

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA



SEP 25 2017

**JAMES H. WRENN,**  
**Petitioner,**

v.

**RICHARD E. DUNN, Director of the  
Environmental Protection Division of the  
Georgia Department of Natural  
Resources,**  
**Respondent.**

**Docket No.: 1729095  
1729095-OSAH-BNR-SW-25-Malihi**

**Agency Reference No. 1729095**

*Kevin Westray*  
Kevin Westray, Legal Assistant

Mathew M. McCoy, Esq.  
Catherine Bolger, Esq.  
For Petitioner

Margaret Kemmerly Eckrote, Esq.  
For Respondent

**FINAL DECISION**

**ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DETERMINATION**

James H. Wrenn ("Petitioner") appeals the Administrative Order ("AO") to cease receipt of all waste and close his inert landfill issued on December 10, 2014, by Richard E. Dunn, the Director, ("Director"), of the Environmental Protection Division ("EPD") of the Georgia Department of Natural Resources, ("Department" or "Respondent"). On June 9, 2017, the Director moved for summary determination. Petitioner submitted its response on August 4, 2017. The Director filed his reply brief in support of his Motion on August 18, 2017. Petitioner responded to the Director's Reply Brief on August 22, 2017. For the reasons set forth below, the Director's Motion for Summary Determination is **GRANTED** and Respondent's AO is hereby **AFFIRMED**.

## I. BACKGROUND

Respondent issued the AO in this case because Petitioner failed to comply with a 2013 amendment to Ga. Comp. R. & Regs. 391-3-4-.06 and a 2013 change to O.C.G.A. § 12-8-24(k) that added a new procedural requirement for inert landfill owners and operators to continue operation. Under the 2013 changes, owners and operators were required to either obtain a site-specific solid waste handling permit or submit a certification to EPD from a professional engineer stating that the facility was in full compliance with all “Permit by Rule” requirements as they existed on January 1, 2012. Even though Petitioner admits he did not comply with the regulatory and statutory requirement, he asserts the AO should be reversed because he has a “vested right” in the Permit by Rule and the AO deprives him of his rights under the Georgia and United States Constitutions.

## II. STANDARD ON SUMMARY DETERMINATION

On a motion for summary determination, the Director, as the moving party, must demonstrate that there is no genuine issue of material fact for determination. Ga. Comp. R. & Regs. 616-1-2-.15(1). A fact is material when it is identified as such by the controlling substantive law. Johnson v. Georgia Dep’t of Human Res., 983 F. Supp. 1464, 1467 (N.D. Ga. 1996). “Genuine disputes [of material fact] are those in which the evidence is such that a reasonable jury could return a verdict for the non-movant. For factual issues to be considered genuine, they must have a real basis in the record.” Mize v. Jefferson City Bd. of Educ., 983 F. Supp. 1464, 1467 (N.D. Ga. 1996).

When a motion for summary determination is made and supported, a party opposing the motion may not rest upon mere allegations or denials, but must show by supporting affidavit or other probative evidence that there is a genuine issue of material fact that requires a trial and that a reasonable jury could find in its favor. Ga. Comp. R. & Regs. 616-1-2-.15(3); Lau’s Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

### III. FINDINGS OF UNDISPUTED MATERIAL FACT

The following are the key material facts that are not in dispute in that Petitioner provided mere blanket denials of these particular facts and failed to provide sufficient evidence or affidavits to dispute the facts as set out by Respondent.

1.

In response to a “Notification of Permit by Rule Operations” submitted by Petitioner to EPD on February 18, 1993, Petitioner obtained a Permit by Rule on March 4, 1993, authorizing him to operate an inert landfill, presently known as the Hollow Oak Mining and Recovery Inert Landfill, near Savannah, Georgia. (Affidavit of David Lyle [“Lyle Aff.”], Ex. A at 1.)

#### *Noncompliance with Changes to Statute and Regulation*

2.

In 2012 and 2013, EPD conducted rulemaking procedures under the Administrative Procedure Act (“APA”), O.C.G.A. § 50-13-1 to 50-12-44, to amend Ga. Comp. R. & Regs. 391-3-4-.06. (Affidavit of Jeffrey Cown [“Cown Aff.”], Ex. A-D.) These APA procedures included issuing public notices of the proposed changes and conducting public hearings. (Cown Aff., Ex. A-C.) In August 2012, EPD proposed to amend the regulation to provide that inert waste landfills in existence on the effective date of the rule change and in compliance with all other regulations applicable to Permits by Rule for inert waste landfill operations (i.e., the 11 regulatory requirements) would be allowed to continue to operate until a site-specific solid waste handling permit is issued or December 1, 2014, whichever occurred first. (Cown Aff., ¶ 12.) The proposed regulation further provided that if a completed application for a site-specific solid waste handling permit were submitted to EPD by June 1, 2014, the Director would have the discretion to extend the deadline after which an inert landfill may continue to operate until after a final decision on permit issuance or denial was made. (Id.) The

proposed regulation stated that if an inert landfill were unable to meet the requirements for a site-specific solid waste handling permit by December 1, 2014, or other deadline established by the Director, the operator must cease receipt of waste on that date and complete regulatory closure by June 1, 2015, or six months from the Director's denial of the requested permit application. (Id.) Under the proposed regulation, persons seeking to operate a new inert landfill after the effective date of the regulation were required to first obtain a site-specific solid waste handling permit. (Cown Aff., ¶ 13.)

