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Protecting Against Environmental Terrorism

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Introduction

Protection of the environment is a major concern of both the public and private sectors, but it is now seen in a new light since the September 11 attacks exposed the vulnerability of certain segments of the country's infrastructure to terrorist acts. Most environmental protection efforts have been directed at operations with the potential to cause environmental damage as a result of accidental spills or releases of toxic materials. Attention has now turned to addressing issues of environmental terrorism, which can include the intentional release of hazardous materials via terrorist activities at facilities or operations, with a resultant tremendous adverse impact on the environment and the public.

What is Environmental Terrorism?

The FBI defines terrorism as "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."² Terrorism takes on many forms, including assassinations, homicide/suicide bombings, chemical or biological attacks, and concerns about attacks on the environment and the associated impact on the public. Environmental terrorism has been defined as "the unlawful use of force against *in situ* environmental resources as to deprive populations of their benefits and/or destroy property."³ In light of the September 11 terrorist attacks, the definition of terrorism may be expanded to include the intended consequences of producing significant injury or death to a large segment of the population. Environmental terrorism attacks may have far-reaching impacts, and, because these attacks can be conducted using conventional explosives or poisons, are easier to carry out than attacks using typical weapons of mass destruction, and therefore, may be more devastating.⁴ Fortunately, the United States has yet to see such a large-scale environmental terrorist attack, but it is possible that an attempt may be made at some time in the future.

Environmental Terrorism vs. Ecoterrorism

Perhaps more mainstream or high profile in recent years is the perpetration of ecoterrorism by what are often referred to as radical or fringe environmental groups, whose intent is to destroy property as a way to publicize and advance their particular agendas. While there is a definite human impact resulting from the activities of ecoterrorists, ecoterrorism differs from environmental terrorism in that there is usually no overt attempt to kill or injure people. Typical targets and methods of ecoterrorism include tree spiking to protest the harvesting of old growth timber, burning of ski resorts to protest the encroachment of civilization into environmentally sensitive areas, or the destruction of new homes in residential areas for the same reasons.

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From the Chair's Desk:

by *Anne Hicks*



On March 7, the Environmental Law Section was honored to hear from **Jimmy Palmer**, the new **Regional Administrator of the U.S. Environmental Protection Agency Region IV**. The program was a huge success, with approximately 100 attorneys in attendance. Mr. Palmer explained how his background as an engineer, lawyer and State regulator has shaped his career and outlook as he begins the momentous challenge of administering the eight-state regional EPA office in Atlanta. Mr. Palmer served for 15 years as Executive Director of the Mississippi Department of Environmental Quality. He appears to be a proponent of delegation to the States and federal accountability. I hope that the Section will continue to have good relations with Mr. Palmer. Thanks to **Doug Henderson** and **David Moore** of **Troutman Sanders LLP** for graciously coordinating and hosting this event.

On April 11, Kilpatrick Stockton, LLP hosted a brown bag lunch program featuring **Chip Scroggs** with the **Georgia Environmental Protection Division, Water Protection Branch's Nonpoint Source Program**, **Michelle Fried, Counsel for the Upper Chattahoochee Riverkeeper** and **Dana Heil with Georgia Transmission Corporation**. The panelists discussed the latest developments with implementation of the General NPDES Permit for Construction Activities and the new State stream buffer variance rules.

The Section officers are nearly finished planning the annual Environmental Law Institute scheduled for **August 2-3 at the Hilton San Destin, Florida**. I am grateful to have such a hard working board to help me with this effort. Each officer has provided valuable suggestions and has undertaken significant responsibility for planning the summer seminar and other Section activities. We have an exciting line up of speakers so far, including the **Honorable Dorothy T. Beasley**, former Chief Judge of the Georgia Court of Appeals, who will speak on ethics. Other prominent speakers include our keynote speaker **Bob Kerr, Director of the Department of Natural Resources' (DNR) Pollution Prevention Division** and **Mike Walker, Senior Enforcement Counsel with EPA's Office of Enforcement & Compliance Assurance**. The summer seminar will also feature an hour debate on a timely environmental issue in a mock hearing format. We have decided to schedule a separate seminar this fall in Atlanta covering recent water law issues in detail. Therefore, the summer seminar will not cover water law in great depth.

The program brochure for the summer seminar should be mailed sometime in May. We are looking forward to seeing you there.

Finally, a committee has been formed to establish the criteria for an award in honor of the late **Jean Tolman**, a dedicated environmental lawyer and former Chair of this Section. Committee members, including **Ann Marie Stack, Rick Horder** and **Doug Arnold**, are investigating options, in keeping with Jean's intent, that include awarding a scholarship to an outstanding law student focused on environmental law.

If you have any questions or comments about Section activities, please do not hesitate to contact me at 770-270-6989 or ahicks@mindspring.com.

Targets of Environmental Terrorism

Several high profile targets may lend themselves to environmental terrorism activities. These are objectives that until recently were, and maybe to a degree still are, fairly easily targeted with the potential for a significant and far-reaching negative impact on the environment.

Water Systems

Perhaps the likeliest target for environmental terrorism is the nation's water system, including supply systems, treatment systems, and distribution systems. A terrorist attack could be carried out through biological contamination of water supplies, with the intent to kill or sicken thousands, as well as have a psychological effect as to whether the public could be adequately protected from similar attacks in the future. In many parts of the country, the water supply and distribution infrastructure is outdated and inefficient, built with little or no concern over protection against terroristic attacks. The sheer number of water systems alone makes it unlikely that every system could be adequately protected any time soon. It is estimated that more than 170,000 public water supply systems serve more than 250 million Americans.¹ An adequate and clean supply of water is essential not only for maintaining life, but for many manufacturing processes and maintaining public safety in firefighting and food processing operations among others.²

Power Generating Plants

Attacks on power generating plants could also affect the environment, most notably if nuclear power plants are targeted. Through the release of a radioactive cloud, not only is there the potential to kill or sicken thousands, but also the rendering of the entire affected area a wasteland, unsuitable for habitation or agricultural purposes for perhaps hundreds or thousands of years. Nuclear waste storage and disposal sites could also become targets, in effect serving as the radioactive source for a huge and destructive "dirty bomb."

Petroleum Storage Sites and Refineries

While bulk petroleum storage and refinery sites may not have the potential for a massive casualty toll like

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

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

1. OSAH Overview

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

2. The Petition

A petition for hearing by an administrative law judge is submitted to the Director of the EPD ("Director"), who then refers the case to OSAH for hearing.⁶ In actions involving the EPD, petitions for hearing are governed by rules of the DNR and those rules should be consulted for the timing, content, and form of the petition.⁷ When the Director receives a timely petition for hearing, he then forwards the petition to the Attorney General with a request that it be transmitted to OSAH for hearing.⁸ In most instances, the filing of a petition for review stays

An Overview of the Small Business Liability Relief and Brownfields Revitalization Act

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On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act (the “Act”).¹ The Act amends and reforms the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), commonly known as the “Superfund”² and authorizes the appropriation of \$200 million dollars for each of fiscal years 2002 to 2006 for brownfields development.³ Many states, including Georgia, have already implemented their own brownfields programs that provide liability protection and cleanup standards for developers of brownfields, however, state programs cannot provide adequate protections under federal law.⁴ The Act responds to this problem by providing liability protection to prospective purchasers, contiguous property owners, and innocent land-owners. Additionally, the Act provides relief to small business owners who previously faced potential liability for an entire Superfund site, despite the fact that they may have only sent a small amount of hazardous or municipal solid waste to the contaminated site. The Act, however, does not apply or in any way affect any settlements, judgments, or administrative orders entered or issued before the date of the Act.

I. BROWNFIELDS REFORMS

A. What Is A Brownfield?

Brownfields are industrial or commercial properties that have been abandoned or underutilized due to the potential liability faced by anyone who purchases or operates the particular site. The Act defines a “Brownfield Site” as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”⁵ Although CERCLA specifically excludes petroleum in its definition of hazardous substances,⁶ the Act includes some petroleum sites in its definition of brownfields, however it is very limited. Petroleum sites are only included if they are determined to be of relatively low risk (as determined by the EPA or state), there is no viable responsible party, and it is not the subject of a cleanup under the Solid Waste Disposal Act.⁷ In addition, the Act also includes sites contaminated by a “controlled substance,” as defined by section 102 of the Controlled Substances Act.

