STATE BAR OF GEORGIA
ENVIRONMENTAL LAW SECTION

E. Peyton Nunez, Chair
Alston & Bird LLP

Jeffrey S. Dehner, Editor
Hunton & Williams LLP

Spring 2003

In This Issue

Upcoming Events

May

Wetlands Law and Regulation
Sponsored by ABA and ALI-ABA
May 28–30, 2003 — Washington, D.C.
http://www.abanet.org/environ/home.html

Water Wars in the East: The Newest Legal Battlefield
Co-sponsored with the ABA Standing Committee on Environmental Law
May 30, 2003 — Baltimore, Maryland
http://www.abanet.org/environ/home.html

August

Annual Summer Seminar
August 1–2, 2003
Ritz Carlton Amelia Island
http://www.gabar.org/SectionDisplay.asp?ID=-1&Section=8

November

Annual Fall Seminar
November 7, 2003
Location TBD
http://www.gabar.org/SectionDisplay.asp?ID=-1&Section=8

An Interview with Phyllis Harris

Linda Crum
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 4
Atlanta, GA

Phyllis Harris was asked to take the position of Principal Deputy Assistant Administrator in the Environmental Protection Agency's Office of Enforcement and Compliance Assurance as part of the EPA Senior Executive Mobility program in August 2002. Prior to that, Ms. Harris served for four years as Regional Counsel and Director of the Environmental Accountability Division in EPA's Region 4 Atlanta offices. Before that position, Ms. Harris served as Acting Regional Counsel for two years and was Branch Chief of the Hazardous Waste Law Branch for two years. She also served as Section Chief in the Hazardous Waste Law Branch, focusing on Florida, Tennessee and Kentucky and worked briefly as a staff attorney at the Department of Health and Human Services. Ms. Harris graduated from Converse College in Spartanburg, South Carolina and from the University of Florida College of Law. The following are excerpts of an interview conducted with Ms. Harris on Monday, March 17, 2003.

Q: In August of 2002, you moved from the Environmental Protection Agency's Region 4 offices in Atlanta, where you were Regional Counsel and Director of the Environmental Accountability Division to the Office of Enforcement and Compliance Assurance ("OECA") in Washington, D.C. Could you describe your new position and areas of responsibility?

A: My new position is that of the Principal Deputy Assistant Administrator for the Office of Enforcement and Compliance Assurance. In that capacity, I am the senior career official with responsibility for the implementation of EPA's Enforcement and Compliance Assurance Program. Other programs that fall under OECA include the NICA Program, the Environmental Justice Program and Civil Penalties Enforcement. Each of these programs have office directors who are responsible for the individual programs, but they all report to me. Through a coordinative fashion, I ensure consistency among the programs, determine resource help, actually coordinate resource issues. It basically kind of stops with me as the senior career official, and I report directly to the Assistant Administrator.

continued on page 6

Message From the Chair

The Environmental Law Section kicked off 2003 with its annual luncheon at the State Bar's Midyear Meeting in January. Jimmy Palmer, Regional Administrator of the U.S. Environmental Protection Agency, Region 4, was our distinguished keynote speaker. He reflected on his first full year in office and discussed some of the major issues facing the Agency in 2003. We are very grateful to Mr. Palmer for taking time out of his busy schedule to speak to the Section.

The Section has already hosted two brown bag programs this year. In February, the Section co-sponsored a very interesting program on Environmental Crimes with the Air & Waste Management Association. Featured speakers were Judson Starr, a Partner with Venable LLP and a former Director and Chief of the Environmental Crimes Section of the U.S. Department of Justice; Elizabeth Obenshain, a former Assistant Regional Counsel with E.P.A. Region 4; and Lee Ann De Grazia, a Senior Legal Advisor with Georgia E.P.D. Special thanks to Chris Thompson and Powell, Goldstein, Frazer & Murphy for hosting the brown bag.

In April, Kilpatrick Stockton LLP hosted a program addressing Environmental Law from the Public Interest Perspective. The brown bag was very well attended, thanks in large part to our great panelists: Ciannat Howett, the new Director of the Southern Environmental Law Center's Deep South office; Julie Mayfield, the Director of the Turner Environmental Law Clinic at Emory University School of Law; and Don Stack of Stack & Associates. Thanks to Julie Mayfield for putting the panel together and to Susan Richardson and Kilpatrick Stockton for hosting.

The Section's annual Summer Seminar is set for August 1 and 2 at the Ritz Carlton Amelia Island. The program agenda and registration information will be sent out soon, but it isn't too early to reserve your hotel room. The program should be informative and a bit different from past seminars, and I hope to see all of you there.

Finally, the Section's officers are always eager to hear from section members. If you have a brown bag or article idea, or want to add something to the section's website (www.gabar.org/SectionDisplay.asp?ID=-1&Section=8) please contact one of us. We look forward to hearing from you!

Letters to the Editor

Editor's Note: In the interest of promoting dialogue and reasoned debate of issues addressed in our publication, we are pleased to present the following Letters to the Editor, received in response to the article entitled "Third Party Permit Appeals and Application of the Georgia Stay Rule", which appeared in our Fall/Winter 2002 edition. (*See* http://www.gabar.org/pdf/Sections/envlawfallwi02.pdf.) We welcome and encourage our readers to submit additional perspectives and reactions to these and other articles in the future. Disclaimer: The opinions expressed herein do not necessarily reflect the views of the State Bar of Georgia, the Environmental Law Section, or its Board or Editor.

