Anne Hunt Hicks, Chair
Holden & Associates

Susan H. Richardson, Editor
Kilpatrick Stockton, LLP

Summer 2002

In This Issue

Upcoming Events

September 24
Brown Bag Luncheon
Clean Air Campaign / Atlanta, King & Spalding

November 8
Georgia Environmental Law Section
Water Law Seminar / Atlanta, Marriott Marquis
cosponsored by Agricultural LawSection of State Bar of Georgia and Georgia Water & Pollution Control Association
For more information: www.gabar.org

Statute of Limitations in Georgia Toxic Tort Cases

By Robert B. Jackson, IV
Stack & Associates, P.C.

I. INTRODUCTION

Statutes of limitations represent a public policy decision about the privilege to litigate. The defense simply alleges that the period of time set by the legislature within which plaintiff should have filed his lawsuit elapsed before plaintiff filed his lawsuit. A primary reason for the defense is to avoid injustice to defendants who would otherwise be called upon to defend old actions for which memories may have faded, witnesses disappeared, and evidence lost. If the plaintiff in fact waited too long to file and the defendant properly raised and successfully argued the statute of limitations defense, the result may be an absolute defense to the action.

Toxic torts may be characterized as those claims involving allegations that person or property have been or are being exposed to substance(s) for which defendant is responsible, which exposure caused or contributed to plaintiff's personal injury and/or property damage. Statutes of limitation and other time-related defenses, (e.g., statutes of repose, laches) may generally be raised in defense of toxic tort actions, as in defense of any other tort actions. Thus, a plaintiff who fails to file suit on his tort claims within the statutory period, subjects those claims to dismissal irrespective of whether they are toxic tort claims.

Except for the seemingly increasingly rare situations where its resolution is genuinely not subject to debate, one reason to always raise the statute of limitations defense in the answer is that despite its superficial simplicity, its application to the facts is rarely straightforward. This is also the reason that statutes of limitation continue to be a source of great angst among lawyers, particularly in toxic tort cases.

To determine whether the statute of limitations period has run out on plaintiff's action, one must first ascertain the limitations period applicable to the action and then calculate the amount of time that has elapsed between when the action accrued and when plaintiff filed suit. The limitations period begins to run upon accrual of the action. Therefore, accurately determining the accrual date is an important hurdle in a statute of limitations analysis. The general rule is that an action accrues and the statute of limitations begins to run upon the occurrence of all the necessary elements of the action, whether or not plaintiff is aware that a cause of action even exists. However, a number of contemporary judicial and legislative exceptions to the general rule may now apply to postpone accrual of the action and/or toll the running of the statute of limitations.

continued on page 3

Message From the Chair

The Environmental Law Section's annual Summer Seminar on August 2-3 at the Hilton Sandestin, was a resounding success. On behalf of Program Co-Chair Peyton Núñez and I, thanks to all the wonderful moderators and speakers for your hard work and enthusiasm. There were many new faces on the panels, along with many attorneys who have delivered consistently strong presentations in the past. The seminar earned attorneys 8.5 CLE credits and covered a broad range of environmental law issues in the areas of air, water and hazardous waste, presented by private practitioners and regulators from both EPA and the Georgia Environmental Protection Division. I hope that everyone found time to appreciate the beautiful white sand beaches and variety of entertainment in Destin. My husband Chip and I enjoyed socializing with everyone, including during our Friday evening reception that was briefly interrupted by torrential rain. If you are interested in the wonderful educational Georgia river system posters that Bob Kerr displayed during the program, please call the Georgia Department of Natural Resources, Pollution Prevention Division at 404-651-5120.

On June 21, 2002, the Environmental Law Section held a brown bag at the Atlanta offices of Alston & Bird LLP. Approximately 25 Section members enjoyed an informative panel discussion on environmental criminal enforcement. The speakers were Simon Miller, Regional Criminal Enforcement Counsel, United States Environmental Protection Agency (EPA) Region 4; Robin Hedden, Special Agent, Criminal Investigation Division, EPA Region 4; and Doug Arnold, Alston & Bird. The discussion highlighted the functions of EPA's criminal investigators and counsel in building and prosecuting suspected environmental crimes and included practical tips for defense lawyers in understanding the complex issues that may arise in a criminal environmental enforcement matter. Thanks to Alston & Bird's Doug Arnold and Peyton Núñez for coordinating this event.

UPCOMING EVENTS

King & Spalding has graciously agreed to host a brown bag program on September 24 that will focus on the Clean Air Campaign (CAC). Chet Tisdale, a partner with King & Spalding and Marlin Gottschalk, Senior Policy and Planning Advisor with the Georgia Environmental Protection Division, will be the featured speakers. Mr. Tisdale and Mr. Gottschalk will discuss why the CAC is necessary for the Atlanta economy and our quality of life. They will provide tips on how environmental lawyers and the region's law firms can take positive steps to reduce traffic congestion and improve air quality, including actual cases in Atlanta where employers have taken steps to make positive changes without losing or wasting money.

On November 8, the Environmental Law Section, the Agriculture Law Section and the Georgia Water and Pollution Control Association will host a one-day Water Law Seminar at the Marriott Marquis Hotel, Atlanta. TMDLs, wetlands, recent litigation under the Clean Water Act and water concerns affecting municipalities will be among the timely topics that will be addressed. Given the anticipated attention that water law issues should receive in the 2003 General Assembly, this seminar should be very timely and informative.

UPDATE ON THE JEAN TOLMAN AWARD

The committee that was formed to establish an award in honor of the late A. Jean Tolman of Arnall Golden Gregory LLP has tentatively decided to establish an endowment at Georgia State University that will be used for an annual award to an outstanding law student. The award will be based on approximately five criteria that the committee, headed by Section Member-At-Large Ann Marie Stack, will establish at a later date.

2002-2003 Seminars and Events

Environmental Law Section, Brown Bag Luncheon - September 24
Clean Air Campaign / Atlanta, King & Spalding

ABA Section of Environment, Energy and Resources - October 9-13
Tenth Section Fall Meeting / Portland, Oregon
For more information: www.aba.net

The Impact of Environmental Law on Real Estate and Business Transactions: Brownfields and Beyond - October 17-18
sponsored by ALI-ABA / Boston
For more information: www.ali-aba.org

Clean Water Act Law and Regulation - October 24-25
sponsored by ALI-ABA / Washington, D.C.
For more information: www.ali-aba.org

Georgia Environmental Law Section - November 8
Water Law Seminar / Atlanta, Marriott Marquis
cosponsored by Agriculture Law Section of State Bar of Georgia and Georgia Water & Pollution Control Association
For more information: www.gabar.org

Brownfields 2002 - November 13-15
sponsored by The Engineers Society of Western Pennsylvania; US EPA and ICCMA / Charlotte, N.C.
For more information: www.brownfields2002.org

Environmental Law - February 13-14
sponsored by ALI-ABA / Bethesda, Maryland
For more information: www.ali-aba.org

Environmental Impact Assessment: NEPA and Related Requirements - April 23-25 / Washington, D.C.
sponsored by ALI-ABA
For more information: www.ali-aba.org

Criminal Enforcement of Environmental Laws - May 8-9
sponsored by ALI-ABA / Washington, D.C.
For more information: www.ali-aba.org

continued from page 1

Section II of this paper identifies the limitations periods applicable to toxic tort actions in Georgia. Sections III and IV examine the manner by which Courts have determined when a tort cause of action accrues under Georgia law. Section IV also reviews Georgia and federal legislative and judicial exceptions which, if applicable, may postpone accrual of the action or toll the statute of limitations in toxic tort actions.

II. STATUTES OF LIMITATION PERIODS FOR COMMON LAW TOXIC TORT ACTIONS

O.C.G.A. § 9-3-30 and O.C.G.A. § 9-3-33 provide the limitations periods applicable to most common law tort claims in Georgia whether for property damage or personal injury. O.C.G.A. § 9-3-30 applies to tort actions for trespass or damage to realty. It allows plaintiffs four (4) years from the date the action accrues in which to file their lawsuit. O.C.G.A. § 9-3-33 applies to tort actions for personal injuries. It allows plaintiffs two (2) years from the date the action accrues within which to file their lawsuit. These two general tort statutes of limitation are also applicable to toxic tort actions for personal injury and property damage in Georgia.

III. ACCRUAL GENERALLY

O.C.G.A. § 51-1-8 states that a tort cause of action in Georgia accrues upon the violation of a specific duty accompanied by damage. This Georgia statute tracks the general rule in that it does not inquire into what plaintiff knows or should have known to ascertain whether her cause of action accrued. Because the statute of limitations time period begins to run when plaintiff's right of action *accrues*, Georgia's general accrual rule for torts can have harsh consequences for plaintiffs.

A. Actions for Trespass Upon or Damage to Realty

The general rule for trespass upon or damage to realty is that the plaintiff's action accrues on the date plaintiff's property was first damaged, whether or not plaintiff was aware of the damage.[1]

B. Actions for Injury to the Person

In personal injury actions, the general rule in Georgia is that plaintiff's action accrues on the day the injury was inflicted, whether or not plaintiff was aware of the injury.[2]

IV. DAILY ACCRUAL, ACCRUAL POSTPONED, AND TOLLING THE STATUTE OF LIMITATIONS

One of the more confusing aspects of decisions that have interpreted Georgia's statute of limitations is their failure to identify consistently and specifically whether application of the law to the facts postpones accrual or tolls the running of the statute of limitations. For example, although postponed accrual and tolled statute of limitations may appear to just be different names for the same thing, they are fundamentally different concepts, despite their treatment in Georgia case law. Daily accrual refers to the creation of a new cause of action each day, against which a new statute of limitations also begins to run each day. In comparison, tolling of the statute of limitations temporarily "stays" the running of the statute of limitations.

A. Georgia's Continuing Tort Doctrines &Discovery Rule

Discovery is an exception to the general rule of accrual, that postpones accrual and/or tolls the statute of limitations until plaintiff discovers or should have discovered her cause of action. Georgia's discovery rule does not apply to cases involving property damage, though continuing tort doctrines have developed in Georgia for both toxic tort property damage and personal injury toxic tort cases. The "continuing tort" doctrine that Georgia courts apply to toxic tort personal injury actions is not the continuing tort doctrine applicable to cases involving property damage in Georgia. Georgia's property damage continuing toxic tort has its roots in conduct amounting to a nuisance or trespass that is said to be continuing because it is not completed -- also referred to in the case law as not "permanent" -- as in environmental contamination that continues to spread.

(1) Personal Injury ("Continuing Tort" & Discovery)

A continuing tort doctrine was first adopted in Georgia for personal injury actions by the Court of Appeals in *Parker v. Vaughn,* 124 Ga. App. 300, 183 S.E.2d 605 (1971), a surgical malpractice case. That doctrine was limited to medical malpractice cases. That all changed in 1972.

The plaintiffs in *Everhart v. Rich's, Inc.*, 229 Ga. 798, 194 S.E.2d 425 (1972), filed suit in 1970 alleging that draperies they purchased from defendant's department store in 1964 caused them personal injury. Plaintiffs claimed that the draperies were releasing fiberglass particles into their home, that they were being personally exposed and injured by the particles without their knowledge, and that they had received no warning from the defendant. The defendant raised the statute of limitations defense. In 1972, the Georgia Supreme Court held that personal injury tort claims such as the Everhart's accrued when exposure to the purported hazard first produced an "ascertainable injury." That fact alone should have meant plaintiffs' actions were time-barred, but the Court went on to extend *Parker* to the Everhart's claims on the basis that the *Everhart* facts presented a tort of a "continuing nature" which "tolls the statute of limitation so long as the continued exposure to the hazard is occasioned by the continued failure of the tortfeasor to warn the victim." *Everhart* postponed accrual and tolled the statute of limitations until such time as plaintiff discovered her injury.

