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AG office seeks to head off challenges*Environmental permit challenges are being held up by questioning legal standing, getting tied up in details*

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Attorney General Thurbert E. Baker and his staff have altered how they defend legal challenges to state environmental permits, according to private attorneys, focusing on small procedural issues instead of debating the merits of the cases.

The eventual result, these attorneys say, could be to discourage members of the public and grassroots organizations from filing court challenges to the state agency that's responsible for permitting everything from new landfills to residential development in sensitive coastal areas.

"[The state is] trying to send a message to anyone else who might consider bringing a challenge that state agencies should not be challenged," said Atlanta attorney Donald D. J. Stack, who has represented Altamaha Riverkeeper, the Center for Sustainable Coast and other environmental groups in litigation disputing state permits.

"Anyone who has the audacity to do so better have a large war chest," Stack said.

The state Department of Law, which Baker heads, represents the state Environmental Protection Division in these challenges and in other legal matters. Legal challenges are heard by the Office of State Administrative Hearings.

The new tactics pursued by Baker's staff fall into two categories, Stack and other environmental plaintiffs' attorneys said. One has been to challenge plaintiffs' legal standing—and thus their ability to bring suits to overturn permits. The other strategy has been to hone in on trivial procedural issues that aren't relevant to the case, hoping to trap petitioners in a minor mistake. That's been the state's strategy in fighting a challenge that's been lodged against EPD's permit for a new coal-fired power plant in southwest Georgia, according to Stack.

The latter issue will be heard June 3, when Fulton County Superior Court Judge Thelma W. Cummings Moore hears an appeal from Friends of the Chattahoochee, GreenLaw and the Sierra Club on an administrative law judge's ruling that upheld the permit.

Russ Willard, a spokesman for Attorney General Baker, defended the state attorneys' legal strategy.

"Standing is the essence of whether a 'case or controversy' exists and must be proven in every case to avoid using courts for advisory opinions," Willard said. "We are representing our clients as we always have, and to attack the state's reliance on defenses that go to essential procedural issues in a case simply gives the impression of sour grapes."

New strategy?

Historically, environmental groups in Georgia never had much problem issuing challenges to state agency decisions, said Stack, the founding partner of Stack & Associates. That changed about two or three years ago.

"There clearly is now an attitude of win at any cost, as opposed to [the attorney general's office] being the public's law firm," Stack said.

"I don't mind arguing legitimate issues," Stack said. "But they're spending more time challenging your ability to even question or criticize them."

The issue of standing came up most recently on May 9, when Office of State Administrative Hearings Judge John B. Gatto ruled that Satilla Riverkeeper in southeast Georgia did not have standing to challenge an EPD permit granted to Ware County and a private company, North American Metal, to build a landfill near the Okefenokee Swamp.

In his ruling, Gatto wrote that "to have standing the alleged procedural violations must also have resulted in injury to each Petitioner's 'concrete, particularized interest.' As indicated *infra*, Petitioners have all failed to satisfy this requirement since they failed to connect any of these alleged violations with any injury to any individual Petitioner."

Gordon Rogers, executive director of Satilla Riverkeeper, said he's worried that the Ware County ruling could have a chilling effect on future challenges.

"They're trying to burn our resources as a tactical move," Rogers said.

But Gatto relied on "very longstanding law" in issuing his ruling, citing two state Supreme Court decisions, said Alston & Bird counsel Beverlee E. Silva, who represented Ware County and the private landfill company. Those Supreme Court decisions were *Georgia Power v. Campaign for a Prosperous Georgia*, 255 Ga. 253, 257-258 (1985); and *Davis v. Jackson*, 239 Ga. 262, 264-265 (1977).

While acknowledging the state has been challenging standing more frequently, Silva said that the state's attorneys are simply saving taxpayers "money, time and resources."

"The state has a duty to see that taxpayers' resources and the court's time aren't wasted by a group that can't show that it has a legal right to challenge the permit," Silva said.

Silva noted that Gatto wrote that the Office of State Administrative Hearings "has been deciding standing on an issue-by-issue basis for over 20 years."

The Ware County landfill case is *Anti-Landfill Corp. and Satilla Riverwatch Alliance v. Couch*, No. 0810933.

