FILED
OSAH
11/19/2021
Devin Hamilton, Legal Assistant

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

METRO GREEN FRANKLIN, LLC, Petitioner,	:	
v.	:	Docket No.: 2202089-OSAH-BNR-SW-59-Howells
RICHARD E. DUNN, DIRECTOR, ENVIRONMENTAL PROTECTION DIVISION, GEORGIA DEPARTMENT OF NATURAL RESOURCES, Respondent,	:	

FINAL DECISION AND ORDER
GRANTING RESPONDENT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY DETERMINATION AND DENYING PETITIONER'S MOTION FOR SUMMARY DETERMINATION

This dispute involves the funds from Irrevocable Standby Letter of Credit No. 26554 (the "Letter of Credit") called in by Richard E. Dunn, Director of the Environmental Protection Division ("EPD") of the Georgia Department of Natural Resources (hereinafter "Director"), after the Director determined that EarthResources' default on the loan for its landfill property constituted an abandonment, default, or other refusal or inability to maintain, operate, or close the facility. Metro Green Franklin, LLC ("Metro Green"), the current holder of the permit for SR 51 Landfill, requested a hearing in response to the Director's refusal to return or reimburse Metro Green the $1,773,304.17 from the "called in" Letter of Credit posted by EarthResources. Currently pending before this court are the Director's Motion to Dismiss, or in the Alternative, Motion for Summary Determination and Metro Green's Motion for Summary Determination. For the reasons stated below, the Director's Motion to Dismiss, or in the Alternative, Motion for

Summary Determination is **GRANTED**, and Metro Green's Motion for Summary Determination is **DENIED.**

Undisputed Material Facts[1]

1.

EarthResources of Franklin County, LLC ("EarthResources") obtained a permit for the operation of the SR 51 Construction/Demolition Landfill located in Franklin County, Georgia (the "SR51 Landfill") on November 9, 2011, by transfer of Solid Waste Handling Permit No. 059-012D(C&D) originally issued by the EPD in 2006 (the "Landfill Permit").

2.

EarthResources satisfied the financial responsibility requirements of O.C.G.A. § 12-8-27.2(a), Solid Waste Rule 391-4-.13, and Condition No. 15 of the Landfill Permit by posting the Letter of Credit issued by SouthCrest Bank as a pre-condition to operate the SR51 Landfill. Adequate financial assurance was required "to ensure the satisfactory maintenance, closure, and postclosure care" of the SR 51 Landfill, or for "any corrective action which may be required" by the Landfill Permit.

3.

EarthResources obtained financing from Renasant Bank in connection with the real property containing the SR 51 Landfill. EarthResources subsequently defaulted on that loan, and Renasant Bank in turn foreclosed on, and in July 2015 took possession of, the SR 51 Landfill real property which was collateral for that loan.

[1] The bases of any Undisputed Material Facts, without a citation, are the Joint Stipulation to Undisputed Material Facts and Documentary Exhibits and the documents attached thereto, which were filed with the court on September 16, 2021.

4.

Thereafter, SouthCrest Bank sent a letter to EPD dated September 23, 2015, advising EPD that the Letter of Credit would not be renewed by SouthCrest Bank since EarthResources no longer owned the real property containing the SR 51 Landfill.

5.

In accordance with his authority under O.C.G.A. § 12-8-27.1(b), the Director thereupon determined that the foreclosure of the SR 51 Landfill constituted an abandonment, default, or other refusal or inability to maintain, operate, or close the facility. On January 20, 2016, the Director issued a timely sight draft to SouthCrest Bank demanding payment in full of the SouthCrest Letter of Credit and those financial assurance funds intended for the maintenance, closure, and post-closure care of the SR 51 Landfill. The Director issued a supplemental sight draft on January 26, 2016, to correct a typographical error.

6.

On March 4, 2016, SouthCrest Bank filed in the Superior Court of DeKalb County, Georgia a "Complaint of Interpleader and for Declaratory Judgment," Civil Action File No. 16-CV-3152-8, against EPD and other parties including EarthResources. The Complaint sought to interplead with the court the funds represented by the SouthCrest Letter of Credit and requested that court to adjudicate the conflicting claims of EarthResources and EPD to those funds.

7.

In January 2017, EPD filed a Motion for Summary Judgment in the DeKalb County action on its Counterclaim to collect the subject financial assurance funds from SouthCrest Bank. In its Brief in Support of its Motion for Summary Judgment on its Counterclaim, EPD stated in pertinent part, as follows: "In essence, letters of credit are meant to be the equivalent of cash in

hand and financial assurance is meant to serve as a surefire safety mechanism in the event the Director of EPD determines a landfill 'has been abandoned, that the owner or operator thereof has become insolvent, or that for any other reason there is a demonstrated unwillingness or inability of the owner or operator to maintain, operate, or close the facility, [or] to carry out post-closure care of the facility.' O.C.G.A. § 12-8-27.1(b)."

8.

EPD's brief further stated, as follows: "If such a situation occurs, the intent of the Georgia Comprehensive Solid Waste Management Act is that EPD will be able to protect the environment and the health and welfare of the citizens of Georgia by implementing the financial assurance mechanism and thereby immediately acquiring the funds necessary to close affected facilities and provide post-closure care."

9.

