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In This Issue

The Georgia Coalition for Sound Environment Policy: Advocate for Business & Industry on Environmental Issues

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I. Introduction

The Georgia Coalition for Sound Environmental Policy (GCSEP or the Coalition) is a not-for-profit, state-wide industry coalition that represents the common interests of Georgia's business and industry in environmental policy and regulatory matters at the state and federal level. GCSEP's mission is to help educate industry and policy makers on important environmental matters and to help shape federal and state environmental regulatory and legislative policy. To that end, GCSEP participates in the development of new legislation, primarily at the state level, and new regulations at both the federal and state level to make sure they are cost-effective and based on good information and sound science. GCSEP is also prepared to seek judicial review of final regulations, if necessary.

A. GCSEP's Members

GCSEP's members include many of the major manufacturing companies across the state from the pulp and paper and wood products industries, cement manufacturing industry, the textile industry, and the energy sector (electricity and natural gas). The membership also includes most of the states' business and industry associations, including the Georgia Chamber of Commerce, the Georgia Industry Association, the Georgia Industry Environmental Coalition, the Georgia Pulp and Paper Association, the Georgia Textile Manufacturers Association, and the Metro Atlanta Chamber of Commerce. Through GCSEP the individual member companies and organizations can leverage and maximize their technical, political and legal resources.

B. Formation of GCSEP

GCSEP was first organized in February 1998, in response to the United States Environmental Protection Agency's (EPA) regional NOx SIP Call, a rulemaking proposed in November 1997 to address interstate transport of ground-level ozone and ozone nonattainment problems across the eastern half of the U.S. The proposed rule required 22 states, including Georgia, to make substantial statewide reductions in NOx emissions and capped NOx emissions from utility and industrial boilers statewide. GCSEP's initial goal was to help educate industry across the state about the implications of the proposed rule for their business, to coordinate affected industries' response to the proposed rule and to work with the Georgia Environmental Protection Division (EPD) on implementation of the final rule. GCSEP has impacted not only Georgia EPD's approach to this critical issue, but also EPA's approach to addressing NOx control in the State of

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Message From the Chair

The Section had a terrific summer and fall. On August 11-12, nearly 100 attorneys gathered at the Jekyll Island Club Hotel for our annual summer seminar. All of the presentations were first rate and covered a wide range of topics, including environmental criminal enforcement, insurance coverage disputes, TMDLs, CERCLA, toxic torts, and stormwater. I want to thank the numerous outside speakers who participated – Phyllis Harris, Mary Wilkes, and Betty Obenshain from U.S. EPA Region 4, Jennifer Kaduck and Jim Brown from Georgia EPD, David Heintz from Travelers Insurance Company, and Linda DiSantis from United Parcel Service. I also want to thank Janet Hart from Atlanta Environmental Management for co-sponsoring the reception on Friday evening. Next summer's seminar will be at the King & Prince at St. Simons Island on August 10-11. Please call Todd Silliman if you are interested in participating.

On October 19, the Section co-sponsored a one-day conference with the Georgia Industry Environmental Coalition (GIEC). With over 200 people in attendance, it was the largest turnout for a Section event in the Section's history. The conference highlights included a keynote address by Governor Roy Barnes and a presentation by Harold Reheis, the Director of Georgia EPD. The conference co-chairs, Bob Mowrey from Alston & Bird LLP and Jim Baker from Colonial Oil Industries, deserve considerable thanks for the many long hours they spent organizing this event to ensure its success.

In terms of upcoming events, the Section Midyear meeting is scheduled for January 11 at the Swissotel. Our guest speaker will be Joe Young, the Legislative Director for the Governor's Office. Joe will be talking about the upcoming legislative session and the Governor's environmental priorities for 2001. The program begins at noon.

It is has been great pleasure and privilege to serve this year as Chair of the Environmental Law Section. I want to give a special thanks to the other Section Officers, Todd Silliman, Anne Hicks, Mary McLean Asbill, and Ann Marie Stack, for their help and hard work. I hope everyone has a happy and safe holiday season and look forward to seeing you next year.

Doug Arnold

Alston & Bird LLP

Georgia Water Resource Policy – A Call for Action

By Chris DeVinney, Associate Legislative Director
Association County Commissioners of Georgia[1]

Access to clean water in reliable quantities drives the economic engine of every city and county in Georgia. Without water, sustaining quality of life and economic prosperity is not possible. Georgia, considered a "wet" state, receives on average fifty inches of rain annually. But our water resources are finite – a point that has been painfully demonstrated by Georgia's drought the past two years.

Georgia is also considered a great place to live. One need only look to the booming economy and the influx of millions of new residents over the past decade as evidence of the state's success. By most accounts, this phenomenal growth is likely to continue well into the future. As it continues, the challenge of balancing competing water demands within the context of a limited water supply will fall largely on the shoulders of local officials.

Several situations around the state illustrate why Georgia must move into a new mode of thinking regarding water management and protection. Solving the "water wars" between Georgia, Alabama and Florida will affect water allocation from northern Georgia down through the southwest farming belt. Salt-water intrusion in the Floridan aquifer on Georgia's coast and the potential for a resulting "water war" with South Carolina has spurred a multi-year study of the aquifer's hydrological properties, which will serve as the basis for determining allocation and use issues there. North of the fall line, Georgia's growth and population demands are expected to surpass the available water supply by mid-century. A pending federal court order is forcing all levels of government to re-think how non-point source pollution is controlled throughout the state.

