STATE BAR OF GEORGIA
ENVIRONMENTAL LAW SECTION

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Douglas S. Arnold, Chair
Alston & Bird LLP

Anne H. Hicks, Editor
G. Graham Holden, P.C.

In This Issue

Upcoming Events

April 13 Brown Bag Luncheon:

Jones, Day, Reavis & Pogue (35th Floor, One Peachtree Center) will host the Section's Brown Bag on April 13, 2000, noon - 1 p.m. Dick Swanson and Lisa Lewis, both Managers with the EPD's Underground Storage Tank Program will discuss enforcement and other important issues.

Environmental Law Section Summer Seminar:

August 11-12, 2000. The Jekyll Island Club Hotel.

Update on EPD's General NPDES Permit for Storm Water Discharges from Contruction Activities: Settlement Reached, Permit Potentially to Take Effect this Summer[1]

By Susan Hearne Richardson, Kilpatrick Stockton, LLP

Editor's Note: On behalf of various utilities, the author has been substantially involved in the litigation and negotiations surrounding the general storm water permit for construction activities.

On February 25, 2000, the Director of the Georgia Environmental Protection Division ("EPD") issued General NPDES Permit GAR 10000 (the "General Permit") for public notice and comment. The General Permit, which reflects EPD's seven-year effort to issue a general storm water permit for construction activities, will authorize the discharge of storm water from construction activities that disturb a land area greater than five acres or tracts of less than five acres that are part of a larger development project (referred to as a "common plan of development"). Depending on the scope of comments received by EPD, the General Permit should become effective some time during the Summer of 2000.

Administrative History

In 1992, EPD issued the first of four versions of the general permit that were successfully challenged by citizen groups. On July 19, 1999, EPD made its fifth attempt to issue a general permit that could withstand administrative challenge (the "July 1999 General Permit"). However, in its attempts to address concerns of the citizen groups raised in the previous appeals, EPD did not take into consideration the difficulties and burdens that would be faced by the regulated community in implementing the terms and conditions of the general permit.

The July 1999 General Permit was appealed on August 18, 1999 by numerous parties including Georgians for Responsible Growth, a coalition of builders, developers and contractors, as well as a number of utilities, including Atlanta Gas Light Company, Georgia Power Company, Transcontinental Gas Pipe Line Company, Southern Natural Gas Company, Plantation Pipe Line Company, Colonial Pipeline Company and Georgia Transmission Corporation (the "Petitioners"). The Georgia Cable Television Association intervened on behalf of the Petitioners. A number of citizen groups, including the Upper Chattahoochee Riverkeeper, the Sierra Club and Terence Hughey (the "Citizen Group"), intervened on behalf of EPD. As a result of the petitions, the July 1999 General Permit was stayed, pending a decision by the Administrative Law Judge ("ALJ").

At the initial status conference with the ALJ, the parties agreed to stay the action for a number of months to allow the parties to enter into intensive settlement negotiations. Subsequently, the parties

[1] *Please refer to Seeing Red: The Conflict & Controversy over the General Storm Water Permit for Construction Activities in Georgia, Michelle Craig Fried and Stephen E. O'Day, Environmental Law Section Newsletter, Winter 1999, for a discussion regarding the history of various versions of the General Permit, as well as the scope and impact of the General Permit (as originally proposed in July 1999). This article provides an update of the most recent settlement negotiations and resultant changes to the General Permit.*

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Message From the Chair

The Section is off to a great start with several more programs scheduled in the months ahead. In January, Stan Meiburg, Deputy Regional Administrator for U.S. EPA Region 4, spoke at the Section's Midyear meeting at the Swissotel. Stan covered a wide-range of topics including use of Project XL at the Atlantic Steel redevelopment and the ozone SIP for the metropolitan Atlanta area. In February, Arnall Golden & Gregory hosted an afternoon presentation by David Word, Assistant Director for Georgia EPD, and a reception afterwards. Thanks again to Jean Tolman for organizing that event.

On April 13, Jones, Day, Reavis & Pogue is hosting a Brown Bag update on Georgia's UST program. The speakers include Dick Swanson and Lisa Lewis from Georgia EPD. On June 13, there will be a Brown Bag on new initiatives in wetlands regulation and green space protection. Paul Schwartz, who is responsible for wetlands enforcement at U.S. EPA Region 4, will discuss recent enforcement developments. Also, Rand Wentworth, who is a director for The Trust for Public Land, will discuss Georgia's green space protection initiatives. The program will be held at Alston & Bird.

On August 11-12, the Section will sponsor its annual Environmental Law Institute at the Jekyll Island Club Hotel at Jekyll Island. Program topics include prosecution and defense of environmental criminal proceedings, insurance coverage disputes for environmental claims, and ethical issues relating to witness preparation, witness interviews, and preservation of testimony. We will also have updates on HSRA, stormwater, TMDLs, citizen suits, and recent CERCLA and toxic tort cases. I hope you and your family can join us.

Please call me or any of the other Section officers if you have any thoughts or suggestions on how we might further improve the Section. I hope to see you at the April and June Brown Bags.

EPD's David Word Provides Information Legilative Update at the February Section Meeting

By David Hoffman, Arnall, Golden & Gregory

On February 9, 2000, EPD Assistant Director David Word provided an update on the 2000 legislative session to a well-attended meeting of the Environmental Law Section of the Georgia State Bar at the offices of Arnall, Golden & Gregory. Word discussed many new and anticipated bills in the General Assembly. EPD supports many of the bills that would directly affect its operation, including:

- **House Bill 1362** (the Flint River Drought Protection Act), which allows permitted farmers in the 28-county region near the Flint River to offer to cease irrigating a number of acres in exchange for a certain sum of money. Word stated that the proposed auctioning of the right to irrigate during a drought year was akin to an airline offering incentives to ticketed passengers when a flight is overbooked. *Editor's Note: This bill passed both the House and Senate and should be signed into law.*
- **House Bill 1182**, establishing an Agricultural Advisory Committee to review and comment upon draft EPD water quality regulations. Word indicated that EPD supported the proposed modification to Georgia's Administrative Procedure Act ("APA") contained within HB 1182, which would allow the General Assembly to veto adopted EPD rules by a 2/3 majority. This change would allow EPD's rules to be treated consistently with rules from all other state agencies. Word felt that if a large portion of the General Assembly does not support an adopted rule, EPD probably should not have adopted the rule in the first place. Further, Word informed the Section that to his knowledge, the General Assembly has never overturned any state agency rule using this procedure.

Editor's Note: This bill passed the General Assembly with a substantial change in the provision modifying the APA. The revised bill limits the legislative veto authority to water quality rules that directly affect livestock, dairy, poultry, or swine that are not promulgated pursuant to federal law or federally delegated programs. The General Assembly will not be able to override other EPD rules.

In addition, Word discussed **House Bill 1423**, that would amend the Georgia Motor Vehicle Emission Inspection and Maintenance Act ("I&M Act"). House Bill 1423:

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met on a weekly basis to discuss resolution of the appeal. Over thirty participants attended the weekly settlement negotiations, including representatives of EPD, the Petitioners, the Citizen Group, consulting engineers, and, of course, numerous lawyers. Given the abbreviated time schedule imposed by the ALJ, the parties retained Albert Ike of University of Georgia's Institute of Community and Area Development as a facilitator.

Settlement negotiations moved rapidly and reached a successful conclusion, with all of the parties signing a settlement agreement on February 7, 2000. Shortly thereafter, Petitioners and EPD filed a motion to dismiss the administrative appeal. The ALJ dismissed the appeal on February 23, 2000.

The Settlement Agreement

Under the Settlement Agreement, EPD agreed to submit a revised General Permit, in the form negotiated between the parties, for public notice and comment within sixty days of execution of the Settlement Agreement. In exchange, the Petitioners and the Intervenors agreed, among other things, that, until the General Permit was effective, they would not lobby the Georgia General Assembly for the purpose of altering the General Permit or any law as it governs the General Permit and not to initiate, participate in or support a legal challenge opposing the General Permit.

Pursuant to the Settlement Agreement, and ahead of schedule, EPD issued the revised General Permit for public notice and comment on February 25, 2000. The public comment period on the proposed General Permit ended on April 5, 2000. A public meeting and hearing was held on the General Permit on March 30, 2000.

The Revised General Permit

Similar to the July 1999 General Permit, the recently-issued General Permit will establish a two-tier permitting scheme that will apply under most development circumstances. First, both the site owner (the "legal title holder") and the operator (e.g., the site developer) of a construction site or common plan of development must obtain coverage under the General Permit as a "Primary Permittee" by filing a "Notice of Intent" ("NOI") with EPD if the construction activities will disturb over five acres of real property. Utility companies, builders and other entities engaging in construction activities within a development obtain coverage under the General Permit as "Secondary Permittees," also by filing a NOI. The General Permit continues to impose two major requirements on owners and operators of developments exceeding five acres: (1) preparation and implementation of an Erosion, Sedimentation and Pollution Control Plan; and (2) preparation and implementation of a Comprehensive Monitoring Program. These two major requirements were revised during the settlement negotiations to address concerns raised by the regulated community.

Highlights of the revisions to the General Permit include:

Tertiary Permittee

The revised General Permit generally adheres to the July 1999 General Permit's two-tier permitting structure, but also establishes a new category of permittee - the "Tertiary Permittee." For large common plans of development with more than one "surface water drainage area" (defined as the "hydrologic area starting from the lowest downstream point where the storm water enters the 'receiving water'[2] and following the receiving water upstream to the highest elevation of land that divides the direction of water flow"), a Primary Permittee may file a Notice of Termination for a surface water drainage area prior to the entire common plan of development being stabilized where all storm water runoff in the surface water drainage area is coming from undisturbed or stabilized areas; at least 90% of the lots in the particular surface water drainage area have been sold, permanent structures completed and final stabilization achieved; and the accumulation of acreage of undeveloped lots within the surface water drainage area is less than five acres. After filing the Notice of Termination, the Primary Permittee is required to provide written notification to the owners of the remaining lots that the owners and operators of these lots will become Tertiary Permittees. The Tertiary Permittee shall be required to file a NOI and develop a site specific plan, a Tertiary Erosion Control Plan, for its individual parcel within the surface water drainage area.