Additional Views on Third Party Permit Appeals and Application of the Georgia Stay Rule

The lead article in your Fall/Winter 2002 newsletter about the application of DNR's automatic stay rule to third party appeals of EPD permitting actions brings back memories and stirs me to submit the following brief thoughts. First, the rule says what it says. Absent a specific exemption created by statute or another rule, any action of a DNR decision maker is stayed when an administrative appeal is filed. Nothing in the rule exempts the issuance of a permit from the application of the rule and nothing in the rule suggests that the appeal must be filed by the permit recipient to trigger the stay. As a result, notwithstanding the Director's comments cited in the article about the original intent of the rule, for the substantial period of time I conducted administrative hearings on the actions of DNR decision makers, first as the DNR Board's ALJ and later as an OSAH ALJ, DNR, its lawyers, and I always interpreted the rule as applying to all appeals of DNR actions including third-party appeals of the issuance of a permit.

Second, the article's statements about the constitutional validity of the automatic stay rule would have substantially more merit if a permit was issued and then the DNR Board adopted such a rule. A post-permit issuance adoption of an automatic stay

continued on page 5

Mold: Latest Developments

Bruce Smith
Morris, Manning & Martin, LLP
Atlanta, GA

In recent years, a wave of multimillion-dollar verdicts, new legislation and media attention have portrayed mold as the next prevalent toxic tort. This paper provides a summary overview of the problem, the state of the science, legislative efforts to deal with the problem, common claims and parties involved in mold litigation, and practical strategies for addressing mold infestation claims.

What is Mold?

When most people think of mold, they envision green dusty clumps on stale bread, black spots on air conditioning vents, or mildew in their shower. However, mold can appear on and inside walls, on ceilings, in air ducts, and on other structures in a variety of colors. Mold spores exist virtually everywhere. Mold has existed since the beginning of time; it is mentioned in the Old Testament book of Leviticus. Mold, a fungus, is a living, naturally occurring organism. As a microscopic organism, mold only becomes visible when numerous individual spores accumulate. Mold is one of millions of bioaerosols, or airborne particles that are living or originate from living organisms. *See* American Conference of Governmental Industrial Hygienists, Inc., Bioaerosols: Assessment and Control, § 1.1 (1999).

Since mold spores travel easily through the air, people and animals frequently transport spores from the outside environment into their homes or offices. Once distributed, mold spores can lie dormant for extensive periods awaiting the ideal conditions to colonize an area.

What Causes Mold Colonization?

The presence of water or moisture in an enclosed area having the right temperature range induces mold colonization. Controlling moisture and humidity levels is vital to preventing mold colonization. Mold growth peaks within a temperature range of 40 to 100 degrees Fahrenheit. Unfortunately, most buildings are climate-controlled to temperatures well within mold's optimum temperature range. Molds live off of carbon molecules contained in plant and animal matter, including wood, drywall and other organic building materials. Therefore, mold flourishes on water-damaged building materials.

Bathrooms and kitchens, because of their water sources, tend to provide moist climates perfect for mold colonization. Sewer systems, basements and other areas that experience repeated flooding, standing water, or excessive moisture conditions are also conducive to mold growth. HVAC systems also constitute sources of mold contamination and proliferation.

The Science of Mold: Do Health Effects Exist?

Most members of the scientific community agree that mold acts as an allergen; however, there is no evidence proving a causal link between mold and cancer, brain damage, pulmonary hemosiderosis, arthritis, and other more permanent conditions. *See* J.S. Weiss and M. Kevin O'Neill, "Health Effects from Stachybotrys Exposure in Indoor Air: A Critical Review," Mealey's Construction Defects in 2002. The lack of scientific literature and studies on the effects of mold makes the epidemiological effects of mold exposure questionable at best.

It is certain that exposure to mold affects people in drastically different ways. Some individuals may not experience any reaction upon contact with mold, while others may experience adverse health impacts. *See generally* "Guidelines on Assessment and Remediation of Fungi in Indoor Environments," New York City Department of Health, Bureau of Environmental & Occupational Disease Epidemiology (Aug. 17, 2001). Among those individuals who react to mold, health effects may be grouped into infection and allergic reactions. Some people have alleged toxic effects due to mold exposure, although these cases are rare and a causal link between the presence of mold and toxic effects has not been proven. "Mold Litigation," Mealey's Publ'ns, Inc., p. 29 (November 11, 2001).

The Lack of Standards and Legislative Initiative Concerning Mold

Currently, the U.S. Environmental Protection Agency and other state and federal agencies have produced some guidance related to mold as an airborne particle. However, there are no exposure limits or remediation standards. As a result, states are trying to bridge the gap through legislation.

The lack of causal evidence between mold and health effects presents a challenge for lawmakers seeking to establish standards and mandate remediation. At this time, Congress has not passed any legislation concerning mold. However, there is a comprehensive mold bill pending in the House of Representatives. Last

continued on page 8

Injunctive Relief in Environmental Enforcement and Litigation

Robert E. Hogfoss
Steven I. Addlestone
Hunton & Williams LLP
Atlanta, GA

Introduction

The resolution of environmental disputes typically involves a two-step process. The first step is for the parties, or the courts, to define and ensure compliance with the applicable underlying environmental law(s) at issue. The second step is to determine an appropriate penalty, if any, for past noncompliance with the applicable law. Problems often arise in the first step of this process, in that the very nature of the dispute may center on the proper interpretation of a given statutory, regulatory or permit provision.

