



State Bar of Georgia

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Contents

2009-10 Section Officers3

A Message from the Chairman8

OSAH Reporter ..9

The 2009 Voluntary Remediation Program Act10

Meet the Editorial Board15

Visibility Regulation in the United States: Progress on the Horizon.....16

Upcoming Events: Summer Seminar Aug. 7 - 8

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Georgia Goes Green

By Gerald L. Pouncey, Jr., Esq. and Stacey Turner, Esq.¹

Green building, one of the strongest trends in the development industry, is increasingly prevalent in Georgia. Within the Atlanta area, more than 5,000 residences and 50 buildings have been certified as “green.” At least four Georgia cities have passed “green building” ordinances requiring more energy-efficient construction, and draft ordinances are slated for votes in more Georgia cities and towns. In the midst of an economic recession, the concept of environmentally- and socially-conscious building continues to thrive. As the commercial real estate industry seeks to cut expenses, sustainable building may present an opportunity for development stakeholders to reduce costs and remain competitive in the marketplace. Regardless, green building has moved from the fringe of the development community into the mainstream.

What is Green Building?

Green building, or sustainable building, is the use of environmentally-responsible, energy- and resource-efficient practices in design, construction, operation, maintenance, renovation, and demolition. Green buildings may incorporate sustainable materials in construction (*e.g.*, recycled concrete), reduce pollution and consumption by design (*e.g.*, a green roof or low-flow water features), and reduce environmental impacts by virtue of location (*e.g.*, high-density projects connected to public transportation).

Building construction involves the consumption of energy, water, materials, and natural resources. The environmental impacts of building construction include waste, heat islands, water pollution, air pollution, and noise, which ultimately degrade the natural environment. Buildings account for approximately 39 percent of the nation’s energy consumption, according to the U.S. Environmental Protection Agency (EPA).² Buildings also account for 12 percent of the nation’s daily water consumption, 68 percent of electricity

consumption, and 38 percent of carbon dioxide emissions, also according to EPA. Construction and demolition waste comprises more than half of the nation’s non-industrial waste.³

Traditional building principles related to economy, durability, and comfort have not placed a high priority on the environmental impact of building practices. Green building principles seek to minimize the impact of the built environment on the natural environment. Green features may include the use of geothermal heating and cooling systems, gravity-fed rain-harvesting cisterns, solar panels, recycled materials, and high-efficiency windows, doors, and appliances.

National accreditation and certification programs such as “Energy Star” and “LEED” award seals of approval to projects that incorporate green principles. For example, buildings that have earned the federal government’s “Energy Star” label use 35 percent less energy and emit 35 percent less greenhouse gases than average buildings.⁴ Buildings that earn a LEED (Leadership in Environmental Energy and Design) credential have demonstrated superiority in energy savings, water efficiency, emissions reductions, indoor environmental quality, and stewardship of environmental resources. However, a rating or credential is not necessary to consider a building “green.”

Green Building is Gaining Market Share

In the midst of an economic crisis and credit crunch, green building is gaining momentum. Participation in the two most popular sustainability building programs in the U.S.—Energy Star and LEED—rose dramatically in 2008. The green-building market is predicted to double from the current \$36-49 billion to \$96-140 billion by 2013, according to a study by McGraw Hill Construction. By 2010, approximately 10 percent of commercial

construction starts are expected to be green, according to the same McGraw Hill Construction study.⁵ The nationwide economic slowdown which began in 2007 and dramatically impacted markets will likely reduce the number of expected green construction starts, although numbers quantifying this impact are not available as of the time of this writing.

In 2008, more than 3,300 commercial buildings and manufacturing plants earned the federal government's "Energy Star" label for high efficiency,⁶ representing more than a quarter of the labels awarded in the program's ten-year history. These buildings, which included schools, hospitals, office buildings, courthouses, grocery stores, retail centers, and auto assembly plants, represented savings of more than \$1 billion in utility bills and reduced greenhouse gas emissions by more than 7 million metric tons. The total number of Energy Star qualifying buildings and plants in America is now more than 6,200, with overall annual utility savings of more than \$1.7 billion and the prevention of the greenhouse gas emissions equivalent to those of more than 2 million cars a year, according to EPA.⁷

Also in 2008, the number of projects earning LEED certification more than doubled from the previous year and accounted for nearly 40 percent of new commercial construction, according to the U.S. Green Building Council, which awards the LEED ratings, and a study by GreenerBuilding.com. The Council estimates that \$464 million worth of construction registers with the LEED program *every business day*.⁸

Why Build Green?

Although green building is still a relatively new trend, preliminary studies suggest a strong correlation between green-building principles and higher sales prices, rents, and occupancy rates, as well as lower energy and operational costs. To the surprise of many, buildings which have earned an Energy Star label or LEED rating actually outperform traditional buildings with respect to occupancy, rental rates, and sale price, according to a 2008 study by executives of the CoStar Group, a commercial real estate information firm. LEED buildings command rent premiums of \$11.33 per square foot over their non-LEED peers and have 4.1 percent higher occupancy, according to the CoStar Group study.⁹ The study also found that rental rates in Energy Star buildings represent a \$2.40 per square-foot premium over comparable non-Energy Star buildings and have 3.6 percent higher occupancy.¹⁰ With respect to purchase price, Energy Star buildings sold for an average of \$61 per square foot more than their counterparts, while LEED buildings sold for \$171 more per square foot, according to the CoStar study.¹¹

The stunning increase in market price has not gone unnoticed by institutional investors, according to a study from Responsible Property Investments (RPI). Energy Star properties had 13.5 percent higher market values and 5.9 percent higher net incomes per square foot than non-labeled counterparts, with a result of 10 percent lower utility costs, 4.8 percent higher rents, and 1 percent higher occupancy rates, according to the RPI study authors. The Energy Star buildings also sold at lower cap rates than non-labeled properties. However, the Energy Star buildings did not appreciate faster or generate better overall results than their counterparts, according to the RPI study.¹²

The public perception is that green building requires more expense up front and results in savings over the life of a building. A 2007 study of 146 green buildings found that the additional project costs attributed to green building were 2 percent, although the public perception of those costs was 17 percent.¹³ For homeowners, energy improvements costing less than \$500 to implement in a residence saved an average of more than \$400 a year in energy bills for the same home, according to Southface Energy Institute.¹⁴

Developers are building green in order to take advantage of cost-saving opportunities and to appeal to environmentally-conscious purchasers, tenants, and investors. They also are building green in response to government mandates. On both the state and local levels, lawmakers are requiring new construction to incorporate sustainable-building principles. Builders, owners, and tenants who build green are often rewarded with tax incentives, loans, and grants to cover the initial costs of green building. Insurers also are offering premium discounts to owners of LEED-certified commercial and residential buildings.

As an example of the tax incentives available to promote green building, the federal government provides tax credits and deductions and allows accelerated depreciation for green buildings and green-building components. A building owner may deduct \$1.80 per square foot for new or existing buildings if the owner has installed interior lighting, a building envelope, or heating, cooling, ventilation, or hot water systems that reduce the building's total energy and power cost by at least 50 percent as compared to a building meeting minimum requirements set by the American Society of Heating, Refrigerating, and Air Conditioning Engineers Standard 90.1-2001.¹⁵ The energy savings must be calculated using qualified computer software approved by the IRS. Deductions of \$0.60 per square foot are available to owners of buildings in which individual lighting, building envelope, or heating and cooling systems meet target levels that would reasonably contribute to an overall building savings of 50 percent if additional systems were installed. In other words, if one system (e.g., the building envelope) meets a standard so that, if all other systems were performing at a similar standard, the overall savings would be 50 percent or greater, then the lesser deduction of \$0.60 per square foot would apply.

The federal tax code also allows businesses to depreciate certain types of renewable energy equipment at an accelerated rate.¹⁶ The federal Modified Accelerated Cost-Recovery System (MACRS) establishes a set of class lives for various types of property, ranging from 3 to 50 years, over which the property may be depreciated. A number of renewable energy technologies are classified as five-year property, allowing businesses to depreciate this equipment at a more rapid rate. Renewable energy technologies subject to accelerated depreciation include a variety of solar electric and solar thermal technologies; fuel cells and microturbines; geothermal electric, direct-use geothermal, and geothermal heat pumps; wind technologies; and combined heat and power. In addition to accelerated depreciation, the federal government permits taxpayers to take a bonus 50 percent reduction off the basis of certain depreciating renewable energy technologies for the 2009 tax year.

The State of Georgia offers a tax credit to corporate taxpayers who install and utilize renewable energy and energy efficiency programs and technologies.¹⁷ Georgia offers a Clean Energy Tax

Credit against corporate income tax for energy-efficient buildings. The tax credit applies to the construction, purchase, or lease of clean-energy property that is placed into service in Georgia between July 1, 2008 and December 30, 2012. The credit may be applied in connection with several types of energy-efficient technologies, including lighting-retrofit projects and energy-efficient buildings. For purposes of the tax credit, an "energy efficient building" means a non-single family residential building (either new or retrofitted) that is designed, constructed, and certified to exceed the standards set forth in ASHRAE 90.1.2004 by 30 percent.¹⁸

The Georgia credit for a "clean energy property" cannot exceed the lesser of 35 percent of the actual cost to put the property into service, or, with respect to energy-efficient buildings, the sum of the cost of the energy-efficient products installed during construction at \$1.80 per square foot (with a maximum of \$100,000), or, with respect to lighting-retrofit projects, the sum of \$0.60 per square foot of the building (with a maximum of \$100,000).¹⁹ The Clean Energy Tax Credit is available on a first-come, first-served basis.²⁰ Credits for 2009 and 2010 are limited to \$2.5 million per year total for all

applicants.²¹ As of July 1, 2009, approximately \$2.175 million in credits remained available for 2009.²² In the last legislative session, Governor Sonny Perdue signed HB 473 into law. The new law creates a grant, to be administered by the Georgia Environmental Facilities Authority (GEFA), for the construction, purchase, or lease of clean-energy property (except for single-family residences).²³

Tax incentives are not the only reason to go green, however. In the midst of an economic crisis and credit crunch, property owners and tenants also may look to "green" renovations for savings on operational costs. Minor improvements which do not require a large capital commitment may result in a high level of savings, reduced operating costs, and a higher asking price in a later disposition. EPA recommends many low- to no-cost measures that will reduce energy costs, such as replacing light fixtures.

Green building also may have a positive impact on human health. On average, Americans spend 90 percent of our lives indoors. Typical indoor environments may contain two to five times the number of pollutants than the outdoor environment, according

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to EPA. Poor indoor environmental quality has been linked to cancer and asthma as well as other respiratory ailments. Green-building principles seek to minimize sources of indoor pollution by both material usage and design.

To be more than a trend, green building must be profitable. The studies cited above indicate that a green credential may be a product differentiator which adds independent value to a project. Different stakeholders will have different incentives for green buildings. A developer who plans to sell a project shortly after it is constructed will incur up-front costs of green building but may not capture long-term energy savings, unless the developer can charge a premium for green design when it sells the property. An owner who constructs and operates a building will benefit directly from long-term savings on energy costs. An owner who leases a building may or may not recover savings from green building in the long-term, depending upon the presence of pass-through provisions in its leases.

