for using living shorelines can arise, because they often entail either creation or expansion of natural shoreline features toward or into the water and/or into the upland to create the necessary conditions for long-term success. To the degree that a living shoreline approach requires expansion into the water, this is often accompanied by a rock or other sill structure with sand fill between it and the shore to create appropriate bedding and slope for plantings. If the living shoreline must also extend farther landward, the existing slope or bench along the shoreline may need to be graded back into the property to reduce the slope. Such regrading and conversion of the upland area to wetland or buffer area may conflict with or impair approved or existing uses of or property rights in upland areas. Success of a living shoreline is usually determined by ongoing monitoring and, as needed, replacement of the new plantings or other ecologically enhanced features to be sure the living shoreline is establishing itself and functioning as designed over time. Layering the living shoreline mandate over the previously existing conditions and prohibitions and the other new obligations mentioned above therefore adds a material new and even different challenge for protection of tidal waterfront properties with many issues to resolve for the property owner.

The fundamental question presented by the mandate is, when would best available science show that a living shoreline approach is not suitable for a shoreline management project? Begged by this question are the more discrete issues of what is "best available science," who gets to decide what it is, and what is meant by "not suitable?" Interestingly, and apparently intentionally, the term "best available science" is not defined in the revised Guidelines, leaving the issue open for each proposed project. In some cases, the determination of the applicable "best available science" may be rather straightforward. Still, each property shoreline presents its own unique set of facts and considerations that may affect which "best available science" is most applicable.

Lack of a definition of "best available science" only makes more important the role of arbiter of what

constitutes "best available science" and who will at least assist VMRC and local wetlands boards in determining the applicable "best available science" for a particular project. This was a key question for VMRC and stakeholders that arose during the drafting of the amendments to the Guidelines. The revised Guidelines designate the Virginia Institute of Marine Science ("VIMS") Office of Research and Advisory Services for those roles. Id. at 7 & 14. VIMS has published its own guidance and research studies on living shoreline design. See Living Shoreline Design Guidance. As an arm of the College of William and Mary and a well-recognized center of excellence for the study of marine sciences and coastal impacts of climate change in Virginia and even other states, VIMS is a logical, but also narrow, choice. Limiting the role of determining what constitutes "best available science" exclusively to VIMS may preclude a project applicant from presenting information that may have been determined to be "best available science" by other reliable sources – including other Virginia academic institutions or Virginia-licensed professional engineers and wetlands scientists – at least until VIMS has reviewed and blessed it. It remains to be seen how often and to what degree VMRC and local wetlands boards will consult with VIMS in evaluating what is "best available science" presented to them as part of an application relying on methods other than a living shoreline.

As to what is "not suitable," no hard and fast conditions are provided in SB776 or the revised Guidelines, but the revised Guidelines summarize various factors to be considered by VMRC and local wetlands boards. Such factors include "hydrodynamic setting, local bathymetry, sediment composition at the location of any structures, conditions in the adjoining riparian zone, potential impacts on adjacent properties, and potential impacts on adjacent habitats, such as riparian vegetation, submerged aquatic vegetation (SAV) and oyster reefs," as well as "fetch exposure, bank height and condition, upland structure proximity and vulnerability, offshore water depth and sediment consistency, presence and proximity of submerged aquatic vegetation, potential maximum storm wave conditions, conditions of adjacent shorelines, and sunlight availability." Id. at 6 & 9-10. In addition, living shoreline system breakwaters and sills need to "be shown to function under future sea level rise conditions." Id. at 10. In this vein, and with perhaps substantial effect on ongoing or potential tidal shoreline land use, the revised Guidelines expressly contemplate the need for tidal wetlands, SAV, and "riparian communities" to be able to migrate uphill to escape inundation from rising sea levels. Id. Even with all that said, the revised Guidelines acknowledge that a "definitive guidance cannot be provided in a single document for every shoreline treatment scenario likely to arise in Tidewater Virginia." Id. at 6.

Going further, the revised Guidelines also address the potential for use of hardened structures in lieu of living shorelines and make it clear that such structures are to be viewed as the last resort. "Shoreline protection structures can be permitted only if there is active, detrimental shoreline erosion which cannot be otherwise controlled by use of a living shoreline," but even then living shoreline elements must be used in tandem to the maximum extent possible in keeping with the statutory mandate. Id. at 10.

