BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

GEORGIA RIVER NETWORK and AMERICAN RIVERS,	:	
Petitioners,	:	
v.	:	
JUDSON H. TURNER, DIRECTOR, ENVIRONMENTAL PROTECTION DIVISION, GEORGIA DEPARTMENT OF NATURAL RESOURCES,	:	**Docket No.: OSAH-BNR-EPD-ES-1308374-60-Miller**
Respondent,	:	
GRADY COUNTY BOARD OF COMMISSIONERS,	:	
Intervenor.	:	

FINAL DECISION

ORDER DENYING RESPONDENT'S MOTION TO DISMISS
ORDER DENYING INTERVENOR'S MOTION TO DISMISS
ORDER DENYING INTERVENOR'S MOTION FOR SUMMARY DETERMINATION
ORDER GRANTING PETITIONERS' MOTION FOR SUMMARY DETERMINATION

I. SUMMARY OF PROCEEDINGS

The Grady County Board of Commissioners ("Grady County" or "Intervenor") holds a permit, issued by the United States Army Corps of Engineers, to construct a 960-acre fishing lake in Grady County, Georgia. The permit authorizes the County to build a dam that will impound sections of Tired Creek, a tributary of the upper Ochlockonee River, and flood approximately nine miles of streams and 129 acres of wetlands. As a condition of the permit, Grady County was required to obtain a state-level variance authorizing the encroachment of buffers along state waters at the site.

On July 6, 2012, Judson H. Turner, the Director of the Environmental Protection Division of the Georgia Department of Natural Resources ("Director" or "Respondent"), granted a variance authorizing Grady County to disturb the buffers along the streams that will be inundated during the construction of the Tired Creek Fishing Lake. The Director did not issue a variance as to any on-site wetlands buffers, based on his determination that wetlands do not require buffers under the Erosion and Sedimentation Act, O.C.G.A. § 12-7-1, *et seq.*

On August 3, 2012, the Petitioners, Georgia River Network and American Rivers ("Petitioners"), initiated the instant proceeding by filing a Petition for Hearing ("Petition").[1] The Petition alleges that the buffer variance fails to consider all state waters on the site, specifically wetlands, in violation of O.C.G.A. § 12-7-6(b)(15)(A). The Petitioners seek an order invalidating the Director's issuance of the buffer variance.

On October 12, 2012, the Director and Grady County moved separately to dismiss the Petition.[2] On the same date, the Petitioners and Grady County filed cross-motions for summary determination. Response briefs were filed on November 1, 2012, and replies on November 15, 2012. Thereafter, on November 28, 2012, the parties presented oral argument on the pending motions.[3]

After careful consideration of the parties' motions and arguments and for the reasons set forth below, the Director's and Grady County's Motions to Dismiss are **DENIED**. Grady County's Motion for Summary Determination is also **DENIED**. The Petitioners' Motion for Summary Determination is **GRANTED**, and the Director's issuance of the buffer variance,

[1] The Petition was referred to the Office of State Administrative Hearings on August 24, 2012.

[2] Grady County also joined in the Director's Motion.

[3] The briefing record remained open until December 14, 2012.

which does not consider, account for, and authorize impacts to all state waters on the site, is **REVERSED**.

II. MOTIONS TO DISMISS

A. Legal Standard on Motion to Dismiss

Pursuant to O.C.G.A. § 50-13-13(a)(6), this Court is authorized to "dispose of motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground . . . ." See also Ga. Comp. R. & Regs. r. 616-1-2-.22(1)(i); O.C.G.A. § 9-11-12(b). For the purpose of deciding the Director's and Intervenor's Motions to Dismiss, the Court assumes that the allegations contained in the Petition are true and construes them in the light most favorable to the Petitioners. Byck v. Ga. Dep't of Natural Res., No. OSAH-DNR-CRD-98-036-025-MAD, 1998 Ga. ENV LEXIS 14, at *2-3 (Aug. 26, 1998); see Sherman v. Fulton County Bd. of Assessors, 288 Ga. 88, 89 (2010).

