PERSPECTIVES
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Answering *Atlantic Research*'s Call: The Eleventh Circuit's Decision in *Solutia, Inc. v. McWane, Inc.*

By Sarah T. Babcock & Jonathan E. Wells, Alston & Bird LLP

The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 et seq., or CERCLA, establishes a broad federal program for remediating contaminated sites. Courts have grappled with the proper relationship between two provisions of CERCLA that authorize suits to recover remediation costs—Sections 107 and 113—since Section 113 was added to the statute in 1986. These Sections have been the subject of continued scrutiny and analysis because the stakes are high. The availability of relief under either Section can impact the way in which liability is allocated in multi-million dollar hazardous waste cleanups. The Supreme Court has twice intervened in the last decade to correct lower court rulings regarding the availability of relief under each Section, and its most recent decision, *United States v. Atlantic Research Corp.*, 551 U.S. 128, 127 S. Ct. 2331 (2006), has been widely expected to create the need for a third trip to the Court. In Atlantic Research, the Court expressly left open the question of whether a party who has incurred response costs pursuant to a consent decree can recover those costs under Section 107. To date, both district and appellate courts have largely agreed that Section 107 relief is not available to a party in those circumstances. The 11th Circuit recently became the fourth federal Court of Appeals to so hold, and its decision in *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230 (11th Cir. 2012), reconfirms that this is the only interpretation consistent with CERCLA's language and structure.

CERCLA's Statutory Framework

The twin goals of CERCLA are to ensure the "prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party."[1] To that end, CERCLA authorizes the United States Environmental Protection Agency (EPA) to conduct necessary cleanup work itself[2] and recover the costs from any potentially responsible party (PRP) by bringing a cost recovery action pursuant to Section 107.[3] Alternatively, EPA can require a PRP to finance and perform the cleanup itself.[4] In some instances, a party elects to clean up a hazardous waste site without any formal enforcement action by EPA.

In each case, CERCLA permits the party funding and/or performing the cleanup to seek reimbursement of its remediation costs from PRPs. Section 107 allows a party who has incurred costs in cleaning up a contaminated site to bring a cost recovery action against PRPs.[5] Section 113 provides a right of contribution to a party who has incurred response costs after being sued by EPA to perform a cleanup or after settling its CERCLA liability with EPA.[6]

CERCLA did not always contain this express right of contribution. The initial version of the statute only expressly provided the cost recovery remedy found in Section 107. This left parties who had been sued by EPA or another PRP without an express statutory mechanism for seeking reimbursement of costs above their fair share from other PRPs. To right this perceived wrong, courts began holding

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that CERCLA contained an implied right to contribution.[7] In 1986, Congress codified this judicially-created right of contribution by adding Section 113 to CERCLA in the Superfund Amendments and Reauthorization Act of 1986 (SARA Amendments).[8]

While offering PRPs a statutorily-explicit avenue for seeking reimbursement of response costs, the SARA Amendments limited Section 113's contribution right in several significant respects. First, Section 113 only provides for contribution, meaning that a party can only recover those costs beyond what the party should have paid.[9] Section 107, in contrast, potentially permits a party to seek joint and several liability.[10] A Section 107 plaintiff can therefore potentially shift all of its liability to defendant PRPs. Next, Section 113 actions are subject to a three year statute of limitations, while a party generally has six years to bring a Section 107 claim.[11] Finally, Section 113 actions are subject to CERCLA's settlement bar. As part of the SARA Amendments, Congress granted PRPs that settle their CERCLA liability with the United States protection from contribution suits by other PRPs.[12] Congress intended this bar to encourage PRPs to settle their CERCLA liability with the United States as quickly as possible.[13] This protection does not, however, extend to suits brought pursuant to Section 107.

Courts Begin "Directing Traffic" between Sections 107 and 113

Although the SARA Amendments might have been expected to simplify options for recovering response costs, the CERCLA jurisprudence only grew more complicated after the addition of Section 113. Seeking to "direct traffic" between Section 107 and the new Section 113 remedy, courts mostly held that relief under Section 107 was only available to "innocent" parties, i.e., parties that did not contribute to the contamination at issue.[14] This restriction of Section 107 led to a corresponding expansion of Section 113; courts permitted PRPs to seek contribution under Section 113 even in the absence of a suit under Sections 106 or 107, as the express language of Section 113 would seem to require.[15]

The Supreme Court held in Cooper Industries that Section 113 did, in fact, require the initiation of a suit under Sections 106 or 107 as a prerequisite to filing a contribution action.[16] In that case, the plaintiff, Aviall, discovered contamination at a property it had purchased from Cooper Industries.[17] After notifying the state environmental agency of the contamination and being threatened with enforcement action if the contamination was not remedied, Aviall began to clean up the site.[18] Aviall then filed suit under Section 113 against Cooper Industries as the prior owner, seeking contribution for its response costs.[19] The Supreme Court held that the plain language of Section 113 did not permit Aviall's suit. As a result, Aviall was unable to recover any of its response costs.

The holding in Cooper Industries put PRPs in an untenable position. In the absence of a suit or settlement pursuant to Section 106 or Section 107, a PRP could not engage in a voluntary cleanup and recover its response costs pursuant to Section 113. Under the case law at the time, a PRP was also prevented from bringing suit under Section 107 because it was not "innocent."[20] Thus, a PRP had no incentive to voluntarily remediate a site because it could never recover against other PRPs. As the Third Circuit observed, this state of the law was inconsistent with CERCLA, as "[v]oluntary cleanups are vital to fulfilling CERCLA's purpose."[21]

Atlantic Research Closes One Gap but Opens Another

Atlantic Research presented the Supreme Court with an opportunity to address this gap. In Atlantic Research, the plaintiff brought suit against the United States under Section 107 following its voluntary cleanup of a site operated by the Department of Defense.[22] The United States filed a motion to dismiss the complaint, arguing the plaintiff, as a PRP, could not seek relief under Section 107.[23] The Supreme Court decided that the plaintiff could, in fact, bring suit under Section 107, holding that there was no textual basis for limiting Section 107 relief to "innocent" parties.[24] The Court emphasized that CERCLA must be read as a whole and determined that the cramped textual interpretation advanced by the government simply did not make sense within CERCLA's statutory framework. The Court also emphasized the "complementary yet distinct" nature of the remedies under Sections 107 and 113:

> the remedies available in §§ 107(a) and 113(f) complement each other by providing different causes of action to persons in different procedural circumstances. Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under § 106 or § 107(a). And § 107(a) permits cost recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs.[25]

Although the Court stopped short of holding that a plaintiff could not elect between available remedies under CERCLA, the Atlantic Research decision restored the incentive for PRPs to voluntarily clean up contaminated sites, by allowing such parties to sue other PRPs in the absence of a suit or judicially-approved settlement under Section 106 or Section 107.

While the Atlantic Research decision resolved an important question regarding whether PRPs may bring suit under Section 107, it created a gap for Section 107 claims in other circumstances. In a footnote, the Supreme Court noted that, in some cases, a PRP may incur costs "pursuant to a consent decree following a suit under § 106

or § 107(a)."[26] The Court expressly declined to decide, however, whether such compelled costs can be recovered under Section 107, Section 113, or both, stating only "[f]or our purposes, it suffices to demonstrate that costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f)."[27] The Court declined to define the gap between these two ends of the spectrum, leaving the lower federal courts to determine the extent to which costs incurred pursuant to a consent decree can be recovered under either statutory section.

In the wake of the Atlantic Research decision, most courts faced with a claim for recovery of response costs incurred pursuant to a consent decree held that, if Section 113 relief was available to the plaintiff, a Section 107 remedy was foreclosed. [28] In other words, if the response costs gave rise to a claim for contribution under Section 113, i.e., they were incurred pursuant to an agreement that settled the plaintiff's CERCLA liability, then the plaintiff could not elect to proceed under Section 107 instead. This holding, according to the lower courts, preserved the "complementary yet distinct" remedies of Sections 107 and 113 and gave effect to Congress' addition of an explicit contribution remedy in the SARA Amendments.[29] In *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, for example, the Second Circuit held that an administrative consent order with the New York Department of Environmental Conservation settled the plaintiff's CERCLA liability and created a cause of action under Section 113.[30] The court held that, because a Section 113 remedy was available, the plaintiff could not seek relief under Section 107.[31] As the court stated, "[t]o allow [plaintiff] to proceed under § 107(a) would in effect nullify the SARA amendment and abrogate the requirements Congress placed on contribution claims under § 113."[32]

Although the district courts began to reach this consensus in the years shortly after Atlantic Research, by the beginning of 2012, only three Circuits—the Second, Third, and Eighth[33]—had addressed the issue left open by that decision. The Solutia case would make the 11th Circuit just the 4th appellate court to tackle the question raised in *Atlantic Research.*

Factual and Procedural Background of *Solutia, Inc. v. McWane, Inc.*

The litigation in *Solutia, Inc. v. McWane, Inc.* arose from EPA's investigation of PCB and lead contamination in Anniston, Ala. in the early 2000s. Based on its findings, EPA designated portions of Anniston as two federal Superfund sites: the Anniston PCB Site and the Anniston Lead Site.[34] The Sites overlap geographically and contain PCBs, lead and/or other hazardous substances.[35]

In 2002, EPA filed suit against Solutia, Inc. and Pharmacia Corporation (collectively, Solutia and Pharmacia) in relation to the contamination in Anniston. The parties negotiated a Partial Consent Decree (PCD), requiring Solutia and Pharmacia to perform certain sampling and removal actions to address both PCB and lead contamination.[36]

Approximately one year later, Solutia and Pharmacia filed suit against a group of PRPs—the *Solutia, Inc. v. McWane, Inc.* lawsuit—seeking to recover their response costs for the Anniston Lead Site under Section 107 and seeking contribution for certain costs incurred at the Anniston PCB and Lead Sites under Section 113.[37] Several defendant PRPs subsequently resolved their CERCLA liability with EPA for both the Anniston PCB and Lead Sites, entering into a settlement and administrative order on consent.[38] As a result, the court dismissed Solutia and Pharmacia's Section 113 claim as to the settling defendant-PRPs, holding that these parties were shielded from a Section 113 suit by CERCLA's contribution protection for settling parties.[39]