Where disputes over the scope and interpretation of the underlying law exist, injunctive relief often becomes an attractive remedy for litigants. Injunctive relief is often described as an "extraordinary" type of equitable remedy. As such, injunctive relief is typically appropriate only if an adequate remedy at law is not available. The purpose of an injunctive remedy is to grant preventative, protective or restorative relief; it is not intended to redress wrongs already committed. In essence, injunctive relief is "designed to deter, not punish." *Hecht v. Bowles*, 321 U.S. 321, 329-330 (1944).

Because environmental law is still relatively new — and still evolving — disputes continue to arise as to whether adequate remedies at law are available under the existing statutory framework. Environmental law has grown over the past thirty years,[1] and statutory and regulatory provisions have grown almost exponentially. As the body of environmental law has grown, and been given interpretation and definition by the courts, less room for dispute remains. New statutory and regulatory provisions are promulgated frequently, however, and so the process of interpretation, definition — and dispute — continues.

Equitable Standards for Granting Injunctive Relief

Under common law principles, a trial court has discretion to accept or deny a request for injunctive relief. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982). The trial's court discretion is guided by traditional equitable principles. *Id.* These equitable principles require that the court consider four factors when making its decision: 1) the probability of success on the merits, 2) the irreparable harm that could occur if the injunction is not granted, 3) the balance of harm for both parties, and 4) the public interest. *Reynolds v. Sheet Metal Workers, Local 102*, 702 F.2d 221, 223 (D.C. Cir. 1981).

This same standard applies to requests for either preliminary injunctions or permanent injunctions, except that when a plaintiff requests a permanent injunction, the court must consider the actual merits of the case rather than the likelihood of success on the merits. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987). Permanent injunctive relief is thus only available after a trial on the merits, and the plaintiff must show actual success on the merits before it can obtain the injunctive relief. *Id.*

Success on the merits is usually considered a "threshold consideration." *Platinum Home Mortgage Corp. v. Platinum Financial Group, Inc.,* 149 F.3d 722, 726 (7th Cir. 1998). For example, failure to establish proper standing can obviously hinder a litigant from satisfying the first factor. *Natural Resources Defense Council v. Watkins*, 954 F.2d 974, 983 (4th Cir. 1992). In *Watkins*, Natural Resources Defense Council (the "NRDC"), requested an injunction to prohibit the Department of Energy from reopening a nuclear reactor at the Savannah River Site because the operation of the reactor would violate the Clean Water Act. The respondent did not deny that operation of the reactor would cause it to exceed the limits of its Clean Water Act ("CWA") permit. *Id*. at 976-78. The court concluded as a threshold matter, however, that because the NRDC is an organization, it must demonstrate that it had standing to sue and that the group or one of its members had been harmed by these violations. *Id.* at 978. The court found that the NRDC had not presented any evidence to establish this point; rather, the group argued only that it had "representational standing." *Id.* Because the court did not find satisfactory evidence to establish standing, the court denied the injunction on the grounds that without standing, there is no likelihood of success on the merits. *Id.* at 983.

The second factor, irreparable harm, "must be proved, not assumed." *Huntington v. Marsh*, 884 F.2d 648, 653 (2nd Cir. 1994). In *Marsh*, the Army Corps of Engineers violated procedural provisions of the National Environmental Policy Act of 1969 ("NEPA"), and the Marine Protection, Research, and Sanctuaries Act or 1972 ("Ocean Dumping Act"). *Id.* at 651. The district court found that these violations constituted "irreparable harm" and granted an injunction against the Corps. *Id.* at 650. On

continued on page 11

1 The National Environmental Policy Act was enacted in 1969. The Clean Air Act was enacted in 1970, and the Clean Water Act in 1972.

Letters to the Editor

continued from page 2

rule would transform a permit that could be used immediately without fear of such a stay into a permit that could not be used until any administrative review was completed if an appeal was filed. However, as things stand now, the automatic stay rule precedes the issuance of any permit and a permit recipient knows the right to proceed with a permitted activity is subject to the potential imposition of the automatic stay rule. If an appeal of a permit is filed, no right to proceed without limitation has been lost, as the right to proceed was subject to the automatic stay rule from the moment of the permit's issuance.

Is the automatic stay rule a good rule? I don't know. Until OSAH was created, the final DNR action on any appealed permit was not taken until a committee of the Board resolved the appeal (until about 1980) or the Board's ALJ resolved the appeal in the Board's name (from about 1980 to 1995). Accordingly, I expect the rule represented a determination by the Board that it is much easier to make a permit recipient wait than to try to undo any activities performed during agency review if it turns out that the ultimate DNR action was to deny the permit. The legal landscape changed with the creation of OSAH in 1995 as a replacement for the Board's ALJ and the final action by an entity at DNR now occurs with the issuance of a permit by a DNR decision maker. However, the Board has not changed the automatic stay rule and apparently still believes that it remains a good idea to prevent any activity pursuant to a DNR permit until after the final executive agency action has been taken. If not, the Board can always change the rule.