Still, the revised Guidelines acknowledge that "[a] structural approach to shoreline stabilization may be necessary in certain limited instances in response to hydrological and geological shoreline factors, and/or to sufficiently address erosion control. Shoreline modification to address upland and landscape issues other than storm water runoff is not permitted." Id. Indeed, hardened structures, such as revetments or bulkheads, will be permitted "only when absolutely necessary and where the best available science shows that a living shoreline approach is not suitable." Id. Any permitted hardened structure "must be specifically designed for the shoreline segment in question and must be shown to function under future sea level rise conditions." Id. at 10. A bulkhead or seawall is not allowed unless VMRC or the local wetlands board finds that this approach "is necessary and that no other alternative approach is suitable." Id. at 11. "Rock revetments are the preferred alternative" in such cases. Id. at 10-11. Any necessary seawall or bulkhead structure "should ordinarily be placed as far landward as possible as long as the local government determines it is consistent with the [CBPA] and any regulations

adopted thereunder required to promote coastal resilience and adaptation to sea level rise and climate change." Id. at 11. Uses of groins and channel jetties are also addressed with limitations and special factors for those structures. Id. at 11-12. The combination of the revised Guidelines' now very high bar to using hardened structures with the new living shoreline mandate and obligation to incorporate living shoreline elements to the maximum degree possible in any event seems to render future construction of traditional hardened structures extremely difficult to pursue for many properties.

3. Key Concerns for Property Owners and Operators.

From an ecological, practical or economic perspective (or a combination of them), not every shoreline is reasonably well suited to or even feasible for a living shoreline management approach, and it takes a very site-specific assessment to determine which is the best overall approach. Perhaps the most obvious concerns arise for properties that rely on vessel deep water access at or right near the shoreline as these properties typically require hardened infrastructure to protect the shoreline and immediate upland areas servicing vessels from storm events and related erosion and damage. These improvements and structures often provide critical and space-efficient, and in many cases the most cost-effective, means to defend against storms and, over time, rising seas. In doing so, however, these structures often cut off or remove wetland areas at the shoreline or prevent their migration in response to changing water levels, reducing shoreline habitat and eliminating some water quality improvement functionality, so they have their drawbacks as well.

Abrupt elevation differences and certain waterfront land uses can also affect the feasibility and utility of living shoreline approaches extending landward from average tide elevation (and any required regrading of the slope as just noted). Where elevation benches or bluffs exist, a living shoreline can be too impractical or too costly to implement due to the degree of regrading necessary and impacts in upland land uses. Even where elevation difference at the shoreline is not significant, the upland immediately above the shoreline typically is integral to (a) an upland vegetated buffer along the shoreline serving valuable ecological and water quality functions of its own; (b) the residential, commercial or industrial use and value of the property; or (c) both purposes in some respects. There may also be land use restrictions, easements, navigation concerns, or other implications for use of living shoreline that would create legal risk or liability for the landowner depending on how the mandate is imposed. Therefore, for many commercial waterfront operators and many residential waterfront owners, loss of the use of hardened structure options may present substantial practical, financial, and even land use compliance concerns that previously had not existed.

The living shoreline mandate as now expressed in the revised Guidelines can be expected to lead to some ironic but unfortunate results. As a project permit applicant, many property owners and operators seeking to protect their waterfront property may find the mandate's burden of proof too complex or expensive to pursue and instead defer appropriate protection measures or simply leave their shorelines unprotected, resulting in even greater shoreline erosion or decline and damage to unprotected upland structures and existing tidal wetland habitat. The owner or operator will likely need to hire consultant engineers or wetlands scientists (and perhaps a lawyer) to perform the requisite evaluation of the "best available science" to determine suitability of a living shoreline approach. The owner or operator will also then need to evaluate the cost effectiveness or affordability of any feasible living shoreline measures in comparison to or in supplement to traditional bulkhead or rip-rap revetment measures, particularly if a living shoreline needs to migrate inland to keep pace with rising sea levels. Of course, embedded in this analysis are the values of the upland property and improvements and their useful lives. Both living shorelines and structural improvements also require maintenance and even replacement over time, though in different respects given their designs and useful lives. For many property owners, there is concern about the costs of ongoing living shoreline maintenance and periodic replacement.