On June 12, 2017, SouthCrest Bank and EPD together filed in that action a "Joint Stipulation of Facts and Admissibility of Documents," in which those parties stipulated to facts contained in an attached Affidavit of Jeffery W. Cown, then Chief of EPD's Land Protection Branch, along with five Exhibits attached to that affidavit. In the affidavit, Mr. Cown states, in part, as follows: "The Georgia Comprehensive Solid Waste Management Act includes a requirement at O.C.G.A. § 12-8-27.2 that owners and operators must post financial assurance before a landfill can be operated. The purpose of the requirement is to ensure that EPD has the money available to cover closure and post-closure care of a landfill if the Director determines closure is necessary. Irrevocable standby letters of credit are an approved financial assurance mechanism precisely because they protect EPD, the environment, and the citizens of Georgia by

ensuring funds are available when necessary to cover closure and post-closure of a landfill deemed closed in violation of the Georgia Solid Waste Management Rules."

10.

The Cown Affidavit further stated, as follows: "EarthResources' actions of causing or allowing foreclosure on the landfill triggered the Director of EPD's determination that the landfill closed in violation of the Georgia Rules for Solid Waste Management as well as the Director's determination that closure and post-closure care must commence under the Georgia Comprehensive Solid Waste Management Act and the Rules for Solid Waste Management."

11.

On June 19, 2017, the Superior Court of DeKalb County, Honorable Linda Warren Hunter, Judge, approved and entered the proposed Consent Order presented by SouthCrest Bank and EPD granting EPD's Motion for Summary Judgment on its Counterclaim. The Consent Order stated, in part, as follows: "The Director of EPD made demand on the Letter of Credit pursuant to his responsibility of implementing Georgia's solid waste management program to enhance and protect the health, safety, and well-being of the citizens of Georgia pursuant to O.C.G.A. § 12-8-21(a) and (d). In order to protect the health and safety of the citizens of Georgia, the landfill must be closed in accordance with the Act and the Rules. The landfill will require 30 years of post-closure care."

12.

Judge Hunter entered judgment in favor of EPD pursuant to the Consent Order entered on June 19, 2017, and, following subsequent appeal proceedings in which that Order was affirmed, SouthCrest Bank transferred the Letter of Credit funds into a bank account used for the Georgia Solid Waste Trust Fund (also "SWTF") on January 9, 2019, in the amount of $1,773,304.17.

13.

On June 28, 2017, Judge Hunter entered an Order and Judgment in a separate matter that had originally been filed by JFS Properties, Inc., Appalachian Company, and EarthResources against SouthCrest Bank in the Superior Court of Fayette County, on January 27, 2016. That matter was subsequently transferred to the Superior Court of DeKalb County. The complaint was for injunctive relief, in which the plaintiffs alleged that if SouthCrest Bank honored EPD's sight drafts, it would facilitate a material fraud by EPD on SouthCrest. The same day the plaintiffs filed the complaint, they obtained an ex parte temporary restraining order ("TRO") from the Superior Court of Fayette County. The court continued the TRO and subsequently ruled that EPD was an indispensable party; however, the plaintiffs never moved to join EPD.

14.

In Judge Hunter's June 28, 2017 Order and Judgment, she held that injunctive relief was improper for multiple reasons. Judge Hunter concluded that injunctive relief was improper, in part, because there was never a substantial likelihood that the plaintiffs would prevail. She further concluded that they were not parties in interest to the Letter of Credit, and their allegations of fraud were meritless. She also concluded that injunctive relief was a "disservice to the public interest because for almost a year and a half it . . . prevented EPD from collecting the funds posted as financial assurance and depositing them into the solid waste trust fund so it could commence closure and post-closure care of the landfill." Among numerous findings, Judge Hunter found that the only proper parties at-interest to the Letter of Credit were SouthCrest and EPD. Additionally, she found that the issuance of the Consent Order in the Companion Case (i.e., the interpleader case filed by SouthCrest) was dispositive of the injunctive relief matter.[2]

[2] The Georgia Court of Appeals affirmed the Order and Judgement issued by the Superior Court of DeKalb County in the injunctive relief matter on March 8, 2018, in JFS Properties, Inc. et al. v. SouthCrest Bank, N. A., No.

15.

During the three years of the litigation in the Superior Court of DeKalb County, the Georgia Court of Appeals, and the Georgia Supreme Court from January 2016 to January 2019, the SR 51 Landfill did not receive any waste. The Landfill Permit for the facility was not revoked and remained in the possession of EarthResources. No closure, post-closure care, or corrective action activities occurred at the facility.

16.

On January 20, 2020, Petitioner Metro Green Franklin, LLC ("Metro Green") applied to EPD for transfer of the Landfill Permit for the SR 51 Landfill to Metro Green.

17.

Metro Green paid EarthResources $1,773,304.17 to obtain EarthResources' consent to transfer the Landfill Permit. (Affidavit of Mitchell D. Stephens, at ¶ 4.) EPD did not require, inform, or advise Metro Green to purchase the permit or any rights from EarthResources. (Second Cook Affidavit, at ¶ 11.)

18.