Best Management Practices Defense

As will be described in greater detail below, the General Permit requires "monitoring" (i.e., sampling and analysis) of outfalls[3] or receiving waters following storm events of a designated size to determine compliance with a 10/25 nephelometric turbidity Unit ("NTU") limit.[4] An exceedance of this NTU limit constitutes a violation of the General Permit. However, both the Erosion and Sedimentation Act, O.C.G.A. § 12-7-1 et seq., and the General Permit provide a Best Management Practices ("BMP") defense – if BMPs are properly designed and implemented. Therefore, an exceedance of the NTU limit will not constitute a violation of the General Permit. Several members of the consulting engineering

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[1] A "receiving water" is defined as "waters of the State supporting warm water fisheries, or waters of the State classified as trout streams, into which the runoff of storm water from a construction activity will actually discharge, either directly or indirectly."

[3] An "outfall" is the "location where storm water in a discernible, confined and discrete conveyance, leaves a facility or site, or if there is a receiving water on site, becomes a point source discharging into that receiving water."

[4] A nephelometric turbidity unit is a unit of measure based on the measurement of light scattered by fine particles of a substance in a suspension — here, sediment in the receiving water. A permittee is prohibited from increasing the turbidity of waters classified as trout streams by more than 10 NTU. The turbidity of waters classified as supporting warm water fisheries cannot be increased by more than 25 NTU.

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field were concerned that the wording of the certification regarding compliance with the BMP requirement was too vague and that they would not be comfortable providing the certification using the language as presented in the July 1999 General Permit. As a result, EPD agreed to language that addresses the consulting engineers' concerns and clarifies the BMP defense.

Comprehensive Monitoring Program

Perhaps the subject of greatest debate during the negotiations was the Comprehensive Monitoring Program ("CMP"), which requires sampling and analysis of receiving waters for change in NTU limits during certain specified storm events. The July 1999 General Permit provided that a Primary Permittee must obtain and analyze samples from upstream and downstream locations of *every* receiving water during *every* one-half inch/24 hour storm event. This frequent sampling requirement was seen as too onerous by the Petitioners. The Petitioners believed that sufficient data could be developed to meet the needs of EPD and comply with the regulatory requirements under a less cumbersome monitoring program. As a result of the negotiations, significant changes have been made to the CMP:

- In general, monitoring will only be required once per month for a one inch/24-hour storm event[5] rather than for every one-half inch/twenty-four hour storm event. This will significantly reduce the costs of sampling by reducing the size and frequency of storm events that must be sampled, while continuing to generate the sufficient data for a determination of compliance with the BMP requirements.
- Permittees will have the option of monitoring receiving waters or outfalls, or a combination of the two. Originally, the July 1999 General Permit only allowed monitoring of outfalls when monitoring of receiving waters was legally or physically impossible.
- EPD agreed that the sampling method does not have to comply with U.S. Environmental Protection Agency protocols regarding refrigeration. What this means is that a much less expensive automatic sampler may be used.
- Permittees will have greater flexibility regarding when samples must be collected and analyzed. If using automatic sampling devices, the samples do not have to be collected from the device until the next business day.
- Permittees conducing "linear projects" (i.e., construction activities such as pipeline, road construction and transmission line projects, where the length of the project is at least 25 times longer than the width of the project) will be allowed to designate "representative" receiving waters, thus decreasing the number of water bodies that must be monitored under the CMP. To qualify for the linear project representative sampling program, a licensed professional must certify that an increase in turbidity of an identified receiving water to be sampled will be representative of the turbidity of identified "unsampled" waters. In designating representative receiving waters, the licensed professional is to take into consideration such characteristics as site land disturbances, receiving water watershed sizes and site runoff features.
- The permit contains "alternative turbidity limits," which are used when a permittee has elected to monitor outfalls in lieu of receiving waters. These alternative turbidity limits in the July 1999 General Permit allowed a maximum discharge of 1000 NTU for certain sites that have a large surface water drainage area. In exchange for substantial revisions to the monitoring program, the Petitioners agreed to limit the maximum number to 750 NTU to address concerns of the Citizen Group.

Conclusion

All parties involved in the settlement negotiations believe that the General Permit reflects a reasonable and responsible compromise to address the concerns of EPD, the regulated community and citizens of the state of Georgia. Although the General Permit is complex and will be difficult to interpret and implement in the early stages, overall, the General Permit represents a comprehensive program that will make sufficient strides in addressing storm water runoff in Georgia without creating excessive burdens on the regulated community. ■

[5] *In other words, a permittee must sample a rainfall event greater than or equal to 1.0 inches in a 24 hour period.*

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- moves the administration of the I&M program to the Department of Natural Resources (currently the program is technically under the Department of Public Safety's authority);
- requires all counties to have an I&M program if EPA designates the county as within a nonattainment area that is required to have an I&M program and if the Board of Natural Resources designates the area as subject to the I&M Act;
- allows for the I&M program to be administered outside the (13 county) nonattainment area if the Board determines that such areas adversely influence the ambient air levels of nonattainment areas;
- permits the Board to establish a remote sensing program that would identify, through the use of remote sensing technology or other means, vehicles which are producing excessive emissions at times other than their regularly scheduled inspections;
- allows the Board, for the first time, to set standards and require inspections of heavy duty vehicles;
- allows the Board to generally establish the term for vehicle emissions inspections. Current law allows the Board to set an annual or biennial (every two years) term. Since January 2000, the inspection term has been annual;
- allows the Board to lower or increase inspection fees after an annual review.

As Word expected, House Bill 1423 was extremely controversial in the legislature. Word acknowledged that if some of the modifications to the I&M Act were not made, EPD may have to find new sources for the emission reductions that were included in the latest proposed State Implementation Plan ("SIP") submitted to EPA. EPD and the Atlanta Regional Commission ("ARC") have relied on emission reductions based on anticipated changes to the I&M program when developing the regional transportation plan and the associated mobile emission budget. As the July 2000 deadline for EPD to submit an approvable SIP for the Atlanta ozone nonattainment area approaches, finding alternative sources of emission reductions may be difficult. The ARC was scheduled to consider a new 25-year transportation plan in March 2000 and the approval of this plan is integral to the Atlanta area receiving matching federal transportation funds. *Editor's Note: At first, this bill passed the House and Senate with a key amendment prohibiting the Board from establishing inspections less frequently than biennially. This amendment would have resulted in a nonconforming SIP, as the required NO_x reductions would not be achieved. However, in the waning hours of the last day of the legislative session (March 22), a House/Senate conference committee restored the provision of the bill allowing annual inspections. The legislature approved the bill, thereby allowing the State to continue annual emissions inspections. The Governor is expected to sign this bill.*

Another key bill which Word mentioned briefly is **Senate Bill 399** (the Green Space Bill), which provides state grants to fast-growing counties willing to set aside 20% of their undeveloped land for green space. About 40 counties would divide a proposed $30 million this year. *Editor's Note: At press time, this bill had passed the Senate and House and was awaiting the Governor's signature.*

The text and current status of proposed bills may be tracked through the Internet at: www.ganet.org/services/leg/ ■

Reimbursement of Removal Costs Under the Oil Pollution Act of 1990: What CPA Giveth, The Fund Taketh Away

By J.T. Boone III, Hunton & Williams

The Oil Pollution Act of 1990 ("OPA")[1] was enacted in response to a series of accidents involving the transportation of oil in commerce. The eleven million gallon Exxon Valdez spill in Alaska, combined with three other spills within a twenty four-hour period several months later in waters off of the coasts of Rhode Island and Delaware and in the Houston Ship Channel, led Congress to conclude that existing oil spill response mechanisms were woefully inadequate.[2] Under the pre-existing regime, at least five federal statutes addressed oil spill liability and compensation; OPA was intended to replace them with a comprehensive regulatory scheme which would facilitate prompt cleanup of, and ensure compensation related to, environmentally-damaging oil spills.[3] OPA complements the federal Clean Water Act,[4] which is intended to prohibit the unpermitted discharge of pollutants to navigable waters.

This article describes OPA's mechanism for private parties, who are able to assert defenses to liability, to obtain reimbursement from OPA's Oil Spill Liability Trust Fund (the "Fund"). Although the Fund's reimbursement regulations appear innocuous, the leading, recent judicial decisions in the Fourth and Eleventh Circuits concerning those regulations indicate that parties can expect the Fund to part with its resources only reluctantly in

[1] *33 U.S.C. §§ 2701-2720 (1994 and Supp. III 1997), as amended.*

[2] *S. Rep. No. 101-94, at 2 (1989), reprinted in 1990 U.S.C.C.A.N. 722, 723.*

[3] *Id. at 3, reprinted in 1990 U.S.C.C.A.N. at 724. When enacting OPA, Congress recognized that "any oil spill, no matter how quickly we respond to it or how well we contain it, is going to harm the environment." Id. at 2, reprinted in 1990 U.S.C.C.A.N. at 724. With OPA, Congress intended to encourage prompt and voluntary remediation of spills through cooperation with federal and state authorities, while also providing a mechanism for prompt reimbursement of costs. Id. at 10, reprinted in 1990 U.S.C.C.A.N. at 732.*

[4] *33 U.S.C. §§ 1251 et seq. (1994 and Supp. III 1997), as amended.*

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some cases, particularly where regulatory requirements are unclear. In order to improve the viability of claims against the Fund, parties able to assert defenses to OPA liability should take care to develop extensive documentation concerning their cleanup activities. That documentation should not be limited to the extent of the costs incurred by a party; it should also include as much evidence as possible concerning the federal On-Scene Coordinator's ("OSC's") determination of the removal action's consistency with the National Contingency Plan ("NCP") and concerning the OSC's oversight and direction of private party removal efforts. Absent such evidence, and despite Congress' expressed intent in creating a reimbursement-friendly program, the Fund appears inclined to deny, rather than approve, private party claims for removal costs in instances where a party's response activities fall within regulatory "gray areas" and where the claims are for substantial sums of money.