Another important issue that is not clearly addressed in the Guidelines is how the repair or replacement of existing hardened structures will be handled by VMRC and local wetlands boards. No express grandfathering of such cases from the living shoreline mandate exists in SB776 or the revised Guidelines. Nor do the revised Guidelines address whether or to what degree the living shoreline mandate will be triggered when such work would otherwise essentially maintain the status quo but a permit may still be needed due to access or impacts to tidal wetlands associated with such work. Finally, depending on the degree to which a living shoreline mandate is imposed, a regulatory takings case or inverse condemnation may arise by application of the revised Guidelines. This would seem especially so where, as a condition for issuance the permit, VMRC or the local wetlands board requires landward extension or migration of tidal wetlands or living shoreline elements into the riparian buffer area or upland space that are inherent to the property's authorized use and value. Consider such an obligation imposed on a residential property with a relatively narrow yard between the house and the waterline or an industrial property with a loading yard or storage structures near the waterfront. The loss of buffer and/or useable space due to a reservation of area for migrating wetlands or living shoreline elements may be substantial enough to constitute a taking of property without just compensation. Of course, such cases are very fact-specific and will depend in part on the degree to which the property interest is burdened for the public benefit (e.g., water quality, habitat, etc.) derived from the living shoreline mandate as applied to that property. If VMRC and the local wetlands boards can strike a reasonable balance in the application of the revised Guidelines to avoid undue burdens on private property and loss of property value in this regard, then such takings can be avoided.

4. Conclusion.

Most stakeholders in the process for developing the revised Guidelines agree that accounting for projected sea level rise and the use of living shorelines warrant consideration and appropriate implementation for shoreline management projects. As is normally the case, the thorniest issues arise as to how best to implement such objectives. For many owners and operators of tidal waterfront properties, though, the revised Guidelines will present new difficulties and often increased costs for shoreline protection projects. VMRC and the local wetlands boards will be tested in how they apply the revised Guidelines to actual applications for projects, and VIMS will be tested as arbiter of what is "best available science" for such projects. These "real world" cases will tell us the most about whether the right balance is being struck and how well these different objectives can be aligned and sustained over time.

SB776, 2021 Va. Acts. c. 809, codified at Va. Code Ann. §§ 28.2-104.1.D, 28.2-1301, 28.2-1302 & 28.2-1308
Virginia Marine Resources Commission, See Tidal Wetlands Guidelines (May 2021 Update)
George M. McLeod et al., Commonwealth Center for Recurrent Flooding Resiliency, "Future Sea Level and Recurrent Flooding Risk for Coastal Virginia" (February 2020)

LAST MINUTE TRUMP ADMINISTRATION REGULATION LIMITS ENVIRONMENTAL JUSTICE SETTLEMENTS

BY: CARRICK BROOKE-DAVIDSON

A regulation adopted by the Department of Justice ("DOJ") late in the Trump administration prohibiting settlement payments to third parties continues to be an impediment to possible environmental justice consent decrees in actions brought by the federal government.

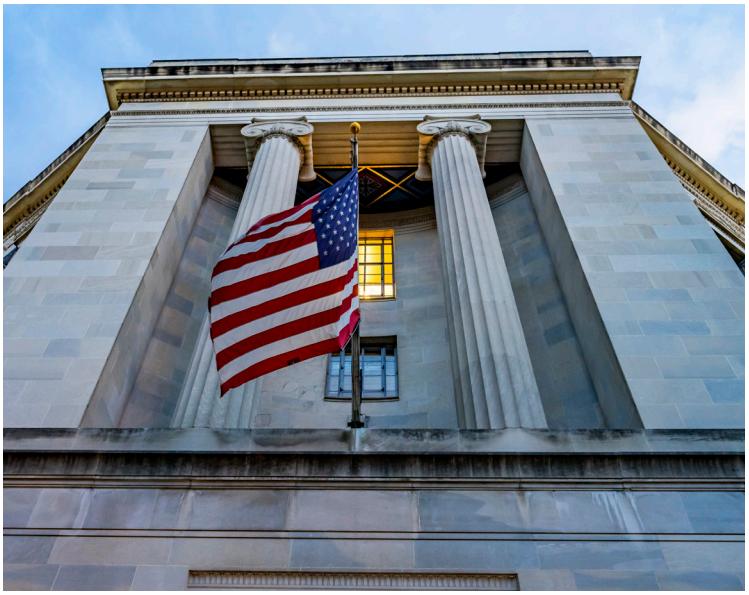
The regulation "Prohibition on Settlement Payments to Non-Governmental Third Parties," 85 Fed. Reg. 81409, adopted on December 16, 2020 and codified at 28 CFR 50.28, was adopted without notice or comment in the waning weeks of the Trump administration. The streamlined regulatory process was possible as many of the procedural requirements for rulemaking in the Administrative Procedure Act and other federal statutes and directives can be streamlined for rules relating to a matter of agency management

and is a rule of agency organization, procedure, or practice.

