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State Bar of Georgia's
Midyear Meeting
Sheraton Colony Square,
Atlanta

Significant Stakeholder Input Shapes Georgia's Phase II Permits NPDES

General Storm Water Permits for Construction Activity

by Anne H. Hicks
Holden & Associates, P.C.**Introduction**

On Aug. 13, 2003, the Georgia Department of Natural Resources, Environmental Protection Division (EPD) issued three general National Discharge Elimination System (NPDES) permits (Phase II General Permits or Permits)¹ that regulate storm water discharges to waters of the state associated with construction activities disturbing one or more acres. The Phase II General Permits, authorized by the Federal Clean Water Act² (CWA) and the Georgia Water Quality Control Act,³ replace the NPDES General Permit No. GAR 100000 (Phase I General Permit) that was in effect from Aug. 1, 2000 to July 31, 2003 and regulated construction sites between five and 250 acres. The permits will be in effect until July 31, 2008.

The Phase II General Permits are the result of significant, and perhaps unprecedented, input from various organizations representing the environmental and regulated communities. For two to three years prior to the issuance of the Phase II General Permits, these stakeholders met and corresponded with EPD to offer revisions to the confusing state system for the control of erosion, sedimentation and storm water flowing from construction activities. Although there is still room for improvement, the recent amendments to this area of state law streamline the regulation of land disturbing activities, while continuing to protect waters of the state from the negative effects of storm water runoff.

The table on page five summarizes the applicability of each Phase II General Permit, some important provisions of these permits and how they compare to the original Phase I General Permit. The language in the three Phase II General Permits is substantially similar; with the exceptions noted in the table. Each Phase II General Permit is at least 30 pages long and highly technical in nature. Therefore, this article, and particularly Section V, highlights only some of the critical aspects of the new permits.

History of the General Storm Water Permit System

The CWA prohibits the discharge of any pollutant⁴ into waters of the United States from a point source unless the discharge is authorized by a NPDES permit

or another exception applies.⁵ The U.S. Environmental Protection Agency (EPA) allows authorized states, such as Georgia, to issue general NPDES permits to certain categories of industrial activities, including construction activities. Unlike an individual permit that applies to an individual discharger, a general permit applies to an entire class of discharges.

In response to the 1987 Amendments to the CWA, EPA developed Phase I of the NPDES Storm Water Program in 1990.⁶ Under Phase I, EPA required permit coverage for storm water discharges from certain municipal separate storm sewer systems and eleven categories of industrial activity, including construction activity disturbing five or more acres of land. In April 1990, EPD amended its Rules for Water Quality Control⁷ (WQC Rules) to allow for the issuance of general NPDES permits. The WQC Rules provide that “storm water point sources” are “point sources subject to the NPDES permit program.”⁸ In January 1991, EPA granted EPD authority to issue general NPDES permits.

In September 1992, EPD issued the first of five different general NPDES permits for construction activities disturbing greater than five acres of land. Each of the permits was administratively appealed by interested parties and never became effective. The first four general NPDES permits were appealed administratively by Terrence Hughey, the Sierra Club and other environmental groups. The fifth general NPDES permit was appealed in 1999 by members of the regulated community, including utilities and homebuilder’s. After months of settlement negotiations with environmentalists and members of the regulated community, EPD issued the Phase I General Permit on Aug. 1, 2000 for the regulation of storm water discharges into waters of the State from construction activity disturbing between five and 250 acres.

On Dec. 8, 1999, EPA established the Phase II storm water regulations that address construction activities disturbing between one and five acres of land. In response, EPD amended its WQC Rules again in April 2001 to incorporate the federal Phase II regulations.

Feedback from the Stakeholder Groups

Only five months after issuing the Phase I General Permit, Georgia’s Board of Natural Resources (the DNR Board) passed a resolution on Jan. 24, 2001, requesting an audit of the state erosion and sedimentation and general storm water permit programs, including recommendations on whether legislative changes to the Georgia Erosion and Sedimentation Act (E&S Act)⁹ were needed. Subsequently, the Georgia Department of Audits conducted an Erosion and Sedimentation Program Performance Audit in September 2001.

Later in 2001, EPD began assessing the Phase I General Permit and the E&S Act to determine how the overlapping programs could be improved. EPD worked with the Erosion and Sediment Control Overview Council (Council)¹⁰ and formed the General Permit Advisory Committee (GPAC, also referred to as the Storm Water Advisory Committee) to address concerns and ideas for clarifying the Phase I General Permit. GPAC’s members included developers, utilities, contractors, local governments, environmental groups and others involved in implementing or potentially enforcing the general storm water permits.¹¹

Throughout 2002, the Council and GPAC met and corresponded with EPD to discuss changes to the E&S Act and the Phase I General Permit. EPD produced a series of “Concept Papers” that described proposed amendments to streamline these regulatory programs. It became increasingly clear that EPD required additional inspectors to ensure that the purpose of the general storm water program – keeping soil out of state

waters – was enforced. Imposing permit fees on the entities regulated by the storm water permits became a growing reality. There was a general consensus between the stakeholders and EPD that the E&S Act needed to be amended to establish a permit fee system, be more consistent with the general storm water permits and to minimize the duplicate regulation of the same activity (land disturbance) by multiple agencies (EPD and local governments). In exchange for their support of the permit fee system, members of the regulated community understood that EPD would reduce the monitoring requirements and make other specific changes to the Phase I General Permit.

Amendments to the E&S Act and Their Interplay with the Phase II General Permits

After nearly two years of discussions with the Council and the GPAC stakeholder groups, House Bill 285 was introduced in the Georgia General Assembly in February 2003. After the General Assembly approved the bill it was signed by Gov. Sonny Perdue. The amendments to the E&S Act became effective on July 1, 2003.

House Bill 285 significantly amended the E&S Act by:

- Requiring local governments, in order to become certified local issuing authorities (LIAs),¹² to amend their local land disturbance ordinances by July 1, 2004 to *meet or exceed* the standards and requirements of a state general permit,¹³ except that the provisions for monitoring, reporting, inspections, design standards, turbidity standards and education and training *cannot exceed* the requirements in the state general permit.¹⁴
- Amending O.C.G.A. § 12-7-7 so that in a jurisdiction where no LIA exists, a party disturbing one or more acres must *only* comply with a state general permit and does not need to obtain an individual land disturbing activity (LDA) permit from EPD.¹⁵ However, if the construction project is within a LIA jurisdiction, the party

message from the chair

e. peyton nunes

On Aug. 1 and 2, the Section held its annual Summer Seminar at the Ritz -Carlton Amelia Island. Robert Fabricant, who recently resigned but at the time was the Environmental Protection Agency's General Counsel, kicked off the event by speaking to attendees about some of the important cases the EPA is involved in. Over the course of the two day seminar, various panels spoke on traditional environmental topics, such as air and water; law-based topics, including takings/commerce clause issues and administrative law procedures; and "sign of the times" topics, such as the HSRA panel and the homeland security discussions. Many thanks to all of the panel participants.

