

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



OCT 2 2013

K. Westray
Kevin Westray, Legal Assistant

UPPER CHATTAHOOCHEE RIVERKEEPER, INC.,

Petitioner,

v.

JUDSON H. TURNER,¹ DIRECTOR,
ENVIRONMENTAL PROTECTION
DIVISION, GEORGIA DEPARTMENT
OF NATURAL RESOURCES,

Respondent,

FORSYTH COUNTY,

Intervenor.

Docket No.:
OSAH-BNR-WQC-1107476-60-Miller

ORDER ON REMAND

On August 12, 2013, the Petitioner, Upper Chattahoochee Riverkeeper, Inc. (“Riverkeeper”) filed a “Motion to Invalidate and Remand Permit Pursuant to Governing Law and This Court’s June 1, 2011 Factual Findings.” The Respondent, Judson H. Turner, Director of the Environmental Protection Division of the Georgia Department of Natural Resources (“Director”) and the Intervenor, Forsyth County, filed separate responses in opposition to Riverkeeper’s Motion on August 19 and 22, 2013, respectively. Riverkeeper replied on August 23, 2013.²

On appeal of the Final Decision in this case, the Georgia Court of Appeals held that this Court had committed an error of law by interpreting the antidegradation rule, found at Ga. Comp. R.

¹ While the appeal of this case was pending, Judson H. Turner replaced F. Allen Barnes as Director of the Environmental Protection Division.

² This Court lacked jurisdiction to consider Riverkeeper’s Motion until it received the appellate record, which includes the original administrative record and the order of remand from the Superior Court of Forsyth County, on September 10, 2013.

& Regs. r. 391-3-6-.03(2)(b)(ii), to require an analysis of whether a surface water discharge of treated wastewater containing levels of pollutants authorized under a National Pollution Discharge Elimination System (“NPDES”) permit would degrade the quality of the receiving water, and if so, whether such lower water quality was necessary to accommodate social or economic development. Upper Chattahoochee Riverkeeper v. Forsyth County, 318 Ga. App. 499, 504 (2012). Instead, the Court of Appeals found that an antidegradation review consists solely of “a determination as a threshold matter whether any new or expanded discharge should be allowed into a high quality body of water,” without regard to specific discharge-pollutant limits, after consideration of the need to accommodate social or economic development. Id. (emphasis added).

In its Motion, Riverkeeper argues that the permit should be invalidated and remanded to the Director, on the ground that the Court of Appeals’ ruling requires the Director to rule out no-discharge alternatives before issuing a permit for a surface water discharge. However, because Riverkeeper did not raise this claim in its original Petition for Hearing (“Petition”), it has been waived. Petition at ¶¶ 16-19; see Holloman v. D.R. Horton, 241 Ga. App. 141, 146-47 (claim not alleged in complaint is waived); Drug Emporium v. Peaks, 227 Ga. App. 121, 128 (same). Riverkeeper’s Motion is therefore **DENIED**.

Further, although the Superior Court of Forsyth County has remanded this matter for further proceedings, no further proceedings are necessary. Riverkeeper’s only remaining claim, found at Count II of the Petition, is premised on the same erroneous interpretation of the antidegradation rule that was adopted by this Court and reversed by the Court of Appeals. See Petition at ¶¶ 16-19; Upper Chattahoochee Riverkeeper, 318 Ga. App. at 504. Since this claim has already been decided in favor of the Director and Forsyth County, no issues remain for adjudication. Accordingly,

judgment as a matter of law is entered in favor of the Director and Forsyth County as to Count II of the Petition, and the Director's issuance of the permit is hereby **AFFIRMED**.

SO ORDERED, this 2nd day of October, 2013.



KRISTIN L. MILLER
Administrative Law Judge