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Fall / Winter 2002

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Upcoming Events

February 12-14

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

February 20-21, 2003

21st Annual Water Law Conference
San Diego, California
For more information: www.abanet.org

March 13-16

32nd Annual Conference on Environmental Law
Keystone, Colorado
For more information: www.abanet.org

Third Party Permit Appeals and Application of the Georgia Stay Rule

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McKenna Long & Aldridge

Introduction

During the past decade, federal and state administrative agencies charged with issuing and enforcing environmental permits have witnessed an increased level of public participation during the permitting process. Such public participation is required by various environmental statutes. *See, e.g.*, 42 U.S.C. § 7470(5) (Clean Air Act); 42 U.S.C. § 1251(e) (Clean Water Act); 42 U.S.C. § 6974(b) (Solid Waste Disposal Act). The benefits of public participation in the permitting process have been heralded in the legislative history of the environmental laws and cannot be overlooked as a critical component of these environmental programs. *See, e.g.*, H.R. Rep. No. 95-294 (Part 3 of 5), at 319 (May 12, 1977) ("in the Committee's view, appropriately broad administrative discretion to promulgate regulations to protect health or the environment must be restrained by thorough and careful procedural safeguards that insure an effective opportunity for public participation in the rulemaking process.").

Having complied with the public participation requirements in connection with the permitting process and having considered the public comments received during such process, it is then up to the administrative agency to make a final determination as to whether, and in what form, a requested permit should issue. Once an agency decides that a permit should be issued and subsequently issues the permit, all state action has been taken, and the permit beneficiary should be entitled to rely upon such permit as soon as it becomes effective, subject, of course, to the potential that the permit may be revoked, modified or rescinded altogether following a timely-filed administrative appeal of the permit or as a result of an agency enforcement action.

The Stay Rule

Recent challenges by various interest groups to permits issued by the Director of the Georgia Environmental Protection Division ("EPD") pursuant to the Georgia Air Quality Act, O.C.G.A. §§ 12-9-1, *et seq.* ("Air Act") and the rules and regulations promulgated thereunder, Ga. Comp. R. & Regs. ch. 391-3-1 ("Air Rules") have disputed the right of a permittee to rely upon a permit issued

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Message From the Chair

The Environmental Law Section's Water Law Seminar on November 8 at the Marriott Marquis, Atlanta, was a resounding success. The distinguished speakers represented local, state and federal government, the public interest environmental community as well as the business community. Keynote speaker Dr. Stephen Draper set the stage for what became a daylong debate between the public resource and private commodity advocates. Mitchell County farmer Murray Campbell illuminated the lunch audience with the southwest farming community's perspectives on water issues. The wealth of information presented by the speakers throughout the day provided an excellent update on many significant water law issues facing Georgians today. I cannot thank the speakers enough for their contributions both with the written materials and the seminar presentations. In addition, thanks to program co-chair Greg Blount of Troutman Sanders, LLP and the other section officers for helping to plan the Water Law Program. Attendance was particularly strong thanks to co-sponsorship by the Georgia Water and Pollution Control Association (Jack Dozier, President) and the Agriculture Law Section of the State Bar (Doug Henderson, Chair). Those of us staying for the reception hosted by the environmental consulting firm Golder Associates enjoyed a delicious spread of appetizers. If you were unable to attend the Water Law Seminar, you may obtain a copy of the program materials from ICLE at 1-800-422-0893.

2003 SECTION OFFICERS

Congratulations! The results of the 2003 elections for the Environmental Law Section officers are final as follows:
Chairperson:

Peyton Núñez - Alston & Bird, LLP

Chair-Elect :

Susan Richardson - Kilpatrick Stockton, LLP

Secretary and Newsletter Editor

Jeff Dehner - Hunton & Williams

Treasurer:

Chris Thompson - Powell, Goldstein, Frazer & Murphy

Member-at-Large:

Chuck Conerly - Smith Diment Conerly, LLP (Carrollton)

Given the proven leadership of Peyton, Susan and Jeff this past year, the 2003 Board will be supremely qualified to continue the Section's hard work next year.

PAST AND FUTURE EVENTS

Please mark your calendars for the Environmental Law Section's luncheon on January 10 at the Swissotel, as part of the State Bar's midyear meeting. Jimmy Palmer, Regional Administrator of the U.S. Environmental Protection Agency Region 4 will be our distinguished guest and speaker. The registration information and brochure are available through the Georgia Bar's web site at www.gabar.org.

Special thanks to King & Spalding and Chet Tisdale for hosting the brown bag program on September 24 featuring the work of the Clean Air Campaign (CAC). Mr. Tisdale and Marlin Gottschalk, Senior Policy and Planning Advisor with the Georgia Environmental Protection Division, discussed the progress of the CAC in improving Atlanta's air quality.

Finally, it has been my distinct pleasure serving as your Chairperson this past year. I have enjoyed this experience immensely, particularly working with the other Section officers and meeting so many enthusiastic and intelligent Section members. If you are interested in serving as an officer in the future or if you have any questions about Section events, please do not hesitate to call me at 770-270-6989.

2003 Seminars and Events

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21st Annual Water Law Conference - February 20-21, 2003

San Diego, California / For more information: www.abanet.org

32nd Annual Conference on Environmental Law - March 13-16

Keystone, Colorado / For more information: www.abanet.org

Environmental Impact Assessment: NEPA and Related Requirements - April 23-25 / Washington, D.C.

sponsored by ALI-ABA / For more information: www.ali-aba.org

Criminal Enforcement of Environmental Laws - May 8-9

sponsored by ALI-ABA / Washington, D.C.
For more information: www.ali-aba.org

Environmental Litigation - June 23-27

Boulder, Colorado / For more information: www.ali-aba.org
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State Bar of Georgia, Environmental Law Section Environmental Law Seminar - August 1-2

Ritz Carlton, Amelia Island, Florida
More information to come . . .

