

# Administrative Law News

VOLUME XV, ISSUE 14

WINTER 2015

## CONTENTS:

### Governor McAuliffe Releases 2014 Virginia Energy Plan ...1

*Meera Ahamed*

### Blowing in the Wind? The Commonwealth's Efforts to Bring Offshore Wind Energy to Virginia ...1

*Gregory W. Durham*

### Message from the Chair ...2

*Kristian M. Dahl*

### From Smokestacks to the Grid: An Overview of EPA's Proposed Rule for Carbon ...3

*Matthew L. Gooch*

### Senate Confirms New FERC Commissioner ...4

*James G. Ritter*

## SAVE THE DATE

*Thirty-Third Annual  
National Regulatory Conference*

**May 20-21, 2015**

*Marshall-Wythe School of Law,  
College of William & Mary  
Williamsburg, Virginia*

## Governor McAuliffe Releases 2014 Virginia Energy Plan

By Meera Ahamed

On October 1, Virginia Governor Terry McAuliffe released the 2014 Virginia Energy Plan, a document that lays out a long-term strategy for the development and growth of the Virginia energy industry and one that includes energy efficiency as a top priority.<sup>1</sup> The 2014 Plan is an update to the Virginia Energy Plan completed in 2007.<sup>2</sup> The Commonwealth's energy policy and objectives to address energy issues to advance the health, welfare and safety of residents of the Commonwealth are detailed in the Code of Virginia,<sup>3</sup> and call for Virginia to take a broad range of energy actions, including:

- Ensuring the availability of reliable energy at costs that are reasonable;

— continued on page 4

## Blowing in the Wind? The Commonwealth's Efforts to Bring Offshore Wind Energy to Virginia

By Gregory W. Durham

The Commonwealth of Virginia, in cooperation with the federal government and the private sector, is currently pursuing the development of an offshore wind energy generation project ("the WEA Project") in an area off the coast of Virginia Beach. On September 4, 2013, the Department of the Interior ("DOI") held a competitive lease sale of the 112,800 acres of ocean that will be the site of the Project ("Virginia Wind Energy Area" or "WEA"). Dominion Virginia Power ("Dominion") won the lease with a bid of \$1.6 million, and with it an exclusive right to develop offshore wind in

— continued on page 6

**ABOUT THE EDITOR** James G. Ritter is an associate in the Energy and Telecommunications practice group at Christian & Barton, LLP in Richmond. He focuses on regulatory matters before state and federal administrative entities involving electric, natural gas, and water utilities and cable companies. He also has experience working on behalf of telecommunications providers and local governments in Virginia. He earned his law degree from Washington & Lee University School of Law and his undergraduate degree from the University of Virginia.

## Message from the Chair

The new year is well underway, and so too are the Administrative Law Section's plans for a number of exciting programs. As we have for decades now, our premier activity will be the National Regulatory Conference to be held on May 20th-21st at the College of William & Mary's Marshall-Wythe School of Law in Williamsburg. Now in its 33rd year, the Conference will feature panels on a variety of legal and regulatory topics, including the economics of renewable energy technologies, the future of demand response, the increasing role of natural gas in electric generation, and the Environmental Protection Agency's proposed Clean Power Plan.

Our able NRC planning committee – chaired this year by Ashley Macko – remains hard at work lining up a slate of expert panelists to explore these topical issues and generate thoughtful and lively debate. And as always, the conference will offer a legal ethics session worth two hours of CLE credit, and opportunities to socialize with regulators and other members of the Section, including a reception hosted by the Commissioners of the State Corporation Commission. It will certainly be a fun and informative two days, and remains a very economical way to get CLE hours under your belt. (Last year, the NRC was approved for over 9 hours of Virginia CLE, including the 2 hours for ethics/professionalism needed in Virginia.)

Speaking of CLEs, last year's Section Chair Sam Brumberg has begun plans for our annual Brown Bag CLE lunch meeting. The chosen topic is land use and condemnation, with a special focus on the eminent domain rights of utilities, and a ripped-from-the-headlines backdrop of the natural gas pipeline activity now taking place in the Commonwealth. The exact date and location of the meeting will be determined soon, so be on the lookout for more information. As usual, there will be no charge to attend the program.

Finally, the Section will co-sponsor a session at VSB's 77th Annual Meeting scheduled for June 18th-21st in Virginia Beach. With its new events and new format, this should also be a great opportunity for learning and fellowship.

As the year moves on, please do not hesitate to contact me or the other members of our Section's Board of Governors with any thoughts or ideas you may have. We are always open to suggestions about how the Section can provide value to its members, and we welcome your participation. And we encourage you to contribute to the newsletter. If you'd like to submit an article, contact our editor, Jamie Ritter ([jritter@cblaw.com](mailto:jritter@cblaw.com)).

Best wishes for 2015.

- Kris

## VIRGINIA STATE BAR ADMINISTRATIVE LAW SECTION

### Committee Chairs 2014-2015

*National Regulatory Conference:*

**ASHLEY B. MACKO**

[ashley.macko@scc.virginia.gov](mailto:ashley.macko@scc.virginia.gov) / 804.371.2066

*Brown Bag Speakers Lunch:*

**SAMUEL R. BRUMBERG**

[sbrumberg@odec.com](mailto:sbrumberg@odec.com) / 804.380.2870

*Annual Meeting CLE Program:*

**CHARLOTTE P. MCAFEE**

[Charlotte.P.McAfee@dom.com](mailto:Charlotte.P.McAfee@dom.com) / 804.819.2277

*Newsletter:*

**JAMES G. RITTER**

[jritter@cblaw.com](mailto:jritter@cblaw.com) / 804.697.4141

©2015, The Virginia State Bar, Administrative Law Section. All Rights Reserved

## Administrative Law News

is published by the Virginia State Bar's Administrative Law Section. Statements, expressions of opinion or comments appearing herein are those of the editors or contributors, and not necessarily those of the Virginia State Bar or the Section. Articles and materials accepted for publication become the property of the Virginia State Bar's Administrative Law section and may not be reprinted without the express written permission of the editor.

# From Smokestacks to the Grid: An Overview of EPA's Proposed Rule for Carbon

By Matthew L. Gooch

On June 18, EPA promulgated its long-awaited, and highly controversial, proposed regulations for carbon emissions from existing stationary sources.<sup>1</sup> It did so under the authority of section 111(d) of the Clean Air Act, a provision rarely enough invoked that the regulations are commonly referred to as “111(d).” EPA has previously used section 111(d) to regulate four pollutants from five specific source categories, including sulfuric acid plants (acid mist) and primary aluminum plants (flourides).<sup>2</sup> This rule would extend the list to regulating carbon dioxide from stationary sources.