In 1981, the Georgia Court of Appeals heard the case of *King v. Seitzingers, Inc.*, 160 Ga. App. 318, 287 S.E.2d 252 (1981). In *King*, as in *Everhart*, plaintiff alleged that his exposure to a substance (lead) for which defendant was responsible had caused his personal injury. Plaintiff King admitted that by September 1977, he knew that he had lead poisoning. Nevertheless, *King* claimed that it was not until several months after learning of that injury that he discovered it was caused by his years of exposure to welding fumes at defendant's plant. Plaintiff filed suit on October 9, 1979, just over two years after September 1977. The Court of Appeals determined that King clearly knew of his injury by September 1977, but that since he did not know of its cause until some months later, the cause of action did not accrue in September 1977. The Court then said that King's "[…] cause of action did not accrue and the statute of limitation did not run against him until he knew or through the exercise of reasonable diligence should have discovered not only the nature of his injury, but also the causal connection between the injury and the [defendant's] alleged negligent conduct." As the statute of limitations defense was before the Court on defendant's motion, the Court construed conflicting evidence against defendant and left for a jury the question whether *King* knew or should have known of the cause of his injury sooner than he claimed. The Court of Appeals thus extended *Everhart* by permitting a plaintiff time to discover not only the injury but also the causal connection between that injury and the defendant's alleged improper conduct (i.e. accrual postponed).

Thus, Georgia's version of the continuing tort doctrine for personal injury toxic tort actions, as expressed in *Everhart* and *King*, appears to accrue when plaintiff first discovers or should have discovered both her injury and its cause.

(2) Property Damage ("Limited Damages Continuing Tort" & No Discovery)

Although the Georgia Supreme Court held in 1985 that O.C.G.A. § 9-3-30 would also be subject to Georgia's rule of discovery,[3] that decision was short-lived.[4] Currently, the rule is that neither Georgia's *Parker* progeny continuing toxic tort doctrine set out in *Everhart* and *King*, nor its concomitant discovery rule, apply to toxic tort cases involving property damage pursuant to O.C.G.A. § 9-3-30.[5]

Parties to toxic tort actions for property damage pursuant to O.C.G.A. § 9-3-30 do have available at least two Georgia "continuing tort" causes of action. They are the tort of "continuing nuisance" and the tort of "continuing trespass." These toxic torts are often referred to collectively as "continuing nuisance and trespass." Under Georgia's continuing nuisance and trespass causes of action, and unlike personal injury continuing tort actions in Georgia, plaintiffs are not required to prove anything about what they knew or when, but they must prove that the contamination has spread during the four years prior to their lawsuit. Plaintiffs are also limited to the damages suffered in those four years.[6]

In *Hoffman v. Atlanta Gas Light*, 206 Ga. App. 727, 426 S.E.2d 387 (1992), a petroleum pipeline had leaked beginning sometime in 1956, during Defendant's predecessor's ownership. In March 1990, plaintiffs demanded that defendants remove the contamination from their property. Defendants refused, and Plaintiffs filed suit in August 1990. Defendants noted that the pipeline leaks had long been repaired and raised the statute of limitations in defense. Plaintiffs claimed that the contamination was spreading and was therefore not a completed act, but a continuing abatable nuisance and trespass. The Court held that the spreading contamination was not a completed act. Citing *Goble v. Louisville*, 187 Ga. 243, 249, 200 S.E. 259 (1938), the Court determined that so far as the contamination "continues" and "has" inflicted damages within four years before the time of filing suit, though "the act which originally caused the nuisance was not done within the period of limitation of the action," plaintiffs may "maintain the cause of action for the continuing nuisance as well as for the continuing trespass."

In *Citizens & Southern Trust Co. v. Phillips Petroleum Co. Inc.*, 192 Ga. App. 499, 385 S.E. 2d 426 (1989), plaintiffs brought suit to recover for property damage alleged to have resulted from the invasion of their property by gasoline from defendant's neighboring underground storage tank. Defendant raised the defense of statute of limitations. Citing *City of Columbus v. Myszka*, 246 Ga. 571, 572, 272 S.E. 2d 302 (1980), a 1980 Georgia Supreme Court decision, the Court said that plaintiffs had timely filed a claim for the maintenance of a continuing nuisance, which action "accrues at the time of such continuance, and against which the statute of limitations runs only from the time of such accrual."

In *Smith v. Branch*, 226 Ga. App. 626, 487 S.E.2d 35 (1997), defendants operated a dry cleaning business on property they leased from plaintiff since 1964. Plaintiff filed suit in 1993, claiming to have recently discovered from an environmental study, that the property was contaminated with dry cleaning chemicals. The trial court granted summary judgment to the defendant on the basis that the statute of limitations had run on plaintiff's claims. The Court of Appeals, however, found that the contamination was spreading and applied Georgia's continuing nuisance doctrine to find plaintiff's claims were not untimely. The Court also expressly limited Georgia's property continuing tort doctrine from *Citizen & Southern* and *Hoffman* to those toxic tort actions where the contaminants have spread (migrated) within the four years prior to the date the lawsuit is filed.

In *Tri-County Investment Group, Ltd. v. Southern States, Inc.*, 231 Ga. App. 632, 500 S.E.2d 22 (1998), the Court of Appeals again addressed Georgia's continuing nuisance and trespass actions. Defendants had apprised plaintiffs of defen-

dant's groundwater contamination at plaintiff's property in 1990 or 1991. Plaintiffs filed suit against defendants in 1995, alleging continuing trespass and continuing nuisance. Defendants claimed that the tort they committed (contaminating plaintiff's groundwater) was permanent rather than incomplete, and that therefore plaintiff's claims were barred by the four year statute of limitations period contained in O.C.G.A. § 9-3-30. After deciding that the contamination had migrated during the four years prior to the lawsuit, the Court applied the "continuing tort" theory to the case, and held that plaintiff's property damage claims were not time-barred. The Court of Appeals characterized Georgia's continuing tort theory as "a cause of action that is continuing in nature - for example, the frequent runoff of contaminated water across land, or […] the underground leakage of hazardous waste onto adjoining property - accrues at the time of continuance." This means that a new cause of action accrues to the plaintiff each day that the contamination migrates. Georgia's continuing tort to property cause of action does not inquire into plaintiff's knowledge, but it only permits recovery of those damages suffered during the four years preceding the date suit was filed. It does not permit recovery of damages back to the date of creation of the nuisance and trespass.

B. Federal Commencement Date

Recognizing that the general accrual rule is a harsh rule in whatever jurisdiction it is applied, the U.S. Congress mandated use of a federal commencement date in certain types of toxic tort cases where the claim is for personal injury or property damage. 42 U.S.C. § 9658. The federal commencement date now mandates a rule of discovery as the national uniform accrual rule in certain cases. The federal CERCLA discovery rule is found at 42 U.S.C. § 9658(a)(1) and 9658(b)(4)(A). It provides:

> [i]n the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence [on the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages ... were caused by the hazardous substance or pollutant or contaminant].

(1) Criteria for Applying CERCLA §9658.

The assertion of a CERCLA claim in the particular state or federal litigation is not a prerequisite to application of the federal commencement date to the state law claims. However, an examination of the CERCLA § 9658 provisions identifies a number of criteria that must be met in order for the federal CERCLA discovery rule to preempt the state accrual date. First and foremost, pursuant to CERCLA, if the federal commencement date and the state law accrual date would cause the state law action to accrue on the same date, then the state law is not preempted. Likewise, if state law provides an accrual date that is later than the federal commencement date, the state law is not preempted. It is only where the state law would provide a commencement date that is earlier than the federally required commencement date that the federally required commencement date may preempt state law.[7] This preemption feature of CERCLA has withstood constitutional challenge.[8]

In addition to the necessity that the federal commencement date provide a later accrual date than state law, the federal commencement date will not preempt state law that specifies an accrual date, unless the state law claim is:

(1) for personal injury or property damage;
(2) which was caused or contributed to by exposure to a hazardous substance, or pollutant, or contaminant;
(3) released into the environment;
(4) from a facility.[9]

Although Georgia's discovery rule is limited to only certain types of personal injury cases,[10] the federal rule is expressly applicable in all cases of property damage and personal injury if the criteria above are met. The second criteria identified hereinabove has been held to have a broader reach than if only the term CERCLA "hazardous substance" had been used. For example, although petroleum is not a CERCLA hazardous substance, it has been held that in state law actions where petroleum is the offending substance, 42 U.S.C. § 9658 may still preempt state law because petroleum is a "pollutant, or contaminant" within the meaning of 42 U.S.C. § 9658.[11] With respect to criteria three and four above, the usual CERCLA definitions and construction may not subject the state accrual date to preemption where, for example, the release is inside certain workplaces,[12] or is not from a facility.[13] It has also been determined that certain state statutes of repose may be preempted by 42 U.S.C. § 9658, though because preemption depends on how the response statute is drafted, there is contrary authority.[14] Discovery under the federal rule may occur upon plaintiff's suspicion of contamination even though plaintiff does not know either the identity of each hazardous substance, pollutant, or contaminant, nor the identity of all the responsible parties.[15] In some toxic tort personal injury cases for example, this means that application of § 9658 could start plaintiff's limitations clock running sooner than would application of the Georgia rule. In such cases, § 9658 can not preempt the Georgia rule.

(2) ***Tucker v. Southern Wood Piedmont Co.*, 28 F. 3d 1089 (11th Cir. 1994)**

In 1994, the Eleventh Circuit applied CERCLA's feder-

al discovery rule to Georgia's state law accrual date for plaintiff's state law toxic tort claims in *Tucker v. Southern Wood Piedmont*, 28 F.3d 1089 (11th Cir. 1994). According to the federal court, plaintiffs alleged "causes of action for negligence, trespass, and nuisance under Georgia law." The Court then noted that those claims were governed by Georgia's four year statute of limitations at O.C.G.A. § 9-3-30 and were therefore barred. If not for application of the federal discovery rule or application of Georgia's continuing tort doctrine, plaintiff Tucker would have been out of court. The defendant attempted to limit plaintiff's recovery to those damages that occurred during the four years immediately preceding the filing of the lawsuit. The plaintiff wanted damages back to creation. Plaintiff claimed to have first discovered the contamination within the four years immediately preceding the date the lawsuit was filed.

The Court applied the 42 U.S.C. §9658 federal commencement date and determined that "[a]s long as plaintiffs sued within four years of the time they discovered or should have discovered the wrongs of which they complain their recovery will not be limited to the four years immediately preceding the lawsuit." Notwithstanding later discussion in the case about the continuing tort doctrine, this statement appears to indicate that the causes of action to which the Court applied CERCLA § 9658, were the plaintiff's original nuisance and trespass creation actions (which are not limited as to damages), not actions for a Georgia continuing nuisance and trespass (which are limited to damages incurred within the limitations period for the claim [i.e., the four years immediately prior to the date the lawsuit was filed]). To understand the damages aspect of *Tucker*, the practitioner must draw a clear distinction between the cause of action's commencement date (i.e., accrual and the start of the limitations period) and the actual length of the limitations period. CERCLA § 9658 does not preempt or alter the length of the limitations period. In cases where CERCLA is applicable, it can only preempt the date on which the claim accrues and from which the limitations period begins to run. It cannot preempt the length of the limitations period.

Tucker assists by clarifying Georgia's "CERCLA-commencement-date-modified" toxic tort rules for property damage cases as follows: [a] if the action(s) originated, continued, and/or or is continuing during the four years prior to the filing of the lawsuit, plaintiff may have a viable cause of action in Georgia irrespective of the federal discovery rule; [b] if the action(s) have not originated or continued, in the four years prior to the filing of the lawsuit, plaintiff may not have a viable cause of action under Georgia law unless application of the federal discovery rule (to the original action(s) or to the continued action(s)) shows that plaintiff did not know and had no reason to know of the contamination, in the four years immediately preceding the date the lawsuit is filed. Though *Tucker* has been cited for the proposition that application of 42 U.S.C. § 9658 to Georgia's continuing nuisance and trespass actions somehow avoids the limitations period restrictions on recoverable damages for those causes of action, it does not currently appear that the federally mandated commencement date can substantively or constitutionally alter the length of a state law statute of limitations period, or otherwise alter state laws that specify what damages are recoverable on state law cause(s) of action.