B. What Is Not A Brownfield?

The Act also excludes certain areas as brownfields. However, financial assistance may still be available for these exclusions if the President finds that “financial assistance will protect human health and the environment, and either promote economic development or enable the creation of, preservation of, or addition to parks, greenways, undeveloped property, or other recreational property, or other property used for nonprofit purposes.”⁸

The areas excluded as brownfields include the following:⁹

- Facilities that are part of an ongoing or planned removal action or that are listed or proposed for listing on the National Priorities List (“NPL”);
- Facilities that have been issued a permit for response action under the Solid Waste Disposal Act, the Federal Water Pollution Control Act, the Toxic Substances Control Act (“TSCA”), or the Safe Drinking Water Act;
- Land disposal for hazardous waste where closure notification and requirements have been submitted in a closure plan or permit;
- A portion of a facility where there has been a release of PCBs and that is subject to remediation under TSCA;
- Facilities that are subject to the jurisdiction of a department, agency, or instrumentality of the United States, except for land held in trust for an Indian tribe; or
- A portion of a facility where assistance for response activity has been obtained under the Solid Waste Disposal Act from the Leaking Underground Storage Tank Trust Fund.

C. Who Is Eligible For Funding?

The Act gives the EPA the power to issue grants to states and local governments for programs to inventory, characterize, assess, and conduct planning of brownfields sites.¹⁰ These grants are limited to \$200,000 per site, however the EPA

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OSAH's administrative law judge ("ALJ") is to determine all issues, including whether the petitioner has satisfied the filing requirements and is entitled to a hearing at all,¹¹ and has all the powers of the Director of the EPD with respect to that case.¹² There is no requirement under either DNR or OSAH's rules that the Director file an answer or response to the petition. The ALJ may, of course, require that a response be filed.¹³

3. OSAH Rules Generally

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

4. Appearance by Attorneys

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

5. Default

The ALJ may enter an order of default, including a partial default where appropriate, if a party fails to participate at any stage, fails to file a required pleading, or fails to comply with an order or subpoena of

the ALJ.²² Because the ALJ is not vested with the same range of powers as judges within the judicial branch, its broad power to enter a default against an offending party perhaps is its most powerful direct compulsory device. Otherwise, the ALJ, through the application of a party, has to request action from the appropriate Superior Court.²³

6. Filing by Mail

OSAH allows filing by mail, with documents "deemed filed on the date on which they are received by the Clerk or the official postmark date such document was mailed, properly addressed to the Clerk with postage prepaid, by first class mail, whichever date comes first."²⁴ In contrast, the Civil Practice Act deems documents filed only upon receipt in the Clerk's office, with the filing party assuming the risk of any delays in the mail.²⁵ Of course, mailing is not required and a party still may file documents with OSAH by hand delivery to the Clerk. Courtesy copies, particularly of motions or where immediate action is sought, may be sent directly to the ALJ.

7. Burdens of Persuasion and Going Forward

Although OSAH rules generally place the burdens of persuasion and of going forward with the evidence on the agency involved, they place those burdens differently under certain circumstances.¹ Taking a typical environmental permit case, for example, the holder of a permit bears the burdens in challenging the revocation, suspension, amendment, or non-renewal of the permit.² An applicant bears the burdens in challenging the denial of a permit.³ Anyone other than the permit holder or applicant, such as an environmental activist organization, who challenges agency action on a permit bears the burdens.⁴ Even then, after notice, the ALJ may shift the burdens upon motion or when "justice requires."⁵

8. Amendments to Pleadings

Under the Civil Practice Act, a party may amend its pleadings without leave of court or agreement of the parties any time before entry of a pretrial order.⁶ The OSAH rules limit this right slightly,

may extend the limitation to \$350,000 based on the anticipated level of contamination, size, or status of ownership of the site.¹¹ The President may also issue grants to states, local governments or nonprofit organizations to be used directly for remediation of brownfield sites owned by the government entity or nonprofit, not to exceed \$200,000 per site.¹² Additionally, \$1,000,000 grants are available to states and local governments for capitalization of revolving loan funds.¹³ States and local governments may then, in turn, make loans to site owners and developers to assist with the remediation of brownfield sites.¹⁴ However, no part of a loan or grant may be used to pay a penalty or fine, a federal cost-share requirement, a response cost for a potentially responsible party ("PRP"), the cost of compliance with any federal law other than the laws applicable to the cleanup, or administrative costs.¹⁵

II. LIABILITY REFORMS

The Act provides liability protections to small businesses, contiguous property owners, prospective purchasers, and innocent landowners; and creative settlement options for PRPs.

A. "Small Business" Relief

Historically, the only relief available to small businesses was the possible settlement with the EPA if the business did not contribute or only contributed a small amount to the contamination.¹⁶ Under the Act, some of these businesses may now be exempt from liability altogether.

1. De Micromis Exemption.

Transporters and arrangers may be exempt from Superfund liability if they can demonstrate that they contributed less than 110 gallons of liquid materials or 200 pounds of solid materials to a hazardous waste site and that all or part of the disposal, treatment or transport occurred before April 1, 2001.¹⁷ Additionally, for sites listed on the National Priorities List ("NPL"), the burden of proof is on the plaintiff in third-party contribution actions to demonstrate that the requirements of the exemption have not been met.¹⁸

2. Municipal Solid Waste Exemption.

Generators of municipal solid waste are also provided with liability protection for NPL sites under the Act.¹⁹ The exemption not only includes waste generated by a household, but waste generated by a commercial, industrial, or institutional entity if the waste is essentially the same as that generated by a household, is collected and disposed with other municipal solid waste, and con-

tains the relative quantity of hazardous substances as that of a single-family household.²⁰ The Act exempts the following for liability associated with contamination from municipal solid waste:²¹

- An owner, operator, or lessee of residential property from which all of the person's municipal solid waste was generated with respect to the facility;
- A business entity (including a parent, subsidiary, or affiliate of the entity) that during the three taxable years prior to the federal government's written notification of the entity's potential liability employed no more than 100 full-time individuals and is a small business concern (pursuant to the Small Business Act) from which all municipal solid waste attributable to the entity was generated with respect to the facility; or
- A nonprofit organization that, during the taxable year preceding the date of the President's notification of potential liability, employed no more than 100 paid individuals at the location where all the municipal solid waste attributable to the organization was generated with respect to the facility.

3. Burdens of Proof.

Like the De Micromis Exemption, the burden of proof is on the plaintiff in a third party contribution action for a NPL site to show that the requirements of the exemption have not been met.²² Furthermore, if a nongovernmental party brings a contribution action and the defendant is found not liable based on either the De Micromis or Municipal Solid Waste exemptions, the plaintiff will be liable for the defendant's reasonable costs in the action, including attorney's fees and expert witness fees.²³ Additionally, the Municipal Solid Waste Exemption provides that Federal, State, and local governments have the burden of proof in cost recovery or contribution actions for municipal solid waste disposed before April 1, 2001.²⁴ Third-party nongovernmental contribution actions are not allowed against generators whose municipal solid waste was generated from a residential property.²⁵

4. Limitations on Exemptions.

Note that a person may still be liable under both the De Micromis and Municipal Solid Waste exemptions if the President finds one of the following:²⁶

- That the hazardous substances or municipal solid waste "contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action;"

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power plants or water systems, the environmental impact and associated economic costs of cleanup can create a long-term problem for a particular area. Several well-placed explosives could destroy an entire storage complex, resulting in the release of massive amounts of petroleum products. Usually located along main waterway or highway commercial transportation corridors, an attack would have significant impacts beyond strictly environmental damage. Environmental health problems associated with contaminated water supplies and burning petroleum generating toxic fumes could be significant

Chemical Plants

The United States Environmental Protection Agency estimates that in 1999 approximately 850,000 facilities in the country were using hazardous or extremely hazardous materials.³ These plants, which at one time may have been isolated from population centers, may now be situated in populated areas as urban sprawl continues. Like petroleum storage facilities and refineries, terrorist attacks on these facilities could have devastating consequences.