B. The Director's Motion to Dismiss

The Director argues that this Court lacks jurisdiction to consider the Petition because the Petitioners have not challenged an "order or action" of the Director. The Director's Motion is premised on O.C.G.A. § 12-2-2(c)(2)(A), which provides, "Any person who is aggrieved or adversely affected by any order or action of the director shall, upon petition to the director within 30 days after the issuance of such order or the taking of such action, have a right to a hearing before an administrative law judge . . . ." See also O.C.G.A. § 12-7-16 (hearings shall be provided and conducted in accordance with O.C.G.A. § 12-2-2(c)). However, the Director's interpretation of the statute is overly narrow. Contrary to his argument, the Director took action in this case by granting the buffer variance to Grady County, and the Petitioners' appeal is a proper challenge to the scope and sufficiency of the variance.

The Director cites two cases to support his position: In re AZS Corp., No. OSAH-DNR-EPD-HW-AH 1 and 2-96, 1997 Ga. ENV LEXIS 2 (Jan. 4, 1997), and In re Union Timber Corp., No. OSAH-DNR-EPD-HW-AH 6-94, 1995 Ga. ENV LEXIS 14 (Mar. 3, 1995). In each of the two cases, the permit holder argued that the Director had failed to act on its request for a permit amendment. Also in both cases, the administrative law judge determined that he was not authorized to review the Director's alleged failure to act. AZS Corp., 1997 Ga. ENV LEXIS 2, at *16 (proper remedy for Director's failure to act is mandamus action); Union Timber Corp., 1995 Ga. ENV LEXIS 14, at *9. However, the Director's reliance on these cases in misplaced, as they are readily distinguishable from the case at bar. In the present matter, the Director did not fail to act on Grady County's variance request. Instead, he notified the County in writing that he had approved the encroachment on stream buffers at the site of the proposed lake, thereby taking "action" and/or issuing an "order" within the meaning of O.C.G.A. § 12-2-2(c)(2)(A). See In Re City of Nashville, No. OSAH-DNR-EPD-WQ-AH 3-89, 1989 Ga. ENV LEXIS 3 (July 26 1989) (Director's argument that a letter is not an order or action construes statutory terms too narrowly). The Petitioner's appeal is a challenge to the scope and sufficiency of the Director's action,[4] not a challenge to his inaction.

The Director's issuance of the buffer variance to Grady County constitutes an "order or action" which may be challenged in accordance with O.C.G.A. § 12-2-2(c)(2)(A). This Court therefore has jurisdiction to consider the Petition, and the Director's Motion to Dismiss is denied.

[4] The Director established the scope of the variance by instructing Grady County to submit a revised application to include streams that were not part of its original application. (Letter from Director to Elwyn Childs [July 6, 2012] [Stipulated Documents filed Oct. 12, 2012 ("Stip. Docs."), Ex. 1]; Letter from Chris Mangianello to Michael Berry [May 18, 2012] [Stip. Docs., Ex. 2]; Buffer Variance Application [Apr. 13, 2012] [Stip. Docs., Ex. 6].) Further, the statute makes no distinction between a stream buffer and any other type of buffer. O.C.G.A. § 12-7-6(b)(15)(A) (requiring "a 25 foot buffer along the banks of all state waters"). Thus, one buffer variance should account for all state waters on a particular site.

C. Grady County's Motion to Dismiss

Grady County seeks dismissal of the Petition on the grounds that the Petitioners lack standing to bring the present case. Essentially, the County argues that the Petitioners' alleged injuries arise exclusively from the issuance of the federal permit authorizing construction of the lake. Therefore, according to Grady County, the Petitioners' injuries are not caused by the Director's issuance of the buffer variance and may not be redressed in this proceeding. The Court finds no merit in the County's arguments.

In this case, because the Petitioners are organizations rather than individuals, they may establish either direct standing or associational standing, or both. Sawnee Elec. Membership. Corp. v. Ga. Dep't of Revenue, 279 Ga. 22 (2005). An organization with associational standing acts "solely as the representative of its members," while an organization with direct standing has "standing in its own right to seek judicial relief from injury to itself." Id. at 22 (quoting Warth v. Seldin, 422 U.S. 490, 511 (1975). The Petitioners here have established associational standing.[5]

In Georgia, "[a]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Aldridge v. Ga. Hospitality & Travel Ass'n, 251 Ga. 234, 236 (1983) (quoting Hunt v. Wash. State Apple Advertising Comm'n, 432 U. S. 333, 343 (1977)). The Petitioners meet these requirements.

