Water Wars

An Update on Environmental Issues

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Georgia's Next Great Ambulance Chase: Water Runoff Claims

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While Georgia may not regularly experience extreme rain events, notable storms have occurred and resulted in significant lawsuits and claims. In recent memory, Tropical Storm Alberto dumped between 15 to 20 inches on Georgia during the July 4th holiday weekend in 1994. The mid-Georgia cities of Macon, Albany, Americus, Montezuma, and other down-river towns were hardest hit by flood waters, with the peak rainfall of 27.85 inches occurring in Americus.

The fall of 2009 brought epic floods to the Atlanta area when torrential rains fell in late September and early October. Scientists charged with categorizing the magnitude of that event struggled, as rainfall amounts, stream gauging records, and probabilities involved were all so far off the charts. The National Weather Service gauged that event as a 1 in 10,000 probability, whereas the charts stop tracking events at a 1 in 500 probability. Most recently, 2013 set records as one of the wettest in Georgia's history, almost claiming the top spot.

When record setting rain results in flooding, as occurred in the fall of 2009, homeowners in many underwater neighborhoods file lawsuits to cover their losses because they do not have flood insurance. Indeed, numerous lawsuits resulted from the 2009 floods, including lawsuits against local counties and municipalities for inadequate and outdated storm water controls.

Water runoff claims have developed into a lucrative niche practice where plaintiffs' attorneys, and even entire firms, are devoted to litigating water claims. These repeat players have developed sophisticated strategies for exploiting the already considerable advantages they possess under Georgia's water laws. Therefore, insurance carriers must consider different approaches to defending these lawsuits and claims.

Georgia follows an ancient law of riparian rights in water runoff cases that stacks the deck in favor of the water runoff plaintiff. Georgia's law ignores the reasonableness to which the property is used and imposes liability (including liability for punitive damages) based upon the unavoidable increase in surface water discharge occuring with improvement of real property. The law applied in Georgia leaves little room for negotiation: "As to surface water, one land proprietor has no right to concentrate and collect it, and thus cause it to be discharged upon the land of a lower proprietor in greater quantities at a particular locality, or in a manner different from that in which the water would be received by the lower estate if it simply ran down upon it from the upper by the law of gravitation."

Plaintiffs also possess the ultimate trump card in the form of the Clean Water Act (CWA), which allows a plaintiff the right to recover attorney's fees for substantially prevailing in enforcing the CWA. The attorney fee provision of the CWA is often used to extort unreasonable settlements, particularly when plaintiffs have a "can't lose" case. Georgia's red clay soils make causation a simple matter of following bright orange runoff to the nearest upstream development. The intuitive nature of causation, coupled with the CWA's strict liability scheme, is a potent combination that encourages strident settlement demands. Thus, the CWA often creates the ultimate Hobson's Dilemma for the defendant: overpay now to settle, or pay even more

later when assessed the plaintiff's attorneys' fees after trial (not to mention having to pay your own attorney's fees and an unfavorable judgment).

The water runoff claim is particularly perilous because the damages are never static. Unlike most torts that are one-time occurrences, such as an auto-accident or a slip and fall, the harm from a "water runoff problem" continues to occur until the underlying problem is resolved. So, while most claims typically get better with more investigation and defense work, water runoff claims can often get worse, because with each passing rainfall, the plaintiff incurs more harm, collects more evidence to use at trial, and has more and increasingly undeniable proof the defendant knew of the continuing problem but did nothing to fix it. Juries tend to mete out judgment harshly for the water runoff defendant that fails to address an obvious problem. Damages are also not static because attorneys' fees are often an element of damages, and therefore opposing counsel's fee meter runs daily.

The water runoff claim also runs counter to prevailing defense orthodoxies about venue. The three largest water runoff verdicts in Georgia came from conservative, generally rural, and defense-oriented counties: Hall, Forsyth, and Cobb. The themes of property ownership and property rights that pervade water runoff claims strike a particular chord with conservative and rural populations whose roots run deep with the land. The runoff claim also typically pits the lone landowner against large and powerful land developers and corporations, which taps into popular themes involving the underdog or the crusader standing up for one's rights.

In addition to attorneys' fees under the CWA, damages are available for loss of enjoyment of property, which is measured by the enlightened conscience of a jury. This element of damage can be an opportunity for a jury to unload on an unpopular developer or neighbor. Finally, violation of the surface water law of Georgia has been deemed an intentional tort and, therefore, juries are given unfettered license to randomly impose punitive damage awards. The three largest runoff cases from Hall, Forsyth and Cobb, referenced above, illustrate how verdicts are often out of proportion to special damages. In one case, a $2.1 million verdict resulted from $50,000 in special damages and $2 million in punitive damages. In another, the jury awarded $2.5 million on $100,000 in special damages and $2.25 million in attorneys' fees.

