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**Without Nationwide Permit 26, is the Corps of Engineers Destined to get Swamped?**

*By Bill Sapp and Scott Hitch  
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**I. Introduction**

On March 9, 2000, the Army Corps of Engineers ("Corps") did something that it had been threatening to do since 1996, namely, replace the controversial Nationwide Permit ("NWP") 26.<sup>1</sup> NWP 26, like any general permit, was designed to free up administrative resources for more critical purposes. In that regard, NWP 26 has accomplished its mission extremely well; so well in fact, that now that this bulwark is gone, it is a virtual certainty that the Corps offices are going to be inundated with individual permit applications.

The Corps, under authority of section 404 of the Clean Water Act, regulates discharges of "dredged or fill material" into "waters of the United States."<sup>2</sup> Although the Corps issues individual Section 404 permits for projects that will likely have a detrimental effect on water quality, the Corps authorizes the vast majority of activities that impact wetlands under NWP 26 and the other nationwide permits. The NWPs authorize broad categories of activities determined by the Corps to have minimal impacts on wetlands. As long as an applicant meets all the conditions of the permit, which can include notification of the Corps, the applicant in most cases is free to construct its project.

NWPs are often easy and quick to process. Whereas an individual permit can take from 6 months to 2 years to process, a NWP authorization can in some cases be instantaneous. As discussed below, now that NWP 26 is no longer available, the Corps will be forced to process between 20-40 percent more individual permits. This, of course, will stretch the Corps limited regulatory resources still further. In short, if you or your client is planning to seek a wetlands permit, it is more crucial than ever to try to fit the proposed project within the requirements of one of the NWPs. If you have to apply for an individual permit, do so as early as possible—hopefully before the Corps becomes mired in individual permit applications.

<sup>1</sup> See 65 Fed. Reg. 12818. The same day that the Corps announced its new schedule, the National Association of Homebuilders challenged the final rule by filing a declaratory judgment action in the U.S. District Court for the District of Columbia.

<sup>2</sup> See 33 CFR Parts 320-330.

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## Message From the Chair

I hope all of you are making plans to attend this year's annual Environmental Law Institute at the Jekyll Island Club Hotel. Another great meeting has been planned for you to learn from the experts and visit with colleagues. Confirmed speakers include Phyllis Harris, Regional Counsel, U.S. EPA Region 4; Jennifer Kaduck, Branch Chief for the Hazardous Waste Branch, Georgia EPD; Betty Obenshain, Senior Regional Criminal Enforcement Counsel, U.S. EPA Region 4; Bart Daniel, the former U.S. Attorney for South Carolina; and Mary Wilkes, Water Branch Chief, U.S. EPA Region 4. These speakers and numerous panelists from the private sector plan to cover a wide range of trends and developments in environmental law. These topics include environmental criminal prosecutions, water law developments, insurance coverage disputes for environmental coverage, and a review of recent CERCLA and toxic tort cases.

The Jekyll Island Club Hotel is perfect place to host this year's program. The hotel was originally built in 1888 and is located in the center of Jekyll's National Landmark Historic District. There are several fun-filled activities for friends and families on and off the hotel property.

The Section has a history of excellent CLE programs, and we expect the program at Jekyll Island to continue this outstanding tradition.

See you at Jekyll Island!

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## EPA's New Source Review Enforcement Initiative Under the Clean Air Act

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### I. Introduction

In 1997, the United States Environmental Protection Agency (EPA) commenced a broad enforcement initiative against the electric utility industry for alleged violations of New Source Review (NSR) provisions of the Clean Air Act. The initiative, which began with an administrative investigation and is now playing out in federal district court and the 11<sup>th</sup> Circuit Court of Appeals, has significant implications for the future of the New Source Review Program, including how key provisions are interpreted, implemented, and enforced across all industry sectors.

### II. Previous Enforcement Initiatives

The utility industry is not alone. EPA has undertaken very similar NSR enforcement initiatives against other industry sectors including the wood products manufacturing industry, the pulp and paper industry, and the petroleum refining industry. The wood products industry was EPA's first target under the NSR program. The wood products initiative began in the early 1990's with an investigation of a single Louisiana-Pacific (L-P) facility and quickly expanded to a nationwide investigation of L-P and other large wood products manufacturers, including Georgia-Pacific and Weyerhaeuser. The investigation led to the issuance of Notices of Violation (NOVs), which alleged hundreds of violations at each company's facilities nationwide and resulted in significant settlements. For example, Louisiana-Pacific agreed to pay over \$11 million in civil penalties and over \$70 million for additional VOC emission controls at its existing wood products manufacturing plants across the country.

Buoyed by the settlements in the wood products initiative, EPA turned its attention to the pulp and paper industry, petroleum refiners, and electric utilities. In the pulp and paper industry initiative, EPA has already issued NOVs against several pulp and paper facilities in EPA Region 3. Investigations of other facilities are underway in numerous other EPA Regions including Regions 4, 5, and 6. EPA has also begun its investigation of the petroleum refining industry.

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## Without Nationwide Permit 26 . . .

*Continued from page 1*

### II. Nationwide Permit 26

Since 1977, the Corps has regulated discharges of dredged or fill material into headwaters<sup>3</sup> and isolated waters<sup>4</sup> under NWP 26. The earliest version of NWP 26 authorized unlimited fill in headwaters and isolated waters without notification to the Corps. By 1984, the Corps capped the authorized fill of headwaters and isolated waters to 10 acres of waters of the United States, and required notification to the Corps for disturbances of more than one acre. In its final form, NWP 26 authorized discharges of dredged or fill material only if those discharges impacted less than 3 acres or 500 linear feet of stream bed.

### III. The Replacement Permits and the New General and Regional Conditions

In replacing NWP 26, the Corps employed a five-pronged approach. First, the Corps crafted NWP 39 to serve as a “general-purpose” nationwide permit for development projects. Second, it added five new nationwide permits for discrete activities. Third, it broadened the scope of six existing nationwide permits. Fourth, it modified certain general permit conditions. Finally, the Corps gave greater authority to the Corps District offices to develop regional conditions to the nationwide permits.

#### A. Nationwide Permit 39

Under NWP 39, discharges of dredged or fill material associated with construction or expansion of residential, commercial, and institutional buildings and their “attendant features” is allowed, provided certain conditions are met. These conditions are more stringent than the conditions under NWP 26. Additionally, the NWP 39 permit process is more onerous than that of NWP 26, providing less incentive for developers to avoid the individual permitting process through complying with NWP 39.

NWP 39 applies to all non-tidal waters of the United States, excluding non-tidal wetlands that are adjacent to tidal waters. Though NWP 39 covers more area than NWP 26, which was restricted to headwaters or isolated waters, its scope has been significantly reduced from NWP 26 through its other provisions.