Third Party Permit Appeals

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by EPD after having completed the requisite public notice and comment process. Although EPD in issuing such permits has made them immediately effective, such groups maintain that the application of Ga. Comp. R. & Regs. r. 391-1-2-.07(1) ("Stay Rule") automatically stays the effectiveness of any permit upon the filing of an administrative appeal. *See, e.g.*, Petition for Hearing to Appeal Air Quality Permit No. 4911-263-0013-P-01-0 Issued to Oglethorpe Power Corporation at 2; In re: Oglethorpe Power Corporation Air Quality Permit No. 4911-263-0013-P-01-0; OSAH-DNR-AQ-0206135-72-MMM (September 7, 2001) ("This petition stays the effectiveness of the Permit pursuant to DNR Rule 391-1-2-.07(1)"); Petition for Hearing to Appeal Air Quality Permit No. 4911-303-0040-P-01-0 Issued to Duke Energy Sandersville, L.L.C. of Houston, Texas at 2; In re: Duke Energy Sandersville, LLC Air Quality Permit No. 4911-303-0040-P-01-0; OSAH-DNR-AQ-01-10759-44-MMM (November 14, 2001) (same). The Attorney General's office, representing the Board of Natural Resources, has agreed with this position.

The Stay Rule is included in the Georgia Department of Natural Resources Board regulations and provides,

[e]xcept as otherwise provided by law or regulation concerning a specific type of order or action taken by a Decision Maker, any order or action of a Decision Maker shall be stayed upon the filing of a petition for review of the order or action pursuant to [Ga. Comp. R. & Regs. r. 391-1-2-.03].

Ga. Comp. R. & Regs. r. 391-1-2-.07(1).

This provision was no doubt intended to stay the effectiveness of an enforcement order when appealed by the recipient or to stay permit modifications, suspensions or revocations when such actions are appealed by the permittee. *See, e.g.*, April 15, 2002, Memorandum from Harold Reheis to Board of Natural Resources, F-3 ("The original intent of [the Stay Rule] was to protect parties subject to EPD enforcement actions from accumulating large penalties, fines or fees pending the disposition of their appeal. In general, the rule comes into effect when a person or corporation has been ordered to perform by EPD and challenges that order.") ("Reheis Memorandum"). The Stay Rule was probably never intended to be used as a weapon for third parties to deprive parties of their permit rights simply by filing an administrative permit appeal. Nevertheless, various interest groups have recently maintained that the mere filing of a permit appeal "automatically" stays the effectiveness of the permit, regardless of

whether the party appealing the permit has standing or the appeal has any merit.

The Superior Court of Washington County, Georgia, ("Superior Court") earlier this year considered whether the Stay Rule applies in the context of third party administrative permit appeals. *See* Order on Motions for Summary Judgment, Duke Energy Sandersville, LLC v. Board of Natural Resources, Civil Action No. 01-CV-360, McMillan, J. (January 22, 2002) ("Superior Court Order"). Among other things, the Superior Court held,

[t]he only constitutional construction of the Air Act and the Stay Rule is that neither stays the effectiveness of a permit when it is appealed by a third party. In such cases, the third party is free to seek to enjoin the permitted activity by showing that it has standing, that it is likely to succeed on the merits of the objections, that it will suffer irreparable harm if the activity is not enjoined, and that the harm to it by not granting the injunction outweighs any harm to the permittee by granting the injunction. In this manner, the rights of both the permittee and the complaining party are balanced.

Id. at 10.

Although the Superior Court Order is broad enough to apply in a variety of contexts, it is particularly applicable to third party appeals of permits issued in accordance with the Air Act's Prevention of Significant Deterioration ("PSD") program which requires, among other things, that major emitting facilities undergo preconstruction review to ensure that they will not cause or contribute to a violation of any national ambient air quality standard, any PSD increment or any other applicable emission standard. *See* O.C.G.A. §§ 12-9-5(b)(15) and -7(a); Ga. Comp. R. & Regs. r. 391-3-1-.02(7). *See also*, 42 U.S.C. § 7475(a)(3).

The Superior Court Order was issued in the context of a declaratory judgment action brought pursuant to O.C.G.A. § 50-13-10 by the holder of a PSD permit against the Board of Natural Resources. The Board of Natural Resources appealed the Superior Court Order and sought to have it vacated. *See* Georgia Court of Appeals Case No. A02A1566, Board of Natural Resources v. Duke Energy Sandersville, LLC (2002). The Board's appeal was dismissed as moot by the Georgia Court of Appeals, however, and the Superior Court Order remains standing.

The Board of Natural Resources adopted the position asserted by those groups contending that permits are stayed upon the filing of a timely appeal. The Board argued that a permit is effective upon issuance only if it is not timely appealed. The Board offered no explanation why a permit issued by EPD after careful, technical review should convey no rights if appealed.

The Superior Court Order is supported by both statutory construction and federal and state constitutional law. Specifically, fundamental tenets of due process and equal protection, as well as express provisions of the PSD program itself, preclude application of the Stay Rule in the context of a third party PSD permit appeal.