V. CONCLUSIONS

A statute of limitation is a simple concept that can be complex in its application. Georgia's two and four year tort statutes of limitation for personal injury and property damage actions respectively, also apply to toxic tort actions. Those statutes of limitation begin to run when the actions accrue. Accrual generally occurs (and the limitations period begins to run), on the date of damage or injury, regardless of plaintiff's knowledge. This harsh general rule has been ameliorated by both state and federal statutes and case law (i.e. exceptions) that may postpone accrual, toll the statute of limitations, or provide daily accrual of a new cause of action.

Georgia law has a different continuing tort doctrine for toxic tort actions involving personal injury than it does for toxic tort actions involving property damage. Georgia's personal injury continuing tort doctrine for example, still inquires about plaintiff's knowledge, while Georgia's property damage continuing tort doctrine does not. Georgia law does have a discovery rule for certain types of toxic tort cases that involve personal injury. Georgia law does not have a discovery rule for toxic tort cases involving property damage, but limits recovery under its property damage continuing tort to the four years immediately prior to the date the lawsuit was filed.

Federal law now mandates use of CERCLA's rule of discovery in toxic tort cases for both personal injury and property damage, if certain criteria are met. In addition to certain other criteria, CERCLA's federal discovery rule applies only where the federal commencement date would provide an accrual date that is later than the date provided by the particular state law cause of action. The federal discovery rule also applies to Georgia causes of action for creation of a nuisance and trespass, if the CERCLA criteria for its application are met in the particular case. If however, on the date suit is filed, plaintiff's Georgia causes of action are for the continuance (also known as "maintenance") of a nuisance and trespass, that have continued in the four years immediately prior to the date the lawsuit was filed or are continuing on the filing date, then the federal CERCLA discovery rule may or may not be applicable to those continuing torts.

Moreover, if the Georgia cause of action is for continuing nuisance and trespass, and the continuance ceased more than

4 years prior to the date the lawsuit was filed, plaintiff might seek application of the federal discovery rule. However, because damages under Georgia's continuing nuisance and trespass doctrine would be restricted to the limitations period for the cause of action (i.e., the 4 years immediately prior to the date of filing), this author presumes that a plaintiff would only seek application of the federal discovery rule to her Georgia actions for continuing nuisance and trespass, rather than to her original nuisance and trespass actions, if it were determined that she knew or should have known of the original nuisance and trespass more than four years before she filed suit, but that she neither knew nor should have known of her subsequent action(s) for continuance of the nuisance and trespass, more than four years before she filed suit (e.g., where plaintiff knew or should have known of the existence of the contamination but did not know and had no reason to know of the spreading contamination).

---

1 *Corporation of Mercer University v. National Gypsum Co.*, 258 Ga. 365, 368 S.E.2d 732 (1988).

2 *Bitterman v. Emory University,* 75 Ga. App. 348, 333 S.E.2d 378 (1985).

3 *Lumberman's Mutual Casualty Company v. Pattillo Construction, Inc.*, 254 Ga. 461, 330 S.E.2d 344 (1985) (overruled by *Corporation of Mercer University v. National Gypsum Co.*, 258 Ga. 365, 368 S.E.2d 732 (1988)).

4 Id.

5 *Corporation of Mercer University v. National Gypsum Co.,* 258 Ga. 365, 368 S.E.2d 732 (1988).

6 *City of Columbus v. Myszka*, 246 Ga. 571, 272 S.E.2d 302 (1980)[because evidence established a continuing abatable nuisance, O.C.G.A. § 9-3-30 does not preclude recovery for any damages save those which were suffered more than 4 years prior to the filing of the suit].

7 *Briggs & Stratton*; *Union Pacific Railroad Co. v. Reilly Industries, Inc.,* 215 F.3d 830 (2000).

8 *In re Pfohl Brothers Landfill Litigation*, 26 F.Supp.2d 512 (1998).

9 42 U.S.C. § 9658; *Knox v. AC&S, Inc.*, 690 F.Supp. 752, 755 (S.D. Ind. 1988).

10 The Georgia Supreme Court has explicitly limited the discovery rule's application "to cases of bodily injury which develop only over an extended period of time." *Corporation of Mercer Univ. v. National Gypsum Co.,* 258 Ga. 365, 368 S.E.2d 732, 733 (1988) (quoting *Lumbermen's Mut. Cas. Co. v. Pattillo Constr. Co.*, 254 Ga. 461, 330 S.E.2d 344, 348 (1985)).

11 *Buggsi, Inc. v. Chevron USA, Inc.*, 857 F.Supp. 1427 (1994).

12 *Becton v. Rhone-Poulenc, Inc.*, 706 So.2d 1134 (1997) [particular workplace interior was not the environment for purposes of CERCLA 42 U.S.C. § 9658]; *Chestang v. W.R.Grace & Co.*, 709 So.2d 470 (1998).

13 *Electric Power Board of Chattanooga v. Westinghouse Electric Corporation,* 716 F.Supp. 1069 (E.D. Tenn., 1988) [transformers are not facilities].

14 *Covalt v. Carey Canada, Inc.,* 860 F2d 1434 (7th Cir. 1988); *ASI, Inc. v. Sanders*, 853 F.Supp. 1349 (D.Kan. 1993).

15 *Seneca Meadows, Inc. v. ECI Liquidating, Inc.*, 983 F.Supp. 360 (W.D. N.Y., 1997); *Reichhold Chemicals, Inc. v. Textron, Inc.*, 888 F.Supp. 1116 (N.D. Fla., 1995).

The Army Corps of Engineers Issues New Wetlands Mitigation Guidance

By Joan B. Sasine and Christopher A. Thompson
Powell, Goldstein, Frazer & Murphy LLP

I. Background

Section 404(a) of the Federal Water Pollution Control Act, otherwise known as the Clean Water Act ("CWA")[1], authorizes the Secretary of the Army, acting through the Army Corps of Engineers (the "Corps") to issue permits for the discharge of dredged or fill material into the navigable waters of the United States.[2] In accordance with section 404(b)(1) of the CWA, the United States Environmental Protection Agency ("EPA") has promulgated permitting standards, popularly known as the "404(b)(1) Guidelines," which the Corps must follow in administering the permit program.[3] The 404(b)(1) Guidelines require the Corps to determine that the proposed activity will not "cause or contribute to significant degradation of the waters of the United States."[4]

The 1990 *Memorandum of Agreement Concerning the Determination of Mitigation under the Section 404(b)(1) Guidelines* between EPA and the Department of the Army (the "Mitigation MOA")[5] established a mitigation sequence that is used to evaluate individual permit applications. This process is known as "sequencing" and requires the Corps to determine that the applicant has taken all appropriate and practicable steps first to avoid and then to minimize adverse impacts to wetlands that cannot reasonably be avoided. Unavoidable impacts that remain after all minimization efforts have been made must be offset through compensatory mitigation.[6] The Mitigation MOA expresses a preference for on-site versus off-site mitigation and in-kind versus out-of-kind replacement of wetlands.[7]

Wetlands mitigation has been both highly used and highly controversial. Initially, the Corps and EPA focused on on-site project-specific mitigation efforts. A 1990 study by the Florida Department of Natural Resources found that only 6% of the permittees had complied with their wetland permit's mitigation requirements and that 34% of the permittees had not even started their mitigation projects even though they had already impacted the wetlands that were the subject of their permits.[8] A similar study in Washington state found that only four of 18 mitigation projects provided acceptable ecological function.[9] Because the success record for these isolated mitigation projects was marginal at best, in 1995 the Corps, EPA and several other federal agencies issued federal guidance for the use of wetlands

mitigation banks. The mitigation banks are premised on the idea that large contiguous wetlands that may be created, enhanced, restored or protected off-site provide greater ecological benefits than on-site project-specific mitigation efforts.[10]

In June 2001, the National Research Council and the National Academy of Sciences issued a report that criticized the Corps' mitigation efforts in several ways, including the failure of mitigation projects to provide ecological benefits; the failure of permittees to build planned mitigation projects; the failure of the Corps to take a watershed approach to mitigation; and excessive reliance on on-site mitigation, which often fails because of altered hydrology at the site where draining and filling of wetlands occurs.[11]

To address these concerns, the Corps issued regulatory guidance letter 01-1 (the "Guidance") on October 31, 2001 in order to improve mitigation conditions required in Corps permits, provide a sound basis for the improved compliance and enforcement of permit conditions and help achieve the goal of "no net loss" of wetlands.[12] Like most aspects of the wetlands program, the Guidance has been quite controversial. Nevertheless, practitioners who advise clients regarding wetlands permitting should be familiar with the Guidance which applies to applications submitted for individual permits after October 31, 2001.

II. Types of Wetlands Mitigation

The Guidance discusses four standard types of wetlands mitigation:

1. Establishment. The creation of a new wetland at upland or deep water sites. Establishment results in a net gain in wetland acres.
2. Restoration. Returning function to a former or degraded wetland. If wetlands are re-established, such work results in a gain in wetland acres. However, if sites are rehabilitated, the work does not result in a gain in wetland acres even though the rehabilitation results in improved wetlands function.
3. Enhancement. The manipulation of the characteristics of an existing wetland to improve specific functions or change its vegetative composition. Enhancement must be undertaken for a specific purpose such as water quality improvement, increased flood water storage or improved wildlife habitat. Enhancement does not result in a gain in wetland acres.
4. Protection/Maintenance. Protecting a wetland from future threats such as development. Such measures include purchasing property containing wetlands; obtaining conservation easements or deed restrictions to limit the development of wetlands; or structural protections such as barriers, fences or drainage systems to protect existing wetlands. Preservation/maintenance does not result in a gain of wetland acres.

The Guidance does state that applicants may also propose the use of mitigation banks, in-lieu fee arrangements and/or separate activity-specific mitigation projects.

The Corps will approve a mitigation plan when it determines that the mitigation site is in, or reasonably close to, the impacted watershed and that the mitigation activity will off-set the impact on a functional basis.

III. Credits and Debits

The Guidance adopts the concepts of "credits" and "debits" to measure wetlands gains and losses in the context of the "no net loss" policy. Acres are the traditional measure of wetland gains and losses. A credit is defined as the unit of measure representing the gain of aquatic functions at compensatory mitigation sites. The measure of function is typically indexed to the number of acres of wetland resources restored, established, enhanced, or protected as compensatory mitigation. Conversely, a debit is defined as the unit of measure representing the loss of aquatic functions at a project site. The measure of function is typically indexed to the number of acres lost or impacted by the issuance of the wetlands permit. The evaluation of adverse impacts to a wetlands system will be evaluated with a view towards assigning an identifiable debit to be offset by a credit. The specific system used to assign credits and debits may vary between Corps Districts; the Guidance only requires that the systems for measuring credits and debits be comparable and approved by the Corps District with jurisdiction over the project.

The use of debits and credits will allow the Corps to better compare the loss of wetlands at a site with the gain of wetlands at an on- or off-site mitigation area. For example, credits may be granted when existing off-site wetlands are protected or maintained if the protection or maintenance of those existing wetlands is completed in conjunction with the establishment, restoration or enhancement of adjacent wetlands, and it is demonstrated that preservation or maintenance will augment the functions of the established, restored or enhanced wetland area. In addition, the Guidance also states that the permanent preservation of existing wetlands may be authorized as the sole basis for generating credits for mitigation projects.

Credits may also be created for the inclusion of upland areas occurring within a compensatory mitigation project to the degree that the protection of such upland areas is an enhancement of the function of the adjacent wetlands. For example, protecting and maintaining vegetated upland buffers could be shown to protect an adjacent wetland or stream. The Guidance states that mitigation projects should normally include vegetated buffers to protect adjacent wetlands or open waters. The Guidance also states that in many cases, vegetated buffers will be the only compensatory mitigation required and may be wetland, upland or a blend of the two.