As a condition of EPD's approval for transfer of the Landfill Permit for the SR 51 Landfill, Metro Green was required to provide a replacement financial responsibility and financial assurance mechanism pursuant to Solid Waste Rules 391-3-4-.02 and 391-3-4-.13 for closure and post-closure care of the SR 51 Landfill. The amount of the financial assurance

---

A18A0028. The Court of Appeals agreed with the Superior Court of DeKalb County and stated, "the trial court did not err in concluding that JFS Properties' argument that the subsequent owners of the landfill property should be responsible for closure and post-closure costs was not relevant to the issue of the obligation to honor the particular terms of the letter of credit." In JFS Properties, Inc. et al. v. SouthCrest Bank, N. A., No. A17A2078, the Georgia Court of Appeals granted SouthCrest's motion to dismiss the appeal filed by JFS Properties, Inc., Appalachian Company, and EarthResources of Franklin County, LLC., on the grounds that JFS Properties Inc. et al. lacked standing to bring the appeal. Specifically, the court held that JFS Properties et al., applicants on a letter of credit, lacked standing to "intervene in the relationship that the letter of credit created between EPD and SouthCrest Bank,

mechanism is $1,956,160.63. Financial assurance was initially provided by Metro Green through an Irrevocable Standby Letter of Credit issued by United Community Bank on January 23, 2020.

19.

Subsequently, that financial assurance mechanism was replaced in the same amount by a "Performance/Surety Bond for Closure and Post-Closure Care of Solid Waste Handling Facilities," Bond No. 107241656, issued by Travelers Casualty Insurance Company of America. That financial assurance mechanism for the SR51 Landfill remains in place to assure the satisfactory maintenance, closure, and postclosure care of the SR51 Landfill facility or to carry out any corrective action which may be required.

20.

On January 28, 2020, EPD approved the request from Metro Green for transfer of the Landfill Permit EarthResources to Metro Green.

21.

Following a period of time after the transfer of the Landfill Permit to Metro Green, during which Metro Green brought the SR 51 Landfill facility into compliance with the approved Design and Operations Plan by Metro Green, the SR 51 Landfill facility has continued in operation to the present for receipt and disposal of construction and demolition waste materials pursuant to the Landfill Permit.

---

except as provided by O.C.G.A. § 11-5-109(b)." Furthermore, because JFS Properties et al. had already availed themselves of filing for injunctive relief and lost, they could not show that they were aggrieved.

22.

A Limited Warranty Deed was executed by Sterling Environmental Park, LLC, on June 1, 2020, by which title to the real property containing SR 51 Landfill was transferred to Metro Green.

23.

On June 2, 2020, EarthResources and the associated entities assigned to Metro Green all of their rights, titles, and interests in recovery of the financial assurance funds collected and held by the Director, when he called in the Letter of Credit posted by EarthResources. (Stephens Affidavit, at ¶ 4 and Ex. 1 attached thereto.)

24.

The financial assurance funds received by the Director and deposited in the Georgia Solid Waste Trust Fund as a result of the Director's implementation of the Letter of Credit for the EarthResources SR 51 Landfill facility, in the amount of $1,773,304.17, have not been utilized by the Director or EPD for any purpose in connection with the SR 51 Landfill.

25.

By letter dated March 31, 2021, from legal counsel for Metro Green to Richard E Dunn, in his capacity as Director of EPD and as Trustee of the Solid Waste Trust Fund, Metro Green asserted legal rights to and a legal claim for return and reimbursement of the subject financial assurance funds in the amount of $1,773,304.17 collected by EPD and deposited in the Solid Waste Trust Fund to provide financial assurance for closure and post-closure care of the SR 51 Landfill.

26.

On May 7, 2021, counsel for Metro Green received a letter from Georgia Department of Law Senior Assistant Attorney General Robin Leigh, on behalf of her client the Director and EPD, rejecting Metro Green's claim to the subject financial assurance funds being held by the Director in the Solid Waste Trust Fund.

27.

By letter dated June 28, 2021, Metro Green through legal counsel requested the Director take final action and communicate a final decision with respect to the claim of Metro Green to the subject financial assurance funds. By letter dated June 29, 2021, the Director took final action and issued a final decision rejecting Metro Green's claim of right to those financial assurance funds and its request for return of those funds from the Solid Waste Trust Fund to Metro Green by the Director in his capacity as Director of EPD and Trustee of the Solid Waste Trust Fund.

28.

On June 30, 2021, Metro Green through legal counsel submitted the Petition for Hearing which was subsequently referred to the Office of Administrative Hearings and docketed for determination by an OSAH Administrative Law Judge on July 26, 2021. Metro Green filed its Amendment to the Petition for Hearing on September 8, 2021.

Conclusions of Law

1.

On motion for summary determination, the moving party must show by supporting affidavits or other probative evidence that there is no genuine issue of material fact for determination and the moving party is entitled to prevail as a matter of law. Ga. Comp. R. & Regs. 616-1-2-.15(1). 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(s) or other probative evidence that there is a genuine issue of material fact for determination. Ga. Comp. R. & Regs. 616-1-2-.15(2)(c).

2.

In his Motion to Dismiss, or in the Alternative, Motion for Summary Determination, the Director asserts that Metro Green's Petition for Hearing should be dismissed because it lacks standing under Georgia Code Section 12-2-2(c)(2)(A). In the alternative, the Director asserts that he should be granted summary determination as to the four counts raised in Metro Green's Petition for Hearing, and as to count five raised in its Amendment to Petition for Hearing.

3.

In its Motion for Summary Determination, Metro Green argues that the Director's position regarding the use of funds deposited into the Solid Waste Trust Fund is contrary to the plain language of O.C.G.A. § 12-8-27.2 and contrary to the legislative intent of that Code Section 12-8-27.2 and Code Section 12-8-27.1 when they are read separately or in *pari materia*. In essence, Metro Green argues that because the purpose of requiring landfill owners or operators to post financial assurance mechanisms is to ensure the satisfactory maintenance, closure, and postclosure care, or to carry out corrective action, the financial assurance mechanism or the funds therefrom may only be used for the specific landfill for which they were posted.