With respect to existing buildings, it is unlikely that landlords will pay for green renovations or retrofits if only the tenant will benefit from reduced electric costs. Tenants will not pay for these costs if the utility bill is pro-rated for every tenant in a multi-tenant building. Some tenants may install submeters for a single tenant space to recover savings from green build-outs.

Who Decides What Makes a Building Green?

Within the United States, the Green Building Council's LEED certification and the federal government's Energy Star program have set the standard in sustainable development. Although the LEED rating and Energy Star label may be the most familiar designations for green building, the market includes many industry groups competing to act as a benchmark in sustainable development.

LEED, or Leadership in Environmental Energy and Design, is a building-rating system awarded by the U.S. Green Building Council, a Washington, D.C.-based non-profit. LEED is a point system that tracks a construction project's adherence to sustainable-building principles. The LEED guidelines and certification system have become the benchmark in green building in the United States.

LEED can be applied to any building type at any phase in the building lifecycle. The LEED rating systems evaluate key areas with potential impact on human and environmental health, including sustainable site development, water savings, energy efficiency, materials selection, and indoor environmental quality. In April 2009, the U.S. Green Building Council launched LEED 2009, the third version of the rating system.

After June 26, 2009, all new LEED projects will be required to seek certification under the LEED 2009 rating system. LEED offers nine different rating systems: five that are active and four that are under development. The active rating systems are New Construction, Existing Buildings, Commercial Interiors, Core & Shell, and Schools. The four new programs under development, which are expected to launch in 2009, are LEED for Retail Interiors; LEED for Existing Schools, LEED for Healthcare; and LEED for Retail. Of all of the LEED programs, the New Construction rating has been the most popular.

The LEED process involves registration, design review, construction review, and, ultimately, certification. Applicants pay both a registration fee and a certification fee. On average, the

time from project registration to certification is two years, with an attrition rate of 25 to 30 percent of projects, according to a study by GreenerBuildings.com. The cost for certification is calculated based upon the building's gross square footage and range from \$500 to \$27,500 for an initial certification, depending upon whether the applicant is a member of the U.S. Green Building Council.

The first step in the LEED process is registration. Registration is a declaration of intent to seek a LEED certification. Projects which are registered appear in the publicly-available LEED database of registered and certified projects.

After registration, an applicant has immediate access to LEED Online, the online program for collecting documentation required for a certification. Each LEED credit and prerequisite has a unique set of documentation requirements that must be completed as a part of the application process. Only the LEED Project Administrator is eligible to submit an application for review. To initiate the review process, a complete application is submitted via LEED Online. Prior to certification, the project team is required to submit completed documentation requirements for all prerequisites and at least the minimum number of credits required to achieve certification, as well as completed general project-information forms. The applicant may elect to either split or combine the construction and design-review processes. The application-review process varies according to the rating sought (e.g., New Construction or Core & Shell). The certification process is managed by the Green Building Certification Institute (GBCI), which works with 10 different certification bodies. In the event that an applicant disputes the GBCI's decision concerning certification, the applicant may appeal within 25 days of the decision.

The LEED rating system awards points based upon numerous sustainability principles. To obtain certification, a project must obtain a specified number of points, depending upon the level of certification. A project might earn credit for stormwater control, connectivity to public transportation, redevelopment of a Brownfield, water-efficient landscaping, use of recycled materials, and many other construction and design features. During the design phase, an applicant determines which credits it will seek. Following construction, the GBCI determines if the applicant has earned the credit. The LEED 2009 rating system also awards bonus points based upon regional priorities. Green Building Council chapters and regional councils have identified sustainability issues which are critical in their geographic areas. The revised rating system emphasizes those priorities by zip code, so a candidate in a drought region might earn a bonus point for exceptional water efficiency.

Other than the LEED certification, perhaps the most familiar green-building credential is EPA and DOE's "Energy Star" program, which awards the familiar Energy Star logo to products and projects that meet energy-efficiency guidelines set by EPA and DOE. EPA introduced Energy Star in 1992 as a voluntary, market-based partnership to reduce greenhouse gas emissions through energy efficiency. The Energy Star label can be found on more than 50 products, new homes, and commercial and industrial buildings. EPA estimates that as many as 500 of the more than 4,000 commercial buildings that have earned an Energy Star label consume 50 percent less energy than traditional buildings.

LEED and Energy Star are complementary programs. Buildings that earn a LEED certification may not earn an Energy Star label,

and vice versa. However, buildings that earn a LEED certification often will incorporate Energy Star products. The obligation to obtain a LEED certification often falls on the design team (*e.g.*, architects and engineers). Energy Star, which evaluates energy consumption, is more likely to be implemented by a property management team in existing construction. Energy Star relates exclusively to energy efficiency and reduction of greenhouse gas emissions, while the LEED rating system evaluates energy efficiency as one of many features of green design, along with sustainability, water efficiency, indoor air quality, and sustainable siting.

As an alternative to the LEED system, some developers seek a Green Globes rating. The Green Globes credential is awarded by the Green Building Initiative (GBI). More than 50 buildings in the United States have been certified by the GBI. The GBI is an accredited standards developer under the American National Standards Institute (ANSI) and has begun the process to establish Green Globes as an official ANSI standard. The GBI offers an online rating system, assessment, and guidance after an applicant completes an online questionnaire. The credential is used extensively in Canada, but, within the U.S., the Green Globes so far has been eclipsed by the LEED rating system. In July 2008, Jones Lang LaSalle Inc., an international real estate firm with more than 1 billion square feet of commercial and industrial buildings, acquired Toronto-based ECD Energy and Environment Canada Ltd., the developer of Green Globes' online evaluation tool. The Chicago-based real estate giant stated that it purchased the tool with the intention of acting as a leader in sustainable development. However, the impact of new ownership on the public perception of Green Globes as an independent rating system remains to be seen.

For residential builders, there is an alternative to LEED certification that originated in Atlanta. EarthCraft House, a program developed by the Greater Atlanta Home Builders Association and Southface Energy Institute, is a voluntary green-building blueprint for healthy, comfortable homes that reduces utility bills and protects the environment. To obtain certification from EarthCraft, a home must meet the federal Energy Star certification requirements, including passing diagnostic tests for air infiltration and duct leakage. In addition, an EarthCraft home must receive a minimum of 150 points from a scoring sheet which includes the following general categories: site planning, energy-efficient building envelope and systems, resource-efficient design, resource-efficient building materials, waste management, indoor air quality, water conservation (indoor and outdoor), homeowner education, builder operations, and bonus/innovation points.

With LEED, Energy Star, Green Globes, and EarthCraft, there is no shortage of green credentialing programs in the marketplace. The credentialing programs are appealing because they provide an independent verification that a project has met a universal benchmark of green building and therefore reduce opportunities for "greenwashing," that is, the use of disingenuous or misleading claims that a project promotes sustainability or has an environmental benefit. However, a project may be green without earning any credential simply by incorporating principles of sustainability into design, construction, and operation. Third-party certifications, such as LEED, are unappealing to some members of the construction community. The third-party certification process adds time and expense to a project. Also, many of the credentialing

programs are based on submissions made online and may not include on-the-ground, at-the-site inspections or communications.

Local Initiatives to Go Green

State and local governments contribute to the consumption of energy by the building industry. Local governments own and construct public buildings, own and operate landfills and sewage treatment plants, and own and maintain fleets of service vehicles and the surface roads on which they travel. In addition to the cost of constructing buildings and acquiring services, state and local governments pay the continued costs of energy use and maintenance. Green building may reduce the lifetime cost of a facility for a local government. For example, the City of Atlanta calculated that obtaining a LEED silver certification for a municipal fire station that cost \$2.5 million to construct would cost an additional \$50,000. Over 20 years of use, however, the city calculated that the sustainability features would result in a savings of \$150,000 in operation costs.

State and local governments first began regulating energy use in construction as early as the 1980s, in response to the fuel shortages of the late 1970s. Generally, state and local governments seeking to address energy efficiency in construction will adopt an energy code based upon one of several model codes or efficiency rating systems. For example, the International Code Council, a non-profit organization founded in 1994 by several different building code groups, has developed an International Energy Conservation Code (first released in 1998 and updated as recently as 2006) and an International Residential Code. The State of Georgia has incorporated many provisions of the International Energy Conservation Code into the State's energy code. Many local residential building codes also recognize the federal Energy Star program.

In May 2008, the City of Chamblee became the first city in Georgia to mandate green certification for private development. Doraville quickly followed Chamblee's lead, and several other cities and counties have proposed green-building ordinances. More than 14 percent of U.S. cities with populations of at least 50,000 have passed green-building initiatives, which may include third-party certifications, expedited permitting, or financial incentives, according to the American Institute of Architects. Any local government authority considering a green ordinance must determine whether or not the ordinance will require certification from an independent third-party (*e.g.*, LEED or EarthCraft) or simply require "green" features in the energy and building codes without requiring third-party certification. Otherwise, the building inspector will not be able to determine whether a building is sufficiently "green" to comply with the ordinance.

Chamblee's green-building ordinance requires that new construction obtain either a LEED or a Green Globes certification.²⁴ The ordinance applies to all new construction greater than 20,000 square feet, except for single-family homes, and all new construction of municipal buildings regardless of square footage. Applicants for building permits must produce a completed LEED checklist or Green Globes certification showing that the project will, if built as designed, meet the certification requirements. Chamblee will not issue permanent certificates of occupancy without proof of final certification from LEED or Green Globes.

The City of Conyers adopted an ordinance similar to Chamblee's that is applicable to all new residential construction or new construction of municipal buildings with more than 5,000 square feet of occupied space for which building permits are sought after January 1, 2009.²⁵ The Conyers ordinance incorporates the LEED rating system and EarthCraft House standards.

In 2003, the City of Atlanta passed an ordinance that requires the use of green and/or sustainable-building practices in the design, construction, and operation of all city facilities and city-funded projects.²⁶ The Atlanta ordinance incorporates the LEED rating system as a "measuring tool to determine what constitutes sustainable building by national standards."²⁷ Buildings larger than 5,000 square feet of occupied space or costing more than \$2 million dollars must meet the standards for a LEED silver rating. The City of Atlanta contains more than 50 LEED-registered or LEED-certified projects, according to the Mayor's office.

Green-building ordinances have not yet withstood the test of the U.S. court system. In at least one court case, *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*, a federal district court opined that a "green ordinance" might be preempted by federal standards.²⁸ The New Mexico case involved portions of three city ordinances that imposed minimum energy efficiency standards for commercial and residential structures. The plaintiffs were local and regional distributors of heating, ventilation, air-conditioning, and water-heating projects and three national trade associations that represent the manufacturers, contractors, and distributors of such products. The plaintiffs sought to enjoin enforcement of the disputed portions of the ordinances, arguing that they were preempted by federal law, specifically, the Energy Policy and Conservation Act, as amended, which establishes nationwide standards for the energy efficiency and energy use of major residential and commercial appliances, including those distributed by the plaintiffs.

The court noted that the purpose of a preliminary injunction is to preserve the *status quo* pending the outcome of the case.²⁹ It further stated that an injunction would maintain the *status quo* by not requiring products that exceed the requirements of federal law. With respect to the plaintiffs' likelihood of later success on the merits, the court found that the federal statute contained an express preemption provision, to wit, that "[t]here is no doubt that Congress intended to preempt state regulation of the energy efficiency of certain building appliances in order to have uniform, express, national energy efficiency standards."³⁰ The court also noted that, although the ordinances provided for a choice of several product alternatives, if an owner elected to purchase a product which met only the federal requirements and not the higher standards prescribed by the ordinances, that owner would be required to incur additional expense under the ordinances to demonstrate efficiency in other areas.