1. The Petitioners' Members Would Have Standing to Bring This Action As Individuals.

To establish that their members would otherwise have standing in their own right, the Petitioners must show that their members are "aggrieved or adversely affected" by the Director's

[5] Because the Petitioners have established associational standing, and because the parties have not fully briefed the issue of direct standing, the Court does not determine whether they may also have direct standing in this action.

issuance of the buffer variance. O.C.G.A. § 12-2-2(c)(2)(A). 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). The Petitioners in this case are "aggrieved or adversely affected" within the meaning of O.C.G.A. § 12-2-2(c)(3)(A).

a. Injury in Fact

The Petitioners have established that the Director's issuance of the buffer variance will cause their members an injury in fact. "[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." Friends of the Earth, Inc. v. Laidlaw Environmental Svcs., Inc., 528 U.S. 167, 183 (2000) (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). In this case, members of the Petitioners' organizations use and enjoy the site of the proposed Tired Creek Fishing Lake. These members use the lake site, as well as the land and waters downstream, for recreation and aesthetic enjoyment. (Affidavit of Beth Grant [Petition, Ex. 6] ["Grant Aff."] ¶¶ 3-4, 8, 10, 15; Affidavit of Margaret Tyson [Petition, Ex. 6] ["Tyson Aff."] ¶¶ 5, 12.) They share the concern that the destruction of the wetlands and their buffers will have a negative impact on animal life, natural habitats, and the quality of the water downstream. (Grant Aff. ¶¶ 10-12; Tyson Aff. ¶ 6-10.) Consequently, the Petitioners meet the "injury in fact" requirement for standing, notwithstanding Grady County's argument to the contrary.

Grady County does not dispute that the Petitioners' members will be harmed. Rather, the County claims that their injuries stem not from the Director's issuance of an allegedly deficient buffer variance, but from the federal permit previously issued by the U.S. Army Corps of Engineers.[6] Grady County correctly observes that the federal permit, if implemented, will result in the flooding of all wetlands (including any wetlands buffers) on the site. However, the mere fact that the Petitioners have identified the issuance of the federal permit as one source of their members' injuries does not preclude them from identifying the issuance of the buffer variance as a second source. To hold otherwise would render the Director's review of the County's variance request meaningless.

Grady County argues, in effect, that where a federal permit has been issued, the Director's grant of a variance is a foregone conclusion. This argument is belied by the federal permit itself, which requires the County to comply with "the minimal requirements as contained in the Georgia Erosion and Sedimentation Act of 1975, as amended" and specifically states that the permit "does not obviate the need to obtain other federal, state, or local authorizations required by law." (Dep't of the Army Permit 200500967 [May 28, 2010] [Stipulated Documents filed Oct. 12, 2012 ("Stip. Docs."), Ex. 10] at 4, 8.) Furthermore, while Georgia law instructs the Director to "consider granting a variance . . . [w]here a proposed land-disturbing activity within the buffer would require the landowner to acquire a permit from the United States Army Corps of Engineers . . . ," the statute stops well short of requiring him to do so. O.C.G.A. § 12-7-6(b)(15)(C)(i) (emphasis added). The issuance of a federal permit does not excuse the Director from his obligation to determine whether or not a variance request should be granted, applying the "specific criteria" adopted in rules promulgated by the Board of Natural Resources. O.C.G.A. § 12-7-6(b)(15)(C). Finally, the process followed by the Director in this case

[6] The federal permit was upheld by the district court and is currently on appeal to the Eleventh Circuit.

demonstrates that his issuance of the variance was not a mere formality. Grady County's original variance application delineated only those streams identified in the federal permit. The Director, because he determined that the original application did not account for more than six thousand linear feet of streams constituting state waters, required the County to submit an amended application to address the additional on-site streams. (Letter from Director to Elwyn Childs [July 6, 2012] [Stip. Docs., Ex. 1]; Letter from Chris Mangianello to Michael Berry [May 18, 2012] [Stip. Docs., Ex. 2]; Buffer Variance Application [Apr. 13, 2012] [Stip. Docs., Ex. 6].) These circumstances demonstrate that the Director's review of the variance request is more than a rubber stamp of the federal permit.

