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## ENVIRONMENTAL REGULATION AND THE CURRENT POLITICAL CLIMATE

John F. Sawyer, Esquire



What happens when you place the chief litigator for the National Association of Home Builders (“NAHB”) on the same panel with the counsel for the National Resources Defense Council (“NRDC”) and National Wildlife Federation (“NWF”) with a tenuous buffer of U.S Army Corps of Engineers (“USACE”) and Environmental Protection Agency (“EPA”) attorneys in between? Passionate debate, frayed nerves, a few sucker punches and very little common ground.

This was the scene at the Wetlands Law and Regulation conference in Washington, D.C. that I recently attended. The organizers assembled a diverse panel of both legal and scientific experts to provide environmental practitioners with an update on recent legal precedent, efforts by federal and state governments to clarify their positions for the regulated public, and an update on efforts to revise and amend current environmental law. It was heavily laden with political and policy positions as one would expect from these groups in an election year.

Environmental law came of age in this country in the early 1970s with passage of the National Environmental Policy Act (“NEPA”), the Clean Air Act (“CAA”), and the Clean Water Act (“CWA”). The CAA and CWA have undergone amendment and revision since their inception, but a great deal of discretion has been given to the regulatory agencies in the implementation of these Acts. In order to flesh the Acts out and carry out Congress’ intent, the agencies are given authority to enact regulations which they then enforce. In what is commonly known as the Chevron two-step, federal courts conduct a two part analysis to determine whether challenged agency regulations are proper. First, the court must decide whether the statute in question is ambiguous. If it is clear, then there is no need for agency interpretation of it and the regulation is struck. If the statute is ambiguous, then courts go to the second step. There the court determines whether the agency’s interpretation of the ambiguous statute is reasonable. The concept is that if Congress left an ambiguity in the statute, then it intended the agency tasked with implementation of the statute to interpret it first and foremost. Courts will not second guess the agency, which is comprised of experts in the field, unless their interpretation is deemed clearly unreasonable.



Since the 1970s, the breadth and scope of environmental regulation has continued to expand to the point where it impacts not only large power companies and utilities but land developers and even private home owners. The CWA has expanded, virtually unchecked, until relatively recently. In its recent opinion known as Rapanos, the Supreme Court ruled against the agencies and their interpretation of wetlands regulation. The Rapanos decision has invigorated the regulated public, such as the NAHB, and dozens of cases have been filed seeking to overturn or reduce the scope of environmental regulation.

The vast economic development and construction in this country accompanied by a much greater scientific understanding of the environment and the impact of development on it has further polarized the environmental movement and developers. The regulatory agencies are left somewhere in the middle, attempting to keep pace with changing times and science, and it is being challenged from both the left and the right in court constantly.

There have been some congressional attempts to craft new law. Perhaps the most noticeable is the Clean Water Restoration Act of 2007 (“CWRA”). Lobbying efforts from all sides have been intense and the CWRA did not make it past the committee level last year. However, with the pending change in administration, it is very likely that environmental regulation will undergo an overhaul in the coming years.

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## SEVEN STEPS TO A SUCCESSFUL EVICTION

Brandon H. Zeigler, Esquire



Residential real estate can be a wonderful investment, notwithstanding the current real estate market. However being a landlord is fraught with difficulties including the non-payment of rent by your tenant. Here are seven steps to a successful eviction.

**1. Be Able to Identify the Breach for the Court.** While this seems elementary, it is not as easy as it sounds. Most breaches are going to deal with the failure to pay rent which must be remedied according to the terms of the lease. Generally, a five day pay or quit letter will be sent, thereafter a summons for unlawful detainer will be filed. The lease can be breached in other manners such as not allowing proper inspections, failure to abide by the occupancy restrictions, or failure to maintain utilities and services. Regardless, the breach of the lease must be clearly identified with references to the lease and with sufficient proof to convince the court of the breach.

**2. Before Heading to Court, You Must Serve the Proper Notice.** In order to serve the proper notice you will have to determine whether your lease is governed by the Virginia Residential Landlord Tenant Act (“VRLTA”). VRLTA deems notices are to be received when they come to the tenants attention as served by regular mail or if sender retains a certificate of mailing or sufficient proof of mailing or if served to the tenant by hand-delivery according to Virginia Code § 8.01-285.

Additionally, the notice that will be served changes based upon the type of breach. A material non-compliance notice should be sent to tenants when they breach the lease in such a way that the lease could be remedied, such as failure to maintain the yard, or to provide access to the property.

A five day pay or quit letter should only be sent when the tenant has failed to pay rent.

There is also a notice of termination that may be sent for non-remediable violations. This is used in situations when the tenant has breached the lease in such a way that there is no remedy.