Charting New Ground: Legal Issues and Green Building

As green building becomes more mainstream, development stakeholders and their attorneys will be faced with new legal issues, or at least new wrinkles on old ones. For example, one challenge will be how to allocate the risk of failure to obtain a green credential or meet a local mandate for green building. Attorneys drafting purchase

agreements, construction contracts, loan documents, and leases with prospective tenants will need to include risk-allocation provisions that clearly describe which party bears the risk of loss if a green building does not obtain green credentials, either because the building is not certified by a third-party credentialing entity or because a local official will not issue a certificate of occupancy for a building that is not in compliance with the municipality's green-building ordinance. Attorneys also will need to include appropriate remedy provisions for the failure to obtain appropriate green credentials.

As green building becomes more common, it also can be expected that green-building litigation will increase. In addition to the typical construction litigation claims arising from defects and delays, owners, developers, architects, and contractors involved in green building also must anticipate claims arising from the failure of projects to meet the applicable green-building standards (whether LEED, a local standard, or otherwise). In such cases, critical issues will be how to allocate the loss and also how to define and quantify the loss.

The first "green building" case, *Shaw Development v. Southern Builders*, involved both of these issues.³¹ Because the case was settled prior to adjudication, the issues were not resolved by the court. *Shaw Development* involved a Maryland luxury condominium project that was designed to attain a LEED silver rating. The contractor and developer entered into a 1997 AIA form A101 agreement, in which the contractor committed to the project schedule and the specifications incorporated into the contract. The Project Manual (which was incorporated into the contract) contained the following green-certification requirement:

"Project is designed to comply with a Silver Certification Level according to the US Green Building Council's Leadership in Energy and Environmental Design (LEED) Rating System, as specified in Division I Section 'LEED Requirements.'"

In order for the developer to obtain a green-building tax credit from the Maryland Energy Administration, the condominium project had to be completed within a certain timeframe and meet the LEED silver standard. The Maryland Energy Administration offers a tax credit of up to 8 percent of a project's total cost for buildings that are greater than 20,000 square feet and certified under the LEED standards. The tax credit was worth approximately \$635,000 to the developer. The project did not meet the LEED silver standard and was not completed within the timeframe required by the Maryland Energy Administration. The available pleadings (which relate to the liens) do not indicate whether green-building components were included in the project specifications.

The contractor sued the developer, asserting a claim for unpaid fees under a mechanic's lien. The developer countersued the contractor, alleging that the contractor was responsible in damages for the amount of the tax credit because the contractor did not complete the project within the timeframe set by contract and did not construct the project in a manner that would meet the LEED standard.

As noted above, the court did not reach the issue of how to allocate the risk of loss for failure to obtain the LEED certification or the issue of whether a lost tax credit could be recovered as

damages. Moreover, the court did not consider whether the mutual waiver of consequential damages contained in the AIA agreement would prevent the owner from recovering the amount of the tax credit from the contractor. Nonetheless, the *Shaw Development* case is illustrative of the types of legal issues that can arise in the green-building context.

In addition to claims under construction law, other types of claims, such as claims of false advertising by tenants or investors, also can arise. The LEED system requires registration prior to certification, and pre-certification is optional. Often, developers or real estate brokers advertise that a project is LEED-registered or pre-certified with a LEED rating, even though final certification is not guaranteed. This can give rise to claims by tenants who were counting on occupying a green building. Also, should a shareholder purchase a security based upon information about the green credentials of a building that turns out to be misleading (e.g., where a LEED-registered building fails to meet final certification requirements), this could result in a lawsuit.

Green Buildings in Georgia

Georgia is home to more than 90 LEED-certified buildings. In the metro-Atlanta area, more than 4,000 EarthCraft House single-family homes and 1,500 EarthCraft multi-dwelling homes have been certified.

Atlantic Station, the mixed-use redevelopment of the Atlantic Steel mill in midtown Atlanta, is home to several LEED-certified or pre-certified buildings. The Wachovia high-rise at 171 17th Street was the first speculative commercial office high-rise building in the United States to earn a LEED Silver certification in the Core & Shell category. The Core & Shell evaluation focuses on essential building elements such as building envelope and HVAC system. The Atlantic Station development also contains a building with a LEED Gold certification (271 17th Street) and a building that has been pre-certified to meet the LEED Gold rating (201 17th Street).

The Management Building at the Georgia Institute of Technology is the largest building in Technology Square, Georgia Tech's mixed-use development that extends the traditional campus into midtown Atlanta. The Management Building was the second building in Georgia to earn LEED certification. The 248,000-square-foot, \$40-million structure contains a 350-seat auditorium, classrooms, offices, bookstore, and street-level retail space. The building incorporates low-emitting interior finishes, recycled materials, and a white heat-reflecting roof.

The Hurt Building, located near Edgewood Avenue in downtown Atlanta (and made famous to many non-Georgians as the law office of the fictional Georgia attorney Matlock, played by Andy Griffith in the television series of the same name), recently earned the LEED Gold rating for Existing Buildings. The building, which was constructed in 1913, is one of Atlanta's oldest high-rise buildings.

The new World of Coca-Cola museum in downtown Atlanta also has received LEED certification. Almost 90 percent of the construction waste from the building project was salvaged and reused, and 20 percent of the building materials were of a recycled nature. A key ingredient in plastic beverage containers was used in the carpeting.

Barbour Pointe, a 38-acre single-family community 10 miles southwest of Savannah, was designated as a participating EarthCraft House community. The development was planned to preserve a maximum amount of trees and natural foliage, to incorporate xeriscaping to minimize the need for irrigation, and to use both geothermal and solar power.

Future of Green Building

Sustainable building is an established trend in the construction and development markets of Georgia. Despite a nationwide economic slowdown, green building continues to thrive. As more municipalities make green building the standard for new construction and consumers and tenants increasingly demand environmentally "friendly" development, the construction industry will respond with innovative building components and accessible, streamlined certification processes. In the midst of a recession, the federal government and local governments are providing incentives for green building in the form of both tax credits (already available in Georgia) and grant money, which may be available in the latter half of 2009. It appears that the trend of green building will continue to grow for the foreseeable future.



The Hurt Building, Atlanta, Ga.

(Endnotes)

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- 15 26 U.S.C. § 179D (2009).
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- 17 See Ga. Code Ann. § 48-7-29.14 (2009).
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A Message from the Chairman

By Bill Sapp

Now that the heat of the summer has set in, what better time to nail down your plans for the Environmental Law Section's summer seminar at the King & Prince on St. Simons Island. We are going to lead off with keynote speeches from Mary Wilkes, the Regional Counsel for the U.S. Environmental Protection Agency, and Chris Clark, the new Commissioner of Georgia's Department of Natural Resources. They will be discussing how the changes in Washington, D.C. and the changes on "main street" here in Georgia are affecting what their agencies can realistically accomplish. To follow them, we have assembled a strong line-up of panels covering everything from nutrient criteria to forest roads to carbon dioxide. And for the first time we have divided up some of the sessions so we can offer you even more variety. As a sign of the times, we will also have panels on global climate change and building green. So if you ready for a weekend at the beach, please sign up for the summer seminar on August 7 and 8.

If you can't make it to St. Simons, be on the lookout for future brown bag lunches. So far we have had a legislative wrap up and EPA has sponsored one on groundwater. We have plans to have others on land-use planning, wetlands, and hazardous waste. If you want to put one on, please give me a call so we can set one up. All you need to supply is a speaker, a conference room, ice tea, and cookies. We will get the word out.

And finally, please enjoy the articles in this Newsletter. James Griffin and his new editorial board have put a lot of time into finding and editing these article for you. If you have an article that you would like to get into a future edition, please give James a call.

OSAH Reporter

Reported by John C. Bottini, Esq., King & Spalding, Atlanta.

Editor's Note: In an effort to apprise Section members of recent environmental decisions from the Georgia Office of Administrative Hearings ("OSAH"), the Editorial Board of the Newsletter presents the first of many periodic summaries of significant OSAH decisions that may affect your practice. The Editorial Board would like to thank Chief Judge Lois Oakley and her staff for assisting us in this effort.

Coastal Marshlands Protection Act Permitting

Altamaha Riverkeeper, Inc., et al. v. Coastal Marshlands Protection Committee, et al., Docket No. OSAH-BNR-CM-0821398-98-Howells. On March 4, 2009, Judge Stephanie M. Howells affirmed the issuance of a Coastal Marshlands Protection Act ("CMPA") permit to MID-ROC, LLC to build and maintain a community dock along the South Newport River in McIntosh County, Georgia. MID-ROC, LLC proposes to build a SunDock rail system dock, as opposed to a traditional planked walkway, that will extend 1,394 feet from the jurisdictional marsh line to the mean low water mark in the South Newport River. After a three-day hearing, Judge Howells concluded that Petitioners Altamaha Riverkeeper, Inc. and Ann and George Fuller had failed to demonstrate that the proposed dock would unreasonably interfere with navigation, viewshed, or the conservation of marine life, wildlife, or other resources; increase erosion, shoaling, or stagnant water; or that a feasible alternative site could be used. Accordingly, the Coastal Marshlands Protection Committee's issuance of the CMPA permit to MID-ROC, LLC was affirmed.

Georgia Conservation Tax Credit Program

Andlot, LLC v. Georgia Department of Natural Resources, Docket No. OSAH-BNR-CTCC-0910893-63-Baxter. On June 8, 2009, Judge Amanda C. Baxter affirmed the Georgia Department of Natural Resources' ("DNR") denial of a certification of a conservation easement for income-tax credit under Georgia's Conservation Tax Credit Program ("GCTC Program"). The property at issue is a 0.11-acre lot adjacent to the Island Trail on St.

Simons Island in Glynn County, Georgia. In 2006, the property owner, Andlot, LLC, donated the property in fee simple to the St. Simons Land Trust for use as a grassy "Pocket Park" and rest stop for those traveling along the Island Trail. At issue in the OSAH proceeding was whether the property satisfied three of the stated goals of the GCTC Program: scenic protection, recreation, and connection of existing or planned conservation areas. Judge Baxter held a one-day hearing, after which she concluded that the property does not possess the scenic or recreational significance to warrant inclusion in the GCTC Program, nor does it connect other existing or planned areas that contribute to the conservation goals of the GCTC Program. Accordingly, Judge Baxter affirmed DNR's denial of certification for a conservation easement income-tax credit.