Grady County further argues that the Petitioners' alleged injuries are not redressable by any relief that may be granted in this proceeding. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992). However, this is a federal standing requirement; the state standing statute does not specifically contemplate redressability. See O.C.G.A. § 12-2-2(c). Moreover, even if a showing of redressability were required, the Petitioners' injuries would, in fact, be redressed by the relief they seek: an order invalidating the buffer variance. As noted above, the construction of the lake and the inundation of the wetlands cannot occur without a state-issued buffer variance, in addition to the federal permit. Thus, the Petitioners have established that "the challenged action has caused or will cause them injury in fact," as required by O.C.G.A. § 12-2-2(c)(3)(A).

b. Zone of Interests

The recreational and aesthetic benefits that the Petitioners seek to protect fall within the "zone of interests" protected by the Erosion and Sedimentation Act, whose purpose is to avoid pollution of state waters and "damage to domestic, agricultural, recreational, fish and wildlife,

and other resource uses." O.C.G.A. § 12-7-2; Smart Growth-Forsyth County v. Couch, No. OSAH-BNR-ES-0707202-60-Howells, 2007 Ga. ENV LEXIS 7, *5 (Mar. 2, 2007). The Petitioners therefore meet the "zone of interests" requirement of O.C.G.A. § 12-2-2(c)(3)(A).

For the reasons stated above, the Petitioners have fulfilled the first component of the three-prong test for associational standing by showing that their members would have standing to bring this action as individuals because they are "aggrieved or adversely affected" by the Director's issuance of the buffer variance.

2. The Petitioners Seek to Protect Interests Germane to the Purposes of Their Organizations.

Both Petitioners also satisfy the second prong of the associational standing test, as they seek to protect interests that are germane to their organizational purposes. Georgia River Network's mission is "to ensure a clean water legacy by engaging and empowering Georgians to protect and restore our rivers from the mountains to the coast." (Affidavit of April Ingle [Petition, Ex. 2] ["Ingle Aff."] ¶ 4.) Similarly, American Rivers works to protect and restore the rivers of the United States, including those found in Georgia, "for the benefit of people, wildlife, and nature." (Affidavit of Jenny Hoffner [Petition, Ex. 2] ["Hoffner Aff."] ¶¶ 4-5.) In furtherance of their missions, both organizations advocate for the enforcement of environmental laws such as the Erosion and Sedimentation Act. (Ingle Aff. ¶¶ 4-5, 8-9; Hoffner Aff. ¶¶ 5.) Both organizations also share the goals of protecting natural infrastructure, including wetlands and their buffers, as a means of ensuring clean water supplies. (Ingle Aff. ¶ 8; Hoffner Aff. ¶ 7.) In this case, the Petitioners fear that the unmitigated destruction of wetlands buffers on the site will adversely affect downstream water quality. (Ingle Aff. ¶ 18; Hoffner Aff. ¶¶11-12.) The Petitioners seek to protect these interests, which are germane to the missions of their organizations, through the present litigation.

3. Neither the Claims Asserted By the Petitioners Nor the Relief They Seek Requires the Participation of Individual Members.

Finally, the Petitioners satisfy the third prong of the associational standing test. Georgia courts hold that where a "suit is primarily seeking declaratory and injunctive relief and does not present complicated issues of individual damages," there is no need for individual members of the association to join as parties. Aldridge, 251 Ga. at 236. Here, the Petitioners do not request damages but merely ask for declaratory and injunctive relief: specifically, the invalidation of the buffer variance based on a finding that it did not address impacts to on-site wetlands buffers, in violation of the Erosion and Sedimentation Act. Thus, individual members of the Petitioners' associations need not participate in this litigation.

Based on the foregoing analysis, the Petitioners have met each of the three requirements for associational standing in this matter: first, that their members would otherwise have standing as individuals, because they are aggrieved for adversely affected by an order or action of the Director; second, that the interests the Petitioners seek to protect are germane to their organizations' purposes; and third, that neither the Petitioners' claims nor the requested relief requires the participation of individual members.