Earlier this year, Harold Reheis resigned after a long and distinguished career as Director of Georgia's Environmental Protection Division. In recognition of his many accomplishments, and as a final farewell, the section, in conjunction with Alston & Bird LLP, hosted a cocktail reception for Harold Reheis on Sept. 29 from 5:30 to 7 p.m. at Alston & Bird's Atlantic Center Plaza location.

Finally, it's time again to nominate members for section officer positions. Susan Richardson, currently Chair-elect, will automatically become Chair in January 2004. Ballots for the remaining officer positions will be distributed in early October, so please remember to cast your vote and return your ballots by the specified date.

must still obtain a LDA from the local authority and comply with the state general permit.

- Requiring all persons involved in land development, design, review, permitting, construction, monitoring or inspections after Dec. 31, 2006, to meet certain education and training requirements developed by the State Soil and Water Conservation Commission (Commission).¹⁶ In establishing an education and training program, the Commission must consult with EPD and a 13-member Stakeholder Advisory Board to be appointed by the governor.¹⁷

- Striking the mandatory minimum penalty provisions and instead allowing EPD or the LIA to issue mandatory stop work orders when a party fails to maintain a stream buffer or "significant amounts of sediment," as determined by the LIA or EPD, have been discharged into state waters and where best management practices (BMPs) have not been properly designed, installed and maintained.¹⁸

- In addition, House Bill 285 amended the Georgia Water Quality Control Act, by requiring the DNR Board to establish a general storm water permit fee system by Dec. 31, 2003.¹⁹ These fees will be used to hire additional EPD inspectors to enforce the Phase II General Permits.²⁰

Phase II General Permits

Development of the Drafts Permits

As the July 31, 2003 deadline for the expiration of the Phase I General Permit approached, EPD increasingly sought feedback from the GPAC regarding specific changes to the Permit. GPAC members generally agreed that separate permits were needed for infrastructure projects and for projects within common developments, to avoid the confusing differentiation of such projects in the Phase I General Permit.

In May and June 2003, EPD distributed at least three draft versions of the Phase II General Permits to the

GPAC, prior to the formal notice and comment period for the draft Permits. GPAC members provided substantial written and oral comments to EPD during this time. EPD held at least four meetings with the stakeholder groups to attempt to resolve the most controversial permit changes. Bob Kerr, director of DNR's Pollution Prevention Assistance Division and EPD's Larry Hedges chaired the meetings. EPD's Mark Wyland spearheaded the dubious task of incorporating the numerous revisions to the permits that resulted from the meetings with stakeholders.

Following a 30-day public comment period,²¹ on Aug. 13, 2003, EPD issued the following Phase II General Permits:

- NPDES General Permit No. GAR 100001 for Storm Water Discharges Associated with Construction Activity for Stand-Alone Construction Projects (the Stand-Alone Permit);

- NPDES General Permit No. GAR 100002 for Storm Water Discharges Associated with Construction Activity for Infrastructure Construction Projects (the “Infrastructure Permit”); and

- NPDES General Permit No. GAR 100003 for Storm Water Discharges Associated with Construction Activity for Common Developments (the “Common Development²² Permit”).

The Common Development Permit generally applies to construction activities involving multiple structures under one plan of development, where the primary permittee (i.e. the owner or operator of the land) chooses to use secondary permittees. “Secondary permittee” is narrowly defined as “an individual builder, utility company, or utility contractor that conducts a construction activity within a common development.” If secondary permittees are not utilized for the development, the stand-alone permit applies. The infrastructure permit generally applies to linear construction activities, such as roads and utility lines.

In its Aug. 13, 2003 letter responding to the formal public comments received on the draft Permits, EPD stated:

EPD believes that these permits capture the agreements and understandings reached in the GPAC, and are in accordance with the requirements of the Federal Clean Water Act and the Georgia Water Quality Control Act. EPD firmly believes that these permits provide enhanced protection for the environment while lowering costs to the regulated community.²³

Significant Changes in the General Storm Water Permits

As depicted more briefly in the table, the major changes reflected in the Phase II General Permits, compared to the Phase I General Permit, include the following:

1. Monitoring Requirements²⁴

The primary permittee’s responsibility to conduct sampling has been substantially reduced to the following two key sampling events:

(1) For each area of the site that discharges to a receiving stream,²⁵ the first rain event > 0.5 inches after all clearing and grubbing operations have been completed in the drainage area of the sampling location; and

(2) For each area of the site that discharges to a receiving stream, the first rain event \geq 0.5 inches that occurs either 90 days after the first sampling event [in (1) above] or after all mass grading²⁶ operations have been completed in the drainage area of the sampling location, whichever comes first.

In addition, if, during either of the two sampling events previously described, BMPs for preventing and minimizing erosion and resultant sedimentation are found not to be properly designed, installed and maintained, corrective action shall be defined and implemented within two business days and turbidity samples shall be taken in that area for each subsequent rain \geq 0.5 inches until the selected turbidity standard is attained or until post-storm event inspections determine that BMPs are properly designed, installed and maintained.²⁷

2. Permit Fee System

By submitting a Notice of Intent for coverage under one of the Phase II General Permits, the primary permittee agrees to pay a per acre fee for each acre of disturbed land. EPD’s proposed Erosion and Sedimentation Control (E&SC Rules) establish an \$80 per acre permit fee system that will be presented to the DNR Board at its October 2003 meeting.²⁸

3. Best Management Practices

The Phase II General Permits require construction activities to utilize BMPs for preventing and minimizing erosion and storm water runoff at construction sites. The Phase II General Permits now specifi-

cally incorporate the BMPs that are described in the most recent “Manual for Erosion and Sediment Control in Georgia” published by the Commission.

Part III.C. of the Phase II General Permits retains the provision protecting permittees that “proper design, installation and maintenance of best management practices shall constitute a complete defense to any action by the [EPD] Director or to any other allegation of noncompliance with Parts III.C.3 and Part III.C.4.” A new sentence in this part clarifies that permittees will not be subject to violations for “BMP maintenance as a result of the permittee’s routine inspections.” In addition, this part now provides that if, during the course of routine site inspections, a permittee observes BMP failures (e.g. silt fences that have collapsed), the permittee must correct the BMP failure and submit a summary of violations to EPD. Nonetheless, mere failure of a BMP does not necessarily warrant a legal conclusion that the BMP was improperly designed, installed or maintained if BMPs are promptly repaired.

4. Erosion, Sedimentation & Pollution Control Plans

The major document required under the Phase II General Permits is the Erosion, Sedimentation and Pollution Control Plan (ES&PC Plan). The ES&PC Plan must be prepared by a “design professional” and contain the information in Part IV of the applicable Permit, including a description of BMPs and receiving waters or outfalls that will be sampled. The Phase II General Permits require the primary permittee to prepare only an ES&PC Plan, rather than both an ES&PC Plan and a Comprehensive Monitoring Program. Essentially, the information in the two documents have been merged into one plan. Furthermore, in jurisdictions where there is no LIA, ES&PC Plans now must be submitted to EPD’s Water Protection Branch and the local Soil and Water Conservation District office.²⁹ In addition, for projects \geq 50 acres, a copy of the ES&PC

Plan must also be sent to the appropriate EPD district office.

