

**IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

**BOB BOARD, MARY BOARD, and
ANTHONY AVERY,
Petitioners,**

v.

**RICHARD DUNN, DIRECTOR OF THE
ENVIRONMENTAL PROTECTION
DIVISION, GEORGIA DEPARTMENT
OF NATURAL RESOURCES,
Respondent.**

and

**PAULDING COUNTY AIRPORT
AUTHORITY,
Intervenor-Respondent.**

Charles K. McKnight, Esq., and
Craig K. Pendergrast, Esq.,
For Petitioners

Graham Barron, Esq., and
Suzanne Osborne, Esq.,
For Respondent.

W. Thomas Cable, Esq.,
For Intervenor-Respondent

**Docket No.: 1740579
1740579-OSAH-BNR-WQC-60-Malihi**



**FINAL DECISION
ORDER GRANTING RESPONDENT'S AND INTERVENOR-RESPONDENT'S
MOTIONS FOR SUMMARY DETERMINATION**

I. INTRODUCTION

Petitioners challenge the decision of Richard Dunn, Director of the Environmental Protection Division, Georgia Department of Natural Resources (hereinafter "the Director" and "EPD," respectively) to grant the Paulding County Airport Authority (hereinafter "PCAA") coverage under the National Pollution Discharge Elimination System ("NPDES") General Permit to discharge storm water associated with construction activity (GAR100001 – Stand Alone).

The parties filed motions for summary determination on August 18, 2017, and responses thereto on September 8, 2017. Petitioners also filed a reply on September 15, 2017. Having carefully reviewed the parties' filings, the Court **DENIES** Petitioners' motion for summary determination and **GRANTS** Respondent's and Intervenor-Respondent's motions for summary determination for the reasons stated below.

II. STANDARD ON SUMMARY DETERMINATION

Summary determination in this proceeding is governed by 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. 616-1-2-.15(1). On a motion for summary determination, the moving party must demonstrate 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. Env'tl. Prot. Div., Dep't of Natural Res.*, OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at *6-7 (OSAH 2004) (citing *Porter v. Felker*, 261 Ga. 421, 421 (1991)); see generally *Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res.*, 282 Ga. App. 302, 304-05 (2006) (noting summary determination is "similar to 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. 616-1-2-.15(3). See *Lockhart v. Dir. Env'tl. Prot. Div., Dep't of Natural Res.*, OSAH-BNR-AE-0724829-33-RW, 2007 Ga. ENV LEXIS 15, at *3 (OSAH 2007) (citing *Leonaitis v. State Farm Mutual Auto Ins. Co.*, 186 Ga. App. 854 (1988)).

III. STATEMENT OF UNDISPUTED FACTS

Having reviewed the motions for summary determination, responsive filings, and exhibits, the Court concludes that the following facts are not in dispute:

1.

Paulding Northwest Atlanta Airport (hereinafter “the Airport”) is a small general aviation facility located in Paulding County, Georgia. *Deposition of Terry E. Tibbitts, Interim Director, Paulding Northwest Atlanta Airport.*

2.

A tributary to Bluffy Creek (hereinafter “the Tributary”) flows through the property on which the Airport is located. *Respondent's Ex. E.* The Tributary is classified as a trout stream. *Respondent's Ex. F.*

3.

On May 1, 2017, PCAA submitted a Notice of Intent to EPD requesting coverage under the GAR100001 – Stand Alone Permit (hereinafter “the Permit”) for the discharge of storm water associated with a construction project at the Airport. *Affidavit of James Cooley, District Manager, Mountain District, EPD* [hereinafter *Cooley Aff.*] ¶ 5.

4.

The planned construction project involves installing two parallel 2,830-foot pipes along the bottom of the existing stream channel, diverting the flow of the Tributary into one of the

pipes, and covering the length of the pipes with ten feet of fill. *Petitioner's Ex. 1, Tabs 10 and 11; Petitioner's Standing Hearing Ex. 10; Respondent's Exs. C, D, E, and H.*

5.

PCAA plans to construct three taxiways and three roads over the piped Tributary. *Respondent's Exs. D, E, G, and H; Petitioner's Standing Hearing Ex. 7.* If the construction project is completed as planned, the Tributary will flow underneath the taxiways and roads via the 2,830-foot pipe. *Id.*

6.