III. MOTIONS FOR SUMMARY DETERMINATION

A. Legal Standard on Motion for Summary Determination

Summary determination in this proceeding is governed by Office of State Administrative Hearings ("OSAH") Rule 15, which provides, in relevant part:

> A party may move, based on supporting affidavits or other probative evidence, for summary determination in its favor on any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination.

Ga. Comp. R. & Regs. r. 616-1-2-.15(1). On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact such that the moving party

"is entitled to a judgment as a matter of law on the facts established." Pirkle v. Envtl. Prot. Div., Dep't of Natural Res., No. OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at *6-7 (Oct. 21, 2004) (citing Porter v. Felker, 261 Ga. 421 (1991)); see generally Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-305 (2206) (noting that a summary determination is "similar to a summary judgment" and elaborating that an administrative law judge "is not required to hold a hearing" on issues properly resolved by summary determination.)

Further, pursuant to OSAH Rule 15:

> When a motion for summary determination is supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or other probative evidence, that there is a genuine issue of material fact for determination.

Ga. Comp. R. & Regs. r. 616-1-2-.15(3). See Lockhart v. Dir., Envtl. Prot. Div., Dep't of Natural Res., No. OSAH-BNR-AE-0724829-33-RW, 2007 Ga. ENV LEXIS 15, at *3 (June 13, 2007) (citing Leonaitis v. State Farm Mutual Auto Ins. Co., 186 Ga. App. 854 (1988)).

B. Motions for Summary Determination

The Petitioners contend that the Director erred as a matter of law by issuing a buffer variance without considering impacts to all state waters on the site of the proposed Tired Creek Fishing Lake, including wetlands and their buffers, as mandated by the Erosion and Sedimentation Act, O.C.G.A. § 12-7-1, *et seq* (the "Act"). Taking the opposite position, Grady County's Motion for Summary Determination argues that the Act requires buffers only where wrested vegetation is present; and, because wetlands do not have wrested vegetation, they do not have buffers. For the reasons that follow, the Court concludes that the Director issued the buffer variance in violation of O.C.G.A. § 12-7-6(b)(15)(A), which establishes buffers for all state

waters, including wetlands. Accordingly, the Petitioners' Motion is granted; Grady County's Motion is denied; and the Director's issuance of the buffer variance is reversed.

1. Findings of Undisputed Material Fact

Pursuant to OSAH Rule 15(1), a motion for summary determination shall include "a short and concise statement of each of the material facts as to which the moving party contends there is no genuine issue for determination." Ga. Comp. R. & Regs. r. 616-1-2-.15(1). Similarly, a response to a statement of material facts must contain "a short and concise statement of each of the material facts as to which the party opposing summary determination contends there exists a genuine issue for determination." Ga. Comp. R. & Regs. r. 616-1-2-.15(2). The Court has endeavored to streamline the facts presented by the parties and has relied only upon those that are both undisputed and material to the issues presented for summary determination.

The Director and Grady County, in their responses to the Petitioners' Statement of Undisputed Material Facts, have offered unsupported denials of a number of the specific facts proposed by the Petitioners. Where this has occurred, they have not demonstrated, by affidavit or other probative evidence, that a genuine issue of material fact exists. Ga. Comp. R. & Regs. r. 616-1-2-.15(3); Ellis v. England, 432 F.3d 1321, 1325-26 (11th Cir. 2005). Consequently, in these instances, the Court has accepted the Petitioners' proposed undisputed facts to the extent they are properly supported.

The Petitioners have included with their Motion the Affidavit of Donley Kisner, which offers Mr. Kisner's opinion that the site contains more than the 129 acres of wetlands identified by the Army Corps of Engineers. (Affidavit of Donley Kisner [Petitioners' Motion for Summary Determination, Ex. 4].) However, the acreage of wetlands on the site is irrelevant to this proceeding. Therefore, Mr. Kisner's Affidavit and its attached exhibits are stricken from the

record and have not been considered.[7] Additionally, Exhibits A, B, and C attached to the Petitioners' Reply in Support of Their Motion for Summary Determination are stricken from the record. All other objections and/or motions to strike filed by the Director and/or Grady County are overruled or denied to the extent the material objected to is relied upon herein.

1.