Hampton Pastures, LLC v. Noel Holcomb, Commissioner, Department of Natural Resources, Docket No. OSAH-BNR-CTCC-0903300-33-Schroer. On March 2, 2009, Judge Kimberly W. Schroer affirmed DNR's denial of a certification of a conservation easement for income-tax credit under the GCTC Program. The property at issue is a 31-acre parcel located in the Hampton Island area of Liberty County, Georgia. A conservation easement for the subject property was donated to Liberty County in 2006. After a two-day evidentiary hearing, Judge Schroer concluded that the Petitioner Hampton Pastures, LLC had presented sufficient evidence to demonstrate that preservation of the isolated wetlands on the property would meet one of the GCTC Program's stated conservation goals. Nevertheless, because of several "reserved rights" of property access and development that the Petitioner had retained in the conservation easement, Judge Schroer held that the easement failed to ensure the permanent protection of the isolated wetlands. In particular, the Court noted that the Petitioner retained the right under the conservation easement to fill the isolated wetlands in order to carry out permitted construction activities on the property. For this reason, Judge Schroer affirmed DNR's denial of Petitioner's application for certification of a conservation easement for income-tax credit under O.C.G.A. § 48-7-29.12(c).

Call for Professional Announcements

The editors of this Newsletter would like to add a place for professional announcements. If you have set up your own practice, changed or merged firms, made a career change, published a major article, received an award, or participated in an event of interest to members of this Section, please submit a short paragraph to jgriffin@wtcraig.com.

The 2009 Voluntary Remediation Program Act: A New Beginning for Hazardous Site Response in Georgia?

By Casey Fernung, Esq.¹

On May 5, 2009, Gov. Sonny Perdue signed the Voluntary Remediation Program Act (the “Act”)² for properties in Georgia that are contaminated by releases of regulated substances. The Act became effective on June 1, 2009, and it directs the Environmental Protection Division (“EPD”) of the Georgia Department of Natural Resources to implement a Voluntary Remediation Program (“VRP”) with more cost-effective cleanup standards and more flexible remedial options than are currently available under existing law. The general idea of the Act is to forge a “win-win” scenario by offering property owners a more flexible and cost-effective program; that is, the VRP is intended to facilitate the cleanup of more contaminated properties in the state.³

Although the VRP could significantly improve hazardous site response in Georgia, the program still faces several obstacles. First and foremost, EPD did not receive any funding for the VRP and is not accepting VRP participants until sufficient funding is available and regulations have been promulgated.⁴ This position could delay VRP implementation until the spring of 2010. After funding becomes available, the success of the VRP will depend on exactly how EPD designs and implements the new program.

Existing Law: Brownfields and HSRA

An understanding of Georgia’s existing programs for hazardous site response is necessary to grasp the significance of the VRP. At present, not all contaminated properties in the state fall under a formal regulatory program for conducting remediation with oversight and approval from EPD. The state’s “Brownfields Program” under the Hazardous Site Reuse and Redevelopment Act⁵ is available only for certain prospective purchasers of contaminated property who want to limit their liability by reaching an agreement with EPD on the required level of cleanup before assuming ownership. Brownfields remediation is not available to persons who cause a release of regulated substances or who discover a release on land they already own.

The state’s “superfund” program under the Hazardous Site Response Act (“HSRA”)⁶ authorizes EPD to directly investigate and remediate sites that have a reportable release of regulated

substances. HSRA also imposes joint, several, and strict liability for EPD’s response costs on persons deemed responsible for a release as well as the present owners of contaminated property. In practice, HSRA remediation is normally conducted by property owners or other responsible parties subject to EPD’s oversight and approval.

The corrective action provisions of HSRA apply to properties that are listed on Georgia’s Hazardous Site Inventory (“HSI”). The HSI consists of only those sites where a reportable release of regulated substances has occurred and the resulting score based on site conditions exceeds certain thresholds. Properties that are not listed on the HSI cannot be remediated under HSRA. As a result, owners of properties that score below the HSRA thresholds may not be able to gain the state’s formal approval of corrective action. Without approval from the state, these property owners have less incentive to perform a voluntary cleanup.

Even where HSRA does apply, property owners may face another problem: HSRA’s strict procedures and cleanup standards sometimes result in time-consuming and costly cleanups, with more resources being expended than necessary to protect human health and the environment.

An Overview of HSRA Procedures

HSRA operates according to a highly-regimented set of procedures. Upon identifying a reportable release, EPD determines whether to list property on the HSI by applying a risk-based scoring



Atlantic Station, Atlanta, Ga., a remediated brownfield.

system called the “Reportable Quantities Screening Method” (“RQSM”).⁷ Listing on the HSI triggers rigorous investigation, possible corrective action, and property notice requirements unless and until the property owner or other responsible party can certify that the property is in compliance with cleanup criteria called “Risk Reduction Standards” (“RRS”).⁸

EPD maintains five types of RRS.⁹ The first four types require remediation of source material, soil, and groundwater to the applicable RRS.¹⁰ The Type 5 RRS is unique in that it allows regulated substances to remain in place, provided that the principal threats from such substances are appropriately managed using engineering controls such as fences and caps.¹¹ Type 5 RRS are allowed only when compliance with all other standards is shown to be infeasible. Institutional (land-use) controls may be available under the Type 5 RRS, if active remedial measures are impracticable.

Once a site is listed on the HSI, the responsible party must prepare a Compliance Status Report (“CSR”) that delineates the vertical and horizontal extent of contamination in soil and groundwater.¹² The CSR also must include a certified statement of either compliance or noncompliance with all applicable RRS in the delineated zone.¹³ If a site is not in compliance with the RRS, the responsible party normally prepares a Corrective Action Plan (“CAP”) with a proposed remedial approach.¹⁴

The same cleanup criteria that determine the need for corrective action under HSRA also determine when a site should be removed from the HSI because corrective action is complete. EPD removes sites from the HSI upon their compliance with Type 1 - 4 RRS.¹⁵ Sites that comply with Type 5 RRS, however, must remain on the HSI and undergo corrective action until they comply with another (Type 1 - 4) standard.¹⁶

HSRA: Stringent Risk Presumptions and Remedial Requirements

Over the years, HSRA has been widely criticized as requiring overly costly and extensive remediation of many properties. Two general characteristics of the HSRA Program give rise to this criticism. First, the program operates according to the strict procedures discussed above, which can sometimes unnecessarily inflate costs and delay remediation. Second, HSRA relies heavily on hypothetical presumptions of risk that may result in cleanup standards being more stringent than necessary to protect human health and the environment. Specific examples of this second concern are described below:

Delineation to Background Concentrations: When investigating a site under HSRA, EPD requires that the area of contamination be delineated to background concentration levels, meaning the levels found where soil and groundwater have not been affected by a release of a regulated substance.¹⁷ Responsible parties must identify background concentrations, even when those concentrations have no bearing on the appropriate cleanup standards or actual exposure risks at a site.¹⁸

Assumption that All Groundwater Is Drinking Water: When applying cleanup criteria to groundwater contamination under HSRA, EPD assumes that the most contaminated groundwater at a site will be used as a source of drinking water. As a result,

responsible parties must remediate groundwater to the applicable RRS, regardless of whether there is any real potential for human exposure to groundwater contamination.

Point-By-Point Assessment of Compliance with Standards: With respect to both soil and groundwater at a HSRA site, EPD requires compliance with applicable RRS at each and every sample point. EPD does not consider whether the soil or groundwater meets those standards based on a site-wide average of constituent concentrations.¹⁹

Assumption of Soil Exposure: HSRA also requires that all soil at a site must comply with applicable RRS, even when exposure to certain portions of soil is practically impossible as a result of soil depth or overlying structures.²⁰

Preference for Media Removal and Decontamination: Because HSRA generally fails to consider actual exposure risks, and because Type 5 RRS are available only upon a showing that other standards are not feasible, HSRA entails a strong preference for media removal (meaning soil excavation or groundwater extraction) and media decontamination. The program tends to under-utilize less costly strategies such as institutional and engineering controls, which leave regulated substances in place to attenuate naturally over time with no real risk of exposure to human or sensitive environmental receptors.

Groundwater Certification Is Necessary for De-listing: EPD interprets HSRA to require that responsible parties must certify compliance with RRS for both soil and groundwater in every case.²¹ Even if substantial evidence shows that a release exceeding a reportable quantity was limited to soil and did not reach groundwater, the responsible party still must select the appropriate cleanup standards for groundwater and certify compliance with those standards.

The VRP: Broader, More Flexible, and More Cost-Effective

Compared to HSRA, the new Act calls for the VRP to apply to more properties with simpler and more flexible procedures for remediating releases of regulated substances. The Act also incorporates a more realistic risk-based analysis than is available under HSRA.

Unlike Georgia’s Brownfields Program, current property owners may participate in the VRP, even if they caused a reportable release of regulated substances, provided that they are not currently in violation of any EPD order, judgment, statute, rule, or regulation. Eligible VRP participants also include persons who have express permission from a property owner to enter a site and perform corrective action or implement controls pursuant to a written lease, license, order, or indenture.²²

Properties are eligible for the VRP under the Act if they are listed on the HSI, eligible for Georgia’s Brownfields Program, or otherwise have had a release of regulated substances to the environment.²³ The Act is broader than HSRA in this respect, since there is no requirement that a release must exceed any minimum quantity. Properties are excluded from VRP eligibility only if they are federal Superfund sites, subject to a response order from the U.S. Environmental Protection Agency, required to hold a hazardous waste permit, or subject to a lien under HSRA or Georgia’s Underground Storage Tank law.²⁴

Simple and Flexible Procedures

Eligible participants can apply for the VRP simply by submitting a one-time fee of \$5,000 and a Voluntary Remediation Plan prepared by a registered professional engineer or geologist.²⁵ Under the Act, Voluntary Remediation Plans must be based on a “streamlined form” to be prescribed by the Director of EPD and will be subject to EPD approval.²⁶

If EPD approves a Voluntary Remediation Plan, it becomes the participant’s responsibility to cause one or more registered professionals to oversee implementation of the Plan.²⁷ Status reports describing plan implementation are due to EPD on a semi-annual basis. Upon completing corrective action at a site, a participant must submit a CSR that certifies compliance with applicable cleanup standards.²⁸ If EPD agrees with the conclusions in a CSR, the Director will issue a decision of concurrence with the CSR. If the site is listed on the HSI, the Director must de-list the property within 90 days of concurrence.²⁹

The Act also offers a new short-cut for removing certain properties from the HSI immediately upon their enrollment in the VRP. If, at the time of enrollment, an applicant can show that a release exceeding a reportable quantity did not occur at a VRP property, the Act requires the Director to immediately de-list that property, unless the Director decides there is an imminent or substantial danger at the site.³⁰ This provision of the Act may be useful for properties that are listed on the HSI based on information that is later found to be inaccurate or incomplete. Appropriately de-listing these properties as quickly as possible is important to restore their marketability and potential use.

A More Realistic Risk-Based Analysis

In addition to offering several procedural advantages, the VRP replaces HSRA’s risk presumptions with the following program elements to achieve a more genuine risk-based approach:

Choice of Delineation Methods: Under the Act, the background concentration of a constituent of concern is just one possible measure of delineation. A participant also may choose to delineate to HSRA’s Notification Concentrations for soil, background metal concentrations for soil established by the U.S. Geological Survey, two times the laboratory lower detection limit, or “default residential cleanup standards.”³¹ Compared to background concentrations, these other methods for delineating a release may be more cost-effective because they are more closely aligned with actual exposure risks and cleanup standards.