While a number of efforts have taken place recently to address water issues in specific regions of the state (e.g.

[1] ACCG is the consensus-building, training, and legislative organization for all of Georgia's 159 county governments, and works to ensure that counties can provide the necessary leadership, services and programs to meet the health, safety and welfare needs of their citizens. One of ACCG's major objectives is to provide Congress and the state legislature with information necessary for the development of sound legislation. For more information, go to www.accg.org.

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Georgia more generally. Since its inception, GCSEP has also begun to get involved in other environmental policy matters, including water quality and quantity issues.

This article provides an overview of the Coalition's work on air quality issues and the issues it is tracking related to water quality and quantity.

II. Air Quality Issues

At the federal level, GCSEP submitted fairly extensive technical and legal comments on EPA's proposed NOx SIP Call. In its comments, GCSEP noted that business and industry in Georgia understand the health and welfare impacts of ozone nonattainment and believe clean air is essential to improving the quality of life in our state and that the Coalition supports the efforts of the Georgia EPD to bring the Atlanta area into attainment with the one-hour ozone standard. However, GCSEP argued, among other things, that EPA's approach circumvented provisions of the 1990 Clean Air Act Amendments that were specifically designed to address multi-state ozone transport problems. Recognizing that ozone transport was a problem in the Northeast and could also be a problem among other states, Congress provided EPA explicit authority under sections 184 and 176A to expand the Northeast Ozone Transport Region or designate new interstate transport regions. The Act provides very specific directions about who must be involved in the process (the governor of each state or his designee) and specific procedures for decision-making, including opportunities for public review and comment. GCSEP maintained that to address ozone transport, EPA should establish an ozone transport region and organize a transport commission to address the problem rather than relying on the SIP Call process under section 110 of the Clean Air Act.

GCSEP also argued that the rulemaking ignores important findings and recommendations of the Ozone Transport Assessment Group (OTAG), an organization of 37 eastern U.S. states which was established by EPA specifically to study ozone transport and the need for NOx emission controls.

With respect to Georgia specifically, GCSEP argued that EPA had failed to demonstrate that NOx emissions from the state of Georgia significantly contributed to ozone nonattainment in any other state. EPA was requiring statewide NOx reductions from the affected states on the basis that emissions from those states were significantly contributing to ozone nonattainment in other states. However, EPA had not conducted any state-by-state modeling analyses to support that conclusion. In fact, air quality modeling conducted by OTAG indicated that emissions from south Georgia had no significant impact on downwind ozone levels. Additional modeling conducted by Southern Company and submitted to EPA confirmed these analyses. Even EPA admitted that emissions from south Georgia, even when lumped together with emissions from other states, has little or no impact on air quality in any other state. Despite the evidence in the administrative record, EPA concluded that emission reductions from south Georgia would "help" nonattainment areas downwind and claimed state-wide implementation of the rule was necessary for ease of administration.[1] In its comments on the proposed rule, GCSEP argued that EPA had failed to demonstrate that the state of Georgia "significantly contributes" to nonattainment in any other state and all evidence indicates that, at a minimum, south Georgia should be exempt from any control program altogether.

At the state-level, GCSEP has worked with EPD to evaluate EPA's proposed NOx SIP Call and to understand the impact of the SIP Call on the state's utility and industrial boilers. In its evaluation of the rule as applied to Georgia, GCSEP identified numerous problems with the NOx emissions inventory data used by EPA to develop the NOx emissions budget for the state. During the public comment period, GCSEP worked with EPD to update the state's NOx emissions inventory so that EPD could provide a more accurate inventory to EPA. The SIP Call contemplates that each state will implement the final rule through a NOx emissions cap and trade program. The Coalition has been working with EPD to develop a cap and trade program for Georgia. Because the NOx SIP Call in Georgia is closely tied to the State's ongoing efforts to bring the Atlanta area into attainment with the one-hour ozone standard, GCSEP has also provided input to EPD on its development of its final attainment plan for the Atlanta ozone nonattainment area.

When EPA promulgated its final SIP Call rule in October 1998[2] without any significant change from the proposal, GCSEP, along with numerous states and other industry groups, filed a petition for review of the final rule in the D.C. Circuit. The D.C. Circuit consolidated all of the petitions in connection with the final rule into a single case. Subsequently, the D.C. Circuit heard the case and issued its decision in March 2000.[3] While the Court upheld the final rule in large part, it vacated the rule as applied to the State of Georgia. The Court agreed with the petitioners that there was no basis in the administrative record for applying the NOx SIP Call state-wide in Georgia, and, for that reason, the Court remanded the portions of the rule specific to Georgia to EPA for further rulemaking. As a result, EPA must re-propose the NOx SIP Call for Georgia. EPA plans to publish the proposed SIP Call for Georgia this fall, and GCSEP plans to comment on the revised proposal. In the meantime, the Coalition also continues to work with EPD on its plans for implementing the federal rule once it is finalized. At the same time, the industry petitioners in the SIP Call case are seeking Supreme Court review of the D.C. Circuit Court decision. Thus, GCSEP's work on the air quality front is ongoing.

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[1] 62 Fed. Reg. 60,318, 60,342 (Nov. 7, 1997)

[2] 63 Fed. Reg. 57,356

[3] *State of Michigan, et al. v. Environmental Protection Agency,* 213 F.3d 663 (D.C. Cir. 2000).