Mark A. Dickerson
Administrative Law Judge, Georgia Board of Worker's Compensation (Judge Dickerson previously served as an ALJ for the Georgia DNR and the OSAH)

The Article "Third Party Permit Appeals and Application of the Georgia Stay Rule," which appeared in the Fall/Winter 2002 edition, leaves out a discussion of controlling statutory law in claiming that state issued Air Quality Act Prevention of Significant Deterioration (PSD) permits are final and thus valid during the pendency of administrative appeals of the permits. Specifically, OCGA § 12-9-7(h)(emphasis added) provides that PSD permits are "final *unless* a petition for hearing is filed in accordance with Code Section 12-9-15." Thus, the law provides that if an administrative appeal is filed, the PSD permits are not final. Regardless of how one interprets the "Stay Rule" the statute is clear that PSD permits are not final until the completion of the administrative appeal. None of the various forums in which power companies have shopped their interpretation of the Stay Rule have disagreed with the plain language of OCGA § 12-9-7(h). Moreover all of the courts except the one mentioned in the article that have addressed this issue have found that permits are not final during the pendency of an administrative appeal. Judge (former Georgia Supreme Court Justice) Willis B. Hunt, Jr. ruled that a PSD permit is not final when a timely administrative appeal is filed. *Sierra Club v. Duke Energy Sandersville*, 1:01CV3067-WBH (N.D.Ga. Nov. 27, 2001)(Order at 6). Two other courts have reached the same result, although mainly based on rejecting the permittees' interpretation of the Stay Rule rather than turning to the statute. *See Duke Energy Murray, LLC v. Georgia PIRG*, No. 2001CV38459 (Fulton Co. Sup. Ct. 2001); *In re: Bulk Distribution Centers, Inc.* 1989 Ga.ENV LEXIS 33, *11 (OSAH Oct. 31, 1989). Finally, it is also relevant that the issuance of a PSD permit does not confer a property interest in the holder, thus any due process argument must fail. *See Duke Energy Sandersville*, 1:01CV3067-WBH (N.D.Ga. Nov. 27, 2001)(Order at 7); 40 CFR § 70.6(a)(6)(iv).

Robert Ukeiley
Director, Georgia Clean Air Project, Georgia Center for Law in the Public Interest

An Interview with Phyllis Harris

continued from page 1

Q: How is OECA organized with respect to legal issues?

A: Legal issues per se are not necessarily handled within any one office. Any office could have legal issues, but I think what you're getting at is that the Regional Counsel offices (or the equivalent in Regions 2, 3, 4, 5, 6, 7, 9 and 10) report to OECA simply because that has made sense. The predominant resources in those offices are enforcement, because the main work in many of those offices is enforcement work. So those attorney's offices and its Regional Counsel report to OECA. I would say that the prevailing legal issues come out of the Office of Regulatory Enforcement which is headed by Walker Smith, formerly from the Department of Justice, and Susan Bromm in the Office of Site Remediation and Enforcement, the Superfund Enforcement Office. We also have an Office of Policy and Analysis, headed by Mary Kay Lynch, that handle legal issues from a *policy* perspective.

Q: At what point does OECA get involved in enforcement activities?

A: Well, you have to understand most enforcement matters are delegated to the Regions and under delegation agreements they outline the specific instances when OECA consultation or concurrence is needed. Then you have cases that have been determined to be a national case or a national issue in scope, such as the litigation on power plants, petroleum refineries, certain kinds of wetland matters, CSOs (combined sewer overflows), SSOs (sanitary sewer overflows). The Regions may handle a lot of those cases, but they work very closely with OECA. In some instances, OECA will handle a case exclusively because of its sensitivity and nature. For instance, we have a small cadre of cases that we handle without Regions at all, such as mobile source matters. Any settlements that you see regarding manufacturers of automobiles, trucks, diesel engines . . . all of those cases are handled by our Mobile Sources Enforcement Group and are fairly exclusively Headquarters' cases.

Q: Traditionally, EPA has enforced environmental laws through the civil and criminal actions, as well as through the issuance of administrative orders, do you see any significant changes in this approach?

A: What we stress to the Regions — and what Assistant Administrator J. P. Suarez has emphasized — is "smart enforcement." Not saying that anything that has been done in the past wasn't "smart" or that it didn't make sense. Rather we are really thinking *strategically* to identify the most significant problems and challenges in a particular Region or in the national program. Once we pinpoint the problems, we can select the types of tools we can bring to bear to get the most significant outcome. It is not one-size-fits-all approach. For instance, you may find that it makes sense, for example, to bring a group of cases in a program at the same time that you historically had done in more of a piecemeal fashion. We want people to focus on what makes the most sense, given our resource issues and constraints, and where we will get the most "bang for the buck." We need to think about whether this is the most significant and most important use of our resources before we bring a case, or are there other things in the pipeline that we should instead, so we could get a better outcome.

Q: How are you getting the word out to folks so they will think a little differently about Agency enforcement cases and projects?

A: We are getting out and talking to the Regions this spring. We recognize that for some this appears to be a different concept, but I don't think it is. For example in Region 4, where we have so many issues, we've historically tried to follow a smart enforcement-type approach. It is really making that a part of the entire EPA thought process in terms of what kind of case we should or should not bring. Another notion about smart enforcement is the number of allegations that you might put in a complaint. For instance, does it make sense to present evidence for 150 counts when you could get the same message and results with 50 or 20 or 10 counts? So again, the goal is to think strategically, by thinking about the use of resources and the ultimate outcome.

Q: As Principal Deputy and also as a citizen, what do you see as the most pressing environmental issues in the country today?

A: Actually, without sounding the "party line" here, the things that we are working on now are some of the most pressing issues. As we begin to get some results on the power plant cases, we know there will be a significant reduction in pollutants that will have enormous benefits for children, particularly those living in urban areas. I am very proud that we are still working on those cases and that we are getting some good results. Recent results in the *Ohio Edison* trial demonstrate some of those successes.