Exposure Pathways In General: The Act contains a blanket prohibition against reliance on incomplete exposure pathways. An exposure pathway, in general, is the route by which a constituent of concern moves from its source and comes into contact with a human or other sensitive organism.³² When there is any discontinuity or impediment in a site-specific exposure pathway, the Act is clear that the pathway does not require evaluation.³³

Use of Type 5 RRS: The Act specifically provides that all five types of RRS are available without requiring any “impracticability” demonstration.³⁴ Thus, a VRP participant does not need to show that compliance with Type 1 – 4 RRS is not feasible before relying on engineering and institutional controls under a Type 5 RRS.³⁵ Additionally, a VRP site that certifies to Type 5 RRS can be

removed from the HSI, whereas under HSRA it must remain on the HSI pending compliance with another standard. These new provisions of the Act should allow VRP participants to draw upon whatever remedial strategies are most appropriate and cost-effective for reducing risks as needed to protect human health and the environment.³⁶ In many cases, the most cost-effective approach for achieving this goal is to safely immobilize contamination so that it can naturally attenuate over time.

A New Approach to Groundwater Exposure: Participants in the VRP must demonstrate that site-specific groundwater concentrations are “protective of any established downgradient point of exposure.”³⁷ The term “point of exposure” is separately defined in the Act as the nearest of (1) the closest existing downgradient drinking water supply well; (2) likely nearest future drinking water supply well location, if a public supply is not and will not be available; or 3) a “hypothetical point of drinking water exposure located at a distance of 1,000 feet downgradient from the delineated site contamination.”³⁸ Because the last phrase of this definition refers to a hypothetical point of “drinking water exposure,” EPD may interpret the Act to simply push the presumption that all groundwater is drinking water to a point located 1,000 feet from the edge of the delineated zone of contamination. Interestingly, this interpretation would involve a risk presumption that seems inconsistent with the Act’s blanket prohibition against reliance on incomplete exposure pathways.

Use of Depth-Based Soil Criteria: For soil, the Act expands the use of site-specific RRS that vary by depth. VRP participants may rely on direct exposure factors for surface soils and construction worker exposure factors for subsurface soils, provided that they also apply controls to maintain the criteria necessary to safely limit exposure.³⁹

Reliance on Average Exposure Concentrations: The Act, unlike HSRA, considers average constituent concentrations in some circumstances. Participants may determine compliance with site-specific RRS on the basis of average constituent concentrations across the applicable exposure domain. HSRA’s strict point-by-point assessment does not always apply.⁴⁰

De-listing Without Groundwater Certification or Corrective Action: For VRP properties that are listed on the HSI, removal from the HSI is possible under the Act without groundwater certification or corrective action, provided that the site was not originally listed on the HSI as a result of a reportable release to groundwater, and also provided that site data continue to show no reportable release of regulated substances to groundwater.⁴¹ This element of the Act is a significant departure from HSRA.

Expanding the Right of Appeal

Consistent with its goal to create a more workable framework, the Act offers participants a broad right to appeal EPD’s decisions under the VRP. HSRA, in contrast, is subject to a special provision that prevents appeals of HSI-listing decisions and corrective action requirements before an Administrative Law Judge (“ALJ”) under the Georgia Administrative Procedures Act⁴² unless or until EPD seeks to recover response costs, impose penalties, or otherwise enforce a corrective action order.⁴³ The only exception is that property owners may appeal a designation on the HSI that corrective action is necessary.⁴⁴ This appeal structure has left responsible parties with very little ability to challenge EPD’s decisions under HSRA.

For purposes of the VRP, the Act expressly rejects HSRA's special limitation on the right of appeal.⁴⁵ Consequently, the VRP will be governed by the normal rules for appealing EPD actions to ALJs and courts of law.⁴⁶ Although there may be uncertainty about whether certain EPD actions under the VRP are "final," participants will, at least, be able to appeal several types of EPD decisions under the VRP without waiting for formal enforcement action. For instance, participants may be able to appeal a decision by EPD to accept or reject a property in the VRP, terminate participation in the VRP, approve or disapprove a Voluntary Remediation Plan, or concur with or reject certifications in a CSR.

Challenges Ahead

Although the Act became effective on June 1, 2009, EPD has decided that it cannot promulgate regulations for the VRP or accept participants into the new program until it receives funding for those efforts.⁴⁷ The Act calls for participants to pay \$5,000 application fees and other costs associated with VRP participation, but EPD did not receive additional money in the 2009 or 2010 fiscal years to fund an initial VRP rulemaking. The next opportunity to receive such funding could be as late as the spring of 2010, when the 2010 supplementary budget and the 2011 original budget will become available.

A one-year delay in VRP implementation could have serious consequences for otherwise eligible VRP participants who are facing time-sensitive regulatory requirements, contractual obligations, financing needs, or marketability concerns. As a practical matter, however, these parties may have little choice but to wait for EPD to receive sufficient funds. Submitting VRP applications would do little or no good for these parties if EPD lacks the resources needed to process applications and, furthermore, is not bound by any clear deadline for doing so.⁴⁸

Even after sufficient funding becomes available, the success or failure of the VRP will depend on exactly how EPD interprets the Act and implements the new program. The following are a few of the many questions facing EPD:

What impact, if any, will participation in the VRP have on the obligation to comply with the requirements of a pre-existing cleanup order issued under HSRA?

Given that a VRP participant cannot be in violation of any order, judgment, statute or regulation, will the negative compliance status of only some members of a group of potentially responsible parties affect the VRP eligibility of the group as a whole?

In Ga. Code Ann. § 12-8-107(g), the Act allows EPD to remove properties from the HSI immediately upon their enrollment in the VRP, if there is a showing "in accordance with rules and regulations promulgated by the board pursuant to [HSRA]" that no reportable release of regulated substances occurred at the site. What procedures and substantive standards will EPD apply when deciding whether a showing is sufficient to warrant immediate removal from the HSI under this provision?

EPD will need to answer these and other questions based on a fair and reasonable reading of the Act and related laws. Some issues will require EPD to exercise its discretion in deciding how to best fill regulatory gaps and clarify requirements in a manner that is consistent with the Act's goal of encouraging voluntary and cost-

effective remediation to safe levels. On other issues, the Act pursues these goals by clearly requiring a dramatic shift in EPD's policies and procedures for hazardous site response.

Conclusions

Even after the VRP is in place, HSRA and the Brownfields Program will continue to serve as cornerstones of hazardous site response in Georgia. HSRA will remain the sole regulatory paradigm for some sites in the state, but for many, the VRP will provide a more efficient and effective avenue. The Brownfields Program will continue to be the only mechanism by which prospective purchasers in Georgia may limit their liability for assuming ownership of contaminated property. The VRP does not result in any express release from liability upon completion of corrective action. However, where property owners are willing and able to conduct cleanup on land they already own, the VRP could provide a cooperative framework with regulatory approval to facilitate voluntary remediation, preserve the marketability of property, and protect human health and the environment in the most cost-effective manner possible. The initial challenge, of course, will be to appropriately fund and to implement a program that can accomplish these goals.

(Endnotes)

- 1 Casey Fernung is an associate in the Environmental, Health and Safety Practice Group of Jones Day's Atlanta office. She received her J.D. from the University of Virginia School of Law (2006) and a B.S. in Forest Resources and Conservation from the University of Florida (2003). Thanks are due to Carol Northern of Premier Environmental Services, Inc. for her comments on this article.
- 2 Ga. Code Ann. §§ 12-8-100 to -108 (2009).
- 3 Specifically, the stated goal of the Act is to "encourage the voluntary and timely investigation and remediation of properties . . . for the purpose of reducing human and environmental exposure to safe levels, to protect current and likely future use of groundwater, and to ensure the cost-effective allocation of limited resources . . ." Ga. Code Ann. § 12-8-101(a).
- 4 See EPD's message at <http://www.gaepd.org/Documents/vrp.html> (last visited July 2, 2009).
- 5 Ga. Code Ann. §§ 12-8-200 to -207 (2002).
- 6 Ga. Code Ann. §§ 12-8-90 to -97 (1992).
- 7 GA. COMP. R. & REGS. r. 391-3-19-.05(1), Appendix II.
- 8 GA. COMP. R. & REGS. r. 391-3-19-.05(2)-(4); 391-3-19-.07(3).
- 9 GA. COMP. R. & REGS. r. 391-3-19-.07(6)-(10).
- 10 GA. COMP. R. & REGS. r. 391-3-19-.07(6)(a), (7)(a), (8)(a), (9)(a). Type 1 and 4 RRS are the default standards for residential and industrial property, respectively. Types 2 and 3 allow for the development of site-specific standards.
- 11 GA. COMP. R. & REGS. r. 391-3-19-.07(10)(a).
- 12 GA. COMP. R. & REGS. r. 391-3-19-.06(3)(b)2-3.
- 13 *Id.* 391-3-19-.06(4).
- 14 See *id.* 391-3-19-.06(3)(b)9.
- 15 *Id.* 391-3-19-.06(6)(b)1-3.
- 16 *Id.*

- 17 *Id.* 391-3-19-.06(3)(b)2-3.
- 18 Background concentrations affect cleanup standards only when they are greater than the concentrations specified in the RRS. *Id.* 391-3-19-.07(4)(e).
- 19 *See id.* 391-3-19-.07(6)(b)-(c) (requiring compliance “at any point” of soil or groundwater that has been affected by a release).
- 20 *See id.* 391-3-19-.07(6)(c) (requiring compliance “at any point above the uppermost groundwater zone in soil that has been affected by a release”).
- 21 *See* EPD’s Compliance Status Report Review Checklist *available at* http://www.gaepd.org/Files_PDF/HSRAGuide/CSRChecklist.pdf (last visited July 2, 2009).
- 22 Ga. Code Ann. § 12-8-106.
- 23 Ga. Code Ann. § 12-8-105(1).
- 24 Ga. Code Ann. § 12-8-105(2).
- 25 Ga. Code Ann. § 12-8-107(a).
- 26 *Id.*
- 27 Ga. Code Ann. § 12-8-107(b).
- 28 Ga. Code Ann. § 12-8-107(e).
- 29 Ga. Code Ann. § 12-8-107(f).
- 30 Ga. Code Ann. § 12-8-107(g)(1).
- 31 Ga. Code Ann. § 12-8-108(1).
- 32 Ga. Code Ann. § 12-8-102(7).
- 33 Ga. Code Ann. § 12-8-108(2).
- 34 Ga. Code Ann. § 12-8-108(6).
- 35 Ga. Code Ann. § 12-8-108(6).
- 36 Ga. Code Ann. § 12-8-108(8).
- 37 Ga. Code Ann. § 12-8-108(4).
- 38 Ga. Code Ann. § 12-8-102(11).
- 39 Ga. Code Ann. § 12-8-108(5).
- 40 Ga. Code Ann. § 12-8-108(3).
- 41 Ga. Code Ann. § 12-8-107(g)(2). EPD may require annual groundwater monitoring for up to five years after removal from the HSI, unless the Director determines that a longer time period is necessary.
- 42 Ga. Code Ann. § 50-13-40.
- 43 Ga. Code Ann. § 12-2-2(c)(3)(B).
- 44 *Id.*
- 45 Ga. Code Ann. § 12-8-107(g)(3).
- 46 Ga. Code Ann. § 12-2-2(b)(2)(A) (Persons who are “aggrieved or adversely affected” by an “order or action” of the Director under the VRP have the right to petition for a hearing before an ALJ within 30 days.); Ga. Code Ann. § 50-13-19(b) (Judicial review of “final” agency decisions is available for 30 days after service of the final decision.).
- 47 *See* EPD’s message about the VRP at <http://www.gaepd.org/Documents/vrp.html> (last visited July 2, 2009).
- 48 The Act does not set any specific time period by which EPD must approve or disapprove Voluntary Remediation Plans.