A cursory outline of the proposed regulations will be offered below. Since the publication, and even prior to it, numerous voices have challenged EPA's approach: for instance, that the Clean Air Act does not empower EPA to regulate “outside the fence line.” Some of those legal objections will be summarized here. Also included will be a brief discussion of two recent CAA cases of the *Chevron* lineage from the Supreme Court's last term, which may offer clues about the review of the 111(d) carbon regulations in light of the objections being raised.

## The Proposed Rule

Broadly, the rule requires states—not EGUs—to reduce their carbon emissions.<sup>3</sup> States can pass the responsibility to EGUs or develop state-run programs where the state becomes the responsible party in whole or in part (for instance, by operating an energy efficiency program).<sup>4</sup> The regulations will reduce greenhouse gases from the power sector by 30% from 2005 levels.<sup>5</sup> The reduction in carbon emissions would of course have the concomitant benefit of reducing exposure to ambient PM<sub>2.5</sub> and ozone through emission reductions of precursor pollutants.<sup>6</sup> There would also be a reduction in the direct exposure to PM<sub>2.5</sub> and sulfur dioxide, but EPA has not offered monetized estimates for those benefits.<sup>7</sup>

That 30% reduction in CO<sub>2</sub> emissions will not be achieved uniformly among the states.<sup>8</sup> Rather, each state

will have its own uniquely tailored goal, and the overall reductions will amount to 30%.<sup>9</sup> A state's emission “rate” is roughly pounds of CO<sub>2</sub> per megawatt-hour of electricity.<sup>10</sup> Burning coal, for example, leads to a rate in the neighborhood of 2000 lbs/MWH.<sup>11</sup> Burning natural gas in a new combined-cycle (NGCC) facility can result in a rate of approximately 900.<sup>12</sup> Solar and wind, of course, have a rate of zero. Under the rule, EPA requires Virginia's average carbon emission rate to be 810 by 2030.<sup>13</sup> It requires an interim goal (meaning an average of 2020-2030) of 884.<sup>14</sup> By contrast, West Virginia's final goal is exactly double Virginia's at 1620 lbs/MWH.<sup>15</sup> That disparity is the basis for a legal challenge to the rule, summarized below.

To calculate each state's emission rate goal, EPA analyzed how much carbon could be reduced by employing four “building blocks”: (1) heat rate improvements of 6% at carbon intensive EGUs, (2) redispatch from coal burning plants to combined-cycle natural gas at a 70% utilization, (3) outlay of renewable energy, and (4) reduction in energy use by 1.5% annually from 2020-2029 through energy efficiency measures.<sup>16</sup> EPA used these four building blocks to set a state's rate, but a state may achieve compliance using any combination of these or other measures (for example, market-based trading, construction of new NGCC or nuclear plants, or carbon capture and storage).<sup>17</sup> Again, the rates vary between states because EPA used data specific to each state's EGUs and other characteristics of its generation resources.<sup>18</sup>

In EPA's view, the rate assigned to each state constitutes the standard of performance that reflects the degree of emission limitation achievable through the application of “best system of emission reduction” under section 111(d) of the CAA.<sup>19</sup> EPA's view is that “the combination of all four building blocks is the BSER.”<sup>20</sup> EPA, however, would still leave to the states which building blocks, or other measures, to use in achieving the rate.

— continued on page 11

# Senate Confirms New FERC Commissioner

By James G. Ritter

In December, with support from lawmakers in both parties, the United States Senate confirmed Colette Honorable as the newest member of the Federal Energy Regulatory Commission. Nominated by President Obama in August, Commissioner Honorable fills the vacancy left by John Norris, who resigned from FERC last year to accept an overseas post with the Department of Agriculture.

Before arriving at FERC, Commissioner Honorable served for over seven years on the Arkansas Public Service Commission, including as chairman since 2011. She also is a past president of the National Association of Regulatory Utility Commissioners, or NARUC.

An attorney by training, Commissioner Honorable began her career as a staff lawyer with the Arkansas Center for Legal Services. She later held a number of roles in public service, including prosecutor, assistant public defender, and law clerk for the Arkansas Court of Appeals.

She also served as the chief of staff for former Arkansas Governor Mike Beebe and former U.S. Senator Mark Pryor during their tenures as the state's attorney general.

FERC's biography of Commissioner Honorable describes her as "a fair, pragmatic, moderate and hardworking leader who is able to build consensus across party lines for common goals." FERC Chairman Cheryl A. LaFleur said in a statement that "Colette brings a wealth of experience and expertise to the important issues we are facing. She and I worked together closely during her time as the President of NARUC, and I very much look forward to continuing that strong relationship when she joins the Commission."

Commissioner Honorable's term expires in June 2017. ✱

*About the Author: see About the Editor p. 1*

## 2014 Virginia Energy Plan *(continued)*

- Establishing sufficient energy supply and delivery infrastructure to support energy needs;
- Using energy resources efficiently and facilitating conservation;
- Facilitating development of low-cost energy resources, including development of clean coal resources;
- Facilitating development of less polluting energy sources and ensuring the economic viability of Virginia's producers of low-cost energy resources;
- Fostering research and development of alternative energy sources that are competitive at market prices; and
- Ensuring that energy generation and delivery systems minimize adverse impacts to the environment.

In his remarks formally unveiling the 2014 Plan, Governor McAuliffe said, "If we are going to build the economy Virginia families deserve, we must begin by

giving them the energy plan our economy demands. The plan we are rolling out today is focused on growing our energy economy (particularly in the renewable sector), emphasizing energy conservation, strengthening our energy infrastructure and training the workforce we need for the future." The 2014 Virginia Energy Plan focuses generally on incorporating aspects of energy assurance, energy response, and energy infrastructure resiliency, and specifically emphasizes the need to diversify energy sources and promotes the greater use of renewable generation such as solar and wind over traditional energy sources. The Plan also includes an analysis of the costs and benefits of distributed generation and net metering, an offshore oil and gas preparedness study, and a study of the possibility of 2,000 megawatts of offshore wind power generation by 2022. Other key highlights of the 2014 Energy Plan include:

- Strategically grow the energy sector by promoting increased development of renewable generation and supporting innovation in nuclear technology.
- Reduce energy consumption by aggressively

— *continued on next page*

## 2014 Virginia Energy Plan *(continued)*

pursuing energy efficiency measures in government, businesses and residences.

- Invest in reliable and resilient energy infrastructure to strengthen Virginia’s already strong business climate.
- Prepare Virginia’s workforce to drive the future energy economy.