The rule codified and expanded a prior internal DOJ policy directive. On June 5, 2017, then-Attorney General Sessions issued a Memorandum to the Heads of all Department of Justice Components and to all United States Attorneys titled, "Prohibition on Settlement Payments to Third Parties." That policy generally prohibited settlements that required payments to third parties as part of the settlement. One of the exceptions to the policy prohibition was restitution payments to victims. The December regulation retains this exception, but with a significant change, as it expressly prohibits third party payments in environmental cases for Supplemental Environmental Projects ("SEPs").

While around the time the regulation was adopted the Environment and Natural Resources Division at DOJ was adopting a policy that prohibited SEPs, that policy was quickly overturned by the incoming Biden Administration. See Williams Mullen Environmental Notes, March 2021 "Biden DOJ Quickly Rescinds Trump Environmental Enforcement Policies." Thus, SEPs have been reinstated as an enforcement settlement tool by DOJ. The regulatory prohibition on third party payments, however, remains.

This prohibition on SEPs requiring third party payments means that, unless the regulation is withdrawn or amended, SEPs are unlikely to be a mechanism to address environmental justice concerns in environmental enforcement cases, since providing payments, goods, or services to third parties is almost inherent in any environmental justice SEP. While SEPs that provide for additional pollutant reductions can possibly be couched as having an environmental justice component, SEPs that more directly benefit environmental justice communities will likely be limited due to the third-party payment prohibition, and DOJ officials have recently confirmed this in reports in the trade press. There are two ways this issue may be addressed by the Biden administration. The first, and most obvious, would be to rescind the regulation prohibiting third party payments, and indeed this regulation was identified by the White House as



one of the regulations slated for review under Executive Order: "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis", January 20, 2021. Since the original regulation was adopted without notice and comment as it involved agency management, a modification of the regulation could similarly be adopted using an abbreviated rulemaking process. To date, however, no effort appears to have been undertaken to modify the regulation.

The other possible approach to incorporate environmental justice concerns into environmental settlements would be to couch the environmental justice component as mitigation for the harm caused. Mitigation relief, while often facially similar to a SEP, had very different legal underpinnings. While a SEP is a project that is not legally required and is undertaken in return for a reduction in penalty, a mitigation project is a remedy that is secured to mitigate the harm caused by the violation and is seen as another form of equitable relief. While SEPs are creatures of settlement and could not be ordered by a court absent agreement by the defendant, mitigation is seen as a remedy that could be imposed unilaterally, although most mitigation remedies in practice are a product of settlements. An indication of the legal difference is that, while the Trump DOJ prohibited SEPs, it issued a policy on use of mitigation that embraced that remedy in the proper circumstances. That the Trump DOJ mitigation policy was withdrawn by the Biden DOJ should not be seen

as a rejection of mitigation as a remedy; rather it is a rejection of the limitations on its use that the Trump-era policy imposed.

The use of mitigation as an environmental justice tool is not without impediments. First, it will still have to meet the strictures of the regulation on third party payments, as long as that regulation is in effect. Thus, an environmental justice mitigation project would have to be fashioned as restitution or compensation to a victim. Second, and closely related, an environmental justice project would have to be designed to mitigate the harm caused by the applicable environmental violation. As EPA has noted in its policy on mitigation, a mitigation remedy should have a closer relationship to the underlying harm than the broader nexus requirement that is applied to SEPs. Therefore, mitigation projects may be as broad in their scope as SEPs due to these limitations.

The Biden administration has stated that environmental justice is a key goal. How it will address the limitations imposed by the DOJ rule on third party payments remains to be seen and bears watching by the regulated community.

