

BRIEF OVERVIEW OF GEORGIA ENVIRONMENTAL LAW
STORM WATER CASES

Over the last decade, Georgia has experienced extraordinary growth. A body of law has developed relating to the impact to a property owner's rights when those rights are impacted by development activities. Georgia Law strongly supports a property owner's rights to use, enjoy and exclusively possess their land. Damages to property from development activities can be substantial and property owners need to be diligent in defending their property rights, particularly where there are ponds, lakes or streams located on the property.

With few exceptions, there are no natural lakes in Georgia. What are often referred to as "lakes" and "ponds" are really "impoundments," created when a stream or river is dammed. These bodies of water act as natural deposits for sediment and run-off through a natural process of erosion and sedimentation. These processes can be significantly accelerated when vegetation and topsoil are stripped during land-disturbing activities, resulting in unsightly silting of ponds and lakes. Sedimentation can also turn a once valuable feature into an eyesore, result in the loss of recreational use, and diminish property values as high as ten to twenty percent. Moreover, sediment is considered a "pollutant" because it can greatly alter ecosystems, resulting in objectionable odors, degraded water quality and fish kills. Unfortunately, such impacts have become commonplace due to developers' refusal to comply with local, state and federal law.

Georgia law requires that anyone engaged in land-disturbing activities obtain a "Notice of Intent to Discharge Storm Water under the National Pollution Discharge Elimination System" ("NPDES") permit. NPDES permits, which arise under the federal Clean Water Act, are issued by the Georgia Department of Natural Resources Environmental Protection Division, and are enforced locally through city or county ordinances. The State of Georgia and Georgia Soil and Water Conservation Commission also maintain enforcement powers. As part of the NPDES permit, developers are required to submit detailed Erosion and Sedimentation Pollution Control Plans, and to certify that they understand the applicable laws and regulations. The developer must insure that excessive amounts of sediment-laden storm water are not discharged from the site. Georgia law also prohibits a developer from increasing the volume or concentrating the flow of storm water onto adjoining downstream properties.

A common source of erosion and sedimentation of ponds, lakes, and streams is the developer and/or builder's failure to employ "Best Management Practices" ("BMPs") at residential and commercial construction sites where clearing, excavating, grading and filling activities have occurred. Common BMPs include silt fencing, hay bales, and establishing suitable ground cover. Because development activities frequently result in increased volume of storm water runoff due to the creation of impervious surfaces, detention ponds are commonly required. The failure to timely install and maintain detention ponds can greatly contribute to the damage caused by excessive erosion and sedimentation. Failure to comply with the NPDES

Permit and the associated Erosion Sediment and Pollution Control Plan are also violations of both the Georgia Erosion and Sedimentation Act and Georgia Water Quality Control Act.

When an individual's property rights are affected by a third party, it is important to collect evidence and put the offending party on notice. Property owners should be mindful that local and state agencies often lack funding to conduct enforcement actions, so private litigation may be required to achieve resolution. Fortunately, Georgia law supports the award of attorney fees and significant punitive damages to punish and deter developers and/or builders' flagrant violations.

When a lawsuit is filed, the Plaintiff (i.e. aggrieved landowner) typically makes claims for *Trespass, Nuisance, Negligence, Negligence Per Se, Ejectment, Punitive Damages, and Attorney's Fees and Litigation Expenses*. Repeated interferences with the Plaintiff's ability to use, enjoy, and exclusively possess their property is illegal. For nearly one hundred years, Georgia has recognized that one landowner cannot use his property in a manner that unreasonably invades the rights of others. *Holman v. Athens Empire Laundry Co.*, 149 Ga. 345, 350, 100 S.E. 207, 210 (1919). Such interferences constitute a nuisance and trespass under Georgia law for which Plaintiffs are entitled to compensation. *Tyler v. Lincoln*, 513 S.E.2d 6, 236 Ga.App. 850 (Ga. App. 1999).

Under Georgia law, the violation of a statute is *negligence per se* when the type of harm that occurs is the type of harm that the statute was intended to guard against. *Decker v. Gibson Products Co. Of Albany, Inc.*, 679 F.2d 212, 214 (11 Cir. 1982). Accordingly, a Defendant's negligence in their failure to follow all applicable laws, regulations, standards, ordinances and guidelines intended to prevent these types of damages such as the NPDES permit gives rise to claims for *Negligence Per Se*.

In an *Ejectment* action, the Plaintiff requests that the jury be asked to order the Defendant developer's sediment to be "ejected" from the Plaintiff's property. This means that the developer can be forced to remove all sediment from the Plaintiff's property, which can be quite costly.

Pursuant to O.C.G.A. § 51-12-5.1, Georgia law allows for the award of punitive damages when "defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." Multiple calls, letters, Notices of Violation, Stop Work Orders, and other forms of notice to a developer regarding the ongoing trespasses and flooding to the Plaintiff's property are very important, as the failure to correct problems with erosion and sedimentation controls once the Defendant is put on notice of the problems and resulting damages authorizes punitive damages. *Ponce de Leon Condominiums v. DiGirolamo*, 238 Ga. 188, 190, 232 S.E.2d 62 (1977).

Pursuant to O.C.G.A. § 13-6-11 a jury may award Attorney's fees where it finds Defendants have acted in bad faith, have been stubbornly litigious, and/or have caused Plaintiffs unnecessary trouble and expense. An award of damages for trespass, an intentional tort, supports a claim for expenses pursuant to O.C.G.A. § 13-6-11 under the theory that the intention evokes the "bad faith" necessary for recovery under that statute. *Tanner v. Gilleland*, 186 Ga. App. 377, 378, 367 S.E.2d 257 (1988); *Piedmont Cotton Mills, Inc. v. H. W. Ivey Construction Co.* 109 Ga.App. 876,881, 137 S.E.2d 528, 532 (1964); *Tyler v. Lincoln*, 527 S.E.2d 180,272 Ga. 118 (2000).

Finally, Plaintiffs may also contend that they are entitled to have the water in their stream come on to their land in its natural and usual flow. When a Defendant developer increases and concentrates the flow of water onto Plaintiff's land Georgia Law provides that the Plaintiff is entitled to an award of compensatory damages, attorney fees, and punitive damages. *Sumitomo v. Deal*, 256 Ga. App. 703 (2002); *Greenwald v. Kersh*, 265 Ga.App. 196 (2004).

Georgia law limits the amount of time (i.e. Statute of Limitations) in which a party may bring a claim. Typically, this is in the range of three to four years, but may be more or less depending upon certain aspects of the case. Each case is different and this article does not constitute legal advice. If you believe that your property is being impacted by nearby development or building, it is important to contact an attorney experienced in environmental law.

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