In addition, the work that we continue to do in OECA — particularly with CSOs and SSOs — has had enormous impacts in terms of knowing that in a span of five to ten years, citizens will actually notice and see decreased levels of pollutants and con-

continued on page 7

An Interview with Phyllis Harris

continued from page 6

taminates, and, at some point, this will them to swim and fish in waters where they can't swim or fish now. This work is exemplified in cases such as the City of Baltimore and Toledo, and through carrying Consent Decrees through to fruition, such as the City of Atlanta Consent Decree. To know that through these cases and others like them, we will have waters that will meet water quality standards is very exciting. In another aspect, last year we were able to assist over three million citizens obtain drinking water that meets drinking water standards.

What we are trying to deliver is the message that enforcement is about *results*. It is about outcomes such as the number of people who can actually drink from municipal water systems, the number of impaired water bodies that come off the list of impaired waters, and the number of children who won't have to suffer asthma attacks anymore. These outcomes can be credited in large part to the actions that EPA has taken against industries, particularly the petroleum refinery and power plant sectors.

Q: To follow up a little bit, you mentioned the power plant sector. Activities in this sector seem to intersect a great deal with the Bush Administration's emphasis on Clear Skies and new NSR (new source review) regulations and reforms. How do you see these reforms and initiatives impacting ongoing enforcement litigation and activities?

A: My boss, J. P. Suarez, was very much engaged in the rule development process. The rule is now published and litigation is ongoing. I think that process has to take its own course. That said, we are supporting cases that are in litigation, and we are getting good results. Until and unless the law changes, that is our mandate. Likewise, Clean Skies will go through the process. We support our program as it currently stands, and we don't think that what we are doing is inconsistent with Clear Skies. We will continue to pursue the avenues of getting settlements as well as resolving things through litigation. We expect to see both settlements and some good decisions over the next several weeks.

Q: What role does your office play in terms of supporting the enforcement aspects of state delegated programs, especially in light of recent budget cuts and the rise in citizen challenges to these programs?

A: Much of the Agency's direct work with states is done through the Regions working very closely with their states. Through our Office of Policy and Analysis, we work with the Regions to resolve enforcement related issues. Our most recent case came out of a citizen petition challenging the enforcement aspects of many of the delegated programs in Ohio. After about three years of negotiation, Ohio met some of the requirements that we felt they needed for compliance. We set some goals and performance criteria, which the state accomplished. We have similar efforts underway with the state of Louisiana. We have identified things that need attention and they are working on those as well. That matter is ongoing as we monitor Louisiana's adherance to its commitments.

In addition, we have definitely seen a rise in the citizen's group activities. These groups have become much more savvy. As a result, states have been taking some fairly dramatic hits in terms of budgets. We have taken some pretty significant budget cuts as well. We have a couple of grant programs for which states can compete, and we encourage them to do so. At the same time, we recognize that we are going to have to figure out how we are going to hold Regions accountable in terms of reviewing these state programs. By the same token, we do not wish to find ourselves in a position of having to reclaim delegated programs from the states, either due to performance issues or budgetary limitations. The budget situation is a very significant concern to Governor Whitman, and I know that she is actively working on that issue.

Q: What role does your office play in ongoing CERCLA and Brownfields discussions?

A: There are a couple aspects to the interplay between CERCLA and Brownfields. In the 2001 Brownfields Legislation, there were specific provisions regarding liability. There were liability provisions for municipal waste, liability provisions related to property owners trying to provide some certainty on innocent land owner aspects, and liability provisions related to ability to pay. Our office takes the lead on developing the policy for those particular statutory provisions because the statute provides that EPA will develop regulations or policy and guidance within a certain number of days. We are moving forward on that. We need to get the guidance out there so people will better understand how the statute applies to them in certain situations.

In addition, we continue to provide guidance to the Regions and concurrence on PPAs under Superfund, but here the need isn't as great, because the legislation gave a lot of relief in this area. The other aspect that we see kind of growing is the whole notion of PPAs at RCRA facilities. This is an area that we are looking at very cautiously, primarily from a resource perspective. We don't

continued on page 8

An Interview with Phyllis Harris

continued from page 7

have as many resources in RCRA as we do in Superfund, and, because of the permitting aspect of RCRA facilities, it is a lot more intensive in terms of what is expected in terms of releases from liability. Thus, we have done this in a couple of places across the country and now we are looking at how to develop some consistency and some efficiencies in moving these along.

In April, the Administrator and J. P. Suarez will announce a whole revitalization agenda, which will cover the things I have discussed here. We are a big partner in that field, and we see a lot of value in getting sites that are blighted eyesores for the community in a place so the site could be a new shopping center, it could be greenspace, it could be a park, or whatever the community envisions for that property. We see this as something that is exciting. We are glad we are a player and we look forward to working with folks in doing that.

Q: How have your perceptions of Georgia and Region 4 changed since moving into your new position?

A: They haven't changed. I do miss my colleagues in Region 4 and going to the occasional brown bag lunch with the Georgia Bar. People here probably grow really tired of me using Region 4 as an example of certain issues — both good and bad. But I'm just drawing examples from my own experience. The program in Region 4 is a fairly strong one. In terms of Georgia, overall, we are working very hard on conformity and ozone nonattainment issues. People are very committed to the environment and to finding solutions that make sense given the resources and other issues with which they have to deal. I am able to see how different states and different Regions across the country handle issues, and I see my job as directing Regions to consider adopting various innovations or ways of handling a problem that they may not have considered, but which may be in use at other Regions.