I. Regulatory Background

OPA applies to any "incident" that results in a "discharge" of oil, or that "poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines." OPA defines the term "incident" very broadly to include "any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil." OPA also defines the term "discharge" broadly to mean "any emission (other than natural seepage), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping." Finally, the term "navigable waters" means "waters of the United States."[5]

When an oil spill occurs, a "responsible party" is liable for removal costs incurred in connection with a "facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters." The term "responsible party" encompasses, *inter alia*, owners and operators of vessels, on-shore and off-shore facilities, deepwater ports, and pipelines. Despite OPA's general rule of liability, an otherwise "responsible party" is not liable for removal costs resulting from a discharge if the discharge and associated removal costs were caused solely by: (1) an act of God; (2) an act of war; or (3) a third-party and if the responsible party exercised due care with respect to the oil concerned and took precautions against foreseeable acts or omissions of such third party and the foreseeable consequences of those acts or omissions.[6]

Under OPA, the term "removal" means the "containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines and beaches."[7] "Removal costs," in turn, are "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident."[8]

From a regulatory standpoint, OPA contemplates a relatively streamlined oil spill response structure: (1) discovery and notification of the spill pursuant to the Clean Water Act;[9] (2) preliminary assessment of the spill and its impacts and the initiation of corrective action (i.e., "removal"); (3) implementation of spill containment, countermeasures, cleanup, and disposal; and (4) documentation and cost recovery.[10] When a spill involves a private party, this structure translates into the following series of events. First, the party discovering the spill notifies the National Response Center ("NRC"). Second, the NRC informs the OSC. Third, the OSC, pursuant to its regulatory mandate, investigates the spill and coordinates and directs all removal action at the site. Fourth, if the OSC so elects, a responsible party may conduct any removal activity subject to OSC oversight or monitoring.

As noted above, OPA imposes only a single affirmative obligation on a responsible party: notification to the NRC of the spill. The duties of the OSC, on the other hand, are significantly greater. Although a responsible party must demonstrate that its response efforts were directed by or coordinated with the OSC in order to recover from the Fund, OPA charges the OSC with affirmatively directing and coordinating such response efforts. Although, "[w]here practicable" the OSC should make "continuing efforts . . . to encourage response by responsible parties," the OSC may not rely on responsible parties to conduct a removal and must remain ready to "take appropriate response actions" related to a spill. The OSC serves, therefore, as a safeguard for private party efforts. If those efforts are not adequately

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[5] *33 U.S.C. § 2701(21). Although this term is broadly defined, it is clear that OPA does not encompass releases that solely impact groundwater. Fund guidance indicates, however, that Fund moneys may be spent "to handle oil discharges in groundwater which are tributary to surface waters of the United States. . . . {T}he OSC must have a reasonable basis to conclude that there is a clear hydrological nexus to surface waters before taking removal action to clean up groundwater." United States Coast Guard National Pollution Funds Center, "Technical Operating Procedures for Determining Removal Costs Under The Oil Pollution Act of 1990," at 7-1 (Jan. 16, 1996) ("TOP Guidance"). Thus, the Fund contemplates that removal actions undertaken under OPA may extend to groundwater in addition to surface water in those instances where a clear hydrological nexus exists. In this manner, OPA's approach to removal costs is consistent with its approach to liability. See 33 U.S.C. § 2702(a) (general liability standard).*

[6] *33 U.S.C. § 2703(a). These very limited defenses are virtually identical to the defenses available under the Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA") of 1980, 42 U.S.C. § 9601 et seq., as amended.*

[7] *33 U.S.C. § 2701(30).*

[8] *33 U.S.C. § 2701(31).*

[9] *33 U.S.C. § 1321(b)(5).*

[10] *See, e.g., TOP Guidance at 1-2; see also 40 C.F.R. §§ 300.300 - 300.335 (1999).*

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addressing spill impacts, then the OSC must take action to ensure that OPA's objectives are achieved.

II. Recovery from the Fund

An otherwise "responsible party" under OPA, who qualifies for one of the defenses to liability under OPA, may seek its removal costs from other responsible parties in a private cost recovery action.[11] Where such an action fails to fully compensate the plaintiff, that party may look to the Fund for reimbursement.[12] Specifically, where a party can assert a defense to liability under section 2703 of OPA, that party may seek reimbursement from the Fund removal costs that are consistent with the NCP.[13] Thus, oil spill response activity involves a mix of private and public funding mechanisms.[14]

Congress specifically recognized that claims against the Fund should be granted in most instances without the restraints of stringent evidentiary or causation standards. The legislative history of the Act elaborates on this principle and states:

> The Fund is to provide compensation for damage claims fully and promptly. While the Fund must require some evidence of loss and the establishment of a causal connection with oil pollution, it should not routinely contest or delay the settlement of damage claims. The Fund will sometimes be providing compensation where there is little chance of subrogation against the discharger. Even so, litigation or lengthy adjudicatory proceedings over liability, defenses, or the propriety of claims should be reserved for subrogation actions against dischargers.[15]

Although the Fund is not a comprehensive "oil spill insurer," OPA's legislative history indicates that the Fund was intended to err on the side of reimbursement when evaluating claims.

The Fund has guidance concerning the requirements for a party to obtain reimbursement of removal costs. The National Pollution Funds Center ("NPFC"), which manages the Fund, has published the Technical Operating Procedures ("TOP") Guidance, which establishes "procedures necessary to determine oil spill removal costs" and which is meant to guide NPFC employees in their review and approval of removal costs.[16] The TOP Guidance emphasizes two points: (1) the need for private party removal costs to be consistent with the NCP in order to be reimbursable by the Fund; and (2) the importance of OSC participation in removal activities. A component of both requirements is proper documentation of removal activities. If the requirements set forth in the TOP Guidance are met, "any action necessary to contain or remove oil from water or shorelines, or otherwise necessary to minimize or mitigate damage to the public health and welfare may be . . . payable from the Fund.

A. Consistency with the NCP

The TOP Guidance recognizes that, under OPA, and "[a]lthough not necessary for [responsible party] liability, removal costs must be 'consistent with the NCP' to be payable from the" Fund. The determination of consistency is, as an initial matter, apparently the responsibility of the OSC. Significantly, the OSC's determination of whether particular costs are consistent with the NCP is not a final, appealable administrative decision.[17] Such determinations may be evaluated by a court under an arbitrary and capricious standard, however, if the denial of a claim for reimbursement is appealed.[18]

OPA's implementing regulations do not define what constitutes consistency with the NCP for purposes of reimbursement from the Fund. The TOP Guidance, however, sets forth three criteria intended to clarify the concept of "consistency:"

1. The removal activity was deemed necessary for the cleanup or the prevention of an oil spill and not otherwise contrary to the NCP.
2. The removal activity was authorized by a federally-approved response plan, the OSC or the responsible party, or was condoned by the OSC or responsible party. If there is no OSC or responsible party involvement in the incident, then good cause must be shown for the lack of coordination with the OSC.
3. The removal activity was within the scope of the tasking, either in the federally approved response plan or given by the OSC or respon-

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[11] *See 33 U.S.C. § 2708.*

[12] *Congress created the Fund under the Internal Revenue Code, 26 U.S.C. § 9509 (1994).*

[13] *33 U.S.C. §§ 2708(a), 2713; see also 33 U.S.C. § 2712(a)(4) (one purpose of Fund is to pay uncompensated "removal costs" that are consistent with NCP). The NCP provides an organizational structure and procedures for responding to discharges of oil, as well as hazardous substances, pollutants, and contaminants, and is required by OPA and other federal environmental statutes. See 40 C.F.R. §§ 300.1, 300.2 (1999).*

[14] *"The fund has various sources of revenues, including taxes collected from the petroleum industry, interest earned on fund principal from United States Treasury investments, and cost recoveries, fines and civil penalties collected from responsible parties." United States v. Conoco, Inc., 916 F. Supp. 581, 584 (E.D. La. 1996).*

[15] *S. Rep. No. 101-94, at 10 (1989), reprinted in 1990 U.S.C.C.A.N. 722, 732.*

[16] *TOP Guidance, at 1 (Jan. 16, 1996).*

[17] *See, e.g., United States v. Hyundai Merchant Marine Co., No. A94-0391-CV (HRH), 1996 U.S. Dist. LEXIS 21219, at *8 (D. Alaska Jan. 26, 1996).*

[18] *See id. Judicial review of adverse Fund claim decisions may be available under OPA, see Gatlin Oil Co. v. United States, 169 F.3d 207, 209 (4th Cir. 1999) {noting that district court had jurisdiction over Fund's claim denial pursuant to OPA section 2717(b), and the Administrative Procedure Act, 5 U.S.C. §§ 701 to 706 (1994)}. See, e.g., Plantation Pipeline Co. v. Oil Spill Liab. Trust Fund, 47 Env't Rep. Cas. (BNA) 1598, 1600-02 (N.D. Ga. 1998), aff'd, 189 F.3d 486 (11th Cir. 1999); International Marine Carriers v. Oil Spill Liab. Trust Fund, 903 F. Supp. 1097, 1102-03 (S.D. Tex. 1994).*

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> sible party. Absent clear tasking, it must be shown that the activity conducted was a customary removal action under the circumstances or there was good cause for the deviation from the norm. The OSC may terminate authorized activities and may ratify unauthorized ones for good cause if they are otherwise consistent with the NCP.[19]

The above standards appear to establish a flexible regime for determining consistency for purposes of reimbursement from the Fund, in which the practical exigencies of spill responses take precedence over a formalistic application of OPA and its implementing regulations.