As stated above, NWP 39 applies to all discharges associated with development of residential, commercial, and institutional building foundations and building pads, including “attendant features” such as roads, parking lots, garages, yards, utility lines, stormwater management facilities, and recreation facilities.

Most notably, where NWP 26 authorizes discharges that impact less than three acres or 500 linear feet of stream bed, NWP 39 can only be used if the discharge causes the loss of less than ½ acre of non-tidal waters or 300 linear feet of stream bed. Thus, many development projects that were included under NWP 26 will be excluded from NWP 39.

Applicants for NWP 39 must notify the Corps if a discharge will eliminate 1/10 acre of open waters—even for intermittent or perennial streams—below the ordinary high water mark. Similarly, if NWP 39 is used in conjunction with another NWP and the total loss of acreage exceeds 1/10 acre, the applicant must notify the Corps. For discharges causing the loss of 1/10 acre or less, the developer is required to submit a report of the activity within 30 days of completion of the work. If wetlands or other “special aquatic sites” are involved, the notifications must include a delineation of the affected area.

NWP 39 specifically requires developers to “avoid and minimize discharges . . . to the maximum extent practicable.” Applicants are required to explain how they propose to achieve this “avoidance and minimization of losses of waters” in their notification to the Corps. Additionally, applicants must provide a “compensatory mitigation proposal” for offsetting any losses of waters that do occur.

As part of the “compensatory mitigation,” required by NWP 39, applicants must establish and maintain wetland or upland vegetated buffers on open waters or streams in the project area by deed restriction, conservation easement, protective covenant, or other means. These buffers must be at least 25 to 50 feet wide on each side of the stream, but can be increased by the District Engineer.

#### B. New Nationwide Permits

The new nationwide permits are more activity-specific than NWP 39. Table 1<sup>5</sup> details the new nationwide permits, including NWP 39, and their relevant characteristics:

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<sup>3</sup> *Headwaters are defined by NWP 26 as “non-tidal streams, lakes, and impoundments that are part of a surface tributary system to interstate or navigable waters of the United States with an average annual flow of less than 5 cubic feet per second.” 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.*

<sup>4</sup> *Isolated waters are defined as “non-tidal waters of the United States that are not part of a surface tributary system to interstate or navigable waters and are not adjacent to such surface tributary systems to interstate or navigable waters.”*

<sup>5</sup> *Public Notice for Federal Register Notice Announcing New Nationwides, U.S. Army Corps of Engineers, Savannah District, Mar. 15, 2000.*

*Continued on page 4*

**Update on EPD's General NPDES Permit . . .**

*Continued from page 3*

NWP	Title/Description	Applicable Waters	Thresholds	PCN <sup>6</sup>
39	Residential, Commercial, and Institutional Developments - building pads, building foundations, and attendant features	Non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters	½ acre; 300 linear feet of stream bed	1/10 acre; all below the ordinary high water mark
41	Reshaping Existing Drainage Ditches - modify cross-section of currently serviceable drainage ditches - cannot increase drainage or flows or relocate ditch	Non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters	Limited to minimum necessary	Sidecast into waters of the U.S.; reshape greater than 500 linear feet
42	Recreational Facilities - facilities integrated into natural landscape without substantial grading or filling - examples: trails, campgrounds, environmentally designed golf courses	Non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters	½ acre; 300 linear feet of stream bed	1/10 acre
43	Storm Water Management Facilities - construction or maintenance - no new construction in perennial streams	Non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters	½ acre; 300 linear feet of stream bed	1/10 acre
44	Mining Activities - aggregate (sand and gravel and stone) mining - hard rock/mineral mining	Isolated waters; non-tidal wetlands; lower perennial streams	½ acre	All activities

**C. Modifications to Existing Nationwide Permits**

In addition to creating five new nationwide permits, the Corps has modified six other NWPs so that they will cover additional activities, namely, activities that were once covered under NWP 26. Table 2<sup>7</sup> includes a description of these modified permits:

NWP	Title/Description	Applicable Waters	Thresholds	PCN
3	Maintenance - added removal of accumulated sediments from vicinity of existing structures - added activities in waters associated with replacing uplands damaged by storms	All	200 linear feet from structure; 50 cubic yards	All except repair, replacement, or rehabilitation of structures or fills
7	Outfall Structures and Maintenance - added removal of accumulated sediments from intakes, outfalls, and canals	All	Limited to original configurations	All activities
12	Utility Activities - added substations - added foundations for overhead utility line towers, poles and anchors - added permanent access roads for utility line maintenance	Non-tidal waters, excluding adjacent to tidal waters (substations, access roads); all waters (other activities)	½ acre (substations); minimum necessary for foundations; ½ acres (access roads)	1/10 acre (substations); 500 linear feet of above-grade access road; impervious roads
14	Linear Transportation Crossing - added larger crossings for public projects only - no change for private roads and public crossings in tidal waters and non-tidal wetlands adjacent to tidal waters	Non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters  All	½ acre (public)  1/3 acre (public and private)	1/10 acre; all below ordinary high water mark
27	Stream and Wetland Restoration Activities - added restoration of non-tidal streams and open waters - added restoration of tidal waters	All	No limit	Non-federal public or private land (no agreement)
40	Agricultural Activities - discharges into non-tidal wetlands to increase agricultural production - relocation of existing drainage ditches constructed in non-tidal streams - construction of building pads for farm buildings	Non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters	½ acre; 300 linear feet of stream bed	1/10 acre (activities not reviewed by National Resource Conservation Service; all farm buildings)

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## **D. General Conditions**

The Corps further tailored its replacement of NWP 26, by changing some of the General Conditions (“GC”) that apply to nationwide permits. In the following, we discuss the most notable of these changes.

First, the Corps modified GC 9 to require permittees to develop and implement water quality management plans for certain nationwide permits. Such plans are designed to ensure that activity authorized—both through the use of storm water management techniques and vegetated buffers—causes only a minimal impact to the waters of the U.S.

Second, although GC 19 still recommends that permittees locate compensatory mitigation in the same watershed as the impacts, the Corps recognizes that there may be occasions when it may make more ecological sense to do out-of-watershed mitigation to help restore a particularly degraded watershed. The GC also puts limits on the amount of vegetated buffers that can serve as mitigation.

And third, GC 26 prohibits the use of certain nationwide permits in the 100-year floodplain. Any development in the floodplain will have to go through the individual permit process.

## **E. Savannah District<sup>8</sup> Regional Conditions**

In addition to the General Conditions described above, the Savannah District Corps has proposed general regional conditions that would apply to projects in Georgia, in addition to the specific requirements of the NWPs. The most of notable of these include the following:

### **1. General Restrictions**

The proposed regional conditions would add three additional restrictions to all NWPs. First, NWPs would be prohibited for non-linear projects that would result in bank filling, relocating, or culverting of more than 500 linear feet of intermittent or perennial streams in north Georgia (“North Georgia Stream”). Second, no NWP could be used for any project that would impact compensatory mitigation sites or mitigation banks. Additionally, the Savannah District would not allow any other NWP to be used in conjunction with NWP 39 or 44.