As for the Section 107 claim, the defendants argued that Solutia and Pharmacia were limited to Section 113 relief for any costs stemming from the work required under their settlement with EPA.[40] Because the PCD gave rise to a Section 113 claim, the defendants argued, Solutia and Pharmacia were limited to that relief and could not pursue a Section 107 remedy. The district court ultimately agreed with the defendants and granted summary judgment, resulting in the dismissal of Solutia and Pharmacia's Section 107 claim.[41] Significantly, the district court held not only that Solutia and Pharmacia were limited to a Section 113 claim by virtue of the PCD, but also that all of the work performed pursuant to that settlement—including work at the Lead Site—was encompassed by the Section 113 claim.[42]

The 11th Circuit Answers Atlantic Research's Call

Solutia and Pharmacia appealed the district court decision to the 11th Circuit, challenging both the holding that a party may not bring a Section 107 claim when relief is available under Section 113, as well as the conclusion that the PCD encompassed Solutia's and Pharmacia's claims for recovery of costs related to cleanup work at the Lead Site.[43]

In regard to the legal question, the 11th Circuit acknowledged that the issue before it was one of first impression for the Circuit, but recognized that other federal appellate precedent meant the court was "not drawing on a completely blank slate."[44] While the 11th Circuit agreed with the ultimate holdings of its sister circuits, the court approached the interplay between Sections 107 and 113 in a slightly different manner. The court first noted that, under an 11th Circuit case that predates *Atlantic Research*, a consent decree gives rise to a right to contribution under Section 113.[45] Consistent with this precedent, the 11th Circuit held that a Section 113 contribution claim was available to Solutia and Pharmacia.[46]

The court then turned to the issue of "whether a party who has a claim under § 113(f) for cleanup costs may also have a claim under § 107(a) for those same costs."[47] Solutia and Pharmacia had argued that nothing in the text of CERCLA precluded bringing an action under both Section 107 and Section 113. While the court acknowledged this textual argument, it followed the Supreme Court's admonishment in Atlantic Research that CERCLA must "be read as a whole."[48] Adopting Solutia and Pharmacia's interpretation, the 11th Circuit concluded, would eviscerate CERCLA's remedial scheme. As the court stated, "[i]f a party subject to a consent decree could simply repackage its § 113(f) claim for contribution as one for recovery under § 107(a), then the structure of CERCLA remedies would be completely undermined."[49] For example, a party would be able to circumvent the statutory contribution protection given to parties that settle their liability with EPA, which, the court explained, "would destroy CERCLA's statutorily-created settlement incentive."[50] This situation would be even more untenable given that such a plaintiff, having thwarted the defendants' contribution protection, could potentially use Section 107 to seek joint and several liability.

To avoid this untenable result, the 11th Circuit held that Section 107 relief is not available to a plaintiff when a Section 113 remedy exists.[51] Quoting the Eighth Circuit's decision in *Morrison Enterprises, LLC v. Dravo Corp.*, the court explained, "we must deny the availability of a § 107(a) remedy under these circumstances in order '[t]o ensure the continued vitality of the precise and limited right to contribution.'"[52]

While following the rulings of its sister circuits, the 11th Circuit's holding extends beyond those decisions. This is made apparent in the court's discussion of Solutia and Pharmacia's claim that the PCD did not expressly encompass their lead cleanup work. Solutia and Pharmacia had argued that because the PCD was for the Anniston PCB Site, any costs related to cleanup of the Anniston Lead Site were recoverable under Section 107. In assessing this claim, the 11th Circuit noted that Solutia and Pharmacia had not resolved their liability for the Lead Site with EPA.[53] Nonetheless, because Solutia and Pharmacia were required to clean up lead under the PCD, the 11th Circuit held that any costs related to the lead cleanup work were recoverable only under Section 113.[54] The court's decision makes clear that parties cannot escape the limitations of Section 113 by claiming that a given settlement agreement does not encompass discrete parts of a cleanup. Moreover, under this ruling, courts will not be required to parse a consent decree and its related documents to determine which aspects of a cleanup were truly "required." Rather, the 11th Circuit's decision demonstrates that response costs related to any work performed pursuant to a consent decree are recoverable only under Section 113.

Conclusion

By expressly leaving part of the interplay of Sections 107 and 113 open in Atlantic Research, the Supreme Court created the distinct possibility that it would be forced to revisit this issue at a later date. However, the federal Courts of Appeals are rapidly reaching a consensus on the proper answer to the question left open by Atlantic Research. With its ruling in Solutia, the 11th Circuit became the fourth federal Court of Appeals to hold that a party may only recover response costs incurred pursuant to a consent decree under Section 113. As it and the other courts have emphasized, this result is the only interpretation consistent with CERCLA's language and statutory structure. This agreement among Circuits should prevent another trip to the Supreme Court and will provide parties with the certainty that is so often absent under CERCLA.

Jonathan Wells is a Partner at the law firm of Alston & Bird LLP, where his practice is devoted to environmental regulatory, toxic tort and environmental litigation, and transactions involving environmental matters. Sarah Babcock is an Associate at Alston & Bird with a practice focusing on environmental, toxic tort, and land use litigation.

(Endnotes)

1 *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483, 116 S. Ct 1251, 1254 (1996).
2 42 U.S.C. § 9604.
3 42 U.S.C. § 9607.
4 *Id.* at § 9606.
5 *Id.* at § 9607(a).
6 *Id.* at § 9613(f)(1) & (f)(3)(B).
7 *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 162, 125 S. Ct. 577, 581 (2004).
8 Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (1986).
9 *See Solutia*, 672 F.3d at 1235.
10 The Supreme Court has interpreted Section 107 to permit joint and several liability when a defendant cannot show that a reasonable basis for apportionment of harm exists. See *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 613-15, 129 S. Ct. 1870, 1880-81 (2009).
11 42 U.S.C. § 9613(g)(2) & (3).
12 *Id.* at §§ 9613(f)(2), 9622(g) & (h).
13 *See E.I. DuPont Nemours & Co. v. United States*, 460 F.3d 515, 537 (3d Cir. 2006); *Transtech Indus. v. A & Z Septic Clean*, 798 F. Supp. 1079, 1085 (D.N.J. 1992).
14 *Atlantic Research*, 551 U.S. at 133, 127 S. Ct. at 2334.
15 *Atlantic Research*, 551 U.S. at 132, 127 S. Ct. at 2334. Section 113(f)(1) states that "[a]ny person may seek contribution . . . during or following any civil action under [Section 106] or [Section 107]."
16 *Cooper Indus.*, 543 U.S. at 165-66, 125 S. Ct. at 583.
17 *Id.* at 163-64, 125 S. Ct. at 582.
18 *Id.* at 164, 125 S. Ct. at 582.
19 *Id.*, 125 S. Ct. at 582.
20 *See Atlantic Research*, 551 U.S. at 133, 127 S. Ct. at 2334.
21 *E.I. DuPont Nemours & Co. v. United States*, 508 F.3d 126, 135 (3d Cir. 2007).
22 *Atlantic Research*, 551 U.S. at 133-34, 127 S. Ct. at 2335.
23 *Id.*, 127 S. Ct. at 2335.
24 *Id.*, 551 U.S. at 135-36, 127 S. Ct. at 2336-37.

25 *Id.* at 139, 127 S. Ct. at 2338 (internal quotation marks and citations omitted).
26 *Id.* at 139 n. 6, 127 S. Ct. at 2338 n.6.
27 *Id.*, 127 S. Ct. at 2338 n.6.
28 *See Solutia, Inc. v. McWane, Inc.*, 726 F. Supp. 2d 1316, 1341-42 (N.D. Ala. 2010) (collecting cases).
29 *See, e.g., Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 127 (2d Cir. 2010); *ITT Indus., Inc. v. BorgWarner, Inc.*, 615 F. Supp. 2d 640, 646 (W.D. Mich. 2009).
30 596 F.3d at 125-26.
31 *Id.* at 127-28.
32 *Id.* at 128.
33 *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112 (2d Cir. 2010); *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 225-26, 229 (3d Cir. 2010); *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 603 (8th Cir. 2011).
34 *Solutia*, 726 F. Supp. 2d at 1321-22.
35 *Id.*
36 *Id.*
37 *Id.* at 1323.
38 *Id.* at 1324.
39 *Id.* at 1326-27.
40 *Id.* at 1327.
41 *Id.*
42 *Id.* at 1347.
43 *Solutia*, 672 F.3d at 1235, 1237.
44 Id. at 1236.
45 *Id.*
46 *Id.* (citing *Atlanta Gas Light Co. v. UGI Utilities, Inc.*, 463 F.3d 1201, 1203–04 (11th Cir. 2006)). Of course, since certain defendant-PRPs resolved their CERCLA liability for both the Anniston PCB and Lead Sites through a subsequent settlement and administrative order on consent with EPA, this Section 113 claim—although "available" —was barred as to those defendant-PRPs. *See id.* at 1234.
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.* at 1236-37.
51 *Solutia*, 672 F.3d at 1237.
52 Id.
53 Id. at 1238 n.11.
54 Id. at 1238.

AGENDA

Presiding: ***Mack McGuffey,*** Program Co-Chair; Chair, Environmental Law Section, State Bar of Georgia; Troutman Sanders LLP, Atlanta
Kasey Sturm, Program Co-Chair, Stack & Associates, P.C., Atlanta

FRIDAY, JULY 20, 2012

7:15 **REGISTRATION AND CONTINENTAL BREAKFAST**
(All attendees must check in upon arrival. A jacket or sweater is recommended.)