85 Fed. Reg. 81409 (December 16, 2020)

BAIT AND SWITCH: EPA REQUESTS COMMENTS ON REGULATION OF TCE/PCE REPLACEMENT AS HAP

BY: ETHAN R. WARE

The EPA decision to add 1-Bromopropane ("1-BP") to the list of Hazardous Air Pollutants ("HAP") has implications that go beyond the addition of another chemical to the HAP list. Industry received a glimpse of how far the effects of the new HAP listing may extend in a June 11, 2021, Advanced Notice of Proposed Rulemaking ("Advanced Notice"). 86 Fed. Reg. 31225 (June 11, 2021). Manufacturers, who avoided Title V and maximum achievable control technology ("MACT") requirements by replacing listed HAPs (like perchloroethylene ("PCE") and trichloroethylene ("TCE")) with 1-BP in facility operations, may now want to file comments against broad application of the final rule.

Clean Air Act Regulation of HAP

When the Clean Air Act ("CAA") was amended in 1990, Congress provided EPA a list of 189 HAP for which federal Title V Permits would be required. The HAP list was grounded in years of research and development into health risks posed by air emissions to the community. Sections 112 (c) and (e) of the CAA direct EPA to "identify and list source categories [of industry] that emit HAP," then "set [MACT] emissions standards for [each] categor[y] and subcategor[y] [identified by EPA] as expeditiously as practicable." 86 Fed. Reg. at 31227.

The HAP emissions standards distinguish between sources considered "major" and "area" based on the amount of emissions of a HAP a facility potentially may emit. Id.; CAA Section 112(d). A major sources is a stationary source or group of stationary sources located within a contiguous area and under common control, that "emits or has the potential to emit considering controls, in the aggregate, 10 tons per year (TPY) or more of any [HAP] or 25 [TPY] or more of any combination of [HAP]." Id. Area sources are simply those stationary source categories listed by EPA that are not major sources.

Bait and Switch: Addition of 1-BP to the HAP List

For the first time since Congress passed the HAP program, EPA is adding a new air pollutant to the list of HAP. On June 18, 2020, EPA granted a petition from environmental groups and added 1-BP to the list of HAP. 85 Fed. Reg. 36851 (June 18, 2020). This decision cannot be reversed absent a new rulemaking or direction from Congress. Adding 1-BP to the list of HAP now looks a bit like the classic "bait and switch." Since promulgation of the list of HAP, many manufacturers have substituted PCE and TCE with 1-BP in the workplace. Using an unlisted solvent like 1-BP allowed the facilities to keep plantwide HAP emissions below federal permitting thresholds and below the levels for which MACT controls are necessary on process units.

Substituting PCE and TCE was not limited to a few business segments. 1-BP is used as a solvent cleaner/degreaser generally, and more directly in --

- Adhesives and adhesive accelerants
- Mold release agents
- Aerosol spray applications

This substitute for PCE and TCE is an intermediate chemical in the production of pharmaceuticals and pesticides, and even dry-cleaners replaced PCE with 1-BP.

The Advanced Notice states this large-spread use of 1-BP raises "concerns [at EPA] that air emissions associated with 1-BP use could be higher" than previously thought, and, as a result, the chemical use should be addressed as a HAP. 86 Fed. Reg. 31228. However, listing 1-BP is at odds with a 2016 determination not to restrict use of 1-BP under the Toxic Substances Control Act ("TSCA") because EPA determined at that time 1-BP "does not pose an unreasonable risk to the environment or general population." 86 Fed. Reg. at 31228.

Regulatory Impacts of Listing 1-BP as a HAP

Because EPA made the determination in 2020 to add 1-BP to the list of HAP, the purpose of the Advanced Notice is to obtain information on existing uses and controls for 1-BP. Courts have held consistently EPA has a "clear statutory obligation to set emission standards for each listed HAP." See, *National Lime Association v. Environmental Protection Agency,* 233 F-3d 625, 634 (D.C. Cir. 2000).

There is no specific deadline for promulgating standards for newly listed HAP under CAA Section 112(b)(1), however. CAA Section 112(e)(1)(E) requires EPA to promulgate MACT for all source categories for the original list of HAP provided by Congress within ten years of listing, and, as a result, EPA believes this same time frame could apply to a newly listed HAP like 1-BP.