The transport of hazardous materials to and from these facilities also provides an opportunity for terrorist attacks. The well-publicized efforts on the part of suspected terrorists to obtain licenses to transport hazardous materials indicate that this target is indeed viable.⁴ The disruption of rail shipments of hazardous materials by explosives or derailment could result in significant impacts to highly industrialized areas where these shipments are headed, also to high-density residential areas through which some of these shipments pass. The damage to the population and the environment could be significant if highly toxic materials such as chlorine gas, methyl isocyanate, or others are released to the environment.

“Countering environmental terrorism begins with evaluating the exposure to such acts by thinking like a terrorist and assessing potential targets and their vulnerability, taking into account target accessibility, affected population and the economic impact

What Is Being Done to Counter Environmental Terrorism?

The entities charged with the protection of the targets presented above have become much more aware of the need to evaluate exposure to terrorist attacks, minimize those exposures, and develop and implement plans for preventing or responding to attacks. Environmental management systems that may already be in place can serve as starting points for developing additional protective measures against terrorism. Lawyers for these entities have begun to scrutinize the potential liability their clients may face as a result of terrorist attacks.

Countering environmental terrorism begins with evaluating the exposure to such acts by thinking like a terrorist and assessing potential targets and their vulnerability, taking into account target accessibility, affected population, and the economic impact of successful attacks.⁵ Under the Emergency Planning and Community Right-to-Know Act (EPCRA),⁶ a mechanism already exists for most facilities to begin the process of exposure evaluation. EPCRA is intended to promote and implement planning for chemical emergencies at the state and local level, and to provide the public with information about the chemicals that are used, stored, and released in their community. Under Section 302 of EPCRA, a company must submit a facility profile to a State Emergency Response Commission (SERC) and/or Local Emergency Response Commission (LEPC) for extremely hazardous substances used or stored at the facility. The profile will include chemical use information, storage location, and information for first-responders to an emergency, including maximum predicted casualties in a worst-case scenario.⁷ While updating § 302 reporting requirements a facility should assess how hazardous materials are secured, determine whether they are stored near easily and covertly accessible areas of the facility, and institute tighter inventory control procedures in order to ensure that all materials are accounted for.

- That the PRP has failed to comply with an information request or administrative subpoena; or
- That the PRP has impeded, through action or inaction, the performance of a response action.²⁷

B. Contiguous Property Owners

As stated earlier, historically, CERCLA has imposed liability on a landowner whether or not that person actually caused the contamination. Perhaps the most unfair result of this may be seen with contiguous property owners, who simply had the misfortune of owning property next to a hazardous site. The Act now gives EPA the power to issue an assurance that no enforcement action will be initiated against these landowners and to grant protection against third-party contribution actions.²⁸ To qualify for this protection, a person must show, by a preponderance of the evidence, that:²⁹

- He did not cause, contribute or consent to the release;
- He is not a PRP or affiliated with any other PRP through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than one for the sale of goods or services) or the result of a reorganization of a business that is a PRP;
- He has taken reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental or natural resource exposure to any hazardous substance released on or from his own property;
- He has provided full cooperation, assistance and access;
- He is in compliance with any land use restrictions established or relied on with the response action and have not impeded the effectiveness or integrity of any institutional control employed with the response action;
- He is in compliance with any request for information or administrative subpoena;
- He has provided all legally required notices with respect to the discovery or release of any hazardous substance; and
- At the time that person acquired their property, he conducted "all appropriate inquiry" of the environmental conditions of the property (as discussed in greater detail below) and did not know or have reason to know that the property was or could be contaminated.

Even if the person had reason to know of the contamination and, therefore, cannot seek protection as a

indiscontiguous property owner, they still may obtain protection as a Bona Fide Prospective Purchaser.³⁰

C. Bona Fide Prospective Purchasers and Windfall Liens

Perhaps the most important change made by the Act was to significantly expand EPA's prior policy regard prospective purchasers.³¹ The previous policy limited Prospective Purchaser Agreements to those sites where an EPA action was completed, ongoing or planned for the facility, and where EPA would receive a substantial benefit either directly or indirectly from the cleanup. These two limitations excluded numerous potential purchasers from eligibility, and thus impaired prospects for the redevelopment of contaminated property. The Act expands the ability of a purchaser to obtain an exemption from CERCLA "owner" liability. Under the Act, a purchaser who acquired his ownership interest after January 11, 2002 (the effective date of the Act), will not be liable as an owner or operator if he does not "impede the performance" of the response action and he establishes, by a preponderance of the evidence, the following criteria:

- all disposal activities occurred before the person acquired ownership of the property;³²
- the person made "all appropriate inquiry" into the previous uses and ownership of the property, as discussed in greater detail below;
- all legally required notices with respect to the hazardous substances have been provided by that person;
- "appropriate care" was exercised with regard to the hazardous substances at the property;
- the person fully cooperated and provided assistance and access to the persons conducting the cleanup;
- institutional controls are complied with;
- the person complied with information requests and
- the person is not affiliated with a PRP via a familial, contractual, corporate or financial relationship. A contract conveying ownership of the property is not considered to create a "contractual relationship."³³

If the United States incurs unrecovered response costs and the response action increases the fair market value of the property from the fair market value that existed before the response action, the United States will have a lien on the property to prevent a purchaser from obtaining a windfall from EPA's cleanup actions.³⁴ However, the lien is only for the amount of the increase in fair market value.³⁵ Additionally, by agreement with the property owner, the United States may take a lien

Changes To The Hazardous Site Reuse and Redevelopment Act and the Hazardous Site Response Act: A Legislative Update

Daniel N. Esrey, Alston & Bird LLP

Introduction

The 2002 Georgia General Assembly enacted important amendments¹ to the Hazardous Site Response Act (“HSRA”)² and the Hazardous Site Reuse and Redevelopment Act (“Brownfields Act”).³ Key changes to be made by H.B. 1406 (“the Bill”) include (1) applying the Brownfields Act to non-HSI sites that have experienced a “preexisting release” and granting a qualifying purchaser apparent liability protection with respect to groundwater conditions at a contaminated site; (2) amending HSRA’s fee structure; and (3) expanding HSRA’s liability scheme to make it easier for the state to recover its costs from responsible parties in situations where such parties cannot be located or in an emergency situation.⁴

Changes to Brownfields Act

The Brownfields Act provides a program wherein a prospective purchaser of contaminated property may remediate the property and obtain a limitation of liability under HSRA. Presently, the Brownfields Act is of limited utility due to the fact that it is underfunded, restricts coverage of the program to only contaminated properties listed on Georgia EPD’s Hazardous Site Inventory and provides no relief from the stringent cleanup standards of HSRA. H.B. 1406 attempts to change these limitations. Whether these changes will be successful will only be determined through implementation of the amendments. Among the changes, the Bill provides a previously non-existent funding mechanism for the administration of the Brownfields Act by providing for collection of application review fees. These fees begin at \$3,000 and are subject to increases at the apparent discretion of the Director.⁵ The Bill also amends the Brownfields Act by expanding the universe of properties qualified to participate in the program and obtain certain liability protections. Those properties previously were limited to sites listed on the HSRA Hazardous Site Inventory (“HSI”), foreclosing a large category of contaminated properties from the potential benefits of the Brownfield Act. A property will now be eligible for liability protection under the Brownfield Act if it has experienced a “preexisting release.”⁶ A “preexisting release” is any release of hazardous substances, as defined under HSRA, that occurred prior to the prospective purchaser’s application for a limitation of liability under the Brownfields Act.⁷ Lastly, the Bill ostensibly alters the requirements a prospective purchaser must fulfill to obtain or retain a limitation of liability under the Brownfields Act.

The Brownfields Act has rarely been utilized because the liability “protection” was illusory. Such “protection” only came at the cost of full compliance by the prospective purchaser with all of HSRA’s strictures. A prospective purchaser of an HSI site obtained a limitation of liability in one of two ways: (1) if the HSI site was not designated as needing corrective action under HSRA, by certifying the site’s compliance with risk reduction standards and having the Director approve the certification;⁸ or (2) if the Director had designated the HSI site as needing corrective action under HSRA, by submitting a corrective action plan to the Director and obtaining approval.⁹

If the prospective purchaser was required to submit a corrective action plan, the plan had to be designed to achieve compliance with all risk reduction standards including those applicable to groundwater.¹⁰ The prospective purchaser was then required to certify compliance with these risk reduction standards and the Director had to approve this certification in order for the prospective purchaser to retain the limitation of liability afforded by the Brownfields Act.¹¹

The Bill is, among other things, intended to encourage participation and thus the cleanup of underutilized contaminated properties by relaxing a prospective purchaser’s obligation to comply with the stringent groundwater cleanup standards of HSRA. This goal would, in principle, prove useful in promoting brownfields transactions. Uncertainties concerning groundwater are often the most difficult to define and, even if defined, the most costly to remediate. Therefore, groundwater issues

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Additionally, under Sections 311 and 312 of EPCRA, a facility is required to submit a one-time notification to the SERC, LEPC, and local fire department for each hazardous chemical on site. Similar threat evaluations can also be conducted in response to updating and submitting Section 112(r) emergency planning activities under the Clean Air Act⁸ or through OSHA's Process Safety Management requirements, or the Hazard Communication Standards.