Legal Framework

4.

In 1990, the Georgia General Assembly enacted the Georgia Comprehensive Solid Waste Management Act ("Act"). O.C.G.A. § 12-8-20. The purpose of the Act is "to institute and

maintain a comprehensive state-wide program for solid waste management" in furtherance of the state's responsibility "to protect the public health, safety, and well-being of its citizens and to protect and enhance the quality of its environment." O.C.G.A. § 12-8-21(a).

5.

Under the Act, a permit is required to operate a solid waste handling facility. O.C.G.A. § 12-8-24(a). Additionally, owners or operators of landfills must provide a financial responsibility mechanism before the landfill can receive any waste.[3] O.C.G.A. § 12-8-27.2(a); 40 C.F.R. § 258.74(l)(3). Satisfying "all applicable financial responsibility requirements" is also a condition of solid waste handling permits issued by EPD. The same law applies when a permit is transferred. Before EPD will approve the transfer, the new permittee must provide its own financial assurance.[4] O.C.G.A. § 12-8-27.2(a); Ga. Comp. R. & Regs. 391-3-4-.02(4).

6.

Financial responsibility mechanisms ensure that owners and operators of solid waste handling facilities will meet their financial obligations to maintain their facilities through operation, closure, and 30 years of post-closure care, even if they become insolvent. O.C.G.A. §§ 12-8-27.2(a) and 12-8-22(10) (defining financial responsibility mechanism as a "mechanism designed to demonstrate that sufficient funds will be available to meet specific environmental protection needs of solid waste handling facilities"); Ga. Comp. R. & Regs. 391-3-4-.13; 40 C.F.R. §§ 258.71, .72, and .73; see also O.C.G.A. § 12-8-27.1(b). The protective financial

[3] The parties have used the terms "financial assurance mechanism" and "financial responsibility mechanism" interchangeably, to mean that same thing. The Georgia Code Sections refer to "financial responsibility mechanisms." See O.C.G.A. § 12-8-27.1(b). The Code of Federal Regulations refers to "mechanisms used to demonstrate financial assurance." See 40 C.F.R. § 258.74. For the purpose of this decision, the court considers "financial assurance mechanism" and "financial responsibility mechanism" to be the same.

[4] After a permittee transfers its permit to a new permittee, the former permittee is no longer responsible for maintaining financial assurances. See Ga. Comp. R. & Regs. 391-3-4-.02 (4). Although they must be effective for

assurance mechanism can be an irrevocable standby letter of credit, a surety bond guaranteeing payment or performance, a trust fund, insurance, a financial test, or a corporate guarantee. O.C.G.A. § 12-8-22(10); Ga. Comp. R. & Regs. 391-3-4-.13(4); 40 C.F.R. § 258.74. The financial assurance required is calculated by the owner or operator based on how much it would cost to hire a third party to perform the required activities. 40 C.F.R. §§ 258.71, .72, and .73. The amount must be annually adjusted to cover the cost of inflation. Id.

7.

Once financial assurance is in place for a landfill, Georgia Code Section 12-8-27.1(b) and (c) spells out how the mechanism(s) can be implemented, or "called in." Subsections (b) and (c) of the statute give the Director the sole authority to determine whether a landfill has been abandoned or an owner or operator is unwilling or unable to properly manage or close the facility. Specifically, subsection (b) says:

> If the director determines that a solid waste or special solid waste handling facility has been abandoned, that the owner or operator thereof has become insolvent, or that for any other reason there is a demonstrated unwillingness or inability of the owner or operator to maintain, operate, or close the facility, to carry out postclosure care of the facility, or to carry out corrective action required as a condition of a permit to the satisfaction of the director, the director may implement the applicable financial responsibility mechanisms. The proceeds from any applicable financial responsibility mechanisms shall be deposited in the solid waste trust fund.

O.C.G.A. § 12-8-27.1(b).

Subsection (c) says: "The determination of whether there has been an abandonment, default, or other refusal or inability to perform and comply with closure, postclosure, or corrective action requirement shall be made by the director." O.C.G.A. § 12-8-27.1(c).

---

at least one year, letters of credit can be canceled by the issuing institution with 120 days of advance notice to the owner and operator and the Director. 40 C.F.R. § 258.74(c)(3).

8.

As part of the Act, the Georgia General Assembly established the SWTF. See O.C.G.A. § 12-8-27.1. The purpose of the SWTF is to provide the Director with resources to respond to emergencies caused by leaking landfills and illegal dumps, clean up abandoned landfills, fund a state-wide scrap tire management program, and make permissible grants to local governments. See O.C.G.A. §§ 12-8-27.1(a), 12-8-37.1. Funding for the SWTF comes from four sources: a $1 fee tacked onto every new tire sold in the state; fines collected for violations; proceeds from financial responsibility mechanisms that have been implemented under the law; and accrued interest. O.C.G.A. §§ 12-8-27.1(b); 12-8-30.6(d) and 12-8-40.1(h)(1). Only the financial responsibility mechanisms are relevant to this case. Financial responsibility mechanisms ensure that owners and operators of solid waste handling facilities will meet their financial obligations to maintain their facilities through operation, closure, and 30 years of post-closure care, even if they become insolvent. O.C.G.A. §§ 12-8-27.2(a) and 12-8-22(10) (defining financial responsibility mechanism as a "mechanism designed to demonstrate that sufficient funds will be available to meet specific environmental protection needs of solid waste handling facilities"); Ga. Comp. R. & Regs. 391-3-4-.13; 40 C.F.R. §§ 258.71, .72, .73.