B. Coordination with the OSC

The Fund's reimbursement regulations require only that the removal activities at a site be coordinated with and/or directed by the OSC.[20] At the same time, the regulations specifically recognize that, in some instances, removal activities need not be coordinated with the OSC. Thus, although coordination by the OSC is the general rule, action may be taken independent of the OSC (i.e., without coordination) under "exceptional circumstances."[21]

The TOP Guidance presumes active OSC management of removal activities. The Guidance provides that OSCs "are responsible for effective financial management and costs controls during the response, including verification of removal costs and certification of consistency with the NCP." As noted above, the OSC's active participation does not foreclose private parties from taking the initiative in oil spill cleanups. To the contrary, the TOP Guidance states that if federal "removal costs can be avoided by encouraging the [responsible party] to clean up their spills, that is always the preferred course of action." Thus, the TOP Guidance envisions responses in which the OSC exercises significant control over the types of costs incurred to clean up oil spills and, at the same time, relies on private party funding of those costs.

OPA's reimbursement regulations do not specify the form of the OSC's coordination or direction. The NCP, to which the reimbursement regulations refer, however, authorizes the OSC to either direct or monitor a removal action. The OSC may also "determine[] that effective and immediate removal [or] mitigation . . . can be achieved by private party efforts."[22] A removal is being properly carried out by a private party for purposes of 40 C.F.R. § 300.320(a)(3) if: (1) the responsible party is applying the resources necessary to remediate the release; and (2) the removal efforts comply with applicable regulations, including the NCP. A removal will be considered complete only when the OSC has so determined in consultation with an appropriate state agent.

C. Documentation of Claims Against the Fund

A private party that asserts a claim against the Fund has the burden of establishing both consistency with the NCP and coordination with the OSC. As a practical matter, a claimant should support its claim with documentary evidence to the extent possible. The NPFC's discussions of its reimbursement regulations emphasize, however, that the documentary burden for issues other than the extent of damages should be minimal.[23] Given OPA's bias in favor of reimbursement,[24] therefore, documentation which only indirectly substantiates a claim or circumstantial evidence should be sufficient to establish a valid claim against the Fund.[25] Much of the documentation related to a claim may come from the OSC, who bears the responsibility for gathering claim documentation that is sufficient to support full cost recovery.

Although the NPFC's reimbursement regulations specify particular pieces of documentation that must accompany a claim, they nowhere require that a claimant provide documentation of the OSC's determination of consistency with the NCP.[26] Despite the foregoing, the NPFC has stated informally that claimants must submit with their claim either a "[r]eport from the OSC that actions were necessary, appropriate and consistent with the NCP" or a "justification why there is no [OSC] report."[27] Thus, while there is no formal regulatory requirement that the OSC's determinations of consistency and coordination be documented, the NPFC clearly expects that such documentation be provided as part of a claim.

III. Practical Considerations When Submitting a Claim

Although few courts have had occasion to review the NPFC's implementation of its reimbursement regulations, two recent decisions, *Gatlin*

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[19] *TOP Guidance at 1-2.*

[20] *See 33 C.F.R. § 136.205 (1999).*

[21] *The regulations do not define the term "exceptional circumstances."*

[22] *40 C.F.R. § 300.320(a)(3).*

[23] *Claims Under the Oil Pollution Act of 1990, 57 Fed. Reg. 36314, 36315 (Aug. 12, 1992); accord NPFC publication, "Oil Pollution Act of 1990, Interim Claim Regulations," at *6 (Oct. 28, 1992) <http://www.uscg.mil/hq/npfc/regs.pdf>.*

[24] *S. Rep. 101-94, at 10 (1989), reprinted in 1990 U.S.C.C.A.N. 722, 732.*

[25] *See, e.g., Dana Corp. v. American Standard, Inc., 866 F. Supp. 1481, 1489 (N.D. Ind. 1994); United States v. Midwest Suspension & Brake, 824 F. Supp. 713, 730 (E.D. Mich. 1993), aff'd, 49 F.3d 1197 (6th Cir. 1995).*

[26] *See generally 33 C.F.R. § 136.105.*

[27] *NPFC Guidance on Completing Standard Claims Forms, at *3 (July 18, 1997) <http://www.uscg.mil/hq/npfc/regs.pdf>.*

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Reimbursement and Removal Costs . . .

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Oil Company v. United States[28] and *Plantation Pipeline Company v. Oil Spill Liability Trust Fund*,[29] provide important guidance concerning private parties' abilities to obtain reimbursement from the Fund for their removal activities.

A. Documentation of Removal Activities

In *Gatlin Oil*, the United States Court of Appeals for the Fourth Circuit adopted a narrow interpretation of the Fund's reimbursement regulations. The claimant/appellant Gatlin Oil, who took prompt action to remediate an oil spill caused by a third party, was forced to absorb its removal costs, rather than obtaining reimbursement from the Fund. Gatlin Oil's request for reimbursement was for costs derived from an oil spill incident caused when a vandal opened several of Gatlin Oil's fuel storage tanks, spilling 20,000-30,000 gallons of oil. Vapors from the spill ignited, resulting in a fire that destroyed substantial portions of Gatlin Oil's facility. Although the vast majority of the spilled oil was contained on land, approximately ten gallons reached a nearby creek. The OSC arrived on-site, directed Gatlin Oil to perform specific tasks related to the spill, and then turned the site over to state authorities for further monitoring. The state, in turn, ordered Gatlin Oil to perform additional spill-related activities.

On appeal from the NPFC's denial of Gatlin Oil's claim for reimbursement, the parties debated the scope of the damages that Gatlin Oil was entitled to recover from the Fund as a result of the spill. As an initial matter, the Fourth Circuit adopted the NPFC's narrow interpretation of OPA and concluded that a party may only recover removal costs and damages that result from an OPA incident, i.e., that result from a discharge of oil or from a substantial threat of a discharge of oil into navigable waters or adjacent shoreline. The court's holding limited Gatlin Oil's recovery on remand to those costs determined by the OSC to be consistent with the NCP or specifically directed by the OSC, rather than authorizing Gatlin Oil to recover all costs and damages resulting from the oil spill.[30]

The court next rejected, for several reasons, Gatlin Oil's efforts to recover removal costs incurred as a result of state directives, when such directives were not also required by the OSC. First, although Gatlin Oil asserted that the entire oil spill posed a substantial threat of reaching navigable waters, the Fourth Circuit noted the lack of evidence that the soil or groundwater contamination addressed by the state directives threatened navigable waters. Second, the court disagreed with Gatlin Oil's argument that the OSC assumed responsibility for the entire cleanup by virtue of his position. Specifically, the court noted the absence of evidence that Gatlin Oil complied with the OPA or its implementing regulations when obeying the state directives, the absence of a determination by the OSC that Gatlin Oil's activities were consistent with the NCP, and the fact that the OSC had not directed Gatlin Oil to comply with the state's directives. Based on those factors, the court concluded that Gatlin Oil could not recover from the Fund for costs incurred in responding to the state's directives.

In order to avoid similar negative outcomes in the future, a claimant should develop as much documentation as possible supporting a claim for reimbursement from the Fund. Indeed, to ensure, to the extent possible, the viability of a claim, a potential claimant should request a formal, written OSC determination as part of the claimants' spill response activities. *Gatlin Oil* indicates that, absent clear documentation of the OSC's determination and directives, a private party who later seeks reimbursement from the Fund for those actions can expect to have its claim denied.[31] Private parties should not rely on the OSC to carry out its obligations under either OPA or the NCP, and cannot presume that the OSC's failure to object to particular removal activities constitutes approval of those activities. Indeed, as *Gatlin Oil* makes clear, a party's blind reliance on the OSC's expertise and compliance with the NCP merely opens the door for the NPFC to deny that party's claim.[32]

B. Spill Notification

The importance of coordinating removal activities with the OSC cannot be over-emphasized. One important component of that coordination involves a party's initial notification to the NRC of the spill event. Failure to properly notify the NRC of a spill may result in denial of a claim, regardless of whether the claimant's removal activities were otherwise consistent with the NCP.

In *Plantation Pipeline*, a petroleum pipeline operated by Plantation Pipeline Company ("Plantation") was breached, allegedly by real estate development contractors engaged in new home construction, resulting in an oil spill that was *close* to navigable waters, but did not immediately impact such waters. Plantation notified the NRC of the spill and the OSC's representative visited the site to determine the spill's status. After performing an assessment of the spill, the OSC's representative turned the site over to state authorities "for further monitoring." Several days later, Plantation discovered that the spill had, in fact, impacted navigable waters. Plantation informed the state, but not the OSC or NRC, of that impact.[33] After

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[28] *169 F.3d 207 (4th Cir. 1999).*

[29] *47 Env't Rep. Cas. (BNA) 1598 (N.D. Ga. 1998), aff'd, 189 F.3d 486 (11th Cir. 1999).*

[30] *169 F.3d at 211. Gatlin Oil's reimbursement request encompassed all cleanup costs associated with the spill as well as damages caused by the resulting fire, plus interest. Id. at 210.*

[31] *Given the aggressive positions the NPFC has taken in litigation involving its claim denials, a claimant should assume that the NPFC will simply deny a claim based on the absence of certain materials rather than provide the claimant with an opportunity to supplement its record.*

[32] *See 169 F.3d at 213 (stating that "Gatlin's theory that the {OSC} is deemed to have directed all state and federal removal costs is contrary to" the Fund's reimbursement regulations).*

[33] *"At the time the {OSC's representative} left the scene, it had not yet been discovered that the spill threaten{ed} navigable waterways." 47 Env't Rep. Cas. at 1599. Interestingly, the parties' filings indicate that the spill occurred a mere 100 feet from surface waters. See, e.g., Brief for Appellant at 5, Plantation Pipeline Co. v. Oil Spill Liab. Trust Fund, 189 F.3d 486 (11th Cir. 1999).*

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performing extensive removal activities, Plantation presented a claim to the Fund seeking reimbursement of uninsured removal costs associated with the spill which Plantation had been unable to recover from a responsible party, including the real estate contractors formerly active near the site of the spill.[34] The NPFC denied the claim, concluding, among other things, that Plantation failed to adequately coordinate its removal activities with the OSC.