### **2. Pre-Construction Notification Requirements**

Under its new conditions, the Savannah District requires pre-construction notifications (“PCN”) in the following four situations in which they are not required by the final rule: (a) projects that would impact more than ¼ acre of wetland or 100 linear feet of a North Georgia Stream; (b) projects that would impact waters of the United States or adjacent wetlands that have been designated as trout streams, 303(d)–listed streams, or outstanding water resources; (c) projects that would result in bank to bank filling, relocating, or culverting of a North Georgia Stream within the boundary of a watershed containing threatened and endangered species, as identified by the U.S. Fish and Wildlife Service; and (d) projects within

2000 feet of a National Wildlife Refuge or National Park.

Additionally, the Savannah District could require a pre-application meeting for NWPs 12, 14, and 44. For projects requiring mitigation, the District is requiring that compensatory mitigation be submitted with the PCN.

### **3. Mitigation Requirements**

Mitigation is required for any project done in connection with any NWP that causes the loss or adverse modification of more than ¼ acre of waters of the U.S. or adverse impact to more than 100 feet of a North Georgia Stream. For impacts of ¼ to 1 acre of waters of the U.S., or less than 200 feet of a North Georgia Stream, mitigation may be provided through a commercial mitigation bank. For impacts larger than 1 acre, not more than 50 percent of the mitigation can be provided by preservation. In-kind mitigation, including streamside buffers, restoration, or purchase of stream mitigation credits, will be required for projects including bank-to-bank filling, relocating, or culverting of more than 200 feet of a North Georgia Stream.

### **4. Regional Conditions for Specific NWPs**

Some of the regional conditions only apply to certain nationwide permits. Three examples are discussed below.

Under the regional conditions, NWP 14 or 44 cannot be used in waters of the U.S. supporting anadromous<sup>9</sup> fish or adjacent and tributary waters within 1000 feet of such waters. The District has developed a list of these waters. A mitigation plan would be required for all impacts to waters of the U.S. in certain cases as well. Additionally, an individual public road crossing cannot be authorized under NWP 14 if it impacts more than 300 linear feet of a North Georgia Stream. Furthermore, the total impacts of all crossings for a particular project under NWP 14 cannot exceed 10 acres of wetland or 1500 linear feet of North Georgia Stream. Finally, the regional conditions for NWP 14 require the use of culverts to prevent obstruction of normal sheetflow when a project crosses a floodplain.

Under the regional condition for NWP 43, storm water management facilities cannot cause more than 1/3 acre of permanent impacts to wetlands. Additionally, cumulative project-related wetland impacts are limited to 2 acres. This restriction would include permanent, temporary, and secondary impacts to wetlands.

## **IV. Conclusion**

In light of the above changes to the nationwide permit program, one thing is certain: the Corps will be processing significantly more individual permits. Corps offices will be inundated with these applications and applicants likely will face significant permit processing delays as a result. Consequently, it is more important than ever to try to fit projects within the limitations of a nationwide permit. If that is not possible, file your individual permit as early as possible. ■

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<sup>6</sup> *Preconstruction notification to the Corps required.*

<sup>7</sup> *Id.*

<sup>8</sup> *The Regulatory Branch of the Savannah District administers the regulatory program for the entire state of Georgia under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899.*

<sup>9</sup> *Anadromous fish are those species, such as salmon, that migrate from salt water to spawn in fresh water.*

### III. Regulatory Programs At Issue

In each industry sector, EPA has been investigating compliance with three separate, but related, regulatory programs under the Clean Air Act — Prevention of Significant Deterioration (PSD), nonattainment area New Source Review and New Source Performance Standards (NSPS). All three programs are designed to ensure that new sources of regulated air pollutants meet stringent technology-based emission limits.

PSD and nonattainment NSR are pre-construction review and permitting programs. The PSD program applies to sources locating in areas of the country that meet the national ambient air quality standards. To obtain a PSD permit, affected sources must demonstrate that they will comply with emission limits based on the Best Available Control Technology (BACT) and will not cause or contribute to a violation of a national ambient air quality standard. The nonattainment NSR permitting program applies to sources locating in areas of the country that do not meet national ambient air quality standards for one or more pollutants. This program requires sources locating in such areas to demonstrate that they will: (1) meet the Lowest Achievable Emission Rate (LAER) and (2) more than offset all of their emissions with emission reductions in the area such that the project will result in an overall improvement in air quality in the nonattainment area.

NSPS, on the other hand, are minimum emission standards established by EPA for certain source categories, such as fossil-fuel-fired steam generating units and industrial-commercial-institutional steam generating units. The PSD and nonattainment area NSR requirements apply in addition to, and are typically more stringent than, any applicable NSPS.

Existing sources can also trigger these new source standards and permitting requirements, but only if they undergo a “major modification” as that term is defined in the regulations. Under the PSD and nonattainment area NSR rules, a “major modification” is a “physical or operational change” that “results in” a “significant net emissions increase.”<sup>1</sup> Under the NSPS rules, a “major modification is a “physical or operational change” that “results in” an “increase in the emission rate . . . of any pollutant to which a standard applies.”<sup>2</sup>

The PSD and nonattainment area NSR regulations specifically provide that certain types of changes do not constitute a “physical or operational change,” including routine maintenance, repair and replacement activities, an increase in hours of operation or production rate, or use of an alternative raw material or fuel that the source is “capable of accommodating.”<sup>3</sup> The NSPS regulations contain very similar exclusions.<sup>4</sup>

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<sup>1</sup> 40 CFR §§ 51.165(a)(1)(v)(A) and 52.21(b)(2)(i).

<sup>2</sup> 40 CFR § 60.14(a).

<sup>3</sup> 40 CFR Sections 51.165(a)(1)(v)(C) and 52.21(b)(2)(iii).

<sup>4</sup> 40 CFR Section 60.14(e).

<sup>5</sup> U.S. EPA, *Office of Enforcement and Compliance Assurance, Office of Regulatory Enforcement, Enforcement Alert, Vol. 2, No. 1, Jan. 1999.*

### IV. Current Enforcement Initiatives

The federal enforcement initiatives currently underway focus primarily on whether existing sources in each industry sector have undertaken “major modifications” without first obtaining the appropriate PSD and/or NSR permits and complying with applicable NSPS. In January 1999, EPA’s Office of Enforcement and Compliance Assurance (OECA) issued an “Enforcement Alert,” in which EPA announced its concerns about potential widespread noncompliance with federal NSR requirements and identified “common” violations.<sup>5</sup> According to EPA, widespread violations include, among other things, improper use of the regulatory exemptions, improper reliance on AP-42 emission factors, and/or otherwise incorrect emission calculations.