Save the Date

The Environmental Law Section
Summer Seminar will be held at the
King & Prince Resort on
St. Simons Island from Aug. 7-8.

See Pages 21 -22 for registration
information

Meet the Editorial Board of the Newsletter

By James B. Griffin

This Summer 2009 edition of the Newsletter marks the beginning of the work of the newly expanded Editorial Board. (Please note the Editorial Board members in the right column.) Not long ago, the Newsletter began publication in electronic format and is now e-mailed to the members of the Section. Thus, we are no longer limited by printing and mailing costs in what we can do. Each edition of the Newsletter could contain 20 pieces if we could find willing writers and editors.

In March of this year, the officers selected six members of the Section to serve as associate editors of the Newsletter. They are John Curtis Allen, John Bottini, Casey Fernung, Karen Marie Johnston, Donna Nance, and Andrea Pawlak. They join Brandon Bowen, Martin Shelton, and me in putting together this Newsletter.

If you wish to publish a piece on Environmental Law, or know someone who does, we now have a staff capable of much larger output. The fields of study (besides law) for the editorial board include chemical engineering, biology, economics, forestry, civil engineering, environmental engineering, English, library science, criminology, political science, and history. The fields of legal expertise represented include but are not limited to water rights, wetlands, CERCLA, HSRA, brownfields, Phase I environmental assessments, Clean Air Act, Clean Water Act, OSHA, Georgia Air Quality Act, Comprehensive Statewide Water Management Plan, Georgia Erosion and Sedimentation Control Act, hazardous waste, solid waste and nuisance. Submissions will be reviewed for scientific and technical accuracy as well as persuasiveness and readability.

The goal is to create a quarterly journal published in electronic format which is more substantive than a "newsletter" but not as academic as a law review. Because the elected officers of the Section change each year, the expanded Editorial Board will provide continuity for the Newsletter as well as technical expertise. (Should we outgrow the name "Newsletter," we shall consider a less modest name.)

We want our publication to be useful to the practicing environmental lawyer and to our clients, primarily in Georgia but also to a national and international readership. We welcome articles from the breadth of environmental law practice. We ask that they be well-written, cited where necessary with footnotes, and formatted according to the Blue Book (17th ed.) for publication in a law review. In particular, please be careful in citing internet sources.

Please contact me if you wish to make a suggestion or a submission.

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Visibility Regulation in the United States: Progress on the Horizon

By Jeff Kerr¹

Introduction

In 1977, Congress created a federal visibility program by amending the Clean Air Act (“CAA” or “Act”) to include a new section addressing the protection of atmospheric visibility over scenic federal lands. Although the statutory mandate to protect and restore visibility has been in effect for more than thirty years, the visibility program is only now beginning to get off the ground. This delay was partly the result of legal challenges to the U.S. Environmental Protection Agency’s (“EPA”) implementing regulations and partly the result of the difficulty inherent in responding to visibility impairment, the causes of which are complex and not easily traced.²

Regulations implementing the CAA’s visibility program are finally in place. Under the program, states are required to maintain “reasonable progress” towards the achievement of natural visibility conditions. One of the key means to this end will be the imposition of “best available retrofit technology” (“BART”) on certain stationary sources. For some older sources that were grandfathered in before the CAA was passed, BART may demand expensive technical upgrades. Through imposition of BART and other state-devised measures, the visibility program will help to restore visibility in scenic lands such as the Great Smoky Mountains, Big Bend National Park, and the Grand Canyon.

I. Visibility Impairment in the United States

The National Park Service has identified air pollution as one of the greatest threats to national parks.³ At many parks across the country, air pollution causes noticeable visibility impairment, and hazy skies may prevent visitors from enjoying sights such as the Grand Canyon and Yosemite’s El Capitan in their full natural splendor.⁴ Visibility is defined as “the ability of an air mass to convey landscape images” and is often measured in terms of “standard visual range (SVR), the distance at which one can discern large contrasting images on the horizon.”⁵ Unfortunately, visibility is impaired across the country: in western states, visibility is typically one-half to two-thirds of natural visibility, while in eastern states, visibility has declined to one-fifth of natural levels.⁶ This impairment is caused by both “plume blight” and “regional haze.”⁷ The former results from “dense clouds of particulates” emitted by nearby sources of air pollution,⁸ whereas regional haze is a more widespread problem caused by the interaction of sunlight with volatile organic compounds, sulfur oxides, nitrogen oxides, and particulate matter.⁹ Regional haze appears as a “homogeneous haze from a multitude of sources which impairs visibility in every direction over a large area[.]”¹⁰ and it presents a “vexing problem” in that it can travel over great distances, remain in the air for extended periods, and even impair visibility in areas that do not contain emissions sources.¹¹ Issuing regulations to deal with regional haze has proven to be EPA’s greatest challenge in implementing the visibility program.

II. The Regulatory Response to Visibility Impairment

A. Section 169A

EPA’s program for protecting and restoring visibility stems from Sections 169A and 169B of the CAA. In 1977, in response to growing public perception that visibility was deteriorating in national parks, wilderness areas, and other scenic lands,¹² Congress declared in Section 169A a “national goal” calling for the prevention of future visibility impairment and the remediation of existing impairment in specified scenic areas.¹³ The language of 169A is quite ambitious as it calls for “the remedying of *any* existing impairment of visibility.”¹⁴

Structurally, Section 169A is a statutory directive requiring the EPA Administrator to create a set of implementing regulations, which themselves require the states to create a second layer of regulations applicable to industry. Without rulemaking by both the EPA Administrator and the States, the visibility program created by Section 169A does not begin to limit the emissions that cause visibility impairment. Within the larger structure of the CAA, Section 169A stands out as a substantive addition to the Act. It does not simply overlap with the CAA’s program for the prevention of significant deterioration (“PSD”) or with other sections of the Act.¹⁵ For instance, Section 169A tends to focus on the regulation of existing sources,¹⁶ whereas the PSD program primarily targets new sources.¹⁷ Section 169A’s focus on existing sources is evident in its BART provisions—which, by definition, apply only to sources that have already been built.

Section 169A’s “national goal” of remedying visibility impairment applies only to certain “mandatory [C]lass I Federal areas.”¹⁸ Mandatory Class I areas are “international parks,” wilderness areas greater than 5,000 acres, national memorial areas greater than 5,000 acres, and national parks greater than 6,000 acres.¹⁹ These “Mandatory Class I areas” may not be redesignated as Class II or Class III areas, which are afforded less protection under the CAA.²⁰ In Georgia, there are three mandatory Class I areas subject to the visibility program: the Cohutta Wilderness, the Okefenokee National Wildlife Refuge, and Wolf Island National Wildlife Refuge.²¹

Section 169A also requires the EPA Administrator to provide guidance to the states on techniques for achieving the national goal and requires each state to include provisions in its State Implementation Plan (“SIP”) that require certain “major stationary sources” to install BART to limit emissions that impair visibility.²² Section 169A also requires state SIPs to include schedules of compliance and other measures to ensure reasonable progress towards the national goal.²³ Although BART figures prominently in Section 169A, it is clear that the visibility program enables EPA and the states to employ a variety of methods for protecting and restoring visibility over scenic lands.²⁴

B. Section 169B

Section 169B “(1) directs EPA to identify sources of visibility impairment in [C]lass I areas,²⁵ (2) authorizes EPA to establish visibility-transport commissions to report on visibility impairment in affected regions,²⁶ and (3) requires EPA to establish a visibility-transport commission for the Grand Canyon National Park.”²⁷ Congress added Section 169B to the CAA in 1990 in an effort “to prompt EPA to further address visibility impairment in national parks and wilderness areas.”²⁸ Section 169B requires EPA to identify both source and “source regions” contributing to visibility impairment in Class I areas.²⁹ The section also requires EPA to consider the designation of “transport commissions” intended to study interstate pollution transport.³⁰

In addition, Section 169B further clarifies that the visibility program created by Sections 169A and 169B of the CAA does not operate merely by requiring retrofit technology for a limited class of existing pollution sources. As the D.C. Circuit explained in *Center for Energy and Economic Development v. EPA*, Congress’s addition of Section 169B clarified that the focus of the CAA was to achieve “actual progress and improvement in visibility”³¹ and “not to anoint BART the mandatory vehicle of choice.”³²



Yosemite National Park - Half Dome

C. EPA’s Visibility Regulations

The visibility program has been affected since its inception by a pattern of regulatory delay. EPA promulgated its first visibility regulations in 1980³³—roughly a year late according to the terms of Section 169A. The 1980 regulations divided visibility pollution into two categories: (1) “plume blight,” or traceable streams of visibility-impairing pollutants emanating from a single source or small group of sources and (2) “regional haze,” a widespread and homogeneous haze from a multitude of sources over a large area.³⁴ EPA targeted plume blight in its 1980 regulations but declined to issue regulations for regional haze. Remarkably, neither EPA’s choice to separate visibility pollution into two discrete

categories nor its “assessment of its capacity to understand the problem of regional haze” were subject to judicial review because the regulations went unchallenged during the 60-day notice period.³⁵ EPA’s decision to delay its response to regional haze was based on the agency’s claim that it lacked sufficient information on the relationship between emissions and haze-based visibility impairment.³⁶ Even as late as 1989, a court had to remind EPA that it remained “under a double-barreled duty, statutory and self-imposed . . . to deal with regional haze.”³⁷

1. BART Determinations

In 1999, EPA finally promulgated regulations addressing regional haze and calling on “states to play the lead role in designing and implementing regional haze programs”³⁸ In *American Corn Growers Ass’n v. EPA*, the agency’s 1999 Haze Rule was attacked by both industry and environmental petitioners.³⁹ Industry petitioners argued that EPA’s choice to use a group approach to BART, rather than a source-by-source approach, was impermissible under the CAA.⁴⁰ Under the “group” approach, states would have been compelled to require BART for all BART-eligible sources within a *region* which contributed to visibility impairment at a Class I area.⁴¹ Rejecting this approach, the court held that the CAA allows states to make an individualized determination as to whether a particular source contributes to visibility impairment (and thus whether BART is needed at that source), regardless of the source’s location within a contributing region. Because it held that the group approach was unlawful, the D.C. Circuit vacated the BART portion of the 1999 Haze Rule and remanded to EPA.⁴²

Section 169A(g)(2) of the CAA provides that “in determining [BART] the State . . . shall take into consideration[.]”⁴³

(1) the costs of compliance, (2) the energy and nonair quality environmental impacts of compliance, (3) any existing pollution control technology in use at the source, (4) the remaining useful life of the source, and (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology[.]⁴⁴

In further examining the role of states under the Act, the court in *American Corn Growers* held that the EPA impermissibly “bifurcated” the delegation of responsibility for considering the five factors laid out in Section 169A(g)(2) by allowing states to determine the first four factors on a source-by-source basis while requiring a collective determination to be made regarding the fifth factor.⁴⁵ EPA’s interpretation was impermissible because “the factors were meant to be considered together *by the states*.”⁴⁶ In general, the court held that the CAA gives the states “broad authority over BART determinations.”⁴⁷