The district court upheld the NPFC's determination concerning the lack of adequate coordination. Because Plantation failed to notify the NRC and OSC of the impact to waters upon discovery, and despite its earlier notification concerning the spill to those same parties, the court held that the Fund properly denied Plantation's claim for reimbursement.[35]

After *Plantation Pipeline*, a party that promptly notifies the NRC of a spill that is in the immediate area of navigable waters and that proactively cleans up the spill when it does impact such waters may ultimately find itself foreclosed from reimbursement if the OSC fails to perform a thorough assessment of the spill. Instead of rewarding Plantation's efforts, the NPFC instead denied all reimbursement based on Plantation's technical failure to keep the OSC informed of the spread of the spill to navigable waters. The NPFC's approach is at odds with OPA's and the Clean Water Act's goal of preventing discharges of oil to navigable waters. The case disregards a party's obligation to notify the NRC when both navigable waters *and* adjoining shorelines are impacted by a discharge.[36] This approach runs counter to OPA's and the Clean Water Act's commandment that notification occur at more or less the same time as liability arises, i.e., for actual discharges to navigable waters as well as for discharges which merely threaten navigable waters.

Unfortunately for parties confused about when, or whether, to notify of a spill, delaying notification also has it problems: a party's failure to notify the NRC can result in both civil and criminal punishment.[37] Although no cases yet address whether the United States may prosecute or penalize parties who "should have known" that a release would reach navigable waters but did not notify, such a case is possible. Thus, the standard established by *Plantation Pipeline* places parties between a rock and a hard place: delay notification in order to ensure, to the extent possible, that response costs can be recovered from the Fund; or risk imprisonment, among other things, for failure to notify of a threat to navigable waters. Decisions like *Plantation Pipeline* may legitimize poor spill assessment on the part of the OSC, at the expense of the regulated community.[38] While the NPFC's approach may preserve the Fund's resources for future oil spill response activities, it is inconsistent with Congress' intent and penalizes, rather than compensates, private parties who take action pursuant to OPA to reduce the environmental impacts of oil spills.

IV. Conclusion

OPA is an ambitious effort to address the environmental impacts of oil spills. By providing certain defenses to liability and by establishing the Fund, Congress attempted to allow parties who are not "responsible" for spills to recover costs incurred in cleaning up those spills. The recent *Gatlin Oil* and *Plantation* decisions indicate that, despite Congress' intent, parties cannot expect the NPFC to easily part with its reimbursement resources.

The NPFC's successes in preserving its OPA-derived resources in the context of litigation may have serious consequences for both OSCs and potential claimants. In order to safeguard the viability of a claim against the Fund, a private party claimant must proactively ensure that the OSC carries out its responsibilities in order to obtain reimbursement, and cannot assume that the government's mere involvement in spill response activities is sufficient to support its claim.

In addition, after *Gatlin Oil*, a party's failure to obtain formal, written determinations of consistency with the NCP or to have the OSC preapprove every step in the removal process may result in the NPFC later denying a claim for reimbursement. Similarly, the *Plantation* decision implies that the NPFC prefers that claimants notify the NRC of spill events only after those events have impacted navigable waters, rather then when such waters are merely threatened. The NPFC's litigation approach also undermines the Fund's express goal of encouraging private parties to clean up spills associated with their own facilities.[39]

Private parties must exercise caution when engaging in spill response in order to increase the viability of any claims that they may choose to assert against the Fund. Under the current case law, private parties able to assert a defense to liability may be better served by deferring leadership of removal activity to the OSC, rather than attempting to conduct an appropriate removal on their own initiative.[40] ■

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[34] *47 Env't Rep. Case. at 1599.*

[35] *Id. at 1603, 1605.*

[36] *See 33 U.S.C. § 1321(b)(3), (5) (requiring notification in event of discharge to, or which threatens, navigable water).*

[37] *See, e.g., United States v. Fredericks, 38 F. Supp. 2d 396, 401 (D.V.I. 1999) {discussing conviction of defendant for failure to notify of oil spill in accordance with 33 U.S.C. § 1321(b)(5)}.*

[38] *This discussion does not disregard the fact that multiple notifications to the NRC may be appropriate in some cases. For example, a spill to soil where no threat or impact to navigable waters is implicated may be reportable as an initial matter under the Pipeline Safety Act. If that spill spreads and threatens or impacts navigable waters, it would be prudent to provide a second notice pursuant to the Clean Water Act. The submittal of multiple notifications is not, in and of itself, unduly burdensome. Requiring multiple notifications becomes problematic, however, where that requirement is not stated explicitly in OPA or its implementing regulations and where the Fund utilizes the resulting regulatory ambiguity as a mechanism for defeating otherwise appropriate claims.*

[39] *See, e.g., United States Coast Guard Federal On Scene Coordinator (OSC) Finance and Resource Management Field Guide, at 30 <http://www.uscg.mil/hq/npfc/ffarm.htm>.*

[40] *If private parties defer to the OSC, however, those parties should continue to monitor the OSC's removal effort and should seek to participate in the formulation of a cost-effective response to the spill.*

Low-Level Radioactive Waste Compact Seeks Significant Funds from North Carolina for Failure to Develop Regional Facility

By David Hoffman, Arnall Golden & Gregory

I. Introduction

The Southeast Compact Commission for Low-Level Radioactive Waste Management ("Southeast Compact"), originally formed in 1984 following Congress' passage of the Low-Level Radioactive Policy Act ("Act"), consisted of South Carolina, North Carolina, Georgia, Tennessee, Alabama, Florida, Mississippi and Virginia. South Carolina and North Carolina have since dropped out of the Southeast Compact. On December 9, 1999, the Southeast Compact adopted a resolution, ordering the State of North Carolina to pay the Southeast Compact $89.9 million by July 10, 2000. The Southeast Compact alleges that North Carolina owes this money because of its failure to develop a regional low-level radioactive waste disposal facility. North Carolina Attorney General Mike Easley has made it clear that North Carolina has no intention of paying the Southeast Compact a dime, setting up a potentially novel legal battle, but, more importantly, posing the important question as to where generators of low-level radioactive waste are going to dispose of their waste in the future. This article discusses the background of the Regional Compact system with an emphasis on the Southeast Compact and the problems it has faced siting a low-level radioactive disposal facility.

II. Disposal Problem Associated With Low-Level Radioactive Waste

Low-level radioactive waste is simply a by-product of processes that use radioactive materials. Such processes are widespread, and waste may include general trash, protective clothing, test tubes, machine parts, filters and other items exposed to radiation. Examples of generators include nuclear power plants, universities, laboratories and hospitals. The waste is either stored where it is produced or sent to privately-owned disposal facilities. The only landfills that can accept this waste are those that are specially built to prevent the release of the radioactive material into the environment. Low-level radioactive waste suffers from the same problems as other radioactive waste, namely, that there is almost no place to dispose of it. Fifteen years ago, anticipating an impending crisis, Congress set out to address the problem through legislation requiring states or groups of states to deal with the disposal of such wastes.

III. Background of the Regional Compacts

Congress passed the Act and Amendments to the Act to make states responsible for the disposal of waste generated within their borders and to encourage states to form regional groups or compacts.[1] Pursuant to the Act, and the Compact Clause of the United States Constitution, Congress approved the creation of ten regional compacts, including the Southeast Compact.[2] In 1985, only three facilities in the nation accepted low-level radioactive waste. Between 1986 and 1992, the Act allowed any low-level radioactive disposal facility operating within a regional compact to exact a graduated surcharge for waste arriving from outside the regional compact. After 1992, the Act permitted a disposal facility within an approved regional compact to refuse to accept waste generated outside its region. As a final incentive for states to provide for disposal sites for low-level radioactive wastes, the Act indicated that if a state had not provided for a disposal site by 1996, a generator of waste within such a state could demand that the state take title to and physical possession of the waste. Moreover, the state would be liable for any damages incurred by the generator if the state did not take possession.[3]

IV. Supreme Court Scrutiny of the Low-Level Radioactive Policy Act

The Act was premised on the idea that by 1996, there would be, at a minimum, a disposal site serving each regional compact.[4] However, before the "take-title" provision could ever really start to affect the states, the U.S. Supreme Court struck down the provision as violative of the Tenth Amendment of the United States Constitution.

In *New York v. United States*, 112 S. Ct. 2408 (1992), the Court found that "while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability to simply do so."[5] New York and a few New York counties in which the state was considering siting a disposal facility claimed that the Act's "incentives" violated the Tenth Amendment and the Guarantee Clause.[6] The Court upheld the Act's increased surcharges and the ability of a compact to exclude wastes generated outside its region, but struck down the take title provision. The Court held that the take title provision was not encouragement, but amounted to coercion because it forced a state to enact and enforce a federal program.[7] Nonetheless, the Court did not strike

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[1] *42 U.S.C. §§ 2021b – 2021f.*

[2] *See Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, 99 Stat. 1859 (Jan. 1986); U.S. Const., Art. I, § 10, cl. 3..*

[3] *See 42 U.S.C. § 2021(e)(d)(2)(C) (1988).*

[4] *42 U.S.C. § 2021d(c).*

[5] *112 S. Ct. 2408, 2412.*

[6] *Id. at 2417.*

[7] *Id. at 2428.*

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down the entire Act because it held that the take title provision was severable from the rest of the Act.[8]

V. Background of the Southeast Compact Commission and Georgia's Involvement in the Compact

The first order of business for each regional compact in the mid-1980's was to decide where to site a disposal facility. In this respect, the Southeastern Compact was more fortunate than most other compacts, because one of the three facilities accepting low-level radioactive waste in the entire country was conveniently located in Barnwell, South Carolina.[9] Having this facility allowed the Southeast Compact, pursuant to the Act, to exact a surcharge on waste that was sent to Barnwell, but generated outside the Southeast Compact.