5. Education Requirements

As a result of House Bill 285, all “qualified personnel” and “design professionals,” engaging in inspections and preparing ES&PC Plans under the permits, must comply with specific education and training requirements. After Dec. 31, 2006, design professionals and qualified personnel must complete an erosion

and sediment control certification course approved by the Commission.□

Endnotes

1. See <http://www.ganet.org/dnr/environ> (EPD’s web site) for a copy of the Phase II General Permits. Click onto “Technical Guidance” and scroll down to “Storm Water” to see the permits.

2. 33 U.S.C. §§ 1251 *et seq.*

3. O.C.G.A. §§ 12-5-20 *et seq.*

4. The definition of “pollutant” under the CWA includes rock, sand, cellar dirt and industrial, municipal and agricultural waste. 40 C.F.R. § 122.2.

5. See 33 U.S.C. §§ 1311 and 1342.

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GEORGIA’S PHASE II GENERAL STORM WATER PERMITS FOR CONSTRUCTION ACTIVITY				GEORGIA’S EXPIRED PHASE I GENERAL PERMIT
	Stand-Alone Permit	Infrastructure Permit	Common Development Permit	
Scope of Coverage Under the Permit	Construction activities ≥ 1 acre that are not part of a Common Development where the primary permittee chooses not to use secondary permittees	Construction activities ≥ 1 acre that are not part of a Common Development that are being conducted by an Infrastructure Company or Infrastructure Contractor	Construction activities ≥ 1 acre in a contiguous area where multiple separate & distinct construction activities may be taking place at different times on different schedules under one plan of development or sale, where the primary permittee chooses to use secondary permittees	Construction activities between 5 and 250 acres. Distinctions made for linear (infrastructure) projects and Common Developments
Examples of Projects Covered Under the Permit	Stand alone buildings such as schools, hospitals and gas stations	Roads, gas pipelines, substations, high voltage electric transmission lines, telecommunications lines, water & sewer lines	Subdivisions, industrial parks	All projects
Exceptions to Coverage	Agricultural & silvicultural practices	(1) Agricultural & silvicultural practices; (2) Routine maintenance projects that disturb < 5 acres if certain conditions are met; and (3) Railroad construction projects	Agricultural & silvicultural practices	Agricultural & silvicultural practices
Sampling Requirements	First ½” rain event after clearing & grubbing complete + first ½” rain 90 days later or after all mass grading complete + after each ½” rain if BMPs improperly designed, installed or maintained. Samples taken during normal business hours.	Same as Stand-Alone Permit; however, representative sampling of streams & outfalls is also allowed – see note 25 below.	Same as Stand-Alone Permit	Following various ½”, 1” and 2” rain events. Samples must be taken within required time period, 24 hours a day.
Routine Site Inspections	Every 7 days & within 24 hours of end of storm with ≥ ½” rainfall	Every 14 days & within 24 hours of end of storm with ≥ ½” rainfall	Every 7 days & within 24 hours of end of storm with ≥ ½” rainfall	Every 7 days & within 24 hours of end of storm with ≥ ½” rainfall

Wetlands Enforcement 101

by William W. Sapp

United State's Environmental Protection Agency

Introduction

To the uninitiated, wetlands enforcement can seem confusing. A number of questions can, and often do, arise while the Army Corps of Engineers or the Environmental Protection Agency pursues a potential violator in an enforcement action. Which agency is going to take the lead? Can the agencies switch enforcement responsibilities mid-stream? Do the agencies need a warrant to inspect the violator's property? Will the action be administrative, civil, criminal or all of the above? What role will the Department of Justice assume in the case? Will the violator have to restore the disturbed wetland? These questions and several more are addressed in this article.

The article begins by explaining the enforcement responsibilities of the EPA and the Corps and then briefly summarizes the enforcement tools that each can employ in enforcement cases. The article is not meant to be all-encompassing; instead it aims at providing a basic introduction to the wetlands enforcement regime.

Corps and EPA Enforcement Responsibilities

The Corps and EPA have overlapping enforcement responsibilities for protecting wetlands under the Clean Water Act (CWA).¹ The two agencies set forth their respective enforcement duties in 1989 by entering into a memorandum of agreement.² In accordance with this MOA, the Corps, with its extensive field resources, conducts the majority of initial investigations to identify violations.³ Furthermore, the Corps is the lead enforcement agency for violations of Corps permits and for certain unpermitted discharges. The latter category includes: i) violations that do not involve repeat or flagrant vio-

lators, ii) cases where EPA has not requested to be the lead enforcement agency, and iii) violations that the Corps has not yet referred to EPA.⁴ EPA typically assumes the lead on all other unpermitted discharges and in special cases. "Special cases" are wetlands violations that involve the exemptions under section 404(f) of the Clean Water Act for agriculture and silviculture in addition to anything EPA defines as a special case.⁵

Even after an enforcement action has commenced, the lead agency can always refer an enforcement matter to the other agency to take advantage of that agency's expertise and resources.⁶ For instance, the Corps will refer cases involving "flagrant violators" to the EPA for further prosecution. Typically, the Corps and EPA work well together realizing that they have a common enforcement mission to protect wetland resources.

The Wetlands Enforcement Toolkit

The enforcement tools available to the agencies are several and are designed to cover wetlands violations both large and small. Whether these tools do the job, however, depends in large measure on the resources the agencies have available at the time of the action and on the continually evolving body of wetlands law.

For any given enforcement case, the agencies have three basic options at their disposal i) administrative enforcement, ii) civil enforcement in conjunction with the Department of Justice; and iii) criminal enforcement in conjunction with the Department of Justice. It is not uncommon for agency enforcement officials to apply more than one of the options in a particular case. Thus, if you are involved in a wetlands enforcement case, it is important that you understand not only the respective enforcement responsibilities of each of the

agencies, but also each tool in the wetlands enforcement toolkit.

A. Administrative Enforcement Options

1. Information Requests

Both the Corps and EPA have broad authority under Section 308 of the CWA to collect information related to any potential violation of Section 404. This includes information about the financial status of the violator, economic benefit of the violation, the existence of government contracts, development plans, and the specifics on the violation itself.⁷ Corps and EPA inspectors can also go on the violator's property as long as they do so at reasonable times and have their credentials in hand. Although it is not required, the agencies often obtain administrative warrants when violators refuse to allow entry.

2. Corps Cease and Desist Orders and EPA Compliance Orders

Both the Corps and EPA can issue orders demanding that violators cease activities causing wetlands violations. The Corps issues "cease and desist" orders,⁸ whereas EPA issues "compliance" orders.⁹ These orders typically require removal of the illegal fill and restoration of the damaged wetlands. They also set the stage for further enforcement actions by giving notice to recipients of the violation and by demanding compliance.¹⁰

Typically, these administrative orders lead to negotiations between the violator and either the Corps or EPA. If a settlement is reached, and often times they are, the settlement is embodied in an administrative order on consent that can be entered by the agency without assistance from the Department of Justice or a Federal Court. If a violator does not comply with such an order, he or she may end

up in Federal District Court and can be subject to a civil penalty of \$27,500¹¹ per day in addition to judicial penalties for the underlying violations under Section 309(d) of the Act.