IV. Mitigation Requirements

The Corps affirms its position that in-kind compensation

of resource impacts (e.g., restoring wetlands ecologically similar to impacted wetlands) is usually appropriate. However, the Corps does state that out-of-kind compensation may be appropriate if the mitigation is planned in a watershed context and when the function of the out-of-kind compensation site provides equal or better performance to in-kind compensation. When the ecological function of the impacted wetland is different from the ecological function of the mitigation wetland, the Guidance allows the Corps to use ratios in determining the amount of compensation required. Since the risk of mitigation failure is greater at sites where the hydrology is uncertain or where a greater plant diversity is required to maintain the function of the wetland, some mitigation projects may require a higher ratio than those mitigation sites with greater predictability. Note that the actual ratios are not set forth in the Guidance document. As long as these ratios are based on some identifiable rationale, any ratio may be used provided that the underlying policy of "no net loss" is adhered to. Approval of out-of-kind mitigation proposals will be made on a case-by-case basis by Corps District.

Because the restoration of existing wetlands provides the best potential for success, the Guidance document expresses a preference for the rehabilitation of existing wetlands and accordingly suggests that more credits can be issued for the rehabilitation of an existing wetland than for the establishment of wetlands in an area where they previously did not exist.

Following up on one of the conclusions of the National Research Council report, the Guidance states that the Corps will carefully consider the use of off-site mitigation projects in cases where on-site alterations of hydrologic and topographic conditions from site development activities reduce the potential success of on-site mitigation measures. The off-site project area should generally be in the same watershed as the impacted area. The mitigation plan will face greater scrutiny by the Corps the farther it is located away from the permitted site.

The Guidance sets forth the minimum components that should be included in a wetlands mitigation plan submitted as part of a permit application. These components of a mitigation plan should include the following:

1. Baseline Information;
2. Goals of the Mitigation Project;
3. Mitigation Work Plan;
4. Success Criteria;
5. Monitoring Plan;
6. Contingency Plan;
7. Site Protection;
8. Financial Assurances; and
9. Identification of the Party Responsible for Long-Term Maintenance.

In addition, the Guidance sets forth the minimum elements of the Mitigation Work Plan:

1. Maps and drawings showing the boundaries of proposed restoration, establishment, enhancement, rehabilitation or protected/maintained areas;
2. Replacement ratios developed consistent with the known difficulty and risk of replacement;
3. Construction methods, timing and sequence;
4. Data indicating historic and existing hydrology, stream bottom and/or soil conditions;
5. Source of water supply, connections to existing waters, and proximity to uplands (in some areas, a water budget may also be necessary);
6. Elevations at the mitigation site;
7. Plant materials and planting plan;
8. Methods and times of year for planting;
9. Plans for control of exotic vegetation;
10. Elevation(s) and slope(s) of the proposed mitigation area to ensure they conform with required elevation for target plant species;
11. Erosion control measures to prevent upland erosion into a site;
12. Stream or other open water geomorphology and features such as riffles and pools, bends, deflectors, etc; and
13. A plan outlining the short- and long-term management and maintenance of the mitigation site.

Mitigation wetlands must be permanently protected with the appropriate real estate instruments (e.g., conservation easements, deed restrictions or conveyance to appropriate state or non-profit agency). The applicant will have to demonstrate that it has adequate financial resources to implement the mitigation project and monitor and maintain the project for five to ten years to ensure the success of the project. The Guidance notes that the Corps may take enforcement action even after the monitoring period has ended.

In the past, many permittees were allowed to impact wetlands before their mitigation plan was implemented; in many cases, mitigation plans were never implemented. Accordingly, the Guidance clarifies that the following prerequisites must be satisfied prior to any impact to a wetland:

1. Approval of the mitigation plans;
2. Securing of the mitigation project site;
3. Availability of a permanent source of adequate water; and
4. Establishment of the appropriate financial assurances.

In addition, the Guidance states that the mitigation activities should be completed no later than the first full growing season following the impact to the permitted wetland.

V. Conclusion

A review of the list of requirements for mitigation plans emphasizes the point that, for many projects, it would be preferable to design a site to avoid impacting wetlands, rather than incurring the expense to obtain a wetlands permit and implement a mitigation plan. However, at those sites where, despite efforts to avoid and minimize impacts to the on-site wetlands, impacts to wetlands resources are unavoidable (e.g., projects with a water focus such as marinas or coastal developments), the new Guidance would seem to provide flexibility in designing and implementing a mitigation plan.

As those who attended the Section's Brown Bag luncheon on wetlands development last year will remember, the Savannah District (the Corps' District with jurisdiction over most of Georgia) is very under-staffed and overworked. It remains to be seen whether the Corps will be able to monitor approved mitigation plans to make sure that the national goal of "no net loss" of wetlands is achieved.

---

1 33 U.S.C.A. § 1251 et seq. (2001 & Supp. 2002).

2 33 U.S.C.A. § 1344 (2001 & Supp. 2002).

3 See 40 C.F.R. Part 230.

4 40 C.F.R. § 230.10(c).

5 See 55 Fed. Reg. 9210 (March 12, 1990).

6 *Id.* at 9211-9212.

7 *Id.* at 9212.

8 *See* Royal C. Gardner, *Banking On Entrepreneurs: Wetlands, Mitigation Banking, and Takings*, 81 Iowa L. Rev. 527, 540 (discussing the Florida and Washington state studies).

9 *Id.*

10 *See Federal Guidance for the Establishment, Use and Operation of Mitigation Banks*, 60 Fed. Reg. 58605 (November 28, 1995) (the "Mitigation Bank Guidance").

11 National Research Council, *Compensating for Wetland Losses Under the Clean Water Act*, available at http://www.nap.edu/books/0309074320/html (last visited July 24, 2002).

12 A copy of the Guidance is available at http://www.usace.army.mil/inet/functions/cw/hot_topics/rgl01_1.pdf (last visited July 24, 2002). Practitioners should note that the Guidance does not modify or revoke the Mitigation MOA and the Mitigation Bank Guidance. Instead, the Guidance should be read together with the Mitigation MOA and the Mitigation Bank Guidance. Because the Guidance is relatively brief (seven pages plus definitions) we do not provide citations to the Guidance in the following text.

Water Quantity Woes:Growing Concerns over Georgia's Diminishing Surface Water Supply

By Michelle Craig Fried, General Counsel
Upper Chattahoochee Riverkeeper

Introduction

Water quantity is becoming a significant determinant of both water quality and future economic prosperity in the southeastern United States. This is particularly true in Georgia, which in recent years, due to interstate water conflicts, unprecedented growth and severe drought, has been forced to face the reality that it is no longer (and never really was) a water rich State. In part, the concern over shrinking water supplies and growing water demands led Governor Barnes in 2001 to create a water study committee to develop comprehensive strategies for long-term water supply planning on a statewide basis, something the State's regulatory structure previously lacked.

This article explains Georgia's existing system for regulating water supply and discusses the growing debate over how the State's water managers will balance competing economic and environmental demands on limited water resources in the future.

The Applicable Laws and Policies

Regulated Riparian System

The current regulatory structure in Georgia gives people the right to reasonable use of the State's water resources, but that use is subject to the requirements of Georgia's Surface Water Withdrawal Act ("SWWA"), O.C.G.A. §§ 12-5-31, et seq., and Ground-Water Use Act of 1972 (the "GWUA"), O.C.G.A. § 12-5-90, et seq. This hybrid of the common law riparian rights doctrine[1] and government issued permits has been referred to as a "regulated riparian" system. In contrast, many western states such as Colorado and New Mexico follow what is known as a "prior appropriations" system, wherein the strength of an individual's right to use water depends on when he acquired the water right and whether he actually exercises the right. In other words, water is allocated largely on a first in time, first in right basis, and a water right is maintained by continued use of the right.[2]

Specifically as to the use of surface waters,[3] the SWWA requires all persons wishing to withdraw over 100,000 gallons per day of water from any of the surface waters of the State to obtain a permit from the Environmental Protection Division ("EPD"). O.C.G.A. § 12-5-31. The SWWA explicitly provides that the Director of EPD shall only grant permits to

meet the applicant's "reasonable needs". Furthermore, the Director of EPD shall not grant any water withdrawal permit that would have "unreasonably adverse effects upon other water uses, including but not limited to, public use, farm use and potential as well as present use; . . .." O.C.G.A. § 12-5-31(g).[4]

To protect against "unreasonably adverse effects", the Rules of the Department of Natural Resources ("DNR Rules") governing surface water withdrawal permits require the Director to incorporate "low flow protection" into all surface water withdrawal permits. See DNR Rule 391-3-6-.07(4)(b)9(iii). As part of low flow protection, the Director must include a minimum instream flow level in the permit that the permittee must maintain below its water intake. DNR Rule 391-3-6-.07(4)(b)9(iii). The Director cannot issue a permit that authorizes the depletion of that instream flow level except for periods of emergency water storage. Id. In other words, the permittee's withdrawals cannot cause the level of water flow in the stream or river to drop below the minimum instream flow level established in the permit. The Rule provides three definitions of appropriate minimum instream flow levels, but gives the Director significant discretion to set the minimum instream flow level so long as the permit does not cause unreasonable adverse impacts to other water uses. DNR Rule 391-3-6-.07(4)(b)9(iii)(II).

Interim Instream Flow Protection Policy

In addition to the instream flow options set forth in the SWWA regulations, the Director must consider a new interim instream flow policy adopted by the Board of the Department of Natural Resources ("DNR Board") when making water supply decisions. In early 2001, the DNR Board's water subcommittee examined the State's policy for protecting instream flows, in other words, the amount of water remaining in Georgia's rivers and streams after water withdrawals for industries and municipalities and below reservoirs. For more than 20 years, the State has used a calculation called the "7Q10" (the lowest seven-day continuous flow at a particular point in a stream over a ten-year period of record) as the target flow to be protected. The 7Q10 flow is, thus, by definition a low or drought flow.

In 1995, Georgia's Wildlife Resources Division (WRD) published a report that recommended a different approach, stating, "[t]here is clear consensus among aquatic biologists on the need to reserve more water for instream habitat requirements than is provided by the 7Q10 flow." A task force of diverse stakeholders that met from 1996 to 1997 also concluded that the current 7Q10 policy was inadequate to protect flows for aquatic life in state waters and recommended an interim approach to be employed until further research on Georgia streams could verify an appropriate final policy. Finally, in 2001, in a joint recommendation made to the DNR Board's water subcommittee, both WRD and EPD finally concluded that the basic interim approach recommended by the stakeholder group in 1997 should be adopted.

At its May 2001 meeting, the DNR Board voted unanimously to adopt the recommended interim instream flow protection policy and to seek funding to conduct needed research upon which to base a final policy. Basically, the interim policy requires that all new or expanded permits employ one of the following three flows: 1) the monthly 7Q10 (as opposed to the annual 7Q10 that was rejected by WRD and the stakeholder group); 2) a seasonably variable minimum flow of 30/40/60% of annual average flow for regulated streams (30% for unregulated streams); or 3) a site-specific flow study approved by WRD. The policy specifically exempts streams highly regulated by federal dam projects, such as the Chattahoochee, Coosa and Savannah Rivers.

The Current Debate

The "Tristate Water Wars"

Since the 19th century, upstream and downstream states have disputed how to allocate water resources in their shared river basins. One such "water war" broke out in the southeast in 1990 when the State of Alabama sued the U.S. Army Corps of Engineers (the "Corps") over the Corps' proposed changes to the operations of upstream reservoirs in the Apalachicola - Chattahoochee - Flint (ACF) and the Alabama - Coosa - Tallapoosa (ACT) river basins. Alabama agreed to stay its legal action against the Corps pending a comprehensive study by Georgia, Florida and Alabama of the water resources in the two river basins. After completion of a six-year study, the three states, with the help of the federal government, developed interstate water compacts for both the ACF and ACT basins to equably apportion the water resources in these river basins (the "Compacts"). The legislatures of all three states incorporated the Compacts into their respective state laws in 1997. The U.S. Congress also passed the Compacts, and President Clinton signed the Compacts into law on November 20, 1997.[5]

The three states have been negotiating under the Compacts for almost five years and have yet to reach an agreement on how to allocate water resources in the ACF/ACT basins. The stakes in the negotiations are tremendous, as the ACF/ACT basins provide drinking water for millions of people, harbor a diverse array of aquatic species and offer outstanding recreational opportunities for the three states.[6] In addition, the waters in these basins support a host of other services directly and indirectly linked to the continuing welfare of the region such as hydropower generation, wastewater assimilation, irrigation and navigation.[7] Each of the three states wants to ensure it has enough water to meet the requirements of state and federal environmental laws and to support future growth.