Constitutional Considerations

The application of the Stay Rule in the context of third party appeals would effect a summary suspension of an issued permit without prior notice and opportunity for hearing and would thus be unconstitutional. *See* Superior Court Order at 8-10. Basic notions of procedural due process limit state power to terminate an interest, including, for example, an interest in a license or permit. It is fundamental that when an alteration or extinction of a party's right or interest officially removes the interest from the recognition and protection previously afforded by the state, procedural due process guarantees are triggered. *See, e.g., Bell v. Burson*, 402 U.S. 535, 539-42 (1979) ("it is fundamental that *except in emergency situations . . . due process requires* that when a State seeks to terminate an interest such as that here involved, it must afford '*notice and opportunity for hearing* appropriate to the nature of the case' before the termination becomes effective.") (emphasis added); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (without first offering parolee procedural safeguards which guarantee due process, state cannot alter status of a parolee because of alleged parole violations after affording parolee the right to remain at liberty as long as parole conditions were maintained); *Dennis v. S & S Consol. Rural High Sch. Dist.*, 577 F.2d 338 (5th Cir. 1978) (where state has conferred right upon certain citizens, it may not alter or extinguish right without due process); *Witbeck v. Hardeman*, 51 F.2d 450, 452 (5th Cir. 1931) (oil and gas permit is a valuable right that must be protected; it would be inequitable to substitute rights of another party for rights conveyed previously to permittee).

Like the suspension of a drivers' license or other state-issued entitlement, a suspension of a validly-issued permit, which is immediately effective upon issuance, involves significant state

action that adjudicates interests that are critically important to the permittee. As such, a permit cannot be taken away without the procedural due process required by the Federal and State Constitutions. *See, e.g., Burson* at 539.

Consistent with due process requirements, the APA creates a procedure by which parties aggrieved or adversely affected by agency actions can seek relief. It is this procedure that is typically invoked by third party petitioners that will result in a hearing before an administrative law judge, who will determine whether the permit at issue should be revoked or modified as requested, and it is this hearing to which the permittee is entitled before its permit can be suspended, modified or revoked. Indeed, the APA would not allow the Director of EPD to suspend or revoke Duke's Permit without first giving the permittee notice and an opportunity for hearing. O.C.G.A. § 50-13-18(c). Therefore, the Stay Rule cannot constitutionally authorize third parties to suspend summarily an issued permit when the EPD Director cannot do so.

While a procedural rule such as the Stay Rule can satisfy due process in one context (*e.g.,* by protecting an appellant from having to comply with an administrative order's requirements during his appeal of those requirements), it can be completely unsatisfactory in another context (*e.g.,* by providing a mechanism by which one's substantive and procedural rights are deprived by the filing of an appeal by a third party, regardless of the merits of such appeal). *See, e.g., Burson* at 540 (recognizing that a procedural rule may satisfy due process in one context but not necessarily in every context). By providing for exceptions to its application, the Board of Natural Resources surely did not intend that the Stay Rule be used to deprive parties of their due process rights.

Additional Georgia APA Considerations

Moreover, as previously noted, the Stay Rule is a Board of Natural Resources regulation promulgated pursuant to rule-making authority conferred upon the Board by the APA. Ga. Comp. R. & Regs. r. 391-1-2-.07 (*citing* O.C.G.A. § 50-13-22 as authority for the rule). The APA provision conferring that authority provides that

[n]othing in this chapter shall be held to diminish the constitutional rights of any person, to limit or repeal additional requirements imposed by statute or otherwise recognized by law, to diminish any delegation of authority to any agency, nor to create any substantive rights; but this chapter shall be procedural. Except as otherwise required by law, all require-

ments or privileges *relating to* evidence or *procedure shall apply equally to agencies and persons*. Every agency is granted all authority necessary to comply with the requirements of this chapter through the issuance of rules or otherwise.

O.C.G.A. § 50-13-22 (emphasis added). This APA provision makes it clear that the APA was never intended to give parties the right to effect a summary suspension of permit rights. This APA provision also makes it clear that procedural notice and hearing requirements imposed upon the Director of EPD by the APA apply equally to persons and that the Board cannot confer the right to suspend a permit summarily upon any person.

Consistent with the requirements of constitutional due process, the APA, O.C.G.A. § 50-13-18(c), provides that a permit can neither be suspended nor revoked without notice and an opportunity for hearing unless an agency has first determined that the public health, safety or welfare requires emergency action. O.C.G.A. § 50-13-18(c). The Stay Rule was obviously adopted by the Board to comply with this requirement and was no doubt intended to apply in enforcement actions or when the Director of EPD seeks to modify, suspend or revoke a permit. See Reheis Memorandum at F-3. A rule authorizing a suspension of a permit without prior notice and an opportunity for hearing would not, however, comply with the APA. Accordingly, the APA provides an exception to the Stay Rule, and the Stay Rule can have no application to appeals of permits by third parties.

PSD Program Considerations

With respect to PSD permits in particular, Georgia law precludes application of the Stay Rule to third party permit challenges. As previously noted, the Stay Rule provides that “[e]xcept as otherwise provided by law or regulation concerning a specific type of order or action taken by a Decision Maker, any order or action of a Decision Maker shall be stayed upon the filing of a petition for review of the order or action” Ga. Comp. R. & Regs. r. 391-1-2-.07(1) (emphasis added). The PSD provisions in Georgia's State Implementation Plan provide an exception that precludes the application of the Stay Rule to third party permit appeals. Specifically, Ga. Comp. R. & Regs. § 391-3-1-.02(7)(b)16, which incorporates by reference 40 C.F.R. § 52.21(w), provides,

Permit rescission. (1) Any permit issued under this section or a prior version of this section shall remain in effect, unless and until it expires under paragraph

(s) of this section or is rescinded.

Ga. Comp. R. & Regs. § 391-3-1-.02(7)(b)16 ("PSD Rule").