8:00 **INTRODUCTION AND PROGRAM OVERVIEW**
Mack McGuffey, Troutman Sanders LLP, Atlanta

8:15 **KEYNOTE ADDRESS—STATE OF THE ENVIRONMENT IN REGION 4**
Hon. Gwendolyn Keyes Fleming, Regional Administrator, EPA Region 4, Atlanta

9:00 **EPA ENFORCEMENT IN TRANSITION: RAPANOS GUIDANCE III AND *UNITED STATES V. SACKETT***
Richard E. Glaze, Jr., Balch & Bingham LLP, Atlanta
Adam G. Sowatzka, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Atlanta

10:00 **BREAK**

10:15 **SEEING THE FOREST FOR THE TREES: CLEAN WATER ACT EXEMPTIONS FOR FORESTRY**
William W. Sapp, Southern Environmental Law Center, Atlanta
Richard W. Morgan, U.S. Army Corps of Engineers, Savannah

10:45 **PERSPECTIVES ON INTERBASIN TRANSFERS**
Gilbert B. Rogers, Southern Environmental Law Center, Atlanta
Katie Kirkpatrick, Metro Atlanta Chamber, Atlanta
Bennett Weinstein, Georgia Environmental Protection Division, Atlanta

11:30 **ETHICS WORKSHOP**
M. Allison Burdette, Assistant Professor in the Practice of Business Law, Emory University, Atlanta

12:30 **RECESS**

6:00 **RECEPTION**

SATURDAY, JULY 21, 2012

7:15 **CONTINENTAL BREAKFAST**

8:00 **INTRODUCTION AND PROGRAM OVERVIEW**
Kasey Sturm, Stack & Associates, P.C., Atlanta

8:15 **PROFESSIONALISM**
John E. Hennelly, Senior Assistant Attorney General, State of Georgia, Atlanta
David H. Pope, Southern Environmental Law Center, Atlanta

9:15 **INDUSTRIAL AND MUNICIPAL STORMWATER PERMITTING**
Bill Phillips, Office of the Attorney General, Atlanta

9:45 **EXPERT LAW IN ENVIRONMENTAL AND TOXIC TORTS LITIGATION: *DAUBERT* AND BEYOND**
Douglas A. Henderson, Troutman Sanders LLP, Atlanta

10:30 **BREAK**

BREAK OUT SESSIONS—TRACK 1

10:45 **LOCAL ENVIRONMENTAL PRIORITIES AND STATE LAW**
Laurie A. Fowler, Odum School of Ecology, University of Georgia, Athens
Todd Edwards, Association of County Commissioners in Georgia, Atlanta

11:30 **GEORGIA INERT LANDFILL REGULATIONS: TRANSITION AWAY FROM PERMIT-BY-RULE STATUS**
Michael Smilley, Golder Associates, Atlanta

12:00 **CHEMICAL REGULATORY POLICY: IS GREEN CHEMISTRY THE FUTURE?**
Angela J. Levin, Troutman Sanders LLP, Atlanta

BREAK OUT SESSION—TRACK 2

10:45 **PERSPECTIVES ON THE EVOLVING CLEAN AIR ACT**
C. Max Zygmont, Mowrey Meezan Coddington Cloud LLP, Atlanta
Brandon A. Mogan, Geosyntec Consultants, Kennesaw

11:30 **FACTORS INFLUENCING BASELINE ENVIRONMENTAL CONDITIONS IN THE GULF OF MEXICO PRIOR TO THE DEEPWATER HORIZON SPILL**
Joseph P. Nicolette, ENVIRON, Atlanta

12:00 **LESSONS LEARNED ABOUT CREATING MEANINGFUL ENVIRONMENTAL DATA**
Jerry L. Aycock, P.E., Kinder Morgan Energy Partners, Atlanta
Benjamin Grove, P.E., P.G., MWH Americas, Inc., Alpharetta

12:30 **ADJOURN**

CANCELLATION POLICY
Cancellations reaching ICLE by 5:00 p.m. the day before the seminar date will receive a registration fee refund less a $15.00 administrative fee. Otherwise, the registrant will be considered a "no show" and will not receive a registration fee refund. Program materials will be shipped after the program to every "no show." Designated substitutes may take the place of registrants unable to attend.

SEMINAR REGISTRATION POLICY
Early registrations must be received 48 hours before the seminar. ICLE will accept on-site registrations as space allows. However, potential attendees should call ICLE the day before the seminar to verify that space is available. All attendees must check in upon arrival and are requested to wear name tags at all times during the seminar. ICLE makes every effort to have enough program materials at the seminar for all attendees. When demand is high, program materials must be shipped to some attendees.

The Georgia EPD Air Protection Branch's NSR Permitting Review

By Susan L. Jenkins & Jennifer H. Welte, Georgia EPD

The Georgia Environmental Protection Division (EPD) Air Protection Branch is constantly looking for ways to improve the performance of its permitting functions without diminishing the quality of its permit reviews or permitting decisions. With this goal in mind, the Stationary Source Permitting Program undertook a study in 2008 to review the performance of its New Source Review (NSR) permitting functions for new major sources and major modifications.

The majority of the major NSR permitting functions carried out by the Stationary Source Permitting Program pertain to those facilities in attainment areas governed by the Prevention of Significant Deterioration (PSD) requirements in Title I Part C of the Clean Air Act Amendments of 1990 (CAA) (42 U.S.C. §§ 7470 et. seq.), as promulgated under 40 C.F.R. § 52.21. Another portion of the major NSR program includes Nonattainment New Source Review permitting governed by CAA Title I Part D (42 U.S.C. §§ 7501 et. seq.), as promulgated under 40 C.F.R. Part 51 Appendix S.[1] In addition, some permitting functions carried out by the Stationary Source Permitting Program pertain to major sources of hazardous air pollutants for which there is no CAA emissions standard as set forth in 40 C.F.R. Part 63. In such cases, the applicant must perform a Case-by-Case MACT determination under CAA § 112(g), as the New Source Review regulations do not apply.[2]

The NSR permitting functions performance review revealed the need for two action items by the EPD Air Protection Branch: (1) the development of a PSD permit application protocol to be followed by all applicants, and (2) the designation of a "one-stop-shop point of contact" within the EPD Air Protection Branch for parties seeking major NSR and/or 112(g) permits.

To develop a PSD permit application protocol, the Stationary Source Permitting Program worked cooperatively with members of the Georgia Industry Environmental Coalition (GIEC) to develop a draft Georgia EPD PSD Permit Application Guidance Document. Georgia EPD made this guidance document available for public review on June 11, 2012, with a comment deadline of July 13, 2012. With this application guidance document, Georgia EPD and the GIEC seek to provide a consistent foundation for what constitutes a "complete" PSD permit application in Georgia.

The Stationary Source Permitting Program also designated an NSR-focused point of contact to serve permit applicants. In September 2010, Ms. Susan Jenkins was tapped by Air Protection Branch chief James Capp to serve as the PSD Coordinator for the Stationary Source Permitting Program. In this position, Ms. Jenkins serves as the "one-stop-shop point of contact" for interested parties for major NSR and 112(g) permitting activities in Georgia. Susan Jenkins has also been asked to advise the Georgia Attorney General's Office on PSD permit appeals during her tenure with the Georgia EPD Air Protection Branch.

The PSD Coordinator's duties include:

- Developing and maintaining major NSR application procedures for applicants;
- Developing and maintaining major NSR and 112(g) application review procedures for Air Protection Branch staff;
- Coordinating permit reviews of all major NSR and 112(g) permitting actions, which may include technology reviews by the Stationary Source Permitting Program and air impact assessment reviews by the Data and Modeling Unit;
- Attending all in-house meetings and conference calls with potential major NSR applicants and/or 112(g) applicants, including air impact modeling focused meetings;
- Ensuring that the Air Protection Branch stays up to date on all proposed and final EPA rule changes for major NSR and 112(g) permitting;
- Ensuring consistency in EPD's record of permit development (i.e., Preliminary and Final Determination and Notice of MACT Approval); and
- Participating in relevant EPD stakeholder meetings, public meetings and public hearings.

The Georgia EPD Air Protection Branch has successfully streamlined several complicated PSD air application reviews since implementing these changes in the fall of 2010. Of particular note, the Branch worked successfully with PyraMax Ceramics, LLC Kings Mill ("PyraMax Ceramics") and CARBO Ceramics Millen ("CARBO Ceramics") in the preparation and issuance of these facilities' PSD air permits in an effective, timely manner (i.e., less than 8 months from receipt of a complete application to issuance of a final permit).

PyraMax Ceramics sought PSD air permits in both Georgia and under the South Carolina Department of Health and Environmental Control (DHEC). Georgia EPD

issued the final PSD air permit for PyraMax approximately 6 months from receipt of a complete application - without the additional South Carolina requirement to pay an expedited permit application fee. The timeliness of the EPD Air Protection Branch's actions for PyraMax was noted by a local news publication as one reason PyraMax Ceramics located their Kings Mill facility in Georgia.[3]

Likewise, Georgia EPD issued a final PSD air permit to CARBO Ceramics in less than 8 months from receipt of a complete application. The Air Protection Branch's outstanding efforts in streamlining the PSD air permitting process was acknowledged in an April 2012 letter from CARBO Ceramics to Branch chief James Capp, EPD Director Judson H. Turner, and Governor Nathan Deal.

The Georgia EPD Air Protection Branch looks forward to working with potential Georgia applicants and helping them move through the NSR regulatory process in a timely manner. Interested parties should contact Susan Jenkins at (404) 675-1497, or susan.jenkins@dnr.state.ga.us, for further information and assistance in permitting a major NSR and/or 112(g) source in the State. More information is also available on the EPD Air Protection Branch's website.[4]

Susan Jenkins has worked in the EPD Air Protection Branch since 1993 as an environmental engineer in the air permitting and compliance programs and the Planning and Regulatory Development Unit. Ms. Jenkins has reviewed over 400 air quality permit applications for numerous Georgia industry sectors, including eleven NSR-PSD air quality permit applications. Prior to joining EPD, Ms. Jenkins worked in the engineering and environmental consulting arenas. She holds a B.S. and M.S. in Mechanical Engineering from the University of Alabama-Huntsville and an M.S. in Environmental Engineering from the University of Tennessee-Knoxville.