A new component of the 2014 Plan addresses a recent amendment to Virginia Code § 67-201 that requires the Virginia Energy Plan to include an analysis of proposed or promulgated Environmental Protection Agency regulations for reducing carbon dioxide emissions. Specifically, the Virginia Energy Plan must address § 111(d) of the Clean Air Act (commonly referred to as “§ 111(d)”)⁴ and EPA’s recently proposed rules for § 111(d) relating to reducing carbon dioxide emissions from existing fossil fuel-fired electric generation units (also known as the “Clear Power Plan” rules).⁵ Under the authority of § 111(d), EPA is proposing emissions guidelines for states to follow in developing plans to address greenhouse gas (GHG) emissions from existing fossil fuel-fired electric generating units. EPA’s proposed Clean Power Plan rule is based on four specific assumptions: (i) improve the unit heat rates at coal-fired plants by 6 percent; (ii) run all existing and new natural gas combined-cycle (NGCC) units at a 70 percent capacity factor and preserve 6 percent of current nuclear capacity; (iii) implement mandatory state renewable energy programs reaching up to 13 percent by 2030; and (iv) implement mandatory state energy efficiency programs reaching 10.7 percent market penetration by 2030.

EPA’s proposed rules for the Clean Power Plan have two main elements: (1) state-specific emission rate-based CO2 goals; and (2) guidelines for the development, submission, and implementation of state plans. Large reductions are proposed for Virginia’s emissions. In 2012, the rate for Virginia CO2 emissions was 1,438 lbs/MWh. The EPA’s proposed initial interim target goal is 991 lbs/MWh by 2020, followed by a rate of 810 lbs/MWh by 2030. EPA’s proposal also includes an alternative with a higher ultimate target of 962 lbs/MWh, but with compliance required by 2025. EPA’s calculation of Virginia’s targets does not count either improvements in efficiency gained since 2005 or the full effect of the 28.7 million MWh of non-emitting

nuclear power generation in Virginia. Virginia’s CO2 state compliance plan must be submitted to EPA by June 2016.

Between 2008 and 2012 there were fundamental shifts in Virginia’s power generation mix, although the percentage of renewable generation continues to account for a low percentage of the generation mix:

	VA Generation 2008	VA Generation 2012
<i>Coal</i>	44%	20%
<i>Natural gas</i>	13%	35%
<i>Nuclear</i>	38%	41%
<i>Petroleum</i>	2%	1%
<i>Hydroelectric</i>	1%	1%
<i>Other</i>	2%	2% <sup>6</sup>

This data indicates that there is room for growth and additional diversity in the renewable energy sector in Virginia. The 2014 Virginia Energy Plan concludes that an energy policy focused on further diversification of energy resources, combined with energy efficiency by both the private and public sectors, will enable Virginia to grow its economy and increase employment by 2030.<sup>7</sup> \*

**About the Author:** *Meera Ahamed has served in Washington Gas Light Company’s Office of the General Counsel for over nine years, focusing primarily on Virginia regulatory matters. She is a graduate of the George Washington University School of Law and earned an M.B.A. from George Mason University.*

*(Endnotes)*

1. 2014 Virginia Energy Plan (Oct. 1, 2014), available at [http://www.dmme.virginia.gov/DE/2014\\_VirginiaEnergyPlan2.shtml](http://www.dmme.virginia.gov/DE/2014_VirginiaEnergyPlan2.shtml).
2. The statutory provisions addressing the Virginia Energy Plan are set forth in Title 67 of the Code of Virginia. Va. Code § 67-100 *et seq.* After its initial completion on July 1, 2007, the plan was updated on July 1, 2010. By recent amendment to § 67-202 of the Code, the Plan must be updated by the Division

— continued on next page

## 2014 Virginia Energy Plan *(continued)*

of Energy of the Department of Mines, Minerals and Energy by October 1, 2014, and every fourth October 1 thereafter. In addition, the Division shall provide interim updates on the Plan by October 1 of the third year of each administration.

3. The energy objectives and the Commonwealth Energy Policy are detailed in §§ 67-101 and 67-102, respectively.

4. 42 U.S.C. § 7411(d).
5. The EPA issued its proposed rules on June 18, 2014. The comment period, which was initially set to end on October 16, 2014, was extended to December 1, 2014.
6. Source: 2014 Virginia Energy Plan, Executive Summary at 1.
7. *Id.* at 2.

## Blowing in the Wind? *(continued)*

Virginia.<sup>1</sup> If fully developed, the Project is anticipated to produce 2,000 megawatts of wind generation, or enough electricity to power 700,000 homes.<sup>2</sup>

Though the lease has been signed, Dominion does not expect the first turbine to be installed in the WEA for at least 10 years.<sup>3</sup> The long delay is in part due to the fact that there remain significant regulatory, financial, and technological barriers to the development of the WEA. This article will assess Virginia's efforts toward overcoming those barriers. It will do so through an investigation of efforts by the Commonwealth to address the regulatory, financial and technological costs and uncertainties currently facing the Project. To contextualize the Commonwealth's efforts, this article will begin with a discussion of the federal regulatory regime governing the development of offshore wind energy, and conclude with an examination of the positions of major stakeholders to the Virginia WEA project.

### Federal Regulations and Support for Offshore Wind in Virginia

Offshore wind energy generation is a new phenomenon in the United States. Though projects like Cape Wind are inching closer to construction, there are currently no commercial-scale offshore wind projects generating electricity in the U.S.<sup>4</sup> Nevertheless, there has been significant push by the federal government to jump-start the industry.<sup>5</sup> These efforts are a mixed blessing for Virginia. As will be seen, federal incentives enhance the feasibility of the Project in a number of ways, but the regulatory process that must be navigated to capture those incentives can be daunting. A 2011 study by the Department of Energy identified nearly a dozen federal entities that have authority over the siting, permitting,

and installation of offshore wind facilities.<sup>6</sup> A private or public entity wishing to pursue an offshore wind project must therefore devote significant time and money to learning and traversing this bureaucracy. In all, the process was estimated by that study to take up to nine years.<sup>7</sup>

This federal bureaucracy is not without purpose. The role of states in the development of offshore wind is complicated by the geographical location of the resource. A coastal state's jurisdiction does not extend much farther than its coastline. According to Section 388 of the Energy Policy Act of 2005, the federal government controls the development of *offshore* wind resources.<sup>8</sup> The term "offshore" in the context of wind energy means the Outer Continental Shelf ("OCS").<sup>9</sup> The OCS consists of the submerged lands, subsoil, and seabed in a specified zone beginning roughly 3 nautical miles, and extending out 200 nautical miles or more from the U.S. coastline.<sup>10</sup> The WEA is within this region, at roughly 23.5 miles off the coast of Virginia Beach. The agency charged with administering the authority granted under Section 388 is the Bureau of Ocean Energy Management ("BOEM"), which is part of DOI.<sup>11</sup>

Political support at the federal level for offshore wind is currently strong. The Obama administration has made the development of offshore wind resources part of its "all of the above" energy strategy, and has committed to accelerating the regulatory approval process.<sup>12</sup> Toward that end the BOEM issued new rules and guidelines in 2009, which govern the leasing, permitting, and operation of offshore wind facilities.<sup>13</sup> The rules streamlined existing procedures for environmental review, which is one of the most costly and time-consuming regulatory components of the development process.<sup>14</sup> They also included procedures for an expedited leasing framework, and accelerated procedures for processing offshore