If the Corps or EPA, depending on which agency issued the order, cannot reach a settlement with the violator, then the Agency may refer the case to DOJ. DOJ will usually try to broker a settlement. If this fails, DOJ will file suit in Federal District Court.

It is important to understand that violators cannot seek immediate judicial review of cease and desist orders or compliance orders.¹² The Corps and EPA have been able to resist defending these orders on grounds of prematurity and lack of finality because the CWA does not provide for such judicial review.¹³ Violators who have sought judicial review of cease and desist and compliance orders have not prevailed.¹⁴ Therefore, the violator who receives a cease and desist order or compliance order has two options: i) defy the order and wait for the DOJ to prosecute, or ii) comply with the order and enter into settlement discussions with the Agency involved to work out an acceptable resolution.¹⁵ In the large majority of cases, the violators opt for the latter option. One of the quickest ways for a violator to end up in Federal District Court with a DOJ wetlands attorney seeking significant penalties, is to ignore multiple cease and desist or compliance orders.

3. *After-the-Fact Permits*

The Corps, as the permit issuing agency, also has the option to process “after-the-fact” permits for violators who have either released unpermitted discharges of dredged or fill material or violated the conditions of a Corps Section 404 permit.¹⁶ Under certain circumstances, after-the-fact permits allow violators to leave unauthorized discharges in waters of the United States if they mitigate the impact of these discharges. For example, if a violator fills a wetland without a permit and builds a house on top of this fill before being discovered, the Corps

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does not have to force the violator to remove the fill and the house. Rather, the Corps can issue an after-the-fact permit, requiring the violator to provide compensatory wetlands mitigation for the damage caused.

The Corps can only issue an after-the-fact permit if the lead enforcement agency, which may be the EPA, is satisfied that an acceptable enforcement result has been reached. Furthermore, after-the-fact permits are generally reserved for situations where it appears that the fill would have satisfied the Section 404(b)(1) Guidelines and there was no wilfulness or recalcitrance involved during the settlement process.

To receive an after-the-fact permit, violators must complete a permit application similar to the application for an initial wetlands permit.¹⁷ The Corps will reject after-the-fact permits in three situations: i) if the violator, after attempting to restore the site, fails to “eliminate current and future detrimental impacts to the satisfaction of the district engineer”; ii) if legal action is still pending; or iii) if a federal, state, or local authorization or certification for the after-the-fact permit has been denied.¹⁸ If none of these exceptions are present, then the Corps processes after-the-fact permits in the same manner as a standard permit application, by applying EPA’s Section 404(b)(1) Guidelines¹⁹ and by determining whether the activity would be contrary to the public interest.²⁰ If the Corps denies an after-the-fact permit, the violator must take appropriate corrective action to restore the site.²¹

4. *Penalty orders*

In the 1987 amendments to the CWA, Congress granted both the Corps and EPA administrative penalty

authority, but limited the Corps’ authority to violations of permit conditions and limitations.²² In contrast, EPA’s penalty order authority extends to any violation of the CWA.²³ Section 309 of the CWA, the source of both agencies’ administrative penalty authority,²⁴ establishes two classes of penalties.²⁵ Class I penalties may not exceed \$11,000 per violation or a total of \$27,500 for multiple violations.²⁶ Class II penalties, which are directed at more egregious violations, may neither exceed \$11,000 per day nor \$137,500 in the aggregate.²⁷

The Corps has promulgated Class I penalty procedures that allow a violator thirty days from the time of receiving the penalty to request a hearing.²⁸ The Corps notifies the public of the penalty order and establishes a thirty-day comment period.²⁹ All hearings are informal and the violator may present evidence orally or in writing.³⁰ Although another Corps employee may act as the hearing officer, the District Engineer ultimately determines the outcome of the case.³¹ If a violator does not prevail at a hearing, his only recourse is to file suit in Federal District Court.³² The Corps has not promulgated Class II penalty procedures, and as a result does not pursue Class II penalties. Instead it refers cases that would warrant higher penalties to the DOJ, or, in some instances, to the EPA.

Both EPA Class I and Class II penalty procedures include a hearing.³³ Although the Class II penalty hearings are subject to Section 554 of the Administrative Procedures Act and the Class I penalty hearings are not, the two types of hearings are very similar in practice. The only readily

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EPA's Evolving 'All Appropriate Inquiry' Rule - Broad Implications for Real Estate Transactions

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When President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields Law) in January 2002, the law amended the "Innocent Landowner Defense" under CERCLA (i.e. Superfund), in addition to providing two new categories of liability protection for contiguous property owners and bona fide prospective purchasers. The Brownfields Law also requires EPA to develop regulations that will establish standards and practices for conducting "all appropriate inquiry" into the prior ownership and use of sites in order to meet superfund's requirement. Importantly, the law also designates the ASTM Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process" (hereinafter the "ASTM Phase I Standard") as the interim technical standard. Since 1993, the ASTM Phase I Standard has routinely been relied upon by property owners, prospective purchasers, lenders and attorneys to meet the all appropriate inquiry obligation. While the widely recognized ASTM Phase I Standard will serve as the interim procedure until Jan. 11, 2004, it may well be replaced with a new, more comprehensive EPA Rule currently being developed. The new rule will also establish the procedures to receive funding under the EPA Brownfields Program. Significantly, because of the very general definition of what constitutes a "Brownfield" site, EPA's new rule will effect virtually all commercial real estate transactions, not just those involving Brownfields.

In order to develop standards and practices that reflect the positions of the various stakeholders, EPA opted to assemble a group of 25 organizations and associations identified as the "Negotiated Rule Making Committee," establishing the so-called "Reg-Neg" process. This approach is a departure from the EPA's typical procedure of drafting the proposed rule in-house and then putting it out for review and com-

ment. Committee members first assembled in Washington in late April to establish basic processes and define goals and objectives that strike a balance of the often divergent views of the various stakeholders. To guide EPA's process the agency published "EPA's Common Elements Guidance" on March 6 which established 10 criteria to be included in the federal "All Appropriate Inquiry Rule." The committee met most recently in early September to further discuss the definition of "Environmental Professionals," as well as expanding the scope of current Phase I environmental site assessments to include interviews with adjoining property owners. This approach is particularly problematic for a number of reasons. There is a lack of statutory basis for conducting such interviews and contacting adjoining landowners could significantly compromise the confidential nature of pre-acquisition environmental due diligence assessments. In addition, the reliability of information obtained in such interviews may be difficult to establish and many types of information likely to be gained from such interviews can be more readily and efficiently obtained from public records.

One important question that quickly emerged is what role the ASTM Phase I Standard will play in the process. Pursuant to the National Technology Transfer and Advancement Act (NTTA), federal agencies are required to adopt existing consensus standards wherever possible. In coordinating with other federal, state and local agencies, NTTA seeks to achieve greater reliance on voluntary standards (such as the ASTM Phase I Standard) and to lessen dependence on in-house standards. Indeed, Congress said as much in establishing the ASTM Phase I Standard as the interim procedure in the Brownfields Law. It appears to be EPA's position, however, that the ASTM Phase I Standard – the single most financially successful standard in that organization's history - does

not go far enough to meet EPA's interpretation of its Congressional mandate. The agency has also taken the position that it reserves the right to proceed with its own rulemaking notwithstanding the outcome of the Reg-Neg Process. Patricia Overmeyer, who is spearheading EPA's efforts through the Office of Brownfields Cleanup and Redevelopment, stated the agency will also need to have the new rule reviewed by OMB, among other federal agencies, before being finalized. This "process could take a year, a month or a day," according to Overmeyer.