Statements made by Florida negotiators earlier this year indicate that one sticking point in the ACF basin seems to be whether Georgia will promise Florida that it will limit its consumptive use of water (i.e., water withdrawals minus water returns via wastewater discharges). In essence, Florida wants a

commitment from Georgia that a certain percentage of the water withdrawn from the basin (primarily the Chattahoochee) for Atlanta eventually will be returned to the basin in the form of wastewater discharges.[8] Thus far, Georgia negotiators have resisted committing Georgia to a specific rate of return.

A recent U.S. Army Corps of Engineer's (the "Corps") report threw another wrench in the negotiations process. The Corps reported that, during the summer months of 1999 and 2000, Atlanta area water consumption from the Upper Chattahoochee River[9] (i.e., water withdrawals minus water returns via wastewater discharges) sometimes exceeded consumption levels not expected until 2030. The Corps' findings about summer water consumption sent Georgia negotiators scrambling, and they quickly came up with an explanation for this seemingly frightening picture of the State's water future.

The Corps used estimates based on 1) a six-year comprehensive study, which determined how much water could reasonably be withdrawn from the Upper Chattahoochee Basin and 2) the assumption that Atlanta water consumption does not vary greatly from season to season. This last assumption, while questionable in hindsight, has been a supposition that Georgia has operated under for the past five years of negotiations with Florida and Alabama. Georgia negotiators now claim that the 2030 water demand projections do not accurately represent the timing of water consumption in the Atlanta area. Under EPD's revised water use projections for 2030, annual average water consumption (approximately 705 million gallons per day) remains the same, but water consumption shifts more profoundly with the seasons.

Despite the controversy created by the Corps' Report, the three states recently voted to extend the deadline for completing negotiations under the Compact until January, 2003, indicating that they are making progress towards an agreement. Even if the three states never reach an agreement on water allocation in the ACF/ACT basins, however, the Tristate Water Wars has clearly illustrated the need for comprehensive water supply planning in this region.

Water Planning Agencies--Metropolitan North Georgia Water Planning District and Statewide Joint Comprehensive Water Study Committee

The looming Tristate Water Wars and the current drought, in part, spurred the Georgia General Assembly in 2001 to pass legislation creating two quasi-governmental agencies to look at long-term water quantity and quality planning in the State.

Senate Bill 130, Governor Barnes' water bill, created the Metropolitan North Georgia Water Planning District (the "Metro District"). The bill was based largely on the recommendations of the Clean Water Initiative ("CWI"), a group of business, local government and a few environmental leaders that met throughout last summer and fall to develop solutions to metro Atlanta's water issues. Basically, the Metro District is charged with developing plans to govern the District areas' management of wastewater, storm water and water supply. In terms of water supply planning, the Metro District must develop a water supply plan for the District area by May 2003.[10]

A related piece of legislation, Senate Resolution 142, created the Joint Comprehensive Water Study Committee ("JSC") to study statewide water policy and planning issues, including water supply planning. The JSC must present its final report to the Governor's office by September 2002. The final report will include recommendations related to the development of a comprehensive statewide water management plan, including a recommendation on the government entity that will actually control statewide water planning, Georgia's water supply regulatory structure, and interbasin transfer laws (e.g., the transfer of water from one river basin to another).

At its July meeting, the JSC voted on recommendations presented by JSC subcommittees, including water supply and planning framework subcommittees. It appears from a July draft of the JSC's final report that it will recommend keeping the surface water and groundwater permitting system largely as it stands, with one significant exception. The JSC voted to place more restrictions on agricultural water users, including requirements for metering water withdrawal rates and term limits on permits.[11] However, the JSC will meet again at the end of August to complete its final report and the ultimate recommendations by the JSC may change.

Conclusion

While the specific outcomes and impacts of the Tristate Water Wars, the Metro District and the JSC are uncertain, efforts such as these have elevated Georgia's water woes to a regional and even national level. For example, The New York Times recently published an article about water shortage throughout the United States and used the ACF/ACT basins as a key example of the conflict between growth and water resources.[12] As a result of this new spotlight on the State's water issues, state and local water managers will be increasingly forced to make future water allocation decisions more precisely and under greater scrutiny from the public and neighboring states. Efforts such as the JSC and Metro District have also renewed the discussion about water-saving technologies, ranging from basic water conservation techniques to more cutting-edge approaches such as reuse of treated wastewater for irrigation, industrial processes and even potable water supply. It is this author's opinion that such alternative water sources will likely become more commonplace in the future.

Overall, one common theme has arisen from the intensive dialogue surrounding the current water crisis. Irrespective of interstate demands, Georgia must make intrastate water supply decisions on a comprehensive and long-term basis. Each

water supply decision, whether it is an industry's request for a water withdrawal permit or a local government's request to build a new reservoir, must be considered in light of past and future decisions. Georgia must also face the toughest and most controversial question of all-can the State's existing and finite water resources support the region's current growth rate?

---

1 A riparian system gives riparian property owners the right to use the surface waters on or adjacent to their properties, so long as the use is reasonable and does not harm downstream riparian property owners reasonable use of the waterway. See e.g., O.C.G.A. §§ 44-8-1, et seq.; Price v. High Shoals Mfg. Co., 132 Ga. 246 (1908).

2 See David M. Gillilan, Instream Flow Protection 17-21, 31-34 (1997).

3 This article focuses primarily on the right to use Georgia's surface waters, as a majority of the State's water supply (approximately 80%) comes from its streams, rivers and lakes. U.S. Geological Survey, U.S. Dep't. of Interior, Pub. No. FS-011-99, USGS Programs in Georgia (1999).

4 The SWWA, O.C.G.A. § 12-5-31(o)(1), provides that "any person who is aggrieved or adversely affected by any order or action of the director pursuant to this Code section shall, upon petition within 30 days after the issuance of such order or taking of such action, have a right to a hearing before an administrative law judge appointed by the Board of Natural Resources." In the first third party challenge to a surface water withdrawal permit in Georgia, an Administrative Law Judge ruled that public use of surface waters, including recreational and aesthetic uses, are "other water uses" protected by the SWWA, and thus, aggrieved citizens had standing to challenge water withdrawal permits. Upper Chattahoochee Riverkeeper, et al. v. Director of Environmental Protection Division, et al., OSAH-DNR-WW-01-11087-74-MMM (July 8, 2001 Order).

5 Pub. L. No. 105-104.

6 See, e.g., U.S. Army Corps of Engineers, Draft Environmental Impact Statement, Water Allocation for the Apalachicola-Chattahoochee-Flint (ACF) River Basin, September 1998; U.S. Army Corps of Engineers, Draft Environmental Impact Statement, Water Allocation for the Alabama-Coosa-Tallapoosa (ACT) River Basin, September 1998.

7 Id.

8 Charlie Seabrook, Water Talks End in Failure, Atlanta Journal-Constitution, March, 19, 2002, § A1.

9 The Upper Chattahoochee River is defined as the Chattahoochee River from Lake Lanier to Whitesburg, Georgia. (See Corps' Report on its website at www.sam.usace.army.mil/hottopics.htm.

10 For more information, the Metro District maintains a website at www.northgeorgiawater.org.

11 The JSC's draft final report is posted at www.cviog.uga.edu/water under "Documents for August 1 Meeting".

12 Douglas Jehl, Atlanta's Growing Thirst Creates Water War, N.Y. Times, May 27, 2002.

New Source Review Reform and Enforcement

By Margaret Campbell and Steve Hewitson
Troutman Sanders LLP

On June 13, the Bush Administration issued its long-awaited review of the New Source Review ("NSR") program under the Clean Air Act and concluded that the decades old program is fraught with uncertainty and creates disincentives for projects designed to improve the efficiency, safety and reliability of existing facilities. To address perceived problems with the current program, the Administration also announced its intent to initiate a series of rulemakings later this year in which it will (1) finalize numerous NSR reforms originally proposed by the Clinton Administration in 1996 and (2) propose new rules to clarify the scope of the "routine maintenance repair and replacement" exclusion and address other controversial provisions of the NSR rules and guidance. The NSR rulemaking process is expected to get underway before the end of the year.

Despite the Administration's conclusions and intent to revise the rules, EPA and the Department of Justice are actively pursuing numerous NSR enforcement actions pending in federal district courts across the country. These enforcement actions were brought by the Clinton Administration as part of a nationwide, multi-industry NSR enforcement initiative. Targeted industries included pulp and paper manufacturing, petroleum refining, and electric utilities.

As part of this enforcement initiative, in 1999 and 2000, EPA filed separate civil enforcement actions in federal district courts around the country against several electric utilities, including Alabama Power, Georgia Power, Savannah Electric and Power, Duke Energy, American Electric Power (AEP), Cinergy, First Energy, Illinois Power, and Southern Indiana Gas and Electric Company (SIGECO) in which EPA alleged that projects the utilities believed to be "routine maintenance repair or replacement" projects were in fact "major modifications" that triggered new source permitting and emission control requirements. The complaints in all of these cases are virtually the same. They focus primarily on the replacement of certain non-emitting boiler components. Some of the allegations are based on projects that were undertaken almost 30 years ago. All of the complaints seek civil penalties and injunctive relief.

In addition to these civil actions, EPA filed an administrative enforcement action against the Tennessee Valley Authority (TVA) in which EPA made virtually identical allegations with respect to a number of TVA's plants. The TVA action was reviewed by EPA's Environmental Appeals Board (EAB), and in a decision issued September 15, 2000, the EAB largely upheld EPA's administrative compliance order.

Four of the other electric utility enforcement actions are set for trial in the next 14 months and all will be in or through the summary judgment stage in the next six months. Under the current schedule, the first case to be heard will be *USA v. Southern Indiana Gas and Electric Company (SIGECO)*, No. 99-C-1692 (S.D. Ind.). Trial on the liability issues in that case will begin on October 16, 2002, and the court has already begun ruling on summary judgment motions.

Specifically, on July 19, 2002, the court denied SIGECO's Motion for Partial Summary Judgment Based on Lack of Emissions Increases. The district court held that emissions increases must be determined by reviewing evidence of the "projected emissions" following the project as opposed to evidence of actual emissions following the project. The court cited as persuasive authority the EPA Environmental Appeals Board decision in *In re: Tennessee Valley Authority*, which is currently on appeal before the Eleventh Circuit. On July 29, 2002, the court ruled on two additional summary judgment motions. The court granted SIGECO's motion for partial summary judgment on statute of limitations issues, but denied its motion for partial summary judgment with respect to certain refurbishments SIGECO made to one of its facilities.

On the statute of limitations issue, SIGECO argued that failure to comply with preconstruction permitting requirements is not a continuing violation of the Clean Air Act but is a one-time violation which ends when construction is complete. Therefore, the federal five-year statute of limitations bars EPA's claims for civil penalties for the SIGECO projects completed in 1991 and 1992. The court agreed with SIGECO and rejected EPA's argument that continued operation of the facility constituted a continuing violation of the Act. The court noted as significant EPA's claims that SIGECO violated certain construction permit requirements as opposed to operating permit requirements. Finding that "SIGECO's alleged failure to comply with preconstruction permit requirements resulted, if at all, in discrete violations that were complete at the conclusion of construction," the court held that the five year statute of limitations barred EPA from asserting claims for civil penalties associated with the 1991 and 1992 projects. SIGECO did not seek summary judgment on EPA's request for injunctive relief.

