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Georgia Goes Superfund: A Look at The New Georgia Hazardous Site Response Act

by Robert D. Mowrey*

I. INTRODUCTION

The enactment in 1980 of the Federal Comprehensive Environmental Response, Compensation, and Liability Act1 ("CERCLA") is commonly attributed to the uproar surrounding the evacuation of the Love Canal neighborhood in Niagara Falls, New York.2 The discovery of thousands of buried drums containing hazardous waste on a Douglas County, Georgia horse farm known as Basket Creek might be considered Georgia’s Love

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* Associate in the firm of Alston & Bird, Atlanta, Georgia. Wittenberg University (B.A. summa cum laude, 1985); University of Chicago (J.D. with honors, 1988). Member, State Bar of Georgia.
Canal, not because of any particular environmental similarities to the Niagara Falls site, but because of the similarities in legislative impact. Just as the publicity surrounding Love Canal gave sudden rise to CERCLA, Basket Creek provided the primary impetus to the introduction and passage in the Georgia General Assembly of a “baby” Superfund, officially known as the Georgia Hazardous Site Response Act (“Georgia Act”). The Director of the Georgia Environmental Protection Division (“EPD”) has aptly described the Georgia Act as the most significant environmental legislation passed in the last decade.

Like CERCLA, the Georgia Act vests tremendous power in the State EPD. Indeed, in certain respects, EPD’s coercive authority under the new statute exceeds the Environmental Protection Agency’s (“EPA”) authority under CERCLA. Moreover, the Georgia Act carries significant legal consequences for those parties subject to it, posing dilemmas for the regulated community, particularly property owners who may find their property subject to disclosure requirements and deed notices.

This Article examines the Georgia Act’s major features and discusses areas of ambiguity and controversy that may pose difficult dilemmas for the regulated community, thereby generating rulemaking disputes and litigation. Additionally, this Article examines the enforcement and liability provisions of the Georgia Act with particular emphasis on those that contrast markedly with CERCLA.

II. OVERVIEW OF THE HAZARDOUS SITE RESPONSE ACT

For the first time, the Georgia Act unambiguously authorizes EPD to undertake and order responsible parties to perform corrective action at any contaminated site. It also gives EPD a funding mechanism to pay for the administration of the “Superfund” program and any cleanups EPD undertakes.

The Georgia Act features the following: (1) a hazardous waste trust fund for cleaning up orphan sites and for administering the program; (2) fees—the politically preferred term for taxes—on the disposal of solid

5. The enacting legislation (H.B. 1394 as passed by the House and Senate), in addition to creating wholly new statutory provisions setting forth the Act, also amended in certain minor respects other existing Georgia statutory provisions. See, e.g., Ga. H.R. Bill 1394, § 1, Reg. Sess. (1992) (amending O.C.G.A. § 12-2-2 (1992)) (concerning rights to appeal actions taken by the Director of the Environmental Protection Division under the Act).
7. Id. § 12-8-95.
waste and on the handling of hazardous waste; (3) a scheme of strict, joint and several liability for parties who "contribute" to a release of hazardous wastes, substances, or constituents; (4) a hazardous sites inventory listing sites meeting certain regulatory criteria; (5) requirements for reporting releases of hazardous wastes, substances, or constituents; and (6) requirements for placing notations on deeds and similar instruments reflecting the presence of hazardous wastes, substances, or constituents on a property, and requirements for recording such notations in the county real property records.

III. THE HAZARDOUS SITES INVENTORY AND THE DEED PROVISIONS

The most unique and problematic provisions of the Georgia Act, particularly in the near-term, are those concerning the listing of properties on the "hazardous sites inventory" and the placement of notices in deeds and in real property records.

A. The Inventory

The Georgia Act requires EPD, by July 1, 1994, to publish an annual hazardous sites inventory "of all known or suspected sites where hazardous wastes, hazardous constituents, or hazardous substances have been disposed of or released in quantities deemed reportable by rules or regulations of the board." The published inventory must include, among other things, a relative priority for cleanup, a summary of needed actions, and, if appropriate, a designation that no further action is required. The Georgia Act sets no standards for listing or designating a site as needing no further action. Rather, these issues are left to the promulgation of future regulations.