Alton R. "Tony" Brown, III, SCSM/CLS, the longstanding chairman of the International Council of Shopping Centers (ICSC) Environmental Subcommittee, was appointed by EPA's committee to represent the member-stakeholders of the ICSC. "At this preliminary stage of the of the discussions, no positions are being taken by any of the stakeholders in favor of getting general concepts out on the table from which EPA will draft proposed language for review and comment," said Brown. He points out that while "the ASTM document looms large in the discussions, there are a number of issues on the table that go beyond the existing Phase I Scope." According to Brown, "the commercial real estate industry is fairly represented at the bargaining table." David A. Luick, Regional Environmental Real Estate Manager for Target Corporation, serves as the ICSC alternate.

Echoing ICSC's sentiments, Charles "Chic" Creales, National Site Assessment coordinator and principal at GZA GeoEnvironmental in Needham, Mass., acknowledges that discussions at the first stakeholder meeting were philosophical in nature; no details have been discussed and no level of consensus has emerged. According to Creales, "the people at the table are now getting a taste of the difficulty in going from abstract concepts to regulations that will meet the

needs of differing interests.” For example, EPA’s mandate to investigate “past owners and operators” of a facility poses significant challenges to the Phase I practitioner as the ability to identify such parties can be burdensome and add significant cost to the environmental site assessment process.

As most real estate professionals know, the completion of Phase I Environmental Site Assessments is important for a number of reasons beyond the ability to establish CERCLA’s Innocent Landowner Defense. A thorough understanding the environmental issues at a property helps parties allocate risk and avoid costly construction delays. Virtually every lender, consultant and real estate professional in the United States recognizes the ASTM Phase I

Standard as “the” process for evaluating environmental impairment liability. According to committee member Julie Kilgore of Wasatch Environmental, “the ASTM Standard gives us two things: a common language and a baseline. If EPA moves much beyond the ASTM process, the decision will need to be made as to what the purpose of the assessment will be.” The rancor and debate that characterized the development of ASTM Phase I Standard will not be so easily avoided if substantial portions of the document are not reflected in the new EPA rule.

The old comparison between *legislation* and *sausage* seems to have some applicability here. What remains clear is that the Reg-Neg process in which EPA is now engaged may be significantly more contentious

than the agency anticipated. Expanding the scope of Phase I inquiries beyond that which is either necessary or appropriate will almost certainly be the subject of considerable resistance by the regulated community. It remains possible that EPA will simply choose to delay the implementation of the new rule beyond the Jan. 11, 2004 deadline set by Congress in favor of maintaining the status quo. The new rule, however, could have a significant effect on virtually all commercial real estate transactions. In the meantime, the ASTM Phase I Standard will continue to be widely relied upon for meeting the all appropriate inquiry standard and business needs of the real estate community. Stay tuned. □

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6. 50 Fed. Reg. 47990 (November 16, 1990) and 57 Fed. Reg. 11394 (April 2, 1992).

7. Ga. Comp. R. & Regs. r. 391-3-6 *et seq.*

8. Ga. Comp. R. & Regs. r. 391-3-.16(3)(a). “Storm Water Point Source” is defined as “a conveyance or system of conveyances (including pipes, conduits, ditches, and channels or sheet flow which is later conveyed) primarily used for collecting and conveying storm water runoff excluding conveyances that discharge storm water runoff combined with municipal sewage. *Id.* at 391-3-.16(2)(c).

9. O.C.G.A. §§ 12-7-1 *et seq.*

10. The Council’s mission, pursuant to O.C.G.A. § 12-7-7.1(f), is to “provide guidance on the best management practices for implementing any erosion and sediment control plan” [that the Department of Transportation (“DOT”) or the State Road and Tollway Authority must prepare for any construction or main-

tenance project disturbing one or more acres] and “may develop recommendations governing the preparation of plans and the installation and maintenance of best management practices.” Members of the Council include DOT, EPD, the Georgia Regional Transportation Authority, a professional engineer and two representatives of the highway contracting industry certified by DOT.

11. Members of GPAC included representatives of local governments throughout the State, the Upper Chattahoochee Riverkeeper, the Home Builders Association of Georgia, the Georgia Branch, Associated General Contractors, Georgia Power Company, Georgia Transmission Corporation, Atlanta Gas Light Company and various consultants and engineers involved in implementing the Phase I General Permit.

12. “Local issuing authority” means the governing authority of any county or municipality which is certified pursuant to the procedures in O.C.G.A. § 12-7-8. *See* O.C.G.A. § 12-7-3(10).

O.C.G.A. § 12-7-8, in turn, requires the DNR Board to establish Rules setting forth the requirements and standards for certification and decertification of a LIA. EPD will publish amendments to its Erosion and Sedimentation Control Rules (“E&SC Rules”), Ga. Comp. R. & Regs. r. 391-3-6.01 *et seq.*, for public comment in September 2003. The E&SC Rules should be adopted by the DNR Board in October 2003.

13. The definition of “state general permit” is “the National Pollution Discharge Elimination System general permit or permits for storm water runoff from construction activities as is now in effect or as may be amended or reissued in the future pursuant to the state’s authority to implement the same through federal delegation” under the CWA and O.C.G.A. § 12-5-30 (the GWQCA). Therefore, this term now refers to the Phase II General Permits.

14. O.C.G.A. § 12-7-8. This language may be somewhat confusing

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Wetlands

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apparent distinction is that the Class II penalty hearings are conducted by an administrative law judge and the Class I penalty hearings are conducted by a regional judicial officer.³⁴ Both types of hearings are similar to a trial; however, the rules of evidence are relaxed and hearsay is typically allowed in.