9.

The Director, as trustee of the SWTF, also determines how to spend the proceeds deposited into it, with approval from the Board of Natural Resources ("BNR"). O.C.G.A. § 12-8-27.1(a) ("The moneys deposited in such fund . . . may be expended by the director, with the approval of the board . . . ."). The statute limits expenditures to specifically defined purposes including emergency action, preventive or corrective action, monitoring or providing postclosure

care, implementing a scrap tire program in the State, and making certain grants to local governments. Id. at §§ 12-8-27(a)(1)-(4); 12-8-37.1.

Metro Green Does Not Have Standing to Bring This Action

10.

The right to a hearing before an administrative law judge is only available to persons who are "aggrieved or adversely affected by any order or action of the director." O.C.G.A. § 12-2-2(c)(2)(A). A person is "aggrieved or adversely affected" if "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 and enforce." O.C.G.A. § 12-2-2(c)(3)(A).

11.

Here, Metro Green has failed to establish an injury in fact that was caused by the director. Metro Green has no interest or rights to the $1.77 million that was obtained by EPD by calling in the letter of credit and subsequently deposited into the SWTF. See Pres. Alliance of Savannah v. Norfolk S. Corp., 202 Ga. App. 116, 117 (1991) ("[T]o challenge a statute or an administrative action taken pursuant to a statute, the plaintiff must normally show that it has interests or rights which are or will be affected by the statute or the action.")

12.

SouthCrest Bank issued the Letter of Credit on behalf of Appalachian Company, acting on behalf of EarthResources. The Letter of Credit was backed by a certificate of deposit posted by JFS Properties, Inc. The Director was named as the beneficiary. Metro Green was not a party to the Letter of Credit. It was never entitled to receive funds from it and therefore cannot claim an injury based on money to which it has no right.

13.

The requirement to post financial assurance is an owner/operator-specific obligation. See O.C.G.A. § 12-8-27.2(a); Ga. Comp. R. & Regs. 391-3-4-.13(1) ("The requirements of this Rule apply to all owners and/or operators . . . ."); 40 C.F.R. §§ 258.71(a) – 258.74(a)(1). When a landfill's permit is transferred to a new owner or operator, the new permittee must post its own financial assurance. Ga. Comp. R. & Regs. 391-3-4-.02(4), 391-3-4-.13(3); O.C.G.A. § 12-8-27.2(a).

14.

Metro Green asserts that it stands in the shoes of EarthResources because it entered into an Assignment of Claims with EarthResources. This does not change the analysis. Metro Green entered into the Assignment of Claims on June 2, 2020, four and a half years after the Director called in the Letter of Credit. The funds from the Letter of Credit ceased to belong to EarthResources when it abandoned the landfill and the Director called in the Letter of Credit.

15.

EarthResources and its affiliates spent three years litigating their claim to the money, losing in the DeKalb County Superior Court and the Georgia Court of Appeals. The Georgia Supreme Court denied their Petition for Certiorari. Those decisions conclusively ended any claim that EarthResources and its affiliates had to the money. Therefore, four and a half years after EarthResources no longer had any right to the funds from the Letter of Credit, and one year after it was conclusively determined that EarthResources and its affiliates had no right to the funds, there was nothing for EarthResources to transfer to Metro Green.

16.

Moreover, if Metro Green truly stands in EarthResources shoes, then it is barred from relitigating any claim to the money under the doctrine of collateral estoppel. The requirements for the application of collateral estoppel are as follows: (1) two proceedings involving the same parties or their privies; (2) the issue in question was actually litigated and determined in the first proceeding, (3) the issue determined was essential to the outcome of the first adjudication; and (4) the party against whom the doctrine is asserted had a full opportunity to litigate the question at issue in the first proceeding. Ga. Neurology & Rehab. v. Hiller, 310 Ga. App. 202, 205 (2011); Malloy v. State, 293 Ga. 350, 354 (2013); ALR Oglethorpe, LLC v. Henderson, 336 Ga. App. 739, 742 (2016). By signing the Assignment of Claims, Metro Green became a privy of EarthResources. The right to the funds from the Letter of Credit was litigated and conclusively decided against EarthResources, who had a full opportunity to litigate the issue. Because EarthResources is barred from relitigating its right to the funds from the Letter of Credit, so is its privy, Metro Green.

17.

Furthermore, any loss of $1.77 million sustained by Metro Green was not *caused* by the Director. Rather, any loss sustained by Metro Green was caused by its decision to pay $1.77 million for EarthResources' consent to transfer the permit and later attempt to recover the money, to which it had no right, from EPD.

18.

Even if Metro Green could establish an injury in fact, which it cannot, its interest is not within the zone of interests to be protected or regulated by the statutes the director is empowered to administer and enforce. O.C.G.A. § 12-2-2(c)(3)(A). The purpose of the Act and the SWTF

is to protect the public health and environment from mishandled scrap tires, illegal dumps, abandoned landfills, landfills that the owner or operator is unwilling or unable to maintain or close, and landfills where the owner or operator will not carry out correction actions and proper post-closure care. O.C.G.A. §§ 12-8-21, 12-8-27.1(a), 12-8-37.1. Metro Green seeks to recover funds from a Letter of Credit posted by EarthResources and called in by the Director. Nothing in the statutes and regulations at issue provides for any such authority. Accordingly, the Director's Motion to Dismiss for Metro Green's lack of standing is **GRANTED**.

