PERSPECTIVES
on Georgia's Environment
A Publication of the Environmental Law Section of the State Bar of Georgia Spring 2014

ESA – Coming to a River Near You

By David Montgomery Moore, Balch & Bingham, LLP

The Center for Biological Diversity's (CBD) petition to list 404 southeast aquatic species under the Endangered Species Act, 16 U.S.C. §§ 1531 et seq. (ESA) (the Southeast Mega-Petition) promises to increase pressure on the competing demands on our water resources, wetlands and riparian habitats. CBD and Wild Earth Guardians (WEG) petitions will require the United States Fish and Wildlife Service (USFWS) and National Oceanic and Atmospheric Administration-Fisheries (NOAA) to assess, and possibly list, over 700 species as threatened or endangered and entitled to enhanced legal protections in the next several years (see graphic on page 2).

The alleged causes for species or sub-species decline in the Southeast Mega-Petition are identified as development, roads, logging, agriculture, recreation, mining, overutilization and exploitation, disease and predation, invasive species, dams, and hydropower generation.

Implications of Listing

Among environmental practitioners, the ESA is well known as one of the most potent of environmental laws. ESA issues are at the forefront of the well-publicized interstate water disputes between Georgia, Florida, and Alabama (involving the purple bankclimber, gulf sturgeon, fat three-ridge mussel). The habitat conservation plan for the fairly recently listed Etowah darter, never finalized, proposed to expand Georgia's buffers and restrict use and development. Lessons from the western United States indicate that authorization for roads, bridges, docks, water intakes and piping, sewer, rail, and other infrastructure would be affected and delayed or precluded due to ESA consultation, determination regarding potential for jeopardy to the species, and reasonable and prudent measures via biological opinion developed by USFWS and NOAA. At the core of ESA protections are the broad prohibition of 'take' of species or their habitats (Section 9), consultation and conditioning of permits and authorizations with 'reasonable and prudent measures' (Section 7), and the prospect of citizen suit, civil, and criminal penalties (Section 11).

Congressional Concern Regarding "Sue and Settle" and the ESA

Some in Congress have raised concerns that the citizen petition provisions in the ESA such as that used in the Southeast Mega-Petition have resulted in a 'cottage industry for filing lawsuits,'[1] that attorneys' fees provisions have been abused and promote litigation,[2] and that the approach overall impedes true species recovery while wreaking havoc on USFWS resources and economic and social interests.[3] The Government Accounting Office determined that attorneys' fees and costs paid by the Department of Interior from the United States Judgment Fund for ESA cases was $ 21,298,971 from March 2001 to September 2010. By comparison, the entire listing budget for USFWS for FY2013 is $ 22,431,000, just above the attorneys' fees amount.[4]

Currently, based upon citizen petitions, USFWS and NOAA are scheduled to make listing determinations regarding more than 750 species, a large portion of which occur in the southeastern United States.[5] USFWS estimates that, based upon Section 4 petitions for listing, USFWS

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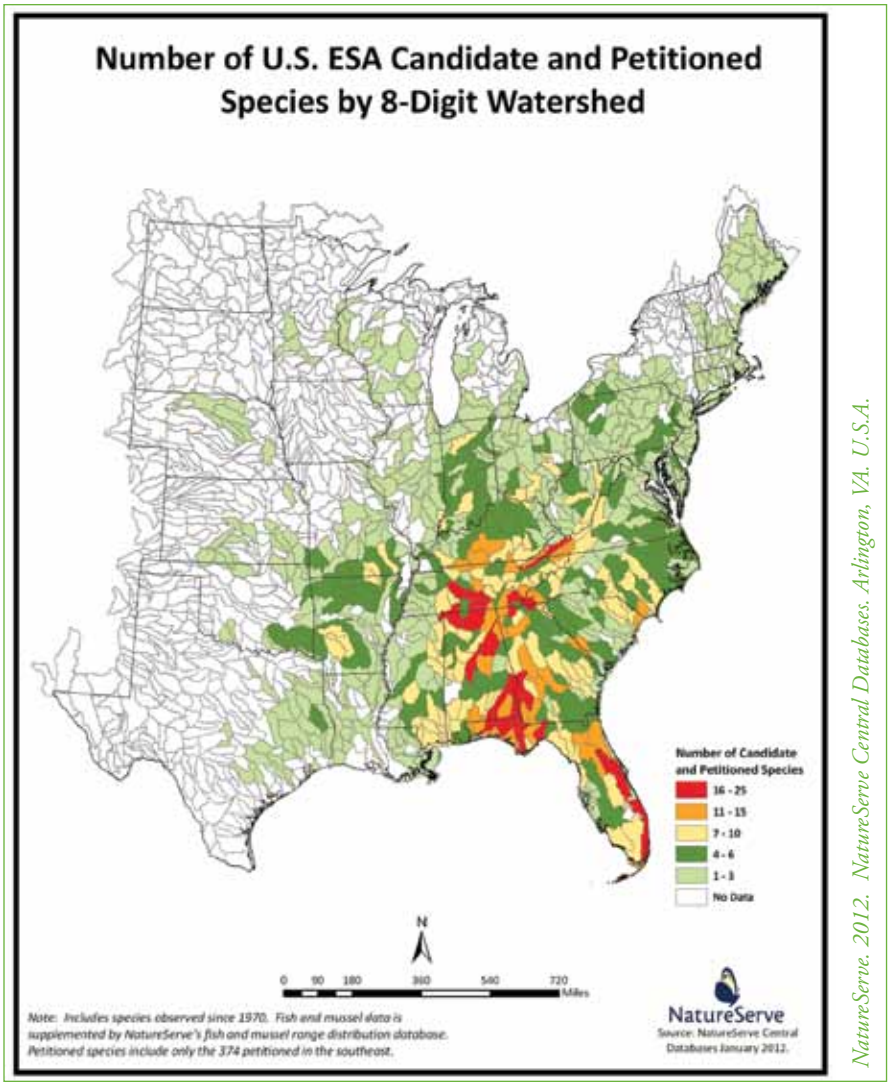

NatureServe. 2012. NatureServe Central Databases. Arlington, VA. U.S.A.

listing decisions would dramatically increase and exceed the totality of decisions for the first 20 years of the ESA. The majority of these petitions have been filed by CBD, which has petitioned for listing of over 750 species. *See* CBD Statement, Hastings Relies on False Information in Attacks on Endangered Species Cases (June 27, 2012). Wild Earth Guardians, another environmental group active in ESA listing petitions, recently settled with USFWS regarding determinations for over 600 species. *In re Endangered Species Act Section 4 Deadline Litigation*, Settlement Agreement, MDL Docket No. 2165 1:10-mc-00377-EGS (May 10, 2011).

In light of the sheer number of species, there is concern that listing decisions present a significant possibility that determination regarding some species will be based upon incomplete or little scientific information. USFWS has indicated that the number of petitioned species far exceeds USFWS resources and the reasonable workload.

Conclusion

The southeastern United States, with its wealth of aquatic resources and species diversity, has generally avoided much of the dispute and limitations on development faced in other parts of the United States under ESA provisions. The filing of the Southeast Mega-Petition and its proposed 404 species marks a significant change in the ESA landscape in this region.