Protecting the nation's water systems may be a more daunting task in light of the fact that drinking water supplies may include large bodies of surface water and widespread and complex distribution systems. Given the need to upgrade the infrastructure of many of these systems, the cost of modernizing a major water supply system should now include the cost of protecting the system from attack. Increasing security patrols, the development and use of new technology for testing and treating water supplies, and the availability of back-up systems or alternative sources of water must be evaluated as protective measures.

Since many of the major water supply systems are automated, concern must also be given to the possibility of cyberterrorism causing systems to shut down completely, or changing the treatment operations such that water that has not been fully treated is allowed to leave the supply facilities and make its way to homes and businesses.⁹

Legal Issues

Legal theories of environmental terrorism are developing based more on anticipated liability than legal precedent. In the aftermath of the 1993 World Trade Center bombing, lawsuits were filed based on negligence claims, premises liability, personal injury, wrongful death, property damages, and business interruption.¹⁰ It is fair to assume that many of these claims would also arise following an environmental terrorist attack, as would new legal theories of liability. Although protection against environmental terrorism will be expensive and difficult in some cases, the potential legal impact on corporations and municipalities cannot be ignored in light of the heightened state of alert concerning terrorist attacks.

Conclusion

While the idea of environmental terrorism is not new, efforts to combat it are utilizing new methods as well as traditional approaches. Environmental attorneys must be prepared to assist their clients in safeguarding against such acts by initiating counter-terrorism measures, updating long-standing environmental management systems, and becoming more aware of potential liability resulting from such attacks. While the chances of environmental terrorism happening may be slim, the potential consequences could be widespread and long-lived.

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² Elizabeth L. Chalecki, *A New Vigilance: Identifying and Reducing the Risks of Environmental Terrorism*. A Report of the Pacific Institute for Studies in Development, Environment, and Security (September 2001) <http://www.pacinst.org/environment_and_terrorism.htm>.

³ *Id.* at 3.

⁴ *Id.* at 3.

⁵ *Id.* at 5.

⁶ Tim De Young & Adam Gravley, *Coordinating Efforts to Secure American Public Water Supplies*, 16 NR&E 3, 146, 148 (2002).

⁷ *Id.* at 147.

⁸ Amy E. Smithson, Prepared Statement before the House Committee on Transportation and Infrastructure, November 2001, available at <http://www.house.gov/transportation/water/11-08-01/smithson.html>.

⁹ Clean Air Act of 1990, 42 U.S.C. § 7412(r)

¹⁰ *Safety of Our Nation's Water, 2001: Hearings on H.R. 3178 Before the House Committee on Science*, 107th Cong. (2001) (statement of Richard G. Luthy, Chair, Water Sciences Board, National Research Council).

¹¹ De Young & Gravley, *supra*, note 4, at 152.

often present an unacceptable risk for a prospective purchaser. Unfortunately, the Bill was drafted in such a manner that it creates uncertainties over the protection it purports to provide.

The Bill will revise the Brownfields Act to provide that, upon the Director's approval of a corrective action plan submitted by a prospective purchaser (or concurrence with a certification of compliance with applicable risk reduction standards), the prospective purchaser "shall not be required to certify compliance with risk reduction standards for groundwater, perform corrective action, or otherwise be liable for any preexisting releases to groundwater."¹² This seemingly straightforward provision is muddled by a further amendment that will require a prospective purchaser to certify that the qualifying property complies with the cleanup standards for "source material" and soil in order to maintain the limitation of liability provided by the Brownfields Act.¹³ Unfortunately, the definition of "source material" raises more questions than answers concerning compliance with risk reduction standards.

The Bill defines "source material" as "any hazardous waste, hazardous substance, or hazardous constituent that has been released or disposed of that requires notification in accordance with the HSRA rules." Thus, while source material does not include groundwater itself, it appears to include the hazardous waste, hazardous substance, or hazardous constituent within the groundwater. Since contaminated groundwater samples inherently reflect the presence of analytes that meet the definition of a "hazardous substance," it is not clear how parties (and their consultants) will distinguish and dismiss such sample results as not reflecting source material. To the extent there arguably exists "source material" within groundwater, it is unclear what degree of protection a prospective purchaser will actually obtain or what demonstrations may be required to obtain it.

Another uncertainty in the Brownfields Act, as amended, is the question of whether, in certifying compliance with applicable cleanup standards, a prospective purchaser will be required to define the extent of contamination to groundwater by delineating the contamination to background concentrations. This delineation effort is often a

costly and difficult undertaking. Under the HSRA rules, a responsible party certifies compliance with risk reduction standards by preparing a compliance status report ("CSR").¹⁴ The CSR must delineate the vertical and horizontal extent of the soil and groundwater contamination to background concentrations.¹⁵ For any non-naturally occurring substance in groundwater, background means at or close to "zero." Although a prospective purchaser is apparently no longer required to certify compliance with groundwater risk reduction standards, it is unclear whether this also relieves a prospective purchaser from the delineation requirements as well. Likewise, even if an argument could be fashioned that delineation is not required under the statutory language, it is far from certain what degree of investigation EPD may require to support its apparently discretionary decision whether to approve a corrective action plan.

One possible solution to these uncertainties would be the promulgation by the Department of Natural Resources of rules clarifying what obligations, if any, a prospective purchaser may have to certify compliance with risk reduction standards for source material to the extent such source material is contained in groundwater. The Board may also clarify whether, in submitting a CSR, a prospective purchaser will be required to include a delineation of contamination in groundwater. Absent such rulemaking, the Brownfields Act remains unclear and potentially of limited usefulness to the real estate market.

In addition to the uncertainties created by the language of the amended Brownfields Act, there are a number of additional issues that merit consideration in evaluating the Act's potential effectiveness. First, the Brownfields Act requires EPD approvals at various stages of a prospective purchaser's application or redevelopment of a qualifying property. Because no rules have been promulgated under the Brownfields Act, a prospective purchaser cannot rely upon any established time periods in which EPD would be required to make such approvals. Thus, timely determinations are far from guaranteed.

Another concern facing prospective purchasers is potential liability to third parties under alternate statutes or legal theories. For example, the Brownfields Act will not

allowing amendment of pleadings without leave or agreement until the tenth day prior to the hearing or until the entry of a prehearing order, whichever is earlier.⁷ In contrast, the Federal Rules of Civil Procedure allow a party to amend a pleading without leave or agreement once, but only before a responsive pleading is served or, if no responsive pleading is permitted, 20 days after service of the pleading being amended.⁸

The OSAH rules are substantially different from the Civil Practice Act in requiring responses to amended pleadings. If a party in an OSAH proceeding amends “any pleading to which a response or reply is required,” the opposing party must file its response within seven days after service of the amended pleading, unless the ALJ orders otherwise.⁹ Only slightly different, the Federal Rules require that a party respond to an amended pleading by the longer of the time to respond to the original pleading or 10 days after service of the amended pleading, unless the Court orders otherwise.¹⁰ In contrast to both the Federal and OSAH rules, which require a response unless relieved by the Court, under the Civil Practice Act a party is only required to respond to an amended pleading if the Court orders a response.¹¹

9. Intervention

OSAH rules govern the procedure for a party’s intervention in an OSAH proceeding, incorporating the Administrative Procedure Act to provide the grounds for such intervention.¹² Together, the OSAH procedure and the APA grounds are substantially identical to the requirements for intervention under both the Civil Procedure Act and the Federal Rules.¹³ The OSAH rule goes a step further, however, allowing the ALJ to “limit the factual or legal issues which may be raised by an intervenor” to “avoid undue delay or prejudice to the adjudication of the rights of the original parties.”¹⁴

