BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

CRAIG BARROW, III,	:	
	:	
Petitioner,	:	
	:	
v.	:	
	:	
JUDSON H. TURNER, DIRECTOR, ENVIRONMENTAL PROTECTION DIVISION, GEORGIA DEPARTMENT OF NATURAL RESOURCES,	:	**Docket No.: OSAH-BNR-EPD-WQC-1420278-60-Miller**
	:	
Respondent,	:	
	:	
CITY OF GUYTON, GEORGIA,	:	
	:	
Respondent-Intervenor.	:	

ORDER ON STANDING

I. SUMMARY OF PROCEEDINGS

On November 21, 2013, Craig Barrow, III ("Petitioner") initiated the instant proceeding by filing a Petition for Hearing ("Petition"),[1] challenging a decision by the Respondent, Judson H. Turner, Director of the Environmental Protection Division of the Georgia Department of Natural Resources ("Director") to issue Land Application System Permit No. GAJ040010 ("Permit") to the Respondent-Intervenor, the City of Guyton, Georgia ("City"). The Permit authorizes the City to construct and operate a facility in Effingham County, Georgia, that will apply treated wastewater to land via spray irrigation.

[1] The Petition was referred to the Office of State Administrative Hearings on December 2, 2013.

On December 30, 2013, the Director filed a motion challenging the Petitioner's standing to bring this action, pursuant to O.C.G.A. § 12-2-2(c)(3)(A).[2] As required by the statute, the Court took evidence and heard arguments on this issue over the course of a three-day hearing, on January 27, February 5, and February 10, 2014. After consideration of the evidence and arguments of the parties, and for the reasons stated below, the Court finds that the Petitioner has standing to bring this action.

II. FACTUAL OVERVIEW

The Permit authorizes the City to build and operate a land application system ("LAS") facility on a 265-acre tract of land located in Effingham County, Georgia, in the Ogeechee River basin ("Guyton site"). (Exhibits J-1, P-6, R-29.) The Guyton site is bounded on its southeast side by Riverside Drive, a dirt road that divides the proposed LAS facility from a farm owned by the Petitioner. (T. 177-79; Exhibits J-4 at 2, P-6, P-15.)

A land application system is a type of reuse facility that uses an irrigation process to remove constituents from treated wastewater. (T. 98-100; Exhibit J-5 at § 1.1.) The LAS facility at issue in this case will receive wastewater that has been collected in the City of Guyton's sewer system. (T. 100, 485-86.) When it arrives at the facility, the wastewater will first pass through screens that will remove solids. (T. 486.) Next, it will move to aeration ponds, where bacteria will break down the organic waste. (T. 486; Exhibit R-29.) This treated wastewater will then be transferred to storage ponds and eventually applied to fields at the Guyton site using spray irrigation, at a rate of up to 1.61 inches per week. (T. 100, 153-54, 486; Exhibits J-1 at 8, R-29.) As the wastewater percolates through the soil, a percentage of the constituents will be taken up and recycled by crops planted on the spray fields. (T.100-01, 486.) At the Guyton site, Bermuda

[2] The City has joined in the Director's Motion.

grass will be planted during the warm season, while rye and/or oats will grow during the cool season. (T. 119; Exhibit J-4 at 27-29.)

III. ANALYSIS

To establish that he has standing to challenge the Permit, the Petitioner must show that he is "aggrieved or adversely affected" by an action of the Director. O.C.G.A. § 12-2-2(c)(2)(A). When the Director challenges a party's standing, "the administrative law judge shall take evidence and hear arguments on this issue and thereafter make a ruling on this issue before continuing with the hearing." O.C.G.A. § 12-2-2(c)(3)(A). The Petitioner bears the burden of going forward with evidence on the issue of standing. Id. After taking evidence and hearing arguments as to standing, the Court concludes that the Petitioner in this case has shown that he is "aggrieved or adversely affected" by the Director's action, within the meaning of O.C.G.A. § 12-2-2(c)(3)(A).

The standing inquiry is intended to "ensure[] that a plaintiff has a sufficient personal stake in a dispute to render judicial resolution appropriate." Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 153 (4th Cir. 2000). Under the statute, "[p]ersons are 'aggrieved or adversely affected' . . . where the challenged action has caused or will cause them injury in fact and where the injury is to an interest within the zone of interests to be protected or regulated by the statutes that the director is empowered to administer or enforce." O.C.G.A. § 12-2-2(c)(3)(A). In addition to these statutory requirements, Georgia courts have looked to United States Supreme Court precedent to resolve issues of standing. Center for a Sustainable Coast v. Turner, 324 Ga. App. 762, 764 (2013). . In Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000), the Supreme Court held:

> [T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or

> imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 180-81 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). Thus, reading O.C.G.A. § 12-2-2(c)(3)(A) together with Supreme Court precedent, the Petitioner must show the following: (1) that he has suffered or will suffer an injury in fact; (2) that his injury is fairly traceable to an order or action of the Director; (3) that his injury is to an interest within the applicable zone of interests; and (4) that the injury is likely to be redressed by a decision in his favor. O.C.G.A. § 12-2-2(c)(3)(a); Laidlaw, 528 U.S. at 180-81; Lujan, 504 U.S. at 560-61. Each element will be addressed in turn.