3.

On January 23, 2013, the DNR Board adopted the proposed amendment, which became effective on February 25, 2013. (Cown Aff., ¶ 14.)

4.

On July 1, 2013, the Georgia General Assembly adopted a new subsection (k) to O.C.G.A. § 12-8-24, which added a grandfathering provision that modified the effects of amended Rule 391-3-4-.06. (Cown Aff., ¶ 15.) Under the new provision, inert waste landfills which, as of January 1, 2014, had been certified by a professional engineer registered in accordance with Chapter 15 of Title 43 as being in full compliance with all Permit by Rule requirements established in EPD's rules and regulations as they existed on January 1, 2012, were allowed to continue to operate under the Permit by Rule requirements. (Id.) Existing inert waste landfills that complied with the certification requirement would thus be exempt from the requirement that they apply for and obtain a site-specific solid waste handling permit. (Id.)

5.

Following the legislature's enactment of O.C.G.A. § 12-8-24(k), EPD conducted another round of APA rulemaking to amend Rule 391-3-4-.06 again to add language consistent with the new grandfathering provision. (Cown Aff., ¶ 16.) Another public notice was issued, and another public

hearing was scheduled. (Id.) On October 22, 2013, the DNR Board adopted the regulatory amendment adding the grandfathering provision required by O.C.G.A. § 12-8-24(k), which became effective on January 28, 2014. (Id.)

6.

Petitioner did not submit to EPD a certification from a licensed engineer by January 1, 2014, certifying that his landfill was in compliance with all Permit by Rule requirements established in EPD's regulations as they existed on January 1, 2012. (Cown Aff., ¶ 19.)

7.

Petitioner did not submit to EPD an application for a site-specific solid waste handling permit by June 1, 2014. (Lyle Aff., ¶ 22.)

*Noncompliance with Permit by Rule Requirement*

8.

Petitioner's March 1993 Permit by Rule listed eleven (11) mandatory requirements that were conditions of operation and are required by Ga. Comp. R. & Regs. 391-3-4-.06(3)(c)(1)-(11). (Lyle Aff., Ex. A at 1-2.) Petitioner's Permit by Rule stated that "[v]iolation of any of the applicable requirements will invalidate your [P]ermit by [R]ule status." (Lyle Aff., Ex. A. at 2.)

9.

EPD conducted an inspection of Petitioner's landfill in August 2012, which revealed that Petitioner had violated mandatory conditions of operation set forth in his Permit by Rule, resulting in the issuance of a September 18, 2012 Documentation of Violation. One of the violations was for failure to apply a compacted area of clean earth cover no less than one foot in depth over all exposed inert waste material at least once monthly (Permit Condition No. 3.) (Lyle Aff., ¶ 14; Lyle Aff., Ex. B.)

10.

An October 2014 inspection revealed that Petitioner was still failing to cover inert waste with clean earth on a monthly basis in violation of Permit Condition No. 3 of the Permit by Rule and Ga. Comp. R & Regs. 391-3-4-.06(3)(C)(3). (Lyle Aff., ¶ 17; Lyle Aff., Ex. D.) EPD also discovered an area where waste “had been left uncovered for years” on the eastern edge of the property adjacent to a small pond, which was a separate violation of Condition No. 3 of the Permit by Rule and Ga. Comp. R. & Regs. 391-3-4-.06(3)(C)(3). (Lyle Aff., ¶ 18; Lyle Aff., Ex. D.) On November 6, 2014, Petitioner was issued a Notice of Violation (“NOV”) for the violations discovered at the October 2014 inspection. (Lyle Aff., ¶ 22; Lyle Aff., Ex. G.)

11.

Petitioner responded to the November 2014 NOV with a letter to the EPD, dated November 21, 2014, which acknowledged that the “working face” of its landfill was not covered monthly and stated, “the working face will be covered and sloped monthly, except for the area where trash is being pushed daily.” (Lyle Aff., ¶ 23; Lyle Aff. Ex. H.)

12.