Unlike cease and desist and compliance orders, violators can seek judicial review of penalty orders.³⁵ Few violators have sought review and fewer still have been successful. For example, in *Hanson v. United States*, the court upheld a \$24,000 Class I penalty in a wetlands enforcement case.³⁶

Infrequently, these penalties are overturned. This occurred in *Hoffman Homes, Inc. v.*

Administrator, U.S. EPA,³⁷ where, after a prolonged legal battle, a developer was able to persuade the Seventh Circuit to vacate a Class II administrative penalty because the EPA could not demonstrate to the Court's satisfaction that it had jurisdiction over the .8 acre isolated wetland the developer had filled.³⁸

One drawback of seeking an administrative penalty order is that the agency pursuing it cannot seek the restoration of the site. The penalty is all that the agency can hope to obtain. In many situations leaving the site unrestored is unacceptable and the agency is forced to refer the case to DOJ if a settlement cannot be reached that includes restoration. It is for this reason that the agencies will often issue a cease and desist order or a compliance order that requires restoration in tandem with a penalty order. If restoration is deemed necessary, then the agency can enforce the

cease and desist or compliance order with the help of DOJ. However, if an agency moves forward with an administrative penalty, and then follows later with a civil action to obtain restoration, the agency cannot seek both administrative and judicial penalties for the same violation.³⁹

B. Civil Judicial Enforcement

As mentioned above, the Corps and EPA can pursue violators through civil judicial enforcement if the administrative enforcement tools do not bring the desired result or are simply inadequate to deal with the violations. In some cases a maximum administrative fine of \$137,500 is not sufficient to get the attention of a fla-

grant violator. In other cases, restoration is an imperative and civil judicial enforcement is the only

vehicle to achieve that end. The Corps often goes directly to the appropriate local U.S. Attorney's office to seek assistance.⁴⁰ The EPA typically refers its cases to the Environmental Defense Section of DOJ, which is located in Washington, D.C. Once a case arrives in Federal District Court, the court has the authority under the CWA to enjoin the violator's activities, order restoration and assess fines of up to \$27,500 per day per violation.⁴¹ Generally, a new violation occurs for every day in which an illegal fill remains on a site.⁴² Thus, penalties for wetlands violations in Federal District Court can be substantial. Also, the "continuing-violation" approach allows courts to grant injunctive relief even in cases in which a fill has been in place a significant amount of time.⁴³ In such cases, effectively, there is no statute of limitations.

In calculating civil penalties, courts

often determine, as they should, the appropriate penalty amount by calculating the maximum penalty and then using the factors contained in Section 309(d) of the CWA to determine whether a reduction is warranted.⁴⁴ The penalty factors are

- i) "the seriousness of the violation or violations,"
- ii) "the economic benefit (if any) resulting from the violations,"
- iii) "any history of such violations,"
- iv) "any good-faith efforts to comply with the applicable requirements,"
- v) "the economic impact of the penalty on the violator," and
- vi) "such other matters as justice may require."⁴⁵

By starting at the maximum penalty permissible, courts make it less likely that the environment is short-changed in the penalty calculations. When civil penalties will not provide the deterrence necessary, the agencies, with the help of DOJ, can bring criminal charges against violators, as is discussed below.

C. Criminal Enforcement

The 1987 amendments to the CWA strengthened the criminal enforcement provisions in the Act; now any person who negligently or knowingly violates the CWA can be prosecuted criminally.⁴⁶ Such violations can lead to large fines and lengthy prison sentences.⁴⁷

Criminal enforcement is usually reserved for "egregious conduct, such as significant environmental harm, abusive conduct, continued illegal conduct after warnings, and in cases involving other serious, knowing, and willful violations."⁴⁸ For example, DOJ prosecuted an individual who ignored i) several Corps warnings, ii) a Corps cease and desist order, and iii) a court-ordered temporary restraining order, all of which directed him to stop filling a wetland he owned.⁴⁹ The infamous Mr. Pozgai

was convicted and sentenced to three years in jail, given five years probation and a \$200,000 fine, and ordered to restore the wetland.⁵⁰

In *United States v. Ocie Mills and Carey Mills*,⁵¹ a man and his son were sentenced to twenty-one months in jail and one year of probation for illegally filling a wetland.⁵² Just recently a Montana man was sentenced to 33 months in jail because he violated the terms of his probation that he received from filling in wetlands near his residence.⁵³ And even more recently the Sixth Circuit Court of Appeals reinstated a criminal conviction in *U.S. v. Rapanos*.⁵⁴ On resentencing, the violator could face a 10 to 16 month prison term based on the offense level selected by the Sixth Circuit.

Although these high profile cases serve to deter people from filling wetlands illegally, they are often distorted by the press and can inflame opposition to the wetlands program.⁵⁵ Furthermore, when a case is pursued criminally the stakes are raised on issues such as wetlands jurisdiction. Thus, before the Corps or EPA decides to opt for a criminal action, the agencies weigh the pros and cons of doing so quite carefully. If a violator sees jail time as a result of a wetland violation, he undoubtedly deserved it.

Citizen Lawsuits

The CWA authorizes citizens to pursue violators directly under Section 505.⁵⁶ Because citizen suits are supplemental to federal actions, citizen plaintiffs must give notice to the alleged violator and government officials at least sixty days prior to filing a complaint.⁵⁷ These actions cannot proceed unless government officials decide not to pursue the enforcement action.⁵⁸ These "private attorney general" suits are supposed to be aimed at protecting the environment rather than furthering private interests. Fortunately, in most cases they are. In such cases, the federal government may intervene or submit amicus briefs if important general

enforcement issues arise.

Conclusion

Although many of the enforcement authorities and options available to the EPA and Corps are set forth in the CWA and its implementing regulations, the agencies continue to adapt their use to the shifting landscape of wetlands law. Factors such as how post-SWANCC cases are decided can weigh heavily on the future direction of wetlands enforcement actions, as can cases such as *United States v. Phillips*, which demonstrates that federal judges are still willing to hand out substantial prison sentences to wetlands violators. Like the wetlands that they protect, wetlands enforcement authorities are designed to respond to the ebb and flow of the legal and political tides and to be as effective as possible regardless of the enforcement climate. □

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Any opinions expressed in this article are solely those of the author and should not be attributed to the Environmental Protection Agency or any other government agency discussed in the article.

Endnotes

1. The Corps and EPA have enforcement authorities for the Federal Wetlands Regulatory Program in accordance with CWA §§ 301(a), 308, 309, 404(n), 404(s), 33 U.S.C. §§ 1311(a), 1318, 1319, 1344(n), 1344(s).

2. Memorandum of Agreement

Between the Department of the Army and the Environmental Protection Agency, Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act (Jan. 19, 1989).

3. Id. at II.A.

4. Id. at III.D.

5. Id. at II.D.

6. Id. at II.D.

7. 33 U.S.C. § 1318.

8. 33 U.S.C. § 1344(s).

9. 33 U.S.C. § 1319(a)(3).

10. Margaret Strand, Federal Wetlands Law: Part II, 23 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,284, 10,299 (May 1995).

11. Under the Federal Civil Penalties Adjustment Act of 1990, all administrative and judicial penalty amounts are increased by 10 percent for all violations that occur after January 30, 1997. See 40 C.F.R. § 309(d).

12. Strand *supra* note 10 at 10,301.

13. Id. at 10,301.

14. Id. (citing *Southern Pines Ass'n v. United States*, 912 F.2d 713 (4th Cir. 1990) (no pre-enforcement review of compliance order); *Hoffman Group, Inc. v. U.S. Environmental Protection Agency*, 902 F.2d 567 (7th Cir. 1990) (same); *McGown v. United States*, 747 F. Supp. 539 (E.D. Mo. 1990) (no review of Corps cease and desist order); and *Fiscella & Fiscella v. United States*, 717 F. Supp. 1143 (E.D. Va. 1989) (same)).

15. A few notorious wetlands viola-

tors who have chosen to defy these orders have landed in jail as a result. See, e.g., *United States v. Pozgai*, No. 88-00450 (E.D. Pa. 1988), *aff'd* 897 F.2d 524 (3d Cir. 1990), cert. denied, 498 U.S. 812 (1990); *United States v. Ocie Mills and Carey Mills*, No. 88-03100 (N.D. Fla. 1989), *aff'd* 904 F.2d 713 (11th Cir. 1990).