Of the federal enforcement efforts underway, none are as far along as the electric utility industry initiative. That initiative is currently focused on companies that operate coal-fired power plants located in EPA Regions 3, 4, and 5. On November 3, 1999 EPA issued NOV’s and simultaneously filed civil complaints in federal district courts across the eastern U.S. against seven electric utilities — American Electric Power Company (AEP), Cinergy Corp., FirstEnergy Corp., Illinois Power Company, Southern Company, Southern Indiana Gas and Electric Company (SIGECO), and Tampa Electric Company (TECO). EPA also issued a NOV and an administrative order to the Tennessee Valley Authority (TVA). EPA has since issued NOV’s to additional companies, including Virginia Electric Power Company (VEPCO) and Duke Energy Corp.

In each of these cases, EPA maintains that many long-standing utility industry maintenance practices, which are intended to preserve and improve the reliability, efficiency, and safety of electric generating units without increasing their hourly emissions, are, in fact, non-routine “modifications” under the NSR regulations and, therefore, triggered new source review. The list of alleged violations includes boiler tube replacements, which are common maintenance projects across the utility industry. The utility industry strongly disagrees with OECA’s interpretation of the NSR rules and is defending itself against what it sees as an attempt to apply retroactively new interpretations of the rules to actions taken by industry and state and federal agencies many years ago.

If the projects identified by EPA in these enforcement actions are found to be non-routine, the finding would have significant implications not only for the utility industry but for other source sectors as well. In each of the pending cases, EPA is seeking substantial civil penalties and injunctive relief that would require affected units to come into compliance with new source standards for nitrogen oxides (NOx), sulfur dioxide (SO<sub>2</sub>), and particulate matter (PM).

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## **EPA's New Source Review . . .**

*Continued from page 6*

To date, only one case has been settled. This spring, TECO announced that it had reached a settlement with the State of Florida in connection with the alleged violations at its plants, and, several weeks later, the Company entered into a Consent Decree with EPA. To resolve its case, TECO agreed to invest approximately \$1 billion in two of its coal-fired power plants to reduce emissions of NO<sub>x</sub>, SO<sub>2</sub>, and PM. In addition, TECO agreed to pay \$3.5 million in civil penalties. EPA has indicated that it would expect more substantial penalties in order to resolve the allegations against the other electric utilities involved in this initiative.

The civil actions pending in the district courts are still in the early stages. In May, AEP filed a motion to dismiss the government's complaint in its case on several grounds, including statute of limitations. Preliminary jurisdictional motions have also been filed in the Southern Company case, which is pending in the Northern District of Georgia. At press time,

discovery had not yet begun in any of the cases.

Some or all of the legal issues presented by the pending cases could be heard in the next year by the 11<sup>th</sup> Circuit Court of Appeals in Atlanta. On May 4, TVA filed a petition for review of its administrative order with the 11<sup>th</sup> Circuit on the grounds that the order constitutes final agency action under the judicial review provisions of the Clean Air Act. The administrative order alleges the same types of violations and seeks the same relief sought by EPA in the civil complaints filed by EPA against the other electric utilities. EPA will almost certainly attempt to oppose jurisdiction in the Court of Appeals in favor of an administrative review process. If the 11<sup>th</sup> Circuit finds that it has jurisdiction, it will be reviewing numerous legal issues associated with the scope of the NSR rules that could have a significant impact on all source sectors. If the Court of Appeals does not take the case, given the stakes involved, the issues may have to be resolved in the federal district courts over the next two or three years. ■

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## **Should We Be Testing for MTBE in Georgia?**

*By Scott Starr, P.E., Senior Engineer, Levine-Fricke Recon<sup>1</sup>*

The presence of methyl tertiary-butyl ether (MTBE) in groundwater is the latest highly publicized environmental concern for public health, as demonstrated by a prime time news story on the television show, 60 Minutes, that aired in January 2000, and the Clinton Administration's March 2000 proposed ban on the use of MTBE. The source of MTBE in groundwater is the prevalent number of leaking gasoline underground storage tanks (LUSTs) throughout the country. In Georgia, MTBE is not tested for as part of the investigation and remediation of LUST sites. Therefore, downgradient properties from LUST sites and even drinking water supplies may be unknowingly impacted from MTBE contamination.

### **I. Background**

MTBE is a fuel additive in gasoline that has been used since 1979 as an octane-enhancing replacement for lead. More recently, all the major oil companies have added this constituent to gasoline as a fuel oxygenate to reduce ozone and carbon monoxide emissions in the most polluted areas of

the country as part of two U.S. Environmental Protection Agency (EPA) programs under the 1990 Clean Air Act Amendments.<sup>2</sup> The first program is the "federal oxygenated gasoline" program which began in October 1992. This program has been implemented in some 40 metropolitan areas throughout the United States, with the intended purpose to reduce carbon monoxide emissions during the winter months.<sup>3</sup> The second program is the "federal reformulated gasoline" program which has been implemented in some 28 metropolitan areas beginning in January 1995.<sup>4</sup> The primary intended purpose of this program is to reduce ozone production.

Thus, in an effort to reduce air pollution pursuant to federal mandates, we may have adversely impacted drinking water supplies throughout the country. As a result of the use of MTBE, private and municipal drinking water supplies have been condemned in California and other parts of the country, following the detection of MTBE in these water supplies. The South Tahoe California Public Utilities district has discovered that two public supply wells have been impacted by MTBE. They have had to subsequently close the two wells and find alternate water supplies. In all, MTBE has been found in more than 44 wells and 30 drinking water reservoirs throughout California.<sup>5</sup>

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<sup>1</sup> Mr. Starr is a registered Professional Engineer in the State of Georgia with over 8 years of experience in assessing and remediating contaminated properties. He has managed the closure and assessment of over 100 USTs in thirteen states.

<sup>2</sup> Squillance, Paul J., James F. Pankow, Nic Korte, and John S. Zogorski, *Environmental Behavior and Fate of Methyl tert-Butyl Ether (MTBE)*, U.S. Geological Survey – National Water Quality Assessment Program, 2/98.

<sup>3</sup> API Publication Number 4699, February 2000, *Strategies for Characterizing Subsurface Releases of Gasoline Containing MTBE*.

<sup>4</sup> *Id.*

<sup>5</sup> ACWA, *MTBE Status Report*, August 1999.

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## Should We Be Testing . . .

Continued from page 7

### II. The Problematic Behavior of MTBE

The concern over MTBE in the groundwater is that it behaves differently from other petroleum constituents when released. Engineers and environmental regulators have previously used the gasoline constituent benzene as the driver for the detection and remediation of gasoline releases because of its high solubility and known carcinogenicity. However, new data indicates that MTBE is more resistant to biodegradation and less likely to adsorb to soil than benzene. The end result in the differences in characteristics between MTBE and benzene is that MTBE will migrate into groundwater and off-site more rapidly than benzene and typically will remain in the environment longer.