10. Discovery

The ALJ in an OSAH action is not limited to the evidence before the referring agency and hears the case *de novo*.¹⁵ However, traditional discovery procedures,

such as those of the Civil Practice Act or Federal Rules of Civil Procedure, are not available to parties in an OSAH administrative proceeding.¹⁶ Although OSAH rules provide procedures for obtaining testimony and documents prior to the hearing, these are to be in lieu of live testimony from those witnesses at the hearing.¹⁷ A party remains free to obtain publicly available records, such as under O.C.G.A. § 50-18-70 et seq. and under OSAH Rule 37.¹⁸

Although not a discovery device per se, a party may take advantage of OSAH’s prehearing conference procedures to discover information on the opponent’s issues, witnesses, experts, and documents. Prehearing conferences are not mandatory, but the ALJ may require the parties to appear for one or more prehearing conferences and/or submit a written joint prehearing submission addressing a number of issues, including clarification of the issues; identification of documents and witnesses for hearing; stipulation of facts; and identification of expert witnesses and substance of the facts and opinions on which the expert will offer testimony.¹⁹

Through aggressive use of such prehearing procedures, a party can stake out its opponent on these issues. In fact, the ALJ should encourage this, particularly in complex cases, because it may simplify the hearing by resolving and avoiding disputes and unnecessary surprise. The ALJ then may issue a prehearing order, similar to a pretrial order in state or federal court, memorializing the results of these prehearing conferences and providing that “issues, factual matters, witnesses and documents not included in the prehearing order shall not be considered, allowed to testify, or admitted into evidence over the objection of any party” except upon good cause shown.²⁰

11. Motions

OSAH Rule 16 governs the filing of motions.²¹ Any response must be filed within 10 days of service of the motion.²² In state and federal courts, a party’s time to respond to motions other than for summary judgment varies widely, the Northern District of Geor-

provide the prospective purchaser any liability protection against claims brought under the federal counterpart to HSRA – the Comprehensive Environmental Response, Compensation and Liability Act or “CERCLA.” CERCLA claims may be brought by the federal government for cost recovery and, more likely, by third parties for contribution. The Brownsfield Act does not provide any protection from these claims. Further, although the Brownfields Act may have abrogated common law theories of liability, the question remains to what extent a prospective purchaser may be liable to adjacent landowners under codified nuisance statutes or other common law theories of property damage.

Finally, although the Brownfields Act may provide some comfort to prospective purchasers of qualifying properties, certain trade-offs must be recognized. For instance, to the extent the Brownfields Act can be utilized for properties not listed on the HSI, the Act imposes investigation and remediation obligations that would not otherwise apply to such properties. In many instances, preparation of a CSR or conducting a clean up to meet HSRA soil standards at a site otherwise not subject to HSRA may be a steep price to pay for a brownfields transaction.

Renewal and Changes to HSRA Fee Authority

In addition to revising the Brownfields Act, HB1406 changes HSRA’s fee system. HSRA is funded through four sources: (i) otherwise unallocated fees and civil penalties collected by EPD, as set forth in O.C.G.A. § 12-2-2(e); (ii) solid waste surcharges provided for by O.C.G.A. § 12-8-39(e); (iii) financial responsibility instruments implemented pursuant to O.C.G.A. § 12-8-68(d); and (iv) hazardous waste management and hazardous substance reporting fees of O.C.G.A. § 12-8-95.1. Of these sources, both the solid waste surcharges and the hazardous waste management and hazardous substance reporting fees were scheduled to expire in 2003.

Hazardous Waste Management fees are imposed when hazardous waste is treated or disposed and range between \$1.00 per ten to \$20.00 per ten. Hazardous substance reporting fees are based on the annual Toxic Release Inventory report and vary between \$500 per year for reporting annual releases of less than 10,000 pounds up to \$1,500 per year for reporting annual releases greater than 10,000

pounds. The Bill extends the imposition of these fees through July 1, 2013, and increases the fees by approximately 15 percent, effective July 1, 2003. Fees were eliminated for one type of hazardous waste activity – recycling. Section 12-8-95.1 of HSRA was amended to eliminate hazardous waste management fees applying to hazardous waste that is recycled or reused.

Expanded HSRA Liability Provision

In addition to a revised fee structure, the Bill also amends HSRA’s liability provisions. Prior to the amendment, HSRA imposed joint, several, and strict liability upon certain persons for EPD’s reasonable costs associated with the cleanup of environmental hazards, but only upon the “failure of such persons to comply” with an order issued by the Director.¹⁶ Section 12-8-96.1(a) has now been amended to provide that such persons will be liable even in the absence of the issuance of an order, and therefore absent a failure to comply with such order, in the following two circumstances: (1) If the Director is unable to locate the person after a “reasonable effort”¹⁷ to do so prior to commencing clean up actions; or (2) if the person contributed to a release that resulted in an emergency action by the Director and the issuance of an order in that situation would cause a delay in corrective action that could endanger human health and the environment.¹⁸

This amendment makes HSRA more akin to CERCLA in that a party can be held liable for the government’s costs without necessarily receiving prior notice of a clean up. There are, however, several differences that may make HSRA liability more onerous than CERCLA liability. HSRA provides that the State of Georgia may recover punitive damages up to three times the costs incurred by state associated with the cleanup of contaminated property.¹⁹ Because section 12-8-96.1(a), as amended, does not distinguish between a person liable for failure to comply with an order and a person whom EPD has not previously issued any order a party could be responsible for treble damages even if it did not receive prior notice and an opportunity to perform the work. In contrast, treble damages are only available to the federal government under CERCLA if a party refuses or fails to comply without sufficient cause with an order issued by EPA under CERCLA Section 106.

gia allowing 10 days, the Southern District allowing 15 days, the Middle District allowing 20 days, and State and Superior courts allowing 30 days.²³ The ALJ is not required to hold a hearing on a motion, but may do so on its own or upon written request of a party.²⁴ OSAH rules specifically provide that the ALJ may conduct motion hearings by telephone.²⁵ OSAH rules provide for a “summary determination” that largely is consistent with the summary judgment procedures under both the Civil Practice Act and the Federal Rules.²⁶ However, OSAH does not distinguish between types of motions in setting the time to respond, leaving it at 10 days for all.²⁷ In contrast, a party in Superior or State Court generally has 30 days to respond to any motion, including for summary judgment.²⁸ Federal courts in Georgia generally allow 20 days to respond to a motion for summary judgment.²⁹

12. Voluntary Dismissal

In an OSAH action, the initiating party has a broad right of voluntary dismissal. The ALJ must dismiss the case if the party requesting the hearing *at any time* withdraws that request.³⁰ The Civil Practice Act provides a fairly similar right of unilateral dismissal, allowing a plaintiff to dismiss its action voluntarily any time before it rests its case.³¹ In contrast, the Federal Rules prohibit a plaintiff from unilaterally dismissing its action after the adverse party serves its answer or files a motion for summary judgment.³²

13. Evidence

OSAH rules, pointing to the APA, require that the ALJ “apply the rules of evidence as applied in the trial of civil nonjury cases in the superior courts.”³³ Similar to the evidentiary provisions of the APA, that rule goes on, however, to add that the ALJ “may, when necessary to ascertain facts not reasonably susceptible of proof under such rules, consider evidence not otherwise admissible thereunder if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.”³⁴

Before concluding that OSAH’s provision broadening of “the rules of evidence applicable in superior

courts” has eviscerated those traditional rules, note that it remains subject to the prefatory condition that such evidence be admissible only “when necessary to ascertain facts not reasonably susceptible of proof under such rules.”³⁵ Probably less than comfortable with the relatively undefined expansion of the traditional rules of evidence, reviewing courts have required satisfaction of this condition.³⁶

OSAH provides five examples of evidence that “may be admitted” under this expansion of the traditional rules of evidence.³⁷ The first of these, OSAH Rule 18(1)(a), is for records and reports of public agencies.³⁸ The language of that example is substantially identical to Federal Rule of Evidence 803(8), which excepts such documents from the prohibition on hearsay. Georgia law has no direct equivalent to the public records and reports exception of FRE 803(8) and such records generally must be admitted under some other provision.