Initial drafts of the legislation specifically excluded any possibility of an appeal of the listing on the inventory or refusal to determine that no further action is necessary. At the prodding of the regulated community, the General Assembly ultimately included a right to contest listing of the property, first by presenting information to EPD prior to listing, and thereafter by appealing to an administrative law judge and ultimately to a superior court if EPD refuses to remove a site from the inventory.

8. Id. § 12-8-95.1.
9. Id. § 12-8-96.1.
10. Id. § 12-8-97.
11. Id. § 12-8-97(a).
12. Id. § 12-8-97(b).
13. Id. § 12-8-97(a).
14. Id. § 12-8-97.
15. Id. § 12-8-97(c)(2).
Consequently, the Georgia Act requires EPD to provide the property owner with thirty days notice of its intent to list a property. Within that thirty days, the owner may present information and facts supporting the view that the property does not meet the applicable criteria for listing as provided in the yet to be promulgated regulations. Additionally, once a property is listed, the owner may petition for its removal from the list and is temporarily relieved of the obligation of placing the required notation on the property deed if, within ninety days of listing, the owner has filed a petition for removal. Finally, the Georgia Act’s replacement of Official Code of Georgia Annotated (“O.C.G.A.”) section 12-2-2(c)(3) makes clear that EPD’s refusal to remove a property from the inventory is appealable to the superior courts.

B. The Notification and Deed Restriction Requirements: A Dilemma for Property Owners

With shades of New Jersey’s Environmental Cleanup Responsibility Act (“ECRA”), the Georgia Act requires that a statement be placed on any deed or other instrument transferring interest in property—including, for example, a mortgage or a lease—that the property is known to contain hazardous wastes, substances, or constituents. An affidavit containing the same statement must be filed in the county real property records. These requirements apply to any property: (1) listed on the inventory designated as having a known release and not designated by EPD as requiring no further action, or (2) where hazardous wastes, substances, or constituents are known as of July 1, 1993 to have been disposed or released in amounts exceeding the “reportable quantity.” As noted above, the deed notice and recordation requirements are stayed if they are triggered by listing on the inventory and the listing is appealed within ninety days.

16. Id. § 12-8-97(f).
17. Id.
21. The New Jersey Environmental Cleanup Responsibility Act, N.J. STAT. ANN. § 13:1 K-6 to K-14 (West 1991), is considered among the most stringent of state laws affecting contaminated property. ECRA requires, prior to any property transfer, a “negative declaration” that the property is not contaminated. If a negative declaration cannot be made, a state-approved cleanup plan is required prior to transfer. Id.
25. See supra text accompanying note 19.
The significance of these requirements to a property owner cannot be overstated. An affected property, in all likelihood, will be rendered virtually unmarketable. The deed notations may be supplemented with affidavits upon remediation of the property, but the notation will nevertheless remain permanently on the record. In today’s real estate environment, such a notation, even supplemented to reflect remediation, will act much like a cloud on the title, forever affecting marketability of the property.

The deed notation requirements pose at least two very practical problems. The first concerns the lack of any legal recourse for the majority of owners affected because of the manner in which the requirement is triggered. The second relates to difficulties inherent in relying on a “reportable quantity” determination to trigger the requirement.

The “Trigger” Problem and the Lack of Legal Recourse. As noted above, the deed provisions are triggered either by (1) listing on the inventory or by (2) knowledge of a release or disposal on the property of any hazardous waste, substance, or constituent in an amount exceeding the reportable quantity. Listing on the inventory carries legal protections, including the right to contest listing and the right to appeal. Importantly, the exercise of these procedures stays the requirement to comply with the deed notice and recording provisions. However, no comparable protection is associated with the “knowledge” trigger. Thus, any property owner subjected to the deed restrictions solely through the knowledge trigger is without statutory recourse to contest the deed restriction.