— continued on next page

## Blowing in the Wind? *(continued)*

transmission applications.<sup>15</sup> The guidelines established a four-stage authorization process, including (1) planning & analysis; (2) leasing; (3) site characterization & assessment; and (4) commercial development.<sup>16</sup> Each stage carries with it specific priorities, programmatic incentives, and metrics, which must be achieved if a project is to advance toward development.<sup>17</sup>

While the regulatory picture has been streamlined, reducing cost, federal actions only go so far in reducing risk for private sector investors. The simple fact that there are no commercial-scale offshore wind projects currently operating in the U.S. is itself a source of great uncertainty, which inhibits private sector buy-in.<sup>18</sup> It is important to note that the fact that Dominion holds the lease for the Virginia WEA does not obligate it to build-out the full-scale facility.<sup>19</sup> If the risks involved prove too great for Dominion, then it may simply choose not to build the full-scale project. Virginia feels that fully developing the WEA has the potential to create high-skilled jobs and generate millions of dollars in industrial activity for the Commonwealth.<sup>20</sup> Therefore, as the next section will illustrate, state leaders have dedicated significant resources in hopes of establishing the investor confidence needed to realize the full-scale deployment of the Project.

### Virginia's Support of Offshore Wind: Reducing Risk and Building Confidence

The Virginia Offshore Wind Project is currently moving into the five-year site characterization and assessment phase under the BOEM planning rubric.<sup>21</sup> This phase is devoted to environmental analysis, technological deployment, and regulatory approval.<sup>22</sup> As such, it requires significant on-site research. Areas under evaluation at this point include the construction and operation of the anchors, turbines, and transmission lines, demonstration of a variety of the technologies likely to be deployed, and site-specific environmental impact.<sup>23</sup> As will be seen below, the Commonwealth has stepped in to reduce the risk to Dominion by coordinating many of the activities needed during this stage before full-scale development of the WEA can begin. By doing so, the Commonwealth hopes to accelerate the development of the WEA and the related energy industry supply chain. Two state initiatives – the Virginia Offshore Wind Technology Advancement

Project, and the Virginia Offshore Wind Development Authority – are the primary mechanisms through which the Commonwealth is currently furthering its interests in the context of offshore wind.

### *The Virginia Offshore Wind Technology Advancement Project*

One of the most significant steps the Commonwealth has taken in this effort is the establishment of the Virginia Offshore Wind Technology Advancement Project (“VOWTAP”). VOWTAP is an offshore wind technology demonstration project being developed by the Commonwealth in partnership with Dominion.<sup>24</sup> As will be explained in more detail below, VOWTAP will feature a fully operational, but scaled-down, version of the WEA Project in an area directly adjacent to the WEA. The project is led in partnership with Dominion and the Department of Mines, Minerals and Energy (“DMME”), which holds the federal lease to the site where the VOWTAP demonstration facility will be constructed.<sup>25</sup>

In December of 2013, VOWTAP was awarded a \$4 million grant from DOE intended to facilitate the initial engineering, design, and permitting for the wind demonstration facility.<sup>26</sup> By imitating the fully developed WEA at a much smaller scale, VOWTAP will facilitate the on-site research necessary to gain further regulatory approval and know-how, while incurring limited financial exposure. This initial phase of the demonstration facility will therefore primarily be a state-directed data acquisition effort intended to reduce uncertainty and risk for the private sector stakeholders, who ultimately will make much larger investments in Virginia's offshore wind industry.<sup>27</sup>

The demonstration facility will consist of two Alstom 6-megawatt turbines standing at over 100 meters in height and featuring some of the longest wind turbine blades in the world.<sup>28</sup> The turbines will be mounted on innovative “twisted jacket” foundations – themselves not at full-scale commercial deployment.<sup>29</sup> These turbine mounts use substantially less steel than traditional foundations while maintaining the strength needed in a deep-sea environment.<sup>30</sup> The turbines will be grid-connected via an undersea cable, and will have a generating capacity of roughly 12 megawatts.<sup>31</sup> The demonstration project is scheduled to become operational in 2017. It will facilitate detailed assessment of construction, installation, and design data applicable to the full build-out of the

— *continued on next page*

## Blowing in the Wind? *(continued)*

WEA, thereby reducing risk and building confidence along the way.<sup>32</sup>

### *The Virginia Offshore Wind Development Authority: Responsibilities to Stakeholders*

The other major step undertaken by the Commonwealth in coordinating the full-scale development of the WEA is the creation of the Virginia Offshore Wind Development Authority (“VOWDA”). Nested within the DMME, VOWDA is a quasi-state organization responsible for spearheading the development of offshore wind energy in Virginia.<sup>33</sup>

VOWDA’s mission is very much oriented toward facilitating the needs of non-state governmental stakeholders in the development of offshore wind energy in Virginia. Its leadership includes experts in energy development, as well as representatives from local governments and the various private sector industries, which will play an integral role in the supply chain, construction, and maintenance of the Virginia offshore wind project.<sup>34</sup> The stakeholders are diverse and include the wind energy industry, the shipping industry, commercial real estate developers, power companies, landowners, local governments, environmental groups, and other NGOs.<sup>35</sup> VOWDA facilitates the collection of information needed from this distinct array of stakeholders, brings to light barriers, and responds to the needs of supply chain manufacturers and other businesses integral to the development of the offshore wind industry in the Commonwealth.<sup>36</sup>

The shipping industry is a particularly significant stakeholder in the development of offshore wind in Virginia.<sup>37</sup> One reason for the chosen location of the WEA is the fact that the Virginia Beach area is one of the busiest shipping lanes in the country.<sup>38</sup> On the one hand, this means the area already has in place much of the infrastructure necessary to build and maintain an offshore wind facility. On the other hand, it also means that siting and the shipping demands of the wind facility will create conflicts with other shipping needs along the coast. The construction of the full Virginia WEA will require transporting hundreds of turbines, each over 100 meters tall, to the WEA. To facilitate the massive shipping needs of the project, VOWDA is charged with coordinating efforts to upgrade port facilities, ensuring the development of the WEA is compatible

with recreational and commercial fisheries, and working with officials at the Norfolk Naval Base to minimize any interference with military activities.<sup>39</sup>

Environmental interests have made their voice heard on offshore wind development across the country, and Virginia is no exception.<sup>40</sup> They do not, however, speak on the issue with one voice. Many environmental groups support the development of wind energy as a clean alternative to fossil fuels.<sup>41</sup> Others are concerned with the impact offshore wind energy generation facilities will have on avian and marine species and habitats.<sup>42</sup> Environmental groups are often cautious of wind energy development because of its deadly impact on birds and bats.<sup>43</sup> With offshore wind there is the added risk of heavy construction machinery and construction-related debris harming marine mammals and polluting the waters and coasts.<sup>44</sup> Therefore, one of the primary goals of VOWTAP is obtaining data on the environmental impact of offshore wind on marine and coastal areas in order to ensure the development of the WEA is compatible with avian and marine wildlife.<sup>45</sup>

Some environmental groups in favor of the Virginia offshore wind project fear that Dominion will delay or abandon the development of the lease.<sup>46</sup> They argue that the Commonwealth’s absence of a mandatory renewable portfolio standard and lack of incentives to reduce carbon emissions has created a policy environment favorable to fossil fuels.<sup>47</sup> When combined with Dominion’s relative autonomy regarding the development of the WEA, the energy giant, as they see it, has the leeway and the motivation to forestall development in favor of building new, and cheaper, fossil-fueled plants. Though Dominion may indeed have the ultimate say in whether it develops the WEA, these environmentalists should be encouraged by the fact that Virginia has sunk significant resources into achieving what they too desire – the successful full-scale development of offshore wind in Virginia.