Thus, the PSD Rule provides that, once issued, a PSD permit remains effective unless and until it expires or is rescinded. EPD elected not to include the Stay Rule in its federally approved PSD program but chose instead to provide that PSD permits become effective immediately and remain effective until they expire or are rescinded. The PSD Rule is therefore an exception to the Stay Rule, and the Stay Rule does not apply to the appeal of a PSD permit by third parties. See Superior Court Order at 6.

Practical Considerations and Conclusion

In addition to the foregoing legal considerations, a host of public policy and practical reasons exist to exclude application of the Stay Rule in the context of a third party permit appeal. Among other things, application of the Stay Rule in such contexts provides, in effect, automatic injunctive relief without judicial intervention, and without regard to the type of permit at issue or the identity of the permit holder. It would confer an unlimited amount of power on third parties to halt activities already determined by EPD to be appropriate and regardless of whether such parties have legitimate claims or are simply ill-willed or mean-spirited. Moreover, third parties that believe a permit will result in irreparable harm to them already have a well-established means of redress available. They can go to court and show cause why an injunction should be issued. In this process, the rights of all parties can be weighed and balanced. Finally, a third-party challenge to a modified or reissued permit, which contains new and more stringent requirements, could have the incongruous result of allowing the permittee reprieve from compliance with the new, more stringent permit requirements while the appeal is ongoing, thus resulting in potentially less protection to the environment. For all of these reasons, the Stay Rule cannot be applied in the context of third party appeals.

Lessee Liability under CERCLA: Application of *U.S. v. Bestfoods*

Chintan Amin

Kilpatrick Stockton, LLP

It never fails. The questions seemingly always come at 4:45. On a Friday. Fifteen minutes before the deal is set to close. The transaction will invariably involve arcane and counterintuitive structures invented purely "for tax reasons." In this way, environmental attorneys are often blindsided by their colleagues, asking about potential environmental liability arising from an intricately constructed, extensively negotiated transaction. Often they involve a long-term lease. Of a former manufactured gas plant site. In downtown Cleveland. Of course, the client, a retailer, wants to know whether anybody will sue it for cleanup costs.

While the concepts of "authority to control" and "actual control" may stream through the environmental practitioner's head at this point, the Supreme Court's decision in *United States v. Bestfoods*¹ may well have rendered those concepts obsolete. In fact, that decision may have streamlined the analysis somewhat by providing what computer scientists might call "highly portable" definitions of CERCLA "operators" and "owners." The *Bestfoods* definitions can be easily taken from one fact pattern to another and applied.

Though *Bestfoods* is about four and one-half years old, practitioners may still find novel cases for its application. On the surface, it resolves the confusion surrounding the liability of parent corporations for CERCLA sites nominally associated with their subsidiaries. But at its core, *Bestfoods* instructs lower courts in interpreting the poorly crafted and therefore unhelpful definitions of "owner" or "operator" under CERCLA. Thus, the case has a much broader application than merely for parent-sub-sidiary liability under CERCLA. An area of potential applicability that has received little attention, but which deserves considerable focus, is that of lessee liability.

Any person incurring costs to remediate hazardous substances at a facility may bring an action under CERCLA to recover at least some of those costs against, among others, "the owner [and] operator of a vessel or facility."² Before *Bestfoods*, lessee liability jurisprudence was jumbled: Some courts held that that when a lessee exerts actual control over a facility, the lessee can be held liable as an "operator" under CERCLA.³ Another line

of cases suggests that lessees could be liable under CERCLA as "operators" of a facility when they merely had the authority to control the facility.⁴ Some courts also held that lessees may also be held liable as "owners" of facilities.⁵

Prior to *Bestfoods*, lessees were found liable as "owners" when, "by maintaining control over and responsibility for the use of the site," they stood in the shoes of the owners. One example of such a case is *Nestle USA Beverage Division, Inc. v. D.H. Overmyer Co.*, where the Northern District of California held that a lessee may be subject to liability as an "owner" of a facility if the "lease" involved is a sale/lease-back transaction.⁶

The Supreme Court's decision in *Bestfoods* clarified the tests for "owner" and "operator" liability. Though the Court was deciding whether a parent corporation should be liable for the cleanup of a facility owned by its subsidiary, its decision is expansive and applicable to lessee liability as well. The Court noted that CERCLA does not provide an adequate definition of "owner" and declared that veil-piercing law determines whether a parent corporation can be held liable as an "owner" of a facility owned by its subsidiary.⁷ According to the Court, Congress did not intend to throw out state corporate law by enacting CERCLA: "CERCLA is thus like many another congressional enactment in giving no indication that 'the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute,' and the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that '[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'"⁸ Actually, the Court explicitly avoided the question of whether the federal courts should develop a federal common law of veil piercing or rely on state law.⁹ However, the quotes selected by the Court and the current Court's respect for state laws counsels that it may be hesitant to adopt a federal common law of veil piercing.

The *Bestfoods* Court likewise clarified the prerequisites for "operator" liability in holding the term should be given "its ordinary or natural meaning." The Court held that the focus of the operator liability inquiry should ask whether the potentially responsible person "manage[s], direct[s], or conduct[s] operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." This is a change from the pre-*Bestfoods* "actual control" test, which merely required control of the subsidiary's operations to form

the basis for liability.¹⁰ It clearly rejected prior "authority to control" caselaw, as well. Thus, "operator" liability under *Bestfoods* requires actual control over the operations of the facility that have a direct nexus with the pollution or contamination.