Given the nature of the exposure faced by a defendant in a water runoff case, it is important to treat such claims differently than the typical liability claim. A jury presented with images of torrential water pouring off a site has little difficulty grasping the concept of a trespass or that the party responsible for the water discharge is maintaining a nuisance. Indeed, when presented with such images, a jury intuitively looks upstream to determine the source.

The typical water runoff plaintiff is easily portrayed as the champion of property rights. Who can be against that? When a developer is the defendant, the plaintiff also dons the mantle of America's favorite sympathetic figure — the lone underdog or little guy taking on the entrenched business establishment. The plaintiff also has significant control over the manner in which the facts are portrayed to the jury. Usually, the only evidence of the pre-runoff condition of the property is provided through the plaintiff's words, which are juxtaposed to hundreds of photographs depicting the damage in minute detail.

Given the strict liability nature of water runoff claims and the parasitic claims that attach to the actual measurable property damage, early resolution should be considered. Options to consider at the outset of a lawsuit or claim include: (1) a written offer to remediate the condition causing the alleged damage; (2) pre-suit alternative dispute resolution; (3) an investigation of other land disturbance activities in the same watershed; (4) a written offer of settlement, if applicable; (5) a meeting of the parties' experts to discuss remediation; and (6) a written request for a remediation plan from plaintiff's experts.

PENNY WISE, POLICY LIMIT FOOLISH

Insurers are faced with many problems when dealing with a water runoff case. As we have seen, the damages available to plaintiffs in such cases are frequently out of proportion to the harm perceived by the insurer. Also, the damages sought are not always covered by the insurance policy at issue.

Indeed, plaintiffs not only seek damages for repair costs, emotional distress, punitive damages and attorneys' fees, but also usually ask for injunctive relief to abate the nuisance. This significantly complicates the role of the insurer, as general liability policies cover damage to the property of others but do not cover the cost incurred by the landowner/developer to correct the water runoff problem so that future damages can be avoided. Adherence to a strict coverage analysis of the damages payable under the policy may be shortsighted. Juries tend to punish the defendant that failed to do anything to repair the problem, despite the obvious

nature of the on-going harm. Water runoff problems do not fix themselves or get better with time. Yet defendants and insurers are often hesitant to act, afraid that early remediation may signal weakness or support a finding of liability, even though early and swift intervention is often necessary to stop the ongoing problem and minimize exposure. Despite the fact the cost of repairing the property can be high, the cost of allowing an obvious problem to languish while litigation drags on for months and years is often extreme. As discussed earlier, the longer a problem lingers, more actual damage occurs and more harmful evidence is developed. Moreover, the likelihood of angering a jury increases significantly the longer an obvious problem is allowed to persist. There are many situations where an insurer can minimize indemnity exposure by abandoning a strict coverage position and immediately repairing the insured's property to stop the source of the problem.

Moreover, due to the continuing nature of trespass and nuisance claims from water runoff, a settlement of past damages does not prevent the plaintiff from immediately asserting new claims for new rain events and damage. Accordingly, the insurer may prefer to fix the "problem," even though the insurance policy does not provide coverage for the remedial actions. Otherwise, the insurer may settle with the plaintiff, only to find its insured back in court the next time it rains.

Because water runoff claims are fundamentally different than the typical liability claim submitted to the insurance company, it is critical to seek experienced counsel and employ tailored strategies to avoid the many traps posed by water runoff claims.

THE DIRTY ON THE CLEAN WATER ACT

Many water runoff lawsuits include a claim for violations of the Clean Water Act (CWA). The CWA is a federal statute enacted to protect the nation's waterways from pollution and ensure their continued integrity. Although not intuitively obvious, pollution legislation like the CWA is often implicated because storm water and sediment are defined as pollutants under the CWA. However, the reason the CWA is not alleged in every runoff lawsuit is because the CWA regulates pollution to "navigable waters," which generally implies waterways supporting commerce, but may apply to much smaller rivers, lakes, and ponds. If the plaintiff owns a pond or stream, there is good likelihood the plaintiff will assert a CWA claim.

Georgia also has its own similar legislative scheme to regulate storm water discharges, known as the Georgia Erosion and Sedimentation Act of 1975 (E&S Act). Both the CWA and the E&S Act seek to control the discharge of eroded soils and sediment through the use of erosion control devices, such as silt fences. Many Georgia counties, cities, and even regional commissions also have similar and often overlapping laws and regulations that could apply. Despite the multiple layers of environmental regulation, the CWA is most important due to its strict liability scheme and harsh penalties.

The CWA achieves its objectives through a national permit system. All discharges of pollutants are absolutely prohibited, unless done in strict compliance with a National Pollution Discharge Elimination System (NPDES) permit. In Georgia, construction projects meeting certain parameters must obtain an NPDES permit. The NPDES establishes certain requirements on the developer with respect to designing, installing, and maintaining erosion control devices on its construction site, among other things. Failure to obtain an NPDES permit or comply with its provisions can give rise to CWA liability and penalties.