On May 11, 2017, PCAA submitted another Notice of Intent to EPD with new information and requested coverage under the Permit to discharge storm water associated with the construction project. *Cooley Aff. ¶ 6; Respondent's Ex. B.*

7.

In a letter dated May 11, 2017, the Director notified PCAA that he was denying its request for coverage under the Permit because the information provided by PCAA was not sufficient for EPD to make a determination as to whether the project qualified as an infrastructure project or whether the roadway drainage structure exemption applied. *Cooley Aff. ¶ 7; Respondent's Ex. C.*

8.

Terry Tibbitts, Interim Director of the Airport, responded to the Director in a letter dated May 12, 2017. *Respondent's Ex. D.* In this letter, Mr. Tibbitts clarified that the project for which PCAA sought coverage under the Permit involved the construction of six roadways and explained that the piping project constituted a single drainage structure under these roadways.

Id. He attached additional information, including drawings of the proposed project and construction plans, to the letter. *Id.*

9.

On May 18, 2017, PCAA provided EPD with an Airport Layout Plan approved by the Federal Aviation Administration (“FAA”) and Army Corps of Engineers permit drawings depicting the planned taxiways and roadways. *Cooley Aff.* ¶ 9. In the e-mail to which these documents were attached, Mr. Tibbitts explained that, as was depicted on the drawings, the project consisted of “three separate two-lane public roadways connecting Airport Parkway to the parking areas and three separate taxiways connecting the apron area to the airport runway.” *Respondent’s Ex. E.* Mr. Tibbitts indicated that the single roadway drainage structure was necessary because the total project width was insufficient to allow for the installation of individual drainage structures under each roadway. *Id.*

10.

On May 19, 2017, PCAA submitted a revised Notice of Intent to EPD for coverage under the Permit. *Cooley Aff.* ¶ 9; *Respondent’s Ex. F.*

11.

On May 26, 2017, EPD requested that PCAA provide detailed profile drawings of the “six proposed roadway drainage structures.” *Cooley Aff.* ¶ 11; *Respondent’s Ex. G.* EPD advised PCAA that it was required to provide sufficient information that the construction of the roadways alone would result in 100% of the impacts to the Tributary, and that “additional piping of the stream [was] not necessary to accommodate hangars and parking areas.” *Id.*

12.

PCAA provided a profile drawing showing the roadways and slopes for the project on May 30, 2017. *Cooley Affidavit* ¶ 12; *Respondent's Ex. H*.

13.

EPD reviewed the information provided by PCAA and determined that the piping project included a series of roadway drainage structures and was therefore exempt from the fifty-foot buffer variance requirements for trout streams under Georgia law. *Affidavit of Michael Berry, Manager, Erosion and Sedimentation Unit, Water Protection Branch, EPD* [hereinafter *Berry Aff.*] ¶¶ 6-7.

14.

On June 7, 2017, the Director issued a letter informing PCAA that, based on the information provided to EPD, any impacts caused by the project within the fifty-foot buffer were necessary to construct a roadway drainage structure and that the project was granted coverage under the Permit. *Berry Affidavit* ¶ 6; *Respondent's Ex. I*.

15.

Petitioners filed a petition challenging the action of the Director on or about June 13, 2017. *Petition for Hearing*.

IV. CONCLUSIONS OF LAW

1.

As third parties challenging the grant of coverage under an NPDES Permit, Petitioners bear the burden of proving, by a preponderance of the evidence, that the Director's decision was unlawful. Ga. Comp. R. & Regs. 616-1-2-.07; *see also Longleaf Energy Assocs. v. Friends of the Chattahoochee, Inc.*, 298 Ga. App. 753, 768 (2009) (administrative law judge required "to consider

the applicable facts and law anew, without according deference or presumption of correctness to the EPD's decision, and to render an independent decision on whether the Challengers carried their burden to prove by the preponderance of the evidence that the permit should not have been issued").

2.