One little used alternative to listing that has seen success in Georgia is the Candidate Conservation Agreement with Assurances (CCAA). CCAA's can be used where a species may be a candidate for listing but is not yet listed. CCAA's are agreements with private or governmental entities to conserve and address threats to candidate species and their habitat. In exchange for agreeing to measures to protect the species, participants in the CCAA obtain the "assurance" that if the species is listed in the future, the parties will not require actions in addition to those provided in the CCAA agreement. USFWS and Georgia Power entered into a CCAA for the robust redhorse in 2002, and subsequently a robust redhorse conservation committee has been established to monitor progress under the CCAA and in other parts of the state where robust redhorse was subsequently found. *See* http://www.robustredhorse.com/. As of November 2011, there were 23 CCAAs in 16 states covering more than 1 million acres and involving 40 species. Three of the CCAAs are for property located in southeastern states (Kentucky, Arkansas, and Georgia).

(Endnotes)

1 Hearing on Implementation of the Endangered Species Act in the Southwest, Committee on Natural Resources. 105th Congress, 2d Session (July 15, 1998)(http://www.gpo.gov/fdsys/pkg/CHRG-105hhrg50135/html/CHRG-105hhrg50135.htm).

2 "Taxpayer Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools," House Natural Resources Committee, June 19, 2012. According to Chairman Hastings, one environmental group, the Center for Biological Diversity, has received $2,286,686.91 in attorneys' fees and court costs from 2009 to 2012. CBD disputes the figures and states that it has received just over $ 500,000 in fees during this period.

3 "The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts," House Natural Resources Committee, December 6, 2011.

4 Keith W. Rizzardi, ESABlawg, "Is $21 million in attorney's fees the best way to spend conservation dollars?" http://www.esablawg.com/ (last accessed March 26, 2013).

5 For the current ESA listing workplan, see https://www.fws.gov/endangered/improving_ESA/listing_workplan_FY13-18.html.

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Restoring the Trust:
A Summary of Georgia's Environmental Trusts

By Stephanie Stuckey Benfield, Executive Director, GreenLaw

Georgia uses a series of fees to finance environmental cleanup, maintenance, education, and enforcement. Historically, these fees have generated enough revenue to fully fund their designated programs; however, for many years, a substantial portion of the collected fees were redirected, in whole or in part, from their statutory designated purposes to help balance the state's general fund.

As a result, at the behest of the Association County Commissioners of Georgia (ACCG), the 2013 session of the General Assembly passed House Bill 276 in an effort to address this problem.[1] With respect to the Hazardous Waste Trust Fund (HWTF), it did so in two ways: 1) by deleting a provision in the law that provided that monies deposited in the HWTF may be spent only if an annual appropriation was made to the Georgia Department of Natural Resources for transfer to the Georgia Hazardous Waste Management Authority in an amount equal to 10 percent of the previous year's payment into the state treasury by the Environmental Protection Division (EPD); and 2) by adding a requirement that if the new appropriation amount for the fund is less than the amount of fees collected, then the amount of the fee must be reduced automatically by 25 percent for the fiscal year beginning July 1 (provided that in no event can the reduction ever be less than an amount equal to the new appropriation amount). The legislature passed these particular provisions because Georgia law does not allow funds to be dedicated except by constitutional appropriation.[2]

On May 7, 2013, Gov. Deal signed the new law with an accompanying signing statement.[3] In that statement, the Governor acknowledged the merits of attempting to dedicate fees to the HWTF for a specific purpose. However, he took the position that this dedication is nonbinding on any subsequent General Assembly because he believes that Georgia Constitution Article 3, Section 9, Paragraph 6 specifically limits any such attempt to dedicate revenues in a general bill unless specifically permitted by the Georgia Constitution. The ACCG, however, suggests that two trust funds, the Hazardous Waste Trust Fund and the Solid Waste Trust Fund, be fully funded, and that the state's Erosion and Sedimentation Fee (also known as the disturbed acreage fee) proceeds go directly and wholly to EPD for their intended purposes.

The Hazardous Waste Trust Fund

The HWTF began with the passing of the Georgia Hazardous Site Response Act of 1992. The Environmental Protection Division (EPD) of Georgia's Department of Natural Resources (DNR) collects fees and fines that go to fund the HWTF. HWTF revenues, in turn, go toward fulfilling the Georgia State Superfund Law, which requires that EPD perform the following tasks:

1. Publish a listing of all hazardous waste sites in the Hazardous Site Inventory;
2. Require a cleanup of the site by the responsible party, which is anyone who has owned the site or operated a known hazardous waste producing entity. The responsible party may then voluntarily clean up the site with EPD oversight, or if the responsible party refuses to clean up the site, EPD may issue an administrative order;
3. If the responsible party ignores the cleanup order, EPD could use the HWTF to clean up the "orphaned" site. After the cleanup is complete, EPD may pursue costs from the responsible party that include cleanup costs and attorneys' fees; and
4. At its discretion, request funds from a local government to complete a hazardous waste site clean-up.

The HWTF fees and fines currently include:

- The solid waste fee ($0.65 per ton of solid waste deposited into a landfill);
- The hazardous waste fee; and
- The hazardous substance fee.

Impact on Environment and Health

Due to many years of diverting collected fees from the HWTF for general appropriations EPD has been unable to maintain the schedule needed to clean up several sites. The total amount of funds collected from 2004 to 2012 was $138,214,289, but only $56,538,733—or approximately 40 percent—was actually appropriated to the HWTF. Due to this failure to properly fund the HWTF, in past years, work in progress was forced to stop on abandoned sites, hiring freezes were imposed and substantial staff vacancies resulted.

According to O.C.G.A. § 12-8-95, all revenue collected and deposited into the HWTF "shall be deemed expended and contractually obligated and shall not lapse to the general fund." The HWTF, unlike a government agency, may carry a balance, or reserve, over to the next fiscal year. When the HWTF receives an estimate of how much a clean-up will cost, it obligates or sets aside the money for that clean-up.

Some projects may take several years to complete, which leaves the money obligated to that project sitting in the fund. Thus, a seemingly large balance in the reserve can be extremely misleading.

In order for the HWTF to fulfill its requirements, it must be appropriated the full amount of revenues from the solid waste fee, the hazardous waste fee, the hazardous substance fee, and fines. On average, the HWTF revenue collected is about $13 million annually. With full funding, the HWTF could pay back local governments, finish the in-progress abandoned site cleanups, begin the remaining abandoned site clean-ups, monitor private clean-ups, and overall help Georgia become hazardous waste free.

Solid Waste Trust Fund

The Solid Waste Trust Fund (SWTF) is designed to finance all aspects of solid waste management in Georgia. The General Assembly created the SWTF in a 1992 amendment to the Comprehensive Solid Waste Management Act of 1990. The SWTF is required to develop and finance a comprehensive management plan for Georgia's solid waste. The SWTF funds many programs as follows:

- Elimination of scrap tire piles and establishment of a scrap tire management program to prevent future tire piles;
- Protection of the public and the environment from past and present solid waste disposal practices by providing a funding source for emergency, preventative; and corrective actions at solid waste disposal facilities that threaten human health and the environment;
- Reduction in the amount of land used as landfills in the state by promoting waste reduction, reuse, and recycling programs;
- Elimination of open dumps and litter that foul our roadsides and streams; and
- Provision of grants to local governments and state agencies for carrying out the goals of the Act.[4]

The SWTF revenues come from a fee of $1 per new replacement tire purchased in the state (the Scrap Tire Management Fee) and revenue from fines.[5] The fees and fines currently generate about $6.5 million annually. HB 908, sponsored by Rep. Lynn Riley (R-50) passed the Georgia Legislature on March 13, 2014 and is now awaiting the Governor's signature. The measure will extend the expiration of the $1 tire fee on purchase of new tires in Georgia from June 30, 2014, to June 30, 2019.