Jennifer H. Welte has worked in EPD's Watershed Protection Branch for nine years, currently serving as manager of the wetlands program. She is a member of the State Bar of Georgia, Environmental Law Section, and previously practiced environmental law at King & Spalding. Ms. Welte holds a B.S. in Civil Engineering with high honors from Georgia Tech, and a J.D. from Georgia State University's College of Law.

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Endnotes)

1 Georgia EPD's regulations concerning PSD and Nonattainment NSR permitting were approved by the U.S. Environmental Protection Agency (EPA) as part of Georgia's State Implementation Plan (SIP). The PSD and Nonattainment NSR regulations are found under Georgia's Rules for Air Quality Control, Ga. R. & Regs. 391-3-1-.02(7) & 391-3-1-.03(8)(c), respectively.

2 Georgia EPD regulations concerning Case-by-Case MACT determinations under 112(g) of the CAA are found under Georgia's Rules for Air Quality Control, Ga. R. & Regs. 391-3-1-.02(9)(b)16.

3 Parish Howard, *Wrens plant one step closer*, The News and Farmer, December 22, 2011, available at http://www.thenewsandfarmer.com/

4 For PSD permitting resources, visit http://www.georgiaair.org/airpermit/html/sspp/ psdresources.htm & http://www.georgiaair.org/airpermit/html/permits/psd/main.html. For information on Georgia's nonattainment areas, visit http://www.georgiaair.org/airpermit/ html/planningsupport/naa.htm. For EPD's NSR modeling resources, visit http://www.georgiaair.org/airpermit/html/sspp/modeling.htm.

A Detailed Look at the Effects of *Sackett v. EPA* on Administrative Enforcement Orders

By Richard E. Glaze, Jr., Balch & Bingham, LLP, Atlanta, Ga.

On March 21, 2012, the United States Supreme Court issued its opinion in *Sackett v. EPA*[1] and settled the question of whether "pre-enforcement" judicial review is available for an administrative compliance order (ACO) issued under section 309(g)(3) of the Clean Water Act (CWA).[2] In doing so, the Supreme Court reversed the decision of the U.S. Court of Appeals of the Ninth Circuit, overruled contrary opinions in other circuits and changed widespread presumptions regarding recourse available to recipients of ACO's issued under environmental statutes.[3] Despite much speculation by commenters, questions remain as to what the decision means for enforcement under the affected programs. This article examines enforcement mechanisms that may be affected by the Sackett holding and the possible consequences to enforcers and the regulated community under the CWA and other environmental statutes administered by EPA.

Legal Background

The CWA prohibits the discharge of "any pollutant," including "dredged or fill material," without a permit into "navigable waters."[4] The Act defines "navigable waters" as "waters of the United States,"[5] which are in turn defined in CWA regulations to include wetlands adjacent to navigable waters or their tributaries.[6] When EPA determines that an unauthorized discharge has occurred, it has various enforcement options, including: (1) assessing an administrative penalty;[7] (2) initiating a civil enforcement action in district court;[8] and (3) issuing an ACO directing the violator to remove the discharged material and take other actions to come into compliance.[9] Recipients of penalty orders are granted the right to judicial review by section 309(g)(8) of the CWA.[10] The Act is silent regarding whether ACO's issued under section 309(a)(3) are reviewable.

Factual and Procedural Background

Sackett involved an order issued by EPA under CWA section 309(a)(3) which accused Mr. and Mrs. Sackett of filling wetlands without a permit. In 2007, Mr. and Mrs. Sackett filled part of a lot they had purchased to build a house. The property was a 2/3 acre residentially zoned lot with a sewer connection. EPA determined that the fill was placed in wetlands and that the fill violated the statute because the Sacketts did not have a permit to fill wetlands as required by the CWA. The ACO directed the Sacketts to remove the fill and restore the site to its original condition. The order explained EPA's enforcement options, which included the possibility of penalties of up to $75,000 per day.[11] In response, the Sacketts petitioned EPA for a hearing to challenge the agency's wetland determination believing that under the relatively recent holding in *Rapanos v. United States*, the filled area was not a jurisdictional "water of the United States." EPA refused to grant a formal hearing, but did agree to meet with the Sacketts informally. Not satisfied with this limited option, the Sacketts filed suit in U.S. District Court to challenge the order. They based their challenge on section 706 of the Administrative Procedure Act[12] and argued that their rights to due process had been violated. The district court granted EPA's motion to dismiss, holding that the court lacked jurisdiction to hear the case because pre-enforcement review of EPA's compliance order was not permitted under the CWA.[13] On appeal, the Ninth Circuit Court of Appeals upheld the lower court's decision.[14] According to the Ninth Circuit, the Sacketts could not bring an administrative challenge to the order because the CWA implies that pre-enforcement review is not available.[15] Moreover, the Ninth Circuit found that the Sacketts were not denied due process because they would still have the opportunity to have their day in court either through the wetlands permitting process or when EPA sued to recover penalties.[16] The Supreme Court reversed the Ninth Circuit, concluding that a CWA administrative compliance order is "final" for purposes of allowing APA judicial review and that the CWA does not implicitly bar judicial review.[17] The Court did not reach the question of whether a bar on pre-enforcement review violates due process.

The Order

It is important at the outset to understand the nature of the CWA compliance order at issue in Sackett and similar orders at EPA's disposal under other statutes. The Sackett order was authorized by section 309(a)(3) of the CWA.[18] These orders are used by the agency to order compliance with the same provisions for which civil judicial actions and criminal actions may be brought.[19] A section 309(a)(3) order may not impose penalties for the underlying alleged violations, but section 309(d) of the CWA provides that failure to comply with a section 309(a)(3) order subjects the recipient to penalties of up to $25,000 per day, (adjusted to $37,500 per day by the Civil Monetary Penalty Inflation Adjustment Rule).[20] A variety of orders that can be used to compel compliance are available to EPA under other environmental statutes. Several are more or less similar in language and effect to the Sackett order, and their use is therefore potentially affected by the Sackett decision.

Holding and Rationale

The Supreme Court was not persuaded by the rationale of the Ninth Circuit and other courts that had upheld EPA's position regarding the absence of any right to pre-enforcement review. The following criticism of the lower court's decision, from the introduction to the petition for certiorari in the case, was apparently more compelling:

> The Ninth Circuit's decision holding that judicial review is unavailable foists an intolerable choice on landowners. According to the decision, landowners who have received a compliance order, and who believe that the compliance order is invalid, can get their day in court only by (1) spending hundreds of thousands of dollars and years applying for a permit that they contend they do not even need, or (2) inviting the agency to bring an enforcement action for potentially hundreds of thousands of dollars in civil penalties for violations of the order, and criminal penalties for underlying violations of the Act.[21]

The Supreme Court acknowledged the challenges faced by the Sacketts after receiving the ACO from EPA and focused its attention on whether the respondents could use Administrative Procedure Act (APA) to immediately challenge the order, avoiding the due process issues the Sacketts had raised.[22] The APA provides that judicial review is available for "final agency action for which there is no other adequate remedy in a court."[23] To reach the conclusion that judicial review was available to the Sacketts under the APA, the Court first examined whether the ACO was "final agency action." Though many other courts in similar situations had made contrary decisions, the Court concluded that the compliance order "has all of the hallmarks of APA finality that our opinions establish."[24] First, the order "determined rights or obligations" by requiring the Sacketts to restore the wetlands in accordance with an agency - approved plan.[25] Second, "'legal consequences' . . . flow from the order . . . which, according to the Government's litigating position, exposes the Sacketts to double penalties in future enforcement proceedings and 'severely limits' their ability to obtain a CWA section 404 permit from the Army Corps of Engineers."[26] According to the Court, the order also "marked the 'consummation' of the agency's decision-making process … for the order's findings in the compliance order were not subject to further agency review."[27] The Court found that the Sacketts lacked an adequate remedy to challenge the final agency action because the Sacketts would have had to wait until the EPA brought suit to challenge the penalties that were accruing for non-compliance and statutory violations.[28]

Noting that judicial review is unavailable under the APA if the agency acts according to a statute that "preclude[s] judicial review," the Court then considered whether CWA section 309(a) did so and found that the statute does not expressly preclude judicial review.[29] Furthermore, the fact that the penalty order provisions in CWA section 309(g) do provide for review does not, in the Court's view, create a strong enough negative implication to imply that review is precluded under CWA section 309(a).[30] The Court also rejected the argument of the government that the CWA bars pre-enforcement review because Congress passed the CWA "in large part to respond to the inefficiency of then-existing remedies for water pollution," and compliance orders "can obtain quick remediation through voluntary compliance."[31] The Court further reasoned that although pre-enforcement review might make EPA less willing to use compliance orders, as the Government argued, the same could be said for all agency actions subjected to judicial review. Noting that the "APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all," the Court concluded that there is "no reason to think that the [CWA] was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review."[32] The Court further recognized that even if subject to review, "[c]ompliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity."[33]

Two Justices filed separate concurrences which served to point out that despite having the right to contest the validity of EPA's jurisdiction, practical problems would remain for the Sacketts and other respondents of EPA's compliance orders. Justice Ginsberg pointed out that although the Court's decision allowed the Sacketts to "immediately litigate" the question of "EPA's authority to regulate their land under the [CWA]," it did not resolve the question of whether the Sacketts could challenge the "terms and conditions" of the compliance order.[34]

Justice Alito also wrote separately to challenge Congress to clarify the reach of the CWA. He acknowledged that the majority opinion "provides a modest measure of relief" by allowing the Sacketts to challenge EPA's wetlands jurisdictional determination, but noted that:

> The combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune…. Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act.[35]

Effect of Sackett on other EPA Orders

Environmental statutes contain dozens of provisions that authorize unilateral agency orders. The various EPA order

provisions were established for different environmental media at different times in history for a variety of enforcement and remedial purposes. Each is therefore unique. Consequently, the analysis of whether Sackett applies to the various orders requires that each order, or at least each type or category of order, be evaluated.

