IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

METRO GREEN FRANKLIN, LLC, Petitioner, v. RICHARD E. DUNN, DIRECTOR, ENVIRONMENTAL PROTECTION DIVISION, GEORGIA DEPARTMENT OF NATURAL RESOURCES, Respondent.	: : : : : : : : : : :	CIVIL ACTION FILE NO.: 21-A-09984-7

FINAL ORDER AND JUDGMENT ON PETITION FOR JUDICIAL REVIEW

A. Introduction

This matter is before the Court for decision of the Petition for Judicial Review (the "Petition") filed by Metro Green Franklin, LLC ("Petitioner" or "Metro Green") pursuant to O.C.G.A. § 12-2-2(c)(2), which provides for judicial review of a final decision of the Georgia Department of Natural Resources Environmental Protection Division, and O.C.G.A. § 50-13-19(b), a section of the Georgia Administrative Procedure Act providing for judicial review of final agency decisions. The agency decision for which the Petition seeks judicial review and determination by this Court is the final decision of the Director of the Georgia Department of Natural Resources Environmental Protection Division (the "Director" or "Respondent"), which denied Petitioner's claim for $1,773,304.14 in financial assurance funds collected by the Environmental Protection Division ("EPD") and the EPD Director from a financial responsibility

mechanism for the SR51 Construction and Demolition Landfill located in Franklin County, Georgia, of which Petitioner Metro Green Franklin, LLC is the current owner and operator.

Under the provisions of O.C.G.A. § 12-2-2(c)(2)(d), the final agency decision was the "Final Decision and Order" entered on November 19, 2021 by an Administrative Law Judge of the Georgia Office of State Administrative Hearings (hereinafter the "OSAH ALJ"), which granted the Respondent's Motion to Dismiss and Motion for Summary Determination and denied Petitioner's Motion for Summary Determination. The Petition for Judicial Review of that final agency decision was timely filed on December 20, 2021. The issues raised by the Petition were briefed by the parties and a hearing was held before this Court on March 7, 2022 during which the Court heard argument from both sides concerning the issues raised by the Petition and the response of the Director.[1] For the reasons discussed herein, after careful consideration of the record, the decision of the OSAH ALJ, the issues presented to the Court in the Petition, and the applicable law and argument by the parties, this Court determines that the decision of the agency through the final decision of the OSAH ALJ should be reversed.

B. <u>Factual Background and Issues for Determination.</u>

Petitioner is the current owner and operator of the SR51 Construction and Demolition Landfill, located in Franklin County, Georgia (the "SR51 Landfill"). This judicial review proceeding involves $1,773,304.14 in financial assurance funds that were required for the SR51 Landfill by the Georgia Solid Waste Management Act and the EPD Solid Waste Management Rules, Chapter 391-3-4 of the Rules of the Georgia Department of Natural Resources (the "Financial Assurance Funds." These Financial Assurance Funds were posted back in 2011 in

[1] This Order on Petition for Judicial Review is being entered within thirty (30) days of the hearing as required by O.C.G.A. § 12-2-1(c).

connection with the issuance of the landfill permit pursuant to O.C.G.A. §12-8-27.2(a) to ensure the satisfactory maintenance, closure, and postclosure care of the SR51 Landfill. In 2015 Renasant Bank foreclosed upon the real property on which the SR51 Landfill was situated. This triggered the Respondent to determine that the SR51 Landfill had been effectively abandoned by EarthResources of Franklin County, LLC (the original permit holder) ("EarthRerources"). The Respondent then set about to call upon the letter of credit posted by EarthResources to collect the $1,773,304.14 in financial assurance funds so that funds would be available for Respondent to provide for the satisfactory maintenance, closure, and postclosure care of the SR51 Landfill.

In proceedings unrelated to this action, EarthResources brought litigation to challenge the Respondent's efforts to collect the $1,773,304.14 in financial assurance funds. That litigation concluded in 2019 and the Respondent did collect the $1,773,304.14 in financial assurance funds that had been posted to ensure the satisfactory maintenance, closure and postclosure care of the SR51 landfill. After collecting these funds, Respondent deposited them into a bank account for the Georgia Solid Waste Trust Fund.