SIGECO also moved for partial summary judgment on the basis that EPA is barred from pursuing its claims where the state agency responsible for implementing the NSR program had previously determined that the project at issue was not subject to NSR requirements. In this case, the Indiana Department of Environmental Management ("IDEM") had reviewed one of the projects at issue in the case in advance of construction and determined that it was a "routine maintenance, repair or replacement" project and therefore excluded from the NSR requirements.

Despite the state-issued applicability determination, the court denied SIGECO's motion for summary judgment. The court found that EPA had disagreed with IDEM's determination and held that IDEM's opinion was not binding on EPA. The court further found no affirmative misconduct on the part of EPA in disagreeing with IDEM's determination, and ruled that SIGECO had provided no basis for invoking equitable estoppel against EPA.

The next trial scheduled is *USA v. Ohio Edison*, No. 99-CV-1181 (S.D. Ohio) on February 3, 2003, with *USA v. Illinois Power Company, et al.*, No. 99-CV-833 (S.D. Ill.) scheduled shortly thereafter on February 11, 2003. The *Ohio Edison* trial is limited to liability issues, but the *Illinois Power* trial is not bifurcated into a liability phase and penalty phase like the other cases. Summary judgment motions in these cases are due by November 1, 2002 and December 16, 2002, respectively.

The final case currently scheduled for trial is *USA v. Duke Energy Corporation*, No. 00-CV-1262 (M.D.N.C). That trial is limited to liability issues and is set to begin on September 1, 2003. Summary judgment motions are due by January 31, 2003.

There is one non-utility NSR enforcement action which may go to trial next year, *USA v. Westvaco Corporation*, No. 00-CV-2602 (E.D. Md.). Summary judgment motions are currently due by July 14, 2003. Like the majority of the utility cases, the *Westvaco* case has been bifurcated into a liability phase and a penalty phase.

In addition to actively pursuing the pending NSR enforcement actions, in June 2002 EPA issued NOVs to two new power companies -- Minnkota Power Cooperative in North Dakota and Xcel Energy in Colorado -- alleging violations of the new source permitting requirements similar to those involved in the pending enforcement actions. This spring, EPA also issued a new wave of administrative information requests to individual companies to gather information on potential NSR violations. At least four of those new information requests were issued by EPA Region 4.

Locally, the civil enforcement actions filed by EPA against Alabama Power Company (N.D. AL), Georgia Power Company and Savannah Electric and Power (N.D. GA) have been stayed or effectively stayed pending a decision by the Eleventh Circuit Court of Appeals in the TVA case. In that action, TVA and several other third party petitioners, including Alabama Power, have appealed EPA's Environmental Appeals Board decision issued in September 2000, which upheld in large part the administrative NSR compliance order issued to TVA and set out for the first time, in detail, EPA's new interpretations of NSR which underlie virtually all of the pending NSR enforcement actions. Legal issues in the TVA case include the scope of the "routine maintenance repair and replacement" exclusion, the proper test for calculating emissions increases, whether the regulated community had fair notice of EPA's current interpretations, and whether the Agency must go through rulemaking prior to enforcing those interpretations. The TVA case has been fully briefed and argued and a decision on the merits was expected by late summer. However, on June 26, the panel referred the case to mediation and stated that the case would be "held in abeyance" for sixty days.

Thus, despite the Bush Administration's June 13 NSR policy announcement and stated intent to change the rules going forward, EPA's enforcement efforts continue unabated.

Note from Editor: Text of this article was inadvertently deleted from the Spring Issue of this Newsletter. The Editor apologizes for this error and this article is reprinted in full herein.

The Environmental Litigator's Procedural Primer on the Office of State Administrative Hearings

By Rita A. Sheffey and Ben F. Johnson IV
Hunton & Williams

The Environmental Protection Division ("EPD") seeks civil penalties against your client, denies your client's permit application, revokes your client's permit, or even issues the permit which then is challenged by a third-party. There are numerous ways that a client -- and you as its environmental lawyer -- might end up in a proceeding before Georgia's Office of State Administrative Hearings ("OSAH").[1] With the increasing likelihood of clients finding themselves in proceedings before OSAH, practitioners more familiar with environmental litigation in state and federal courts should be aware of several practical differences between the procedural rules in those judicial fora and OSAH's rules.

1. OSAH Overview

The legislature created the Office of State Administrative Hearings ("OSAH") in 1994 as a quasi-judicial agency within the executive branch.[2] OSAH provides a uniform system for hearing contested cases that is entirely independent of the various state agencies whose contested cases it hears.[3] Prior to OSAH, the Board of Natural Resources appointed its own administrative law judge to hear cases arising from actions or orders of the Department of Natural Resources ("DNR"), including the Environmental Protection Division ("EPD").[4] Those functions since have been transferred to OSAH.[5]

2. The Petition

A petition for hearing by an administrative law judge is submitted to the Director of the EPD ("Director"), who then refers the case to OSAH for hearing.[6] In actions involving the EPD, petitions for hearing are governed by rules of the DNR and those rules should be consulted for the timing, content, and form of the petition.[7] When the Director receives a timely petition for hearing, he then forwards the petition to the Attorney General with a request that it be transmitted to OSAH for hearing.[8] In most instances, the filing of a petition for review stays the agency action in question.[9] OSAH rules govern the proceedings once the Director refers the matter.[10] OSAH's administrative law judge ("ALJ") is to determine all issues, including whether the petitioner has satisfied the filing requirements and is entitled to a hearing at all,[11] and has all the powers of the Director of the EPD with respect to that case.[12] There is no requirement under either DNR or OSAH's rules that the Director file an answer or response to the petition. The ALJ may, of course, require that a response be filed.[13]

3. OSAH Rules Generally

Georgia's Civil Practice Act generally does not apply to OSAH proceedings, which are governed primarily by OSAH rules and the Administrative Procedure Act ("APA").[14] OSAH's rules explicitly provide that they should be liberally construed and may be "relaxed" where doing so "will facilitate resolution of the matter without prejudice to the parties and will not be inconsistent with the requirements of the APA or other applicable statute."[15] The ALJ retains discretion to resolve any procedural issues not addressed by OSAH rules, the APA, or "other applicable law." and may look to the Civil Practice Act and Uniform Superior Court Rules for guidance.[16]

4. Appearance by Attorneys

Parties may be represented in OSAH proceedings.[17] In order to appear before OSAH, an attorney must be an active member in good standing of the State Bar of Georgia.[18] The ALJ has discretion to admit nonresident attorneys *pro hac vice* upon motion.[19] Unlike practice before Superior and State Courts, an attorney need not fulfill the trial experience requirements of State Bar Rule 8-104(D) in order to appear before OSAH.[20] OSAH has adopted the procedures of the Uniform Superior Court Rules for motions to withdraw as counsel and for leaves of absence.[21]

5. Default

The ALJ may enter an order of default, including a partial default where appropriate, if a party fails to participate at any stage, fails to file a required pleading, or fails to comply with an order or subpoena of the ALJ.[22] Because the ALJ is not vested with the same range of powers as judges within the judicial branch, its broad power to enter a default against an offending party perhaps is its most powerful direct compulsory device. Otherwise, the ALJ, through the application of a party, has to request action from the appropriate Superior Court. [23]

6. Filing by Mail

OSAH allows filing by mail, with documents "deemed filed on the date on which they are received by the Clerk or the official postmark date such document was mailed, properly addressed to the Clerk with postage prepaid, by first class mail, whichever date comes first."[24] In contrast, the Civil Practice Act deems documents filed only upon receipt in the Clerk's office, with the filing party assuming the risk of any delays in

the mail.[25] Of course, mailing is not required and a party still may file documents with OSAH by hand delivery to the Clerk. Courtesy copies, particularly of motions or where immediate action is sought, may be sent directly to the ALJ.

7. Burdens of Persuasion and Going Forward

Although OSAH rules generally place the burdens of persuasion and of going forward with the evidence on the agency involved, they place those burdens differently under certain circumstances.[26] Taking a typical environmental permit case, for example, the holder of a permit bears the burdens in challenging the revocation, suspension, amendment, or non-renewal of the permit.[27] An applicant bears the burdens in challenging the denial of a permit.[28] Anyone other than the permit holder or applicant, such as an environmental activist organization, who challenges agency action on a permit bears the burdens.[29] Even then, after notice, the ALJ may shift the burdens upon motion or when "justice requires."[30]

8. Amendments to Pleadings

Under the Civil Practice Act, a party may amend its pleadings without leave of court or agreement of the parties any time before entry of a pretrial order.[31] The OSAH rules limit this right slightly, allowing amendment of pleadings without leave or agreement until the tenth day prior to the hearing or until the entry of a prehearing order, whichever is earlier.[32] In contrast, the Federal Rules of Civil Procedure allow a party to amend a pleading without leave or agreement once, but only before a responsive pleading is served or, if no responsive pleading is permitted, 20 days after service of the pleading being amended.[33]

The OSAH rules are substantially different from the Civil Practice Act in requiring responses to amended pleadings. If a party in an OSAH proceeding amends "any pleading to which a response or reply is required," the opposing party must file its response within seven days after service of the amended pleading, unless the ALJ orders otherwise.[34] Only slightly different, the Federal Rules require that a party respond to an amended pleading by the longer of the time to respond to the original pleading or 10 days after service of the amended pleading, unless the Court orders otherwise.[35] In contrast to both the Federal and OSAH rules, which require a response unless relieved by the Court, under the Civil Practice Act a party is only required to respond to an amended pleading if the Court orders a response.[36]

9. Intervention

OSAH rules govern the procedure for a party's intervention in an OSAH proceeding, incorporating the Administrative Procedure Act to provide the grounds for such intervention.[37] Together, the OSAH procedure and the APA grounds are substantially identical to the requirements for intervention under both the Civil Procedure Act and the Federal Rules.[38] The OSAH rule goes a step further, however, allowing the ALJ to "limit the factual or legal issues which may be raised by an intervenor" to "avoid undue delay or prejudice to the adjudication of the rights of the original parties."[39]

10. Discovery

The ALJ in an OSAH action is not limited to the evidence before the referring agency and hears the case *de novo*.[40] However, traditional discovery procedures, such as those of the Civil Practice Act or Federal Rules of Civil Procedure, are not available to parties in an OSAH administrative proceeding.[41] Although OSAH rules provide procedures for obtaining testimony and documents prior to the hearing, these are to be in lieu of live testimony from those witnesses at the hearing.[42] A party remains free to obtain publicly available records, such as under O.C.G.A. § 50-18-70 et seq. and under OSAH Rule 37.[43]

Although not a discovery device per se, a party may take advantage of OSAH's prehearing conference procedures to discover information on the opponent's issues, witnesses, experts, and documents. Prehearing conferences are not mandatory, but the ALJ may require the parties to appear for one or more prehearing conferences and/or submit a written joint prehearing submission addressing a number of issues including: clarification of the issues; identification of documents and witnesses for hearing; stipulation of facts; and identification of expert witnesses and substance of the facts and opinions on which the expert will offer testimony.[44]

Through aggressive use of such prehearing procedures, a party can stake out its opponent on these issues. In fact, the ALJ should encourage this, particularly in complex cases, because it may simplify the hearing by resolving and avoiding disputes and unnecessary surprise. The ALJ then may issue a prehearing order, similar to a pretrial order in state or federal court, memorializing the results of these prehearing conferences and providing that "issues, factual matters, witnesses and documents not included in the prehearing order shall not be considered, allowed to testify, or admitted into evidence over the objection of any party" except upon good cause shown.[45]

11. Motions

OSAH Rule 16 governs the filing of motions.[46] Any response must be filed within 10 days of service of the motion.[47] In state and federal courts, a party's time to respond to motions other than for summary judgment varies widely, the Northern District of Georgia allowing 10 days, the Southern District allowing 15 days, the Middle District allowing 20 days, and State and Superior courts allowing 30 days.[48] The ALJ is not required to hold a hearing on a motion, but may do so on its own or upon written request of a party.[49] OSAH rules specifically provide that the ALJ may conduct motion hearings by telephone.[50]