On May 28, 2010, acting pursuant to the Clean Water Act, the U.S. Army Corps of Engineers issued a Section 404 permit to Grady County. The permit authorizes the construction of a 960-acre fishing lake northwest of Cairo, Georgia. (Petitioners' Statement of Undisputed Material Facts ["Undisputed Facts"] ¶¶ 1-2; Director's Response to Petitioners' Statement of Undisputed Material Facts ["Director's Response"] ¶¶ 1-2; Grady County's Objections to Petitioners' Statement of Undisputed Material Facts ["County's Response"] ¶¶ 1-2; Stip. Docs., Ex. 10.)

2.

The permit authorizes Grady County to impound Tired Creek, a tributary of the Upper Ochlockonee River, by constructing a 3,000-foot long, 65-foot tall, and 450-foot wide dam. The construction of the dam and impoundment of the lake would destroy at least 129 acres of wetlands and over nine miles of streams. (Undisputed Facts ¶¶ 3-4; Director's Response ¶ 2; County's Response ¶¶ 3-4; Stip. Docs., Ex. 10.)

[7] Mr. Kisner's Supplemental Affidavit, which authenticates a photograph used by the Petitioners as a demonstrative exhibit at oral argument is not stricken, except to the extent it may purport to prove that the area of wetlands on the site exceeds 129 acres. (Petitioners' Notice of Filing of the Affidavit of Donley Kisner, filed Nov. 27, 2012.)

3.

On April 13, 2012, Grady County submitted a revised application for a buffer variance to the Environmental Protection Division of the Georgia Department of Natural Resources ("EPD"). (Undisputed Facts ¶ 5; Director's Response ¶ 2; County's Response ¶ 5; Stip. Docs., Ex. 6.)

4.

The April 2012 application does not request authorization to encroach on or disturb a buffer along the 129 acres of wetlands identified in the federal permit, nor does it request such authorization for wetlands deemed state waters within the proposed lake bed or at the site of the proposed dam. (Undisputed Facts ¶¶ 6-7; Director's Response ¶ 3; County's Response ¶¶ 6-7; Stip. Docs., Ex. 6.)

5.

The April 2012 application does not identify the location of wetlands deemed state waters, other than the 129 acres included in the federal permit, that are within the proposed lake bed or at the location of the proposed dam. (Undisputed Facts ¶¶ 8-9; Director's Response ¶ 3; County's Response ¶¶ 8-9; Stip. Docs., Ex. 6.)

6.

The April 2012 application does not identify any wetlands on the site that are bounded by a line of wrested vegetation. (Undisputed Facts ¶ 10; Director's Response ¶ 3; County's Response ¶ 10; Stip. Docs., Ex. 6.)

7.

The April 2012 application does not propose mitigation for the impact to buffers on wetlands deemed state waters caused by the impoundment of the lake or the construction of the

dam. (Undisputed Facts ¶¶ 11-12; Director's Response ¶ 3; County's Response ¶¶ 11-12; Stip. Docs., Ex. 6.)

8.

On July 6, 2012, the Director granted a buffer variance authorizing Grady County to encroach upon the 25-foot buffer adjacent to streams on the site of the proposed lake. The Director's letter did not reference any of the wetlands deemed state waters within the proposed lake bed or at the location of the proposed dam. Further, the Director's letter did not authorize the encroachment or disturbance of buffers on wetlands deemed state waters within the proposed lake bed or at the location of the proposed dam. (Undisputed Facts ¶¶ 15-17; Director's Response ¶¶ 2-3; County's Response ¶¶ 15-17; Stip. Docs., Ex. 1.)

9.

In issuing the buffer variance, the Director did not consider the encroachment or disturbance of buffers on wetlands deemed state waters within the proposed lake bed or at the location of the proposed dam. The Director further did not determine whether there are wetlands within the proposed lake bed or at the location of the proposed dam that are bounded by lines of wrested vegetation. (Undisputed Facts ¶¶ 18-19; Director's Response ¶ 3; County's Response ¶¶ 18-19; Stip. Docs., Exs. 1, 5.)

10.