The problems caused by this distinction between properties triggered by listing on the inventory as opposed to knowledge of a reportable quan-

27. The procedure and criteria governing the filing of supplemental affidavits will be the subject of future rulemaking. The Georgia Act directs the Board of the Department of Natural Resources to promulgate regulations “governing procedures for the filing in the deed records of the superior courts of additional affidavits concerning property for which an initial affidavit has been filed . . . .” Id. § 12-8-93(b)(4). Although no rules have been drafted, the filing of an “additional affidavit” will likely turn on some finding by EPD that a site is “clean,” a finding property owners may find very difficult to obtain.


29. In addition, a more theoretical problem with the requirement is that it imposes equally drastic consequences on any affected property without regard to the relative dangers associated with it. There really is no doubt that some properties should contain deed notices. However, the mere release of a reportable quantity of a hazardous substance does not translate into particular long-term dangers actually associated with the property.

30. See supra text accompanying note 29.


32. Id. § 12-8-97(f).

33. Id.

34. Id. § 12-8-97(c)(2).
tity are greatly magnified by the timing of the deed restriction requirements. The inventory is not due to be published until July 1, 1994, while the deed-related requirements go into effect on July 1, 1993. Thus, any property owner having knowledge of a release or disposal on his property who would choose to contest listing on the inventory is nonetheless required irrevocably to record the deed notice on July 1, 1993, effectively rendering his contesting of and appeal from a July 1, 1994 listing on the inventory a useless right.

One might argue, as some did during the drafting of the legislation, that such an owner would lose the appeal of the listing of his property in any event, but that is an unsatisfactory response both from a procedural standpoint and from a substantive standpoint. The Georgia Act evidences an intent that, once listed, properties can be removed from the inventory, presumably through remediation. It seems reasonable to expect that sites contaminated and remediated in the past need not be either listed or subject to deed restrictions, assuming the remediation met some acceptable criteria. However, read literally, the Georgia Act imposes deed restrictions even for previously remediated sites so long as the owner has knowledge that hazardous wastes, substances, or constituents were once disposed there. Similarly, the Georgia Act requires deed notices for a property that, while perhaps once the site of a spill, does not pose any actual environmental threat. An example might involve the spill of volatile organic compounds that have completely volatilized.

No completely satisfactory cure for the above problem exists short of amending the Georgia Act. The most direct legislative cure for this problem would be to eliminate knowledge of a release as a basis for requiring a deed notation and instead to rely exclusively on the inventory. This approach should be sufficiently protective in that the reporting requirement would still apply and EPD would be privy to information required to place affected sites on the inventory. A somewhat more complicated legislative cure for the problem would be to provide an owner, who has knowl-

35. Id. § 12-8-97(a).
36. Id. § 12-8-97(b)-(d).
37. Even absent the timing problem, the lack of parallel treatment between the two deed triggers is troubling. Since no one can be sure how aggressive EPD will be in formulating its initial inventory, it is easy to imagine situations in which EPD, in its first compilation, does not place a property on the inventory, but the deed restrictions would still be triggered. The owner in that instance lacks any statutory right to stay or appeal the placement of the deed notation.
38. See O.C.G.A. § 12-8-93(b)(3) (1992) (authorizing the board of the Department of Natural Resources to promulgate regulations “governing procedures for placement of sites on and removal of sites” from the inventory).
40. Id. § 12-8-97(b)(2).
edge of a reportable release, with a right to appeal that parallels the rights granted to owners of properties listed on the inventory. That cure, however, would involve complicated legislative drafting since there would be no real agency action from which to appeal.

Alternatively, since the problem is greatly exacerbated by the July 1, 1993 date for both reporting sites to EPD and for placing notations on deeds, the General Assembly could remedy the problem to a large extent by changing the latter requirement to July 1, 1994.