### III. Federal Regulation of MTBE

Although very little toxicological data has been collected on MTBE, EPA has tentatively classified this constituent as a *possible human carcinogen* but has yet to establish any regulatory standards.<sup>6</sup> It is unlikely that any federal regulatory standard will be promulgated in the near future given the lengthy regulatory procedures and toxicological research that is required in developing an enforceable standard. EPA has established a drinking water advisory for MTBE at between 20 and 40 :g/l (parts per billion) based upon taste and odor thresholds.<sup>7</sup> To put this concentration into perspective, it would just take one gallon of reformulated gasoline containing approximately 8% MTBE mixed with 4 million gallons of water to result in 20 :g/l. Typically, “federally oxygenated gasoline” and “federal reformulated gasoline” contain 15% and 11% MTBE by volume, respectively. Therefore, just one gallon of gasoline with MTBE, added as required by the 1990 Clean Air Act Amendments, can taint over 4 million gallons of water based upon taste and odor thresholds.<sup>8</sup>

### IV. State Regulation of MTBE

Various states across the country have taken the initiative and established their own regulatory standards and MTBE sampling requirements at LUST sites. For example, in the southeast, Florida, Alabama, South Carolina, and North Carolina have implemented clean-up levels for MTBE ranging from 20 to 500 :g/l.<sup>9</sup> However, some states, including Georgia, do

not yet require any type of testing for MTBE at LUST sites.

Reportedly, the Georgia Department of Natural Resources, Environmental Protection Division (EPD) is hesitant to require testing for this constituent at this time since there are currently no enforceable regulatory standards such as a drinking water Maximum Contaminant Level (MCL) or Georgia In-Stream Water Quality Standard. Lisa Lewis, Unit Coordinator, with the Georgia EPD UST Management Program said that the EPD staff is presently preparing for the Director of the EPD recommendations on the management of MTBE from petroleum releases.<sup>10</sup> Ms. Lewis also said that the EPD is requiring that State Contractors test for MTBE during their next round of groundwater sampling at State managed LUST sites. This data will be used by the EPD as an indicator of the potential frequency of this constituent in Georgia’s groundwater.

### V. MTBE As An Indicator of the Extent, Age and Source of Contamination

Given the EPD UST Management Program’s non-testing requirement for MTBE and the lack of a regulatory standard, environmental professionals in Georgia typically do not sample for MTBE as part of due diligence activities in property transfers. However, there may be compelling reasons why they should be testing for MTBE.

Generally, MTBE plumes migrate faster than benzene, toluene, ethylbenzene, and xylenes (BTEX) plumes and are larger than BTEX plumes. Although testing for benzene is a good indicator parameter of contamination at a source area, MTBE is a better indicator of the leading edge of petroleum plumes since this constituent moves through groundwater more rapidly than benzene and is more resistant to biodegradation. Based upon MTBE’s rapid movement in groundwater, it will typically impact downgradient properties sooner than benzene. Only testing for BTEX at off-site locations may not fully characterize the extent of the release. Therefore, potential purchasers may want to request that consultants test for MTBE during Phase II site assessments and other studies conducted during the due diligence period of property transfers.

Notwithstanding MTBE’s more rapid movement in groundwater, benzene can still be the leading edge indicator in groundwater at many sites because the petroleum release may have occurred well before the use of MTBE. Since MTBE has only been added to gasoline for approximately 21 years, this definitive time period makes it a powerful indicator for dating releases. For example, if MTBE is detected in a plume, then the release likely occurred after 1979.

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<sup>6</sup> U.S. EPA Office of Water Fact Sheet: *Drinking Water Advisory: Consumer Acceptability Advice and Health Effects Analysis on Methyl Tertiary-Butyl Ether (MTBE)*, December 1997.

<sup>7</sup> *Id.*

<sup>8</sup> API, February 2000, pp. 2-2 to 2-3.

<sup>9</sup> U.S. EPA, *MTBE Groundwater Clean-up Levels for LUST Sites: Current & Future*, 1999. <http://www.epa.gov/swerst1/mtbe/mtbemap.htm>

<sup>10</sup> Interview with Lisa Lewis, Corrective Action Unit Coordinator, Georgia EPD Underground Storage Tank Program 2/7/00. Editor’s Note: Lisa Lewis confirmed this intention at the April, 2000 Environmental Section brown bag.

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## Should We Be Testing . . .

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The detection of MTBE can also be used to differentiate between commingling plumes and source areas. For example, when more than one gasoline service station is the suspected source of leaking underground storage tanks impacting a downgradient property, but only one station used gasoline with MTBE, this constituent can identify the source of contamination. This test is useful because not all gasoline contains MTBE. Currently, oxygenates are added to only 30 percent of the gasoline used in the United States.<sup>11</sup> Although MTBE is the most commonly used oxygenate because of its low cost, ease of production, and favorable transfer and blending characteristics, other oxygenates are used, such as ethanol and methanol. Therefore, an evaluation of the type of oxygenate used by one petroleum marketer versus the other can be useful to differentiate commingling plumes.

## VI. Potential Regulatory and Legal Challenges

MTBE's physical properties make it a more difficult constituent to remediate than BTEX. MTBE is a recalcitrant constituent, i.e., it does not readily biodegrade under various environmental conditions. Therefore, it persists in the environment longer than BTEX. Because of these physical differences, some forms of remediation that work well with BTEX are ineffective with MTBE.<sup>12</sup> MTBE can still remain at elevated concentrations at sites that have demonstrated successful remediation of BTEX under applicable regulations. For example, in Georgia, many LUST sites are being remediated using monitored natural attenuation; that is, allowing the petroleum contamination in groundwater to be cleaned-up by natural biological and physical processes. The completion of remediation is determined when groundwater monitoring data indicate that the groundwater plume has stabilized, BTEX concentrations are below applicable regulatory standards at the point of compliance, and are naturally decreasing. As discussed above, MTBE is not readily biodegraded. Therefore, even though a demonstration can be made that the BTEX plume has

stabilized and concentrations are decreasing, the same natural processes are likely not affecting the MTBE concentrations. Without MTBE sampling data, a LUST site may receive a "no further action" letter from the state, although the site may still be contaminated with MTBE that poses a threat to downgradient receptors.

If EPD begins to require testing for MTBE, sites that have previously received "no further action" letters could face additional remediation requirements in the future. Given the EPD's current case load and the potential political backlash, it is highly unlikely that the EPD would require MTBE testing at previously closed sites without data indicating a problem. This evidence could arise when a former LUST site is reassessed as part of a property transfer and a previously undetected MTBE problem is discovered, requiring notification and remediation. This sampling for MTBE in the future may lead to many conflicts between current and former property owner to determine responsibility in the event that a closed site is re-opened due to subsequent MTBE sampling.