Order authority in environmental statutes includes the right to issue orders for penalties and for compliance. Virtually all penalty orders EPA can issue provide for the right to a hearing before penalties are assessed. This category of orders will therefore be largely unaffected by Sackett. The analysis below is confined to compliance orders.

CERCLA Orders

The Comprehensive Environmental Response Compensation and Liability Act (CERCLA)36 provides order authority under sections 104 and 106 to require action to clean up and allow access to facilities where there has been a release or threatened release of hazardous substances.[37] CERCLA expressly limits pre-enforcement review of EPA response actions and orders, providing that no Federal court will have jurisdiction to review challenges to removal or remedial actions "selected" under sections 104 or 106(a) of CERCLA except in limited specific circumstances. In addition to the express limits on judicial review, section 106(b) of CERCLA provides post-enforcement recourse to the recipient of an emergency order that believes it was not liable under CERCLA, so long as the recipient has complied with the order.[38] The combination of CERCLA's express preclusion of judicial review and the post-order remedies of section 106(b) would appear to satisfy the express preclusion and adequate remedy conditions enunciated by the Sackett court and allow CERCLA order authority to remain unaffected by the opinion.

Orders Requiring Urgent Action

Another category of orders that may not be affected by the Sackett preference for judicial review are orders that EPA may issue for urgent or emergency action. Several statutes give EPA authority to issue orders after determining that an "imminent and substantial endangerment" (ISE) exists that threatens public health or welfare or the environment. For example, authority to issue ISE orders is provided under the CWA,[39] the Clean Air Act (CAA)[40], CERCLA,[41] the Resource Conservation and Recovery Act (RCRA),[42] and the Safe Drinking Water Act (SDWA).[43] Other statutes use different language but nevertheless grant EPA authority to issue orders to compel urgent action. The Federal Insecticide Fungicide and Rodenticide Act (FIFRA), for example, grants the agency the power to order persons in control of such pesticides to stop the sale or use of a pesticide or to remove the pesticide.[44] The Endangered Species Act grants seizure and arrest authority based on unilateral determinations of potential violations of the statute.[45]

It is likely that the Sackett holding will be less compelling to courts that are asked to determine whether parties are entitled to pre-enforcement review when they have received such "urgent orders" on the grounds that their urgency reverses the presumption in favor of review. In many cases, this element of urgency will be the only feature of the order that distinguishes it from now-reviewable CWA section 309(a)(3) orders. The question for such urgent order authority is whether the element of urgency will suffice to preclude application of the Sackett holding or rationale.

In Sackett, the Supreme Court acknowledged that the implication of non-reviewability can arise from "inferences of intent drawn from the statutory scheme as a whole." The Court did not address whether the need for urgent action should affect the right to obtain judicial review, other than to note that "[t]he APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all."[46] This was in reply to the Government's argument that granting judicial review will chill the agency's willingness to issue orders to obtain quick remediation. Of course, the order at issue in Sackett was not an ISE order and no particular urgency was otherwise indicated. For an order issued for which truly exigent circumstances exist, Sackett is distinguishable.

Environmental lawyers know that not every ISE order is truly for emergency action because the phrase "imminent and substantial endangerment" has been watered down by the courts. For example, an "endangerment" is not necessarily an actual harm, but may be a threatened or potential harm.[47] The mere risk of harm may be an endangerment, and the risk need not be quantified.[48] Courts have also held that an endangerment may be "imminent" if factors giving rise to it are present, even though the harm may not be realized for years.[49] Courts have interpreted "public health or welfare or the environment" broadly to include health, safety, recreational, aesthetic, environmental and economic interests.[50] Clearly, an imminent and substantial endangerment is not always a ticking time bomb or a runaway locomotive. Courts, therefore, may not always find an ISE order to have sufficient urgency to outweigh the APA presumption in favor of reviewability. Indeed, courts have granted pre-enforcement review for ISE orders after finding the orders were not truly urgent. In *Sinclair Oil Co. v. Scherer*, for example, a federal district court reviewed a RCRA section 7003 order despite EPA's arguments that, because it was an ISE order, review should be precluded.[51] According to the Court:

> It is reasonable to infer that any emergency that did exist has been largely abated, or EPA would have employed the powerful legal remedies at its disposal to ensure abatement. Under these circumstances, the emergency response objective of § 7003(a) has been all but satisfied. Allowing a review of the § 7003(a)

> order would not undermine EPA's ability to swiftly respond to future emergency conditions, or establish a precedent allowing the recipient of such an order to evade or delay compliance by seeking pre-enforcement review.[52]

If the ISE authority is not sufficient in itself to preclude judicial review, the other characteristics of the order must be examined to determine if the order is distinguishable from the CWA section 309(a)(3) order reviewed by the Sackett court. In other words, is there some other reason why the order should not be considered a final agency action for which there is no means of redress other than pre-enforcement review? A RCRA 7003(a) order arguably has no other distinguishing features. Section 7003(a) allows the agency to issue an order to require the removal and disposal of hazardous wastes upon the finding of ISE.[53] Other than the ISE requirement, the operative language is not substantially different from that of CWA section 309(a)(3). Both provisions give the administrator the right to order compliance or to bring a civil action to do so and, under each statute, penalties lie for failure to comply.[54] Apart from the ISE issue, RCRA section 7003(a) appears to satisfy the APA requirements identified in Sackett by constituting a "final agency action for which there is no other adequate remedy in a court."[55] Thus if a court finds a 7003(a) order was not issued for a truly time sensitive matter, it may determine that the order should be reviewed.

The CAA's ISE order authority, found in section 303 of the Act,[56] differs in important respects from the RCRA ISE order. The CAA provision makes clear that the order is intended to require immediate action:

> [T]he Administrator, upon receipt of evidence that a pollution source … is presenting an imminent and substantial endangerment to public health or welfare, or the environment, may bring suit on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary. If it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect public health or welfare or the environment. … Any order issued by the Administrator under this section shall be effective upon issuance and shall remain in effect for a period of not more than 60 days.[57]

The aura of urgency in CAA section 303 warrants the conclusion that the statute implies, to a degree not found in RCRA, that pre-enforcement judicial review would cause delays not intended by the statute and should not be available.

The ISE authority granted under the SDWA likewise implies pre-enforcement review should not be granted. SDWA section 1431(a) authorizes orders to prevent contaminants that are likely to reach a public water system or other source of drinking water or to thwart a terrorist attack.[58] A court should have no trouble denying pre-enforcement review for properly issued SDWA orders on the basis that review would inordinately delay implementation of the acts required by the order.

Non-Emergency Compliance Orders

Sections 113 of the CAA[59] and 3008(a) of RCRA,[60] like section 309(a)(3) of the CWA, allow unilateral orders to be issued for a variety of perceived violations of the respective statutes and do not require a finding of ISE. As explained below, CAA non-ISE compliance orders, but not those issued under RCRA, are likely to be found reviewable under a Sackett analysis.

Clean Air Act Section 113 Orders

The provisions of CAA section 113(a)(3) that authorize issuance of ACO's are the same in most important respects as the provisions of CWA section 309(a)(3).[61] Unlike the CWA, however, the CAA contains provisions that specifically address when judicial review is available for administrative action taken under the statute. Section 307(b) of the CAA specifically provides that certain types of administrative actions are entitled to judicial review in the Court of Appeals.[62] This provision does not specifically identify section 113(a) orders but does provide that review is afforded for "any final action taken by the Administrator under the Act which is locally or regionally applicable …."[63] Because Sackett held the CWA section 309(a)(3) order to be final agency action, and because the CAA section 113(a)(3) order is very similar in appearance and in effect to CWA section 309(a)(3),[64] it is likely that CAA section 113(a)(3) orders will normally be considered reviewable henceforth.[65]

It should be noted that the legislative history of the CAA indicates that Congress removed a provision allowing for judicial review of CAA compliance orders from a draft version of the Act. The Ninth Circuit Court of Appeals saw this as evidence of an intent by Congress not to provide for judicial review of similar compliance orders.[66] However, this mere negative implication drawn from legislative history does not favor an interpretation that CAA compliance orders are not reviewable now that the Supreme Court has concluded that the almost identical CWA 309(a)(3) orders are final agency action entitled to review. Moreover, it seems just as likely that Congress removed the specific review provision before passage of the CAA amendments not for the purpose of denying judicial review but instead because it believed the issue was adequately addressed by CAA section 307(b), which specifically addresses review of CAA final actions.[67]

Unique Impact on CAA Orders in 11th Circuit

In 2003, the U.S. Court of Appeals for the 11th Circuit held unconstitutional EPA's use of ACO's issued under Section 113 of the CAA.[68] As a consequence, EPA lost the use of a potent enforcement tool in the 11th Circuit states of Georgia, Alabama, and Florida. As explained below, for enforcement in these three states, Sackett benefits EPA because it will enable the agency to once again issue effective compliance orders under CAA section 113(a)(3).