In the absence of legislative action, the Department of Natural Resources (“DNR”) might alleviate the problem through the timing of its regulations on reportable quantities. Specifically, DNR could delay the promulgation of the reportable quantity regulations until July 1, 1994 so an owner would know if his property is subject to the initial inventory listing before being forced to place a notation on the deed under the “knowledge” component of the deed restriction trigger. Of course, such a delay in regulations would severely hinder EPD’s preparation of a comprehensive inventory. Alternatively, the reportable quantity regulations themselves might ease the problem somewhat either by exempting sites where remediation has occurred or by utilizing a concentration-based approach in defining reportable quantities whereby a site that in reality poses little environmental threat would not meet the “reportable quantity” definition.

The Reportable Quantity Problem. The Georgia Act requires, after July 1, 1993, that any property owner who knows that a hazardous waste, substance or constituent has been disposed of or released in an amount exceeding the “reportable quantity” notify EPD. As noted above, this “reportable quantity” determination also triggers the deed notation provisions.

The Georgia Act does not define term “reportable quantity,” but the term is to be subject to the promulgation of future regulations. The Georgia Code does define “reportable quantity” in the Oil or Hazardous Material Spills or Releases Act and ties that definition to the federal definition. The federal definition includes a significant limitation in that the reportable quantity must be released within a single twenty-four hour

41. Id. § 12-8-97(b)-(d).
42. Id. § 12-8-97(c)(2).
43. See infra text accompanying notes 44-50.
44. O.C.G.A. § 12-8-97(a) (1992).
45. Id. § 12-8-97(d).
46. Id. § 12-8-97(a).
47. See id. § 12-14-1.
That this same definition was not imported into the Georgia Act, despite suggestions to do so, indicates a possible move toward tightening the federal standards.

Use of the reportable quantity concept generally, and the twenty-four hour period specifically, creates significant uncertainties for the regulated community with respect to historical contamination. For example, suppose an industrial concern discovers that Chemical X contaminates ground water beneath its site at a concentration of five hundred parts per billion and that the industry assumes that the source of contamination is its historical use in industrial processes. If the reportable quantity of Chemical X is one hundred pounds, for example, there will often be no practical way to determine whether one hundred pounds has been released, much less whether the release was in any single twenty-four hour period.

These types of problems were already acute in determining whether reporting such historical, and often diffuse, contamination to EPA or EPD is legally required. With the advent of the hazardous site inventory and deed notices, the problem is even more severely acute, because the consequence of reporting now seems to include placement of a permanent cloud on the marketability of the property. Understandably, some owners have taken and more will take the position that historical contamination of uncertain origin is not or may not be subject to the reporting requirement. In the past, a property owner might conclude that reporting is nevertheless in his overall best interests in that it gets the agency involved in blessing a remediation. Now, however, the calculus may well tilt toward not reporting.

One possible solution lies in defining reportable quantities both with reference to a total weight or volume of the reportable substance itself and with reference to its concentration in soils or ground water or both. Such a concentration-based definition of the reportable quantity could be promulgated by rulemaking under the Georgia Act and, if drafted correctly, would reduce the uncertainty surrounding the reportable quantity—albeit possibly with the net result of subjecting more property to the inventory and the deed notices.

The difficulty in developing appropriate concentration-based reportable quantities, however, may be significant. Assuming that reportable quantities traditionally reflect the degree of immediate risk of danger involved in a release of a hazardous substance in a highly concentrated manner and in a very limited time frame, it might prove difficult to correlate the dangers presented by relatively diffuse historical contamination. The likely result would be the selection of concentration-based standards that

49. Id. § 302.6(a).
lead to far more reportable situations than would be the case using, for example, the CERCLA reportable quantities. Nonetheless, a move toward concentration-based limits, realistically developed from an assessment of actual risk, would serve the regulated community and the community at large very well, both with respect to determining reportable levels and determining cleanup standards.

IV. THE HAZARDOUS SITE RESPONSE ACT'S LIABILITY PROVISIONS

The Georgia Act's various provisions concerning liability resemble to a large degree those contained in CERCLA. However, a few provisions differ, and these may present some pitfalls to the unwary.