## VII. Conclusion

In conclusion, EPD is not currently requiring the testing for MTBE at LUST sites in Georgia. However, given the publicity and growing evidence that this constituent is very problematic once released into the subsurface, it is likely that Georgia will require testing for MTBE in the near future, as part of investigating and remediating LUSTs. In the meantime, MTBE can be used as an effective indicator for assessing the extent of contamination, because it moves more rapidly in groundwater than benzene and is likely to reach downgradient properties before benzene. Also, testing for MTBE can be used to approximate a date of a release because MTBE has been used in gasoline only for the past 21 years. It can also be a powerful tool for differentiating between commingling plumes and source areas. Furthermore, MTBE may be used to determine if and when remediation has been completed because it can remain at sites even after BTEX constituents have been effectively cleaned-up. In any case, MTBE poses significant challenges to both regulators and the regulated community. ■

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<sup>11</sup> API Document Number 4699, p. 2-2.

<sup>12</sup> U.S. EPA Office of UST MTBE Fact Sheet #2: Remediation of MTBE Contaminated Soil and Groundwater, January 1998.

## From the Editor:

Thanks to the contributing writers for this edition of the Environmental Section newsletter. We plan to publish at least one more newsletter this year. If you would like to submit an article for the next edition, please call or send me an e-mail. I also welcome any comments regarding the newsletter.

— Anne H. Hicks

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## EPD Representatives Provide Informative UST Program Update at April Brown Bag

On April 13, 2000, Dick Swanson, J.D., Program Manager and Legal Assistant of the Georgia Environmental Protection Division's ("EPD") Underground Storage Tank ("UST") Program, and Lisa Lewis, P.G., Unit Coordinator for Corrective Action Unit II in the UST Program, provided an update about EPD's UST Program to Environmental Section members at the offices of Jones, Day, Reavis & Pogue.

Mr. Swanson explained that claims against the Georgia Underground Storage Tank Trust Fund ("GUST Fund") have slowed in recent months, most likely due to the passage of the December 1998 deadline for upgrading Georgia USTs. To date, EPD has collected \$ 146 million in the GUST Fund and has spent or allocated \$137 million toward cleaning up sites with reported UST releases.

Ms. Lewis informed section members that the UST Program recently issued proposed new UST closure guidelines to replace the existing guidance document entitled "So You Want to Close an UST?" (dated August 1995). EPD directs users to follow the proposed guidance document, which will become effective on July 17, 2000. Changes in the guidance include clarifications on the number and location of soil and groundwater samples that must be taken after the removal of an UST. The new guidance document also includes a model form for an UST Closure Report that will facilitate the preparation and review of the Report. ■

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## Tri-State Water Wars Update

*By Mary Maclean Asbill, Southern Environmental Law Center*

For over ten years, the states of Alabama, Georgia and Florida have been wrestling over interstate water rights in the Alabama-Coosa-Tallapoosa (ACT) and Apalachicola-Chattahoochee-Flint (ACF) river basins. The ACT basin flows from northwest Georgia south along the border of Alabama and empties into Florida's Apalachicola Bay. The ACT basin also begins in northwest Georgia, and empties into Alabama's Mobile Bay.

The need for water to fuel its growth led to Georgia's 1989 proposal to build the West Georgia Reservoir on the Tallapoosa River. When Georgia signed a contract with the Corps of Engineers to build the reservoir, Alabama and Florida sued the Corps in order to protect their rights to this shared water. The states agreed to postpone the lawsuit after negotiations led to a comprehensive study of the natural and economic resources of the basins. As a result of that study, interstate compacts were created by federal legislation in 1998 to provide a framework for the states to negotiate a settlement of the water conflicts. Under these compacts, which are the first-ever such compacts in the south, negotiators appointed from each state have been meeting on a regular basis in an attempt to design and agree upon an allocation formula that will allocate the water from these basins for the next 50 years. These negotiations have come to be known as the "Tri-State Water Wars." In this struggle, Georgia and Alabama each want enough water to fuel their future growth, while Florida's primary interest is in getting enough water to maintain Apalachicola Bay's large oyster industry.

The negotiators appointed for the state of Georgia are Robert Kerr, of the Pollution Prevention Assistance Division of the Board of Natural Resources and Harold Reheis, Director of the Environmental Protection Division of the Georgia Department of Natural Resources. These negotiators are supported by a technical staff of scientists and engineers. Under the compacts, a federal commissioner, former U.S. Representative Lindsay Thomas, must approve the states' agreement as conforming with federal environmen-

tal laws, such as the Clean Water Act, the National Environmental Policy Act and the Endangered Species Act. Federal Agencies, such as the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service and the U.S. Corps of Engineers will provide guidance to the federal commissioner regarding any agreed-upon formula's compliance with federal law.

The compacts were originally scheduled to expire on December 31, 1998. Since then, the states have extended the deadline three times, most recently agreeing to a 90-day extension of the ACT and ACF compact deadlines, until August 1, 2000. Earlier this spring, talks between the states had virtually broken off. However, the three state governors themselves began a dialogue, which ultimately led to this recent extension. When the current extension arose in April, all interested parties - the states, power companies, federal agencies, and environmentalists - hoped for a swift resolution. The states began to talk about an "interim" agreement that would last ten or fifteen years. Additionally, with the assistance of the U.S. Department of Justice, the states agreed to select and use a mediator to guide the future negotiations.

However, the states have cancelled the three meetings scheduled since they agreed to the August 1<sup>st</sup> extension. The official reason given for these cancellations by the Georgia Environmental Protection Division is that committee members have decided that additional time is required to determine how the recently agreed-upon mediation process will be employed to aid the interstate water allocation negotiations. The states have not yet selected a mediator, or determined whether mediation sessions will be open to the public. Meanwhile, the August 1<sup>st</sup> deadline looms. The states agreed to allow a 60 day public review period for any allocation formula they arrive at prior to the deadline, therefore reducing the actual deadline to June 1<sup>st</sup>.

If no allocation formula is agreed upon by the states by August 1, 2000, the compacts will automatically expire, and it is very likely that the states will end up litigating over the allocation of these river basins in the United States Supreme Court. The United States Supreme Court has original and

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## Tri-State Water Wars . . .