16. 33 C.F.R. § 326.3(e).

17. See *id.*

18. *Id.* § 326.3(e)(1).

19. The 404(b)(1) Guidelines provide the substantive criteria that the Corps must apply in determining whether a wetlands permit should be issued. 40 C.F.R. § 230.

20. 33 C.F.R. § 320.4(a).

21. *Id.* § 326.3(e)(2).

22. 33 U.S.C. § 1319(g)(1)(B); see also 33 C.F.R. § 326.6(b).

23. 33 U.S.C. § 1319(g)(1)(A).

24. The Corps also derives penalty authority from section 404(s) of the CWA, but it is more limited than the authority provided under section 309; consequently, the Corps exercises its section 309 authority when it issues penalty orders. 33 U.S.C. §§ 1344(s)(4), 1319(g)(1)(B).

25. 33 U.S.C. § 1319(g).

26. 33 U.S.C. 1319(g)(1)(B); *supra* note 11.

27. 33 U.S.C. § 1319(g)(2)(B); *supra* note 11.

28. 33 C.F.R. § 326.6(b)(2)(v).

29. *Id.* § 326.6(b)(2)(viii)(3).

30. *Id.* § 326.6(g).

31. *Id.* § 326.6(j)(5).

32. *Id.* § 326.6(l)(2).

33. 40 C.F.R. §§ 22.21 & 22.50(b).

34. 40 C.F.R. §§ 22.21 & 22.51.

35. 33 U.S.C. § 1319(g)(8)(A), (B).

36. 710 F. Supp. 1105, 1108 (E.D. Tex. 1989).

37. 999 F.2d 256 (7th Cir. 1993).

38. *Id.* at 262.

39. 33 U.S.C. § 1319(g).

40. Strand, *supra* note 10, at 10,249.

41. 33 U.S.C. § 1319(b)&(d).

42. Strand, *supra* note 10, at 10,302 (citing *United States v. Cumberland Farms of Conn., Inc.*, 647 F. Supp. 1166, 1183 (D. Mass. 1986), *aff'd* 826 F.2d 1151 (1st Cir. 1987), cert. denied, 484 U.S. 1061 (1988); *United States v. Tull*, 615 F. Supp. 610, 626 (E.D. Va. 1983), *aff'd* 769 F.2d 182 (4th Cir. 1985), *rev'd* on other grounds, 481 U.S. 412 (1987); *United States v. Ciampitti*, 669 F. Supp. 684 (D.N.J. 1987)).

43. See, e.g., *U.S. v. Banks*, 115 F.3d 916, 920 (11th Cir. 1997).

44. *United States v. Marine Shale Processors*, 81 F.3d 1329, 1337 (5th Cir. 1996), citing *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990).

45. 33 U.S.C. § 1319(d).

46. 33 U.S.C. § 1319(c)(1)-(3).

47. *Id.* The highest penalties are reserved for violators who have knowingly placed others in "imminent danger of death or serious bodily injury." *Id.*

48. Strand, *supra* note 10, at 10,304.

49. *United States v. Pozgai*, 757 F. Supp. 21, 22 (E.D. Pa. 1991), *aff'd* 897 F.2d 524 (3d Cir.), cert. denied, 111 U.S. 48 (1990).

50. *Id.* The fine was later reduced to \$5,000. David Salvesen, *Wetlands: Mitigating and Regulating Developments' Impacts*, 2d Ed., 44, 45 (1994).

51. *United States v. Mills*, No. 88-03100 (N.D. Fla. Apr. 17, 1989).

52. *United States v. Mills*, 904 F.2d 713 (11th Cir. 1990) (Sentences affirmed).

53. *United States v. Phillips*, D. Mont. (unpublished).

54. Civ. No. 02-1377, (6th Cir. 2003).

55. See, e.g., Chris Lawin, *At War Over Wetlands: Father, Son Imprisoned After Losing Fight With Government*, ST. PETERSBURG TIMES, Nov. 19, 1989, at 13.

56. 33 U.S.C. § 1365(a)(1), (g).

57. *Id.* § 505(b), 33 U.S.C. § 1365(b)(1)(A).

58. *Id.* § 505(b), 33 U.S.C. § 1365(b)(1)(B).

Managing Trust by Bold Inclusion

by Alec D. Van Ryan
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Over the years, public relations professionals, alternate dispute resolution gurus, defense and plaintiff's attorneys, and a host of so called communications experts have opined on how to build, maintain, and rebuild (if even possible) that magic pillar known as "trust." With the advent of the three-headed monster of the internet, talk radio, and 24-hour cable news, protecting and cultivating trust requires a degree of vigilance and commitment unheard of less than a decade ago.

The two most difficult arenas where the concept of managing trust can be applied are: 1.) When an existing sound reputation comes under siege, and 2.) when a reputation needs to be built from scratch in a limited time frame. Interestingly, both of these circumstances share a similar and proven trust management approach. What is the approach? Put your company or client in a situation so open that any misrepresentation of fact would be blatantly obvious. Manage trust by bold openness.

There are many examples where this approach has both saved companies from ruin or proved to quickly build trust where none had before existed. One of the most famous examples of this approach, that worked to save a firm from impending disaster, was the infamous and deadly tampering of Johnson & Johnson's Tylenol capsules in the early 1980s.

Between Sept. 29 and Oct. 1, 1982, seven people in the Chicago area died after taking Extra-Strength Tylenol that had been laced with cyanide.

Although the investigations eventually ruled out the possibility that cyanide had been introduced into the Tylenol capsules during production, Johnson & Johnson initially came under intense media scrutiny and wild speculation. The stock plummeted and media mavens were dancing around the apparent corpse of what had been, until this tragedy, one of the nation's most trusted names in medical products. What Johnson & Johnson did next changed all the rules and set the standard for managing trust by bold inclusion: they welcomed in the Trojan Horse.

Within hours of the story breaking and the media seemingly reporting every rumor as fact, the CEO and Board of Directors of Johnson & Johnson began an immediate investigation into all rumors and allegations pertaining to the manufacture and distribution of Tylenol. No new ground here, but the brilliant twist in the

strategy that allowed Johnson & Johnson to grab victory from the jaws of defeat was that their CEO and Board welcomed the media to openly sit in any and all company meetings concerning this tragedy. Johnson & Johnson deliberately exposed their

In today's media saturated world, where truth and lies can travel together at the speed of light, it has been proven that bold and consistent behavior beats a spin doctor every time. It's not rocket science, but it does take courage and commitment to deliberately go under a microscope and tell the world to have a look.

company to the kind of risk that no one would take if they intended to deceive the public.

And even with a terrible and unexpected

early setback, Johnson & Johnson staid the course. Almost immediately, and as a direct result of this openness, the media learned that a certain form of cyanide was used for production of other medications in the same building that produced Extra Strength Tylenol. But the story did not have "legs" (or rather it did not get a long play) because the media also learned about this fact at the same time as did the company's management. And in real-time, the media and Johnson & Johnson management met with line management who together learned that the poisoning could not have occurred in the production process. No possibility of "spin," therefore no story. The media moved on to chase other rumors but not at Johnson &

Johnson's detriment. And within weeks, the media spotlight moved away from Johnson & Johnson broadening to deal with all consumer products whose packaging could be tampered with without detection.