Much like CERCLA, the Georgia Act imposes strict, joint and several liability on several categories of persons who "contributed" to a release of hazardous wastes, substances, or constituents. The parties liable include the present owner or operator of the facility, the owner or operator of the facility at the time of disposal, any generator of hazardous wastes, substances, or constituents who arranged for disposal, and any transporter of hazardous wastes, substances, or constituents who selected the site to which they were transported.

Also, like CERCLA, the new statute includes certain limited defenses, including the so-called "innocent purchaser" defense. With the exception of the secured creditor/fiduciary exemption, the Georgia Act appears to have borrowed wholesale the CERCLA defenses.

A. The Scope of Liability

Unlike CERCLA, the Georgia Act's primary liability provision creates liability that runs exclusively to the state. Thus, the only private right of action explicitly created under the Act is through a provision allowing for contribution actions in certain cases. The liability is for costs associated with the cleanup of environmental hazards, including legal expenses incurred by the state, "as a result of the failure of such person to comply with an order issued by the director." This provision allows EPD to re-

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52. Id. § 12-8-92(9) (definition of "person who has contributed or who is contributing to a release").
53. Id. § 12-8-96.1(c).
54. See infra text accompanying note 84.
56. O.C.G.A. § 12-8-96.1(a).
57. See infra text accompanying note 95.
58. O.C.G.A. § 12-8-96.1(a).
cover cleanup costs, but apparently only from a party to whom it first issues an order. Thus, if EPD finds and cleans up a site, then discovers records concerning the responsible parties, it may well lack the authority to seek recovery of its costs. This feature is not present in CERCLA because CERCLA liability is not dependent upon a person’s failure to comply with an order.

B. Unilateral Orders and Mandatory Punitive Damages

The Georgia Act authorizes EPD to issue unilateral orders to parties it identifies as “contributing” to a release of hazardous materials. The unilateral order directs “that necessary corrective action be taken within a reasonable time to be prescribed in the order.” The new legislation requires EPD first to notify contributing parties and provide them an opportunity to perform voluntarily corrective action under a consent order.

EPD’s unilateral order authority, like its counterpart in CERCLA, is unappealable. Judicial review may only be secured by refusing to comply with the order, then waiting for EPD to undertake the corrective action and to sue to recover its costs.

The Georgia Act appears to require imposition of punitive damages upon any person who refuses or fails to comply with a unilateral order. In addition to liability for cleanup costs, these punitive damages require liability of at least one time the cleanup costs and up to three times the cleanup costs. This is distinct from the CERCLA treble damages provision, which is discretionary with the court. The drafters’ use of mandatory punitive damages was not accidental, as a proposal to alter

59. Id.
62. Id.
63. Id.
65. See, e.g., Solid State Circuits, Inc. v. EPA, 812 F.2d 383 (8th Cir. 1987); Wagner Seed Co. v. Daggett, 800 F.2d 310, 314-15 (2nd Cir. 1986).
66. O.C.G.A. § 12-2-2(c)(3)(B) (1992). The Georgia Act’s provision for unilateral orders is arguably broader than EPA’s under section 106 of CERCLA. The CERCLA provision authorizes the unilateral order only upon a finding of “imminent and substantial endangerment” [42 U.S.C. § 9606(a)] while the Georgia Act authorizes EPD to issue an order upon “reason to believe” that a release “poses a danger to health or the environment.” O.C.G.A. § 12-8-96(a). This may be a distinction without a difference, however, because the author is not aware of any cases in which EPA’s finding of imminent and substantial endangerment has been successfully challenged.
the operative language "shall be liable" to "may be liable" was specifically considered and rejected in the legislative drafting process.69

Because the EPD unilateral order is unappealable, mandatory punitive damages requires a party subject to such an order who believes, in good faith, that he has a defense to liability, to incur punitive damages by asserting, and losing, that defense.70 This is not a small issue—despite the Act's limited defenses—given the host of liability issues that, just as occurred under CERCLA, will likely arise under the Georgia Act. These include, for example, potential liability of parent corporations, successor corporations, officers and directors, shareholders, lenders, consultants, attorneys, and the like. The constitutionality of mandatory punitive damages appears likely to be challenged, assuming someone is willing to take the necessary risk to raise the challenge.