Only a few courts have analyzed the issue of CERCLA lessee liability after *Bestfoods*. In *Commander Oil Corp. v. Barlo*,¹¹ the Second Circuit tackled the issue as one of first impression. *Commander Oil* involved a CERCLA contribution action by the fee owner of a property against its lessee/sublessor for response costs related to a release caused by the sublessee's operations. The Second Circuit began by analyzing the definition of the term "owner," by doing "the best we can to give the term its ordinary or natural meaning." Noting that "[l]ong-standing scholarship has informed us that ownership--and its attendant concept 'property'--has limited inherent content," the court found that a lessee could be deemed an "owner" if it possessed characteristics more fairly attributable to a fee owner than a lessee.¹²

At the outset of this analysis, the court rejected the "actual control" test because, "while the imposition of liability in such a situation is surely correct, imposing *owner* liability instead of *operator* liability threatens to conflate two statutorily distinct categories of potentially responsible parties." Thus, the court ruled that the lessee's control over the facility should not automatically impose "owner" liability under CERCLA. That the *Bestfoods* analysis weighed heavily on the court's decision is evident from the fact that the court, like the *Bestfoods* Court, was careful to note "that owner and operator liability should be treated separately." Strict liability should be meted out in measured doses, the court ruled, because central to the "theory of strict liability is the underlying fairness of imposing on the beneficiaries of an ultra-hazardous activity the ultimate costs of that activity."

Because lessees do not always benefit from the use of hazardous substances on their property in the same way that landowners do (i.e., through rental payments), the court held that they should not automatically bear "owner" liability. Instead, the court ruled that "[w]hile the typical lessee should not be held liable as an owner, there may be circumstances when owner liability for a lessee would be appropriate." Thus, the court did "not foreclose the possibility that in some circumstances lessees/sublessors may be liable as owners under CERCLA. Certain lessees may have the requisite indicia of ownership *vis-à-vis* the record owner to be *de facto* owners and therefore strictly liable."

For example, the court noted that a long-term lease may carry sufficient "indicia of ownership." The court went on to outline

several factors that "could be important, specifically: (1) whether the lease is for an extensive term and admits of no rights in the owner/lessor to determine how the property is used; (2) whether the lease cannot be terminated by the owner before it expires by its terms; (3) whether the lessee has the right to sublet all or some of the property without notifying the owner; (4) whether the lessee is responsible for payment of all taxes, assessments, insurance, and operation and maintenance costs; and (5) whether the lessee is responsible for making all structural and other repairs." The court stressed that this list is non-exhaustive and should be adapted to the particular facts of the case. In effect, the Court developed federal common law to determine whether a "lessee" amounts to an "owner" under the *Bestfoods*.¹³

While the Second Circuit listed several factors that a court might use to determine whether a lessee is an "owner" for CERCLA purposes, the Eleventh Circuit's, *Redwing Carriers, Inc. v. Saraland Apartments*¹⁴ decision would probably greatly influence the analysis for Georgia courts. In *Redwing*, the court held that state law should determine whether limited partners can be held liable as "owners" of a facility held in the partnership name. The *Redwing* decision echoes the *Bestfoods* call to respect established convention of state corporate law. A court in the Eleventh Circuit might look to state property law to determine whether a lessee carries sufficient "indicia of ownership" to incur "owner" liability. Thus a federal court sitting in Georgia may evaluate state-specific factors in addition to those enumerated by the *Commander Oil* court.

At this point in the discussion, the reader may note that we have so far left the issue of "operator" liability alone. As noted in both *Bestfoods* and *Commander Oil*, "owner and operator liability should be treated separately." In the post-*Bestfoods* legal landscape, however, the issue of operator liability should boil down to an inquiry as to whether the lessee "manage[s], direct[s], or conduct[s] operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." While research did not reveal a post-*Bestfoods* case on point, it seems that the Supreme Court foreclosed further application of the "actual control" or "authority to control" tests in lessee liability cases. If a lessee does not manage, direct or conduct operations having to do with the release of hazardous substances, it should not incur "operator" liability, no matter whether it "controls" the property.

The *Bestfoods* decision and the subsequent *Commander Oil* decision are steps towards uniform, common-sense rules for

lessee (and other "owner" and "operator") liability under CER-CLA. As discussed above, there are situations where our retailer client would have a strong argument that it is neither an owner nor an operator of the site. Moreover, this analysis does not even contemplate safe harbors under the Small Business Relief and Brownfield Revitalization Act.¹⁵ Hopefully, courts in the Eleventh Circuit will follow the lead of *Commander Oil* while staying faithful to *Redwing* by showing a healthy respect for state property law. This would go a long way towards developing a more predictable liability scheme for lessees under CER-CLA. Then, the next time the telephone rings on a sunny Friday afternoon, an environmental practitioner may not be so afraid to pick it up.

¹ 524 U.S. 51 (1998).

² 42 U.S.C. § 9607(a)(1).

³ *Castlerock Estates, Inc. v. Estate of Markham*, 871 F. Supp. 360, 367 (N.D.Cal.1994); *United States v. A & N Cleaners & Launderers, Inc.*, 788 F. Supp. 1317, 1332-34 (S.D.N.Y.1992); *Burlington N. R.R. Co. v. Woods Indus., Inc.*, 815 F. Supp. 1384, 1391-92 (E.D.Wash.1993); *Pape v. Great Lakes Chem. Co.*, No. 93 C 1585, 1993 WL 424249, at *3 (N.D. Ill. Oct.19, 1993); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1002-03 (D.S.C.1984), *aff'd in part, vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir.1988).

⁴ *Nurad, Inc. v. William E. Hooper & Sons*, 66 F.2d 837 (4th Cir. 1992).

⁵ *Pape v. Great Lakes Chemical Co.*, 1993 WL 424249 (N.D. Ill. 1993)

⁶ *Nestle USA Beverage Division, Inc. v. D.H. Overmyer Co.*, No. C-96-1207 VRW, 1998 WL 321450 (N.D. Cal. March 27, 1998).

⁷ *Bestfoods*, 524 U.S. at 63.