Even if Metro Green Could Establish Standing,
the Director's Motion for Summary Determination Should be Granted

19.

In its Petition for Hearing and Amendment to Petition for Hearing, Metro Green raised five counts. In Count I, Metro Green asserts that the Director does not have the authority to retain or use financial assurance funds posted for SR 51 Landfill for anything other than maintenance, closure, or post-closure of that specific landfill. In Count II, Metro Green claims that the Director's refusal to give to give it the funds from the called-in Letter of Credit posted by EarthResources constitutes a taking under the Georgia Constitution. In Count III, Metro Green asserts that the Director is barred by principles of estoppel by judgement, res judicata, collateral estoppel, and equitable estoppel from refusing to give the subject funds to Metro Green. In Count IV, Metro Green seeks mandamus relief. Metro Green added Count V with its Amendment to Petition for Hearing. In Count V, Metro Green asserts that if O.C.G.A. § 12-8-27.1(b) were interpreted to allow the director to use funds from the SWTF for landfills other than the one from which the funds emanated or for some other purpose, then the statute violates the due process clause and the takings clause of the Georgia Constitution. Also, in Count V, Metro Green asserts that O.C.G.A. § 12-8-27.1(b) is unconstitutionally vague in violation of due

process because it does not grant the Director the authority to use proceeds from financial assurance mechanisms for any other purpose than those required by O.C.G.A. § 12-8-27.2.

The Statutes and Regulations Provide the Director with the Authority to Use Funds Deposited in the SWTF for Any Purpose Listed in Georgia Code Sections 12-8-27.1(a) and 12-8-37.1

20.

In Count I of its Petition for Hearing, Metro Green asserts that the Director does not have the legal authority to use the proceeds from the Letter of Credit posted by EarthResources and called in by the Director for any purpose other than the maintenance, closure, or post-closure care of SR 51 Landfill. For the reasons that follow, Metro Green's assertion is without merit.

21.

As noted above, Georgia Code Section 12-8-27.1 provides the circumstances in which the Director may implement or "call in" a financial responsibility mechanism. Those circumstances include when a permittee has abandoned a landfill, the permittee has become insolvent, or the permittee has demonstrated unwillingness or inability to maintain, operate, close the facility, or to conduct post closure care or corrective action. O.C.G.A. § 12-8-27.1(b). The statute also mandates that the proceeds from a financial responsibility mechanism be deposited into the SWTF. Id.

22.

Furthermore, Georgia Code Section 12-8-27.1(a), together with Georgia Code Section 12-8-37.1, describes how the funds in the SWTF may be expended. Specifically, Section 12-8-27.1(a) provides that the funds in the SWTF may be used by the Director, "with the approval of the board for the following purposes," which are set forth as follows:

> (1) To take *whatever* emergency action is necessary or appropriate to assure that the public health or safety is not threatened *whenever* there is a release or substantial threat of a release of contaminants from *a* disposal facility;
>
> (2) To take preventive or corrective actions where the release of contaminants presents an actual or potential threat to human health or the environment and *where the owner or operator has not been identified* or is unable or unwilling to perform corrective action, including but not limited to closure and postclosure care of a disposal facility and provisions for providing alternative water supplies;
>
> (3) To take such actions as may be necessary to monitor and provide postclosure care of *any disposal facility*, including preventive and corrective actions, *without regard to the identity or solvency of the owner thereof*, commencing five years after the date of completing closure; and
>
> (4) To take such actions as may be necessary to implement the provisions of a scrap tire management program in this state, particularly as may be related to the cleanup of scrap tire disposal piles and facilities, regulation of tire carriers and other handlers, and disbursement of grants and loans to cities, counties, and other persons as may be necessary to implement fully the provisions of this part.

O.C.G.A. §12-8-27.1(a) (emphasis added). The emphasized provisions reinforce an interpretation that the Director has the discretion to use the funds in the SWTF when and where they are most needed and that the use of the funds is not limited to the landfill for which they were originally posted. Georgia Code Section 12-8-37.1 states that the "corpus of the [SWTF]" may be used to make grants or loans to counties and cities for purposes consistent with the Act. O.C.G.A. § 12-8-37.1(c). The fact that this provision exists further supports the Director's discretion to use the funds in the SWTF in a manner where the funds are needed most, because it gives the Director the authority to use funds in the SWTF, including proceeds from financial assurance mechanisms, to provide grants or loans to counties and cities, which likely have no connection to the landfill for which the financial assurance mechanism was originally posted. The reference to the "corpus" or body of the trust weighs against any interpretation that the funds are escrowed or earmarked for a particular landfill, because it essentially refers to the funds as a

single sum of money. Nothing in Sections 12-8-27.1(a) or 12-8-37.1(c) requires that the funds be used on the specific landfill for which they were originally posted.

23.

Metro Green conflates the stated purpose of supplying a financial assurance mechanism with the manner in which the funds in the SWTF may be used. Specifically, Metro Green primarily relies on Code Section 12-8-27.2(a) and Rule 391-3-4-13(3) in support of its argument that any proceeds from a financial assurance mechanism may only be spent on the specific facility for which it was posted. Metro Green's reliance is misplaced.

24.