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In addition to its involvement in air issues, GCSEP is beginning to provide the same type of leadership on the rapidly emerging water issues in Georgia. Unlike the air quality issues, many of the water issues are being driven by state needs, in addition to federal mandates. While there are many industry groups that are addressing water quality and quantity issues, to date, none are working to define statewide the issues that affect industries throughout Georgia. At set forth below, GCSEP has identified a number of issues that it plans to track in the coming year.

III. Water Quality Issues

A. TMDLs

The initial step in the Total Maximum Daily Load (TMDL) process is the listing of "impaired" waters under § 303(d) of the Clean Water Act. For the State of Georgia, EPA delegated this task to EPD. However, EPD does not have the staff nor the money to adequately monitor all waters in the State of Georgia. Therefore, many waters are listed as "impaired" based upon very little data, old data or unreliable data. In some instances, there is no data at all but only anecdotal reports. State legislation to mandate quality control over this data before it is used for listing waters or for any other purposes would be a significant benefit to the regulated community.

Once waters have been listed as impaired, EPD or EPA is required to set a TMDL for each listed water segment. The TMDL is developed for the pollutant or pollutants that caused the segment to be listed. This TMDL setting process in Georgia is controlled by a consent decree and subsequent consent orders issued in *Sierra Club v. Hankinson*.[4] Judge Marvin Shoob initially fashioned a very tight time schedule for the setting of these TMDLs. Although that time schedule has been relaxed somewhat through subsequent consent orders, all TMDLs are currently scheduled to be completed by the end of 2004.

Once a TMDL has been set, reductions may be necessary in the amount of pollutants that may be discharged under NPDES permits. Therefore, the setting of TMDLs may have significant impact on permit holders. It is imperative that the GCSEP membership be advised that they should take every opportunity to obtain information about the setting of TMDLs that may affect permitted discharges.

In many instances, the sources of pollutants, which lead to the listing of a water segment as impaired are believed to be partially or totally non-point sources. These are pollutant sources that are currently not permitted because they are not "point sources." It is unclear how EPD or EPA will regulate non-point sources. Where both non-point sources and point sources may be contributing to the pollutant loading in a listed segment, there is a real concern that regulatory agencies may seek to place a larger share of the burden for reducing the pollutant loading upon the permitted dischargers, rather than the non-point source dischargers which are more difficult to identify and control.

B. Storm Water Issues

Regulatory agencies and environmental groups are concerned about storm water run-off because it allegedly impairs the quality of the receiving waters. Although permits in Georgia regulate certain industrial and construction activities, there is a considerable amount of storm water run-off from non-point sources, which are not regulated. Once again, there is tension between the point sources and non-point sources as to who will or should bear the major cost and effort in reducing these sources of pollution. Where there is concern that receiving waters are "impaired," it is unclear how storm water run-off from non-point sources would be reduced other than by use of Best Management Practices. This is an area of extreme concern to environmental groups. They have been successful in pressuring EPD to adopt a very stringent general permit for storm water discharges from construction activity. Although negotiations involving industry representatives resulted in some lessening of the more onerous provisions of the general permit, it still places a significant burden on construction activities affecting greater than five acres of land. The next target could be so-called "urban run-off" of storm water that is currently unregulated. To the extent that environmental groups are seeking statewide legislation to control urban run-off through land use decisions, any such legislation could impede industry's ability to grow.

C. Trading Mechanism Opportunity

It is possible for point sources and non-point sources to engage in "pollutant trading" or other mechanisms that may achieve the desired reduction in pollutants required by the TMDL in a more cost-effective way. For example, it may be much cheaper to reduce the pollutant loading from a non-point source than to achieve the same pollutant reduction at a point source. Often this situation applies because the point source has already installed significant controls on its discharge and removing the small amount of pollution that remains is much more costly. GCSEP will pay close attention to trading of pollutants and to limiting trading as "basin specific." This would be a precedent setting move on behalf of Georgia and could help address water quality issues.

IV. Water Quantity Issues

A. Drought Planning

The severe impact of this past summer's drought has brought the whole question of drought planning to the forefront. Although some legislation was passed in the last legislative session to address conditions in certain geographic areas of the state, it would be prudent to consider

[4] *Sierra Club v. Hankinson*, 939 F. Supp. 872 (N.D. Ga. 1996).

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recommendations for statewide drought planning. It is unclear whether this issue will be addressed through statewide legislation, regulatory efforts or voluntary cooperation among the various levels of government and the private sector. If the legislative or regulatory routes are chosen, it is important that the impacts of drought planning be allocated on an equitable basis. It is also important to make sure that legislators and regulators understand that if a given facility's supply of intake water is reduced, the pollutant loading in its discharge is likely to increase on a concentration basis. While this is an issue that may be initially addressed by the state and county government, industry should make its views known - if there is a consensus.

B. Water Wars Negotiations

The GCSEP membership is keenly aware of the on-going negotiations between Georgia, Alabama and Florida regarding allocation of water in the affected river basins. While industry groups are not directly participating in these negotiations, it is important to keep current on their status in order to assess the impacts of any allocation scheme upon related water quantity and water quality issues in Georgia.

C. Groundwater Issues

Concerns over the groundwater supply have been present since the 1940's. This issue is of particular importance in the southwestern portion of the state which relies heavily on aquifer water for irrigation and in the coastal portions of Georgia which rely on groundwater for most of the water supply. Both areas are served by the Floridian Aquifer. Currently the state is in the middle of a multi-year, multi-million dollar scientific study to better understand the aquifer in the coastal area and to develop methods to address concerns about the long term viability of using the Floridian Aquifer to serve competing needs.