A. Injury in Fact

To meet the standard under the first prong of the test, the Petitioner must show that he has suffered or will suffer an injury in fact, which must be concrete and particularized, as well as actual and imminent. Id. "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." Laidlaw, 528 U.S. at 183 (citing Sierra Club v. Morton, 405 U.S. 727, 735 (1972)); see Altamaha Riverkeeper, Inc. v. Barnes, No. OSAH-BNR-WW-1031708-98-Walker, 2010 Ga. ENV LEXIS 15, *5-9 (July 19, 2010). For example, the wish to "observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for [the] purpose of standing." Lujan, 504 U.S. at 562-63.

In this case, the Petitioner is concerned that the LAS facility will adversely affect his recreational use and aesthetic enjoyment of his property. (T. 185-88.) Principally, the Petitioner is concerned that surface water and groundwater containing increased levels of waste constituents will flow from the Guyton site to his property and cause harm to amphibians living

on his land. (T. 185-88.) It undisputed that the Petitioner uses his property for recreation and aesthetic enjoyment, including the observation of amphibian species.[3] (T. 177-79, 188.) Although he does not reside at the farm on a full-time basis, he spends most weekends there and has enjoyed observing and learning about the amphibians and reptiles on his property. (T. 177-80, 190.) The northwestern section of the Petitioner's farm, which is just across Riverside Drive from the Guyton site, contains depression wetlands that provide a habitat for frogs, toads, salamanders, and turtles, among others. (T. 236-37.) The Petitioner has invited herpetologists and other experts onto his land to teach him about the species that reside there. (T. 178-80.)

At the standing hearing, the Petitioner established that his property is hydrologically connected to the Guyton site, such that water originating on the Guyton site travels to his property via both surface and groundwater flow. Although both the Director and the City contend that no hydrological connection exists, their arguments are unsupported by the evidence, including the testimony of some of their own witnesses.

Surface water flows from a 72.8-acre area on the southwestern side of the Guyton site onto the Petitioner's property.[4] (T. 35, 41; Exhibit P-20A.) This is evidenced, in part, by culverts that have been built under Riverside Drive, connecting the Guyton site with the Petitioner's property.[5] (T. 23-24; Exhibit P-20A.) The culvert openings on the Guyton site are at a slightly higher than the openings on the Petitioner's property, indicating that some surface

[3] The Petitioner began acquiring his property in 1980, and it currently consists of approximately 2,400 acres of land. (T. 177.) His land is somewhat unique in Georgia because it is in such good condition, making it capable of supporting a variety of imperiled species. (T. 235-36.)

[4] Due to the rapidly permeable soils on the Guyton site, surface water movement takes place only infrequently. (T. 113-116, 148-49; Exhibit J-4 at 20.) Nonetheless, a surface water connection exists between the two properties.

[5] At the standing hearing, the City's consultant, Sam Asady, characterized Riverside Drive as a "continental divide" through which it is impossible for surface water to pass. (T. 286-87.) However, this testimony was contradicted by the physical characteristics of the site, the Petitioner's personal observations, and the testimony of other experts. (T. 35-41, 181-82, 266-70; Exhibits P-16, P-17, P-20A.) Consequently, the Court declines to rely on Dr. Asady's testimony.

water drains through these culverts and across Riverside Drive. (T. 35-40, 267-70; Exhibit P-20A.) In addition, an aerial photograph shows a darkened surface or subsurface flow path traveling from the Guyton Site to the Petitioner's property through the culvert under Riverside Drive. (T. 212-15, 268-70; Exhibits J-3A, P-14, P-15, P-16, P-17, P-18, P-19.) During storm events, rain that does not absorb into the ground travels offsite, onto the Petitioner's property. (T. 69-71, 267-70.) The Petitioner has personally observed this manner of surface water flow. (T. 181-82.) During a 100-year flood event on the nearby Ogeechee River, stormwater may flood certain spray zones on the Guyton site and sweep contaminated surface water through the culverts to the Petitioner's property.[6] (T. 58-59, 65-71; Exhibit P-20B.)