⁸ *Id.* (quoting *Burks v. Lasker*, 441 U.S. 471, 478 (1979) and *United States v. Texas*, 507 U.S. 529, 534 (1993)).

⁹ *Id.* at 63 n.9.

¹⁰ *See, e.g., Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993)

¹¹ 215 F.3d 321 (2d Cir. 2000).

¹² *Id.* at 327-28 (citing Wesley Newcomb Hohfeld, *SOME FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 96 (Walter Wheeler Cook ed., 1923) (stating that property "consists of a complex aggregate of rights (or claims), privileges, powers, and immunities")).

¹³ *See also Servco Pacific Inc. v. Dods*, 193 F. Supp. 2d 1183, 1196 (D. Hawaii 2002) (citing *Commander Oil*, 215 F. 3d. at 330-31).

¹⁴ 94 F.3d 1489 (11th Cir. 1996).

¹⁵ Pub. L. 107-118 (January 11, 2002).

State Administrative Appeals: A Valued Public Forum for Environmental Decision-Making

By Justine Thompson, Executive Director
Georgia Center for Law in the Public Interest

Since the enactment of federal environmental laws such as the Clean Water Act, the Endangered Species Act and the Clean Air Act, environmental litigation by members of the public has become commonplace both in Georgia and across the nation. Here in Georgia, landmark cases such as *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999) (halting timber sales in Georgia), *Sierra Club v. Hankinson*, 939 F. Supp. 865 (N.D. Ga. 1996) (requiring the establishment of TMDLs), and others, have resulted in significant changes in how the State's natural resources are managed and protected. In the past, these and other matters have typically been resolved through our federal court system. While federal court has been the preferred forum for environmental litigation in the past, recently, many important environmental cases have found their way to a very different forum, Georgia's Office of State Administrative Hearings (OSAH).

Georgia law provides that any person who is "aggrieved or adversely affected" by any order or action of the Director of the Environmental Protection Division (EPD), including the issuance of a permit by the Director, may obtain a hearing on the Director's order or action in front of an administrative law judge. O.C.G.A. §§ 12-2-2(c)(2); Department of Natural Resources ("DNR") Rule 391-1-3-.02(1). This statutory right to appeal EPD's actions has been available to Georgia's citizens for years, but recently, use of this right has increased. While an average of only twenty-nine appeals occurred annually between 1995 and 1998, the average has now jumped to forty, annually.¹

According to Harold Reheis, Director of the Environmental Protection Division (EPD), these recent administrative appeals have placed a financial strain on the agency. During the October 2002 Board of Natural Resources meeting, Reheis provided the Board with an overview of appeals of EPD actions and expressed concern about the increasing costs related to defending these appeals.² When asked about this issue, Administrative Law Judge Jessie Altman likewise noted that there has been an increase in contested environmental cases referred to OSAH. She also indicated that these cases are sig-

nificantly different from the routine cases typically handled by OSAH. Specifically, these recent cases are "more complex factually and legally, and if litigated, take longer to hear and decide."³ According to Judge Altman, "[i]f there has been any impact to OSAH recently it has been the need to add newer ALJs to [OSAH's] specialized rotation list to handle these cases."⁴

While the financial impact of increased OSAH appeals is important to consider, the debate regarding the use of OSAH as a forum for environmental litigation has taken an unfortunate turn in recent months. Specifically, the discussion has become a vehicle for criticism of third-party appeals by Georgia's citizens. As an initial matter, this focus on third-party appeals by Georgia's citizens ignores the type of appeals that are actually being filed. Administrative appeals are being filed both by members of the public and by the regulated community. For example, in the past three years, there have been a total of eighty-nine appeals filed by permittees or other members of the regulated community.⁵ During that same time period, there have been only twenty-nine⁶ appeals by members of the public seeking to strengthen or otherwise modify permits or other actions taken by EPD. Thus, the regulated community has filed an overwhelming majority (approximately 75%) of all appeals while members of the public have initiated less than 1 in 4 appeals.

Nevertheless, due to the inaccurate impression that the public is abusing the administrative appeal process, policy makers may seek to limit public access to administrative forums under the guise of cutting costs. If anything, the increase in the number of appeals perceived by EPD reflects an increasingly informed citizenry. As Georgians become more aware of the impact of environmental decision-making on both Georgia's economic future and the public health of its citizens, it follows that there would be a corresponding increase in actions taken by the public to ensure that government policies reflect the needs and desires of Georgia's citizens to protect their quality of life. For example, it can hardly be disputed that Georgia has struggled in its efforts to meet health-based air quality standards. In fact, metro-Atlanta has not met air quality standards in the 31 years since Congress passed laws to protect the health of our citizens and reduce harmful air pollution. Currently, metro-Atlanta is a "non-attainment" area for ozone, meaning that the ozone levels fail to meet health criteria as required by federal law. Furthermore, according to the American Lung Association's Report State of the Air 2002, the metropolitan Atlanta area ranks 6th in the nation for the most ozone-polluted cities. The metro-Atlanta area is also home to

five of the twenty-five most ozone-polluted counties in the nation: Fulton, DeKalb, Douglas, Fayette and Rockdale counties. Given the serious nature of Georgia's air pollution problems, it should be expected that the public affected by this pollution should seek to participate fully in the administrative process provided by law.

Georgia's citizens have also become increasingly aware of the need to protect our water resources. With highly-publicized negotiations continuing between Alabama, Florida and Georgia to allocate water in Apalachicola-Chattahoochee-Flint (ACF) and Alabama-Coosa-Tallapoosa (ACT) basins, and the impact of the recent drought on both water quality and quantity, the public's concern regarding the future of our water resources has only increased. As a result, the increase in administrative appeals reflects the desire of the public to voice concerns regarding current water management policies.