Section 12-8-27.2(a) states, in part, as follows: "No solid waste handling facility shall be operated or maintained by any person unless adequate financial responsibility has been demonstrated to the director to ensure the satisfactory maintenance, closure, and postclosure care *of such facility* or to carry out any corrective action which may be required as a condition of a permit." O.C.G.A. § 12-8-27.2(a) (emphasis added). Similarly, Rule 391-3-4-.13(3) states as follows: "Financial responsibility shall be required for any solid waste handling facility and shall provide adequate financial responsibility to ensure the satisfactory maintenance, closure and post-closure care *of such facility* or to carry out any corrective action which may be required as a condition of a permit." Ga. Comp. R. & Regs. 391-3-4-13(3) (emphasis added). Metro Green relies on the words "of such facility" as the basis of its argument that funds from a financial assurance mechanism deposited into the SWTF may only be used for the facility for which the mechanism was posted. Neither the statute nor the rule limits the expenditure of financial assurance proceeds deposited into the SWTF to a specific site.

25.

By analogy, when an individual pays car insurance premiums those premiums are for the purpose of paying for any damage or injury that might be caused by the insured driver in the future. However, the insurance company is not required to use only the premiums paid by the insured to cover damage or injury he has caused. Rather, the funds go into a pool of funds to be used when necessary to pay for any damage or injury caused by any insured driver. It is the same with the SWTF. The Director may use the funds in the SWTF for any of the purposes identified in Code Sections 12-8-27.1(a) and 12-8-37.1(c). Metro Green's interpretation would prohibit the Director's ability to address the most pressing solid waste problems in the State.

26.

Furthermore, if the General Assembly intended a financial responsibility mechanism to only be used to take care of the solid waste facility for which it was provided, the Legislature knew how to do so. The Georgia Surface Mining Act of 1968, for example, authorizes the Director to use proceeds from a surety bond or other financial responsibility mechanism only on the surface mine for which it was established, to "complete such mining operator's responsibilities under the mining land use plan . . . ." O.C.G.A. 12-4-75(3). The General Assembly did not include similar language in the Act at issue here.

27.

For the foregoing reasons, the Director is entitled to summary determination as to Count I of Metro Green's Petition for Hearing.

The Takings Clause of the Georgia Constitution Does Not Apply

28.

Metro Green, in Count II of its Petition for Hearing, asserts that the Director's refusal to give it $1.77 million of monies deposited into the SWTF is a "taking and damaging of Petitioner's property and property rights without payment of just compensation" in violation of the Takings Clause of the Georgia Constitution. Metro Green's assertion is without merit. Simply put, the Director did not take anything belonging to Metro Green. As noted above, EarthResources ceased having any rights to the funds from the Letter of Credit when it defaulted on its loan and the Director called in the Letter of Credit. The subsequent purported Assignment of Claims did not give Metro Green any rights to the funds because EarthResources had no rights to the funds. Therefore, the Director did not take anything from Metro Green. For this reason, the Director is entitled to summary determination as to Count II of Metro Green's Petition for Hearing.

Metro Green's Res Judicata and Estoppel Claims are Without Merit

29.

In Count III of Metro Green's Petition for Hearing, it claims that the Director is barred from refusing to give it the proceeds from the implemented Letter of Credit by principles of estoppel by judgment, res judicata, collateral estoppel, and equitable estoppel. Metro Green's claim fails for two reasons: 1) the DeKalb County Superior Court did not rule that the Director's use of those funds was limited to closure and post-closure care of SR 51 Landfill; and 2) the statements of the purpose of financial assurance mechanisms in the Joint Stipulation of Facts and

Admissibility of Documents, EPD's brief, and the affidavit of Jeffrey Cown filed in the DeKalb County interpleader matter were not admissions *in judicio*.[5]

30.

First, DeKalb County Superior Court Judge Hunter's statements regarding the purpose of financial assurance mechanisms and the inability of EPD to commence closure and post-closure care of the landfill due to the TRO are in no way determinations that after the circumstances of the landfill changed, as happened here, the Director was forbidden to use the proceeds for other allowable purposes under the Act.

31.

Second, at the time of the decisions rendered by Judge Hunter in the injunction and interpleader matters, the landfill had been abandoned by EarthResources and EPD was entitled to commence closure and post-closure care of the landfill. O.C.G.A. § 12-8-27.1(a)(1)-(3). Subsequently, Metro Green became the permittee and reopened the landfill, removing the need and the legal basis for spending money from the SWTF at that site. Because the landfill was ripe for closure at the time of Judge Hunter's decisions, she could not have determined what the

[5] The undersigned notes that on more than one occasion Metro Green, in its pleadings, misquotes statements in the Joint Stipulation of Facts and Admissibility of Documents, EPD's brief, and the Cown Affidavit. For example, in Metro Green's Statement of Material Facts and Memorandum of Argument and Legal Authorities in Support of Petitioner's Motion for Summary Determination filed in this matter, Metro Green misquotes statements in the Cown Affidavit by stating as follows: "The purpose of the requirement is to ensure that EPD has the money available to cover closure and post-closure of [***that***] landfill if the Director determines closure is necessary. (Emphasis supplied by the court to indicate which word was incorrect.) The statement in the affidavit actually reads as follows: "The purpose of the requirement is to ensure that EPD has the money available to cover closure and post-closure of ***a*** landfill if the Director determines closure is necessary." Metro Green makes this same error in a subsequent quoted sentence of the Cown Affidavit.