OSAH rules provide for a "summary determination"

that largely is consistent with the summary judgment procedures under both the Civil Practice Act and the Federal Rules.[51] However, OSAH does not distinguish between types of motions in setting the time to respond, leaving it at 10 days for all.[52] In contrast, a party in Superior or State Court generally has 30 days to respond to any motion, including for summary judgment.[53] Federal courts in Georgia generally allow 20 days to respond to a motion for summary judgment.[54]

12. Voluntary Dismissal

In an OSAH action, the initiating party has a broad right of voluntary dismissal. The ALJ must dismiss the case if the party requesting the hearing *at any time* withdraws that request.[55] The Civil Practice Act provides a fairly similar right of unilateral dismissal, allowing a plaintiff to dismiss its action voluntarily any time before it rests its case.[56] In contrast, the Federal Rules prohibit a plaintiff from unilaterally dismissing its action after the adverse party serves its answer or files a motion for summary judgment.[57]

13. Evidence

OSAH rules, pointing to the APA, require that the ALJ "apply the rules of evidence as applied in the trial of civil non-jury cases in the superior courts."[58] Similar to the evidentiary provisions of the APA, that rule goes on, however, to add that the ALJ "may, when necessary to ascertain facts not reasonably susceptible of proof under such rules, consider evidence not otherwise admissible thereunder if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs."[59]

Before concluding that OSAH's provision broadening "the rules of evidence applicable in superior courts" has eviscerated those traditional rules, note that it remains subject to the prefatory condition that such evidence be admissible only "when necessary to ascertain facts not reasonably susceptible of proof under such rules."[60] Probably less than comfortable with the relatively undefined expansion of the traditional rules of evidence, reviewing courts have required satisfaction of this condition.[61]

OSAH provides five examples of evidence that "may be admitted" under this expansion of the traditional rules of evidence.[62] The first of these, OSAH Rule 18(1)(a), is for records and reports of public agencies.[63] The language of that example is substantially identical to Federal Rule of Evidence 803(8), which excepts such documents from the prohibition on hearsay. Georgia law has no direct equivalent to the public records and reports exception of FRE 803(8) and such records generally must be admitted under some other provision.[64]

Similarly, the example of OSAH Rule 18(1)(c) substantially tracks the language of FRE 803(18), which excepts statements in learned treatises from the rule against hearsay. Georgia law is more restrictive than the Federal Rule, allowing an expert to provide an opinion based in part on learned treatises but generally prohibiting the introduction of statements from the treatises themselves.[65] The OSAH language, however, omits the last sentence of FRE 803(18), which states that "[i]f admitted, the statements may be read into evidence but may not be received as exhibits." Without this limitation, the OSAH rule presumably allows admission of the document itself and, therefore, broadens even the Federal Rule. In any event, OSAH rules provide for much broader admissibility of published authority than normally would be allowed under Georgia law.

The example of OSAH Rule 18(1)(b) refers to "reports, records, statements, plats, maps, charts, surveys, studies, analyses or data compilations after testimony by an expert witness that the witness prepared such document and that it is correct to the best of the witness' knowledge, belief and expert opinion."[66] Contemplating the admissibility of documents created by the expert witness, this example appears designed to avoid traditional objections to such evidence, such as that it is merely cumulative of the expert's testimony or would unduly reinforce the expert's oral testimony and become a "continuing witness."[67] This also streamlines the admission of demonstrative exhibits prepared by an expert witness.

Appropriating language from the evidentiary provision of the APA, the example in OSAH Rule 18(1)(d) allows admission of "any medical psychiatric, or psychological evaluations or scientific or technical reports, records, statements, plats, maps, charts, surveys, studies, analyses or data compilations of a type routinely submitted to and relied upon by the Referring Agency in the normal course of its business."[68] As with previous examples, this essentially weakens the prohibition on hearsay evidence and eases the introduction of documents on which the agency relied.[69]

The final example, in OSAH Rule 18(1)(e), really contains two separate provisions related to the "best evidence rule." The first part provides for the admission of "documentary evidence in the form of copies if the original is not readily available, if its use would unduly disrupt the records of the possessor of the original, or by agreement of the parties."[70] This essentially softens Georgia's codified "best evidence rule," dispensing with many of its requirements.[71] The second part provides that "[d]ocumentary evidence may also be received in the form of excerpts, charts, or summaries when, in the discretion of the ALJ, the use of the entire document would unnecessarily add to the record's length."[72] Again, this softens Georgia's existing procedure for the introduction of summaries of voluminous evidence.[73]

OSAH Rule 18(4) governs the admissibility of expert testimony in OSAH proceedings, allowing broader admissibility of such testimony than might be allowed under Georgia law.[74] That rule combines, and is substantially identical to, Federal

Rules of Evidence 702, 703, and 705. It specifically includes the provision of FRE 703 that, "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."[75] In other words, an expert witness may base its opinion on hearsay. Georgia traditionally allowed an expert to testify only on facts within his knowledge, facts admitted at trial, or facts presented to him by way of hypothetical questions.[76] Georgia law has been evolving on this issue, a full discussion of which is beyond the scope of this article. In short, though, Georgia has moved towards the Federal Rule, allowing an expert to base an opinion, at least in part, on hearsay, any lack of personal knowledge going to the weight given that opinion by the finder of fact.[77] OSAH's incorporation of the federal standard places it in line with this trend in Georgia law.[78]

A significant feature of OSAH's evidentiary rule is that it allows the ALJ discretion to receive direct testimony in written form, requiring that such testimony be served on all parties in advance of the hearing.[79] The admissibility of written testimony remains subject to the same evidentiary rules as oral testimony and the witness still must appear at the hearing, affirm the written statement, and be subject to cross-examination.[80] Written direct testimony can streamline testimony and provide the opposing party an advantage in preparing for cross-examination.

Finally, OSAH Rule 18 includes provisions allowing the ALJ to take "official notice" of certain evidence. The first, OSAH Rule 18(8), provides that the ALJ may take official notice of "judicially recognizable facts."[81] This appears to be coextensive with judicial notice under Georgia law, adding its own procedure for handling such notice at the hearing.[82] In addition, OSAH Rule 18(9) allows the ALJ to take notice of "the contents of policy and procedure manuals promulgated by State agencies for which OSAH conducts hearings," providing the procedure to be followed when the manual in question has not been adopted pursuant to the rulemaking procedures of the APA.[83] That rule also allows the ALJ to take notice of "any fact alleged, presented, or found in any other hearing before an ALJ, or of the status and disposition of any such hearing; provided, that any party shall on timely request be afforded an opportunity to contest the matters of which official notice is taken."[84]

14. The Hearing

The ALJ is to issue a notice of hearing "[a]s soon as practicable" after OSAH receives a request for hearing.[85] OSAH Rules 21 through 33, along with the APA, primarily govern the hearing and the decision thereon.[86] The hearing is not limited to evidence originally before the agency.[87] The agency's decision is not entitled to any deference and the ALJ will consider the matter *de novo*.[88] The standard of proof is a preponderance of the evidence, unless otherwise provided by statute or rule.[89] In cases imposing civil penalties, the ALJ must consider certain factors set forth in DNR's rules.[90]

The ALJ can issue subpoenas to compel attendance and the production of documents at the hearing.[91] A party requesting a subpoena must do so in writing, served on all parties, at least five days before the hearing.[92] Although issued by the ALJ, the requesting party is responsible for serving subpoenas.[93] The ALJ also may quash a subpoena on grounds provided, including the general ground "for other good reasons of basic fairness."[94] Enforcement of ALJ subpoenas is sought by application to the Superior Court for the county where the case is being heard.[95] A party seeking to compel only the production of documents from a party to the proceedings may serve a notice to produce on that party without the necessity of a subpoena.[96]

There are a few procedural issues of note. Where parties have "substantially similar interests and positions," the ALJ has discretion to limit the number of those parties allowed to cross-examine witnesses, argue motions, or argue objections.[97] The ALJ also can order that the hearing be expedited where required by law or "if necessary to protect the interests of the parties or the public health, safety or welfare."[98]

The ALJ generally is to provide a decision within 30 days after the close of the hearing record[99] but may remand the case to the referring agency at any time.[100]

15. Judicial Review

A party may seek judicial review only of a final decision.[101] Normally, under the APA, an ALJ's decision is only an "initial decision," which then is transferred back to the referring agency for review.[102] If the referring agency does not reject or modify the decision, normally within 30 days, the decision becomes final.[103] In matters arising from the EPD, however, an OSAH decision is a final, reviewable decision.[104] The procedure for obtaining judicial review is set forth in the APA[105] but any petition for judicial review also should be filed with the OSAH Administrative Hearing Clerk, who will certify the record to the reviewing court.[106] Also note that the Superior Court must hear the case within 90 days from the date the petition is filed with it, unless continued to a date certain by order, or the ALJ's decision will be affirmed by operation of law.[107] Although the court may order a stay upon request and good cause shown, a petition for judicial review does not automatically stay the ALJ's decision.[108]

OSAH adds what is at least a third set of procedural rules to the knowledge base increasingly required of the environmental litigator. This article has not addressed every detail of every OSAH rule and there, of course, is no substitute for a thorough reading of them. Instead, this article hopefully provides an entry-point to those rules and highlights many of their unusual provisions that otherwise might not be apparent to one faced with them for the first time.

[1] Office of State Administrative Hearings Background, available at http://www.state.ga.us/osah/background.html.

[2] O.C.G.A. § 50-13-40 et seq.

[3] See O.C.G.A. § 50-13-40. OSAH has jurisdiction over cases arising from the Department of Natural Resources, including the Environmental Protection Division. This article discusses the functions of OSAH in the context of cases contesting actions of the Director of the Environmental Protection Division.

[4] O.C.G.A. § 12-2-2(c)(2).

[5] O.C.G.A. § 50-13-44.

[6] O.C.G.A. §§ 12-1-2(c), 50-13-41(a); Ga. Comp. R. & Regs. r. 391-1-2-.03, .04, .06; see Ga. Comp. R. & Regs. r. 616-1-2-.02(5) (OSAH rules do not supersede agency rules governing how a hearing is to be initiated).

[7] See Ga. Comp. R. & Regs. r. 391-1-2-.01 et seq. (Procedures for Disposition of Contested Cases). The DNR rules specifically require that petitions meet the requirements of OSAH rules. Ga. Comp. R. & Regs. r. 391-1-2-.04(3).

[8] Ga. Comp. R. & Regs. r. 391-1-2-.06.

[9] Ga. Comp. R. & Regs. r. 391-1-2-.07.

[10] See Ga. Comp. R. & Regs. r. 616-1-2-.01 et seq.

[11] Id.

[12] O.C.G.A. § 50-13-41(b).

[13] Prior to the creation of OSAH, DNR rules required that the agency respond to petitions. Ga. Comp. R. & Regs. R. 391-1-2-.06 (repealed).

[14] O.C.G.A. § 9-11-1 (limiting the applicability of the Civil Practice Act to "courts of record"); see Georgia State Bd. of Dental Examiners v. Daniels, 137 Ga. App. 706, 709, 224 S.E.2d 820, 822 (1976) (decided prior to OSAH, holding the Civil Practice Act does not apply to proceedings under the Administrative Procedure Act).

[15] Ga. Comp. R. & Regs. r. 616-1-2-.02(2).

[16] Ga. Comp. R. & Regs. r. 616-1-2-.02(3).

[17] O.C.G.A. § 50-13-13(a)(3).

[18] Ga. Comp. R. & Regs. r. 616-1-2-.34(1).

[19] Ga. Comp. R. & Regs. r. 616-1-2-.34(2).

[20] State Bar Rule 8-104(D) (requiring an attorney admitted after January 1, 1988 to certify completion of nine litigation experiences before appearing as sole or lead counsel in the Superior or State Courts of Georgia).

[21] Ga. Comp. R. & Regs. r. 616-1-2-.42; see Uniform Superior Court Rules 4.3 (withdrawal) and 16 (leaves of absence).