While the income generated from these fees is intended for clean-up of dangerous tire dumps, the funds have instead been diverted by the General Assembly to other state budget items. As with the HWTF, from 2004 to 2012, a substantial amount of funds collected were not appropriated to the SWTF. During that time frame, $57,834,483 was collected, but only $20,040,39—or less than 35 percent—was appropriated to the SWTF. A measure introduced by Rep. Andy Welch (R-110), HR 1087, that would have ensured that fees dedicated to tire dump clean-ups actually funded their intended purpose, failed to pass this session.

Scrap Tire Program

The SWTF was primarily established to address the large number of illegally-disposed scrap tile piles in Georgia. Although the sight of scrap tire piles dotting our landscape alone is enough to warrant their eradication, the true motivation for removal and prevention lies in the health threats posed such as the potential for scrap tire piles to catch fire and release toxic gases into the atmosphere as well as toxic chemicals leaking into the local water supply. The scrap tires also provide an ideal breeding ground for disease-carrying mosquitoes and rodents.[6]

Thus, EPD developed the Scrap Tire Management Program (the Program) funded by the SWTF. The Program combines education, enforcement and elimination of tires to form a permanent solution to Georgia's scrap tire problem. The Program has been largely successful, having eliminated millions of scrap tires since 1992. Although scrap tire piles have been decreasing, the work is not complete.

The permanent elimination of scrap tire piles depends on maintaining the scrap tire prevention programs. A 1998 study commissioned through the passage of HR 874 and conducted by Georgia State University and the Georgia Institute of Technology found that states who had abandoned their scrap tire programs after tire pile clean-ups were completed soon

watched as the tire piles regenerated and grew in size and number. The SWTF has maintained the prevention part of the Program through partnerships with local governments, the Wildlife Resources Division, and EPD's District offices to implement education, enforcement, and recycling plans. The Program has resulted in a very successful campaign for recycling tires with millions of tires being either reused or recycled. The tire recycling industry in Georgia has grown and employs over 200 people. In tire pile cases, the state has also been able to prosecute responsible parties and have them pay for the clean-ups.[7]

Grants to Local Governments

Since its inception, the SWTF has also funded several environmental grants to local governments to help communities with solid waste management, reduction, recycling and enforcement and education efforts. Those grants are the:

- Georgia Environmental Facilities Authority's (GEFA) Recycling and Waste Reduction grant, which helps local governments foster an integrated approach to solid waste management by supporting waste reduction, recycling, and composting programs. Grants of up to $50,000 per year are available per local government; and
- EPD's Enforcement and Education grant (E&E), which offsets local costs in developing and maintaining a local code enforcement program to prevent and enforce against the illegal disposal and management of scrap tires and solid waste.

Environmental Education Efforts

The SWTF has also contributed to the education system in Georgia by sponsoring two programs (and two EPD staff positions) whereby the EPD partners with the Department of Education and other organizations to provide professional learning opportunities for educations and program support for environmental education in our schools:

- The online clearinghouse for Environmental Education (EE) in Georgia provides educators and the general public with tools such as environmental lesson plans, a statewide calendar of EE events, EE news, and facts on Georgia's environment in an easy-to-access format; and
- The "Environment as an Integrating Context for Learning" (EIC) model that uses a school's surrounding environment and community as "a framework within which students can construct their own learning, guided by teachers and administrators." Research on EIC projects has shown that "students show improved performance on standardized tests, reduced discipline and classroom management problems, and increased engagement and enthusiasm for learning, resulting in substantially improved attendance."[8]

NPDES General Storm Water Permit Fee

The National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges from Construction Activities Fee is authorized by the U.S. Environmental Protection Agency (EPA) NPDES Storm Water Program. The goal is to manage erosion and sedimentation caused by construction sites in Georgia.

The NPDES general storm water permit requires that the primary permittee, the landowner or developer, pay $80 per acre of disturbed soil at a construction site. The total fee revenue of $80 per acre will go to EPD if EPD is the issuing authority. If the municipality has been set up as the Local Issuing Authority (LIA), $40 per acre will go to the LIA and the remaining $40 per acre will go to EPD when the permittee submits a Notice of Intent (NOI). This fee payment structure is expected to raise $5 million in revenue for EPD each year.[9]

Since the program began collecting fees on Dec. 1, 2003, it has yet to gather fee revenues for one full fiscal year. Historically, the General Assembly has failed to appropriate a substantial percentage of the fees collected for the program due to other budgetary priorities.

Impact on Environment and Health

The erosion and sedimentation problems that negatively affect Georgia's streams, rivers, and lakes caused by construction activity is the number one complaint EPD receives from citizens on environmental problems.[10] With the population in Georgia increasing at a high rate, the state can

expect an increasing demand for clean drinking water as well as pristine water for recreational activities. The most effective way to achieve clean and safe water supplies is by supporting and boosting the NPDES General Storm Water Permit Fee Program and EPD's ability to administer the state's erosion and sedimentation plan effectively.

According to the NPDES General Storm Water Permits Business Plan, a two year study by EPD found that a minimum of 77 field inspectors are needed in order to enforce and maintain the NPDES general storm water permit. Due to the General Assembly's failure to appropriate all collected funds for the Program, EPD has had to shuffle positions and freeze others.

With a lack of funding support, EPD will not be able to implement the NPDES general storm water permit to the degree that the citizens of Georgia expect it to do. The full impact and benefit of the fee will be unrealized until the NPDES General Storm Water Permit Program is fully funded, which will enable EPD to fill all prescribed field inspector positions.

During the 2014 legislative session, Representative Andy Welch (R – McDonough) introduced House Resolution 1087 which would amend the Georgia Constitution to prohibit dedicated funds from being misappropriated for other purposes. If enacted, this change to the Constitution would result in increased funding for remediating old landfills, cleaning up scrap tire sites, and implement waste reduction and recycling initiatives at the state and local level – just to name a few types of projects.

Georgia collects these fees to protect our environment – it's time they were fully appropriated for that purpose.

(Endnotes)

1 H.B. 276 (May 7, 2013), http://www.legis.ga.gov/legislation/en-US/Display/20132014/HB/276.
2 Ga. Const. Art. VII, Section II, Para. II(a).
3 *See supra* note 1.
4 Georgia Environmental Protection Division, Waste Reduction and Abatement Program, Solid Waste Trust Fund/Scrap Tire Management Unit, *Solid Waste Trust Fund Report Fiscal Year 2003*, http://www.dnr.state.ga.us/dnr/environ/.
5 *Solid Waste Trust Fund Report Fiscal Year 2003*, *supra* note 4.
6 Performance Audit Operation Division Department of Audits and Accounts, *Performance Audit, Environmental Protection Division, Review of the Solid Waste Trust Fund*, June 2001.
7 *Solid Waste Trust Fund Report Fiscal Year 2003*, *supra* note 4.
8 *Solid Waste Trust Fund Report Fiscal Year 2003*, *supra* note 4.
9 Department of Natural Resources (DNR) Environmental Protection Division (EPD), FY 2005, New Permit Fee Program NPDES General Permits for Storm Water Discharges from Construction Activities, Implementation Business Plan.
10 Department of Natural Resources (DNR) Environmental Protection Division (EPD), FY 2005, New Permit Fee Program NPDES General Permits for Storm Water Discharges from Construction Activities, Implementation Business Plan.