While precedent suggests EPA likes to phase-in regulatory controls on covered HAP sources, the Advanced Notice suggests listing 1-BP as a HAP will have an immediate regulatory impact. For example, MACT standards governing solvent use in cleaning or adhesives or surface coatings operations specify HAP emission limits and work practice requirements. This means using 1-BP as a degreaser or process solvent may affect emissions levels of HAP at the facility and as a result, permit applicability determinations. Industries using 1-BP as a compliance strategy to avoid major source permitting are required now to include 1-BP in their permit calculations, unless EPA delays inclusion of 1-BP in permit calculations as part of this Advanced Notice.

A facility could also be required to add MACT controls for HAP emissions from unrelated processes at the plant, which may result in significant costs. This is because counting 1-BP may cause operation emissions to increase above thresholds for being considered a major source subject to MACT system controls. The facility would have avoided those costs in the past by using 1-BP.

Finally, certain source category standards under the MACT rules include "work practice requirements" obliging a major source facility to use "low-HAP" or "no HAP" solvents in cleaning or adhesive operations. A shift to regulate 1-BP as a HAP could cause those facilities to consider replacing cleaning solvents or adhesives, since "no HAP" is defined as containing less than 1% total HAP by weight, and the amount of 1-BP in those chemicals could cause non-compliance.

What Information is the Advanced Notice Seeking

EPA intends to gather more information before setting an effective date for 1-BP to be counted as a HAP in permitting and compliance. As a result, the Advanced Notice provides industry the opportunity to weigh in on how the rule may affect the regulated community before the July 26, 2021 rulemaking deadline.

One area for which EPA requests specific comment is the time necessary for industry affected by the new listing to comply with MACT control technology regulations. EPA could offer a different compliance timeline for sources already meeting

MACT controls for other HAP at its facility as opposed to a facility that becomes subject to MACT standards for the first time as a result of the HAP listing. Under the CAA, existing sources subject to MACT controls as a result of the original list of HAP were allowed up to 3 years after the effective date of a promulgated MACT standard to come into compliance. 86 Fed. Reg. at 31231.

The Advanced Notice indicates 1-BP may not be the last HAP added to Congress's list of HAP. EPA asks industry's view on whether or not the new HAP regulations should become part of "general provisions" of the MACT standards, suggesting "EPA could…provide a consistent compliance timeline for all sources impacted by the addition of any new HAP, rather than addressing only 1-BP." Id.

The deadline for filing comments on the Advanced Notice and listing of 1-BP on the HAP list is July 26, 2021. To file comments on this issue, information must be submitted to EPA by directing comments to Docket ID No. EPA-HQ-OAR-2014-0471.

Conclusion

EPA is now acting on its promise to address use of 1-BP by industry throughout the United States. Under the Advanced Notice, EPA intends to list 1-BP as a HAP and make its listing effective in the future. The listing may change the classification of a manufacturing facility from area source to major source or cause the plant to substitute raw materials for those with 1-BP to avoid Federal Permits and installation of MACT control systems.

86 Fed. Reg. 31225 (June 11, 2021)

TOP FIVE POTENTIAL AIR PERMITTING REFORMS: HOW AIR PERMITTING IN VIRGINIA IS POISED FOR CHANGE

BY: LIZ WILLIAMSON

The Virginia State Air Pollution Control Board (Air Board) took its first measurable step toward a change in air permitting by creating a Subcommittee on Public Participation Processes (the Subcommittee) on June 21, 2019. The Subcommittee is composed of a subset of Air Board members. At the time of formation, the precise agenda of the Subcommittee was not clear. This changed. The meetings, public comment, and discussion since the Subcommittee's first meeting on September 13, 2019 have shaped their initiatives. We discuss these areas and the possible impacts on air permitting in Virginia.

Sources seeking to permit new sources or modify existing sources will be impacted if the reforms are finalized. The Clean Air Act has always been the primary bar for sources looking at a facility change or when building a new source. The Clean Air Act is designed to have standards in place

(National Ambient Air Quality Standards (NAAQS)) to protect all populations, including the air quality for sensitive populations, through lengthy planning, scientific study, risk assessment, and development of policy. State-specific stricter standards would overlay NAAQS and other Clean Air Act regulations, if current emissions regulations were found to be inadequate protection. The Subcommittee's action plan could change this historic balance.