### Conclusion

Fostering the development of a new source of energy as technologically and logistically complex as offshore wind is an immensely difficult task with significant barriers to success. However, federal and state governments have determined that commercial-scale deployment of offshore wind is in the best interest of the Commonwealth and the nation. The preceding discussion has highlighted

— *continued on next page*

## Blowing in the Wind? *(continued)*

just a selection of the efforts of those governments toward facilitating the development of offshore wind in Virginia. Federal agencies such as the BOEM and DOE have cooperated in streamlining the regulatory process, and successfully leased over 100,000 acres of the OCS for the deployment of a commercial-scale wind energy project. The Commonwealth in turn has undertaken VOWTAP in order to demonstrate innovative offshore wind technologies that can lower the costs, reduce risks, and encourage investment in offshore wind projects. Finally, through the Virginia Wind Energy Development Authority, the Commonwealth hopes to facilitate the growth of the various offshore wind energy stakeholders necessary to support and sustain the industry.

Though noticeable progress has been achieved, significant barriers to the development of offshore wind in Virginia remain. It will likely be a decade or more before the full-scale project is in full commercial operation, and there is no guarantee that Dominion will follow the lead of federal and state governments. Until the private sector is fully invested, the Commonwealth must continue to vigorously support offshore wind if it hopes to eventually succeed in bringing this industry and source of energy to Virginia. ✱

**About the Author:** Gregory W. Durham is an associate in the Washington, D.C. office of Vinson & Elkins LLP, where his principal areas of practice are Energy Transactions and Projects and Capital Markets. He graduated from William & Mary Law School in 2014. Prior to entering law school, Greg worked at the Harvard Kennedy School where he coordinated the administration of public policy research programs engaged in the areas of energy technology innovation and science and technology policy. He is a member of the Virginia State Bar and resides in Arlington, Virginia.

### *(Endnotes)*

1. Official Statement of Governor Bob McDonnell on Second in Nation Offshore Wind Lease Sale Off Virginia (Sep. 4, 2013), *available at* <http://www.governor.virginia.gov/News/viewRelease.cfm?id=1971>.
2. *Id.*
3. Dominion Virginia Power, *Dominion Virginia Power Wins Federal Offshore Wind Auction*, *available at* <https://www.dom.com/about/stations/renewable/offshore-wind-power.jsp>.
4. See U.S. Department of Energy Wind and Water Power Technologies Office, *Funding in the United States: Offshore Wind Projects 2006-2012*, *available at* [http://energy.gov/sites/prod/files/2013/12/f5/offshore\\_energy\\_projects.pdf](http://energy.gov/sites/prod/files/2013/12/f5/offshore_energy_projects.pdf) (showing no commercial-scale offshore wind facilities currently producing power in the United States). See also Cynthia Stead, Finally, Spring Ahead, *Cape Cod Times* (Mar. 20, 2014), *available at* <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20140320/OPINION/403200352>.
5. *Id.*
6. United States Department of Energy, *A National Offshore Wind Strategy: Creating an Offshore Wind Energy Industry in the United States* at 11-12 (Feb. 2011), *available at* [http://www1.eere.energy.gov/wind/pdfs/national\\_offshore\\_wind\\_strategy.pdf](http://www1.eere.energy.gov/wind/pdfs/national_offshore_wind_strategy.pdf)
7. Navigant Consulting, Inc. Offshore Wind Market and Economic Analysis (Feb. 22, 2013), *available at* [http://www1.eere.energy.gov/wind/pdfs/offshore\\_wind\\_market\\_and\\_economic\\_analysis.pdf](http://www1.eere.energy.gov/wind/pdfs/offshore_wind_market_and_economic_analysis.pdf) (hereinafter “Navigant Study”).
8. Energy Policy Act of 2005, Pub. L. No. 109-58, § 388 (2005).
9. *Id.*
10. Adam Vann, Congressional Research Service, *Wind Energy Offshore Permitting* at 2 (Oct. 12, 2012).
11. *Id.*
12. See United States Department of the Interior, *Obama Administration Announces Major Steps toward Leasing for Offshore Wind Projects in Mid-Atlantic* (Feb. 2, 2012), *available at* <http://www.doi.gov/news/pressreleases/Obama-Administration-Announces-Major-Steps-toward-Leasing-for-Offshore-Wind-Projects-in-Mid-Atlantic.cfm>.
13. Federal Register Vol. 77, No. 232, Atlantic Wind One Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore Virginia—Proposed Sale Notice.
14. *Id.*
15. *Id.*
16. Navigant Study at 80.
17. *Id.*
18. *Id.* at 79.
19. See Peter Brannen, *Offshore Wind Farms Will Be*