It is also significant that citizens have generally been successful when challenging EPD actions through the administrative process. While EPD boasts of a high success rate with respect to administrative actions, the statistics with respect to the category of citizen appeals does not support EPD's position. Despite EPD's successful defense of five of its decisions in the past three years following a full hearing, it is axiomatic that any measure of success must also include settlements that result in favorable outcomes for the petitioners. With respect to third-party appeals, the majority of claims result in settlements that include permit modifications or providing other relief requested by the petitioner. When one includes settlement, members of the public enjoy an approximate 75% success rate.⁷

Even assuming that the public's efforts were not successful, a conclusion contrary to statistical evidence, public access to the administrative process is guaranteed by law. As discussed above, Georgia law specifically provides for the right to challenge decisions by the Director through the administrative process. O.C.G.A. §§ 12-2-2(c)(2); DNR Rule 391-1-3-.02(1). More significantly, this right is frequently guaranteed by federal law and cannot be abrogated by state action. States, such as Georgia, that administer the Clean Water Act's National Pollution Discharge Elimination System (NPDES) program are required to provide for judicial review of NPDES permits. Moreover, that process must be "sufficient to provide for, encourage, and assist public participation in the permitting process." 40 C.F.R. § 122.30. Furthermore, a state must provide an opportunity for review that is "the same as that available" with respect to federally-issued NPDES permits. *Id.*

Given the comprehensive process provided for federally-issued permits, it is unlikely that Georgia's administrative process could be limited. Similarly, in *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996), the U.S. Court of Appeals for the Fourth Circuit upheld the United States Environmental Protection Agency's denial of the State of Virginia's right to issue air pollution permits because Virginia did not give the public adequate access to judicial review of permits. *See also* 61 FR 34733, 34735 (July 3, 1996)(explaining that if a state court reaches a decision that renders the state Title V program less stringent than the federal Title V program, EPA will take appropriate action to withdraw the program from the state).

While public participation in the administrative process is here to stay, the financial impact of that participation must be addressed. The question remains: how can we reduce the financial impact of increased litigation on State resources? Sara Clark, a long-standing member of the DNR Board, believes that the suitable approach would not be to limit appeals, but to reduce the public's need to resort to the administrative process. Ms. Clark views the increase in appeals as an attempt by members of the public to seek and obtain a place at the table and symptomatic of the need to build bridges between DNR and the general public. Donald D.J. Stack of Stack & Associates, an attorney who has brought numerous administrative actions on behalf of members of the public, agrees and hopes that "[t]he Director and his staff will heed the message being sent to them in the form of these administrative appeals: namely that the citizens of this State are of the opinion that no one is hearing their collective voices."

Fortunately, the DNR Board has already begun to address these issues in a relatively comprehensive manner. Last year, the DNR Board convened a task force to develop recommendations for improving public participation. After over a year of deliberations, DNR's Public Involvement Task Force, comprised of members of the non-profit community, the regulated community and agency representatives, developed recommendations that focus on engaging the public and the regulated community in environmental decision-making. These recommendations include a specific process for permitting designed to increase communication among agency representatives and the public. Some of these recommendations are common sense, such as allowing members of the public to ask questions during hearings. While seemingly simple, such small steps are the foundation for meaningful dialogue between the public and the State. However, this meaningful dialogue will only occur if DNR and EPD take seriously their commitment to public participation in government decision-making.

Equally important is EPD's obligation to meet objective, health-based environmental standards such as air quality standards for smog or water quality standards for mercury and bacteria. Until the citizens of the State of Georgia are convinced that EPD is complying with its mandate to protect the public health and economic well-being of the inhabitants of Georgia by ensuring clean air and water, then EPD should expect administrative appeals to continue. However, once EPD has ensured us that these objective environmental standards have been met, then surely the number of administrative appeals would dramatically decrease.

¹ Litigation Summary, Environmental Protection Division, October 2002 (EPD Litigation Summary) (on file with author).

² *Id.*

³ Letter from Jessie R. Altman to Justine Thompson, October 22, 2002 (on file with author).

⁴ *Id.*

⁵ These actions include twenty-five appeals by permittees challenging their Title V air quality permits, twenty-four appeals of enforcement orders by recipients of those orders, eighteen appeals of vehicle emission revocations and suspensions by inspectors, eleven appeals of denied permits or applications for license variances, three appeals of dam classifications by dam owners, and eight other appeals of permitting decisions by the permittees.

⁶ EPD Litigation Summary. While this Summary states that there were thirty appeals in the past three years by third-party citizens (twenty-eight of which are identified by name), one of those cases was merely a remand following a decision on appeal and was not included in the total number of appeals considered for this article.

⁷ These statistics do not include two cases identified in EPD's Litigation Summary which are still pending, two which were withdrawn and one which was never filed. One case that is still pending follows a voluntary reissuance of the permit by EPD to cure errors in the public participation process raised by the petitioner. As such, this case could be considered as an example of a favorable outcome for the petitioner but was not included in these statistics. The statistics do include two cases which were not identified by name in EPD's Litigation Summary which resulted in settlement agreements. Two additional cases were not included because at the time this article went to press, OSAH had been experiencing computer problems for at least 10-12 days making it impossible to confirm the outcome of the two cases. Although the outcome of these two cases is unknown at this time, assuming that EPD was successful in both of those cases, the settlement success rate would be closer to 69%.