D. Trading Mechanism

As in the water quality arena, there exists an even greater potential for developing legislation that would create a mechanism to provide a strong incentive for reducing water use (either ground or surface), while allowing the permit holder to retain permit limits and either sell or trade these to other potential users of that resource. The application of this concept would have to be basin or aquifer specific.

E. Source Water Protection Plan

Several years ago the EPD initiated a proposal that called for the survey of "water source"
locations and the determination of what protection areas need to be established to protect these critical resources from potential contamination. In doing so, EPD planned to be comparing locations of groundwater wells or surface water intakes with locations of discharge pipes and would be attempting to designate some of the discharges as "potential contamination sources" for water supplies. The regulated community should be interested in the status of this important initiative in that it could have impacts on industrial or other discharge permit holders.

V. Legislative Initiatives

A. Citizen Suit Legislation

In the last few legislative sessions, environmental groups and others have sponsored bills to amend Georgia environmental statutes to include citizen suit provisions similar to those that are found in many federal environmental statutes. Business groups and others have consistently opposed these efforts. To date, these bills have not passed. However, we can expect to see similar bills in future legislative sessions.

B. Possible Creation of Additional Levels of Governmental Regulation

Although GCSEP understands that the Governor's office does not plan to seek legislation which would create a counterpart to the Georgia Regional Transportation Authority (GRTA) for water issues, environmental groups and others have suggested that some additional level of governmental regulation is necessary. Some have suggested the creation of water districts similar to what is occurring in Florida. Others have suggested various types of regional organizations to address specific water issues. However, EPD has ample authority under current Georgia environmental statutes to address these issues. Creation of additional levels of governmental organization may slow down this effort. In addition, there are current instances of cooperation among various levels of local government to address waste water disposal issues and these could be used as a model for future cooperation on other issues.

VI. Conclusion

Needless to say, the challenges on both the water and air quality front are significant. GCSEP's work on the NOx SIP Call provides a model for how industry groups and individual companies can work together and pool their resources to make a difference in environmental policy at the state and federal level. Water quality and water quantity issues present another opportunity for a coordinated effort to provide meaningful input into the development of legislative and regulatory policy. ■

For further information about GCSEP, please contact Jean McRae at jmcrae@bellsouth.net.

Agricultural Nuisances and the Right to Farm

By Terence J. Centner, The University of Georgia

I. Introduction

Agricultural production often is accompanied by offensive odors and other annoying activities. Animal wastes and diverse byproducts that spawn disagreeable smells have been found to be especially offensive. Under public or private nuisance law, neighbors may be able to take legal action to end the disagreeable activity through an injunction. Since the late 1960s, concern about new neighbors using nuisance law to stop agricultural activities led agricultural interest groups to advance anti-nuisance legislation. The resultant state laws are known as the "right to farm" laws.

In a landmark state law decision, *Bormann v. Board of Supervisors*,[1] an Iowa right to farm law was declared unconstitutional. The immunity against nuisances granted by Iowa Code section 352.11(1)(a) was found to be an easement.[2] The *Bormann* court found this easement to embody a *per se* taking in violation of the due process clauses of the federal and Iowa constitutions.[3]

The Iowa ruling raises questions about other states' right to farm laws and governmental regulations that restrict land use. How should courts in Georgia and other states respond to arguments that the nuisance protection afforded by right to farm laws, or the requirements of various land use restrictions, effect unconstitutional takings?

II. Unconstitutional Takings

The controversy concerning right to farm laws is whether their anti-nuisance protection goes too far and embodies an unconstitutional taking in violation of the federal or a state constitution. Just compensation clauses require payment if a government forces some people to bear public burdens. There are two categories of governmental actions that generally must be compensated without any further inquiry into additional factors. First, when an owner is deprived of all economically beneficial or productive use of the land, there is a taking for which compensation must be paid.[4] This is known as a "categorical" taking.[5] Second, state action involving physical invasions of the property, known as "*per se*" takings,[6] must be compensated. All takings of property, both permanent and temporary, require compensation under the just compensation clause.[7]

Most challenges involving a taking fall under the category of "regulatory takings" and an ad-hoc factual inquiry is conducted on a case-by-case basis. The inquiry focuses on three factors: (1) the economic impact of the restriction on the claimant's property; (2) the restriction's interference with investment-backed expectations; and (3) the character of the governmental action.[8]

III. Takings under the Georgia Right to Farm Law

While the Iowa ruling has not been followed, agricultural interest groups are concerned. Supporters of right to farm laws are attempting to differentiate their state's provisions from the offensive Iowa law. With respect to the Georgia Right to Farm Law,[9] three meaningful distinctions may be observed that suggest that a Georgia court will not follow the Iowa *Bormann* decision.

First, there is no reason for a Georgia court to find that the Georgia Right to Farm Law is a *per se* taking involving a physical invasion. Rather, the law is a governmental restriction that may constitute a regulatory taking. Courts should use the ad-hoc factual inquiry test delineated by the U.S. Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*[10] for regulatory takings.

Second, the Georgia Right to Farm Law allows for actions in trespass and negligence, and leaves environmental and health regulations in place. Physical invasions of neighboring property remain actionable under these other causes of action and laws. Therefore, the anti-nuisance protection seems to encompass restrictions on land use distinct from physical invasions. Thus, the law's anti-nuisance protection may be a regulatory taking that would need to be analyzed under an ad-hoc factual inquiry test.