— continued on next page

## Blowing in the Wind? *(continued)*

- Encouraged in Tracts along the East Coast*, Washington Post (Jul. 23, 2012), *available at* [http://www.washingtonpost.com/national/health-science/offshore-wind-farms-will-be-encouraged-in-tracts-along-the-east-coast/2012/07/23/gJQAD2Pu4W\\_story.html](http://www.washingtonpost.com/national/health-science/offshore-wind-farms-will-be-encouraged-in-tracts-along-the-east-coast/2012/07/23/gJQAD2Pu4W_story.html).
20. *See supra* note 2.
21. Navigant Study at 80.
22. *Id.*
23. *Id.*
24. BOEM, Unsolicited Application for a Section 238 Research Lease by the Virginia Department of Mines, Minerals and Energy (Feb. 8, 2013), *available at* [http://www.boem.gov/uploadedFiles/BOEM/Renewable\\_Energy\\_Program/State\\_Activities/VA/DMME%20Application%20for%20Sec238.pdf](http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/State_Activities/VA/DMME%20Application%20for%20Sec238.pdf).
25. *Id.* at 4. Other members include Alstom, a wind turbine manufacturer; the National Renewable Energy Laboratory; Virginia Tech; KBR Corp.; and Newport News Shipbuilding.
26. *Id.* at 11. Alstom, Dominion, and the Virginia DMME have committed to share the additional costs of the first phase of the VOWTAP project.
27. *Id.* at 1 (“The objective of the Virginia research leases is to ... accelerate commercial leasing and development of the Virginia Wind Energy Area (WEA) and the associated offshore energy industry supply chain. The path to achieve the objective is to conduct research activities that will reduce private development and project costs and lower risk.”).
28. *Id.* at 4.
29. BOEM, Unsolicited Application for a Section 238 Research Lease by the Virginia Department of Mines, Minerals and Energy at 4 (Feb. 8, 2013), *available at* [http://www.boem.gov/uploadedFiles/BOEM/Renewable\\_Energy\\_Program/State\\_Activities/VA/DMME%20Application%20for%20Sec238.pdf](http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/State_Activities/VA/DMME%20Application%20for%20Sec238.pdf).
30. *Id.*
31. *Id.*
32. BOEM, Milestone Cleared for Second Wind Energy Research Lease Offshore Virginia (Dec. 6, 2013), *available at* <http://www.boem.gov/Press12062013/>.
33. *See* The Virginia Offshore Wind Development Authority (Apr. 6, 2014), *available at* <http://wind.jmu.edu/offshore/vowda/index.html>.
34. *Id.*
35. *Id.*
36. *See* Va. Code § 67-1200 *et seq.*
37. Virginia Offshore Wind Development Authority, Annual Report at 5-7 (Oct. 15, 2012), *available at* <http://wind.jmu.edu/offshore/vowda/documents/VOWDA2012FinalAnnualReport.pdf>.
38. *Id.* at 26.
39. *Id.* at 2.
40. *See* Tim Zink, *Wind Turbine Proposals for Atlantic Coast Face Challenges*, Bay Journal (Jan. 1, 2013), *available at* [http://www.bayjournal.com/article/wind\\_turbine\\_proposals\\_for\\_atlantic\\_coast\\_face\\_challenges](http://www.bayjournal.com/article/wind_turbine_proposals_for_atlantic_coast_face_challenges).
41. *Id.*
42. Laura Lutz, *Clean May Not Always Be Green Where Wind Power Is Concerned*, Bay Journal (Mar. 1, 2011), *available at* [http://www.bayjournal.com/article/clean\\_may\\_not\\_always\\_be\\_green\\_where\\_wind\\_power\\_is\\_concerned](http://www.bayjournal.com/article/clean_may_not_always_be_green_where_wind_power_is_concerned).
43. *Id.*
44. *Id.*
45. Virginia Offshore Wind Development Authority, Annual Report at 3 (Oct. 15, 2012), *available at* <http://wind.jmu.edu/offshore/vowda/documents/VOWDA2012FinalAnnualReport.pdf>.
46. Sierra Club Virginia Chapter, *Tell Dominion to Support Offshore Wind* (Apr. 6 2014), *available at* <http://action.sierraclub.org/site/PageServer?pagename=TellDominiontoSupportVAOffshoreWind>.
47. *Id.*

## From Smokestacks to the Grid *(continued)*

As an alternative to the rate-based goal, a state may opt for a mass-based goal.<sup>21</sup> Under such an approach, a state would be required to lower its total emissions, perhaps by closing a coal-burning facility, without necessarily changing its rate (if for, example, the remaining EGUs were all coal burning as well).<sup>22</sup> EPA describes and seeks comment on this situation, where states shrink the section 111(d) universe: “under a mass based program, if new NGCCs were not included, their costs would be less than the cost of an existing NGCC unit.”<sup>23</sup>

The first part of the rule is the setting of the rate, summarized above. The second deals with state plans developed to comply with the rule. Each state is required to submit a state plan to EPA for approval, and they have broad discretion in how to craft the state plan.<sup>24</sup> The state plan, like section 110(a) state implementation plans, must include enforceable measures to ensure that the reductions are made.<sup>25</sup> According to EPA, a “state plan must include enforceable CO<sub>2</sub> emission limits that apply to affected EGUs.”<sup>26</sup> All of the measures included in a state plan would be federally enforceable, including those carried out by the state.<sup>27</sup> EPA is seeking comment, however, on a “state commitment approach” that would not have federally enforceable requirements for entities other than affected EGUs—those components would not be part of the state plan.<sup>28</sup>

EPA envisions states that use Integrated Resource Planning (IRP) as planning their emission reductions in the IRP framework.<sup>29</sup> EPA suggests that the Regional Greenhouse Gas Initiative (RGGI) offers a model for how states can design a program for reducing emissions.<sup>30</sup> States will be able to cooperate in a regional approach by submitting one plan for multiple states.<sup>31</sup> A state plan may assign responsibility on the affected EGUs for the entirety of emission performance—the utility then would be responsible for achieving the emissions rate through outlay of renewables and the other building blocks.<sup>32</sup> Alternatively, a state could take a “portfolio approach” by imposing requirements, such as renewable energy and demand-side efficiency measures, on other entities (presumably state agencies or newly created authorities).<sup>33</sup>

The gist of compliance with the rule is to change dispatch from coal to NGCC and zero-emitting sources, lowering a state’s rate. Dispatch of electricity in Virginia is of course controlled by PJM, not by state regulators or the utilities. A state plan in such a setting would likely steer dispatch away from coal through the use of a carbon credit paid for each ton of carbon emitted.<sup>34</sup> The state could determine the total emissions and sell the credits, and allow trading between EGUs, in the way that sulfur dioxide is traded or carbon is traded in RGGI. The emissions credit, paid by the EGU, would be built into the price seen through the eyes of PJM. Thus, compliance with the carbon program would thus be “monetized” into economic decision-making in the power sector, similar to the Acid Rain Program under Title IV of the CAA.<sup>35</sup>

A state possibly could decline to include an enforceable cap on total emissions, opting to charge a carbon tax and model the reduction range expected—and that program would be federally enforceable. This approach would eliminate the need for “offramps” where extreme weather events (*e.g.*, polar vortex) require additional carbon emissions to avoid blackouts. It is not clear the extent to which a state plan could adjust its emissions credit system (trading or tax) to market conditions, or whether such changes would require EPA approval. If there is only one inevitability of the rule, it is that in the PJM setting, a state will set a price on carbon emissions.

### Legal Challenges

Since the publication of the rule, numerous groups have conducted studies and offered conclusions on the technical ramifications of the rule<sup>36</sup> and the environmental benefits and costs of compliance.<sup>37</sup> A raft of objections to this rulemaking appeared even before the promulgation of the proposed rule. And shortly after publication, Murray Energy Company and twelve states filed separate petitions in the D.C. Circuit Court of Appeals challenging the proposed rulemaking.<sup>38</sup> That legal challenge, and several other legal issues, is summarized below.