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TSCA Reform: The Case for Preemption

By Angela Levin, Troutman Sanders

Rep. John Shimkus (R-IL, Chairman of the Subcommittee on Environment and the Economy) recently introduced a draft bill to reform the Toxic Substances Control Act (TSCA), originally passed in 1976. The bill, titled the "Chemicals In Commerce Act" (CICA), would revamp key aspects of TSCA, the only major environmental statute that has not been updated since its passage. These changes would have wide-ranging impacts for every aspect of the chemical industry, including manufacturers, importers, processers, distributers, users, and retailers of chemicals and finished goods that incorporate chemical substances. However, due to opposition from Democrats, states and environmental groups, to have any chance of enactment, at least one aspect of the CICA will need to be reworked. Specifically, to succeed, the bill's broad preemption provision will need to be narrowed so as to retain a substantive role for states while balancing industry's need for a uniform, national standard.

The Chemicals in Commerce Act

While the CICA is not the first congressional foray into TSCA reform, it is the first time the House has taken up the issue. Previously, TSCA reform proposals were limited to the Senate. Last spring, the late Sen. Frank Lautenberg, D-NJ and Sen. David Vitter, R-LA introduced a bipartisan bill – the "Chemical Safety Improvement Act" – that included many of the same concepts as the CICA. Many of those concepts are widely accepted as being necessary to the modernization of TSCA by both environmental groups and industry. Specifically, while TSCA reform bills have suggested tweaks to the regulation of new chemical substances, the focal points for TSCA modernization have been existing chemicals' grandfathered status and EPA's limited authority to obtain information regarding the health and environmental effects of chemical substances under TSCA Section 4.

To address these issues, both the Senate and House have proposed bills that would require EPA to evaluate potential exposures and hazards of all existing chemicals in commerce to categorize them as either high priority or low priority. Once designated as a high priority chemical, EPA would be required to make a determination as to whether the chemical is "safe," which would include chemicals that EPA concludes are "[un]likely to result in an unreasonable risk of harm to human health or the environment under the intended conditions of use." *See* CICA Section 6(a)(10)(b)(2). On the testing front, the House bill, like its Senate counterpart, would expand EPA's authority to require manufacturers and processors to develop and submit additional data. Specifically, under the House version, after "consider[ing] available information, including exposure potential and screening level hazard and exposure information," EPA would be able to require the submittal of additional information if the Agency deems it necessary to support its safety determinations for new or existing chemicals. *See* CICA Section 4(a)(3).

These changes, if implemented, go a long way toward addressing the concerns and limitations that historically have been identified with regard to TSCA. Yet, the Senate version has stalled out in the Environment and Public Works Committee, and environmental groups and key Democrats in the House (*e.g.*, including Henry Waxman (D-CA)) have jumped out to oppose the draft House bill as well. Although there are several issues still on the table, it is quickly becoming clear that a major sticking point that is preventing the advancement of these bills is the timing of and extent to which state regulation of chemicals will be preempted by EPA action.

The Role of Preemption

In the Senate, Barbara Boxer (D-CA, Chairman of the Senate Environment and Public Works Committee) has criticized the Senate bill on numerous points, including that it fails to incorporate fixed deadlines for EPA action, has inadequate protections for vulnerable populations, and includes overly broad preemption language that would bar state regulation of a chemical once EPA has begun its review process for that chemical. In light of this opposition, and in an effort to sidestep Senator Boxer, industry proponents of TSCA reform encouraged the House to take up the issue, which is what led in large part to the CICA proposal sponsored by Rep. Shimkus. Notably, the House proposal addresses many of the issues criticized by Senator Boxer in the Senate version. For example, the House version explicitly requires EPA to take into account vulnerable populations in determining whether a chemical is "safe." *See* CICA Section 6(c)(3).

Despite responding to several of the criticisms raised in conjunction with the Senate bill, the House version continues to include a broad preemption provision. Specifically, while the House version would delay preemption until EPA completes its review of a chemical (as opposed to the Senate's version, which would have preempted state regulation as soon as EPA made its prioritization determinations), the House version arguably goes farther than the Senate bill in that it would preempt more types of state regulation, including labeling and demands for test data and would not allow states to seek a waiver. These provisions appear to be the main impetus for continued opposition to the bill by states, environmental groups, and key Democrats.

The Case for Preemption

Currently, at least 20 states have implemented some type of green chemistry initiative impacting consumer products, ranging from relatively narrow bans on the use of cadmium in children's jewelry in Connecticut to California's comprehensive Safer Consumer Products regulations, which create an extensive agency-driven risk analysis and regulatory framework for product-chemical combinations identified by the Department of Toxic Substances Control

as having an unreasonable risk of harm to public health or the environment. These diverse and divergent laws create an unworkable commercial environment in which regulated entities are essentially forced to design products to satisfy the most stringent level of regulation and then continuously watch for and react to the ever-changing regulatory landscape as individual states adopt new measures. These concerns make some level of preemption of state-law regulation of chemicals central to industry's motivation for national TSCA reform.

Establishing national standards as the ceiling for chemical regulation (including products incorporating chemicals) would be consistent with previous congressional actions preempting state regulation. Specifically, where a patchwork of laws would prohibit or significantly burden commerce, Congress previously has provided, and courts have generally upheld, preemption of state regulation. For example, when Congress passed the Medical Device Amendments of 1976 (MDA), it included a preemption provision that prohibited states from regulating medical devices. Justice Stevens noted in his opinion upholding the MDA preemption provision that Congress had passed the MDA due to "concerns that competing state requirements may unduly interfere with the market for medical devices." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 490 n.12 (1996). The Court reasoned that medical device manufacturers should be protected from divergent state requirements, thereby promoting interstate commerce. *Id.* Even the Clean Air Act—which is often touted as the prime example of federalism allowing states the flexibility to impose more stringent requirements to address local conditions—prohibits states from imposing more stringent requirements in limited circumstances. Specifically, under Title II, states are not permitted to impose more stringent fuel standards for mobile sources than those set by EPA. 42 U.S.C. § 7543. Although Congress preserved an opportunity for states to seek a waiver from federal standards, the waiver must be justified by "compelling and extraordinary conditions." *Id.* at § 7543(b)(1)(A).

International considerations further support a national ceiling for chemical regulatory requirements. For example, in the Ports and Waterways Act of 1972, Congress granted the Secretary of Transportation the authority to create "uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements." *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 163-68 (1978). Because eighty-five percent of the tankers entering U.S. ports arrive from foreign countries, the Supreme Court held that "the Supremacy clause dictated that [a] federal judgment that a vessel is safe to navigate United States waters prevailed over the contrary state judgment." *Id.* Here, where many U.S. manufacturers rely on international suppliers for raw materials and retailers import products from international markets, a national, uniform standard becomes even more central to implementation of a workable framework for the U.S. chemical industry.