In 2005, EPA issued revised BART provisions to bring the Haze Rule into compliance with the holdings of *American Corn Growers*.⁴⁸ These new provisions were in turn challenged by both environmental and industry groups in *Utility Air Regulatory Group v. EPA*.⁴⁹ Industry petitioners argued that the 2005 Haze Rule required states to mandate installation of BART on too many sources, while environmental groups argued that the Rule allowed an excessive number of sources to be exempted from BART requirements.⁵⁰ Adopting a more expansive interpretation of EPA’s authority in implementing the visibility program,⁵¹ the

court rejected both sets of arguments and affirmed EPA's 2005 Haze Rule.⁵²

The BART provisions upheld by the court in *Utility Air Regulatory Group* remain in effect today. These provisions lay out a two-step BART process, and they differ in important ways from the provisions vacated in *American Corn Growers*.⁵³ The key difference is in the first step of the BART process: the Attribution Step.⁵⁴ In the Attribution Step, states assess each source *individually* to determine whether the source contributes to visibility impairment in a Class I area.⁵⁵ No collective determinations are required. However, states themselves may decide to adopt a "collective determination" approach.⁵⁶ Alternatively, a state could make a collective determination that *none* of its BART-eligible sources contribute to regional haze.⁵⁷

In the second step of the BART process, the Determination Step, the state must set BART-based emissions limits⁵⁸ for sources found to be subject to BART during the Attribution Step. In setting emissions limits, the states are responsible for evaluating all five factors laid out in Section 169(a), and EPA may not require states to make a collective determination regarding any of the factors.⁵⁹ The current Haze Rule thus leaves the majority of decisions regarding BART to the states rather than to the EPA.

2. The CAIR Complication

In addition to other challenges, petitioners in *Utility Air Regulatory Group* contested a provision of the Haze Rule which provides that "[a] State that opts to participate in the Clean Air Interstate Rule ["CAIR"] cap-and trade . . . program . . . need not require affected BART-eligible EGUs [electric generating units] to install, operate, and maintain BART."⁶⁰ According to EPA's analysis, CAIR would more effectively reduce emissions and improve visibility conditions than BART.⁶¹ This analysis did not imply, however, that CAIR would satisfy *all* of the "reasonable progress" requirements applicable to the states under the visibility program.⁶² Although this provision was upheld in *Utility Air Regulatory Group*, states and regulated entities may be hesitant to rely on CAIR as an alternative to BART, given that CAIR was struck down by the D.C. Circuit and only remains in force until EPA replaces it with a lawful alternative.⁶³

3. Reasonable Progress

The "reasonable progress" requirement of Section 169A is spelled out in EPA's regulations, which require that "[f]or *each* mandatory Class I Federal area . . . [states] must provide for an improvement in visibility for the *most impaired* days . . . and ensure no degradation in visibility for the least impaired days over the same period."⁶⁴ This mandate is ultimately tied to the goal of attaining natural visibility conditions: reasonable progress is simply continuous progress towards the achievement of natural visibility conditions at Class I areas by the year 2064.⁶⁵ Interestingly, reasonable progress only requires that visibility improve on the *most impaired* days of the year;⁶⁶ the only requirement for the least impaired days is that visibility conditions should not deteriorate.⁶⁷

4. Regional Alternatives

EPA's regulations allow states to pursue regional alternatives rather than single-state BART programs. The D.C. Circuit has noted that EPA has followed the "the implications of [Section] 169B

by incorporating in the Haze Rule not only a BART mandate but a regional alternative."⁶⁸ These provisions permit states "to implement . . . an emissions trading program or other alternative measure" as long as the program "achieve[s] greater reasonable progress than would be achieved through the installation and operation of BART."⁶⁹ Regional alternatives are most clearly available for the nine states of the Grand Canyon "Transport Region,"⁷⁰ but other states are clearly permitted to participate in interstate "emissions trading program[s]" if doing so is shown to be better than BART.⁷¹

In the *Center for Energy and Economic Development*, the D.C. Circuit affirmed EPA's interpretation of Section 169A allowing for alternatives to BART when such alternatives are shown to be superior.⁷² The court took issue, however, with the methodology that states were required to use in demonstrating that an alternative would perform better than BART. In the provisions for state annex plans at 40 C.F.R. § 51.309(f),⁷³ EPA had incorporated an approach which was identical to the "group BART" approach which was struck down in *American Corn Growers*. In *Center for Energy and Economic Development*, the court followed the logic of *American Corn Growers* and vacated the provisions requiring this approach for demonstrating that a state annex plan outperforms BART.⁷⁴ In response, EPA modified the Haze Rule in 2006 to bring the provisions for state annex plans into compliance with the court's holding.⁷⁵

5. Leeway for States

Besides the steps prescribed by the CAA, states are free to use methods other than BART to meet the obligations imposed by the visibility program.⁷⁶ As described above, the Haze Rule allows states to participate in emissions trading programs, and better-than-BART alternatives may be substituted for the BART approach.⁷⁷ EPA uses a two-pronged test to determine whether a state's BART-alternative performs better than BART.⁷⁸ Under this test, if the "distribution of emissions is not substantially different than under BART," *and* the alternative results in a greater reduction in emissions, then it may be deemed to "achieve greater reasonable progress."⁷⁹ On the other hand, if the emissions distribution differs significantly, then the state must conduct dispersion modeling to show that (1) "[v]isibility does not decline in any Class I area" and (2) "[t]here is an overall improvement in visibility, determined by comparing the average differences between BART and the alternative over all affected Class I areas."⁸⁰ If the two conditions are met then the alternative achieves "greater reasonable progress."⁸¹ The D.C. Circuit has observed that "the [CAA] leaves wide discretion about how the [national] goal is to be achieved."⁸² Thus, states are free to implement better-than-BART alternatives as long as those alternatives ensure reasonable progress.⁸³

6. Natural Visibility & No Degradation

The "natural visibility" goal and the "no degradation" requirement are two key parts of the 1999 Haze Rule that survived the attack in *American Corn Growers*.⁸⁴ Despite the court's critical reception of the Rule's BART provisions in that case, the court embraced EPA's interpretation of the "national goal" as attaining a state of "natural visibility" in Class I areas.⁸⁵ The court also held that this goal was "an eminently reasonable elucidation of the statute."⁸⁶ As the court was careful to note, however, the natural visibility goal is only a *goal* and not a mandate.⁸⁷ It serves as "the foundation for

analytical tools to be used by the states to set reasonable progress goals.”⁸⁸ Moreover, achievement of the “natural visibility” goal is set far in the future: the regulations require SIPs to implement the program such that “natural visibility” will be achieved by 2064.⁸⁹

The “no degradation” provisions are somewhat more complicated. These provisions require SIPs to ensure that visibility improves on the days in which conditions are worst; on the best days, however, visibility cannot be allowed to deteriorate.⁹⁰ The “best” and “worst” days are defined by percentages: the “best” being the 20 percent least impaired days and the “worst” being the 20 percent most impaired days.⁹¹ In *American Corn Growers*, the court upheld the “no degradation” requirement and flatly rejected petitioners’ arguments against it.⁹²

III. The Future of Visibility Regulation

The 2006 Haze Rule issued in response to *Center for Energy and Economic Development* contains EPA’s most recent suite of revisions to its regional haze regulations.⁹³ After numerous challenges and revisions, the regulations seem to have taken their final shape.⁹⁴ Still, the visibility program will remain stalled until Georgia and other states submit SIPs that comply with the program.⁹⁵ On January 15, 2009, EPA issued a Federal Register notice finding that 37 states (including Georgia) have failed to submit SIPs for improving visibility in national parks and other sensitive Class I areas by the December 17, 2007 deadline. These states have two years to submit their SIPs in accordance with the visibility regulations found at 40 C.F.R. §§ 51.300–.309 or EPA will override state visibility SIPs with a Federal Implementation Plan.⁹⁶

At a minimum, State Implementation Plans must include: (1) “reasonable progress goals providing for an improvement in visibility for the most impaired days and ensuring no degradation in visibility for the least impaired days[,]” (2) a long term strategy for visibility remediation, (3) enforceable limitations on emissions, and (4) “[BART] determinations for certain older existing stationary sources.”⁹⁷ Notably, under the fourth requirement, SIPs must set BART-based emissions limitations for stationary sources found to contribute to visibility impairment in a Class I area.⁹⁸ For many older sources, this may be the first time that the CAA has required the installation of pollution controls.

EPA’s recent notice in the Federal Register represents the first stirrings of life for the visibility program as an effective means of restoring visibility over scenic lands. After more than 30 years of regulatory delay and legal challenges, the visibility program’s implementing regulations are finally in place at the federal level. As soon as states update their SIPs in accordance with EPA’s regulations, the visibility program will start to limit the emissions that cause regional haze, clearing the air and restoring America’s great vistas.

(Endnotes)

- 1 Jeff Kerr is a third-year law student at Emory University, where he is Articles Editor on the Emory Law Journal.
- 2 Because fires, dust, and emissions from other countries sometimes contribute to visibility impairment over scenic lands, a degree of impairment will remain beyond the reach of regulators.
- 3 Robert L. Glicksman, *Pollution on Federal Lands I: Air Pollution Law*, 12 UCLA J. Envtl. L. & Pol’y 1, 9 (1993).

- 4 See Grand Canyon National Park – Air Quality – Visibility (U.S. National Park Service), http://www.nps.gov/grca/naturescience/airquality_visibility.htm (last visited June 29, 2009); Yosemite National Park – Air Quality (U.S. National Park Service), <http://www.nps.gov/yose/naturescience/airquality.htm> (last visited June 29, 2009).
- 5 Forest Service, U.S. Department of Agriculture, Final Environmental Impact Statement for the Land and Resource Management Plan Chattahoochee-Oconee National Forests 3-82 (2004), available at <http://www.fs.fed.us/conf/200401-plan/FEIS-3PE.pdf>.
- 6 David Wooley & Elizabeth Morss, CAA Handbook § 3:16 n. 1 (West 2008).
- 7 Glicksman, *supra* note 3, at 10–11 (citations omitted).
- 8 *Id.* (footnotes omitted).
- 9 *Id.* (footnotes omitted).
- 10 *State of Maine v. Thomas*, 874 F.2d 883, 885 (1st Cir. 1989) (quoting 45 Fed. Reg. 80,084, 80,085 (1980)).
- 11 *Id.*
- 12 *American Corn Growers Ass’n v. EPA*, 291 F.3d 1, 3 (D.C. Cir. 2002).
- 13 CAA § 169A(a)(1); 42 U.S.C. § 7491(a)(1) (West 2009).
- 14 *Id.* (emphasis added).
- 15 Craig N Oren, *The Protection of Parklands from Air Pollution: A Look at Current Policy*, 13 HARV. ENVTL. L. REV. 313, 390 (1989).
- 16 *Id.*
- 17 See *Great Basin Mine Watch v. EPA*, 401 F.3d 1094, 1096 (9th Cir. 2005) (“If no major source within a baseline area has applied for a permit . . . the PSD restrictions are not triggered.”).
- 18 See CAA § 169A(a)(1); 42 U.S.C. § 7491(a)(1) (West 2009).
- 19 CAA § 162(a); 42 U.S.C. § 7472(a) (2009). Such areas must have been designated as national parks, wilderness areas, etc. as of 1977 to be “mandatory Class I” areas. *Id.*
- 20 Glicksman, *supra* note 3, at 30–31.
- 21 40 C.F.R. § 81.408 (West 2009).
- 22 See CAA § 169A(b)(1), (b)(2)(A); 42 U.S.C. § 7491(b)(1), (b)(2)(A) (West 2009).
- 23 *Id.* § 169A(b)(2); § 7491(b)(2).
- 24 See *Center for Energy and Economic Development v. EPA*, 398 F.3d 653, 660 (D.C. Cir. 2005).
- 25 See CAA § 169B(a)(1); 42 U.S.C. § 7492(a)(1) (West 2009).
- 26 See *id.* § 169B(c); § 7492(c).
- 27 *Id.* § 169(f); § 7492(f).
- 28 *American Corn Growers*, 291 F.3d at 4.
- 29 CAA § 169(a)(1); 42 U.S.C. § 7492(a)(1) (West 2009).
- 30 See *id.* § 169(f); § 7492(f).
- 31 *Id.* § 169(b); § 7492(b).
- 32 398 F.3d at 660.
- 33 See *Visibility Protection for Federal Class I Areas*, 45 Fed. Reg. 80,084, 80,084 (Dec. 2, 1980) (codified at 40 C.F.R. pt. 51).
- 34 *Maine v. Thomas*, 874 at 885.
- 35 *Id.* at 886.