The thrust of the extraordinary writ argument is that EPA does not have the authority to regulate

— *continued on next page*

## From Smokestacks to the Grid *(continued)*

a source under section 111(d) if existing stationary sources of the pollutant in question are regulated under section 112 of the CAA. In promulgating its Mercury Air Toxics Standard (the MATS rule) under section 112 and regulating existing EGUs, the argument goes, EPA lost its ability to use section 111(d). The argument is based on the 1990 amendments to the CAA. The House of Representatives and Senate passed slightly different versions of the bill, and ultimately both amendments were present in the legislation signed by the president.<sup>39</sup> The current version of the CAA contains both changes in brackets with a note that the amendments “appear to be duplicative or conflicting; both, in different language, change the reference to section 112.”<sup>40</sup>

Another legal challenge concerns whether the Clean Air Act allows EPA to impose different requirements on individual states. The text of the Act in section 111(d) speaks to establishing a standard of performance, which is defined as the best system of emission reduction adequately demonstrated—the text does not appear to contemplate state by state emission standards, but only a national one.<sup>41</sup> The legislative history of section 111(d) supports the idea that the section was meant to create nationally uniform standards and not favor one region over another.<sup>42</sup> Like other parts of the Clean Air Act, section 111 was designed to prevent a “race to the bottom” by having nationally consistent standards. EPA takes the position that while the states’ goals are different, the application of the building blocks is consistent, and it is the building blocks that constitute the best system of emissions reduction.

For some states like Virginia, the final emissions rate is actually more stringent than the rates EPA proposed for new power plants.<sup>43</sup> Some commenters have argued that the Clean Air Act does not permit EPA to set a section 111(d) standard for existing sources that is more stringent than the standard for new sources under section 111(b). Legislative history suggests that Congress intended the regulation of new sources to be more stringent than existing sources, as it is more economical to install pollution controls on new facilities.<sup>44</sup> This interpretation comports with EPA’s

own Nutshell publication on the Act: “The law calls for new stationary sources to be built with best technology, and allows less stringent standards for existing stationary sources.”<sup>45</sup>

Another legal issue, and perhaps the most popular, is that EPA is going “outside the fence line” to regulate emissions. Existing power plants cannot reduce carbon emissions by 30% on their own with reasonably available technology. Instead, EPA would permit state regulators to mandate other measures to achieve 30% in statewide emissions. For example, a state can effect a redispatch from coal to natural gas by implementing a cap and trade system or perhaps a carbon tax. It can also increase the outlay of renewable energy and mandate improvements in energy efficiency. A number of state and industry voices have challenged the “outside the fence line” approach as beyond EPA’s authority under the Clean Air Act.

Resolution of these issues will depend on the breadth of deference that federal courts give EPA to interpret the provisions of the Act. Under *Chevron*, the courts will accept the agency’s interpretation if Congress has not addressed the issue, and the interpretation is a reasonable one.<sup>46</sup> Generally, where there is a gap or an ambiguity, courts will generally defer to EPA’s interpretation.

In two cases from the spring of 2014, the Supreme Court applied *Chevron* to uphold EPA’s regulatory authority, at least in practice. In the first case, the Court upheld EPA’s cross-state rule despite the fact that it considered costs, which appeared contrary to the CAA’s language regarding reducing based on contribution (rather than costs).<sup>47</sup> Essentially, EPA’s modeling took into account cost, reflecting the belief that it would make the most sense to require pollution controls at the largest, dirtiest plants where reductions could be made cheaply.<sup>48</sup> The Court, citing to *Chevron*, held that the statute permitted EPA to consider costs, saying that doing so “also makes good sense.”<sup>49</sup> The dissent argued that the Court was undemocratically bending the statute for consideration of economic efficiency.<sup>50</sup>

The same conflict of practicality and efficiency on the one hand versus the statutory text on the other emerged in *Utility Air Regulatory Group v. EPA*.<sup>51</sup> The

— continued on next page

## From Smokestacks to the Grid *(continued)*

Court had before it EPA's determination that Title V of the CAA compelled it to regulate greenhouse gases from any source. Because the number of sources that emit the statutory thresholds was so vast, EPA had adopted the tailoring rule so that only large emitters would be regulated.<sup>52</sup> The Court struck down the tailoring rule, as it strayed from the plain numerical standards of the statute. It also rejected EPA's interpretation of the CAA that a source must obtain a PSD or Title V permit on the sole basis of its potential greenhouse gas emissions. Its reasoning, in light of 111(d), is worth noting:

EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.<sup>53</sup>

But crucially, the Court upheld EPA's authority to regulate large emitters of greenhouse gases as "anyway" sources already regulated under the Act.<sup>54</sup> The Court thus struck two major blows to EPA's legal interpretations, but allowed EPA to proceed with regulation of GHGs from large emitters.

How the federal courts will address the statutory glitch in the 1990 amendments to the CAA, or to the fence line or other legal challenges that it will face, remains to be seen. EPA will most certainly take the position that the Clean Air Act does not specifically address these issues, that the term "best system of emission reduction" has a capacious meaning, and thus that their interpretation should be upheld as reasonable. EPA recently pushed back the date for the final rule to issue to "midsummer," and the final rule for new

sources will issue at that time as well. ✱

**About the Author:** *Matthew Gooch serves as an Assistant Attorney General in the Environmental Section of the Office of the Attorney General of Virginia. He litigates cases before state and federal courts and administrative agencies. In 2014, Mr. Gooch successfully argued an appeal before the Supreme Court of Virginia, which reversed the en banc Court of Appeals in a case involving public health. Prior to joining the office, he clerked for two years for Justice William C. Mims at the Supreme Court of Virginia. Mr. Gooch is a graduate of the University of Richmond's T.C. Williams School of Law and Washington & Lee University. Any views expressed herein are those of Mr. Gooch and not the Attorney General.*

### *(Endnotes)*

1. 79 Fed. Reg. 117 (June 18, 2014) (to be codified at 40 C.F.R. pt. 60).
2. *Id.* at 34879.
3. *Id.* at 34833.
4. *Id.*
5. *Id.* at 34832.
6. *Id.* at 34839-41.
7. *Id.*
8. *Id.* at 34836-37.
9. *Id.*
10. *Id.* at 34894.
11. Virginia Center for Coal and Energy Research, *Virginia Energy Plan Item 8: Impacts of Proposed Regulations under Section 111(d) of the Clean Air Act* at 39 (Sep. 26, 2014), available at [http://www.dmme.virginia.gov/DE/LinkDocuments/2014\\_VirginiaEnergyPlan/21AppendixA1.pdf](http://www.dmme.virginia.gov/DE/LinkDocuments/2014_VirginiaEnergyPlan/21AppendixA1.pdf).
12. *Id.* at 43. See also 79 Fed. Reg. 1430 (Jan. 8, 2014) (setting a rate of 1,000 lbs/MWH for new gas plants).
13. 79 Fed. Reg. 117 at 34895.
14. *Id.*
15. *Id.*
16. *Id.* at 34855-58.
17. *Id.* at 34837, 34876.
18. *Id.* at 34837.
19. *Id.* at 34834.
20. *Id.* at 34836.