Petitioner did not believe he had to cover the work face of the landfill because he Larry Rogers and Bruce Foisy of the EPD previously informed him verbally that he did not have to cover the working face of the landfill. (Affidavit of James Wrenn [“Wrenn Aff.”], ¶ 20.) Petitioners state all other areas of the landfill were covered on a monthly basis. (Wrenn Aff., ¶ 21.)

#### **IV. Analysis**

The crux of this case is whether Petitioner has a vested right in the Permit by Rule because absent a vested right there is no constitutional deprivation. Courts must resolve cases on non-constitutional bases if such a resolution is possible. See Jackson Cnty. Bd. of Health v. Fugett Constr.,

270 Ga. 667, 667 (1999) (the court should look to constitutional challenges “only as a last resort”); see also Bell v. Austin, 278 Ga. 844, 844 (2005) (“A constitutional question will not be decided unless it is essential to the resolution of the case.”). This case can be resolved without having to address the constitutionality of O.C.G.A. § 12-8-24(k) and Ga. Comp. R. & Regs. 391-3-4-.06 because the case can be decided on the grounds that Petitioner has no claim to a vested right. As set forth below, the undisputed material facts demonstrate that Petitioner does not have a vested right.

**A. Petitioner was not in Compliance with the Permit by Rule.**

The continued validity of Petitioner’s Permit by Rule was contingent on Petitioner’s compliance with the EPD regulations set forth in his Permit by Rule. The undisputed facts demonstrate that Petitioner was not in compliance with the requirement to cover the inert waste landfill with one foot of clean earth on a monthly basis.

The EPD has presented documentation from two separate inspections of Hollow Oak. In those inspections, Petitioner was found not to be in compliance with one of the conditions of operation mandated by Ga. Comp. R. & Regs. 391-3-4-.06, which states, “Materials placed in inert waste landfills shall be spread in layers and compacted to the least practical volume; and, a uniform compacted layer of clean earth cover no less than one (1) foot in depth shall be placed over all exposed inert waste material at least monthly.” Ga. Comp. R. & Regs. 391-3-4-.06(3)(C)(3). In stating that, “all other areas” besides the working face were covered on a monthly basis, Petitioner admits he did not cover all of the inert waste at the landfill with a one-foot layer of clean earth on a monthly basis as required by his Permit by Rule and the applicable regulation.

The fact that Petitioner alleges his violation of the Permit by Rule and the regulation was sanctioned by EPD staff, which EPD disputes, is irrelevant. Assuming *arguendo* that EPD staff had made such statements to Petitioner, it does not excuse Petitioner’s admitted violation of the Permit by

Rule and the applicable regulation. EPD staff, as ministerial employees, may not authorize a violation of the Solid Waste Rules or Permit by Rule. See Fed. Elec. Co., DNR-EPD-HW-AH 4-86, 1987 Ga. ENV LEXIS 27, \*38 (Apr. 10, 1987) (the EPD Director is not “estopped by an erroneous determination made by him or an EPD employee”); see also Corey Outdoor Adver. v. Bd. of Zoning Adjustment of Atlanta, 254 Ga. 221, 228 (1985) (finding erroneous issuance of permit by a ministerial employee cannot vest any rights in appellant).

Petitioner’s failure to comply with the mandatory requirement to cover the inert waste with a foot of clean earth on a monthly basis constitutes “culpable conduct,” which effectively eliminates Petitioner’s claim to a vested right. A vested right in a license is present when a person “has more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” Goldrush II v. Marietta, 267 Ga. 683, 696 (1997) (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)). In Goldrush II, the Georgia Supreme Court held that a revocable license, which “can be suspended or revoked only upon proof of certain contingencies,” can in some cases constitute a vested right when it has “engendered a clear expectation of continued enjoyment of the license absent proof of culpable conduct.” Id. at 697-98. Thus, demonstrating a claim of entitlement requires that no “culpable conduct” be present. Id. at 695.

Petitioner’s failure to cover the inert waste with one foot of clean earth on a monthly basis was an ongoing issue. Petitioner asserts that he was not subjected to any enforcement action and his Permit by Rule was not withdrawn; however, the fact that the Permit by Rule was not revoked and Petitioner was not subjected to enforcement action does not equate with compliance with the mandatory requirements of the Permit by Rule and Ga. Comp. R. & Regs. 391-3-4-.06. Petitioner was not in compliance as of August 2012 before the amendments to Ga. Comp. R. & Regs. 391-3-4-.06 and O.C.G.A. § 12-8-24 were adopted, thus the violations divest him of his alleged vested right. The fact



that EPD did not take enforcement action is not relevant. In Bland Farms LLC v. Georgia Dep't of Agric., 281 Ga. 192 (2006), the Georgia Supreme Court recognized that in deciding whether to take enforcement action,

An agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.