The strict liability nature of the CWA means that once a discharge of pollutants is established, the liability of the developer is likewise established. Liability for violations of the CWA requires civil penalties against the violator to be paid to the government. Injunctive relief is also available under the CWA. The most onerous aspect of the CWA is the award of litigation costs, including attorneys' fees, to any prevailing or substantially prevailing party. Even though the award of fees is within the court's discretion, a court cannot deny fees and costs absent good cause.

Enforcement of the CWA can take two forms: (1) traditional enforcement by the appropriate agency; or (2) private enforcement by a private citizen through a citizen's suit. It is even possible for enforcement to occur simultaneously through government action and a private lawsuit. The citizen suit is the primary mechanism whereby an environmental claim is brought in a water runoff lawsuit. The CWA allows citizens, under certain circumstances, to bring an enforcement action against any person who is alleged to be in violation of the CWA. The plaintiff's standing to bring a CWA claim is the focus of frequent litigation, and thus a CWA claim is typically only brought if a stream, pond, or other similar body of water is located on the plaintiff's property.

Although the CWA is nominally for the protection of the nation's waters, it is unfortunately used often as a litigation tool. It presents a path of least resistance with respect to a plaintiff's claim for water/sediment

runoff. Moreover, once the violation is established, attorneys' fees are virtually automatic. Thus, a plaintiff can make a mountain out of a molehill, confident its opponent would not risk trial and the likely prospect of paying attorneys' fees at the end. Therefore, it is not uncommon to be presented with a settlement demand to pay a large portion of plaintiff's unearned (but anticipated) attorney's fees in order to avoid paying an even larger figure at the end of trial.

LITIGATION MAKES STRANGE BEDFELLOWS: CONCURRENT ENFORCEMENT OF THE CWA

Under the CWA, the government is armed with many enforcement options, including the ability to impose fines and file lawsuits to ensure compliance with the CWA. In Georgia, the power to enforce the CWA has been delegated to the Georgia Department of Natural Resources, Environmental Protection Division (EPD). Thus, the EPD is the front line agency to enforce the CWA, although the federal Environmental Protection Agency (EPA) retains oversight and enforcement authority as well.

In the recent past, enforcement of the CWA in Georgia was lax to nonexistent, and Georgia has only recently begun stepping up enforcement efforts. In fact, Georgia did not have an NPDES permit in place until the late 1990s. The NPDES permit, as discussed above, is the primary means of regulating pollution under the CWA. Congress foresaw the difficulty of overseeing the CWA, and provided the ability for citizens to enforce the CWA through private lawsuit filed by private citizens. There are many prerequisites that must be satisfied before a private enforcement action can be maintained, including providing notice to the EPA, EPD, and the alleged wrongdoer of the intent to file a private citizen suit. The supposed purpose of the notice requirement is to allow the wrongdoer an opportunity to come into compliance, and to allow the EPD and EPA the opportunity to assume enforcement efforts. If the EPD or EPA chooses not to get involved, the private citizen can then serve as the enforcement backstop and file suit.

Despite the apparent intent for enforcement to be done either by the government or a private citizen, but not both, a recent Federal case in Georgia is paving the way for concurrent enforcement. This type of double jeopardy is perilous because a defendant faces the potential of having its actions judged twice under the same law, before two separate courts. It is imperative for a defendant faced with concurrent enforcement efforts to involve counsel as early as possible to craft a uniform strategy for dealing with the separate enforcement actions, and to ensure the activities in one action do not imperil the defense in the other. Moreover, swift action in resolving the governmental enforcement action may provide a basis for stopping a private citizen suit, particularly if the private citizens are allowed to participate in the government action.

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Mr. Ward practices in a wide variety of litigated matters dealing primarily with insurance coverage and damage to real and personal property, including construction defect claims where he calls on prior contracting experience. He routinely handles environmental cases in the Federal, State, and administrative courts, ranging from CERCLA liability, mold and lead cases, and water runoff litigation. His practice focuses on first- and third-party coverage litigation, property claims, extra-contractual claims, and bad faith, in which he has taken coverage disputes and first party claims from initial coverage opinions through judgment following jury and bench trials. In addition, he has extensive experience advising clients in coverage matters, bond and surety claims, collections, and contract disputes.

Mr. Ward joined Swift Currie in 2008, after gaining experience at another Atlanta firm in a broad range of litigated matters, including those involving construction law, environmental law, premises liability, ERISA and insurance coverage disputes. He practices in the coverage and commercial litigation section of the firm.

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Mr. Brantley has served as lead counsel for large corporate clients, individuals and insurers. This representation has involved advising clients pre-suit as well as defending the matters through jury trial and appeal.

Mr. Brantley began his legal career by representing plaintiffs in lawsuits similar to those he currently defends. In 1999, Mr. Brantley joined Swift Currie's litigation team and began his defense practice. He is admitted to practice in all State trial courts and appellate courts in Georgia and South Carolina. He is also admitted to practice in the Federal courts, including the Northern and Middle Districts of Georgia, the Eleventh Circuit and the District of South Carolina.