But some environmental-conservation advocates disagree with Silva's assessment and Gatto's ruling. It has never been the case that environmental groups have had to go to these lengths just to make their core arguments, said Neill Herring, a lobbyist for the state chapter of the Sierra Club.

"We're having to spend time, money and effort in proving that we are who we say we are, assertions no one has ever meaningfully challenged before," said Herring, who has lobbied at the state Capitol on behalf of environmental issues since 1989.

"Every single case, we're having to walk through the same esoteric nonsense," Stack said. "You literally are briefing them on the same damn thing over and over and over."

Environmental groups believe that one reason the state Law Department is pursuing its new strategy is to force the nonprofit groups to run out of money.

"Our clients are spending \$10,000 to \$15,000 just to get to the point of finding out whether they can even bring a lawsuit," Stack said. "They're trying to run out the clock."

The Law Department's new approach isn't limited to its work on behalf of EPD, Stack said. It's also using the strategy in defending permits granted by the state Coastal Resources Division. In some of these cases, environmental groups haven't been awarded standing in a case because the group isn't geographically located in the specific watershed in which the Coastal Resources Division permit was granted.

In one specific case, Altamaha Riverkeeper was denied standing to challenge a permit for a dock to be built on marshland because the dock was to be built in Chatham County in the Savannah River watershed, not the Altamaha, Stack said.

"The marsh doesn't make a geopolitical distinction whether the dock is in Chatham County, Glynn County or Liberty County," Stack said. "The dock will have the same impact on the Savannah River or the Altamaha River. Yet under the state's position, the only organization that could challenge, if at all, is the Savannah Riverkeeper, because that's where it's being built."

Longleaf coal plant permit

Equally frustrating to environmental plaintiffs' attorneys has been the state's strategy of focusing on procedural issues that don't address the questions of the underlying suits, said Justine I. Thompson, executive director of Atlanta-based GreenLaw.

Recently, the state has taken that approach with a challenge to EPD's permit to the company Dynegy for a coal-fired power plant, known as Longleaf, in Early County. One of GreenLaw's arguments is that EPD did not adequately assess the risks the plant will pose to public health. The petitioners say they're concerned about the plant's projected emissions of carbon dioxide and toxic metals.

But the state countered that the petitioners must "provide a specific proposed solution to the alleged defects in the permit," in order to address the public health concerns, according to a court filing. The "solution" should be what kind of limitations the EPD permit should contain.

The problem, Thompson said, is that the petitioners can't suggest precise limitations unless EPD first performs the public-health risk assessment.

"The [Administrative Law Judge] simply stated that every count of a petition must contain a proposed permit limitation in order to be heard," Thompson wrote in an April 9 court brief. "There are apparently no exceptions to this supposed pleading requirement, even if the requirements make no sense under the circumstances.

"As a result of this hyper-technical and erroneous ruling, there has been no adjudication in this case of the danger to the public presented by the failure of [Dynegy] to properly evaluate the impact of its emissions."

The upshot is that it removes the ability of members of the public to challenge the state's decisions because the state is erecting demands that are impossible to meet, Thompson said.

"Of all the procedural things I've encountered, this one is the most noxious because it serves no purpose whatsoever," Thompson said. "It feels like gamesmanship to me more than anything I've ever encountered."

The relevant state agency rule, which requires the enunciation of precise limitations by petitioners, is GA. COMP. R. & REGS. r. 391-1-2-.05(1)(g), (h)(2007).

Schulten Ward & Turner partner Martin A. Shelton, who filed an amicus brief in the case, on behalf of Upper Chattahoochee Riverkeeper and supporting the petitioners, said that the state's position is unconstitutional because it violated O.C.G.A. § 50-13-22.

"DNR has no authority to impose additional pleading requirements on petitioners that effectively prohibit certain permit challenges," Shelton wrote in the May 16 amicus brief.

If the court upholds the state's approach, "the practical effect would be to deny Petitioners access to the courts and deprive them of the constitutional guarantee of due process," Shelton wrote.

The Longleaf case is *Friends of the Chattahoochee and Sierra Club v. Couch and Longleaf Energy Associates*, No. 2008-CV-146398.



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