Q: Phyllis, thank you for your time, it has been a pleasure speaking with you.

A: You're welcome, best wishes to everyone at Region 4 and in the Georgia Bar. ■

Mold: Latest Developments

continued from page 3

summer, Rep. John Conyers introduced H.R. 5040; the bill is currently in the House Subcommittee on Environmental and Hazardous Materials.

H.R. 5040 directs the Centers for Disease Control, the Environmental Protection Agency and the National Institutes of Health to jointly study the health effects of indoor mold growth and toxic mold. The bill also would require government agencies to promulgate standards for disclosing, preventing, detecting and remediating indoor mold growth. The bill would also establish a national insurance program to enable individuals to purchase coverage for mold claims and damages. If passed in its proposed form, the bill will allow an annual tax credit for 60 percent of non-reimbursed mold inspection and remediation expenses ($50,000 annual maximum) paid or incurred by a taxpayer. Finally, the bill has a public education component.

California, Maryland and Texas are to date the only states that have passed legislation concerning mold exposure. Although there are currently no mold bills in Georgia, mold legislation is however proposed or pending in at least 12 other states.

The state legislation can be grouped into two categories: research-based and regulatory-based. Research-based legislation generally involves the creation of task forces to study mold and the effects of mold exposure on human health and the environment. The legislation typically mandates the development of permissible exposure limits, standards for inspection and remediation of mold, and guidelines and standards for the construction industry.

Regulatory legislation imposes standards for inspections and disclosure of known mold infestation. This legislation usually also mandates the provision of insurance coverage for certain mold claims and caps certain parties' liability for mold claims (similar to tort reform legislation).

Both forms of legislation are needed. Heightened and informed public awareness and periodic or conveyance-based requirements for inspections should reduce the number of mold claims. Mold legislation is also beneficial because it will mandate some form of insurance for mold, thus reducing individual exposure. However, the effectiveness of any legislation will be seriously hindered until the scientific community is able to provide a conclusive link between mold exposure and health

continued on page 9

continued from page 8

effects and specific guidance concerning acceptable exposure levels.

The Current State of Mold Litigation

Mold litigation costs involves and requires familiarity with construction defect law, toxic tort law, medical and scientific issues associated with mold, the construction industry, and the community in which the claim will be resolved (i.e., public perception, potential jury pool, and plaintiffs' bar).

Plaintiffs in mold infestation suits often sue any entity that manufactures, constructs, designs, maintains or insures any infested structure where the plaintiff spends time (home or office). The basis of the lawsuit is that exposure to mold has made the plaintiffs sick and that the water intrusion and mold infestation has caused property damage.

To recover against a defendant, a plaintiff must demonstrate causation between the defendant's acts or omissions and the plaintiff's injury or damage. Although the causal relationship between mold and many personal injuries is often difficult to prove, it is clear that construction and product defects lead to water damage and subsequent mold growth. Both types of claims are usually brought in the same action, with the more costly battle being waged on the issue of whether personal injury (i.e., illness) was caused by mold exposure.

What Types of Claims are Being Brought?

There are a seemingly unlimited number of legal theories that a plaintiff may allege in mold litigation. Common theories of recovery asserted by plaintiffs in a mold infestation suits include the following:

- Negligence; *See Univ. Sys. of New Hampshire v. United States Gypsum Co.*, 756 F. Supp. 640 (D.N.H. 1991) (suppliers of asbestos products to University buildings were sued under theory of negligent misrepresentation for failing to disclose the dangers of asbestos).
- Fraud and Fraudulent Concealment.
- Breach of Contract; *See Centex-Rooney Constr. Co. v. Martin County*, 706 So.2d 20 (Fla. App. 1997) (county sued construction manager over courthouse and other county building with excessive humidity and mold growth due to construction's manager failure to properly supervise construction in breach of contract).
- Strict Liability; *See Kanecko v. Hilo Coast Processing*, 65 Haw. 447, 654 P.2d 343 (1982) (holding that strict liability applies in cases of prefabricated buildings).
- Nuisance; *See Tioga Pub. Sch. Dist. #15 of Williams County, North Dakota v. United States Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993) (school district sued supplier of asbestos plaster under theory of nuisance).
- Emotional Distress
- Personal Injury; *See New Haverford P'ship v. Stroot*, 772 A.2d 792 (Del. 2001)(tenants sued landlord for failure to address mold contamination after health complaints; $1 million verdict for personal injuries).
- Failure to Disclose Negligent Construction
- Negligent Supervision/Inspection
- Indemnity/Contribution Negligent Design
- Professional Malpractice
- Deceptive Trade Practices
- Constructive Eviction
- Failure to Maintain

Common Defense Strategies for Mold Claims

Defenses to mold claims will vary case by case, and are nearly as numerous as the theories of recovery. Defense theories include the following:

- Lack of Causation/Proximate Cause
- Contributory Negligence
- Assumption of Risk
- Comparative Negligence
- Statute of Limitations
- Statute of Repose

What Types of Damages are Recoverable?

Every type of traditional damages is available to successful plaintiffs in mold litigation. In addition to compensatory damages, defendants may face punitive or treble damages and, in some instances, stigma damage associated with mold contamination. If

continued on page 10

continued from page 9

a plaintiff failed to promptly eliminate the source of water intrusion and timely address mold contamination, defendants should seek to reduce the plaintiff's damages for failure to mitigate or failure to provide prompt notice of the problem to the defendant.