[22] Ga. Comp. R. & Regs. r. 616-1-2-.30(1), .30(2). In addition, if the party requesting the hearing fails to attend after receiving notice, the ALJ may dismiss the action sua sponte or on motion of a party. Ga. Comp. R. & Regs. r. 616-1-2-.30(5). The ALJ may find such a "failure to attend" if the party fails to appear within 15 minutes of the time set for the hearing. Id.

[23] Ga. Comp. R. & Regs. r. 616-1-2-.22(5).

[24] Ga. Comp. R. & Regs. r. 616-1-2-.04(1).

[25] O.C.G.A. § 9-11-5(e).

[26] Ga. Comp. R. & Regs. r. 616-1-2-.07(1).

[27] Ga. Comp. R. & Regs. r. 616-1-2-.07(1)(a).

[28] Ga. Comp. R. & Regs. r. 616-1-2-.07(1)(c).

[29] Ga. Comp. R. & Regs. r. 616-1-2-.07(1)(b).

[30] Ga. Comp. R. & Regs. r. 616-1-2-.07(2).

[31] O.C.G.A. § 9-11-15.

[32] Ga. Comp. R. & Regs. r. 616-1-2-.08.

[33] Fed. R. Civ. P. 15(a).

[34] Ga. Comp. R. & Regs. r. 616-1-2-.08. OSAH's rules for calculating time are consistent with the Civil Practice Act -- intermediate Saturdays, Sundays, and legal holidays are counted in computing the time period except when the prescribed period is less than seven days. Ga. Comp. R. & Regs. r. 616-1-2-.05(1); see O.C.G.A. § 1-3-1(d)(3) (incorporated into the Civil Practice Act by reference in O.C.G.A. § 9-11-6(a)). Under the Federal Rules, intermediate Saturdays, Sundays, and legal holidays are not counted only when the period is less than 11 days. Fed. R. Civ. P. 6(a). For the full rule on computing time under OSAH rules, see Ga. Comp. R. & Regs. r. 616-1-2-.05.

[35] Fed. R. Civ. P. 15(a).

[36] Grand Lodge of Georgia, Independent Order of Odd Fellows v. City of Thomasville, 226 Ga. 4, 9-10, 172 S.E.2d 612, 616 (1970); Random Access, Inc. v. Atlanta Datacom, Inc., 232 Ga. App. 269, 271, 501 S.E.2d 610, 612 (1998).

[37] Ga. Comp. R. & Regs. r. 616-1-2-.13(2). The grounds for intervention under the Administrative Procedure Act are set forth in O.C.G.A. § 50-13-14.

[38] O.C.G.A. § 9-11-24; Fed. R. Civ. P. 24.

[39] Ga. Comp. R. & Regs. r. 616-1-2-.13(2).

[40] Ga. Comp. R. & Regs. r. 616-1-2-.21(3). In contrast, in a judicial review of a final agency decision, the evidence generally is limited to the record before the agency. O.C.G.A. § 50-13-19(g).

[41] Ga. Comp. R. & Regs. r. 616-1-2-.38.

[42] Upon a showing that a witness cannot or will not attend the hearing, the ALJ has discretion to require that the witness, in lieu of testifying live at the hearing, testify at deposition or through written questions and responses. Ga. Comp. R. & Regs. r. 616-1-2-.20. Upon request, the ALJ also may issue subpoenas to compel attendance and the production of documents at such depositions or at the hearing. Ga. Comp. R. & Regs. r. 616-1-2-.19; see also O.C.G.A. § 50-13-13(a)(7), (b). A party seeking to compel the production of documents from a party may serve a notice to produce on that party without the necessity of a subpoena. Ga. Comp. R. & Regs. r. 616-1-2-.19(7). Enforcement of ALJ subpoenas may be had by application to the Superior Court for the county where the case is being heard. O.C.G.A. § 50-13-13(a)(7); Ga. Comp. R. & Regs. r. 616-1-2-.22(5).

[43] Id.; Ga. Comp. R. & Regs. r. 616-1-2-.37 (Request for Agency Records).

[44] Ga. Comp. R. & Regs. r. 616-1-2-.14

[45] Ga. Comp. R. & Regs. r. 616-1-2-.14(3).

[46] Ga. Comp. R. & Regs. r. 616-1-2-.16.

[47] Ga. Comp. R. & Regs. r. 616-1-2-.16(2).

[48] Uniform Superior Court Rule 6.2; Uniform State Court Rule 6.2; N.D. Ga. Local Rule 7.1(B); M.D. Ga. Local Rule 7.2; S.D. Ga. Local Rule 7.5. Note that while both OSAH and the Northern District allow 10 days to respond to such motions, these periods in fact will differ in length due to the differences in the computation of time between OSAH rules and the Federal Rules.

[49] Ga. Comp. R. & Regs. r. 616-1-2-.16(5).

[50] Id.

[51] Ga. Comp. R. & Regs. r. 616-1-2-.15; see O.C.G.A. § 9-11-56; Fed. R. Civ. P. 56.

[52] Ga. Comp. R. & Regs. r. 616-1-2-.15(2) (incorporating the standard OSAH response period of Ga. Comp. R. & Regs. r. 616-1-2-.16(2)).

[53] Uniform Superior Court Rule 6.2; Uniform State Court Rule 6.2.

[54] N.D. Ga. Local Rule 7.1(B) (allowing 20 days to respond to a motion for summary judgment, 10 days to respond to all other motions); M.D. Ga. Local Rule 7.2 (allowing 20 days to respond to all motions); S.D. Ga. Local Rule 7.5 (allowing 20 days to respond to a motion for summary judgment, 15 days to

respond to all other motions).

55 Ga. Comp. R. & Regs. r. 616-1-2-.17(1).

56 O.C.G.A. § 9-11-41(a); but see, Manning v. Robertson, 223 Ga. App. 139, 140-41, 476 S.E.2d 889, 891 (1996) (a dismissal of less than all defendants must be done pursuant to O.C.G.A. § 9-11-21 and requires a court order).

57 Fed. R. Civ. P. 41(a).

58 Ga. Comp. R. & Regs. r. 616-1-2-.18(1); see O.C.G.A. § 50-13-15.

59 Ga. Comp. R. & Regs. r. 616-1-2-.18(1).

60 Ga. Comp. R. & Regs. r. 616-1-2-.18(1).

61 McGahee v. Yamaha Motor Mfg. Corp., 214 Ga. App. 473, 474, 448 S.E.2d 249, 251 (1994) ("failure to call apparently readily available witnesses does not render the absent witnesses' testimony 'not reasonably susceptible of proof'").

62 Ga. Comp. R. & Regs. r. 616-1-2-.18(1)(a)-(e).

63 Ga. Comp. R. & Regs. r. 616-1-2-.18(1)(a).

64 Ga. Comp. R. & Regs. r. 616-1-2-.18(1)(c).

65 E.g., Dean v. State, 250 Ga. 77, 82, 295 S.E.2d 306, 311 (1982).

66 Ga. Comp. R. & Regs. r. 616-1-2-.18(1)(b).

67 E.g., Tibbs v. Tibbs, 257 Ga. 370, 370-71, 359 S.E.2d 674, 674-75 (1987) (stating the general rule that in contrast to oral testimony, which is heard only once, a writing summarizing or recounting a witness's testimony places undue emphasis on the testimony of that witness, unfairly becoming a "continuing witness" to that testimony).

68 Ga. Comp. R. & Regs. r. 616-1-2-.18(1)(d); see O.C.G.A. § 50-13-15.

69 Cf., Nolen v. Dept. of Human Resources, 151 Ga. App. 455, 455-56, 260 S.E.2d 353, 354-55 (1979) (finding no error in the admission of hearsay medical reports under the APA when they are "of a type reasonably relied upon by reasonably prudent men in the conduct of their affairs"), reh'g denied, (Sept. 24, 1979), cert. denied, (Oct. 23, 1979), and cert. denied, 444 U.S. 1092, 100 S.Ct. 1059 (1980).

70 Ga. Comp. R. & Regs. r. 616-1-2-.18(1)(e) (going on to provide that, "[u]pon request, parties shall have an opportunity to compare the copy with the original").

71 See O.C.G.A. § 24-5-1 et seq.

72 Ga. Comp. R. & Regs. r. 616-1-2-.18(1)(e) (going on to provide that, "[t]he entire document shall be made available for examination or copying, or both, by other parties at a reasonable time and place").

73 E.g., Stewart v. State, 246 Ga. 70, 73-74, 268 S.E.2d 906, 910-11 (1980).

74 Ga. Comp. R. & Regs. r. 616-1-2-.18(4).

75 Id.; Fed. R. Evid. 703.

76 See, Peters v. State, 268 Ga. 414, 415-16, 490 S.E.2d 94, 95-96 (1997).

77 See, King v. Browning, 246 Ga. 46, 268 S.E.2d 653 (1980).

78 See, Ga. Comp. R. & Regs. r. 616-1-2-.18(10) ("[t]he weight to be given to any evidence shall be determined by the ALJ based upon its reliability and probative value").

79 Ga. Comp. R. & Regs. r. 616-1-2-.18(5).

80 Id.

81 Ga. Comp. R. & Regs. r. 616-1-2-.18(8).

82 O.C.G.A. § 24-1-4 (Subjects of Judicial Notice).

83 Ga. Comp. R. & Regs. r. 616-1-2-.18(9).

84 Id.

85 Ga. Comp. R. & Regs. r. 616-1-2-.09 (also setting forth the information to be included in such notice).

86 Ga. Comp. R. & Regs. r. 616-1-2-.21 through 616-1-2-.33; O.C.G.A. § 50-13-13.

87 Ga. Comp. R. & Regs. r. 616-1-2-.21(3).

88 Ga. Comp. R. & Regs. r. 616-1-2-.21(3).

89 Ga. Comp. R. & Regs. r. 616-1-2-.21(4).

90 Ga. Comp. R. & Regs. r. 391-1-2-0.39-.09.

91 Ga. Comp. R. & Regs. r. 616-1-2-.19; see also O.C.G.A. § 50-13-13(a)(7), (b).

92 Ga. Comp. R. & Regs. r. 616-1-2-.19(2).

93 Id. The requirements for service are substantially identical to those of O.C.G.A. § 24-10-23. See Ga. Comp. R. & Regs. r. 616-1-2-.19(4).

94 Ga. Comp. R. & Regs. r. 616-1-2-.19(5).

95 O.C.G.A. § 50-13-13(a)(7); Ga. Comp. R. & Regs. r. 616-1-2-.22(5).

96 Ga. Comp. R. & Regs. r. 616-1-2-.19(7).

97 Ga. Comp. R. & Regs. r. 616-1-2-.22(2).

98 Ga. Comp. R. & Regs. r. 616-1-2-.31.

99 O.C.G.A. § 50-13-41(c); Ga. Comp. R. & Regs. r. 616-1-2-.27.

100 Ga. Comp. R. & Regs. r. 616-1-2-.29.

101 O.C.G.A. § 50-13-19.

102 O.C.G.A. § 50-13-41(d); Ga. Comp. R. & Regs. r. 616-1-2-.33.

103 O.C.G.A. § 50-13-41(e)(1)-(2).

104 Individual agencies may provide that OSAH decisions be treated as final decisions of the agency. O.C.G.A. § 50-13-41(e)(3). DNR rules provide that a decision by the ALJ is final and shall not be subject to further review by DNR. Ga. Comp. R. & Regs. r. 391-1-2-0.39-.07. Furthermore, decisions of the ALJ on DNR matters are final decisions by statute. O.C.G.A. §§ 12-1-2(a), 12-2-2(c)(2). Those statutes also make clear that any party, including the agency, may seek judicial review. Id.

105 O.C.G.A. §§ 50-13-19, 50-13-20.1.

106 Ga. Comp. R. & Regs. r. 616-1-2-.39.

107 O.C.G.A. § 12-2-1(c) (also requiring that the Superior Court issue an order determining the issues within 30 days of the hearing, or continued hearing).

Environmental Law Section Officers

[108] O.C.G.A. § 50-13-19(d).