- 36 American Corn Growers, 291 F.3d at 3.
- 37 Maine v. Thomas, 874 F.2d at 889.
- 38 American Corn Growers, 291 F.3d at 2; see also Regional Haze Regulations, 64 Fed. Reg. 35,714, 35,714 (July 1, 1999) (codified at 40 C.F.R. pt. 51).
- 39 291 F.3d at 5–6, 13.
- 40 Id. at 6.
- 41 The provisions of the Rule that the court found unacceptable in American Corn Growers provided that a state must “find that a BART-eligible source is ‘reasonably anticipated to cause or contribute’ to regional haze if it can be shown that the source emits pollutants within a geographic area from which pollutants can be emitted and transported downwind to a Class I area.” Id. at 17 (Garland, J., concurring in part and dissenting in part) (quoting 64 Fed. Reg. at 35,740).
- 42 Id. at 6.
- 43 CAA §169A(g)(2); 42 U.S.C. § 7491(g)(2) (West 2009) (numerals added).
- 44 Id.
- 45 291 F.3d at 6.
- 46 Id. (emphasis added).
- 47 Id. at 8
- 48 Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations, 70 Fed. Reg. 39,104, 39,104 (July 6, 2005) (to be codified at 40 C.F.R. pt. 51).
- 49 Utility Air Regulatory Group v. EPA, 471 F.3d 1333, 1335 (D.C. Cir. 2006).
- 50 Id.
- 51 Id.
- 52 Id.
- 53 Id.
- 54 Id.
- 55 See 40 C.F.R. § 51.302(c)(4)(i) (West 2009).
- 56 Utility Air Regulatory Group, 471 F.3d at 1336 (citing 70 Fed. Reg. 39,104, 39,117 (July 6, 2005)).
- 57 Id. (citing 70 Fed. Reg. 39,104, 39,117 (July 6, 2005)).
- 58 It is important to note that a state’s BART determination vis-à-vis a source is not a requirement that a particular technical upgrade or device be installed. Rather, the BART determination is an emissions limit with which the source must comply. The limit itself should be based on the availability and cost of particular technologies, but sources always have the option of reducing emissions according to their own lights. See 40 C.F.R. § 51.301 (2009) (definition of BART).
- 59 Utility Air Regulatory Group, 471 F.3d at 1336.
- 60 Id. at 1337 (quoting 40 C.F.R. § 51.308(e)(4)).
- 61 Id. (citing 70 Fed. Reg. at 39,136).
- 62 Id.
- 63 North Carolina v. EPA, 550 F.3d 1176, 1178 (D.C. Cir. 2008).
- 64 40 C.F.R. § 51.308(d)(1) (West 2009) (emphasis added).
- 65 See 40 C.F.R. § 51.308(d)(1)(i)(B) (West 2009).
- 66 See id. § 51.308(d)(1).
- 67 The “no degradation” requirement is discussed in subsection II.C.6 *infra*.
- 68 Center for Energy and Economic Development, 398 F.3d at 655.
- 69 40 C.F.R. § 51.308(e)(2) (West 2009).
- 70 See 40 C.F.R. § 51.309 (West 2009). The “Transport Region State[s]” are Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, and Wyoming. Id. § 51.309(b)(2).
- 71 See 40 C.F.R. § 51.308(e)(2) (West 2009). While the section 308 regulations do not explicitly refer to “interstate” emissions trading programs, nothing in the regulations prohibits the use of such programs.
- 72 Center for Energy and Economic Development, 398 F.3d at 659–60.
- 73 Section 51.309(f) is now reserved. See 40 C.F.R. § 51.309 (West 2009).
- 74 Center for Energy and Economic Development, 398 F.3d at 660.
- 75 Regional Haze Regulations; Revisions to Provisions Governing Alternative to Source-Specific Best Available Retrofit Technology (BART) Determinations; Final Rule, 71 Fed. Reg. 60,612, 60,612 (Oct. 13, 2006) (codified at 40 C.F.R. §§ 51.308, 51.309). The revised provisions are found at 40 C.F.R. § 51.308(e)(2) (BART alternatives) and at 40 C.F.R. § 51.309 (provisions regarding Grand Canyon Visibility Transport Commission).
- 76 Utility Air Regulatory Group, 471 F.3d at 1336.
- 77 Id.
- 78 Id.
- 79 Id. (quoting 40 C.F.R. § 51.308(e)(3)).
- 80 Id. (quoting 40 C.F.R. § 51.308(e)(3)).
- 81 Id. (quoting 40 C.F.R. § 51.308(e)(3)).
- 82 Id. at 1340.
- 83 Id. at 1340.
- 84 291 F.3d at 13.
- 85 Id. at 10.
- 86 Id.
- 87 Id.
- 88 Id.
- 89 Center for Energy and Economic Development, 398 F.3d at 655 (citing 40 C.F.R. § 51.308(d)).
- 90 40 C.F.R. § 51.308(d)(1) (West 2009).
- 91 40 C.F.R. § 51.301 (West 2009) (definition section). For purposes of measuring improvement (or, alternatively, for showing that degradation has not occurred) visibility conditions (measured in deciviews) are averaged for the twenty best and worst days to provide a convenient value for comparison. See *id.*
- 92 American Corn Growers, 471 F.3d at 12.
- 93 Utility Air Regulatory Group, 471 F.3d at 1337.
- 94 See *id.*
- 95 74 Fed. Reg. 2392, 2392 (Jan. 15, 2009) (to be codified at 40 C.F.R. pt. 52).
- 96 Id. at 2394. The Federal Register document also notes that EPA may employ discretionary sanctions, and the agency may extend the two-year deadline under certain conditions. *Id.*
- 97 Id. (emphasis added).
- 98 See 40 C.F.R. § 51.308(e)(1)(ii) (West 2009).

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AGENDA

Presiding: *William W. Sapp*, Program Chair, Southern Environmental Law Center, Atlanta

FRIDAY, AUGUST 7, 2009

- 7:15 **REGISTRATION AND CONTINENTAL BREAKFAST** (All attendees must check in upon arrival. A jacket or sweater is recommended.)
- 8:00 **INTRODUCTION AND PROGRAM OVERVIEW**
William W. Sapp
- 8:15 **CHANGES AT THE U.S. ENVIRONMENTAL PROTECTION AGENCY**
Mary J. Wilkes, Regional Counsel, USEPA, Region IV, Atlanta
- 8:45 **CHANGES AT THE GEORGIA DEPARTMENT OF NATURAL RESOURCES**
Chris Clark, Commissioner, Georgia Department of Natural Resources, Atlanta
- 9:15 **WAVES OF CHANGE**
1. Stormwater
Adam G. Sowitzka, King & Spalding LLP, Atlanta
 2. Nutrient Criteria
Carol F. Baschon, Region IV, EPA, Atlanta
 3. Wetlands Criteria
Bruce Pruitt, Nutter & Associates, Athens
- 10:15 **BREAK**
- 10:30 **GEORGIA'S NEW VOLUNTARY REMEDIATION PROGRAM**
1. An Overview
Holly A. Hill, Troutman Sanders LLP, Atlanta
 2. The New Risk-Based Standards
Jim Oliveros, Golder Associates, Inc., Jacksonville, FL
- 11:30 **GLOBAL CLIMATE CHANGE**
1. The Big Picture for Georgia
Patty McIntosh, Georgia Conservancy, Atlanta
 2. The National Perspective
David M. Meezan, Alston & Bird LLP, Atlanta
 3. The Market-Based Perspective
Jere Jacobi, Scott Madden, Inc., Atlanta
- 12:30 **RECESS**
- 6:00 **RECEPTION**

SATURDAY, AUGUST 8, 2009

- 7:15 **CONTINENTAL BREAKFAST**
- 8:00 **WELCOME AND OVERVIEW FROM THE CHAIR-ELECT**
Adam G. Sowitzka, King & Spalding LLP, Atlanta
- 8:15 **SO YOU WANT SOME ETHICS, DO YOU?**
Allison Burdette, Professor, Emory University, Atlanta
- 9:15 **CHANGES IN THE AIR**
1. CO₂ A Pollutant?
Mack McGuffey, Troutman Sanders LLP, Atlanta
 2. Longleaf Coal Plant Appeal
John Bottini, King & Spalding LLP, Atlanta
 3. NAAQS Revision: Lead as an Example
Russell Kemp, Environ, Atlanta
- 10:15 **BREAK**
- 10:30 **BREAK OUT SESSION A – CHANGES IN SUPERFUND**
1. The Changes in Store for Superfund Sites
Stacey A. Haire, USEPA, Region IV, Atlanta
 2. Recent Developments in Superfund Law
Brooke F. Dickerson, Arnall Golden Gregory LLP, Atlanta
- BREAK OUT SESSION B – TRIAL PRACTICE**
1. Dealing with Daubert
Brandon L. Bowen, Jenkins Olson & Bowen, P.C., Cartersville
 2. Artful Cross Examination Techniques
Frank E. Jenkins, III, Jenkins Olson & Bowen, P.C., Cartersville
- 11:30 **BREAK OUT SESSION C – BUILDING GREEN IN ATLANTA**
1. Rules and Policies
Jeffrey S. Dehner, Hartman, Simons, Spielman & Wood LLP, Atlanta
 2. Reaping Rewards while Effectively Managing Risk
H. Jay Enck, LEED AP, Commissioning and Green Building Solutions, Inc., Buford
- BREAK OUT SESSION D – PROPERTY ISSUES**
1. Changes in Wetlands Regulations
Richard Morgan, Army Corps of Engineers, Savannah
 2. Forest Roads and Farm Ponds
Catherine Wannamaker, Southern Environmental Law Center, Atlanta
 3. Nuisance and Trespass
James B. Griffin, Law Offices of Wm. Thomas Craig, Covington
- 12:30 **ADJOURN**



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