Finding the Middle Ground: Creating Escape Hatches and Roles for States

While the chemical industry cannot afford to support national reform that fails to include some form of preemption, the alternative is even less palatable. Without national reform, industry is left with the existing and increasingly variable state-by-state patchwork of regulation that hamstrings commerce. Further, the chemical industry understands that TSCA reform is essential to regaining the U.S. consumer's confidence and trust in its products. As a result, to have any chance at national reform, a more targeted, limited structure for preemption must be developed than the catch-all proposals included in the Senate and House bills discussed above. For example, Congress could preserve an option for states to request a preemption waiver based on local conditions (included in the Senate version but absent from the House) and / or provide states a strong voice in the prioritization and safety determination processes. Without some protection for state involvement in the regulatory development process and in ongoing regulation, the prospects for national reform seem dim at this time.

Hydrogen Sulfide Could Be The Smell Of Death For Environmental Class Actions In Georgia

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An environmental nuisance case focused on Georgia-Pacific's Savannah River Mill in Rincon, Georgia, has become a dispute with serious and far-reaching implications: whether plaintiffs should be allowed to use class action litigation as a vehicle to sue large corporations for, depending on your perspective, the redress of massive injuries caused by profiteering conglomerates or for theoretical damages that pressure good corporate citizens into windfall settlements that deprive them of money better spent on job creation, product development, and lowering consumer prices. *Georgia-Pacific Consumer Prods., LP v. Ratner*, now pending before the Georgia Supreme Court, has caught the attention of not only local organizations but national groups such as the Chamber of Commerce of the United States of America and the Product Liability Advisory Council, Inc. (PLAC), both of which have submitted amicus curiae briefs in the case. Both sides point to fundamental legal rights in jeopardy: Georgia-Pacific and several amici allege that class certification in the case would deprive them of due process by forcing them to abandon plaintiff-specific defenses, while plaintiff class members argue that decertification would effectively bar them from the courthouse altogether.

The Supreme Court heard oral arguments in *Ratner* on Feb. 17, 2014, and will likely issue a ruling in the case this summer.[1] The Court must decide whether to overturn the Court of Appeals of Georgia's decision to affirm certification of a class of property owners in the vicinity of the Mill who complain that their homes are devalued by hydrogen sulfide fumes emanating from the mill.[2] The opinion will represent the first statement by the Court on class action certification since the United States Supreme Court's ruling in *Wal-Mart Stores, Inc. v. Dukes* raised the bar for plaintiffs seeking certification.[3]

According to the Plaintiffs, Georgia-Pacific seeks a decision that will "… drastically alter the prerequisites to class certification by redefining *commonality* to mean *duplication*, by redefining *typicality* to mean *identity* and by redefining *predominance* to mean *uniformity*."[4] Georgia-Pacific, on the other hand, argues that if the Court of Appeals decision is affirmed, "every industrial facility in Georgia — even those, like the Mill, that abide by environmental rules — may be targeted in a class action brought by few disgruntled neighbors, including those who moved in years after operations began."[5] Writing as amicus curiae in support of Georgia-Pacific, PLAC sounds an even greater alarm: "If the Court of Appeals' decision is allowed to stand, it will send a message that Georgia's courts are open to class actions that will be rejected elsewhere, encouraging the filing of more class actions in Georgia, regardless of merit, and driving up costs for manufacturers and consumer alike, to the detriment of the State's economy."[6]

The *Ratner* Class

The class certified in *Ratner* is defined geographically, consisting of property owners within a discreet vicinity of the Mill circumscribed by roads and other landmarks.[7] The area includes 34 residential properties and 33 industrial, agricultural or other zoned parcels.[8] The class primarily complains about gases from the Mill. They claim hydrogen sulfide fumes produced by the biological breakdown of living organisms, which is part of the Mill's wastewater treatment process, as well as from pits containing sludge produced by the Mill, infiltrate their neighborhoods and homes.[9]

Georgia's nuisance statute and its common law interpretation allow for just about every type of relief, from injunctions to monetary damages for personal injuries, loss of use and enjoyment of property and for the diminution in property value.[10] Importantly, the Plaintiff class in *Ratner* seeks only damages to compensate them for the diminution in their property values.[11] However, the record is replete with claims of personal injuries resulting from the emissions from the Mill, which the Plaintiffs say support their claims for diminution of their property values. This is important because a chief point of disagreement in this case and class actions generally is whether individualized proof of damages prevents class certification. Proving diminution of property value is far easier on a class basis than personal injury damages. In support of their damages, the class offered testimony of an expert real estate appraiser who testified that "the reported toxic fumes would constitute a factor in paring the value and marketability" of the properties in the area of the class.[12]

The Court of Appeals' Debate Over Commonality

"Under O.C.G.A. § 9-11-23, a class action is authorized if the members of the class share a common right and common questions of law or fact predominate over individual questions of law or fact. The character of the right sought to be enforced may be common although the facts may be different as to

each member of the alleged class."[13] In order to certify a class, a plaintiff must establish numerosity, commonality, typicality and adequacy pursuant to O.C.G.A. § 9-11-23(a). Further, the plaintiff must satisfy at least one prerequisite set out in O.C.G.A. § 9-11-23(b), which provides as follows:

> (1) the prosecution of separate actions would create a risk of inconsistent adjudications or would impair other parties' ability to protect their interest; (2) the defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or the declaratory relief with respect to the whole class; or (3) questions of law or fact common to members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[14]

The Court of Appeals was split four to three on whether these standards had been satisfied in *Ratner*. The *Ratner* majority found the proposed class of property owners satisfied those standards. The numerosity and adequacy of representation requirements are not expected to be an issue before the Supreme Court. However, the frequently intertwined commonality and typicality requirements stirred up some debate. The majority concluded that

> [T]he trial of a single case or the trial of this case on a class wide basis would involve many of the same witnesses, same documents and same testimony and would require resolution of the same issues of both law and fact. Some number of individualized questions will almost assuredly be presented. However, the prevailing common questions make this matter appropriate for resolution as a class action.[15]

Meanwhile, the three judge dissent focused on the inability of the proposed class to show each member had suffered the same injury, pointing to allegations of the property owners' varying personal injuries.[16] It will take particularly individualized inquiries, the dissenters explained, to determine damages appropriate for various symptoms alleged from hydrogen sulfide exposure, such as difficulty breathing, headaches and vomiting, alleged by different Plaintiffs.[17] Further, the dissent found a lack of commonality with regard to the alleged property damages, which they said will require individualized examinations to determine if each Plaintiff failed to sell his home because of the alleged nuisance as opposed to other factors, such as economic conditions. Also, they were not convinced that the Plaintiffs' expert sufficiently explained his determination that each property in the class area had been impacted by any or all of the Mill's hydrogen sulfide releases:[18]

> Specifically, Plaintiffs have failed (1) to provide evidence that numerous hydrogen sulfide releases over a period of years affected all of the persons and properties included in the proposed class in a substantially similar way; (2) to show that the injuries they and/or properties have suffered are "common to or typical" of most or all of members of the class; or (3) to show that the class definition is the result of a rational determination of the actual effects of the hydrogen sulfide releases issue.