In a letter to the Petitioners' counsel dated June 27, 2012, Larry Hedges, EPD's program manager for the nonpoint source program, referred to the wetlands within the impoundment of the proposed lake and stated, "EPD agrees that the on-site wetlands are state waters." Mr. Hedges' letter further stated, "Wetlands are features that usually do not require a buffer due to the lack of 'wrested vegetation.' Therefore, those impacts are not included in the variance

request." (Undisputed Facts ¶¶ 20, 22; Director's Response ¶ 2; County's Response ¶¶ 20, 22; Stip. Docs., Exs. 1, 5.)

2. Analysis

By issuing a buffer variance for the proposed Tired Creek Fishing Lake without considering impacts to all state waters, including wetlands and their buffers, the Director acted in violation of the Erosion and Sedimentation Act, O.C.G.A. § 12-7-1, *et seq*. The buffer variance is therefore invalid as a matter of law.

The Erosion and Sedimentation Act mandates a buffer[8] for "all state waters."[9] O.C.G.A. § 12-7-6(b)(15)(A). The statute specifically states, "[t]here is established a 25 foot buffer along the banks of all state waters, as measured horizontally from the point where vegetation has been wrested by normal stream flow or wave action, except . . ." in six specifically enumerated situations, none of which pertain here. Id. A statute whose meaning is plain and unambiguous requires no interpretation. Standard Oil Co. v. State Revenue Comm'n, 179 Ga. 371, 375 (1934). In this case, applying the plain and unambiguous meaning of the statute, a buffer is required for all state waters, including wetlands.

The Director and Grady County, however, argue that the Act does not establish a buffer along wetlands because the term "banks" restricts the meaning of "all state waters." These parties interpret the term "banks" to mean "stream banks," which the Board of Natural Resources

[8] Under the Act, a "buffer" is "the area of land immediately adjacent to the banks of state waters in its natural state of vegetation, which facilitates the protection of water quality and aquatic habitat." O.C.G.A. § 12-7-3(2).

[9] The Act defines the term "state waters" to include:

> any and all rivers, streams, creeks, branches, lakes, reservoirs, ponds, drainage systems, springs, wells, and other bodies of surface or subsurface water, natural or artificial, lying within or forming a part of the boundaries of the state, which are not entirely confined and retained completely upon the property of a single individual, partnership, or corporation.

O.C.G.A. § 12-7-2(16). It is undisputed that wetlands, which are "other bodies of surface or subsurface water," are "state waters" within the meaning of the statute. (See Letter from Lawrence W. Hedges to Nathaniel Hunt [June 27, 2012] [Stip. Docs., Ex. 5]).

has defined as "the confining cut of a stream channel . . . usually identified as the point where the normal stream flow has wrested the vegetation." Ga. Comp. R. & Regs. r. 391-3-7-.01(x). Therefore, according to the Director and Grady County, buffers are required only for state waters with lines of wrested vegetation. The Court declines to adopt this interpretation, for a number of reasons.

First, the Director and Grady County incorrectly seek to apply the definition of "stream bank," a term that is not used in the statute, as a means of restricting the buffer mandate to state waters with banks that are defined by wrested vegetation. Since the legislature did not use the term "stream bank," however, its meaning is simply irrelevant. More instructive is the definition offered by the Director of the term "bank," which the American Heritage Dictionary has defined as "the slope of land adjoining a water body." The American Heritage Dictionary (2d College Ed.). Applying this meaning, there is no basis for the Director's determination that a bank must be demarcated by a line of wrested vegetation. The statute refers to the "point where vegetation has been wrested" not as a limitation on the buffer provision, but as a point of measurement for the buffer. O.C.G.A. § 12-7-6(b)(15)(A); see 1993 Op. Atty. Gen. 93-7.[10] The General Assembly's use of "banks" rather than "stream banks" indicates that the buffer provision is properly applied to all state waters.

Second, the Director's and Grady County's interpretation fails to account for the statute's subsequent identification of six specific exceptions to the buffer requirement. Under Georgia law, "the express mention of one thing in an Act or statute implies the exclusion of all other

[10] In 1993, at the request of then-Director Harold F. Reheis, the Attorney General issued an official opinion regarding his interpretation of a previous version of O.C.G.A. § 12-7-6. At that time, the buffer provision stated that "an undisturbed natural vegetative buffer of 25 feet measured from the stream banks shall normally be retained adjacent to any state waters . . . ." O.C.G.A. § 12-7-6(b)(16) (1993). The Attorney General opined that "[t]he term 'stream banks' merely directs where the measurement of the buffer shall begin." 1993 Op. Atty Gen. 93-7.