Similarly, the example of OSAH Rule 18(1)(c) substantially tracks the language of FRE 803(18), which excepts statements in learned treatises from the rule against hearsay.³⁹ Georgia law is more restrictive than the Federal Rule, allowing an expert to provide an opinion based in part on learned treatises but generally prohibiting the introduction of statements from the treatises themselves.⁴⁰ The OSAH language, however, omits the last sentence of FRE 803(18), which states that “[i]f admitted, the statements may be read into evidence but may not be received as exhibits.” Without this limitation, the OSAH rule presumably allows admission of the document itself and, therefore, broadens even the Federal Rule. In any event, OSAH rules provide for much broader admissibility of published authority than normally would be allowed under Georgia law.

The example of OSAH Rule 18(1)(b) refers to “reports, records, statements, plats, maps, charts, surveys, studies, analyses or data compilations after testimony by an expert witness that the witness prepared such document and that it is correct to

on some other property or agree to some other assurance of payment.¹ Any lien under this provision begins at the time costs are first incurred by the United States and continues until the lien is satisfied or all response costs associated with the property have been recovered.²

D. Innocent Landowners

The Act amends CERCLA's definition of "contractual relationship" to afford higher protections to innocent landowners by adding easements and leases to the definition and language similar to the above for Contiguous Landowners and Bona Fide Prospective Purchasers.³ The landowner must provide full cooperation and access, comply with any land use restrictions, and not impede the effectiveness of any institutional controls.⁴ Additionally, the property owner must demonstrate that all appropriate inquiries were made before acquiring the property and that reasonable steps were taken to stop any continuing or threatened release.⁵

E. Expedited Settlements

The Act also amends CERCLA with a provision allowing for expedited settlements when a PRP can demonstrate an inability or limited ability to pay response costs.⁶ Under this new provision, the federal government will consider a party's ability to pay and "still maintain its basic business operations, including consideration of the overall financial condition of the person and demonstrable constraints on the ability of the person to raise revenues."⁷ If it is determined that a party is unable to pay its total settlement, alternative payment methods will be considered.⁸ However, as a condition of settlement, a party is required to waive all contribution claims against other PRPs, unless the President determines waiver would be unjust.⁹

As with the above exemptions, if the PRP has failed to comply with a request for access or for information or is impeding, by action or inaction, the response action, settlement may be declined.¹⁰ A determination that a party is not eligible for expedited settlement is not subject to judicial review.¹¹

F. Standards for Due Diligence

As mentioned above, to take advantage of the liability protections afforded to contiguous property owners, bona fide prospective purchasers, and innocent landowners, a party must show that they made "all appropriate inquiries" before purchasing the property that subjects them to potential liability. For residential properties, this only entails a facility inspection and title search that reveals no basis for further investigation.¹² For nonresidential properties, the Act provides that EPA must establish standards and practices for the purpose of satisfying the "all appropriate inquiries" requirement within the next two years.¹³ In the meantime, the following interim standards apply.

For property purchased before May 31, 1997, a court will take into account:¹⁴

- Any specialized knowledge or experience of the defendant;
- The relationship of the purchase price to the value of the property, if the property were not contaminated;
- Commonly known or reasonably ascertainable information about the property;
- The obviousness of the presence or likely presence of contamination at the property, and
- The ability of the defendant to detect the contamination by appropriate inspection.

For property purchased on or after May 31, 1997, and until EPA promulgates regulations, the procedures of the American Society for Testing and Materials will be followed, including the document known as Standard E1527-97, entitled "Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process."¹⁵ It is unclear to what extent a prospective purchaser must take additional actions, such as a Phase II subsurface investigation, in response to an identification of a "recognized environmental condition" in the Phase I. It is probable that, if such conditions are

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the best of the witness' knowledge, belief and expert opinion."⁴¹ Contemplating the admissibility of documents created by the expert witness, this example appears designed to avoid traditional objections to such evidence, such as that it is merely cumulative of the expert's testimony or would unduly reinforce the expert's oral testimony and become a "continuing witness."⁴² This also streamlines the admission of demonstrative exhibits prepared by an expert witness.

Appropriating language from the evidentiary provision of the APA, the example in OSAH Rule 18(1)(d) allows admission of "any medical psychiatric, or psychological evaluations or scientific or technical reports, records, statements, plats, maps, charts, surveys, studies, analyses or data

compilations of a type routinely submitted to and relied upon by the Referring Agency in the normal course of its business."⁴³ As with previous examples, this essentially weakens the prohibition on hearsay evidence and eases the introduction of documents on which the agency relied.⁴⁴

The final example, in OSAH Rule 18(1)(e), really contains two separate provisions related to the "best evidence rule." The first part provides for the admission of "documentary evidence in the form of copies if the original is not readily available, if its use would unduly disrupt the records of the possessor of the original, or by agreement of the parties."⁴⁵ This essentially softens Georgia's codified "best evidence rule," dispensing with many of its requirements.⁴⁶ The second part provides that "[d]ocumentary evidence may also be received

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identified, a Phase II assessment may be necessary to satisfy the "all appropriate inquiry standard."

The standards and practices for appropriate inquiries ultimately developed by the EPA over the next two years must include the following:¹⁶

- Results of an inquiry by an environmental professional
- Interviews of past and present owners, operators, and occupants of the facility
- Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records
- Searches for recorded environmental cleanup liens filed under Federal, State, or local law
- Reviews of Federal, State, and local government records, waste disposal records, UST records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility
- Visual inspections of the facility and adjoining properties
- Specialized knowledge or experience of the owner
- The relationship of the purchase price to the value of the property, if the property were not contaminated
- Commonly known or reasonably ascertainable information about the property
- The degree of obviousness of the presence or likely presence of contamination at the property

III. CONCLUSION

The Small Business Liability Relief and Brownfields Revitalization Act provides significant reforms to Superfund law. Prior to this Act, developers were wary, for good reason, to purchase and develop abandoned commercial and industrial sites, due to the potential liability associated with the property. The Act combines funding for the development and remediation of these brownfield sites with protections from liability.

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in the form of excerpts, charts, or summaries when, in the discretion of the ALJ, the use of the entire document would unnecessarily add to the record's length."⁴⁷ Again, this softens Georgia's existing procedure for the introduction of summaries of voluminous evidence.⁴⁸

OSAH Rule 18(4) governs the admissibility of expert testimony in OSAH proceedings, allowing broader admissibility of such testimony than might be allowed under Georgia law.⁴⁹ That rule combines, and is substantially identical to, Federal Rules of Evidence 702, 703, and 705. It specifically includes the provision of FRE 703 that, "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."⁵⁰ In other words, an expert witness may base its opinion on hearsay. Georgia traditionally allowed an expert to testify only on facts within his knowledge, facts admitted at trial, or facts presented to him by way of hypothetical questions.⁵¹ Georgia law has been evolving on this issue, a full discussion of which is beyond the scope of this article. In short, though, Georgia has moved towards the Federal Rule, allowing an expert to base an opinion, at least in part, on hearsay, any lack of personal knowledge going to the weight given that opinion by the finder of fact.⁵² OSAH's incorporation of the federal standard places it in line with this trend in Georgia law.⁵³

A significant feature of OSAH's evidentiary rule is that it allows the ALJ discretion to receive direct testimony in written form, requiring that such testimony be served on all parties in advance of the hearing.

A significant feature of OSAH's evidentiary rule is that it allows the ALJ discretion to receive direct testimony in written form, requiring that such testimony be served on all parties in advance of the hearing.⁵⁴ The admissibility of written testimony remains subject to the same evidentiary rules as oral testimony and the witness still must appear at the hearing, affirm the written statement, and be subject to cross-examination.⁵⁵ Written direct testimony can streamline testimony and provide the opposing party an advantage in preparing for cross-examination.