C. The Fiduciary and Lender Liability Protections

The Georgia Act's definitions of "owner"71 and "operator"72 include language designed to offer protection to lenders and to fiduciaries who, under CERCLA, have found themselves in an area of great uncertainty.73 The Georgia Act provides that "owners" and "operators" do "not include a person who holds indicia of ownership primarily to protect said person's security interest in the facility or who acts in good faith solely in a fiduciary capacity and who did not actively participate in the management, disposal, or release of hazardous wastes, substances, or constituents." This language tracks and expands somewhat upon similar CERCLA language creating a "secured creditor" exemption.74 Whether the language will provide the protection desired by the lending community remains to be seen.

The CERCLA secured creditor exemption similarly excludes from the definition of "owner or operator" persons or entities who, "without participating in the management" of a facility, "hold indicia of ownership" primarily to protect a security interest.75 The Eleventh Circuit Court of Appeals interpreted the secured creditor exemption very narrowly in United States v. Fleet Factors Corp.,76 such that a lender could be liable for environmental contamination if it "participat[ed] in the financial

69. The author was involved in negotiations with EPD and the Governor's Legislative Affairs Office, including negotiations on the issue of mandatory punitive damages.
70. O.C.G.A. § 12-8-96.1(c) (1992).
71. Id. § 12-8-92(7).
72. Id.
73. Id.
74. Id.
76. Id.
management of a facility to a degree indicating a capacity to influence the [borrower's] treatment of hazardous wastes. Further, the court held that a secured lender would be liable "if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose." This holding stunned real estate lenders and, as one commentator has observed, presented lenders with the Hobson's choice between actively avoiding oversight and involvement in a borrower's waste disposal practices—with potential liability for failing to act on the authority to intervene, or assuming responsibility to oversee the borrower's practices—only to be held liable for participation in the management.

Although EPA recently promulgated a rule to "clarify" its interpretation of the exemption and to provide comfort to lenders in the face of Fleet Factors, there is some debate over whether an EPA rulemaking can effectively thwart a circuit court of appeals' interpretation of a congressional act.

The Georgia Act may avoid some of the controversy surrounding the CERCLA secured creditor exemption in that its language is slightly different. The new act exempts lenders and fiduciaries "who did not actively participate in the management, disposal, or release" of hazardous materials, while CERCLA exempts secured creditors who hold indicia of title "without participation in the management" of the "facility." The "did not actively" language in the Georgia Act suggests that the Fleet Factors "capacity to participate" test should not apply. Additionally, the apparent nexus between "participation" and the actual management, release, or disposal of hazardous waste, rather than mere participation in the management of the facility, further distinguishes the Georgia language. These distinctions, although subtle, should provide a Georgia court with an ample basis to interpret the provision without direct refer-

78. 901 F.2d at 1557.
79. Id. at 1558. For a discussion of the myriad problems posed by the decision in Fleet Factors, see Nill V. Toulme & Douglas E. Cloud, The Fleet Factors Case: A Wrong Turn for Lender Liability Under Superfund, 26 Wake Forest L. Rev. 127 (1991).
82. See Lauer, supra note 80.
83. See supra text accompanying note 55.
85. Id.
87. O.C.G.A. § 12-8-92(7).
88. 901 F.2d 1550 (11th Cir. 1990).
89. O.C.G.A. § 12-8-92(7).
ence to its CERCLA counterpart, and thus avoid the heavily-criticized Fleet Factors result.