The Georgia Water Quality Control Act regulates the discharge of pollutants into the waters of the state. *See* O.C.G.A. §§ 12-5-20 to -53; *see also Coastal Marshlands Prot. Comm. v. Ctr. for a Sustainable Coast*, 286 Ga. App. 518, 528 (2007), *aff'd*, 284 Ga. 736 (2008). Pursuant to the Water Quality Control Act, activities that result, or will result, in the discharge of pollutants into state waters require a permit from the Director. O.C.G.A. § 12-5-30(a)-(b); *see Upper Chattahoochee Riverkeeper, Inc. v. Forsyth Cty.*, 318 Ga. App. 499, 503 (2012). Within certain enumerated statutory constraints, the Director is authorized to issue general permits for the discharge of storm water from construction activity. O.C.G.A. § 12-5-30(f).

3.

Erosion and sedimentation caused by the discharge of storm water are regulated by the Georgia Erosion and Sedimentation Act of 1975 (hereinafter "the E&S Act"), which the General Assembly enacted in order 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." O.C.G.A. § 12-7-2; *see Coastal Marshlands Prot. Comm.*, 286 Ga. App. at 529. Pursuant to the E&S Act, no land-disturbing activities¹ may be conducted without first providing notice of intent to EPD. O.C.G.A. § 12-7-7.

¹ "Land disturbing activity" is defined in the E&S Act as "any activity which may result in soil erosion from water or wind and the movement of sediments into state water or onto lands within the state, including, but not limited to, clearing, dredging, grading, excavating, transporting, and filling of land but not including agricultural practices." O.C.G.A. § 12-7-3(9).

4.

As part of the state's plan for erosion and sedimentation control, the E&S Act established a fifty-foot buffer along the banks of any state waters classified as 'trout streams' in which no land-disturbing activity may occur, "except where a roadway drainage structure must be constructed." O.C.G.A. § 12-7-6(b)(16). Consistent with the E&S Act's exception regarding roadway drainage structures, the Rules for Erosion and Sedimentation Control provide that application to or approval from EPD is not necessary "where roadway drainage structures must be constructed within . . . the fifty (50) foot buffer of any trout stream . . ." Ga. Comp. R. & Regs. 391-3-7-.05(1)(c).

5.

The E&S Act defines "roadway drainage structure" as

a device, such as a bridge, culvert, or ditch, composed of a virtually nonerodible material such as concrete, steel, plastic, or other such material that conveys water under a roadway by intercepting the flow on one side of a traveled way consisting of one or more defined lanes, with or without shoulder areas, and carrying water to a release point on the other side.

O.C.G.A. § 12-7-3(13).

6.

The Director issued the Permit at issue in 2016. GA. DEP'T OF NAT. RES., AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM STORM WATER DISCHARGES ASSOCIATED WITH CONSTRUCTION ACTIVITY FOR STAND ALONE CONSTRUCTION PROJECTS (June 30, 2016) [hereinafter PERMIT]. The Permit includes a provision regarding the fifty-foot buffer and roadway drainage structure exception that is substantively identical to the one expressed in the E&S Act. *Compare id.* at 15, with O.C.G.A. § 12-7-6(b)(16).

7.

From the facts presented, the Court concludes that the roadway drainage structure exception applies. PCAA sought coverage under the Permit in order to pipe the Tributary. *Petitioner's Ex. 1, Tabs 10 and 11; Petitioner's Standing Hearing Ex. 10; Respondent's Exs. C, D, E, and H.* The purpose of the piping project is to intercept the flow of the Tributary on one side of roadways and carry water to a release point on the opposite side. *Respondent's Exs. D, E, G, and H; Petitioner's Standing Hearing Ex. 7.*

8.

The proposed taxiways and roads are “roadways” as that term is used in the E&S Act. From the definition of “roadway drainage structure,” it appears that the legislature intended “roadway” to mean: “a traveled way consisting of one or more defined lanes, with or without shoulder areas.” O.C.G.A. § 12-7-3(13). Nothing in this definition limits roadways to traditional streets and highways traveled by automobiles. *See id.; see also PERMIT* at 6 (defining “Roadway Project” to include “airport runways and taxiways”). Naturally, a road is encompassed by the term roadway: it is typically traveled by automobiles and consists of defined lanes. Similar to a traditional road, the purpose of a taxiway is to convey a vehicle from one point to another. *See Taxiway, Merriam-Webster Online*, <https://www.merriam-webster.com/dictionary/taxiway> (last visited September 26, 2017) (defining “taxiway” as “a usually paved strip for taxiing (as from the terminal to a runway) at an airport”). In this case, aircraft will use the taxiways for travel between the runway and apron areas of the Airport. *See Respondent's Ex. E.* Therefore, taxiways fit under the broad statutory definition of roadway. *See* O.C.G.A. § 12-7-3(13). Accordingly, as the proposed buffer impacts are necessary to construct a roadway drainage structure, PCAA was not required to obtain a buffer variance and the Director's grant of