**3. Be Like a Boy Scout: Be Prepared with the Proper Documentation and Witnesses.** Only with the appropriate documentation will a court allow a tenant to be evicted, therefore it is essential that the landlord come to court with at least a copy of the lease, the relevant notice served following the breach, a copy of the ledger sheet indicating any and all amounts due, and any acceptance of rent with reservation notices if applicable. The failure to bring any of the relevant documentation to court may result in an unsuccessful unlawful detainer. In fact, the Judges of the Virginia Beach General District Court will not hear an eviction case until and unless all of the damages are itemized on a separate sheet of paper, much like a grocery list.

Also, if there are witnesses to certain conduct or conversation that are critical to your case, have them subpoenaed for trial. That way, if they fail to show for any reason (they forgot, got stuck in traffic, flat tire, family emergency) you have grounds to seek a short continuance.

**4. File the Proper Suit.** An Unlawful Detainer seeks to evict the tenant from the property, allowing the landlord to recover possession and to seek damages and/or unpaid rent. A warrant in debt only covers monetary compensation, not possession of the property.

**5. After You Have Your Judgment, Now What.** A judgment is merely a judicial recognition of an obligation from party A to party B. Collection is the actual payment of that obligation. Landlords should thoroughly familiarize themselves with the types of collections that are allowed in Virginia. Virginia is a very creditor friendly state and allows, among other things, the garnishment of wages and bank accounts and the taking of personal property to satisfy the judgment. You can also demand a debtor interrogatory where the debtor is required to answer questions under oath about their assets and ability to pay the judgment.

**6. Obtaining a Writ of Possession.** Following the entry of an order of possession and the expiration of the ten day period which is granted to the tenant who appears, the landlord may obtain a writ of possession which will allow the landlord to forcibly remove the tenant from the property. This removal is performed by the Sheriff’s Office. A writ of possession must be returnable within 30 days from the date of issuance of the writ.

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## SEVEN STEPS

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**7. Be Wary of Tiger Traps: Accepting Rent During the Eviction Process.** If rent is accepted during the eviction process it must be accepted with reservation and that reservation must be in writing. If not, the tenant will have a good faith argument that the breach has been remedied or waived by the Landlord by their acceptance of rent and that the eviction should be cancelled.

As you can see, an eviction is not as straight forward or as simple as it sounds. If you have any questions about your rights and obligations as a landlord or tenant, the attorneys at Wolcott Rivers Gates are well versed in landlord-tenant law and can assist you at every step.

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## THE VIRGINIA HOME SOLICITATION SALES ACT

**Stephen P. Pfeiffer, Esquire**



Virginia has long been known as a jurisdiction that respects the freedom and sanctity of a contract between parties. However, the Virginia legislature has allowed certain consumers a way out of what was once considered an “ironclad” contract. This consumer escape mechanism is titled, the Virginia Home Solicitation Sales Act (hereafter referred to as “HSA”). The HSA’s potential effect on businesses engaged in the sale and lease of goods and services and the consumers purchasing these goods and services is substantial.

The legislature has defined a home solicitation sale as “any consumer sale or lease of goods or services in which the business or a person acting for him engages in a personal solicitation of the sale or lease or a solicitation of the sale or lease by telephonic or other electronic means at any residence other than that of the business and the consumer’s agreement or offer to purchase or lease is there given to the business or a person acting for him” (See Virginia Code § 59.1-21.2). In other words, if a business calls a consumer at their home or goes to the consumer’s home and the parties enter into an agreement in the home, that business is bound to abide by the HSA.

The legislature has excluded the following transactions from the HSA:

- Farm sales and leases;
- Cash sales of less than twenty-five dollars;
- Sales or leases made pursuant to a preexisting revolving charge account; and
- Sales or leases made pursuant to prior negotiations between the parties (See Virginia Code § 59.1-21.2).

Some businesses may have read exemption number four and thought that all they have to do to avoid the HSA is to simply engage in a few negotiations prior to entering into a sale or lease. However, the case law is very “consumer friendly” and the “prior negotiations” exception is to cover only extensive negotiations between consumers and businesses. Application of this exception will be determined in a very fact specific, case-by-case approach. Thus, the “prior negotiations” exception is a limited defense for a business.

Now that you know what is and is not covered under the HSA, you should know some of the protections the HSA offers the consumers and businesses. The main protection offered to the consumer is the right to cancel a home solicitation sale until midnight of the third business day after the day on which the consumer signs an agreement or offer to purchase (See Virginia Code § 59.1-21.3). The consumer must provide written notice of cancellation to the business at the address stated in the agreement and the notice is deemed effective the moment it is deposited in the mailbox, even though the business may not receive it for a few days.