Subsequently, in 2020 Petitioner purchased the SR 51 Landfill. At the time of purchase, this landfill had been closed since 2015, but its permit was still active. With the consent of the Respondent, Petitioner went to EarthResources and requested that it consent to the transfer of its permit to operate the SR51 Landfill to Petitioner. EarthResources insisted that it would only transfer the permit if Petitioner reimbursed it for the $1,773,304.14 in financial assurance funds Respondent was still then holding for the benefit of the SR51 landfill. At this point, the Respondent had not spent any of those financial assurance funds. Petitioner did reimburse EarthResources the sum of $1,773,304.14 and EarthResources executed an assignment in favor

of Petitioner transferring to Petitioner any and all interest it had in the $1,773,304.14 in financial assurance funds Respondent was still holding for the benefit of the SR51 Landfill.

Even though it was still holding these financial assurance funds, Respondent required, as a condition of the transfer of the permit, that Petitioner post new financial assurance funds in the amount of $1,956,160.63 pursuant to O.C.G.A. §12-8-27.2(a) to ensure the satisfactory maintenance, closure and postclosure care of the SR51 landfill. Respondent also required Petitioner to correct all deficiencies in the SR51 Landfill prior to reopening at its own expense. Thus, Respondent never used any portion of the original $1,773,304.14 in financial assurance funds it was still holding to ensure the satisfactory maintenance, closure and postclosure care of the SR51 landfill, yet required the posting of another $1,956,160 in financial assurance funds for the same landfill.

In this action, Petitioner has not challenged Respondent requiring it to post new financial assurance in the amount of $1,956,160 or using its own funds to correct all deficiencies in the landfill prior to reopening the landfill. Petitioner challenges only the Respondent's power to use for different, unrelated purposes of EPD the $1,773,304.14 posted pursuant to O.C.G.A. §12-8-27.2(a) to ensure the satisfactory maintenance, closure, and postclosure care of the SR51 Landfill. Petitioner contends that because O.C.G.A. §12-8-27.2(a) required those financial assurance funds to be posted for the benefit of the SR51 Landfill, those funds can only be used for that landfill or must be returned.

The primary legal question for determination by this Court is whether the Director of EPD under the facts can lawfully appropriate the subject Financial Assurance Funds to and for the benefit of the Georgia EPD and the Solid Waste Trust Fund for other uses unrelated to the

SR51 Landfill, when those monies were funded by a private entity for a designated solid waste facility and for regulatory purposes of maintenance, closure, and postclosure care and necessary corrective action for that waste facility as required by O.C.G.A. § 12-8-27.2(a), and without regard either to the rights of Petitioner or the rights of EarthResources as the original Permittee who provided those Financial Assurance Funds for the SR51 Landfill. Respondent contends such authority to assume ownership and dominion of the Financial Assurance Funds for other uses by the Director and EPD is derived from O.C.G.A. § 12-8-27.1. Petitioner contends that the Director does not have that asserted legal authority and the State cannot claim ownership of the Financial Assurance Funds when the operative Code Sections 12-8-27.1 and 12-8-27.2(a) are properly construed in *pari materia* and in accordance with the applicable rules of statutory construction under Georgia law. Petitioner contends that Petitioner has a superior interest in and legal right to require the Director to release the Financial Assurance Funds from the bank account of the Solid Waste Trust Fund and, therefore, Petitioner requests this Court enter an Order and Judgment requiring the Director to exercise his authority to issue and disburse the Financial Assurance Funds to Petitioner. The Petition also includes a request by the Petitioner pursuant to O.C.G.A. § 9-4-1 *et seq* for a declaratory judgment by this Court that the construction of the provisions of O.C.G.A. § 12-8-27.1 by the Respondent Director of EPD and the OSAH ALJ is erroneous and would render that Code Section unconstitutional on its face and as applied to the relevant facts, if that Code Section were construed as argued by the Director as that Code Section would thereby authorize and effect a taking and damaging of property rights of Petitioner in the Financial Assurance Funds without payment of just compensation in violation of Article I, Section III, Paragraph I of the Georgia Constitution. For the reasons discussed further below, this Court determines that the legal conclusions reached by the OSAH ALJ as a basis for granting the