coverage under the Permit was done in accordance with the applicable law and regulations. O.C.G.A. § 12-7-6(b)(16); Ga. Comp. R. & Regs. 391-3-7-.05(1)(c).

9.

In the petition and subsequent filings, Petitioners repeatedly cited PCAA's purported plans for a Terminal Area Expansion Project, or "TAEP", which involved the construction of hangars, aircraft tie-down spaces, aprons, and parking lots. *Petitioner's Ex. 1*. However, the TAEP is beyond the scope of the Director's action, which consisted solely of granting PCAA coverage under the Permit for the piping project. *Berry Affidavit* ¶ 6; *Cooley Aff.* ¶ 9. Further implementation of the TAEP, should it occur, would require additional action on the part of the Director and EPD. *See* O.C.G.A. § 12-7-7.

10.

Petitioners contend that the use of the word "must" in the roadway drainage exception provision denotes the legislature's intent to allow for the exception only where the project is necessary. Petitioners' argument is without merit. In context, it is clear that the provision applies where the conditions of a roadway necessitate construction of a roadway drainage structure. *See* O.C.G.A. § 12-7-6(b)(16); *see, e.g., Smith v. United States*, 508 U.S. 223, 229 (1993) ("Language, of course, cannot be interpreted apart from context."). As applied, PCAA presented documentation that its proposed taxiways and roadways will traverse the Tributary and that a roadway drainage structure must be built to support them. The Court will not presume from the mere use of the word "must" that the legislature intended for EPD to review the merits of a project for which a roadway drainage structure is implemented. If the legislature intended to convey to EPD the sweeping authority to adjudge the overall necessity of a construction project, it would have provided an express provision to that effect. *See, e.g.,* O.C.G.A. § 12-5-286; *see*

also *CBS v. Primetime 24 J.V.*, 245 F.3d 1217, 1226 (11th Cir. 2001) ("[W]here [the legislature] knows how to say something but chooses not to, its silence is controlling.") (quoting *Griffith v. United States*, 206 F.3d 1389, 1394 (11th Cir. 2000)).

V. DECISION

Based on the foregoing, Respondent's and Intervenor-Respondent's motions for summary determination are **GRANTED** and Petitioners' motion for summary determination is **DENIED**.

SO ORDERED, this 11th day of October, 2017



MICHAEL MALIHI, Judge



NOTICE OF FINAL DECISION

Attached is the Final Decision of the administrative law judge. The Final Decision is not subject to review by the referring agency. O.C.G.A. § 50-13-41(e)(3). A party who disagrees with the Final Decision may file a motion with the administrative law judge and/or a petition for judicial review in the appropriate court.

Filing a Motion with the Administrative Law Judge

A party who wishes to file a motion to vacate a default, a motion for reconsideration, or a motion for rehearing must do so within 10 days of the entry of the Final Decision. Ga. Comp. R. & Regs. 616-1-2-.28, -.30(3). All motions must be made in writing and filed with the judge's assistant, with copies served simultaneously upon all parties of record. Ga. Comp. R. & Regs. 616-1-2-.04, -.11, -.16. The judge's assistant is Kevin Westray - 404-656-3508; Email: kwestray@osah.ga.gov; Fax: 404-818-3751; 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303.

Filing a Petition for Judicial Review

A party who seeks judicial review must file a petition in the appropriate court within 30 days after service of the Final Decision. O.C.G.A. §§ 50-13-19(b), -20.1. Copies of the petition for judicial review must be served simultaneously upon the referring agency and all parties of record. O.C.G.A. § 50-13-19(b). A copy of the petition must also be filed with the OSAH Clerk at 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303. Ga. Comp. R. & Regs. 616-1-2-.39.