Practical Concerns in Handling Mold Infestation Claims

To minimize legal liability associated with mold contamination, building owners, operators and managers should immediately address all water intrusion conditions that could lead to mold growth contamination. Unless the source of the moisture is eliminated, mold will return. Building owners, operators and managers should also develop proactive preventative maintenance programs to prevent and handle water intrusion and mold problems.

Responding to Occupants' Health Complaints

If water intrusion has occurred or mold contamination is suspected, special attention should be paid to occupants' health complaints. All complaints should be immediately investigated, documented and evaluated.

Individuals with special sensitivities (such as asthma, severe allergies, sinusitis, immune suppression, or other chronic inflammatory lung diseases) tend to present greater risks for adverse health impacts resulting from mold exposure. Typically, mold contamination does not warrant evacuation of an entire building. To avoid unnecessary concern, mold contamination should be identified and sampled to assess possible health risks.

Investigation and Sampling for Mold Contamination

If mold contamination is confirmed, building owners should perform a preliminary investigation recording observations indicating mold colonization. Properly-trained investigators, performing an Indoor Environmental Quality ("IEQ") Evaluation, take samples using a number of different techniques, depending upon the location and severity of the mold infestation. A typical analysis includes air samples, swab samples and wall cavity air samples. On an initial walk-through, investigators will identify potential bioaerosol sources for sampling. *See generally*, American Conference of Governmental Industrial Hygienists, Inc., Bioaerosols: Assessment and Control, § 2.2 (1999).

It is important for investigators to sample all locations of expected mold contamination, as well as locations where mold does not exist. Investigators should take photographs of all locations where they took samples and photographs that reflect the general condition of the property. Investigators should also compare samples taken from inside and outside the building, as well as samples taken in complaint areas and noncomplaint areas in order to determine if significant differences in the air quality exist. Laboratories should receive viable samples within twenty-four hours to perform accurate testing. In all sampling measures, strict adherence to proper sampling procedures should be followed to ensure an accurate analysis of the mold species present.

Potential Insurance Coverage

Although mold infestation may result in claims under a number of different types of insurance policies, mold claims rarely result in coverage. Most commercial and homeowners policies exclude coverage for mold under microbial matter or pollution exclusions, so it may be necessary to purchase insurance specifically covering mold claims. Multimillion-dollar verdicts against insurers have prompted a number of carriers to abandon the market, leading to a crisis in the industry. See, e.g., "Jury Awards $32 Million to Texas Homeowner in Mold Coverage Action," (June 12, 2001) 15 No. 30 Mealey's Litig. Rep.: Ins. 3 (Mealey's Publ'ns, Inc.) available at WL 15 No. 30 MLRINS 3 (the verdict that was the subject of this article was later vacated, see Order Vacating Judgment, Ballard v. Fire Ins. Exch., 2001 WL 883550 (Aug. 1, 2001) (No. 99-05252)). As noted above, Congress is considering mandating some form of mold insurance in response to this crisis. Upon notice of mold infestation, an insured should nonetheless immediately review all its policies and notify insurance carriers that may provide coverage (e.g., water intrusion and resulting damages). Notice is crucial in mold cases due to mold's status as a living organism that can continue to grow and expand the scope of damages as time passes.

Conclusion

The full spectrum of mold's impact on human health, toxic tort litigation, insurance coverage and the construction industry remains to be seen. Despite uncertainty in the scientific and legislative communities, mold litigation is proliferating. In view of those realities, the best course for all parties experiencing either water intrusion or actual mold infestation is to respond aggressively and proactively to minimize potential liability. ■

Injunctive Relief In Environmental Enforcement and Litigation

continued from page 4

appeal, counsel for the NRDC argued that even though the studies completed at the site showed a lack of environmental damage the injunction should be upheld because the procedural violation of NEPA constituted "irreparable injury." *Id.* at 651. The court rejected that argument and stated that in order to grant an injunction there must be "substantial danger to the environment, in addition to a violation of procedural requirements. . ." *Id.* at 653. In other words, alleged harm that is remote or speculative will not be considered "irreparable."

The third factor, balance of harm, mandates that although a violation of law may cause a party to request an injunction, sometimes "the balance of harms may point the other way." *Conservation Law Foundation, Inc. v. Busey*, 79 F.3d 1250, 1272 (1st Cir. 1996). In *Busey*, the Air Force was involved in converting land on Pease Air Force Base to civilian use as a result of the base closure. *Id.* at 1254. The Conservation Law Foundation requested an injunction against the project because the Air Force violated procedural aspects of NEPA. *Id.* at 1271. The court denied the injunction after considering the balance of harms. *Id.* at 1272. The court noted that over $100 million in federal and state bonds and grants had been committed to the project and these commitments would be placed at risk if the injunction was granted. *Id.*

The last factor — perhaps of most significance in the environmental context — is consideration of the public interest. An Eleventh Circuit case denied an injunction against a power plant because it found that it would be adverse to the public interest to grant the injunction. *Sierra Club v. Georgia Power Co*., 180 F.3d 1309, 1310 (11th Cir. 1999). Sierra Club sought an injunction against Georgia Power requesting it to comply with its CWA permit, following violations of the temperature limits in the permit that had caused fish kills in a nearby lake. *Id.* at 1310-11. Georgia Power argued that the only way it could comply with the permit would be to generate less power. *Id.* at 1310. The court denied the injunction as contrary to the public interest, stating that "a steady supply of electricity during the summer months . . . is critical." *Id.* at 1311.