Another contemporary example of the process of becoming, and holding onto, a "standard of truth" communication strategy involves the Alabama Department of Transportation (ALDOT). In cooperation with the Alabama Department of Environmental Management (ADEM), ALDOT has been performing soil and groundwater investigations following the discovery of a 600+ acre trichloroethylene (TCE) groundwater plume under residential areas and commercial properties near the ALDOT headquarters complex in Montgomery, Ala. TCE had been used at the ALDOT Materials and Testing Lab to test and verify the quality and contents of road construction materials.

ALDOT performed an initial series of investigations at the site before entering into a Voluntary Assessment Agreement with ADEM. ALDOT is also under a settlement decree following a related lawsuit concerning this plume. ALDOT knew what it was like to be in the public eye. New roads, old potholes, easements and right-of-way battles have routinely attracted outspoken criticism. And now a 600+ acre TCE groundwater contamination plume put them on track for yet another dose of public distrust and confrontation.

From the very beginning, ALDOT decided that it wanted to earn and maintain a standard of trust with the potentially impacted communities.

Yet unlike some companies and public entities that come under intense scrutiny, ALDOT did not view the concept of community involvement issues as a "necessary unpleasantness."

Taking a page from Johnson & Johnson as well as industry's community advisory panel (CAP) approaches, ALDOT developed a means to quickly build trust by direct, bold, and real-time community involvement in the investigation and eventual cleanup of this contamination. That objective was the driving force behind the conception and formation of a Community Outreach Group (COG).

The COG's design was clear and simple: up to nine individuals, all representatives from the impacted community, would be openly involved in the actual technical planning and implementation of the plume assessment and remediation. The COG representatives would come from a pool of nominees proposed by the impacted communities' themselves and selected by an impartial panel. There were not even restrictions to plaintiffs serving on the COG; the primary stipulations were that COG members commit the time necessary to attend about one meeting a month and live in, or have interests in the potentially impacted neighborhoods.

ALDOT arranged for a facilitator and provided meeting space. The initial few meetings were devoted to COG members being brought up-to-date on the project and personally meeting with the technical team and regulatory agency personnel. The COG was given free reign as to what subject they wanted to discuss or learn more about.

To encourage community interaction, the name of each member of the COG was listed on the ALDOT project web page and members were provided with special business cards indicating their involvement on the COG. Not only are COG members encouraged to attend all public meetings on the project, they are part of the presentation preview team so they see and comment on the presentations before they go out to the public.

By making the investigation and eventual remediation process a true open dialog between ALDOT and the impacted community through the COG, both entities place themselves in the position of being so open that any misunderstandings or miss expectations are quickly made apparent and therefore promptly addressed. Barriers to building and maintaining trust are significantly reduced.

There are many more examples of similar success stories. These two examples demonstrate that in today's media saturated world, where truth and lies can travel together at the speed of light, it has been proven that bold and consistent behavior beats a spin doctor every time. It's not rocket science, but it does take courage and commitment to deliberately go under a microscope and tell the world to have a look. The view may not always be pretty but it can make the difference between standing on a pillar of trust or trying to dig your way out of a pit of suspicion. □

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for local governments trying to revise their ordinances to conform to the Phase II General Permits. Ideally, the legislature should have directed EPD to develop a model ordinance for local governments that would mirror the Phase II General Permits.

15. Local issuing authorities have the ability to issue and enforce LDA permits under a local ordinance to parties engaging in construction activities disturbing one or more acres of land, with some exceptions for State and federally-regulated entities such as DOT and utility companies.

16. *See* O.C.G.A. § 12-7-19 and definition of “qualified personnel” under the Phase II General Permits.

17. *See* O.C.G.A. § 12-7-30 for details about the composition and responsibilities of the Board. The members of the Stakeholder Advisory Board have not yet been appointed. Comments of Larry Hedges, Program Manager for the EPD Water Protection Branch’s Nonpoint Source Program, DNR Board meeting, Aug. 19, 2003.

18. BMPs are described in § 12-7-6(b) of the E&S Act. In addition, BMPs are defined in the proposed E&SC Rules as “a collection of structural measures and vegetative practices which, when properly designed, installed and maintained, will provide effective erosion and sedimentation control and are designed in accordance with the design specifications contained in the ‘Manual for Erosion and Sediment Control in Georgia.’”

19. The fee system will be established by amendment to EPD’s WQC Rules, which should be adopted by

the Board in October 2003.

20. EPD estimates the fees will generate about \$5 million per year, which will enable EPD to hire about eighty additional inspectors, beginning in mid 2004. Comments of Larry Hedges, DNR Board meeting, Aug. 19, 2003.

21. On June 26, 2003, EPD issued the three Phase II General Permits for public comment. The public had the opportunity to submit comments until July 29, 2003. EPD also held a public meeting and hearing on that day.

22. “Common development” is defined as a contiguous area where multiple separate and distinct construction activities may be taking place at different times on different schedules under one plan of development or sale.

23. *See* 2003 Response to Comments Letter for Construction Activities, found on EPD’s web site (*see* n. 1 above).

24. These reduced monitoring events were the result of intense negotiations between EPD and the stakeholders in the GPAC. The expired Phase I General Permit required permittees to sample storm water runoff after certain storm events exceeding ½ inch, 1 inch and 2 inches of rainfall.

25. In general, permittees must take an upstream and downstream sample of each “receiving water,” “outfall,” or a combination of receiving waters and outfalls. “Receiving waters” means “waters of the State supporting warm water fisheries, or waters of the State classified as trout streams, into which the runoff of storm water from a construction activity will actually discharge, either directly or indirectly.

“Outfall” means “the location where storm water, in a discernible, confined and discrete conveyance, leaves a facility or site, or if there is receiving water on site, becomes a point source discharging into that receiving water. However, under the Infrastructure Permit, the permittee is not required to sample each stream or outfall if the design professional preparing the ES&PC Plan certifies that an increase in the turbidity of a specific receiving water to be samples will be representative of the increase in turbidity of other receiving waters not to be sampled.

26. “Mass grading” is defined as the movement of earth by mechanical means to alter the gross topographical features (elevations, slopes, etc.) to prepare a site for final grading and the construction of facilities (buildings, roads, parking, etc.).

27. Note that under Part III.C.1 of the Phase II General Permits, proper design, installation and maintenance of BMPs constitutes a complete defense to an enforcement action brought for alleged noncompliance with the Permits.

28. According to the proposed E&SC Rules, fees must be paid before land disturbance occurs, with the exception of projects occurring between Aug. 13, 2003 and Dec. 31, 2003. Payments for projects occurring within this time period are due by Jan. 31, 2004.

29. Because it is not clear whether these offices have been charged with the task of reviewing ES&PC Plans, the purpose of sending the Plans to the local District office seems to be to increase public awareness of construction projects in the area.

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