Finally, OSAH Rule 18 includes provisions allowing the ALJ to take "official notice" of certain evidence. The first, OSAH Rule 18(8), provides that the ALJ may take official notice of "judicially recognizable facts."⁵⁶ This appears to be coextensive with judicial notice under Georgia law, adding its own procedure for handling such notice at the hearing.⁵⁷ In addition, OSAH Rule 18(9) allows the ALJ to take notice of "the contents of policy and procedure manuals promulgated by State agencies for which OSAH conducts hearings," providing the procedure to be followed when the manual in question has not been adopted pursuant to the rulemaking procedures of the APA.⁵⁸ That rule also allows the ALJ to take notice of "any fact alleged, presented, or found in any other hearing before an ALJ, or of the status and disposition of any such hearing; provided, that any party shall on timely request be afforded an opportunity to contest the matters of which official notice is taken."⁵⁹

14. The Hearing

The ALJ is to issue a notice of hearing "[a]s soon as practicable" after OSAH receives a request for hearing.⁶⁰ OSAH Rules 21 through 33, along with the APA, primarily govern the hearing and the decision thereon.⁶¹ The hearing is not limited to evidence originally before the agency.⁶² The agency's decision is not entitled to any deference and the ALJ will consider the matter *de novo*.⁶³ The standard of proof is a preponderance of the evidence, unless otherwise provided by statute or rule.⁶⁴ In cases imposing civil penalties, the ALJ must consider certain factors set forth in DNR's rules.⁶⁵

The ALJ can issue subpoenas to compel attendance and the production of documents at the hearing. A party requesting a subpoena must do so in writing, served on all parties, at least five days before the hearing. Although issued by ALJ, the requesting party is responsible for serving subpoenas. The ALJ also may quash a subpoena on grounds provided, including the general ground “for other good reasons of basic fairness.”⁶⁹ Enforcement of ALJ subpoenas is sought by application to the Superior Court for the county where the case is being heard.⁷⁰ A party seeking to compel only the production of documents from a party to the proceedings may serve a notice to produce on that party without the necessity of a subpoena.⁷¹

There are a few procedural issues of note. Where parties have “substantially similar interests and positions,” the ALJ has discretion to limit the number of those parties allowed to cross-examine witnesses, argue motions, or argue objections.⁷² The ALJ also can order that the hearing be expedited where required by law or “if necessary to protect the interests of the parties or the public health, safety or welfare.”⁷³

decision within 30 days after the close of the hearing record⁷⁴ but may remand the case to the referring agency at any time.⁷⁵

15. Judicial Review

A party may seek judicial review only of a final decision.⁷⁶ Normally, under the APA, an ALJ’s decision is only an “initial decision,” which then is transferred back to the referring agency for review.⁷⁷ If the referring agency does not reject or modify the decision, normally within 30 days, the decision becomes final.⁷⁸ In matters arising from the EPD, however, an OSAH decision is a final, reviewable decision.⁷⁹ The procedure for obtaining judicial review is set forth in the APA⁸⁰ but any petition for judicial review also should be filed with the OSAH Administrative Hearing Clerk, who will certify the record to the reviewing court.⁸¹ Also note that the Superior Court must hear the case within 90 days from the date the petition is filed with it, unless continued to a date certain by order, or the ALJ’s decision will be affirmed by operation of law.⁸² Although the court may order a stay upon request and good cause shown, a petition for judicial review does not automatically stay the ALJ’s decision.⁸³

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Upcoming Seminars and Events:

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| <i>May 29-31</i> | Wetlands Law and Regulation,
<i>Washington, D.C.</i>
<i>Co-sponsored by the ALI-ABA and ABA, Section of Environmental, Energy and Resources.</i>
<i>For more information: www.ali-aba.org.</i> |
| <i>June (TBD)</i> | Brown Bag Lunch (<i>to be announced</i>)
<i>Atlanta, Alston & Bird</i>
<i>More details forthcoming.</i> |
| <i>June 6-7</i> | Managing Global Risk after September 1 and Enron, <i>Washington, D.C.</i>
<i>Co-sponsored by ABA, Section of International Law & Practice Counsel Committee and International Energy and Natural Resource Committee, and Center for Continuing Legal Education, in cooperation with ABA Section of Business Law and Section of Environment, Energy and Resources.</i>
<i>For more information: www.abanet.org/environ/.</i> |
| <i>August 2-3</i> | Environmental Law Institute
<i>Hilton San Destin Beach Resort, Destin, Florida</i>
<i>Sponsored by State Bar of Georgia, Environmental Law Section</i>
<i>For more information: www.iclega.org.</i> |
| <i>August 11-14</i> | Georgia Water and Pollution Control Association Annual Conference
<i>Atlanta, Georgia</i>
<i>For more information: www.gwpc.org.</i> |
| <i>October 9-14</i> | ABA, Section of Environmental, Energy and Resources, Tenth Section Fall Meeting
<i>Portland, Oregon</i>
<i>For more information: www.abanet.org/environ/.</i> |

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

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Additionally, the Act provides liability relief to small business owners, contiguous property owners, prospective purchasers, and innocent landowners. While the Act provides significant reforms, there are still possible ways in which a landowner, who did not contribute to the actual contamination, may be held liable for the response costs at a site. Most of these are associated with failure to provide adequate notice or to cooperate with government agencies or other PRPs in providing access and information. Liability may also be imposed if the landowner does not take reasonable steps to stop a continuing release, to prevent any additional harm, or to comply with land use restrictions. If a PRP is found to have not cooperated, they may still face liability. As stated above, in the case of expedited settlements and the De Micromis and Municipal Solid Waste exemptions, there is no judicial review available if the party is determined to be uncooperative.

Therefore, in order to take advantage of these liability protections, it would be prudent for any landowner or tenant to make certain they are in compliance with any federal, state, or local notice provisions. Furthermore, if a landowner or tenant receives any notice regarding potential liability, they should immediately notify their legal counsel and do their

utmost in cooperating with any requests for information or access.

¹ See id. § 9607(r)(2).

² See id. § 9607(r)(4).

³ See id. § 9601(35)(A).

⁴ See id. § 9601(35)(B).

⁵ See id. § 9601(35)(A) and (B).

⁶ See id. § 9622(g)(7).

⁷ See id. § 9622(g)(7)(B).

⁸ See id. § 9622(g)(7)(D).

⁹ See id. § 9622(g)(8)(A).

¹⁰ See id. § 9622(g)(8)(B).

¹¹ See id. § 9622(g)(11).

¹² See id. § 9601(35)(B)(v).

¹³ See id. § 9601(35)(B)(ii).

¹⁴ See id. § 9601(35)(B)(iv)(I).

¹⁵ See id. § 9601(35)(B)(iv)(II). ASTM Standard 1527-97 is the industry-accepted standard for conducting Phase I Environmental Site Assessments. This standard, however, has been updated by ASTM in 2000 and the most recent version is referred to as ASTM 1527-00. It appears that compliance with the most recent standard should ensure compliance with the 1997 standard based on similarities between the two standards.

¹⁶ See id. § 9601(35)(B)(iii).

Footnotes for Procedural Primer Cont'd from pg. 18

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

² O.C.G.A. § 50-13-40 et seq.

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

⁴ O.C.G.A. § 12-2-2(c)(2).

⁵ O.C.G.A. § 50-13-44.

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

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

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

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

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

¹¹ Id.

¹² O.C.G.A. § 50-13-41(b).

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

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

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

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

¹⁷ O.C.G.A. § 50-13-13(a)(3).

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

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

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

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

²² Ga. Comp. R. & Regs. r. 616-1-2-.30(1),

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

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

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

²⁵ O.C.G.A. § 9-11-5(e).

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

²⁷ Ga. Comp. R. & Regs. r. 616-1-2-

.07(1)(a).

²⁸ Ga. Comp. R. & Regs. r. 616-1-2-

.07(1)(c).

²⁹ Ga. Comp. R. & Regs. r. 616-1-2-

.07(1)(b).

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

³¹ O.C.G.A. § 9-11-15.

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

³³ Fed. R. Civ. P. 15(a).

³⁴ Ga. Comp. R. & Regs. r. 616-1-2-.08.

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

³⁵ Fed. R. Civ. P. 15(a).

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

³⁷ Ga. Comp. R. & Regs. r. 616-1-2-.13(2).

The grounds for intervention under the Administrative Procedure Act are set forth in O.C.G.A. § 50-13-14.

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

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

⁴⁰ Ga. Comp. R. & Regs. r. 616-1-2-.21(3).

In contrast, in a judicial review of a final agency decision, the evidence generally is limited to the record before the agency. O.C.G.A. § 50-13-19(g).