things." Abdulkadir v. State, 279 Ga. 122, 123 (2005). Surely, if the General Assembly had intended to exclude wetlands from the buffer requirement, it would have included wetlands in its list of six separately enumerated exceptions. See O.C.G.A. § 12-7-6(b)(15)(A). Furthermore, as the Attorney General has previously noted, "[w]hen the Act applies to less than all state waters, the General Assembly used language other than 'state waters." 1993 Op. Atty Gen. 93-7. Thus no wetlands exclusion can be read into the statute.

Third, the General Assembly intended that the Act's requirements should be applied broadly to all state waters. Legislative intent is determined by construing the statute as a whole. "The construction of language and words used in one part of the statute must be in the light of the legislative intent as found in the statute as a whole." Williams v. Bear's Den, 214 Ga. 240, 242 (1958) (internal citations omitted). Here, legislative intent is expressed in O.C.G.A. § 12-7-2, wherein the General Assembly specifically determined that "soil erosion and sediment deposition onto lands and into waters within the watersheds of this state are occurring as a result of widespread failure to apply proper soil erosion and sedimentation control practices in land clearing, soil movement, and construction activities and that such erosion and sediment deposition result in pollution of state waters and damage to domestic, agricultural, recreational, fish and wildlife, and other resource uses." O.C.G.A. § 12-7-2. The legislature further declared that the purpose of the Act is "to strengthen and extend the present erosion and sediment control activities and programs of this state and to provide for the establishment and implementation of a state-wide comprehensive soil erosion and sediment control program to conserve and protect the land, water, air, and other resources of this state." Id. Read in this context, the exclusion of wetlands from the buffer requirement would undermine the General Assembly's intent to protect all state waters.

Finally, the Director's interpretation of the statute is not entitled to deference because he has applied the buffer provision inconsistently. For example, the Director has applied the Act to require a buffer along Georgia's coastal marsh,[11] a saltwater wetland,[12] without reference to a line of wrested vegetation. The marshlands buffer is instead measured from a "marsh jurisdiction line" drawn by the Coastal Resources Division of the Department of Natural Resources "on a project specific basis." (Memorandum from Carol Couch to Erosion and Sedimentation Control Local Issuing Authorities [July 8, 2004] [Stip. Docs., Ex. 9]). This application of the buffer provision appears to contradict the Director's position in the present litigation. Under Georgia law, "courts are not bound to blindly follow an agency's interpretation of a statute." ChoicePoint Servs. v. Graham, 305 Ga. App. 254, 258 (2010). At best, the Director's interpretation may be afforded deference to the extent it has the "power to persuade." See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Here, the Court can discern no plausible basis for the Director's apparent distinction between saltwater and freshwater wetlands. Therefore, his interpretation of the statute is not persuasive, and deference would be improper.

Based on the foregoing, this Court finds that the Director exceeded his regulatory authority by issuing a buffer variance for the Tired Creek Fishing Lake that did not consider, account for, and authorize the project's encroachment on buffers for all state waters on the site, including wetlands. Accordingly, the Petitioners are entitled to judgment as a matter of law.

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[11] The Director's decision to require a buffer along the marsh is consistent with the Court of Appeals' decision in Coastal Marshlands Protection Committee v. Center for a Sustainable Coast, 286 Ga. App. 518 (2007). In that case, the Court of Appeals assumed, without deciding, that the 25-foot buffer requirement applied to all state waters, including coastal marshlands. Id. at 529.

[12] A wetland is "a lowland area, such as a marsh or swamp, that is saturated with moisture." American Heritage Online Dictionary, http://ahdictionary.com/word/search.html?q=wetlands (January 14, 2013).

V. DECISION

For the reasons set forth above, the Director's and Intervenor's Motions to Dismiss are **DENIED**. The Intervenor's Motion for Summary Determination is also **DENIED**. The Petitioners' Motion for Summary Determination is **GRANTED**, and the Director's issuance of the buffer variance for the Tired Creek Fishing Lake is **REVERSED**.

SO ORDERED, this 14th day of January, 2013.

KRISTIN L. MILLER
Administrative Law Judge