As with the CWA administrative order that was the subject of Sackett, an order issued under CAA section 113 (a)(3) can force the recipient of the order to choose between complying with the order and not complying while risking penalties of up to $37,500 per day in a later EPA enforcement action. Orders under both statutes may be issued based solely on "any information available to" EPA. This unfettered power on the part of EPA troubled the 11th Circuit Court of Appeals in 2003 as it did the Supreme Court in the 2012 Sackett decision. The adage that "great minds think alike" proved false, however, and the Supreme Court premised its ruling on a conclusion that was opposite from the conclusion on which the 11th Circuit premised its holding. The Court of Appeals had held that the ACO "enforcement scheme" of CAA section 113(a)(3) violated both the Due Process Clause of the Fifth Amendment and separation of powers principles and could not be allowed to stand.[69] To reach this result, the Court of Appeals found that section 113(a)(3) orders could never be final agency action. The Court held:

> We lack jurisdiction to review the ACO because it does not constitute "final" agency action. Although the CAA empowers the EPA Administrator to issue ACOs that have the status of law, we believe that the statutory scheme is unconstitutional to the extent that severe civil and criminal penalties can be imposed for noncompliance with the terms of an ACO. Accordingly, ACOs are legally inconsequential and do not constitute final agency action. We therefore decline to assert jurisdiction over TVA's petition for review pursuant to 42 U.S.C. § 7607(b)(1).[70]

By premising its holding in Sackett on finding that the CWA ACO at issue was a final agency action,[71] thus rendering it reviewable under the APA as a "final agency action for which there is no other adequate remedy in a court," [72] the Supreme Court undercut the foundation of the 11th Circuit holding and effectively invalidated it. Thus, although Sackett probably means CAA Section 113 ACO's are subject to APA review in district court, it also restores EPA's CAA section 113 ACO authority in three states in Region 4. According to EPA, Sackett is likely to have a minimal effect on administrative enforcement.[73] Arguably, the decision is a boon to EPA Region 4 for CAA enforcement. EPA is likely to conclude that it is better to be able to issue a reviewable CAA ACO in the states of the 11th Circuit than to not be able to issue one at all.

RCRA Section 3008 Administrative Orders

Section 3008(a) of RCRA provides EPA with non-emergency authority to issue orders for compliance and for civil penalties for violating the statute.[74] In section 3008(h), RCRA also gives the agency authority to require remediation of interim status facilities to clean up releases of hazardous substances.[75] This authority is in addition to EPA's "emergency" order powers discussed above.[76] The authority granted under sections 3008(a) and (h) of RCRA differs fundamentally from that granted for section 309(a) orders under the CWA because RCRA section 3008(b) expressly gives respondents of orders the right to a public hearing.[77] Authority under the RCRA ACO also differs from that under CAA 113(a)(3) because the right to a hearing is specifically granted for RCRA compliance orders and is only implied for compliance orders under the CAA because of Sackett.[78] Section 3008(b) of RCRA provides:

> Any order issued under this section shall become final unless, no later than thirty days after the order is served, the person or persons named therein request a public hearing. Upon such request the Administrator shall promptly conduct a public hearing. In connection with any proceeding under this section the Administrator may issue subpenas (sic) for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and may promulgate rules for discovery procedures.[79]

The 40 C.F.R. Part 22 regulations that govern most EPA administrative penalty cases also govern the hearings conducted pursuant to RCRA section 3008(b).[80] The procedure afforded by these regulations has been held to conform to the APA provisions for formal adjudication.[81] Appeals of RCRA section 3008(h) orders are governed by the less formal procedures of 40 C.F.R. Part 24.[82] Hearings under Parts 22 and 24 are concluded by the issuance of final orders by the presiding official (either an Administrative Law Judge or agency Regional Judicial Officer), which are specifically classified by the rules as "final agency action."[83] At the time they are issued, RCRA 3008(a) and 3008(h) compliance orders are not appealable to a district court under the APA because they fail both parts of the two part test of APA section 704: They are neither final agency action nor are they actions for which there are no other adequate remedies in court.[84] They should therefore be unaffected by Sackett.

So What?

The holding in Sackett shifted a prevailing presumption

that compliance orders under CWA section 309 and similar orders under other environmental statutes are not reviewable. They will now be reviewable should EPA choose to continue using them. What does this mean for EPA and for those to whom EPA wishes to issue compliance directives? EPA claims Sackett will not have a major impact on agency enforcement and that EPA will continue administering the enforcement program in substantially the same manner.[85] This is a plausible claim; EPA should be able to easily adjust its practices to avoid significant headaches caused by the decision. If, for example, an EPA Region discovers an ongoing CWA violation, such as the fill of apparent wetlands without a proper CWA section 404 permit, the agency will still be compelled by the statute to take action if it "finds" based on "any information" that a violation has occurred.[86] The Agency's choices for taking action will be the same. It will still have the choice of referring the case to the Department of Justice for a civil action or issuing an ACO. Upon receipt of an ACO, the respondent will still be required to comply or risk enforcement and confiscatory penalties, unless it decides to exercise its new right to appeal and convinces a federal court to set aside the order.[87] It is likely to be relatively rare, however, for a respondent to seek judicial review, particularly if EPA, now "incentivized" by the Sackett decision, has done a thorough job investigating the alleged violation and building an adequate record to support its finding of a violation.

What if EPA does not believe its case against a respondent can withstand an APA challenge, but believes it must take action to prevent additional harm from perceived or suspected violations? Here, the agency should choose to forbear issuing a unilateral order until it develops a record of evidence that will support its case. In the meantime, however, it may notify the regulated entity it believes to be out of compliance by letter, in person, or otherwise that it believes the party is violating the statute, and that daily penalties may be accruing at a rate of $37,500 per day per violation. The agency will not have been substantially prejudiced by not immediately issuing an order, and the regulated party will have a chance and an incentive to rectify any non-compliance. The options of suing to compel injunctive action, issuing a penalty order, and issuing an ACO will still remain for when the agency becomes comfortable with the evidence in the record.

As suggested above, the Sackett holding may or may not be applied to agency orders issued under ISE authority, depending upon whether true urgency is indicated when the order is issued.[88] As with non-ISE orders, the possibility that review will be granted for ISE orders is not likely to be a substantial burden for EPA so long as the agency conforms its conduct with the new legal reality and builds reliable records to support its order-issuing decisions.

Conclusions

The primary impact of the Sackett decision is, arguably, that it will give EPA the incentive to ensure evidence in the record that supports an ACO is sufficient to withstand judicial review, thereby reducing the potential for issuing orders not supported by the facts. Not only will this provide a modicum of protection to the regulated community against overreaching, it may even enhance the credibility of the agency in the long term. Of course, Sackett also means that when respondents feel unjustly accused under certain types of enforcement orders, they now have a greater range of options for defending themselves. The scope of these options has yet to be fully determined, but is sure to be broader than before Sackett was decided.

(Endnotes)

1 32 S. Ct. 1367 (2012).

2 33 U.S.C. § 1319(a)(3). Pre-enforcement review refers here to judicial review of administrative orders prior to the agency's attempt to enforce the order or take action under the order. See *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882 (3d Cir. 1985) and *Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289 (6th Cir. 1991)(quoting *Reardon v. United States*, 922 F.2d 28, 30, n. 4 (1st Cir.1990)).

3 As the Ninth Circuit recognized in the case below: Every circuit that has confronted this issue has held that the CWA impliedly precludes judicial review of compliance orders until the EPA brings an enforcement action in federal district court. See, e.g., *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995); *S. Ohio Coal Co. v. Office of SurfaceMining, Reclamation & Enforcement*, 20 F.3d 1418 (6th Appendix A- 7th Cir. 1994); S. Pines Assocs. by *Goldmeier v. United States*, 912 F.2d 713 (4th Cir. 1990); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990). Many district courts have also so held. See, e.g., *Sharp Land Co. v. United States*, 956 F Supp. 691, 693-94 (M.D. La. 1996); *Child v. United States*, 851 F Supp. 1527, 1533 (D. Utah 1994); Bd. of Managers, *Bottineau Cnty. Water Res. Dist. v. Bornhoft*, 812 F. Supp. 1012, 1014-1015 (D.N.D. 1993); *McGown v. United States*, 747 F. Supp. 39, 542 (E.D. Mo. 1990); *Fiscella & Fiscella v. United States*, 717 F. Supp. 1143, 1146-47 (E.D. Va. 1989). *Sackett v. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010).

4 *See* 33 U.S.C. §§ 1311(a); 1342(a)(1); 1344(a)(1) and 1362(7).

5 33 U.S.C. § 1362(7).

6 40 C.F.R. § 232.2 and 33 C.F.R. § 328(a)(7).

7 33 U.S.C. § 1319(g)(1)(A).

8 33 U.S.C. § 1319(a)(3).

9 Id.

10 33 U.S.C. § 1319(g)(8). Note that the statute provides review is available for Class I administrative penalties in federal district court and for Class II penalties directly to the court of appeals. However, before appealing to federal court, the administrative appeal remedies available under 40 C.F.R. Part 22 must be exhausted. See 40 C.F.R. §§ 22.1(6) (procedure for Class II penalties) and 22.50(a)(1)(different procedure for Class I penalties).

11 The maximum penalty that may be imposed under the CWA is $37,500 per day for each violation. 33 U.S.C. 1319(g); 69 Fed. Reg. 7121 (Feb. 13, 2004). Presumably, EPA intended $75,000 to represent a combination of daily penalties for violating the substantive provisions of the CWA and for violating the order as provided in 33 U.S.C. § 1319(d).

12 5 U.S.C. § 706(2)(A).

13 *Sackett v. EPA*, 2008 WL 3286801 (D. Idaho Aug. 7, 2008).

14 *Sackett v. EPA*, 622 F.3d at 1139.