The HSA provides businesses some protections too. Specifically, the HSA prevents a consumer from canceling a home solicitation sale in a case where the consumer requires the business to act without delay. If the consumer has requested the business to provide goods or services without delay because of an emergency and the business, relying on the consumer’s request, in good faith makes a substantial beginning of performance before the consumer gives notice of cancellation, the consumer is barred from canceling the transaction. However, in order for this protection to have any effect the burden is on the business to require the consumer to memorialize their emergency request in a dated writing personally signed by the consumer and which expressly states that the consumer understands that he is waiving his right to cancel the sale under the provisions of the HAS. (See Virginia Code § 59.1-21.3).

When the consumer gives proper notification of the cancellation, the legislature, via the Code of Virginia Section 59.1-21.5, has required the business to tender to the consumer any payments made, or proof of indebtedness within ten days after the cancellation. But for businesses that have provided goods to the consumer and want those goods returned after the consumer cancels the transaction, the legislature has required the business to demand the return of the goods within twenty days after the cancellation. Once the business makes a demand (preferably in writing) the consumer must tender to the business any goods delivered at their residence in a substantially similar condition as they were when received. A failure of the business to demand a return of the goods results in the consumer taking lawful title to the property without obligation to pay. If the consumer sale is for services rendered, and the business has provided services prior to cancellation, the business is not entitled to compensation under the HSA.



## THE VIRGINIA HOME SOLICITATION SALES ACT continued

Businesses may contemplate contracting around the HSA to avoid its provisions. However, the legislature has decided that protecting the consumer is paramount and as such any contractual attempt to waive or modify the consumer's right to cancel is void and of no effect (See Virginia Code § 59.1-21.3).

So what is a business that engages in home solicitation sales or leases to do to protect itself from the pitfalls of the HSA? Engage counsel to review your current contract and your current method of conducting sales or leases to help your business prepare an efficient and effective plan to navigate through the potentially dangerous waters of the Virginia Home Solicitation Act.

What about the consumer? What is a consumer to do when a business that has engaged in home solicitation sales refuses to abide by the requirements of the HSA? Contact counsel to institute the appropriate action to protect your statutory rights under the HSA.

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## RELOCATING WITH YOUR CHILDREN AFTER DIVORCE

**Regina F. Amick, Esquire**



The only thing more unusual than a cool August afternoon is a Hampton Roads native. Whether a person's military career brought them here, a spouse's career, or just the quality of life, many people in this area were not born or raised here. Unfortunately, if the marriage ends in divorce, a parent is left with the question of whether he or she can go back home with the children.

If the parents can not agree whether the children can "go home" with mom or dad, the court must decide. In Virginia, a court may forbid a custodial parent from leaving the area with the children, even if it is just from Hampton Roads to Williamsburg or

Richmond. Conversely, if the court finds that the proposed move is in the children's best interest, the court may permit the relocation, regardless of the destination, including overseas.

In determining the child's best interest, the court looks to the factors set forth in Va. Code § 20-124.3, as well as the relocating parent's efforts to remain in the area, how the children are developing in the environment in which they were raised, how the children are doing in school, whether the children maintain close relationships with both parents, whether both parents play an active role in the care, education and development of the children, and most importantly, whether the move is going to significantly disrupt the relationship the children have with the non-moving parent.

A parent seeking to relocate will need to give the court a compelling reason why the move is in the children's best interest. It is not enough that the parent wants to move or a better job awaits in a far away town. The move, when viewed from the children's point of view, must benefit them. Such benefits may be a better school system, closer to extended family for support, or nearer to specialized medical care. That list is not exhaustive, but illustrates the need to present a compelling reason from the child's point of view.

To increase your chances of success, the moving parent needs to show the court how he or she intends to preserve the children's relationship with the non-moving parent. This is usually the first question the court wants addressed and the hardest to answer. The moving parent can and should suggest some or all of the following: (1) a detailed visitation plan to include video conferencing and telephone calls; (2) extensive summer and holiday visits; and (3) assisting with travel expenses. It is important for the moving parent to appear flexible and considerate of the other parent. If the moving parent appears spiteful or shows a desire to cut the other parent out of the children's lives, most courts will not allow the children to leave.



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The attorneys of Wolcott Rivers Gates provide a full range of legal services to those who demand exceptional representation.

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## RELOCATING YOUR CHILDREN AFTER DIVORCE

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If a parent is seeking to prevent the relocation of his or her children, that parent should file for Primary Physical Custody, or in the alternative, an Injunction to prevent the parent to move with the children. An injunction is a good alternative if that parent is not available to take primary physical custody, due to military obligations or other scheduling problems.

The parent objecting to the move should emphasize that the move will prevent him or her from attending teacher conferences, sporting or musical events, birthday parties, school plays, and so on. In order for the claim to carry any weight, he or she must have done these types of activities when the children were here. The non-moving parent must show that he or she regularly exercises visitation, that he or she is a devoted parent and moving the children out of the area will significantly damage the parent-child bond.