Injunctive Relief in Environmental Litigation

The Supreme Court has addressed the proper use of injunctive relief in environmental litigation in several cases. The Court has noted that "[i]t goes without saying that an injunction is an equitable remedy." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982). The Supreme Court has also observed that "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Id.* at 312. (citing *TVA v. Hill,* 437 U.S. 153 ,193 (1978); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). In *Romero-Barcelo*, the Supreme Court stated that the equitable factors necessary to establish injunctive relief applied in this instance to violations of the CWA. *Id.* at 317-18. Puerto Rico sued the Navy to enjoin them from performing certain training activities in Puerto Rico that resulted in discharges of pollutants to waters of the United States. The Navy did not have CWA permit. *Id.* at 307. While the district court found that the Navy had violated the CWA by not obtaining a permit, the court refused to grant an injunction against the Navy and instead ordered the Navy to apply for a permit. *Id.* at 309-310. The Supreme Court upheld the district court's opinion stating that "[t]he exercise of equitable discretion, which must include the ability to deny as well as grant injunctive relief, can fully protect the range of public interests at issue in this stage in the proceedings." *Id.* at 320.

After *Romero-Barcelo*, courts have on occasion exercised the discretion to deny a request for an injunction even when a party has violated an environmental statute. *See Amoco Production Co. v. Village of Gambell,* 480 U.S. 531 (1987); *Town of Huntington v. Marsh*, 884 F.2d 648 (2nd Cir. 1989). On the other hand, some courts have held, however, that federal statutes that authorize injunctions for violating a particular law do not require that traditional equitable factors be applied before granting an injunction. *See United States v. Marine Shale Processors*, 81 F.3d 1329, 1358 (5th Cir. 1996). The court in *Marine Shale* held, "[w]e do not agree that *Amoco* and [*Romero-Barcelo*] require a court to balance the equities and make findings regarding irreparable harm and adequacy of legal remedies in all cases arising under environmental statutes." *Id.* According to the Fifth Circuit, although equitable principles apply, a court need not always engage in a strict balancing of the equities, especially if a risk to the public is present.

Subsequent to the Fifth Circuit's decision in *Marine Shale*, the Supreme Court again affirmed its interpretation of the injunctive relief provisions of the CWA in *Friends of the Earth v. Laidlaw Env't Serv., Inc.*, 528 U.S. 167 (2000) ("[T]he district court has discretion to determine which form of relief is best suited, in the particular case, to abate current violations and deter future ones. '[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.' *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982)."). The Eleventh Circuit also has

continued on page 12

Injunctive Relief In Environmental Enforcement and Litigation

continued from page 11

consistently held that injunctive relief is not required for every violation of the CWA. In *Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*, 280 F.3d 1364, 1369 (11th Cir. 2002), the court found the district court erred by "not applying traditional equitable standards in its grant of the injunction" pursuant to the CWA. The court further stated:

> In determining whether an injunction is proper, not only should a district court "balance[] the conveniences of the parties and possible injuries to the them according as they may be affected by the granting or withholding of the injunction[,]" but the court "should [also] pay particular regard for the public consequences in employing the extraordinary remedy of injunction.

Id. (quoting *Weinberger*, 456 U.S. at 312). *See also United States v. Context-Marks Corp.*, 729 F.2d 1294, 1297 (11th Cir. 1984).

Most recently, the United States District Court for the Northern District of Georgia addressed these same issues in *United States v. Colonial Pipeline Co.,* 242 F.Supp.2d 1365 (N.D. Ga. 2002). In doing so, the court ruled:

> The United States Supreme Court has made clear that district courts are not "mechanically obligated to grant an injunction for every violation of the law." *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 313, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982). The *Weinberger* court found more specifically that the CWA did not require a district court to grant injunctions for all violations of the act but instead the CWA "permits the district court to order that relief it considers necessary to secure prompt compliance with the Act." *Id.* at 320, 102 S.Ct. 1798. In *Weinberger* and *Amoco Production Co. v. Village of Gambell, Alaska,* 480 U.S. 531, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987), both cases involving violations of environmental statutes, the Supreme Court reversed the granting of preliminary injunctions that were given without considering irreparable harm or a balance of the equities. Discussing the requirement of irreparable harm for an injunction, the Eleventh Circuit has stated that "[e]nvironmental litigation is not exempt from this requirement." *United States v. Lambert,* 695 F.2d 536, 540 (1983). Considering these cases, it appears that the Court may not determine permanent injunctive liability under the CWA without a showing of irreparable injury, inadequacy of legal remedy, and a balancing of the equities. *Natural Resources Defense Council v. Texaco Refining and Marketing Inc.,* 906 F.2d 934 941 (3rd Cir. 1990).

Id. at 1375. Thus, both the Eleventh Circuit and Northern District of Georgia have clearly established that injunctive relief under environmental statutes should be subject to traditional equitable balancing.

Summary

Injunctive relief provides a powerful tool to both administrative agencies and private litigants in environmental enforcement and litigation. Opportunities to use this equitable remedy arise where no adequate legal remedy exists. Although many environmental statutes expressly authorize demands for injunctive relief, most reviewing courts still require consideration of traditional equitable factors before granting such relief, and the trial court is afforded broad discretion in its consideration. ■

Environmental Law Section Officers