Third, the Georgia Right to Farm Law, and the laws of some other states, has incorporated a coming to the nuisance doctrine[11] that

[1] 584 N.W.2d 309, 321 (Iowa 1998), cert. denied sub nom., *Girres v. Bormann*, 119 S. Ct. 1096 (1999).

[2] Iowa Code § 352.11(1)(a) (West 1994).

[3] See Terence J. Centner, "Anti-Nuisance Legislation: Can the Derogation of Common Law Nuisance be a Taking?" Environmental Law Reporter 30,4(2000):10253-10260.

[4] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

[5] *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999); *Dodd v. Hood River County*, 136 F.3d 1219, 1228 (9th Cir. 1998).

[6] *Philip Morris, Inc. v. Harshbarger*, 159 F.3d 670, 674 (1st Cir. 1998); *Garneau v. City of Seattle*, 147 F.3d 802, 809 (9th Cir. 1996); *Vesta Fire Ins. Corp. v. Florida*, 141 F.3d 1427, 1430-31 (11th Cir. 1998).

[7] *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

[8] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

[9] O.C.G.A. § 41-1-7 (1997).

[10] 458 U.S. 419, 426 (1982).

[11] O.C.G.A. § 41-1-7(c) (1997).

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distinguishes the law from the Iowa law. Right to farm laws with the coming to the nuisance doctrine do not offer protection for future agricultural activities. As such, a law does not embrace a physical invasion nor create a servitude or easement over existing land uses of the type considered in *Bormann*.

It also might be noted that checks and balances imbedded in provisions of some state right to farm laws, but not the Georgia law, may distinguish them from Iowa Code section 352.11(1)(a). Lower court decisions from Michigan[12] and New York[13] have enumerated such a distinction. Under the state statutory schemes, the courts found that the state right to farm laws did not confer immunity against nuisance suits or create a property right. Therefore, the laws did not constitute a compensable taking under the U.S. or state constitutions.

IV. Concluding Comments

A generation ago, state legislatures recognized a need for a defense against nuisance lawsuits that resulted when urban and suburban land uses extended into agricultural areas. The resultant right to farm laws were a legislative response to protect the investments of agricultural producers by eliminating some nuisance actions. At the same time, the laws did not grant outright nuisance immunity to farming operations. Each law incorporated its own set of defining provisions for resolving nuisance disputes.

Iowa Code section 352.11(1)(a) did not incorporate the checks and balances that are present in most of the other state right to farm laws. Instead, it attempted to grant outright immunity from nuisances forever. The *Bormann* case shows the danger of overzealous protection of agriculture. If a governmental regulation goes too far and the interference with the rights of the neighbors is too great, the regulation will be a taking.

Right to farm laws may go too far if they grant blanket nuisance immunity for agricultural operations or say that all expansion and changes in production activities are protected against nuisance lawsuits. For Georgia, the question is whether the statutory language concerning "the established date of operation" reaches too far in granting immunity for agricultural nuisance activities.[14] The law attempts to enable agricultural operations to expand and adopt new technology while retaining the protection against nuisance actions. If this provision is interpreted as providing statutory protection against new nuisance activities, it may be challenged as a regulatory taking. ■

[12] *Gillis v. Gratiot County*, No. 97-04351-AV (Mich. Cir. Ct. March 31, 1999).

[13] *Pure Air and Water, Inc. v. Davidsen*, No. 2690-97 (N.Y. Sup. Ct. May 25, 1999).

[14] O.C.G.A. § 41-1-7(d) (1997).

Environmental Management Systems: Helping Corporations Ensure Compliance

By Anne Hicks, G. Graham Holden, P.C.

I. Introduction

A. Purposes of an EMS

Various entities throughout the world have implemented Environmental Management Systems ("EMS") for many beneficial reasons. First, the United States Environmental Protection Agency ("EPA") and the United States Department of Justice ("DOJ") have issued policies that offer incentives for prompt disclosure of environmental violations that are systematically discovered through a corporate self-audit policy or a compliance management system, such as an EMS. Government incentives are in the form of substantial reductions in civil penalties and decreased risk of criminal prosecution. *See* discussion in section IV below for additional information. Second, a corporation may design an EMS to enhance the company's marketability, to increase employee satisfaction and generally to promote good environmental stewardship. Third, a company may develop an EMS to avoid accidents and other incidents of noncompliance. Environmental audits and monitoring measures, designed to detect and correct potential problems, are key components of an EMS. Detecting potential violations, in turn, minimizes costs of noncompliance, including attorneys' fees, remediation costs, civil and criminal penalties and employee time spent investigating and correcting violations. An EMS can also promote compliance by effectively tracking numerous recordkeeping and reporting requirements under applicable environmental laws. Given the complexities of environmental laws and regulations and the significant risks of noncompliance, an EMS just makes good business sense.

B. Defining and Installing an EMS

The ISO 14001 EMS standard[1] provides a framework for an EMS that allows an organization to establish and meet its own policy goals while requiring a commitment to achieving both environmental compliance and continuous improvement in environmental performance. An EMS provides a systematic, documented, objective system for

[1] Published in late 1996 by the International Organization for Standardization in Geneva, Switzerland. An organization that adopts an EMS consistent with ISO 14001 specifications can be certified as conforming to the ISO 14001 standard.