In addition to this surface water flow, treated wastewater from the Guyton site will also flow into the groundwater underlying the Petitioner's property. As this wastewater percolates through the soil and reaches the water table, it will move laterally toward lower groundwater elevations. (T. 104-05.) The potentiometric map prepared by the City's consultant shows that groundwater south of a ridgeline in the southwest corner of the Guyton site travels toward the Petitioner's property.[7] (T. 106-08, 122-24, 169-70; Exhibit J-7.) This area encompasses approximately ten percent of the Guyton site. (T. 454-56; R-28.)

[6] Although the current FEMA map does not place the Guyton Site within the 100-year flood zone, ~~James~~ Robert Campbell, an expert called by the Petitioner, credibly testified that FEMA's current map is based on incorrect data. (T. 54-68; 487-88.) Specifically, the current map utilizes an erroneous Manning's roughness coefficient to characterize the vegetation surrounding the Ogeechee River. When a more accurate Manning's coefficient is applied, the flood elevation rises approximately two feet and encompasses portions of the spray fields on the Guyton Site. (T. 58-59; Exhibits P-11, P-20B.)

[7] Dr. Asady testified that he lacked sufficient data points to accurately represent groundwater elevations and flow in the area surrounding Riverside Drive. (T. 335-36; Exhibit J-7A.) However, the other experts who testified, including James Kennedy, the State geologist, expressed confidence that the map was sufficiently accurate to support a conclusion that groundwater from a portion of the Guyton site flows to the Petitioner's property. (T. 106-09, 476.) Further, groundwater elevations generally follow surface topography. (T. 108-09.) Thus groundwater underlying the southeast side of the Guyton site, like surface water in the same area, flows to the Petitioner's property. The Court also notes that Dr. Asady's testimony was defensive and, at times, evasive, which further undermined its reliability.

The Petitioner fears that surface water and groundwater entering his property from the Guyton site will contain levels of constituents that are harmful to the amphibians on his land. (T. 187-88, 243, 246-47.) Studies have shown that nitrogen exposure inhibits development and increases rates of disease in amphibians. (T. 204-10.) Nitrogen exposure of as low as 3.4 mg/L in groundwater or surface water can reduce amphibian populations by retarding embryo growth, reducing hatching rates, and hindering the growth of hatchlings. (T. 204-07, 209-10, 227-28.) Phosphorus levels of 130 to 140 mg/L in groundwater or surface water have been shown to cause egg mortality and dehydration. (T. 209-10, 230-31.) Additionally, nitrogen and phosphorus induce eutrophication, a process whereby increased algae growth in a water body suppresses oxygen levels. (T. 208-09.) This decline in oxygen is harmful to organisms that live in the water. (Id.)

The level of constituents found in groundwater depends, in part, on how fast the wastewater moves through the soil and the degree of crop uptake of constituents. (T. 101-103.) The Centenary and Foxworth soils found on the Guyton Site are considered high hazard soils for leaching because constituents can move offsite with only minimal modification. (T. 142-43.) These soils are rapidly permeable, with the potential to move two feet or more within an hour when the ground is saturated. (T. 113-116, 148-49; Exhibit J-4 at 20.) Centenary and Foxworth soils also have a low cation exchange capacity, which means that they have lower constituent capture capability. (T. 143.) As a result, they are not soils considered generally suitable for wastewater irrigation. (T. 116-118; J-5 at 10 § 3.1.3.) Although crops planted on the Guyton site will provide good overall constituent uptake, nitrate and salts will migrate off-site under certain conditions and at certain times of year. (T. 119-21, 142-43, 146-47, 169-70.)

Contrary to the arguments of the Director and the City, the Petitioner is not required to prove the substantive allegations of his Petition at this stage. As the Laidlaw court observed, "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." Laidlaw, 528 U.S. at 181. For the purpose of determining standing, it is assumed that environmental impacts will occur as alleged; the issue presented is, instead, whether the Petitioner's recreational, aesthetic, or economic interests will be affected by these environmental impacts. See id. at 183-84; see also In Re: Coffee Cnty Solid Waste Handling Permit, 1986 Ga. ENV LEXIS 17, at *3 (1986) ("it is assumed that the operation of the landfill as permitted will impair the surrounding ground and surface waters as a result of runoff and leakage as alleged"); see also Upper Chattahoochee Riverkeeper Fund, Inc. v. Reheis, 2003 Ga. ENV LEXIS 63, at *1, n.1. Here, as in Coffee County, it is assumed that the operation of the LAS facility, in compliance with the Permit, will impair the surrounding groundwater and surface water as alleged in the Petition.[8] The Petitioner has further shown that groundwater and surface water will flow from the Guyton site to his property south of Riverside Drive, and that any resulting harm to amphibian species on his property will adversely affect his recreational and aesthetic interests. Accordingly, the Court finds that the Petitioner has established a concrete, particularized, actual, and imminent injury that meets the "injury in fact" requirement for standing.