The following five areas are on our watch list:

- **Site Suitability.** The General Assembly directs the Air Board to consider the facts and circumstances relevant to "the reasonableness of the activity involved and the regulations proposed to control it." Va. Code § 10.1-1307(E)(3). In that determination, the Air Board may consider "[t]he suitability of the activity to the area in which it is located." Id. The statute is vague as to whether site suitability would be a determination for new source siting only. For example, if an existing source wishes to expand its industrial facility and is able to comply with the applicable air emissions regulations to expand, can the Air Board reject the project solely on the basis of its location? The Subcommittee has discussed site suitability as part of their agenda.

  The Virginia Department of Environmental Quality (DEQ) recently published a Notice of Intended Regulatory Rulemaking (NOIRA) on site suitability. The NOIRA identifies the potential for revisions to either the regulations for permits for stationary sources or the regulation for general administration. It would convert the site suitability determination from a case-by-case basis to a set of parameters for the Air Board and DEQ to use. DEQ is currently assembling a Regulatory Advisory Panel (RAP) to assist in shaping the new regulation. In addition, the Subcommittee may put a "gap-filling" guidance in place while the regulation is developed, which will take more than a year in the making.

- **Environmental Justice.** The Subcommittee is shaping, with DEQ, the way in which environmental justice considerations will be folded into the air permitting process. The General Assembly passed the Virginia Environmental Justice Act in 2020 (Act); however, the Act is simply a policy with definitions to promote environmental justice. It does not tell Virginia state agencies how to implement environmental justice principles. The Subcommittee and DEQ have been discussing how to define an environmental justice community. DEQ has enhanced its community data and mapping capabilities to achieve this task. Once these communities are defined, it is not clear how environmental justice considerations will be folded into the permitting process. In other words, is this only an exercise in public notice and engagement at meetings? Or will the presence of an environmental justice community near a pending permitting action stop a project? The Act does not provide any guidance as to whether environmental justice considerations are satisfied by communication alone.

Site suitability and environmental justice considerations are clearly the processes that could dramatically change the permitting process procedurally, as well as whether certain projects can even pass muster in the Commonwealth. In addition, the following reforms are being considered:

- **Electronic Availability of Permitting and Air Board Documents.** The Subcommittee is encouraging improved public accessibility of environmental documents. In particular, the Subcommittee would like a webpage to publish its materials, which would include numerous public comments. In addition, there is interest in posting full air permitting applications. Presently, DEQ updates a spreadsheet with outstanding permitting actions but does not post the applications.

- **Expanded Outreach for permitting activities.** The Subcommittee is compiling ideas on how this expansion would occur.

Although the expansion could call for additional outreach for environmental justice communities, general obligations were discussed, such as additional signage at the site, use of social media, or additional public meetings. The Subcommittee is developing a minimum baseline that would revamp the current process.

- **Consideration of Cumulative Impacts.** The Subcommittee has expressed interest in considering the cumulative impacts of a project in addition to air impacts – such as water, waste or wildlife. Cumulative impacts would be part of the equation when the Air Board votes to approve a permitting action. This initiative is on hold for the moment. The Subcommittee recognizes that there might not be legal authority for the Air Board to consider non-air-related environmental concerns.

In summary, air emission sources in Virginia will need to monitor the upcoming public comment processes and the Subcommittee's activities. Changes to the permitting process may have a significant impact and even restrict air permitting projects in Virginia.

42 U.S.C. § 7409.
State Air Pollution Control Board Meeting Minutes, June 21, 2019
Notices of Intended Regulatory Action, Virginia Register, Vol. 37, Issue 19 (May 10, 2021).
Virginia Environmental Justice Act, Va. Code § 2.2-234 et seq.

BIDEN BOOSTS EPA'S BUDGET BY BILLIONS

BY PIERCE M. WERNER

In a move fitting for a catchy article title, in late May President Biden's administration released its proposed budget for EPA for fiscal year 2022 ("FY2022") (EPA's fiscal year runs from October 1 to September 30). Alliteration aside, the proposed budget could have major implications for the way EPA operates over the coming year, providing $11.233 billion to fund the agency's various missions and duties.

As society becomes more accustomed to large dollar figures from news coverage of limelight billionaires or a total for the U.S. debt over $27 trillion, it's easy to overlook another multi-billion dollar number in the realm of federal budgets without fully appreciating the value and implications involved. To better grasp the significance of this budget proposal, some facts to consider: (1) this is the largest top-line request for EPA's budget in its entire history; (2) the budget effects an increase of $2 billion over the enacted spending for FY2021; and (3) the budget includes a request for approval to add 1,000 new full-time employees ("FTE"), one of the largest of any federal agency.