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preventing, detecting and correcting violations. An environmental compliance policy typically provides the guiding principles for an EMS and sets forth an organization's commitment to comply with environmental requirements, minimize pollution, etc. Senior management approval of the environmental policy is important in order to demonstrate these commitment to employees (and others, if desired and to ensure company-wide support for the EMS.

II. EMS Structure

An EMS typically contains the following elements that are modeled after the ISO 14001 standard:

1. **Compliance policies, standards and procedures**, including an environmental policy and internal procedures instructing employees how to comply with environmental laws and regulations.
2. **Structure and responsibility**, i.e. corporate development and employee implementation of specific responsibilities tied to environmental compliance. EMS procedures should clarify employee roles and responsibilities for environmental compliance
3. **Monitoring and measuring compliance** with environmental compliance policies, standards and procedures, by conducting regular facility audits, periodic evaluation of the overall EMS and contractor reviews.
4. **Training** personnel about the EMS and environmental responsibilities and otherwise encouraging open **communication** regarding environmental compliance and performance. For example, the system should provide a means for employees to quickly and anonymously report a concern, such as through a company hotline.
5. **Evaluating personnel performance** and providing **incentives** for employees to comply with policies, standards and procedures.
6. **Prompt correction of deficiencies**, i.e. procedures for the prompt and appropriate correction of any violations, and modification of the system to prevent recurrence of violations.

Additional important elements of an EMS, based on the ISO 14001 model, include identification of significant environmental aspects, i.e. the specific impacts a company has on the environment; identification of environmental objectives and targets; document control; and environmental records management. For example, a procedure should be in place for documents to be readily available in the event an agency inspector requests permits or other key environmental documents during a surprise inspection.

III. EMS Success Stories

Organizations with an established EMS report the following benefits stemming from EMS implementation:

- Improved cooperation and environmental awareness among employees, including a shared understanding of the impacts of a company's processes on the environment;
- Improved procedures and documentation;
- Enhanced regulatory compliance;
- Improved relationships with regulators; and
- Improved environmental performance.[2]

IV. Complying with Government Self-Audit Policies

A. EPA's Policy

The revised EPA self-audit policy *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, effective on May 11, 2000, provides incentives for regulated entities to implement an EMS that enables them to detect, promptly disclose and expeditiously correct violations of federal environmental requirements. Entities that meet the nine conditions in the policy (listed below) are eligible for 100% mitigation of gravity-based civil penalties that otherwise could be assessed against violators. Entities that do not meet the first condition - systematic discovery of violations - but meet the other eight conditions, are eligible for 75% mitigation of gravity-based penalties. Furthermore, EPA will generally not recommend criminal prosecution for an entity that satisfies at least conditions two-nine below, as long as self-policing, discovery and disclosure were conducted in good faith and the entity adopts a systematic approach to preventing recurrence of the violation. In this policy, EPA reaffirms its policy to refrain from requesting copies of audit reports that may trigger enforcement investigations.

The conditions in the EPA audit policy that trigger such favorable treatment are:

1. **Systematic discovery** of the violation through an environmental audit or a compliance management system. Compliance management programs that train and motivate employees to

[2] *See Environmental Management System Demonstration Project, Final Report*, NSF International (December 1996) (survey of 18 organizations with EMSs); and *The Effects of Environmental Management Systems on the Environmental and Economic Performance of Facilities*, University of North Carolina at Chapel Hill and the Environmental Law Institute (2000).

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prevent, detect and correct violations on a daily basis are a valuable complement to periodic auditing.

2. **Voluntary discovery** of the violation, as opposed to discovery through monitoring, sampling, etc. that is required by a regulation, permit, order or consent agreement.
3. **Prompt disclosure** of the violation to EPA in writing within 21 days after discovery. If the entity suspects that it will be unable to meet this deadline, it should contact EPA to develop acceptable disclosure terms. EPA may accept late disclosure in exceptional cases.
4. **Discovery and disclosure independent of the government or a third-party plaintiff**. For example, a disclosure will not be considered independent where EPA is already investigating the facility in question or where a citizens group has provided notice of its intent to sue over the subject violation.
5. **Correction and remediation** of the violation. The entity must remedy any harm caused by the violation and expeditiously certify in writing to the appropriate regulatory authorities that is has corrected the violation. The entity must correct the violation within 60 days from the date of discovery or as soon as possible. If more time may be needed, the disclosing entity must notify EPA in writing in advance.
6. **Prevention of recurrence** of the violation. The company must take steps to prevent a recurrence of the violation after it has been disclosed.
7. **No repeat violations**. This condition states that the same or closely-related violation must not have occurred at the same facility within three years of the entity's notice of a violation.
8. **Other violations excluded**. This condition exclude violations that result in serious actual harm to the environment or which may have presented an imminent and substantial endangerment to public health or the environment. To date, EPA has not used this condition to deny coverage under the audit policy.
9. **Cooperation with EPA**. For example, the entity must not hide, destroy or tamper with possible evidence following discovery of a potential violation.

Accordingly, an EMS should include internal audit procedures and other procedures for systematically discovering environmental violations and preventing the recurrence of violations. In addition, EMS procedures must detail the reporting requirements under all applicable environmental laws. Further, the EMS procedures should provide for prompt correction or remediation of the harm caused by the violation, which is typically in the company's best interest. Finally, the company must avoid repeat violations and cooperate with EPA, in order to qualify for reduced civil penalties and to avoid criminal prosecution.