The dissent further opined that the class did not meet the criteria of O.C.G.A. § 9-11-23(b) for many of the same reasons. "At the very least, the undisputed evidence shows that 'substantial facts or differences' are likely to emerge between class members whose properties were most affected and others such that 'significant trial time would be devoted to determining separate issues of liability,' including proximate causation, 'regarding individual properties.'"[19]

The majority gave short shrift to these arguments: "While Georgia-Pacific's contentions have some merit as each plaintiff has unique elements or amounts of damage, there are more significant questions that are common to the class which predominate over the individual issues in this case."[20]

Recent United States Supreme Court Cases Have Curtailed Class Certification

The Supreme Court of Georgia's decision in *Ratner* will have significant impact on individuals' ability to bring suit using a class action mechanism. The U.S. Supreme Court has already significantly restricted the ability to bring class action lawsuits through two recent decisions: *Dukes* in 2011 and *Comcast Corp. v. Behrend* in 2013.[21] Both decisions hinged on whether proof of damages suffered by plaintiff class members was unified or had to be presented on an individualized basis.

In *Dukes*, the Ninth Circuit had certified a class of approximately 1.5 million women claiming gender bias employment discrimination who were seeking both injunctive relief and monetary damages for back pay.[22] The Supreme Court went further than ever before in protecting corporations from class actions by heightening the evidentiary standard at the certification stage:

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliant with the rule — that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that "sometimes it may be necessary for the Court to probe behind the pleadings before coming to rest on the certification question,"… in that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied,"**...** Frequently, that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. "The class determination generally involves

considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."[23]

The *Dukes* decision highlights the distinction between injunctive relief and damages claims in the class action context. The Court explained that money damages are far more likely to be individualized, and thus present problems for plaintiffs seeking class certification: "Rule 23(b)(2) … does not authorize class certification when each class member would be entitled to an individualized award of monetary damages."[24] Justice Scalia, in dicta, even wrote that "one possible reading of this provision is that it applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all. We need not reach that broader question in this case, because we think that, at a minimum, claims for *individualized* relief (like the back pay at issue here) do not satisfy the rule."[25] This is especially key in the *Ratner* case, in which the parties cannot even agree on whether the plaintiffs are seeking damages for personal injuries, which tend to represent the most individualized claims.

Two years later, the same five justice majority went even further in *Comcast*.[26] In that case, cable subscribers had formed a class alleging they were harmed because Comcast business practices decreased competition and led to 'supra-competitive prices'."[27] The Supreme Court reversed the Third Circuit's affirmance of class certification on the basis that the plaintiff class could not meet the commonality and typicality requirements of Rule 23 because their damages were susceptible to individualized proof: "Under the proper standard for valuating certification, respondent's models falls far short of the establishing the damages are capable of measurement on a class wide basis."[28] Despite this statement in the majority opinion, the four dissenters wrote defiantly that "in particular, the decision should not be read to require, as a prerequisite to certification, the damages attributable to a class wide injury must be measurable 'on a class wide bases'."[29]

Interpretations of the Heightened *Dukes-Comcast* Standard

If the Georgia Supreme Court follows the prevailing trend in environmental class action cases so far, it may adopt the heightened *Dukes* standard and reverse *Ratner*.[30] Some courts have analyzed the issue under commonality as required by Rule 23(a), while others have viewed it as a predominance problem under Rule 23(b). The Third Circuit, meanwhile, has concluded that "the test for commonality is subsumed by the predominance requirement."[31] If the *Ratner* dissent is any indication, these factors may be completely interchangeable under Georgia law – in refuting the majority's finding of commonality under 23(a), the dissent cites *Brockman v. Barton Brands*, a case in which the Western District of Kentucky explicitly found adequate 23(a) commonality, rejecting class certification on 23(b) predominance grounds instead.[32]

What these decisions have in common is a *Dukes* mentality: a rejection of commonality based solely on global legal issues that may arise in a given case. These courts have adopted a much more exacting standard, many of them citing *Dukes* explicitly in support of their requirement that class members demonstrate not only common legal claims but also a unified showing as to the merits of specific elements of those claims. This involves an examination of applicable law and specific facts of the case. As the Eastern District of Arkansas explained in *Ginardi v. Frontier Gas Servs., LLC*, where property damage near natural gas compressors was at stake, "suffering the same violation of law is not enough to satisfy the commonality requirement… What is important to class certification 'is not the raising of common "questions" – even in droves – but, rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.'"[33]

This rule has perpetuated an all-or-nothing approach to commonality in post-*Dukes* jurisprudence. For example, in *Price v. Martin*, a case involving dust contamination from a wood treatment facility, the Louisiana Supreme Court explained that to obtain certification, each and every class member would have to "prove the cause of his injury based on the same set of operative facts as would be offered by every other member of the class."[34] In other words, "the same emissions or conduct by defendants" would have "to touch and concern all members of the class."[35] Citing *Dukes*, the court rejected certification because "[w]ith regard to causation, plaintiffs failed to present sufficient evidence to prove the existence of that common thread."[36] The Third Circuit adopted the same approach in *Gates v. Rohm and Haas*, upholding denial of class certification in a carcinogen dumping case: "[t]he evidence here is not common because it is not shared by all (possibly even most) individuals in the class."[37]

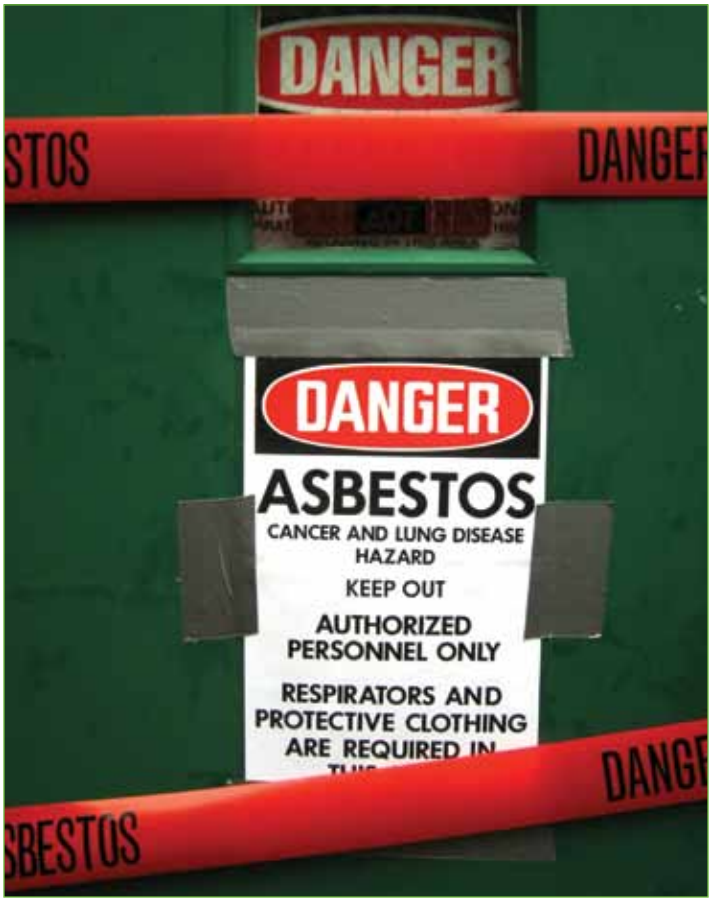
The majority opinion in *Ratner* nodded briefly in a footnote to *Dukes* and to *Rite Aid of Georgia v. Peacock*, the Georgia decision which explicitly adopted *Dukes*,[38] but did not cite any of the above cases in its commonality or predominance analyses. Instead, the Court of Appeals looked to Georgia opinions issued prior to *Peacock* and the 1988 Sixth Circuit case *Sterling v. Velsicol Chem. Corp.* to support its position that commonality may be shown when a "defendant's liability can be determined on a class-wide basis" based on that defendant's singular course of conduct, without regard to evidence of the specific effects on each individual plaintiff.[39] In *Sterling*, the plaintiff class members alleged contamination of local groundwater by a nearby landfill. The court determined that "[a]lmost identical evidence would be required" to prove causation and type of injury suffered.[40] Recognizing "the increasingly insistent need for a more efficient method of disposing of a large number of lawsuits arising out of a single disaster or a single course of conduct," the court found that certification would be proper

to avoid duplication of judicial effort and inconsistent results with similar, if not identical, facts.[41] This was despite the fact that individual class members would still have to submit particularized evidence as to specific damage claims "in subsequent proceedings."[42]

While *Ratner* is not the only opinion to rely on *Sterling* since *Dukes*, it appears to represent a minority viewpoint within the general landscape of class action certification litigation. This minority view seems to involve a more global, policy-driven perspective to certification in which evidence of a common source and type of injury – in other words, more focus on the *defendant's* actions than the *plaintiffs'* particular situations – is sufficient to support certification.