The Southeast Compact used the funds generated from the waste surcharge to begin the process of selecting a site for the next regional disposal facility. The regional facility at Barnwell was scheduled to close at the end of 1992, by which time the Southeast Compact planned to have a new regional disposal facility available. Under the Compact Agreements between the states, a host state had to provide a disposal facility for twenty years or until the disposal facility had accepted 32 million cubic feet of waste, whichever came first. After serving as a host state, the state would not become the regional host state again until every other state within the Compact had taken its turn hosting a disposal facility.

Although there is an estimated 450 licensed users of radioactive material within Georgia, Georgia has approximately twenty-five generators of low-level radioactive waste. Almost all of the low-level radioactive waste generated in Georgia comes from the two Georgia nuclear power facilities, Plant Hatch and Plant Vogtle. The amount of low-level radioactive waste produced by Georgia generators is estimated to be 10,000 - 14,000 cubic feet. This is a relatively small portion of the total amount of low-level waste generated within the Southeast Compact.[10] Despite this fact, Georgia has been active in the Southeast Compact, with Jim Setzer of the Georgia Environmental Protection Division currently serving as the vice-chairman.

VI. Difficulties in Siting a Low-Level Radioactive Site in North Carolina

The Southeast Compact set up a Host Site Identification Committee and a Technical Advisory Committee to establish the criteria for the selection of the host state. On September 11, 1996, the Compact voted to designate North Carolina as the host state for the next disposal facility after Barnwell closed. In 1987, the North Carolina General Assembly accepted this designation by creating the North Carolina Low-Level Radioactive Waste Management Authority ("North Carolina Authority"). The North Carolina Authority had the task of developing, operating, and closing a low-level waste disposal site.

North Carolina appropriated $16 million to the North Carolina Authority for the initial site selection process. On February 9, 1988, the Southeast Compact adopted a resolution establishing a Host States Assistance Fund ("Fund") to "assist any state, duly designated as the next host state, with the financial costs and burdens associated with the preliminary planning, the administrative preparation, and other pre-operational costs arising out of that state's obligation to create and operate a regional facility…"[11] The source of revenue for the Fund was fees from generators collected through the Barnwell facility.

The North Carolina Authority encountered numerous problems and expended a large amount of money before it even selected a disposal site. In 1995, the North Carolina Authority selected a site in southwestern Wake County, located in the central portion of the state that includes the state capitol, Raleigh. However, before the site could be developed, North Carolina law required the facility to obtain a license from the North Carolina Division of Radiation Protection.[12]

In 1995, when it became clear that the opening of the North Carolina regional disposal facility was still years away, South Carolina withdrew from the Southeast Compact. In addition, South Carolina refused to accept waste at the Barnwell facility that was generated within North Carolina. South Carolina's exit from the Southeast Compact eliminated the source of money for the Fund. Subsequently, on August 28, 1997, the Southeast Compact notified the North Carolina Authority that the Southeast Compact would not provide any further funding for a facility, but expected North Carolina to continue its siting activities.[13] Without Southeast Compact funding and with a long, very expensive licensing process still ahead, the North Carolina Authority terminated the siting efforts in early 1998.

On June 21, 1999, Florida and Tennessee filed a sanctions complaint against North Carolina under Article 7(F) of the Southeast Compact Agreement. The Complaint alleged that North Carolina failed to meet its obligations under the Compact Agreement, as the designated second host state, when it ceased pursuing a disposal site within its borders.[14] The Complaint recommended sanctions against North Carolina for its alleged breach of the Compact Agreement. These recommended sanctions included:

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[8] *Id. at 2434.*

[9] *The other disposal facilities accepting low-level waste at that time were located in Hanford, Washington and Beatty, Nevada.*

[10] *For example, Tennessee has low-level radioactive treatment facilities which isolate low-level radioactive material from other waste. This is done to reduce the volume of waste disposed as disposal costs for low-level waste is charged based on the cubic feet of waste disposed.*

[11] *Attachment 2 (Item A) of the Sanctions Complaint against North Carolina filed by the State of Florida, June 21, 1999.*

[12] *N.C. GEN. STAT. § 104E-10 et. seq.*

[13] *Sanctions Complaint against North Carolina filed by the States of Florida and Tennessee, June 21, 1999.*

[14] *Id.*

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- Requiring North Carolina to pay the Southeast Compact $79,930,337 plus interest to reimburse the Southeast Compact for funds it paid North Carolina to develop the regional disposal facility.
- Requiring North Carolina to pay the Southeast Compact $2500 for every day beyond August 1, 2001 that an acceptable facility would not be available.
- Prohibiting North Carolina waste generators from shipping their wastes to any facility accepting wastes from Southeast Compact members until a regional facility located in North Carolina was developed.
- Requiring North Carolina to store all waste generated within the Southeast Compact until a new facility was provided.

Reacting to the Complaint, on July 26, 1999, the North Carolina General Assembly passed a law that: (1) withdrew North Carolina from the Southeast Compact; (2) directed the North Carolina Authority to take all necessary actions to close siting activities and restore the proposed Wake County disposal site; and (3) directed the North Carolina Radiation Protection Commission to study the adequacy of disposal facilities for low-level radioactive waste generated within North Carolina.[15] The Southeast Compact scheduled a hearing on the Florida and Tennessee Complaint on December 8, 1999. North Carolina's Attorney General Michael Easley released a statement on December 2, 1999, stating that North Carolina would not participate in the hearing because it believed that the Southeast Compact had no authority over North Carolina.[16]

Following a hearing on the Complaint, on December 9, 1999, the Southeast Compact issued a resolution, stating that North Carolina violated the Compact because it failed to license and construct a regional low-level radioactive waste facility, ceased all activities to obtain a license to build such a facility, failed to act in good faith, and accepted $79.9 million from the Southeast Compact to develop a regional disposal facility without doing so.[17] The Southeast Compact also issued a resolution requiring North Carolina to reimburse the Southeast Compact $79.9 million it paid to develop the regional facility. Furthermore, in the resolution, the Southeast Compact demanded $10 million in sanctions for the loss of a source of funds for the period during which the regional facility would have been in operation.[18] The resolution states that North Carolina must pay the sanctions in full before July 10, 2000.

On December 9, the North Carolina Attorney General's Office issued a press release stating that the Southeast Compact lacked the means or the authority to enforce the sanctions.[19] The Attorney General also stated that the Southeast Compact breached its agreement with North Carolina and that North Carolina's withdrawal from the Southeast Compact left the Compact Commission with no authority over North Carolina. The clear and sharp difference of opinion, along with the significant amount of money involved in the dispute, points towards litigation. If this dispute is litigated, it will be only the second time a dispute between regional compact members went to court.

VII. Central Compact Dispute with Nebraska Establishes Guidance for Southeastern Compact Dispute

A dispute, similar to the one currently brewing in the Southeast, has been occurring in the Central Interstate Low-Level Radioactive Waste Compact[20] ("Central Compact") since 1993. Despite being chosen as the host state for the first low-level radioactive disposal facility in 1987, Nebraska has failed to process a license for such a facility. The Central Compact alleges that Nebraska acted in bad faith when it took more than eight years to deny a proposed disposal facility's license application.[21] The Central Compact ultimately seeks to recover $74 million allegedly spent in developing the disposal site.[22]

As the result of the ongoing dispute between Nebraska and the Central Compact, several cases in the Eighth Circuit have established the following legal principles regarding Compact law: (1) a Compact Agreement is federal law because it was approved by Congress;[23] (2) there is no right to a jury trial in a dispute between a state and the Compact;[24] and (3) the Eleventh Amendment does not bar a suit by a Compact against a state.[25]

VIII. Possible Litigation Against North Carolina for Breach of the Compact Agreement

In order to establish that it has a justicable dispute with North Carolina, the Southeast Compact first must convince a federal court that North Carolina was subject to the Southeast Compact's December 9, 1999 reso-

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[15] *See 1999 N.C. Sess. Laws 357.*

[16] *Mike Easley Statement, North Carolina Department of Justice, December 2, 1999.*

[17] *Southeast Compact Commission for Low-Level Radioactive Waste Management Resolution adopted December 9, 1999.*

[18] *Id.*

[19] *Mike Easley Statement, North Carolina Department of Justice, December 9, 1999*

[20] *Members of the Central Interstate Low-Level Radioactive Waste Compact are Nebraska, Arkansas, Kansas, Louisiana and Oklahoma.*

[21] *Energy Arkansas, Inc. et al. v. State of Nebraska et al., 46 F. Supp.2d 977 (D. Neb. 1999).*

[22] *Id. at 978.*

[23] *State of Nebraska et al. v. Central Interstate Low-Level Radioactive Waste Compact Commission, 187 F.3d 982, 985 (8th Cir. 1999).*

[24] *State of Nebraska v. Central Interstate Low-Level Radioactive Waste Compact Commission, 974 F. Supp. 762 (D. Neb. 1997).*

[25] *Energy Arkansas, Inc. et al. v. State of Nebraska et al., 46 F. Supp. 2d 977 (D. Neb. 1999).*

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lution. North Carolina's position is that the Southeast Compact had no authority over North Carolina when it voted to impose sanctions.[26] At this point, North Carolina is not planning to respond to the Southeast Compact's sanction demand and currently is studying methods to comply with the Act.[27]

The Southeast Compact contends that under Article 7(f) of the Compact Agreement, the Southeast Compact's authority over North Carolina continued until the effective date of the sanctions imposed.[28] Although Nebraska, like North Carolina, formally has withdrawn from its regional compact, the Central Compact's authority over Nebraska has not been an issue because the Central Interstate Compact language provides for a five-year delay before a state's withdrawal from the Compact becomes effective.[29] Unlike the Central Interstate Compact language, the Southeast Compact Agreement does not contain such an explicit delay provision.