Beyond its scope, details of the proposed FY2022 budget and the initiatives set forth in the proposal demonstrate an increase in activities of which industry should be aware. Some key initiatives set forth by the proposal that justify the budget include addressing climate change, prioritizing environmental justice, increasing support to states, and strengthening the agency's workforce.

Overall, the budget claims an increase of $1.8 billion in programs and efforts for "Tackling the Climate Crisis." Notable components of this include a $100 million increase in finding for air quality grants for states to increase air pollution controls, $100 million to develop "a community air quality monitoring and notification system to provide real-time data to overburdened and marginalized communities and enforcement officials," an additional $60 million for research into the impacts of climate change on human health and the environment, and funds for addressing climate impacts through expenditures on infrastructure. Details of the latter include significant increases in existing water infrastructure programs.

Environmental justice is also prioritized under the proposed budget as an interrelated component of the climate change initiatives. The budget includes more than $930 million in funding in various programs to launch the Accelerating Environmental and Economic Justice initiative and "cement environmental justice as a core feature of EPA's

mission." The creation of new environmental justice programs also gets an increase of $287 million and the creation of 171 FTE positions. Very importantly, a key aspect of the environmental justice component consists of an increase in enforcement and compliance assurance efforts; this includes $31.9 million in additional resources within EPA's compliance monitoring program "to incorporate environmental justice considerations into all phases of work without displacing other important enforcement and compliance assurance efforts."

Another key component of the budget with significant implications for regulated industry is the substantial increase in funding for state agencies. Recent budgets have allocated less and less federal money to state agencies, which often rely heavily on the federal government for resources; in a reversal of this trend, the FY2022 proposed budget allocates $1.242 billion to support state EPA partners, $100 million of which is dedicated to the state and local air quality management programs for "air monitoring, permitting, and pollution reduction efforts, specifically to accelerate immediate on-the-ground efforts to reduce greenhouse gases. The budget notes this is a $142 million increase from the FY2021 enacted spending level. Such an increase in state funding could result in an increase in enforcement and compliance activities by state regulatory agencies to complement those of EPA.

Finally, the budget includes payroll support for the addition of 1,000 FTE positions to raise the total number of FTEs at EPA from 14,297 to 15,324. While many of these positions are correlated with the programs and budget increases discussed above, among others, the measure also is intended to address deeper workforce issues at EPA and pave the way for the future of the agency. As noted by the budget, EPA has "one of the oldest workforces in the federal government" with 30% eligible to retire presently or in the next year, and 43% of employees eligible to retire in the next five years.

Importantly this proposal sets the stage for the future of EPA as the agency is currently developing its new *FY2022 – FY2026 Strategic Plan* to be issued in February 2022. According to EPA, this will "establish a new framework - rooted in a commitment to science, adherence to the law, and environmental justice - to guide the Agency's priorities and progress" to guide EPA over the next four years.

As it stands, the budget is still a proposal which will be considered by Congress in its deliberations and ultimately enacted, likely in some altered form, in an appropriations bill. Even so, it seems the initiatives and goals of the Biden Administration EPA will be well-funded, and those in the regulated community would be wise to take climate change response and environmental justice seriously.

EPA FY 2022 Budget Summary
EPA Budget in Brief

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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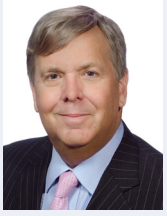

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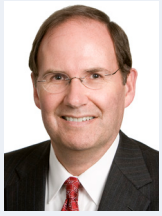

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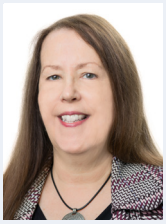

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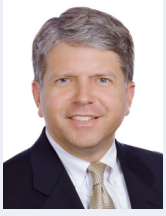

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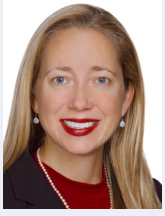

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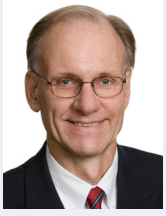

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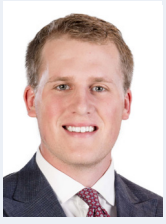

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