The Common Pleas Court of Philadelphia County stated explicitly in *Johnson v. Walsh*, a case involving arsenic and lead exposure, that it would undertake certification analysis against the backdrop of "a strong and oft-repeated policy of this Commonwealth that, decisions applying the rules for class certification should be made liberally and in favor of maintaining a class action."[43] It concluded that a commonality analysis "should focus on the cause of injury and not the amount of alleged damages."[44] Therefore, commonality and predominance were present to support certification where "Plaintiffs seek to redress a common legal grievance on behalf of the similarly situated property owners."[45]

In *Jackson v. Unocal*, which involved allegations of asbestos contamination stemming from removal of an oil pipeline, the Colorado Supreme Court also took a more global approach to certification, accepting that "[t]here is often overlap between the class certification decision and the merits of the case,"[46] but not scrutinizing the evidence at an individual level, holding that "the need for some proof of individual damages does not preclude certification under C.R.C.P. 23(b)(3)."[47]



It is notable that *Ratner*, *Johnson*, and *Jackson* were all decided by state courts. Meanwhile, federal courts addressing the issue since *Georgia Pacific* have sided with the majority view, citing both *Dukes* and *Comcast*. In *Cannon v. BP Prods. N. Am.*, for example, a September 2013 decision involving allegations over numerous chemical emissions from a BP refinery, the Southern District of Texas explained that "chemical exposure is not straightforward or uniform. If Plaintiffs proved causation and damages for one plaintiff, they would still have to make the same proof for all the others."[48] The court found that the class was unable to present evidence linking the defendant's actions to each and every class member, and denied certification on that basis.[49]

On Jan. 17, the Seventh Circuit reversed a lower court's certification of a class of property owners claiming benzene and other contaminates had leaked into their groundwater in *Parko v. Shell Oil Co.*[50] Judge Posner pointed to different levels of contamination and different effects on different property values as reasons not to certify, concluding that "[m]ere *assertion* by class counsel that common issues predominate is not enough. That would be too facile. Certification would be virtually automatic."[51] He chastised the trial judge below for treating predominance "as a pleading requirement… [I]f intentions (hopes, in other words) were enough, predominance, as a check on casting lawsuits in the class action mold would be out the window. Nothing is simpler than to make an unsubstantiated allegation."[52] Without credible evidence of a connection between leaks by defendants and reduction in plaintiffs' property values – which he noted would vary from homeowner to homeowner, depending on individual property values and the extent each property was affected – the class certification had to be reversed.[53]

Will the *Ratner* Class Survive Application of *Dukes*?

In their *Ratner* brief, the property owners wisely do not run from the *Dukes* decision, but instead argue that their facts are vastly different from the Wal-Mart employees' allegations and meet the latest criteria set out by the Supreme Court. "Plaintiffs in *Dukes* asserted class claims that hinged on 'literally millions' of independent employment decisions by store managers at thousands of Wal-Mart stores and offices located throughout the country. The Court held that those diverse claims lacked commonality because they lacked 'some glue holding the alleged reasons for those decisions together'."[54] Plaintiffs argue, as opposed to the case in

Dukes, "this case involves claims by landowners pertaining to damages done to their property by a single facility. The type of damage alleged for each class member is the same — pollution from [Georgia-Pacific's] sludge fields . . . in keeping with *Dukes*, the glue that holds all of the Complaints together are the same — emission of the same chemical by the same company from the same waste disposal area affecting land owners in the same neighborhood."[55]

Georgia-Pacific countered that the Court of Appeals oversimplified the damages analysis. Pointing to the

differences between the class properties, Georgia-Pacific argues that exposure to its hydrogen sulfide does not necessarily equate with any injury at all, but "… depends on the kind of exposure to it, which in turns depends on where each Plaintiff's property is located; whether it is upwind or downwind of the waste disposal area; and the use to which the property is put (residential, agricultural, etc.)."[56] Georgia-Pacific also states that it will have individualized affirmative defenses, most specifically, "coming to the nuisance" pursuant to O.C.G.A § 41-1-7, Georgia's Right to Farm statute."[57] Certification threatens its ability to bring the defense on a plaintiff-by-plaintiff basis, and thus implicates due process concerns, the amici point out: "By approving class certification in environmental tort cases that turn on a wealth of individualized issues, the decisions below, if allowed to stand, would have the effect of forcing defendants in Georgia courts to abandon their plaintiff-specific defenses and settle unmeritorious cases."[58]

Supreme Court Oral Argument

These due process concerns were not addressed during oral argument on February 17.[59] Instead, the few justices who spoke focused on the ability of the class to prove causation on a class-wide basis, echoing defense counsel's theme: "You can try the case of the named plaintiffs… again and again and again, and it would never resolve the claims of anyone else in the class boundaries." The justices sat largely silent during defense counsel's argument. However, when plaintiffs' counsel John C. Bell Jr. began by noting that the widespread failure of class members' air conditioners constitutes "the equivalent of the canary in the coal mine," thus proving class-wide causation, he did not get one minute into his argument before Justice Nahmias interjected: "Can I ask you, do all the members of the class have air conditioning units?" When he received a response of "I do not know," Justice Nahmias continued: "Aren't some of the members of the class vacant land, and industrial land, and timber land?" Mr. Bell's affirmative response prompted yet another question from the justice: "So if you are going to somehow tie air conditioning units to causation, how do you… how does that work for those class members?"

Bell argued that, as the Court of Appeals held, any differences among plaintiffs exist only in the context of damages, because the Mill's emissions were the undisputed cause of injury to all class members. But Justice Nahmias again challenged him: "That's liability, not causation. I mean, the fact that I produce toxic chemicals on my own property doesn't establish causation, any harm to anyone else." Mr. Bell suggested that the Court consider allowing the class to proceed as to liability; should the class obtain a verdict in its favor, the jury could decide a lump sum in damages for the class, and then perhaps hold subsequent proceedings to determine how to allocate those funds among individual class members. Alternatively, he suggested, the jury could decide the issue of liability and then hear damages grouped by subclass, and issue a special verdict on damages as to each subclass. The Court seemed skeptical of this approach: "Have you seen this done in a trial setting?" Justice Nahmias asked. Justice Harold D. Melton wondered whether certification by subclass might be more appropriate: "Wouldn't it be wise to at least segregate based on residential, timber, commercial properties, vacant lands? Aren't those disparate groups that might share some discrepancies? … How is there commonality amongst those?"