Id. at 194. Petitioner likewise failed to obtain a certification from a professional engineer by January 1, 2014, stating that as of that date he was in full compliance with the Permit by Rule requirements in effect on January 1, 2012. Therefore, Petitioner's violations divested him of any potential vested rights.

**B. The regulatory and statutory changes made in 2013 are procedural, not substantive.**

Petitioner cannot claim a vested right in a procedural requirement. Murphy v. Murphy, 295 Ga. 376, 377 (2014); Foster v. Bowen, 253 Ga. 33, 34 (1984) (“[T]here are no vested rights in any course of procedure.”). “Substantive law is that law which creates rights, duties, and obligations. Procedural law is that law which prescribes the methods of enforcing rights, duties, and obligations.” EHCA Cartersville, LLC v. Turner, 280 Ga. 333, 337 (2006).

The grandfathering provision in O.C.G.A. § 12-8-24(k) and amended Ga. Comp. R. & Regs. 391-3-4-.06 allowed existing inert landfills to continue operating under Permits by Rule. The provisions required owners to submit a certification by an engineer certifying compliance with the regulations in existence prior to the rule change. Petitioner states he was already submitting a Notification of Permit by Rule on an annual basis. (See Petitioner's Brief in Opposition to Respondent's Motion for Summary Determination, p. 3.) This indicates that Petitioner was already following one procedure (submitting a Notification of Permit by Rule) and the change imposed by the

2013 amendments was that existing inert landfill owners and operators had to follow a slightly different procedure. The new procedure required that landfill owners either submit an application for a solid waste handling permit or submit a certification from an engineer that their facility was in compliance with the applicable law, rather than submitting the Notification of Permit by Rule as they had done in the past.

The relevant statutory and regulatory amendments made changes to the methods of enforcing the rights, duties, and obligations, not a change in the substantive law which governs rights, duties, and obligations of inert landfill operators. There was no new duty or obligation placed on inert landfill operators, there was merely a change in how the EPD would go about permitting those who operate inert landfills, and ultimately how the EPD would enforce violations of the duties and obligations placed upon those operators. As such, Petitioner's claim to a vested right fails because he is attempting to establish a vested right in a procedure.

**C. The 2013 changes to the regulation and statute are not retroactive.**

Petitioner does not articulate the basis of his argument that the 2013 amendments are retroactive other than to cite Southern States-Bartow Cnty., Inc. v. Riverwood Farm, 300 Ga. 609 (2017). Southern States involves the retroactive application of a county zoning ordinance that required a landfill owner (who the ordinance explicitly recognized as having a vested right for a non-conforming use of the landfill property) to exercise his vested right to use the property as a landfill (a nonconforming use) within one year or lose the right to use the property as a landfill. The Court found that the zoning ordinance is retroactive because it “acts to *eliminate* a previously acquired vested right if the non-conforming use is not commenced within one year . . . . The timing provision applies irrespective of the intent of the vested right holder, any possible financial outlay, and relevant here, the feasibility of use within that time frame. The evidence before the trial court plainly established that

commencing use of the Bartow County property as a landfill within the full year was simply unfeasible.” Id. at 613.

Southern States case can be distinguished from this case in that it imposed substantive requirements on the landfill owner and required the landfill owner to commence the nonconforming use within one year or lose the right to a nonconforming use. This differs from this case in that Ga. Comp. R. & Regs. 391-3-4-.06 and O.C.G.A. § 12-8-24(k) made *no* substantive changes to the regulations governing existing inert landfills, but instead merely added a procedural requirement related to enforcement of the pre-existing regulations, i.e., submission of a certification showing compliance with those regulations. Petitioner cannot claim a vested right in procedural rules governing methods of enforcement.

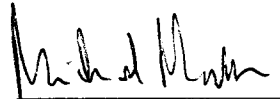
**D. Conclusion.**

The undisputed material fact establish Petitioner had no vested right in the Permit by Rule because Petitioner engaged in culpable conduct sufficient to defeat a legitimate entitlement to his Permit by Rule and because the Permit by Rule was a procedural requirement. With no vested right in the permit, Petitioner was required to meet the requirements of any new or amended Rules. Petitioner failed to comply with a 2013 amendment to Ga. Comp. R. & Regs. 391-3-4-.06 and a 2013 change to O.C.G.A. § 12-8-24(k) that added a new procedural requirement for inert landfill owners and operators to continue operation. Petitioner’s evidence was therefore legally insufficient to defeat the Director’s Motion for Summary Determination.

**V. DECISION**

For the above and foregoing reasons, the Director's Motion for Summary Determination is **GRANTED** and the EPD's order for Petitioner to cease receipt of waste and complete closure of the Hollow Oak Landfill is **AFFIRMED**.

**SO ORDERED**, this the 25<sup>th</sup> day of September, 2017.

  
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**Michael Malihi, Judge**