B. DOJ's Policy

The DOJ published similar guidance in July, 1991 *entitled DOJ Factors in Decisions on Criminal Prosecutions for Environmental Violations*. In the guidance, DOJ states that its policy is to encourage self-auditing, self-policing and voluntary disclosure of environmental violations by the regulated community. DOJ explains that it views these activities as mitigating factors in DOJ's exercise of criminal environmental enforcement discretion. The factors that DOJ considers relevant in whether and how a company should be prosecuted are:

1. **Voluntary disclosure**, i.e. whether the person made a voluntary, timely and complete disclosure of the matter under investigation.
2. **Cooperation.** Full and prompt cooperation is essential.
3. **Preventive measures and compliance programs**. Prosecutors should consider the existence and scope of any regularized, intensive and comprehensive environmental compliance program. The program should include sufficient measures to identify and prevent future noncompliance. Prosecutors should also evaluate whether the company has a compliance program that includes effective internal disciplinary action.

A comprehensive EMS would not only prevent violations from occurring, but would provide leverage in a government investigation into environmental violations. Specifically, DOJ may seek reduced penalties and may choose not to prosecute corporation officials if the corporation has a system in place that at least strives to prevent noncompliance. Even if the system has failed in a particular instance, the DOJ guidance instructs prosecutors to consider the existence of a system designed to detect violations.

V. Conclusion

There are many beneficial reasons for developing an Environmental Management System. Facilitating environmental compliance, clarifying responsibilities and obtaining civil penalty reductions from EPA are only a few of the many benefits. In essence, an EMS assists users identify and manage environmental risks. ISO 14001 provides a comprehensive model for designing such a system. Particularly where a company has multiple facilities, is heavily regulated, generates a large number of environmental documents and/or has a fair amount of turnover of personnel with environmental responsibilities, an EMS may be an effective mechanism for maintaining compliance. ■

An EMS Application for Manageing Corporate Environmental Audit Information

By Tom Bills, Rindt-McDuff Associates, Inc.

I. Background

In the early 1990's, Rindt-McDuff Associates (RMA) developed an Environmental Management Information System ("EMIS") for a client needing a method to manage and maintain large volumes of information generated by its environmental audit activities. The system addressed the need for centralized access to environmental audit information by allowing secure, cross platform access, independent of other networks, to facility personnel, division managers, corporate managers and counsel, and outside counsel and consultants.

EMIS^2 is the next generation of this innovative product. EMIS^2 provides the user with a graphical user interface (GUI), and secure access is available over the Internet. All that is needed to access the EMIS^2 database is a valid user ID, password, an Internet connection, and a current browser. No additional communications software is required.

II. Paperless System

EMIS^2 is a truly paperless system. In addition to allowing various levels of secure access to authorized personnel for entering, reviewing and revising audit information, it allows secure, inexpensive long term storage for the data generated.

EMIS^2 ensures that environmental information is easy for facility personnel to generate, readily available to various personnel for review and revision, and stored securely, both to maintain the record of activities and to avoid unauthorized access. Paper based systems are impractical at best, dangerous at worst, in meeting these requirements.

III. Attorney-Client Privilege

One of the attractive features of EMIS^2 is a special component that allows inside or outside counsel to review the content of draft independent audits uploaded to the system prior to their being finalized. This can be very useful in assuring that correct language is used in describing particular situations or conditions at the facility level. For example, if an auditor were to write "*high levels of zinc detected in process wastewater represent a violation of the local Sewer Use Ordinance*", counsel could suggest that this be changed to read " *zinc was measured in process wastewater at a level that exceeds the levels listed in the local Sewer Use Ordinance*". The use of the word "violation" by the auditor implies that a determination has been made by some regulatory authority. The meaning in the edited version is the same, and generates the same action item at the facility level to address a problem with zinc, but removes the legal conclusion of a violation.

Further, the paperless nature of EMIS^2 can help to protect attorney-client privilege by limiting access to potentially sensitive internal information. Appropriate use eliminates hard copies of audit reports or recommendations that could be indiscriminately viewed or distributed, thereby breaking the privilege protection.

IV. Features of EMIS^2

EMIS^2 looks like a typical web site, but it is not. The first screen is a log-in screen, requesting and requiring a user name and password. The company uses access tools to govern who has access to what information. For example, a facility Environmental Health & Safety Manager can access and read only the information applicable to his facility. A Divisional Environmental Manager can see the information from all of the facilities in her division. A corporate environmental officer, inside or outside counsel may have rights to all information company wide. In addition, counsel may have access to draft independent audits during the sequential review and revision process. An audit stored in EMIS^2, including associated photos and graphics, is available for viewing at any time by anyone with proper.

A successful login leads one to the main navigational screen, which indicates the level of access granted, the date, and gives a total number of "active issues" open for the facilities over which the user has responsibility.

EMIS^2 identifies and highlights activities that must be completed to maintain compliance, while allowing corporate environmental management to assign responsibilities and monitor progress at the facility level. EMIS^2 tracks audit information, and automatically highlights scheduled and overdue action items. It helps attorneys and managers prevent missed deadlines, optimize resources, and track accountability.

V. Conclusion

EMIS^2 solves a multitude of paperwork and record keeping problems throughout a corporation. Perhaps more importantly, though, it provides a secure communications tool that serves to consolidate compliance information and requirements in a way that eases compliance with the full range of environmental regulations. The value of this becomes more pronounced for companies that have facilities which are geographically dispersed, and, therefore, face a variety of different state and local regulations. ■

For more information on EMIS^2 or for a presentation of EMIS^2 capabilities, please contact Tom Bills atmailto: tbills@rindt-mcduff.com.