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exclusive jurisdiction when one state sues another state. In such a lawsuit, a downstream state (Alabama or Florida) would have to prove by clear and convincing evidence that it is suffering real and substantial injury or harm as a result of the use in an upstream state in order to have the Supreme Court equitably apportion the interstate water resource. On the flip side, an upstream state, such as Georgia, if hounded by litigation by Alabama or

Florida residents in other courts (over individual reservoirs or water withdrawal permits), may also be able to initiate an action in the Supreme Court to apportion the interstate water resource. Whether the plaintiff is an upstream or downstream state, the litigation could last for decades. Similar litigation between western states has been pending in the Supreme Court for over 40 years. ■

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## Is GEPA a Sword for Citizens or a Shield for the State? Recent Developments Under the Georgia Environmental Policy Act

By Peyton Nuñez, Alston & Bird

### I. Introduction

Nestled in the foothills of North Georgia in the Oothcalooga Creek flood plain is a 300-acre area known as the Rome Crossroads. The property is both culturally and historically significant: it contains Native American archeological artifacts and a pre-Civil War cemetery, and was the site of a Civil War battle. But despite what many would characterize as a rich history, Rome Crossroads was recently sold to the Gordon County development authority to be transformed into a large industrial park.

If the seller of the Rome Crossroads had been a private individual, the story would be over. But because the seller was the Board of Regents of the University System of Georgia—a State governmental agency—the

saga had only begun.

### II. GEPA's Scope

The Georgia Environmental Policy Act,<sup>1</sup> or GEPA, is Georgia's version of the National Environmental Policy Act. GEPA was enacted by the General Assembly in 1991 to ensure that State agencies conduct their affairs "with an awareness that they are stewards of the air, land, water, plants, animals, and environmental, historical, and cultural resources."<sup>2</sup> Specifically, GEPA requires the "responsible official"<sup>3</sup> of a "government agency" to determine whether a "proposed government action"<sup>4</sup> may "significantly adversely affect the quality of the environment"<sup>5</sup> before approving such action. If a significant adverse effect exists, the responsible official is required to prepare an "environmental effects report,"<sup>6</sup> publish notice

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<sup>1</sup> O.C.G.A. § 12-16-1 *et seq.*

<sup>2</sup> O.C.G.A. § 12-16-2(2).

<sup>3</sup> Under GEPA, a "responsible official" is the official or body in charge of or authorized to act on behalf of a government agency. O.C.G.A. § 12-16-3(8).

<sup>4</sup> GEPA defines "proposed governmental action" as "any proposed land-disturbing activity by a government agency or funded by a grant from a government agency, any proposed sale or exchange of more than five acres of state owned land, or any proposed harvesting of five acres or more of trees over two inches in diameter at breast height." O.C.G.A. § 12-16-3(7). The term does not include: (a) any action by a nongovernmental entity, even if the action requires a permit, license, or other approval by a governmental agency; (b) an action by a municipality, county, or authority of a municipality or county, unless more than 50% of the total cost or more than \$250,000 is funded by a grant of a government agency; (c) the permitting or licensing of an action by a governmental agency; (d) the promulgation and implementation of rules and regulations by a government agency; (e) the sale of bonds or any program of loans funded by the sale of bonds by a government agency; or (f) litigation decisions made by a government agency. *Id.*

<sup>5</sup> A "proposed governmental action which may significantly adversely affect the quality of the environment" is defined as "a project proposed to be undertaken by a government agency or agencies, for which it is probable to expect a significant adverse impact on the natural environment, including the state's air, land, water, plants, animals, historical sites or buildings, or cultural resources." O.C.G.A. § 12-16-3(1). It does not include emergency measures undertaken in response to an immediate threat to public health or safety, or activities in which government agency participation is "ministerial" in nature, involving no exercise of discretion on the part of the government agency. *Id.*

<sup>6</sup> GEPA defines "environmental effects report" circularly as "a report on a proposed governmental action which may significantly adversely affect the quality of the environment." O.C.G.A. § 12-16-3(4). The environmental effects report must discuss:

- (1) The environmental impact of the proposed action;
- (2) Alternatives to the proposed action, including no action;
- (3) Any adverse environmental effects that cannot be avoided if the proposed action is undertaken;
- (4) Mitigation measures proposed to avoid or minimize the adverse impact of the proposed action;
- (5) The relationship between the value of the short-term uses of the environment involved in the proposed action and the maintenance and enhancement of its long-term value;
- (6) The effect of the proposed action on the quality and quantity of the water supply;
- (7) The effect of the proposed action on energy use or energy production; and
- (8) Any beneficial aspects of the proposed action, both short-term and long-term, and its economic advantages and disadvantages.

O.C.G.A. § 12-16-4(a).

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## Is GEPA a Sword for Citizens . . .

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that the effects report has been prepared and is available, and hold a public meeting to discuss the effects report if at least 100 Georgia citizens request one.<sup>7</sup> GEPA requires the government official to consider all comments received concerning the environmental effects report in deciding whether to proceed with the proposed governmental action as originally proposed, to proceed with changes, or not to proceed.<sup>8</sup>

### III. Recent Case Law Under GEPA

Although it has been in effect for almost 10 years, it was not until recently that Georgia citizens began to use GEPA to challenge government actions that allegedly adversely affect the environment.<sup>9</sup> In 1999, the Georgia Supreme Court heard two such cases: Thornton v. Clarke County School District, 270 Ga. 633 (1999) and Georgia Council of Professional Archaeologists v. Board of Regents of the University System of Georgia, 271 Ga. 757 (1999). Neither case bodes well for citizens trying to stop a proposed government action.

In Thornton, Clarke County residents filed suit against their local school district seeking declaratory judgment, mandamus, and injunctive relief under GEPA to prevent the school district from demolishing an old school and constructing a new one in the same area. In their complaint, plaintiffs alleged that the proposed school demolition/construction would destroy approximately five acres of mature oak-hickory forest, would possibly alter a floodplain and wetlands, and would create considerable amounts of solid waste.<sup>10</sup> Despite these claims, the trial court dismissed the residents' complaint because it found that the local school district was not a "government agency," which GEPA defines as "any department, board, bureau, commission, authority, or other agency of the state."<sup>11</sup>

The Georgia Supreme Court affirmed the trial court's order. The Court found that while GEPA does not specifically exclude any governmental entity from the definition of government agency, the Act's repeated reference to "state projects" and "state agencies" reflected the General Assembly's intent to limit GEPA's application to entities traditionally

considered to be state agents. In addition, the court determined that the legislature did not intend for the phrase "government agency" to receive the broadest possible interpretation because GEPA excludes from the definition of "proposed governmental action" actions by municipalities and counties unless more than 50 percent or more than \$250,000 of the action's cost is funded by a governmental agency.

Seven months after dismissing Clarke County residents' complaint in Thornton, the Georgia Supreme Court dealt a second and more substantial blow to citizens seeking redress under GEPA. In Board of Regents, the Georgia Council of Professional Archaeologists challenged the Board of Regents' sale of the Rome Crossroads to the Development Authority of Gordon County, claiming that the Board had not complied with GEPA.<sup>12</sup> Evidence presented by the Council showed that, based on legal advice from the Board's vice president of legal affairs, the Board's responsible official did not consider the Gordon County Development Authority's intended use of the Rome Crossroads in evaluating whether the sale would have an adverse effect on the environment.<sup>13</sup> Instead the responsible official looked solely to the sale itself—which involved the transfer of the property deed and other documents—to determine that the sale had no environmental impact.