In every relocation case, the court will weigh the benefits the children would receive by the move against the loss of the children's relationship with the non-custodial parent and the benefits of maintaining the status quo. This applies to all custody orders, not just orders resulting from a divorce.

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## NEW RIGHTS AND LEGAL REMEDIES ARE AVAILABLE IN VIRGINIA TO PROTECT YOUR PROPERTY FROM INVASION BY NEIGHBORING TREES AND PLANTS

**Marshall A. Winslow, Jr., Esquire**



Are the roots from your neighbor's tree cracking your house foundation, driveway, patio, retaining wall or landscaping? Have the roots from your neighbor's tree busted your water line or clogged your septic field drains? Do your neighbor's overhanging tree limbs rest or fall on your house or car? What legal options do you have to protect your property from invading trees and plants? The law in Virginia changed in 2007 when the Supreme Court of Virginia examined the issue. This article takes you through the evolution of the law in Virginia on this topic.

When the Supreme Court of Virginia considered this topic for the first time in the case of Smith v. Holt, 174 Va. 213 (1939) it analyzed the Massachusetts Rule which was based on the philosophy of liberty for an owner of land to grow trees and cover the land with a thick forest. The Massachusetts Rule drew no distinction between damage done by shade from overhanging branches and damage done by invading roots. The belief was that the extension of branches and the penetration of roots onto adjoining property was natural and reasonable. The neighbor's only legal right and remedy was to exercise self help to cut off the intruding branches and roots. The thought was that it would be wiser to let the individual protect himself at his own expense rather than permit the annoyance and public burden of numerous lawsuits.

The Court in Smith v. Holt also examined the Mississippi Rule which was based on the philosophy that a landowner has the right to enjoyment of property but that enjoyment, by planting trees or otherwise, does not allow the owner to invade a neighbor's rights. The owner of trees must restrain the roots and branches so as not to work injury to a neighbor. The neighbor not only had the right to self help to remove the invading roots and branches but could also file a lawsuit for nuisance and/or trespass for the damages sustained from the trees. In Smith v. Holt, the Supreme Court of Virginia adopted its interpretation of the Mississippi Rule, that a landowner could only exercise self help and did not have a cause of action or remedy in court for nuisance or trespass unless the invading tree or plant was noxious in nature and a sensible injury had been inflicted. My interpretation of the Mississippi Rule is different in that the right to file an action in court did not require that the invading tree be of noxious character, but that proof of the noxious character of the tree or plant would be relevant later in the lawsuit to determine the significance of the injury and the amount of damages. In any event, from 1939 until 2007, the Virginia Rule set forth in Smith v. Holt prevented a landowner from filing suit for nuisance or trespass based upon an encroachment of adjoining trees or plants unless they were noxious and a sensible injury had been inflicted.

In the case of Fancher v. Fagella, 274 Va. 549 (2007), the Supreme Court of Virginia overturned its decision in Smith v. Holt. The Court determined that for 68 years the Virginia Rule had been subject to the just criticism that the classification of a plant as noxious depends on the eye of the beholder. "Noxious" has generally been defined as hurtful, offensive and offensive to the smell such that it causes or tends to cause injury. See: *Black's Law Dictionary* 1065 (6th ed. 1990). The Court explained that many people would agree that poison ivy is noxious because it causes personal injury. The Court found some people would say kudzu is noxious because of its rapid growth and tendency to smother other vegetation. The Court remarked that few people would classify healthy shade trees as noxious even though they may cause more damage and be more expensive to remove than other trees and plants. The Court determined that continued reliance on the distinction between trees and plants that are noxious





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**SEVEN STEPS**  
**continued**

and those that are not creates an unworkable standard for determining the rights of neighboring landowners. The Court specifically overturned its decision in Smith v. Holt to the extent that it conditioned a right of action upon the noxious nature of a tree or plant that sends invading roots or branches into a neighbor's property. The Court adopted the Hawaii Rule which acknowledges that trees and plants are ordinarily not nuisances merely for casting shade, dropping leaves or because they encroach adjoining property either below or above ground. However, trees or plants may become a nuisance if they cause harm or pose an imminent danger of harm to adjoining property. If so, the owner of the tree or plant may be held responsible for the damage caused to the adjoining property and may also be required by way of mandatory injunction to cut back or remove the invading branches or roots or to completely remove the tree or plant. The law of self help remains intact as the adjoining landowner may, at his own expense, cut away the encroaching vegetation to the property line whether it constitutes a nuisance or not. Thankfully the Supreme Court of Virginia has greatly expanded the rights and remedies available to landowners beyond mere self help to protect their property against damage from invading trees and plants.

Hopefully the information in this article will be of assistance to you in protecting your property. This article is meant to serve only as a general summary of issues as the analysis of nuisance and/or trespass claims and remedies involving encroachment by adjoining trees and plants is very often complex and dependent upon the facts and circumstances involved in each particular case.

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