Even if the Southeast Compact succeeds in federal court, the question of how to enforce a judgement against a state remains open. Needless to say, with the high stakes and potential political ramifications of the court battles, a quick resolution to the dispute between the Southeast Compact and North Carolina is unlikely.

IX. Future Disposal Options for Low-Level Radioactive Waste in the Southeast

Regardless of the outcome of the current dispute between the Southeast Compact and North Carolina, the need for a new disposal facility within the Southeast Compact may be coming to a head. Recently, the South Carolina Nuclear Waste Task Force released a report recommending that South Carolina join New Jersey and Connecticut in the Atlantic Compact and that the Barnwell facility stop accepting waste from states other than New Jersey and Connecticut. If the Southeast Compact does not have a regional disposal site or plans to build one, the Compact will be worse off than it was sixteen years ago when the Compact was formed. Collecting money from North Carolina may help to fund the siting of another disposal site, but it probably will not eliminate the intense resistance a new proposed disposal site will face.

The Southeast Compact is aware of these problems and, given its experience with North Carolina, has abandoned plans to site another regional disposal facility.[30] Without the prospect of a new regional disposal facility on the horizon, the Southeast Compact believes it has three options to meet the disposal needs of its generators.[31] The first and least attractive option is to have the generators store their waste on-site. The second option is to send waste to the Utah disposal facility. Currently, the Utah site only accepts the least active class of low-level radioactive waste. However, the Utah facility is pursuing a license upgrade which would permit it to accept all levels of low-level radioactive waste. If the Utah facility receives this license, it could effectively replace Barnwell as the disposal location for low-level wastes generated in the Southeast. The third option that the Southeast Compact is considering for the disposal of low-level radioactive waste is continued access to the Barnwell facility. The Southeast Compact believes that South Carolina will continue to operate the facility, even if it joins the Atlantic Compact, until another regional disposal facility is sited.[32] If this happens, the Southeast Compact may be able to contract with South Carolina for the continued disposal of regional low-level waste at the facility.[33] Such a contract would be attractive to South Carolina because it would allow the Barnwell facility to charge lower rates for South Carolina generators.

These disposal options may quickly collapse if the Utah facility does not receive a license upgrade, South Carolina joins the Atlantic Compact, and the Barnwell facility stops accepting waste from Southeast Compact states. Given the unpredictable nature of the low-level radioactive waste disposal process thus far, these two possibilities very well may occur. If this happens, the Southeast Compact will be back to square one and the crisis situation that Congress feared in 1980. One could argue that this type of pressure may be needed in order for Congress' original regional disposal scheme to become effective.[34] ■

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[26] *Telephone interview with Graceland Kelly, North Carolina Attorney General's Office (Feb. 24, 2000).*

[27] *Id. Currently, generators of low-level radioactive waste in North Carolina are either sending their waste to the Utah facility or storing the waste on-site.*

[28] *See O.C.G.A. §12-8-122 et seq. for this provision and the entire text of the Compact Agreement.*

[29] *Neb. Rev. Stat. § 71-35522 (eff. August 28, 1999).*

[30] *Telephone interview with Jim Setzer of the Georgia EPD (Feb. 28, 2000).*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Once the Supreme Court struck down the "take title" provision of the federal Act, the "hammer" of the scheme was effectively removed.*

Standing at a Crossroads: Citizen Suits After *Friends of the Earth v. Laidlaw*

By Lewis B. Jones, King & Spalding

I. Introduction

On January 12, 2000, the Supreme Court issued its long-awaited opinion in *Friends of the Earch, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[1] Environmental groups feared that this case would finally close the door on citizen-suit standing – the culmination of a successful, incremental campaign by Justice Scalia to write into law views he first articulated before joining the Supreme Court. In a 1983 law review article, Justice Scalia expressed his view that the standing requirement is an essential element of the doctrine of separation of powers, and took issue in particular with Congress' ability to confer standing on private litigants to enforce environmental laws.[2] Beginning in 1992 with *Lujan v. Defenders of Widlife*,[3] the trend in the Court has been toward accepting Justice Scalia's views. *Laidlaw* seemed a perfect opportunity for Justice Scalia to take this program a major step further. Instead, it confirms that the Court is in the process of reversing the trend, and opening the doors to citizen-plaintiffs once again.

The issue presented in *Laidlaw* was whether and under what circumstances citizen-plaintiffs may have standing to sue for civil penalties that are paid into the United States Treasury. In another recent case, *Steel Company v. Citizens for a Better Environment,*[4] the Court had adopted Justice Scalia's view that the imposition of civil penalties cannot "redress" past injuries, and hence that citizen-plaintiffs do not have standing to sue for civil-penalties for wholly past violations. *Laidlaw* presented the Court with an opportunity to take *Steel Company* a step further, and to hold that citizen-plaintiffs do not have standing to sue for civil penalties under any circumstances. Over Justice Scalia's dissent, the Court rejected this position. The Court held that civil penalties may "redress" threatened injuries by detering future violations, and hence that, in appropriate cases, litigants may have standing to sue for civil penalties.

Moreover, while holding the line on *Steel Company*, the Court also recognized a new form of standing, "knowledge of pollution" standing, that may open the door to citizen-plaintiffs wider than ever.

II. Setting the Stage: Initial limitations on citizen-suit standing

A. Lujan v. Defenders of Wildlife

The trend toward limiting citizen suit standing began in earnest in 1992 with *Lujan v. Defenders of Widlife.*[5] In that opinion by Justice Scalia, the Court held that Congress does not have the power to authorize citizen-plaintiffs simply to enforce the law. Thus, despite the explicit provision in the Endangered Species Act stating that "any person may bring a civil suit on his own behalf" against any person or public official to enjoin violations of that Act,[6] the Court held that citizen-plaintiffs must demonstrate the "irreducible constitutional minimum" of standing to invoke the jurisdiction of the courts.[7]

Lujan v. Defenders of Wildlife was rooted in Justice Scalia's analysis of the separation of powers. Article III of the United States Constitution limits the judicial power to "cases" and "controversies" affecting the rights of individuals.[8] Vindicating the public interest, by contrast, is the function of the Congress and the Chief Executive.[9] The Court, therefore, stated the question in *Lujan* as whether Congress had the power to convert an undifferentiated public interest in compliance with the law into an "individual right" vindicable in the courts.[10] The Court held that it could not, as that would "enable the courts, with the permission of Congress, to assume a position of authority over the governmental acts of another and co-equal department."[11]

Therefore, Justice Scalia reasoned, it is essential to the constitutionality of the citizen-suit provisions of the environmental laws that citizen-plaintiffs first demonstrate the "irreducible constitutional minimum" of standing. This requirement has three parts. First, the plaintiff must demonstrate an "injury-in-fact," which is a harm suffered by the plaintiff that is (a) "concrete and particularized" and (b) "actual or imminent," not "conjectural" or "hypothetical."[12] Second, the plaintiff must demonstrate "causation," which means that the injury-in-fact is fairly traceable to the challenged action of the defendant.[13] Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[14]

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[1] No. 98-822, 2000 WL 16307 (U.S. Jan. 12, 2000).

[2] *See The Doctrine of Standing as an Essential Element of the Separation of Powers,* XVII Suffolk University Law Review 881 (1983).

[3] 504 U.S. 555 (1992).

[4] 523 U.S. 83 (1998).

[5] 504 U.S. 555 (1992).

[6] *See* 16 U.S.C. § 1540(g).

[7] *See* 504 U.S. at 576-77.

[8] U.S. Const art. III, § 2; *see also Lujan v. Defenders of Wildlife,* 504 U.S. at 576.

[9] *See Lujan v. Defenders of Wildlife,* 504 U.S. at 576.

[10] *See id.* at 577.

[11] *Id.*

[12] *See id.* at 560.

[13] *Id.*

[14] *Id.* at 561.

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Finally, the conditions that give rise to standing must continue to exist throughout the course of the litigation. If they do not, the case is said to be "moot," and must be dismissed for lack of jurisdiction.[15] Mootness is often described as "standing set in a time frame."[16]

B. Steel Company

In *Steel Company,* the Supreme Court, again with Justice Scalia in the lead, applied this test to deny standing in a claim for civil penalties and attorneys fees for past violations of the Emergency Planning and Right to Know Act ("EPCRA").[17] The plaintiffs alleged, and later proved, that Steel Company had failed to file the hazardous-chemical inventory and toxic-release forms that are required to be filed under that law. The defendant *did* file the reports after the plaintiffs issued notice of their intention to sue, before the suit was actually commenced.

The Court explained that a litigant must demonstrate standing separately for each form of relief sought. Therefore, the court analyzed and dismissed each prayer for relief in turn.[18] With respect to civil penalties that are paid into the United States Treasury, the Court held that an order requiring the defendant to pay such penalties would do nothing to redress any injury-in-fact the plaintiffs might have suffered. As Justice Scalia put it, "although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."[19]

With respect to attorneys' fees and litigation expenses, which obviously would benefit the plaintiffs, Justice Scalia explained that a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit.[20]

In short, because Steel Company had already corrected its violations, there was no "case" or "controversy" for the courts to decide. No order of the court could redress any injury-in-fact the plaintiffs had alleged.

III. Reversing the Trend: Federal Election Commission v. Akins and Friends of the Earth v. Laidlaw

A. *Federal Election Commission v. Akins*: Recognizing Standing to Sue for Generalized Grievances

Laidlaw was actually the second case decided since *Steel Company* to signal a change in the direction of the Court's standing jurisprudence. The first was *Federal Election Commission v. Akins*,[21] in which the court revisited the question of whether "injuries-in-fact" must be both "concrete" and "*particularized*." *Akins* relaxed this requirement.