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

⁴² Upon a showing that a witness cannot or will not attend the hearing, the ALJ has discretion to

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- ¹ Pub. L. No. 107-118, 107th Cong. (codified as amended in scattered sections of 42 U.S.C.).
- ² 42 U.S.C. § 9601 *et. seq.*
- ³ *See id.* § 9604(k)(12)(A).
- ⁴ *See* O.C.G.A. § 12-8-200, *et seq.*
- ⁵ 42 U.S.C. § 9601(39)(A).
- ⁶ *See id.* § 9601(14).
- ⁷ *See id.* § 9601(39)(D). Note that \$50 million, or at least 25% of the funds available for 2002 through 2006 are earmarked for site characterization, assessment, and remediation of these “petroleum” sites. *See* § 9604(k)(12)(B).
- ⁸ *See id.* § 9601(39)(C).
- ⁹ *See id.* § 9601(39)(B).
- ¹⁰ *See id.* § 9604(k)(2).
- ¹¹ *See id.* § 9604(k)(4)(A).
- ¹² *See id.* § 9604(k)(3).
- ¹³ *See id.* § 9604(k)(4)(A).
- ¹⁴ *See id.* § 9604(k)(3)(B).
- ¹⁵ *See id.* § 9604(k)(4)(B).
- ¹⁶ *See id.* § 9622(g). De minimis settlements are available if a party can show that they contributed a minimal amount of hazardous substances as compared to the other hazardous substances at the site and the hazardous effects of its contribution in minimal; or , in the alternative, if the party is the owner of the property and they can show they did not contribute or allow the generation, transportation, storage, treatment, or disposal of any hazardous substance at the site. *See id.* § 9622(g)(1).
- ¹⁷ *See id.* § 9607(o)(1).
- ¹⁸ *See id.* § 9607(o)(4).
- ¹⁹ *See id.* § 9607(p).
- ²⁰ *See id.* 9607(p)(4)(A).
- ²¹ *See id.* 9607(p)(1).
- ²² *See id.* § 9607(p)(5)(A).
- ²³ *See id.* § 9607(p)(7).
- ²⁴ *See id.* 9607(p)(5)(B).
- ²⁵ *See id.* 9607(p)(7).
- ²⁶ *See id.* § 9607(o)(2) and § 9607(p)(2).
- ²⁷ Furthermore, the President’s determination of any of the above is not subject to judicial review.
- ²⁸ *See id.* § 9607(q)(3).
- ²⁹ *See id.* § 9607(q)(1).
- ³⁰ *See id.* § 9607(q)(1)(C).
- ³¹ *Guidance on Agreements with Prospective Purchasers of Contaminated Property*, 60 Fed. Reg. 34792 (1995).
- ³² It is unclear whether “migration” of hazardous substances during a purchaser’s term of ownership will be considered “disposal.”
- ³³ *See id.* § 9601(40).
- ³⁴ *See id.* § 9607(r)(2) and (3).

- ³⁵ *See id.* § 9607(r)(3).
- ³⁶ *See id.* § 9607(r)(2).
- ³⁷ *See id.* § 9607(r)(4).
- ³⁸ *See id.* § 9601(35)(A).
- ³⁹ *See id.* § 9601(35)(B).
- ⁴⁰ *See id.* § 9601(35)(A) and (B).
- ⁴¹ *See id.* § 9622(g)(7).
- ⁴² *See id.* § 9622(g)(7)(B).
- ⁴³ *See id.* § 9622(g)(7)(D).
- ⁴⁴ *See id.* § 9622(g)(8)(A).
- ⁴⁵ *See id.* § 9622(g)(8)(B).
- ⁴⁶ *See id.* § 9622(g)(11).
- ⁴⁷ *See id.* § 9601(35)(B)(v).
- ⁴⁸ *See id.* § 9601(35)(B)(ii).
- ⁴⁹ *See id.* § 9601(35)(B)(iv)(I).
- ⁵⁰ *See id.* § 9601(35)(B)(iv)(II). ASTM Standard 1527-97 is the industry-accepted standard for conducting Phase I Environmental Site Assessments. This standard, however, has been updated by ASTM in 2000 and the most recent version is referred to as ASTM 1527-00. It appears that compliance with the most recent standard should ensure compliance with the 1997 standard based on similarities between the two standards.
- ⁵¹ *See id.* § 9601(35)(B)(iii).

Cont'd footnotes for Procedural Primer

require that the witness, in lieu of testifying live at the hearing, testify at deposition or through written questions and responses. Ga. Comp. R. & Regs. r. 616-1-2-.20. Upon request, the ALJ also may issue subpoenas to compel attendance and the production of documents at such depositions or at the hearing. Ga. Comp. R. & Regs. r. 616-1-2-.19; see also O.C.G.A. § 50-13-13(a)(7), (b). A party seeking to compel the production of documents from a party may serve a notice to produce on that party without the necessity of a subpoena. Ga. Comp. R. & Regs. r. 616-1-2-.19(7). Enforcement of ALJ subpoenas may be had by application to the Superior Court for the county where the case is being heard. O.C.G.A. § 50-13-13(a)(7); Ga. Comp. R. & Regs. r. 616-1-2-.22(5).

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

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

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

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

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

⁴⁸ Uniform Superior Court Rule 6.2;

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

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

⁵⁰ Id.

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

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

⁵³ Uniform Superior Court Rule 6.2;

Uniform State Court Rule 6.2.

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

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

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

shall be determined by the ALJ based upon its reliability and probative value”).

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

⁸⁰ Id.

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

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

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

⁸⁴ Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰¹ O.C.G.A. § 50-13-19.

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

¹⁰³ O.C.G.A. § 50-13-41(e)(1)-(2).

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

¹⁰⁵ O.C.G.A. §§ 50-13-19, 50-13-20.1.

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

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

¹⁰⁸ O.C.G.A. § 50-13-19(d).

¹ The amendments, passed as H.B. 1406, were adopted by the House on March 8, 2002, and by the Senate on April 10, 2002. Governor Barnes is expected to sign the legislation.

² O.C.G.A. § 12-8-90 *et seq.*

³ O.C.G.A. § 12-8-200 *et seq.*

⁴ The Bill also amends HSRA by specifically providing that HSRA administration includes “reviewing and overseeing investigations, corrective action, and other actions by federal agencies required under this article and supporting the reduction of hazardous waste and pollution prevention activities by federal agencies,” and by providing that the hazardous waste trust fund may be used for such review and oversight.

⁵ H.B. 1406, Section 6, amending O.C.G.A. § 12-8-201 and enacting O.C.G.A. § 12-8-209.

⁶ H.B. 1406, Section 6, amending O.C.G.A. §§ 12-8-202 and 12-8-205.

⁷ O.C.G.A. § 12-8-202(b)(5).

⁸ O.C.G.A. § 12-8-206(a), prior to amendment.

⁹ *Id.*

¹⁰ O.C.G.A. § 12-8-206(b)(3) and (b)(4), prior to amendment.

¹¹ O.C.G.A. § 12-8-206(b)(6), prior to amendment.

¹² Formerly O.C.G.A. § 12-8-206(a).

¹³ O.C.G.A. § 12-8-207(b)(4)

¹⁴ Ga. Comp. R. & Regs. 391-3-19-.06(3)(a) (2002).

¹⁵ Ga. Comp. R. & Regs. 391-3-19-.06(3)(b)(3) (2002).

¹⁶ O.C.G.A. § 12-8-96.1.

¹⁷ One interesting question under this revised liability provision is what “reasonable efforts” to locate a person prior to commencing clean up will be required before liability may attach. The Bill provides no guidance on this question, which seems certain to lead to litigation.

¹⁸ O.C.G.A. § 12-8-96.1(a), as amended by H.B. 1406.

¹⁹ O.C.G.A. § 12-8-96.1(a).

2-20. Upon request, the ALJ also may issue subpoenas to compel attendance and the production of documents at such depositions or at the hearing. Ga. Comp. R. & Regs. r. 616-1-2-.19; see also O.C.G.A. § 50-13-13(a)(7), (b). A party seeking to compel the production of documents from a party may serve a notice to produce on that party without the necessity of a subpoena. Ga. Comp. R. & Regs. r. 616-1-2-.19(7). Enforcement of ALJ subpoenas may be had by application to the Superior Court for the county where the case is being heard. O.C.G.A. § 50-13-13(a)(7); Ga. Comp. R. & Regs. r. 616-1-2-.22(5).

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

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

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

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

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

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

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

⁵⁰ *Id.*

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

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

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

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

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

⁵⁷ Fed. R. Civ. P. 41(a).

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