Conclusion

It is always dangerous to draw conclusions from the justices' questions during oral argument, especially when so few ask questions. However, it is clear that the plaintiffs have a harder than usual task for an appellee to preserve the Court of Appeals ruling affirming certification. Regardless of the outcome, the *Ratner* decision should provide environmental lawyers with a more definitive picture of how to approach class action cases in the future. But it will gain notoriety even outside the context of environmental law, given its implications on class action certification, and, therefore, commerce, for years to come.

(Endnotes)

1 *Georgia-Pacific Consumer Prods., LP v. Ratner.*, Supreme Court Case No. S13C1723.
2 746 S.E.2d 829 (Ga. Ct. App. 2013).
3 131 S. Ct. 2541 (2011). *Deal v. Miller*, 739 S.E.2d 487(Ga. Ct. App. 2013) is another class action case pending before the Supreme Court of Georgia. In that case, the Court of Appeals reversed the grant of certification to a class of indigent fathers who allege they were denied government funded counsel while facing jail time for civil contempt in child support cases.
4 Brief of Appellees at 1.
5 *Id.* at 6.
6 Brief of PLAC, as Amicus Curiae in Support of Appellant at 3-4. PLAC is a non-profit association of over 100 manufacturers, including Georgia-Pacific, The Boeing Company, Caterpillar, Inc., Exxon Mobil Corp. and numerous other automobile, tire, and oil companies.
7 *Ratner*, 746 S.E.2d at 833.
8 *Id*.
9 *Id.*
10 *Gainesville v. Waters*,, 574 S.E.2d 638 (Ga. Ct. App. 2002);*see also* O.C.G.A. §41-1-1, stating that, "A nuisance is anything that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary, reasonable man."
11 *Ratner*, 746 S.E.2d at 833.
12 *Id.*
13 *Bd. of Regions of the Univ. Sys. of Ga. v Rux*, 580 S.E.2d 559 (Ga. Ct. App. 2003).
14 O.C.G.A. § 9-11-23(b); *see also EarthLink, Inc. v. Eaves*, 666 S.E.2d 420 (Ga. Ct. App. 2008).
15 *Ratner*, 746 S.E.2d at 835.
16 *Id.*,at 840-41
17 *Id.*
18 *Id.* at 842.
19 *Id.* (citing *Duffin v. Exelon Corp.*, Case No. 06 C 1382, 207 U.S. Dist. Lexis 19683 at *11 (N.D. Ill. 2007) (refusing to certify a class allegedly injured by the release of six million gallons of tritium-contaminated water through a pipeline into a river over a period five years when the class area was defined in geographic terms unrelated to evidence of actual tritium contamination, the class was plainly overbroad, and common questions did not predominate over questions affecting individual members).
20 *Id.* at 837.
21 *Dukes*, 131 S. Ct. 2541 (2011).
22 *Id.* at 2544.
23 *Id.* at 2551-52 (quoting *Gen. Telephone Co. of Sw. v. First Falcon*, 457 U.S. 147 (1982) (internal citations omitted)
24 *Dukes*, 131 S. Ct. at 2557.
25 *Id.*
26 *Comcast Corp. v. Behrand*, 133 S. Ct. 1426 (2013).
27 *Id.*at 1428.
28 *Id.* at 1433.
29 *Id*. at 1436.
30 *See, e.g.*, *Burdette v. Vigindustries Ind.*, No. 10-1083-JAR, 2012 U.S. Dist. LEXIS 15412 (D. Kan. Feb. 8, 2012) (refusing to certify class asserting negligence and nuisance claims asserting damage from neighboring salt mines because different plaintiffs suffered different types and levels of injury); *Benefield v. Int'l Paper Col.*, 270 F.R.D. 640, 651 (M.D. Ala. 2010) (denying class certification in public nuisance case because "individualized determinations" would be necessary to determine whether defendant caused property damage to each class member); *Boughton v. Cotter Corp.*, 65 F.3d 823 (10th Cir. 1995) (upholding trial court's refusal to certify class alleging uranium exposure due to individual issues regarding extent and nature of injuries, degree and length of exposure, prevalence of contamination and proof of ownership as to property rights); *Lipinski v. Beazer East. Inc.*, 76 Pa. D. & C. 4th 479 (2005), aff'd, 909 A.2d 896 (Pa. Super. Ct. 2006) (finding that individual issues regarding chemical exposure predominated regarding personal injury and property claims, precluding class certification); *Aprea v. Hazeltine Corp.*, 669 N.Y.S.2d 61, 62 (App. Div. 1998) (denying class certification in toxic chemical exposure case because "issues exist as to whether and to what extent the emission caused any damage to any individual's property or their use and enjoyment thereof," as well as to the "[e]ffect[] [on] the market value of individual properties") (internal citations omitted).
31 *Georgine v. Amchem Prods.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd*, *Amchem Products v. Windsor*, 521 U.S. 591 (1997).
32 Case No. 3:06CV-332-H, 2007 U.S. Dist. LEXIS 86732, at *21-22 (W.D. Ky. Nov. 21, 2007).
33 Case No. 4:11-CV-00420, 2012 U.S. Dist. LEXIS 54845, at *6-7 (E.D. Ark. Apr. 19, 2012).
34 79 So.3d 960, 970 (La. 2011).
35 Id. at 971.
36 Id. at 972.
37 655 F.3d 255, 266 (3d Cir. 2011)
38 *See* 746 S.E.2d at 834, n. 6 (noting the trial court's citation of *Dukes* and *Peacock*, 726 S.E. 2d 577 (Ga. Ct. App. 2012)).
39 746 S.E.2d at 836 (quoting *Sterling*, 855 F.2d 1188, 1197 (6th Cir. 1988)).
40 855 F.2d at 1197.
41 *Id.*
42 *Id.*
43 2011 Phila. Ct. Com. Pl. LEXIS 317, at *10-11 (C.P. of Phila. Cnty. Dec. 2, 2011).
44 *Id.* at *13.
45 *Id.* at *14.
46 262 P.3d 874, 884 (Colo. 2011).
47 *Id.* at 889 (internal citation omitted).
48 Case No. 3:10-CV-00622, 2013 U.S. Dist. LEXIS 142934 at *49 (S.D. Tex. Sept. 20, 2013)
49 *Id.* at 50.
50 Case Nos. 13-8023 & 13-8024, 2014 U.S. App. LEXIS 1018 (7th Cir. Jan. 17, 2014).
51 *Id.* at *6 (emphasis in original).
52 *Id.* at *9-10.
53 *Id.* at *12-13.
54 Brief of Appellees at 9 (citing *Dukes*, 131 Sup. Ct. at 2552).
55 *Id*. at Page 10.
56 Brief of Appellant at18.
57 *Id*. ate 21.
58 Brief of the Georgia Chamber of Commerce, Inc., Chamber of Commerce of the United States of America, Georgia Agribusiness Council, Georgia Association of Manufacturers, Georgia Chemistry Council, Georgia Mining Association, Georgia Paper and Forest Products Association, Inc., Georgia Poultry Federation, and Georgia Industry Environmental Coalition, as Amici Curiae in Support of Appellant, at 28.
59 Video of the oral argument is available on the Georgia Supreme Court's website at http://www.gasupreme.us/media/oa/021714-S13G1723.php.