Non-Compliance and Environmental Fines - A Regulator's Perspective

Michael Kemether

Vice President, Sierra Piedmont

As an operator of an underground storage tank (UST) or a generator of hazardous waste, you have just received an enforcement order or a notice of violation from a regulatory agency, including a hefty fine. How did these regulators learn of your non-compliance? How did they establish the fine amount? Could this develop into a criminal case? Sierra Piedmont, an environmental consulting firm in Kennesaw, Georgia, interviewed state and federal regulators to learn the answers to these questions and more. This is what we learned:

Regulators most often learn of environmental violations through scheduled audits. Though some regulators cited random audits, local fire marshals, and corporate neighbors as sources through which they learn about non-compliance infractions, all mentioned that the most likely way to learn about environmental non-compliance is through routine, scheduled audits. Robert Hawkins, the Unit Coordinator for Regulatory Compliance within the UST Division of the Georgia Department of Natural Resources, believes planned audits are most effective. "Our inspectors perform both spot checks and planned audits," says Hawkins, "and we believe the planned audits are more effective. With planned audits, the organization usually makes sure that the proper individuals are available to participate and answer any questions, so we get better information. The majority of our audits are scheduled in advance."

There is no regulatory "dart board" when it comes to setting fine amounts. Though it sometimes may feel like state and federal agencies have a random-number generator when determining fine amounts, most times there is a fairly stringent protocol that regulators follow when determining how much to assess an organization. All federal regulators that we spoke to and most state regulators work from a "penalty matrix" that helps regulators determine appropriate fine amounts. Additionally, many organizations have a review process that also helps to ensure consistency regarding fine assessment. There is, however, some leeway in fine enforcement after the fine has been assessed. Bob Hutchinson, Division Director of the South Carolina DHEC Land and Waste Management UST Regulatory Compliancy Division, offers the following: "I don't think there is a lot of latitude regarding the fine amount. There

is, however, room for interpretation by the regulator regarding whether or not the organization in question has responded to the notice of violation in a timely matter. This may affect the negotiation of the fine." Hutchinson adds that there is almost no leeway or room for negotiation with habitual offenders.

Steven McNeely, UST Fields National Team Leader with the EPA, agrees with Hutchinson regarding habitual offenders, but adds that the EPA will sometimes find creative ways to work with first-timers. "A newer officer with the EPA is more likely to enforce the rules 'by the book,' but more experienced regulators may look to other means rather than the traditional fines. For example, if there is a non-compliance situation, the first order of business is for the organization to get back in compliance. Once this is achieved, maybe they can go above and beyond their environmental responsibilities by providing additional environmental training or assisting on other environmentally damaged sites. I look at this as a sort of environmental good will or community service, which may be done in lieu of fines and penalties."

Negotiation is a part of the process. According to regulators we interviewed, fines can range from \$50 to \$25,000 per day, depending on how egregious the infraction and depending on the threat to human health and the environment. Says Hawkins, "I've seen fines ranging from \$50 to \$210,000." All regulators pointed out that the majority of fines are closer to the lower end of the spectrum. And with the exception of repeat offenders, negotiations are part of the process. Based on feedback from the regulators we interviewed, fines are negotiated down between 25%-50%, on average. Says Hawkins, "Negotiations vary, but the average is about a 25% decrease in the fine amount, depending on mitigating circumstances, etc. We are more interested in compliance and getting the organization's attention. An exception is when a company has a release that is a threat to human health and the environment."

Criminal prosecution is extremely unlikely, but it does occur. In these days where it has become commonplace to see CEOs and CFOs of Fortune 500 companies carted away in handcuffs, how often do environmental compliance issues result in criminal prosecution? Not often, according to interviewed regulators. Says Hutchinson, "We have never had a criminal inspection through one of our routine inspections, but less than a year ago our investigators assisted the feds in successfully prosecuting a North Carolina tank testing company. The company was creating phony test data and not performing tests that they said they were. There have been several prosecutions over

the past few years of testing companies either making up data or not performing mandatory tests."

Finally, when asked if there is any advice to offer organizations regarding fine avoidance, Amy Potter, Environmental Engineer with the Georgia Department of Natural Resources, offers the following, "Doing inspections and performing self audits, either internally or, better, with a third party, are important. If you keep track of where you are in compliance and where you are not, you are way ahead of the game."

Sierra Piedmont is a full-service environmental consulting firm specializing in site assessments, remediation, and compliance services, including expert witness testimony. For more information on regulatory fines or other environmental questions, call Mike Kemether at 770 792-6200 or mkemether@sierrapiedmont.com.

Does the State Bar of Georgia have your email address? The Environmental Law Section sends important information, advance notices and newsletters to its members via email. However, only 71% of its members receive this service. To add your email address or to make sure the State Bar has your correct address, please go to www.gabar.org and search for **Address Change Form**. It's easy - just correct or add any information the SBG may not have. While on the site, visit the many pages of information listed there. Did you know the section roster is listed under the section's web page? and it's updated nightly.

A. JEAN TOLMAN AWARD

A committee of Section Members has been working in coordination with Georgia State University to explore the options of establishing an environmental scholarship award, in the name of the late Jean Tolman, to be presented annually to a Georgia State University law student who possesses a keen interest in environmental law. (Jean was a 1987 graduate of the Georgia State University Law School). Currently, the committee proposes two criteria for the award; 1) the student is a member of the law school's Environmental Law Society, and 2) the student has taken and performed well in one or more environmental law classes.

A \$10,000 minimum is required for the one-time funding of the yearly award. A formal proposal will be made to the Environmental Law Section in the near future which will request that the Section vote to fund some portion of the required \$10,000. It is anticipated that additional funding from other entities and individuals will be needed in order to fully fund the award. If you are interested in contributing to the A. Jean Tolman Award, please contact Ann Marie Stack at (912) 644-5747. In addition to Ann Marie, the other committee members are Rick Horder, John Spinrad and Doug Arnold.

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