Finally, the Georgia Act's protection for fiduciaries is a new and welcome feature of Superfund legislation. CERCLA does not explicitly protect fiduciaries. Under that statute, fiduciaries face similar, if not more difficult, uncertainties as those posed by Fleet Factors to lenders.

D. Private Rights of Action—Opportunities and Limitations

As noted above, unlike CERCLA, the Georgia Act does not explicitly include a direct private right of action. It does, however, provide a limited right of contribution. This contribution right provides not only opportunities for parties seeking to recover their cleanup costs from other responsible parties but also interposes a significant precondition on the right to contribution.

First, CERCLA requires a private party to plead and prove that the costs it incurred at a site are "necessary response costs" and that they are consistent with the National Contingency Plan ("NCP"). The requirement of proving necessity and, more significantly, consistency with the NCP often hampstrings plaintiffs who take remedial actions at sites voluntarily and not under the auspices of the CERCLA program. Worse, the courts seem to be getting more strict in applying the consistency requirement.

The Georgia Act, however, authorizes contribution actions by any party undertaking a voluntary corrective action. No consistency with any particular standard in the remediation appears to be required, nor is any proof of necessity required. Indeed, no apparent restriction exists in the Georgia Act, as in CERCLA by virtue of the definition of "response costs," on the types of costs a plaintiff can seek. This very broad provision may present significant opportunities for parties who would find difficulty recovering cleanup costs under CERCLA.

90. Id.
92. 901 F.2d at 1550.
93. See supra note 57 and accompanying text.
96. Id.
97. Id. § 12-8-96.1(f).
100. O.C.G.A. § 12-8-96.1(e).
101. Id.
One ambiguity that might cut against a broad interpretation of the contribution right is that the contribution right is available only to a person "undertaking any voluntary corrective action." The Georgia Act does not define "voluntary corrective action," but O.C.G.A. section 12-8-96 contains language, in the context of EPD's securing agreement by parties to perform corrective action, that the EPD shall notify responsible parties of the "opportunity to perform voluntarily corrective action in accordance with an administrative consent order entered into with the director." It would not be beyond the pale for a defendant to argue, and a court to decide, that the "voluntary corrective action" referred to in the contribution provision contemplates only actions taken pursuant to a consent order entered with EPD. Such an interpretation would be unfortunate as it might reduce a private party's incentive to undertake remedial work unless EPD requires the work.

Finally, the "voluntary corrective action" language places a potentially severe limitation on the right to secure contribution from other participating parties. If a party fails to agree with EPD on the entry of a consent order and EPD issues a unilateral order, the corrective action presumably is not "voluntary," even if the respondent complies with the order, and contribution would not be permitted. Likewise, a party sued after refusing to comply with a unilateral order has no contribution rights. This provision is another aspect of the tremendous pressure the Georgia Act places on parties to ensure that they "voluntarily" undertake to perform remedial work. This coercive effect probably will result in far fewer of the issues and ambiguities lurking in the Georgia Act being litigated, a result that may be applauded by many but that does not serve well the goal of providing reasonable legal certainty and protection to the regulated community.

V. Conclusion

The Georgia Act has the potential to impose substantial consequences on a wide scope of property owners and businesses. It also provides EPD with nearly overwhelming coercive power to force private-party cleanups at contaminated sites.

The deed restriction provisions of the Georgia Act warrant legislative revision or, at a minimum, regulatory action to minimize the burden they
impose. This Article suggests a few possible courses that would alleviate the problems associated with the provisions.

The liability provisions of the Georgia Act\textsuperscript{108} seem certain to encourage private parties to comply with EPD "requests" to conduct remedial work. However, EPD's authority under the Georgia Act to coerce those with a good faith defense or a good faith inability to agree on the scope of requested remedial action\textsuperscript{108} is to some degree offensive to the principles of due process. With the effective absence of judicial oversight in most cases, we all must hope that EPD does not abuse the tremendous authority the General Assembly has entrusted to it.

\textsuperscript{108} Id. § 12-8-96.1.
\textsuperscript{109} Id. § 12-8-96.