15 *Id.* at 1144.
16 *Id.*. at 1146.
17 *Sackett v. EPA*, 132 S. Ct. at 1374.
18 33 U.S.C. § 1319(a)(3).
19 *See* 42 U.S.C. § 1319 (a)(3),(b) and (c).
20 69 Fed. Reg. at 7121.
21 *Sackett v. EPA*, 622 F.3d at 1139, petition for cert. filed Feb. 23, 2011, (U.S. Sept. 14, 2010) (No. 10 - 062).
22 *Sackett v. EPA*, 132 S. Ct. at 1370.
23 5 U.S.C. § 704.
24 132 S. Ct. at 1371.
25 *Id.*
26 *Id.*
27 *Id.*
28 *Id.* at 1369.
29 *Id.* at 1372.
30 *Id.* 1373. But see *United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982). ("Similarly, when two different provisions of the same statute are precisely drawn, the express inclusion of judicial review in one provision will provide 'persuasive evidence that Congress deliberately intended to foreclose further review' of the other provision").
31 *Sackett v. EPA*, 132 S. Ct. at 1374.
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.*
36 42 U.S.C. § 9601 et seq.
37 42 U.S.C. §§ 9604(e) and 9606(a).
38 42 U.S.C. § 9606(b) (2) (providing for the recovery of response costs plus interest).
39 33 U.S.C. § 1321(e)(1)(B).
40 42 U.S.C. § 7603.
41 42 U.S.C. 9606(a).
42 42 U.S.C. §§ 6973(a).
43 42 U.S.C. § 300(i).
44 7 U.S.C. § 136k(a). Note that FIFRA does not state a finding of potential harm is prerequisite for an order. Rather, a finding that the FIFRA has been violated is required.
45 16 U.S.C. § 1540.
46 *Sackett v. EPA*, 132 S. Ct. at 1374.
47 *B.F. Goodrich Co. v. Murtha*, 697 F. Supp. 89, 96 (D. Conn. 1988).
48 *Id.*
49 *United States v. Conservation Chemical*, 619 F. Supp. 162, 193 (W.D. Mo. 1985).
50 *Id.* at 192.
51 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,009 (D. Wyo. June 30, 1989), vacated, No. C88-0190-8 (July 23, 1991). See also *W.R. Grace & Co. v. EPA*, 959 F.2d 360 (1st Cir. 1992); *E.I. DuPont de Nemours & Co. v. Daggett*, 610 F. Supp. 260 (W.D.N.Y. 1985).
52 *Sinclair Oil Co. v. Scherer*, 20 Envtl. L. Rep at *[14].
53 42 U.S.C. § 6973(a).
54 $37,500 per day under the CWA, 33 U.SC § 1319(d), and $7500 per day under RCRA, 42 U.S.C. § 7003(a), both adjusted pursuant to the Civil Monetary Penalty Inflation Adjustment Rule. 69 Fed. Reg. 7121.
55 5 U.S.C. § 704.
56 42 U.S.C. § 7603.
57 *Id.*
58 42 U.S.C. § 300i(a).
59 42 U.S.C. § 7413.
60 42 U.S.C. § 6928(a).
61 As the Ninth Circuit noted in the Sackett appeal, the CAA enforcement scheme served as a model for the CWA provisions. *Sackett v. EPA*, 622 F.3d at 1144. See also *TVA v. Whitman*, 336 F.3d 1236 (11th Cir. 2003) (explaining that the operative provisions in both enforcement regimes are substantively identical).
62 42 U.S.C. § 7607(b).
63 *Id.*
64 *Sackett v. EPA*, 622 F.3d at1139, 1144. ("The enforcement provisions of the CWA were modeled on enforcement provisions in the Clean Air Act (CAA), and many courts have relied on similar provisions in the CAA in concluding that the CWA precludes pre-enforcement judicial review of compliance orders").
65 CAA section 113 (a)(4) provides marginally greater due process rights than CWA section 309(a)(3) by providing that orders will not take effect for most alleged violations until EPA has granted recipients a "right to confer with" the agency. 42 U.S.C. § 7413(a)(4). Section 309 of the CWA, in contrast, grants a similar right only for orders related to a single provision of the Act. 42 U.S.C. § 6928(a). It should be noted that EPA routinely offers respondents the right to consult with agency after it issues 309(a) orders. Region 4, for example, typically offers to hold a "show cause" meeting to hear the respondent's arguments. The Supreme Court in Sackett acknowledged EPA granted this opportunity to the Sacketts but found that "[t]he mere possibility that an agency might reconsider in light of "informal discussion"… does not suffice to make an otherwise final agency action nonfinal." 132 S.Ct. at 1372. Thus, this additional "right" provided by the CAA should not affect this analysis.
66 *Sackett v. EPA*, 622 F.3d at 1144. ("During the enactment of the CAA, the Conference Committee which reconciled the House and Senate versions of the CAA deleted a provision in the Senate's version of the bill that would have expressly provided for pre-enforcement review of CAA administrative compliance orders. ... At least one court has inferred from this deletion that it was intended to preclude pre-enforcement judicial review of compliance orders").
67 42 U.S.C. § 7607(b).
68 See *TVA v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), cert denied, *Leavitt v. Tenn. Valley Auth.*, 124 S. Ct. 2096 (2004).
69 *Id.*at 1258-1260.
70 *Id.* at 1239 (emphasis added).
71 *Sackett v. USA*, 132 S. Ct. at 1371.
72 5 U.S.C. § 704;.
73 *See* EPA Official Sees No Major Shift in Agency's Use of Compliance Orders, Bloomberg BNA Daily Environment Report, May 4, 2012, http://www.bna.com/epa-official-sees-n12884909211/.
74 42 U.S.C. § 6928(a).
75 42 U.S.C. §§ 6928(h).
76 See notes 44-91 and accompanying text.
77 42 U.S.C. § 6928(b).
78 See notes 78-80 and accompanying text.
79 *Id.*
80 The applicability of Part 22 to these orders is not immediately apparent because the rules are named the "Consolidated Rules of Practice Governing the Administrative Assessment of Penalties and the Revocation/Termination or Suspension of Permits." (emphasis added). Also misleading is the fact that Part 22 provides that an administrative hearing under the provisions is initiated with a "complaint" by the agency, not an order. See 40 C.F.R. 22.13. However, the regulation that describes the scope of the procedures makes clear that the regulations "govern all adjudicatory proceedings" for "[t] he issuance of a compliance order or … corrective action order under section 3008(a) of RCRA." See also *Chemical Waste Management, Inc. v. U.S. Environmental Protection Agency*, 873 F.2d 1477, 1479 (1989) ("The Environmental

Protection Agency (EPA) promulgated procedural regulations to implement the "public hearing" provision of subsection (a) of the Resource Conservation and Recovery Act (RCRA), § 3008, which authorizes the EPA to enter orders assessing civil penalties, including suspension or revocation of permits, for violation of RCRA regulations. 42 U.S.C. § 6928(a). 40 C.F.R. Part 22.").

81 *Chemical Waste Management v. EPA*, 873 F.2d at 1479 ("These procedures conform to the provisions of the Administrative Procedure Act for formal adjudication. 5 U.S.C.S. §§ 556, 557.").

82 40 C.F.R. § 24.01(a).

83 40 C.F.R. §§ 22.31(a), 24.19 and 24.20.

84 *See* 5 U.S.C. § 557.

85 *See* EPA Official Sees No Major Shift In Agency's Use of Compliance Orders, Bloomberg Daily Environment Report, Friday, May 4, 2012 ("Mark Pollins, director of EPA's Water Enforcement Division, told a legal forum the agency has no intention of stopping its use of the orders. 'I don't see dramatic shifts in how administration enforcement authority is used, but I do see continued evaluation,' Pollins said during a wetlands seminar sponsored by the American Bar Association-American Law Institute.").

86 33 U.S.C. § 1319(a)(3).

87 *See* 5 U.S.C. § 706(2).

88 *See* footnotes 39 - 58, supra, and accompanying text.

Professional Announcements

If you have set up your own practice, changed or merged firms, published a major article, received an award or participated in an event of interest to members of this Section, please submit a paragraph to John Bottini at john.bottini@gapac.com.

2012 Environmental Law Section Officers

CHAIRMAN:

Carroll Wade "Mack" McGuffey III
Troutman Sanders LLP
600 Peachtree Street, N.E., Suite 5200
Atlanta, GA 30308-2216
Phone: (404) 885-3698, Fax: (404) 962-6808
Email: mack.mcguffey@troutmansanders.com

CHAIRMAN-ELECT:

Kimberly Ann "Kasey" Sturm
Stack & Associates P.C.
260 Peachtree Street, Suite 1200
Atlanta, GA 30303
Phone: (404) 525-9205, Fax: (404) 522-0275
Email: ksturm@stack-envirolaw.com

SECRETARY:

John C. Bottini
Georgia-Pacific LLC
133 Peachtree Street NE, 43rd Floor
Atlanta, GA 30303
Phone: (404) 652-4883, Fax: (404) 584-1461
Email: john.bottini@gapac.com

TREASURER:

Christopher "Max" Zygmont
Mowrey Meezan Coddington Cloud LLP
1100 Peachtree St. Suite 650
Atlanta, GA 30309
Phone: (404) 969-0747, Fax: (404) 335-7220
Email: max.zygmont@m2c2law.com

MEMBER-AT-LARGE:

Katherine Ann "Katie" Sheehan
University of Georgia River Basin Center
110 Riverbend Road, Rm 101
Athens, GA 30602
Phone: (706) 583-0463, Fax: (706) 583-0612
Email: katiesheehan80@gmail.com

IMMEDIATE PAST CHAIRMAN:

James Blount Griffin
Bishop Colvin Johnson & Kent, LLC
1910 First Ave. N.
Birmingham, AL 35203
Phone: (205) 251-2881, Fax: (205) 254-3987
Email: jgriffin@bishopcolvin.com

Bank-Held Properties and Compliance with Storm Water Discharge Requirements

By Albert K. Langley, Jr., Ph.D., Georgia Environmental Protection Division

On Aug. 1, 2008, the Director of the Georgia Environmental Protection Division (EPD) reissued General Permit No. GAR100003, "Authorization to Discharge Under the National Pollutant Discharge Elimination System, Storm Water Discharges Associated with Construction Activity For Common Developments."[1] This revised General Permit addressed a number of issues identified during the implementation of the original permit issued in 2003. The General Permit creates a comprehensive set of requirements used to control the discharge of storm water from construction sites.

The General Permit requires that anyone conducting construction activities[2] at a common development[3] obtain coverage under the permit and comply with the conditions of the permit. Permit coverage is obtained through filing a Notice of Intent[4] with EPD. The Notice of Intent requires certain information from the applicant and a certification that an Erosion, Sedimentation and Pollution Control Plan (Plan) has been prepared in accordance with Part IV of the General Permit, and that such Plan provides for compliance with the General Permit. The General Permit requires continuous coverage from the initial groundbreaking until final stabilization of the entire property has occurred.