B. Causation

The second element of the standing test is causation, i.e., whether the Petitioner's injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the

[8] Whether or not the alleged harm to the environment will actually result from the Permit is an issue to be decided at the hearing on the merits of the Petition. Laidlaw, 528 U.S. at 181; Coffee County, 1986 Ga. ENV LEXIS 17, at *3, n.1; Upper Chattahoochee, 2003 Ga. ENV LEXIS 63, at *1, n.1. The Director further argues that the Petition is premised on speculation that the City will operate the facility in violation of the Permit. However, this argument is not supported by the record.

independent action of some third party not before the court." Lujan, 504 U.S. at 560-61 (citation omitted); see Laidlaw, 528 U.S. at 180-81; O.C.G.A. § 12-2-2(c)(3)(a). The Director argues that the Petitioner has failed to meet this requirement, because "the permit was based on approved design criteria and contains limitations and conditions which prevent the very complaints that Petitioner alleges would cause him injury." Respondent's Response in Opposition to Petitioner's Trial Memorandum In Support of Standing, filed Feb. 14, 2014, at 4. However, this is not the issue presented for purposes of the standing determination. Rather, to meet the traceability requirement, the Petitioner must establish only that "it is reasonably probable that the challenged actions will threaten his concrete interests." Ouachita Watch League v. Jacobs, 463 F.3d 1163, 1172 (11th Cir. 2006). See also New Manchester Resort & Golf, LLC v. Douglasville Dev., LLC, 734 F. Supp. 2d 1326, 1333 (N.D. Ga. 2010) (citing Gaston Copper Recycling, 204 F.3d at 161) ("a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern"). In this case, the Petitioner has shown that the Permit authorizes the City to land-apply treated wastewater containing constituents that are harmful to the aquatic life that the Petitioner enjoys observing on his property. Accordingly, he has established that his alleged injury is fairly traceable to the Director's action in issuing the Permit.

C. Zone of Interests

To meet the third requirement for standing, the Petitioner must show that his alleged injury "is to an interest within the zone of interests to be protected or regulated by the statutes that the director is empowered to administer and enforce." O.C.G.A. § 12-2-2(c)(3)(a). Here, the recreational and aesthetic benefits that the Petitioner seeks to protect fall within the zone of interests protected by the Georgia Water Quality Control Act ("Act"). The Act specifically

declares, "The people of the State of Georgia are dependent upon the rivers, streams, lakes, and subsurface waters of the state for public and private water supply and for agricultural, industrial, and recreational uses," and goes on to require "reasonable treatment of sewage, industrial wastes, and other wastes prior to their discharge into such waters." O.C.G.A. § 12-5-21(a). Under the Act, a permit is required for any person who constructs a facility or commences an operation that will discharge pollutants into the waters of the state. O.C.G.A. § 12-5-30. Additionally, the Department of Natural Resources, under authority granted by the Act and in furtherance of its objectives, has promulgated regulations establishing standards for water quality and the issuance of LAS permits. See Ga. Comp. R. & Regs. 391-3-6-.03, 391-3-6-.19. Through the present action, the Petitioner has challenged the Permit issued by the Director pursuant to these governing statutes and regulations. Therefore, the Court finds that Petitioner has satisfied the third prong of the standing test by alleging an injury to an interest within the zone of interests protected or regulated by the Act.

D. Redressability

Finally, to meet the standard under the fourth prong of the standing test, the Petitioner must show that "it is likely, as opposed to merely speculative, that [his] injury will be redressed by a favorable decision." Laidlaw, 528 U.S. at 181; see Center for a Sustainable Coast, 324 Ga. App. at 767-68 (applying redressability requirement to challenge to order or action of Director). The Petitioner here has established that his alleged injury will be redressed by the relief that may be granted in this proceeding, namely, reversal of the Permit. He has therefore fulfilled the redressability requirement for standing.

IV. CONCLUSION

For the reasons set forth above, the Petitioner has established by a preponderance of the evidence that he has standing to appeal the issuance of LAS Permit No. GAJ040010. Accordingly, the Director's challenge to his standing to bring the present action is **DENIED**.

SO ORDERED, this _____ day of March, 2014.

_____
KRISTIN MILLER
Administrative Law Judge