Director's Motion to Dismiss and Alternative Motion for Summary Determination are erroneous and require reversal by this Court of the agency's final decision represented by the OSAH ALJ's Final Decision and Order. [2]

The OSAH ALJ accepted the construction of Code Section 12-8-27.1 and 12-8-27.2(a) asserted by the Director and thus held that the Financial Assurance Funds belong to the State and may be utilized by the Director for any purposes for which funds in the Georgia Solid Waste Trust Fund are authorized to be used. The OSAH ALJ further held that Petitioner does not have an interest in or a claim of right to those Financial Assurance Funds, basing that determination on rulings in proceedings in the Superior Court of DeKalb County through which the Director collected the Financial Assurance Funds as the proceeds of the SouthCrest Bank Letter of Credit established by EarthResources as financial assurance for the SR51 Landfill. The OSAH ALJ also held that Petitioner does not have standing to assert its right and claim to the Financial Assurance Funds in its capacity of the current owner and operator of the SR51 Landfill or based on the assignment to Petitioner of the rights of EarthResources to assert a claim to the Financial Assurance Funds, also basing that determination on the OSAH ALJ's conclusions from those DeKalb County proceedings (Final Decision and Order, R. 22).

C. Scope of Review

[2] Prior the March 7, 2022 hearing the Respondent filed a Motion to Dismiss and Supporting Brief moving the Court to dismiss the Petition for Judicial Review asserting failure to exhaust administrative remedies and waiver arguments. Petitioner responded to that Motion by a Brief filed on March 2, 2022. The Court heard argument from both sides on the Respondent's Motion at the beginning of the March 7, 2022 hearing on the Petition, and after due consideration denied that Motion. A written "Order Denying Respondent's Motion to Dismiss" was filed by the Court on March 16, 2022.

The scope of this Court's judicial review is addressed in O.C.G.A. §50-13-19(h). Although that Code Section provides for a "clearly erroneous" scope of review for questions of fact, in this case the facts are not disputed and were established by the parties in a Joint Stipulation of Facts and Exhibits filed in the OSAH administrative proceeding and adopted by the OSAH ALJ (R. Doc. Nos. 4 and 5). By Georgia law, judicial review of the Petition is conducted by this Court without a jury and is confined to the record before the OSAH ALJ as transmitted to this Court by the OSAH Clerk. ("Certification of Administrative Record", filed on December 29, 2021, referred to hereafter as "R. Doc. No.__".) The Court has reviewed the recitation of the "Undisputed Material Facts" contained in the first section of the OSAH ALJ Final Decision and Order and determined those facts are consistent with the Stipulation of Facts and Exhibits between the parties and, accordingly, the statement of the material facts in the OSAH ALJ Decision is incorporated by reference in this Order (Final Decision and Order, R. Doc. No. 22, pgs 2-10).

This Court conducts a *de novo* review of the legal conclusions by the OSAH ALJ, and specifically determines whether those legal conclusions are in violation of statutory provisions, in excess of the authority of the agency, made upon unlawful procedure or affected by other error of law, or arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. O.C.G.A. §50-13-19(h). Thus, this Court conducts a *de novo* review of claimed errors of law in the OSHA ALJ's decision. The interpretation of a statute or regulation is a question of law, and thus is also reviewed *de novo* in this Court's judicial review of the OSAH ALJ's decision. *Barrow v Dunn*, 344 Ga. App. 747, 749 (2018).

D. **The DeKalb County Proceedings and Related Erroneous OSAH ALJ Conclusions**

Following the foreclosure of the real property containing the SR51 Landfill by the lender to EarthResources, SouthCrest Bank which issued the Letter of Credit to EPD as financial assurance for the SR51 Landfill advised EPD in a letter dated September 23, 2015 that the Letter of Credit would not be renewed by SouthCrest Bank. Thereupon the Director deemed the SR51 Landfill to have been abandoned by EarthResources by reason of the lender foreclosure of the real property upon which the landfill was situated. The Director issued a site draft to SouthCrest Bank demanding payment of the proceeds of the SouthCrest Letter of Credit as the financial assurance funds intended for the maintenance, closure, and postclosure care of the SR51 Landfill. After EarthResources filed a legal action in the Superior Court of Fayette County resisting SouthCrest Bank's honor of the EPD site draft for the Letter of Credit proceeds, SouthCrest Bank filed an interpleader action in the Superior Court of DeKalb County against EPD and EarthResources, seeking to interplead with the Court the funds represented by the SouthCrest Bank Letter of Credit and requesting that Court to adjudicate the conflicting claims of EarthResources and EPD to those funds (OSAH ALJ Final Decision and Order, R. Doc. No. 22, "Undisputed Material Facts" Nos. 2 – 6). EPD and the Director filed a counterclaim against SouthCrest Bank to enforce the site draft and collect the proceeds of the Letter of Credit.