In the same pleading, Metro Green misquotes a statement from EPD's brief by stating as follows: "If such a situation occurs, the intent of the Georgia Comprehensive Solid Waste Management Act is that EPD will be able to protect the environment and the health and welfare of the citizens of Georgia by implementing the financial assurance mechanism and thereby immediately [***requiring***] funds necessary to close [***the***] affected [f***acility***] and provide postclosure care." The statement in the brief actually reads as follows: "If such a situation occurs, the intent of the Georgia Comprehensive Solid Waste Management Act is that EPD will be able to protect the environment and the health and welfare of the citizens of Georgia by implementing the financial assurance mechanism and thereby immediately ***acquiring*** funds necessary to close affected ***facilities*** and provide postclosure care."

Director could or could not do with the SWTF funds if the circumstances in the future changed. That simply was not the case before Judge Hunter and therefore she made no such determination.

32.

Under the doctrine of res judicata, a former decision bars subsequent litigation only "as to the facts in issue and events existing at the time of such judgment and does not prevent a re-examination even of the same questions between the same parties, if in the interval the material facts have so changed or such new events have occurred as to alter the legal rights or relations of the litigants." Bailey v. Hall, 267 Ga. App. 222, 223 (2004). In this case, material facts have changed. Therefore, any alleged determinations made in the underlying matter do not bind the Director here regarding the use of SWTF funds.

33.

Under the doctrine of collateral estoppel, also known as estoppel by judgement, the issue must have actually been determined in the first proceeding to act as a bar to subsequent litigation. Malloy, 293 Ga. at 354; Hiller, 310 Ga. App. at 205; Henderson, 336 Ga. App. at 742; see also Oxendine v. Elliott, 170 Ga. App. 422, 431 (1984) (noting that estoppel by judgment is also known as collateral estoppel). The issue of what the Director may do with funds in the SWTF if circumstances changed and the SR 51 Landfill no longer required closure was simply not litigated or determined in the injunction or interpleader actions.

34.

Statements regarding the purpose of the financial assurance mechanisms in the Joint Stipulation, Brief, and an affidavit in the previous litigation are not admissions *in judicio*. First, the statements highlighted by Metro Green can easily be construed as statements of opinion or legal conclusions, neither of which can be considered an admission *in judicio*. McReynolds v.

Krebs, 307 Ga. App. 330, 334 (2010) (opinions and conclusions in the pleadings are not admissions *in judicio*). Second, as noted above, statements regarding the purpose of financial assurance mechanisms do not equate to a limitation on the Director's use of funds in the SWTF. The law is clear; the Director may use the funds for any of the stated purposes contained in Code Sections 12-8-27.1(a) and 12-8-37.1(c). Third, statements in previous litigation, even if they were considered admissions, are not binding in subsequent litigation. Khamis Enters., Inc. v. Boone, 224 Ga. App. 348, 350 (1997) ("When admissions in pleadings are introduced as evidence in a later and different action . . . they no longer operate as admissions *in judicio*, but rather as evidentiary admissions which may be explained or contradicted).

35.

For these reasons, Metro Green's res judicata and estoppel claims are without merit, and the Director is entitled to summary determination on Count III of Metro Green's Petition for Hearing.

Mandamus Relief is Not Available in This Administrative Court

36.

Metro Green, in Count IV of its Petition for hearing, seeks mandamus relief. Specifically, Metro Green seeks an order requiring the Director to "perform his official duty" to give Metro Green $ 1.77 million out of the SWTF or alternatively to credit the amount of those funds against any future increases in the financial assurance mechanism posted by Metro Green for closure and post-closure costs for SR 51 Landfill.

37.

As an initial matter, this administrative court has no authority to issue a writ of mandamus. O.C.G.A. §§ 50-13-41(2), 50-13-13(6); see also Ga. Comp. R. & Regs. 616-1-2-.22.

Furthermore, a writ of mandamus is only appropriate when a state officer fails to perform an official duty, causing a "defect of legal justice." O.C.G.A. § 9-6-20. Metro Green asserts that the Director has the legal duty to return to it the financial assurance funds from the implemented Letter of Credit posted by EarthResources, because Metro Green filed an alternative financial assurance mechanism. The statutes cited by Metro Green contain no such duty. See Williamson v. Wilson, 189 Ga. 652, 653 (1940) (explaining that in a suit for a writ of mandamus, the duty which is sought to be enforced must be both authorized and required). Metro Green has made no such showing here. Accordingly, the Director is entitled to summary determination on Count IV of Metro Green's Petition for Hearing.

This Administrative Court Has No Authority to Declare Statutes or Regulations Unconstitutional

38.

In its Amendment to Petition for Hearing, Metro Green asserts, in Count V, that if O.C.G.A. § 12-8-27.1(b) were interpreted to allow the director to use funds from the SWTF for landfills other than the one from which the funds emanated or for some other purpose, then the statute violates the due process clause and the takings clause of the Georgia Constitution. Also in Count V, Metro Green asserts that O.C.G.A. § 12-8-27.1(b) is unconstitutionally vague in violation of due process because it does not grant the Director the authority to use proceeds from financial assurance mechanisms for any other purpose than those required by O.C.G.A. § 12-8-27.2. This administrative court has no authority to declare statutes or regulations unconstitutional. Ga. Comp. R. & Regs. 616-1-2-.22(3). Accordingly, the Director is entitled to summary determination as to Count V of Metro Green's Amendment to Petition for Hearing.

DECISION AND ORDER

For the foregoing reasons, the Director's Motion to Dismiss, or in the Alternative, Motion for Summary Determination is **GRANTED**. Metro Green's Motion for Summary Determination is **DENIED**.

SO ORDERED this 19th day of November, 2021.

Stephanie M. Howells

STEPHANIE M. HOWELLS
Administrative Law Judge