Despite these rather compelling facts, the trial court dismissed the Council's claims, holding that they were specifically barred by GEPA section 12-16-5(c). That section provides, in pertinent part, that "[t]he decision of the responsible official to proceed with the proposed governmental action shall not create a cause of action in any person, corporation, association, county, or municipal corporation; provided, however, the actions of the responsible official in the procedure of giving notice by publication of the environmental effects report and notice by publication of the decision made based upon the report and public comments, if any, may be challenged. . . ."<sup>14</sup>

The Council applied to the Georgia Supreme Court for discretionary review. The Supreme Court granted the application and affirmed the trial court, holding that under GEPA's clear and unequivocal wording, the responsible official's decision to go forward with a proposed governmental action "may not serve as the basis of a judicial action against the responsible

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<sup>7</sup> O.C.G.A. §§ 12-16-4(c); 12-16-5(a).

<sup>8</sup> O.C.G.A. § 12-16-5(b).

<sup>9</sup> Before 1999, the only reported decisions involving GEPA were opinions issued by the Georgia Attorney General. See *Ga. Op. Atty. Gen. No. 91-29 (Nov. 18, 1991)* (discussing GEPA's application to the Georgia Department of Transportation); *Ga. Op. Atty. Gen. No. U93-9 (Oct. 6, 1993)* (construing the phrase "government agency")

<sup>10</sup> *Compl.* ¶ 26.

<sup>11</sup> O.C.G.A. § 12-16-3(5).

<sup>12</sup> Specifically, the Council's complaint sought a writ of mandamus to compel the Board of Regents to prepare an environmental effects report for the Rome Crossroads' sale, as well as a declaratory judgment that (1) the Board had violated GEPA, (2) the Rome Crossroads' sale was null and void, (3) GEPA required state agencies to identify the purchaser's intended use of a property and to make an evaluation of that use before selling it, and (4) state agencies could not avoid their GEPA duty by promising to do a GEPA evaluation after a property sale.

<sup>13</sup> In fact, the same official had acknowledged in an internal memo that "in reality this sale will eventually have a Major Adverse effect on the environment." 271 Ga. at 762.

<sup>14</sup> O.C.G.A. § 12-16-5(c).

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## Low-Level Radioactive Waste . . .

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official or the government agency on behalf of which the responsible official is acting.”<sup>15</sup>

In a strong dissent, Justice Hunstein lambasted the majority’s interpretation of section 12-16-5(c), finding that the legislature did not intend for it to apply in those instances where a responsible official avoids GEPA’s public participation requirements altogether by concluding initially that the proposed governmental action will not significantly adversely affect the environment. Because subsection (c) falls under the GEPA section regarding public hearings and notices of decision—events that happen only after an environmental effects report has been prepared—Justice Hunstein found that that section was not meant to preclude causes of action for an official’s failure to prepare an environmental effects report in the first place. “Under the majority’s interpretation, a State agency can render GEPA meaningless, preempting the application of GEPA requirements by making an initial decision that no significant adverse effect will follow . . . [w]hy go through the expense and delay of preparing an environmental effects report, holding public hearings, publishing notices, when all that effort can be avoided merely by opting to ‘decide’ that the proposed government action will not have significant adverse effect on the quality of the environment?”<sup>16</sup> she asked.

### IV. Future Prospects for GEPA Litigants

Although the Board of Regents majority did suggest in a footnote that, depending on the circumstances, declaratory judgments regarding GEPA compliance are not necessarily barred, there is no doubt that the opinion significantly weakens, if not destroys, the public’s ability to challenge a government agency’s initial decisionmaking under GEPA.<sup>17</sup> Compelling facts notwithstanding, it is not at all clear that the Court could have ruled any other way. GEPA provides citizens with a specific cause of action for

notice-related defects, but does not create a right to bring a claim based on an official’s initial decision regarding environmental impact. The result is that instead of arming citizens with a “sword” to enforce the underlying purposes of the statute, GEPA appears to shield from citizen oversight significant agency decisions regarding impacts to the environment.

GEPA’s status as sword versus shield could be tested again soon. In December 1999, the Garden Hills Civic Association, a Buckhead neighborhood association immediately adjoining the Metropolitan Atlanta Regional Transportation Authority (“MARTA”) Lindbergh transit station, sued MARTA and the City of Atlanta for injunctive relief under GEPA.<sup>18</sup> The amended Complaint alleges, in part, that MARTA’s sale and planned development of the property should be temporarily and permanently enjoined because MARTA failed to prepare an environmental effects report pursuant to GEPA.

Garden Hills is distinguishable from both Thornton and Board of Regents because it seeks injunctive as opposed to mandamus or declaratory relief. In addition, unlike the plaintiffs in Thornton, the citizens of Garden Hills should not have much difficulty establishing that MARTA, an authority created by an act of the Georgia General Assembly,<sup>19</sup> is a “department, board, bureau, commission, authority, or other agency of the state.”<sup>20</sup> However, the pitfall experienced by plaintiffs in Board of Regents - establishing a cause of action based on a government official’s initial decision that no environmental impact exists - appears to be present in the Garden Hills case as well. As a result, it seems likely that the plaintiffs’ GEPA challenge will be effectively thwarted by MARTA and the City.

The question raised by Board of Regents and reasserted by Garden Hills is whether and to what extent the Georgia legislature intended citizen involvement in GEPA-related decisions in the first place. Ultimately, that question that will have to be cleared up by the state legislature itself through statutory amendment. For now at least, it appears that the Act’s chief function is as a shield for Georgia’s agencies, rather than as a sword for her citizens. ■

<sup>15</sup> 271 Ga. at 760.

<sup>16</sup> *Id.* at 765.

<sup>17</sup> The Board of Regents decision appears not to affect the right to challenge any procedural defects with the government official’s public notice of (1) the environmental effects report, and (2) her decision based on the environmental effects report and public comments. Such challenges must be brought in accordance with the Georgia Administrative Procedure Act. O.C.G.A. § 12-16-5(c).

<sup>18</sup> Garden Hills Civil Assoc., et al. v. Metropolitan Atlanta Rapid Transit Auth., et al., No. 1990CV16878 (Fulton Co. Super. Ct. Dec. 7, 1999).

<sup>19</sup> 1960 Ga. Laws 2243.

<sup>20</sup> In fact, neither MARTA nor the City of Atlanta raised MARTA’s “governmental entity” status as a defense in their respective answers to plaintiffs’ complaint.

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