The General Permit is a complex document, placing a significant burden on the permittee to develop and implement the required Plan and to maintain all documentation of compliance. Yet, when correctly implemented, it results in a comprehensive set of erosion and sedimentation controls, inspections and maintenance that can effectively minimize impacts to state waters from construction activities. The implementation of the 2003 version of the General Permit clearly resulted in a significant decrease in sediment impact to state waters, and the EPD anticipated that the 2008 General Permit, by incorporating the lessons learned from the 2003 General Permit, would be even more effective.

One weakness of the 2003 General Permit that the EPD sought to correct in the 2008 General Permit was to address the rare (at that time) occasion in which a bank or other lending institution would obtain ownership of a permitted site. The various lending institutions were not knowledgeable regarding the requirements of the General Permit nor did they often file the required Notice of Intent. The 2008 General Permit directly addresses this potential gap in stormwater discharge coverage by containing the requirement that, "in the event a lender or other secured creditor acquires legal title to the facility/construction site, such party must file a new NOI in accordance with this Part by the earlier to occur of (a) seven (7) days before beginning work at the facility/construction site; or (b) thirty (30) days from acquiring legal title to the facility/construction site. Stabilization and BMP installation and/or maintenance measures of a disturbed site, by the subsequent Owner or Operator, may occur in advance of filing a new NOI, without violation of this permit."[5]

This effort to explicitly bring lenders into the purview of the General Permit did not, however, anticipate the collapse of the entire construction market. The collapse, moreover, created some unique problems, for the logistics facing the lenders did not always accord with the factual scenario anticipated by the General Permit. The most significant anomaly in the current situation is that prior to the financial crisis, there were almost no instances where a development was not completed. In the rare circumstance that a lender obtained ownership, building continued and the project was completed. Thus, the General Permit remained in effect, the project moved forward and no particular issue surrounding permit compliance arose.

This situation completely changed with the collapse of the building market. Lending institutions came into ownership of thousands of properties, many of which they had never seen. These properties were in all stages of development, from having just broken ground to being almost complete. As EPD and Local Issuing Authorities began receiving complaints about these properties, it quickly became clear that the situation was completely different from that contemplated by the General Permit.

The majority of the properties foreclosed by lending institutions are residential subdivisions. In developing the General Permit, the EPD assumed that a lending institution would foreclose on an entire development, including the roads, infrastructure, etc. Though this does occur, it is an exception and not the rule. In most circumstances, the lending institution forecloses on individual building lots. The roads, infrastructure and common areas, however, most often remain in the ownership of the original developer. This bifurcation conflicts with the Primary / Secondary Permittee structure of the General Permit and often leaves unanswered the question of which party has the primary responsibility for environmental compliance.

The framework of the General Permit contemplates a Primary Permittee responsible for the overall development of a Plan to control storm water discharges from the property. The

General Permit requires a complex set of erosion controls that must be inspected and maintained by the Primary Permittee. Many of these controls are located on common areas which remain in the ownership of the bankrupt developer. Lending institutions do not have the right to enter these properties and conduct maintenance activities. When the original developer is bankrupt and lending institutions own many or all of the building lots, but not the common areas or infrastructure, the Primary Permittee concept of the General Permit becomes very difficult to apply.

The General Permit, moreover, does not really contemplate the situation of a development not being completed. Yet, as a community, we are faced with the prospect of hundreds of properties that will possibly not be built on for decades, if ever. Who will assume – and where are the resources for – the responsibility of permitting and stormwater discharge compliance for an indefinite period of time while in this state of development limbo?

Initially many lending institutions began filing Notices of Intent as the Primary Permittee on all the properties they obtained. While that is certainly one - and from the EPD's perspective, the simplest - way to proceed, there are problems, for there was often a wide disconnect between the lender's perfunctory execution of the NOI and its actions taken to ensure compliance. The Notice of Intent contains the following three certifications:

CERTIFICATIONS (Owner or Operator or Both to Initial as Applicable)

- I certify that the receiving water(s) or the outfall(s) or a combination of receiving water(s) and outfall(s) will be monitored in accordance with the Erosion, Sedimentation and Pollution Control Plan.
- I certify that the Erosion, Sedimentation and Pollution Control Plan (Plan) has been prepared in accordance with Part IV of the General NPDES Permit No. GAR100001, No. GAR100002 or No. GAR100003, the Plan will be implemented, and that such Plan will provide for compliance with this permit.
- I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that certified personnel properly gather and evaluate the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

Yet, when questioned, the illusory nature of this "compliance" was made evident as most of the lending institutions had no knowledge of the monitoring being done, the status of the Plan, or whether anything to do with compliance with the General Permit was actually occurring. As the EPD further explored the situation, it became very obvious that other problems existed. While most Primary Permittees had developed an Erosion Sedimentation and Pollution Control Plan, very few of these Plans were transferred to the lending institutions. When lending institutions approached the original design professional, they were greeted with the information that the design professional had not contracted with them, but with the original developer. The design professional would be happy to supply a Plan to the lending institution, but only for the appropriate fee. Lending institutions also began to realize that for the thousands of properties they now controlled they were responsible for significant expenses in monitoring, daily inspections, etc. It became very obvious that the cost of permit compliance could often exceed the value of the foreclosed property, particularly in the depressed real estate market.

As these issues became apparent, the various lending institutions began to more closely examine their obligations regarding compliance with the General Permit. It became very apparent to them and to the EPD that the General Permit did not adequately address the reality of the current market. The General Permit did not really anticipate the situation of a project with all construction activity completely stopped and with no intention to resume in the foreseeable future. The lending institutions began to question the need for General Permit coverage, using the argument that since no construction activity was occurring, no General Permit coverage was required. Further, they began to question exactly what type of coverage could be appropriate. They usually did not control an entire development, often owning only a collection of building lots, the majority of which were not contiguous. They did not control common areas or roads. They thus did not believe they could actually serve as a Primary Permittee, but they could not be Secondary Permittees either, since without a Primary there cannot be Secondaries.

Rather than engage in a costly and drawn out legal battle over these issues, EPD and several of the large lending institutions entered discussions resulting in a compromise that:

- Satisfies the basic intent of the General Permit - that being to keep the dirt out of the water;
- Provides a clear and enforceable framework; and
- Is a real-world solution to a real-world problem.

EPD decided to focus its efforts on preventing sediment from these properties entering state waters. The EPD developed a Consent Agreement which provides that a lending institution:

- Establish a program to stabilize conditions at foreclosed properties where land disturbing activities or construction activities have previously occurred, to inspect each property to evaluate current conditions, and to identify the potential for storm water impacts.
- Based on the results of the property inspections, prioritize all foreclosed properties based on the potential for adverse environmental impacts due to storm water discharge from the properties.
- Take those actions necessary to stabilize conditions and minimize impacts from storm water discharge in general accordance with *The Manual for Erosion and Sediment Control in Georgia.*
- Develop and maintain a database of properties covered by the Consent Agreement. This database will include documentation of actions taken for each property. EPD will be given access to view the database. This database will be updated on at least a monthly basis.
- Inform any purchaser of any property which is subject to this Consent Agreement of the requirement to obtain a stormwater construction permit for land disturbing activities.

Additionally, EPD agreed that:

- Once a property has achieved final stabilization as defined in the General Permit, no further action is required. Any NOI filed by a previous owner shall be considered terminated.
- If EPD receives a complaint regarding any of the properties covered by this Consent Agreement, EPD will contact the lending institution representative to review the complaint and discuss a response to the complaint.

Since the first such Consent Order was negotiated and signed in October 2009, EPD has executed this Consent Order with a number of lending institutions. EPD has received very few complaints regarding sediment loss from these foreclosed properties, and those we have received were quickly resolved. Substituting the Consent Order for the revised General Permit has enabled the EPD to achieve the goal of stormwater discharge control under the actual – and unique – fact situation confronting the construction and lending industries. The Consent Order has thus proven to be an effective tool in addressing this unprecedented financial situation and concomitant environmental exposure.

Alber K. Langley Jr,. Ph.D. is the District Operations Coordinator for Georgia EPD's six District Offices, which are responsible for enforcement and compliance activities. He also serves as manager of the Mountain District office in Cartersville. Langley previously served as Emergency Response and SARA Title III and Clean Air Act Risk Management Program Coordinator for Georgia EPD, and as team leader in the Hazardous Waste Management Program, responsible for permitting and compliance activities at hazardous waste land disposal facilities. Dr. Langley has also served as EPD's representative to the State Homeland Security Task Force, and serves on several federal advisory committees for the EPA and DOE. Prior to joining EPD, he was employed by Dames & Moore, serving as principal investigator or project manager for environmental projects throughout the continental United States. Langley is a graduate of Emory University where he received both Masters and Doctorate degrees in Ecology.

(Endnotes)

1 The General Permit is available on Georgia EPD's website, at http://georgiaepd.org/ Files_PDF/techguide/wpb/FINAL_StormWater_NPDES_Permit_CommonDevelopment_GAR100003_Y2008.pdf

2 A construction activity is defined in the General Permit as "the disturbance of soils associated with clearing, grading, excavating, filling of land, or other similar activities which may result in soil erosion. Construction activity does not include agricultural and silvicultural practices, but does include agricultural buildings." See General Permit, Part I.B.7.

3 A common development is defined in the General Permit as "a contiguous area where multiple, separate, and distinct construction activities will be taking place at different times on different schedules under one plan of development." See General Permit, Part I.B.6.

4 The Notice of Intent is available on Georgia EPD's website, at http://georgiaepd.org/ Files_PDF/forms/wpb/NPDES_NOI_Stormwater_Primary_Permittee_Y2008_revMar2011.pdf

5 *See* General Permit, Part II.A.4.