Akins involved federal elections reporting violations. The plaintiff was a watchdog group alleging that the Republican Party had violated the contribution reporting laws. The plaintiff based standing on its injury in being deprived of information to which it, along with the public at large, was entitled by law. Over Justice Scalia's dissent, the Court held that these allegations established "injury in fact."

The Court explained that the traditional requirement that injuries be "particularized" was based on the Court's understanding of the proper role of the judiciary: the political process, and not the judicial process, was thought to provide the more appropriate remedy for widely shared grievances.[22] The Court reasoned that the problem with generalized grievances, however, is not that they are widely shared, but that they also tend to be abstract and indefinite in nature. It is the abstract nature of the harm, the Court held, that deprives such grievances of the "concrete specificity" that is necessary for standing. Thus, the Court concluded that a widely-held injury might constitute an injury-in-fact *provided the harm is sufficiently concrete.*[23]

B. *Friends of the Earth v. Laidlaw*

Following *Akins*, *Laidlaw* would seem to confirm that the Court is moving in a new direction in its standing jurisprudence. *Laidlaw* re-visited *Steel Company* on citizen-plaintiffs' standing to sue for civil penalties, and limited that holding to wholly past violations. *Laidlaw* also further relaxes what is left of the requirement that injuries be "concrete and particularized."

1. Standing to Sue for Civil Penalties

Laidlaw was very similar to *Steel Company* on the facts. The plaintiffs brought suit against the defendant in the U.S. District Court for the District of South Carolina under the Clean Water Act for violating the mercury discharge limits of its NPDES permit. The plaintiffs' prayer for relief included declaratory judgment, an injunction, civil penalties, and attorneys' fees. The district court found that the defendant had indeed violated its permit, 487 times between 1986 and 1996. It denied the requests for declaratory judgment and an injunction, however, because the defendant had achieved substantial compliance with its permit during the course of the litigation. Nevertheless, the court imposed civil penalties of $405,800, 37% of the amount the court found that Laidlaw had saved over the ten-year period by violating its permit. The court also awarded attorneys fees.

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[15] *Steel Company, 523 U.S. at 109.*

[16] *Arizonans for Official English, 520 U.S. 43, 68 n. 22 (1997).*

[17] *42 U.S.C. §§ 11001 et seq.*

[18] *See id. at 106-07.*

[19] *Id.*

[20] *Id. at 107-08.*

[21] *523 U.S. 83 (1998)*

[22] *Federal Election Common v. Akins, 524 U.S. 11, (1998)*

[23] *See id. at 24.*

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The plaintiffs appealed the amount of the award, claiming that it was too little, as it allowed the defendant to profit from its violations. Instead of increasing the penalty, however, the Fourth Circuit vacated the order altogether and remanded the case with instructions to dismiss it as moot. The Court of Appeals reasoned that the case was moot because the only relief that had survived the district court's order was the request for civil penalties. Because *Steel Company* had held that civil penalties paid into the United States Treasury cannot redress any injury-in-fact, the court found that the plaintiffs no longer had any stake in the litigation. In a footnote, the Fourth Circuit further explained that the plaintiffs' loss on the merits would preclude any recovery of attorneys' fees.[24]

The Supreme Court reversed. With respect to the plaintiffs' standing to sue for civil penalties, the Court distinguished wholly past from ongoing violations. The Court stated that "[i]t can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress."[25] Justice Scalia objected on grounds that civil penalties provide only a generalized deterrent, and therefore could not "remedy" any specific, threatened private harm. The only way to remedy a threatened harm, Justice Scalia argued, was to issue an injunction.

The Court further explained that the Fourth Circuit erred in its analysis of the doctrine of mootness. Though mootness is often described as "standing set in a time frame," the Court explained, that description is not comprehensive. There are several important exceptions. Most important is the well-established rule that a defendant's voluntary, post-commencement compliance ordinarily does not suffice to moot a case.[26] If it did, the defendant would be free to return to its old ways after the suit was dismissed.[27] Therefore, the Court stated, the test for mootness is stringent: the burden is on the defendant to make it "absolutely clear" that its allegedly wrongful conduct could not reasonably be expected to recur.[28] The Court stated that it was indeed possible that events had mooted the case, but left this inquiry for remand.

2. Standing to Sue for Injuries Due Solely to One's "Knowledge of Pollution"

In addition to the holding on civil penalties, the Court also endorsed a theory of standing called "knowledge of pollution" standing. This aspect of the opinion may be just as important as the holding on civil penalties, as it would seem to open the door to citizen-plaintiffs wider than ever.

The Court held that the *Laidlaw* plaintiffs demonstrated standing by proving that they had "reasonable concerns" about the effects of *Laidlaw's* permit exceedences.[29] The plaintiffs had submitted affidavits to the effect that they would have liked to have used the river more, for fishing and swimming and other recreational activities, if not for their fears concerning the harmful effects of discharged pollutants.

At the commencement of the suit, these allegations were certainly enough to demonstrate standing. By the end of the trial, however, the allegations with respect to the environment were proved to be untrue. In the penalty phase of the trial, the district court explicitly held that Laidlaw's discharges did not result in any health risk or environmental harm.[30] The question, therefore, was whether the plaintiffs' "reasonable fears" would suffice for standing, even if the fears were proved to be untrue.

Stating that "the relevant showing for purposes of Article III standing … is not injury to the environment but injury to the plaintiff,"[31] the Court held that plaintiffs' reasonable fears were enough. "Laidlaw's discharges, and the affiant members' reasonable fears about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests."[32]

This is a departure from prior precedent. Prior to *Laidlaw*, the Third and Fourth Circuits each considered and rejected similar theories of standing, under very similar circumstances. In both cases, *Public Interest Research Group of New Jersey v. Magnesium Elektron, Inc.*[33] and *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp,*[34] respectively, plaintiffs based standing on allegations that they had curtailed recreational uses of the river due to concerns about pollution. Both cases were dismissed on appeal for lack of standing after a full trial on the merits and a judgment imposing civil penalties. The problem in each case was that the district court had, during the penalty phase of the trial, made an explicit finding that the violations for which the defendants were cited had done no harm to the environment or to human health. On these facts, the courts ruled that the plaintiffs' fears and concerns did not constitute concrete injuries in fact.[35] An *en banc* panel of the Fourth Circuit relied on *Laidlaw* to reverse its holding in *Gaston Copper* six weeks after *Laidlaw* was decided.[36]

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[24] *See Laidlaw, 149 F.3d 303, 306 n. 5 (4th Cir. 1999).*

[25] *Laidlaw, 2000 WL 16307, at * 12*

[26] *See id., at *4.*

[27] *See id., at *13.*

[28] *Id., at *13.*

[29] *See id. at *11.*

[30] *See 956 F. Supp. 588, 602 (D.S.C. 1997).*

[31] *Laidlaw at *10.*

[32] *Laidlaw at *11.*

[33] *123 F.3d 111 (3d. Cir. 1997).*

[34] *179 F.3d 107 (3d. Cir. 1999).*

[35] *See 123 F.3d at 121; 179 F.3d at 113-14.*

[36] *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 2000 WL 204559 (4th Cir. Feb. 23, 2000) (en banc).*

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If counter-factual fears can now be recognized as "injury in fact," it is not at all clear what remains of the requirement that injuries be "concrete and particularized." These allegations of injury are wholly abstract and subjective. In previous cases where similar theories of injury have been recognized, the plaintiffs' subjective fears and concerns were linked to demonstrable harm to the environment – such as pollution in a river that is offensive to sight or smell,[37] or construction or logging activities that would obviously diminish the plaintiffs' aesthetic enjoyment of a place.[38] With respect to fears of health risks from pollution that is imperceptible to the senses, the courts have required plaintiffs at least to demonstrate their concerns are based on *actual* risks to their health, as in the case of pollution that is present in measurable quantities in stream sediments or fish tissues, and that presents a known risk.[39] Eliminating this requirement comes very close to giving citizen plaintiffs standing simply "to enforce the law," whether or not they can demonstrate a concrete injury from the violation.

As Justice Scalia argued in dissent, "[b]y accepting plaintiff's vague, contradictory, and unsubstantiated allegations of 'concern' about the environment as adequate to prove injury in fact, and accepting them even in the face of a finding that the environment was not demonstrably harmed, the Court makes the injury-in-fact requirement a sham. If there are permit violations and a member of a plaintiff organization lives near the offending plant, it would be difficult not to satisfy today's lenient standard."[40]

IV. CONCLUSION

In sum, *Laidlaw* confirms that *Steel Company* marked the high-water mark of Justice Scalia's campaign on standing. The tide seems to have shifted now, back in the direction of citizen-plaintiffs.

Indeed, between *Laidlaw* and *Akins*, it is not clear what is left of the core, constitutional requirement that a litigant must demonstrate a "concrete and particularized" injury-in-fact to invoke the jurisdiction of the federal courts. *Akins* relaxed the requirement that injuries be "particularized." *Laidlaw* relaxed the requirement that injuries be "concrete." Thus, in just the past year and a half, the Court seems to have significantly reduced the "irreducible constitutional minimum of standing." It will be interesting to see where the Court will go from here. ■

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[37] *See, e.g., Friends of the Earth, Inc. v. Consolidated Rail Corp., 768 F.2d 57, 61 (2nd Cir. 1985); Ecological Rights Foundation v. Pacific Lumber Co., 61 F. Supp.2d 1042, 1056 (N.D. Cal. 1999)*

[38] *See, e.g., Sierra Club v. Morton, 405 U.S. 727, 735 (U.S. 1972); Sierra Club Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 557 (5th Cir. 1996)*

[39] *See, e.g., L.E.A.D. v. Exude Corp., Iv. 96-3030, 1999 WL 124473, at *17 (E.D. Pa. Feb. 19, 1999).*

[40] *Laidlaw, at *20 (Scalia, J., dissenting).*