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the Clean Water Initiative in metro Atlanta and the Flint River Drought Protection Act dealing with irrigation), there are several critical statewide initiatives that must be undertaken if long-term, effective regional / local solutions are to be supported and facilitated. The Association of County Commissioners of Georgia (ACCG) and the Georgia Municipal Association (GMA) recognized this, and in 1999, took steps to create the Joint Task Force on Water Resource Policy.

The task force was comprised of city and county elected and appointed officials from around the state. Its goal was to comprehensively examine Georgia's water issues and recommend possible solutions and actions, to all levels of government, for addressing long-term water management and protection. Task force members identified **four key needs** that must be addressed to ensure effective long-term management and protection of water resources, and recommended several goals and corresponding actions, which, if taken, will move Georgia significantly in the direction of comprehensive water management.

First, Georgia needs a comprehensive, clearly stated, long-term water management strategy that is consistently communicated and based on sound data. Currently, such a strategy does not exist. Georgia's water management and protection efforts have typically been based on a hodge-podge of policies and programs, regulations and requirements, incentives and restrictions that do not facilitate optimal usage of fiscal and water resources. Such practices have typically been done with little coordination, and in the context of oft-changing federal and state requirements.

Keeping in mind that any successful plan is only as good as the information on which it is based, it is imperative that Georgia's water management strategy be based on sound scientific data. Currently, a lot of water quality data exists throughout the state, but it exists in various forms, in various places, and with inconsistent standards of quality. ACCG and GMA believe that the Georgia Environmental Protection Division (EPD) should be adequately funded to:

(1) inventory and evaluate existing water data throughout the state to determine its accuracy and reliability;

(2) establish a baseline level of quality for data collection to allow for an accurate comparison of watersheds across the state;

(3) determine where holes in the data set exist; and

(4) take strides to collect the data necessary to fill those holes.

All data should be converted into a compatible, electronic form and placed in a centralized, user-friendly database that covers the entire state. The database should be organized according to watershed boundaries, and maintained and updated regularly. The idea here is to establish a "one-stop-shopping" site for water-related data so that any entity in the state making a decision affecting water quality can do so in an educated fashion. Establishing and maintaining a comprehensive water database is essential if Georgia is to move from reactionary decision-making toward proactive, long-term water management, allocation, and protection.

Second, Georgia should refine its water allocation policies. The state's current means of allocating water is rather loosely defined, and withdrawal allocations are granted at the discretion of the Director of EPD. Increased demands necessitate a tightening of allocation policies and procedures so that future allocations granted by EPD are based on a justifiable set of criteria. Factors such as available supply, current and projected population needs, competing demands, economic development goals, conservation efforts, stewardship, instream flow requirements and the term of a permit should all be considered. Water allocation policies must be clearly stated and consistently applied throughout Georgia.

Third, the state should encourage multi-jurisdictional (regional) approaches to water management. Since water flows within the bounds that nature created and not the bounds created by governments, regional approaches to water management based on watershed rather than political boundaries are needed to ensure that water management and protection efforts are comprehensive. This is not to say that Georgia needs to establish new governmental entities based on watershed boundaries, but that local governments should think and work regionally, outside of their own political boundaries, with neighboring local governments within a watershed to implement solutions effectively.

State government should demonstrate its commitment to water quality by providing substantive incentives to encourage regional water

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From the Editor:

Thanks to the contributing writers for this edition of the Environmental Section newsletter. I have enjoyed serving as editor this past year and speaking to environmental lawyers throughout the state. I look forward to seeing everyone at the January 12th lunch.

— Anne H. Hicks
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management efforts. Twenty-first century water solutions are complex in nature and expensive to implement. Completing a watershed assessment, providing on-going water monitoring, and undertaking activities to abate non-point source pollution can be very expensive and even cost-prohibitive for some local governments. The state, in its role as trustee for the people, must ensure that those responsible for managing and protecting Georgia's water resources are adequately financed to do so. In addition, there is a strong need to increase state and federal grants and loans to serve as incentives to local governments to trigger action and to continue to encourage those local governments which are ahead of the crowd.

Finally, water resource management and protection efforts must be coordinated with land use planning and management activities. Historically, technological fixes have been sought to protect water, but more than half of the pollutants now entering Georgia's waters come from non-point sources (e.g. water flowing over parking lots and roads, construction sites and agricultural fields, lawns and cut-over forest lands). Land use decisions must increasingly consider how they will affect water resources. This will require that local governments do a better job of long-term land use planning, but it will also require that the state not subsidize activities that contribute to growth and development patterns that negatively affect water quality. To do this, state and local governments must engage in careful self-examination to determine where policies, procedures, ordinances, and requirements impede protection, and change them accordingly.

Regardless of the type of regional solution that metro Atlanta, coastal Georgia or southwest Georgia chooses to pursue, it does not change the fact that, as a state, we must address these statewide, critical needs. They are the key underpinnings to a long-term successful water management effort. And while it is important to continue to work diligently toward effective regional solutions now, it is imperative that we also pursue meeting these statewide goals at the same time. To do otherwise will simply keep Georgia in a reactive, piecemeal mode, rather than taking us down the proactive, comprehensive path where we need to go. ■