— continued on next page

**From Smokestacks to the Grid:** *(continued)*

21. *Id.* at 34837.
22. *Id.* at 34838, 34924; *see also* Technical Support Document for Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Translation of the Clean Power Plan Emission Rate-Based CO<sub>2</sub> Goals to Mass-Based Equivalents, Docket ID No. EPA-HQ-OAR-2013-0602 (Nov. 2014).
23. *Id.* at 34924.
24. *Id.* at 34900-28; *see also* Technical Support Document for Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, State Plan Considerations, Docket ID No. EPA-HQ-OAR-2013-0602 (June 2014) (“State Plan Considerations Technical Support Document”).
25. *Id.* at 34909-10.
26. *Id.* at 34837.
27. *Id.* at 34902.
28. *Id.* at 34902.
29. *Id.* at 34834.
30. *Id.* at 34838.
31. 34833, 34834.
32. *See* State Plan Considerations Technical Support Document at 6.
33. *Id.* at 34853; State Plan Considerations Technical Support Document at 8-12.
34. *See id.* at 34847-48, 34910; State Plan Considerations Technical Support Document at 7-8.
35. *Id.* at 34834, 34862.
36. *See e.g.*, Virginia Center for Coal and Energy Research, *Virginia Energy Plan Item 8: Impacts of Proposed Regulations under Section 111(d) of the Clean Air Act* at 39 (Sep. 26, 2014), *available at* [http://www.dmme.virginia.gov/DE/LinkDocuments/2014\\_VirginiaEnergyPlan/21AppendixA1.pdf](http://www.dmme.virginia.gov/DE/LinkDocuments/2014_VirginiaEnergyPlan/21AppendixA1.pdf); Comments of the Staff of the Virginia State Corporation Commission on the Proposed Clean Power Plan, Docket ID No. EPA-HQ-OAR-2013-0602 (Oct. 14, 2014).
37. *E.g.*, Southern Environmental Law Center, Clean Power Plan Impact Analysis Support (Sep. 4, 2014), *available at* [http://www.dmme.virginia.gov/DE/LinkDocuments/2014\\_VirginiaEnergyPlan/22AppendixA2.pdf](http://www.dmme.virginia.gov/DE/LinkDocuments/2014_VirginiaEnergyPlan/22AppendixA2.pdf).
38. *Murray Energy v. EPA*, Case No. 14-1112 (D.C. Cir. 2014); *West Virginia v. EPA*, Case No. 14-1146 (D.C. Cir. 2014).
39. Pub L. 101-549, § 108(g), 104 Stat. 2,399, 2,467 (1990) (House version); Pub. L. 101-549, § 302(a), 104 Stat. 2,399, 2,574 (1990) (Senate version).
40. 42 U.S.C. § 7411(d) (as amended through P.L. 108-201 (Feb. 24, 2004)).
41. 42 U.S.C. § 7411.
42. H.R. Rep. 95-294 (1977); H.R. Conf. Rep. 95-564 (1977).
43. *See* 79 Fed. Reg. 1430 (Jan. 8, 2014) (setting rate of 1,000 lbs/MWH for new gas plants and 1,100 lbs/MWH for new coal plants).
44. H.R. Rep. 95-294 (1977); H.R. Conf. Rep. 95-564 (1977).
45. United States Environmental Protection Agency, *The Clean Air Act in a Nutshell: How it Works* (Mar. 22, 2013).
46. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 476 U.S. 837 (1984).
47. *EPA v. EME Homer City Generation, LP*, 134 S. Ct. 1584 (2014).
48. *Id.* at 1596-97.
49. *Id.* at 1607.
50. *Id.* at 1610 (Scalia, J., dissenting).
51. 134 S. Ct. 2427 (2014).
52. *Id.* at 2437-38.
53. *Id.* at 2444 (internal citations and quotation marks omitted).
54. *Id.* at 2449.

## VIRGINIA STATE BAR ADMINISTRATIVE LAW SECTION Board of Governors 2014-2015

**Kristian Mark Dahl****Chair**

McGuireWoods LLP  
(804) 775-4730  
kdahl@mcguirewoods.com

**Ashley B. Macko****Vice Chair**

State Corporation Commission  
(804) 371-2066  
ashley.macko@scc.virginia.gov

**Charlotte P. McAfee****Secretary**

Dominion Resources Services, Inc.  
(804) 819-2277  
Charlotte.P.McAfee@dom.com

**Samuel R. Brumberg****Immediate Past Chair**

Virginia Maryland & Delaware  
Association of Electric Cooperatives  
(804) 346-3344  
sbrumberg@odec.com

**James G. Ritter****Newsletter Editor**

Christian & Barton, LLP  
(804) 697-4141  
jritter@cblaw.com

**Meera Ahamed**

Washington Gas Light Company  
(202) 624-6622  
mahamed@washgas.com

**Charles M. Burton, Jr.**

Office of the Attorney General  
(804) 371-0343  
cburtonjr@oag.state.va.us

**K. Beth Clowers**

State Corporation Commission  
(804) 371-9671  
beth.clowers@scc.virginia.gov

**Philip R. "Duke" de Haas**

Troutman Sanders LLP  
(804) 697-1452  
duke.dehaas@troutmansanders.com

**Alisson P. Klaiber**

State Corporation Commission  
(804) 371-9146  
alisson.klaiber@scc.virginia.gov

**Nancy F. Loftus**

nancy.loftus9@gmail.com

**William T. Reisinger**

Office of the Attorney General  
(804) 786-5852  
wreisinger@oag.state.va.us

**Mark C. Shuford**

Spencer LLP  
(804) 285-5227  
mshuford@spencerllp.com

### Web Site News

The Section's home page on the Virginia State Bar's web site now provides a helpful bit of history, reflecting past developments in state regulatory law and the Section's efforts to keep its membership apprised of those developments. A comprehensive collection of Administrative Law News issues dating back to 1988 can now be accessed on-line. In addition, the programs of every National Regulatory Conference can be downloaded.

The Administrative Section home page can be found at <http://www.vsb.org/sections/ad/index.htm> Or, if it's easier, just go to the State Bar's web site ([www.vsb.org](http://www.vsb.org)), click on "Sections," then "Administrative Law."

# Administrative Law News

VIRGINIA STATE BAR  
1111 E. MAIN STREET, SUITE 700  
RICHMOND, VA 23219-3565  
[WWW.VSB.ORG/SECTIONS/AD/INDEX.HTM](http://WWW.VSB.ORG/SECTIONS/AD/INDEX.HTM)



PRST STD  
U.S. POSTAGE  
PAID  
PERMIT NO. 709  
RICHMOND