Subsequently EPD and SouthCrest Bank submitted to Judge Hunter of the DeKalb Superior Court a proposed Consent Order requesting the Court enter a judgment in favor of EPD requiring payment of the Letter of Credit proceeds from SouthCrest Bank to EPD. With that proposed Consent Order the Director of EPD and SouthCrest Bank submitted a brief in support of its summary judgment motion, and a sworn Affidavit of Jeffery W. Cown who was then Chief of EPD's Land Protection Branch. In that proposed Consent Order, in EPD's supporting brief, and in the Cown Affidavit, EPD and the Director represented to and assured the Court that the

purpose of the SouthCrest Letter of Credit and its proceeds being collected by the Director in those proceedings was to provide EPD with those financial assurance funds for the purpose of ensuring the satisfactory maintenance, closure, and postclosure care of the SR51 Landfill and to carry out any corrective action which may be required at that landfill, as provided by O.C.G.A. § 12-8-27.2(a) and EPD Solid Waste Management Rule 391-3-4-.13(3) (Final Decision and Order R. Doc. No. 22, paras 7-11).

EPD in those filings represented to the Court in the Cown Affidavit, for example, that the purpose of those financial assurance requirements "is to ensure that EPD has the money available to cover closure and postclosure care of a landfill for which the Director determines closure is necessary and to ensure that sufficient funds are available to cover closure and postclosure care of a landfill deemed closed in violation of the Solid Waste Management Rules." Similar statements of that purpose for financial assurance funds are contained elsewhere in the Cown Affidavit and in EPD's supporting brief (Joint Stipulation Exhibits, R. Doc. 7, Ex. 6 and Ex. 7 A Affidavit). The Consent Order proposed by EPD itself stated in pertinent part:

> "The Director of EPD made demand on the [SouthCrest] 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 [SR51 Landfill] must be closed in accordance with the Act and Rules. The landfill will require 30 years of postclosure care." (OSAH ALJ Final Decision and Order, "Undisputed Material Facts" Nos. 7-14)

(Joint Stipulation, R. Doc. No. 6, Ex. 8)

This Court disagrees with the conclusion of the OSAH ALJ those statements and representations to the Court by the Director and EPD that the purpose of the Financial Assurance Funds is to ensure the maintenance, closure, and postclosure care and corrective action for the

SR51 Landfill can be properly treated as mere matters of "opinion" (Final Decision and Order R. Doc. No. 22, pg. 25, para 34). Instead, those statements and representations to the Court, upon which the DeKalb Superior Court based its entry of the EPD Consent Order presented by EPD, must be considered the legal interpretation, understanding, and intent of the EPD and its Director with respect to the operative provisions in Code Section 12-8-27.2(a) and Code Section 12-8-27.1(b). That latter provision authorized the Director to collect the proceeds of the SouthCrest Bank Letter of Credit and deposit those proceeds in the bank account of the Solid Waste Trust Fund for the purposes described in that same subsection which in turn recite those same purposes described in Code Section 12-8-27.2(a). The Director's current position that the Financial Assurance Funds belong to EPD and the Solid Waste Trust Fund and therefore may be used by the Director for any number of different purposes unrelated to the SR51 Landfill clearly is contrary to that position of EPD and the Director in those DeKalb County proceedings concerning the legal construction and intent of these Code Section.

The EPD Consent Order granted EPD's Motion for Summary Judgment based on the terms within the "four corners of the Letter of Credit" and on applicable Georgia letter of credit law, in addition to the EPD "Joint Stipulation of Facts and Admissibility of Documents" which included the Cown Affidavit explaining the legal requirements in the Solid Waste Act and Rules that the financial assurance proceeds of the SouthCrest Letter of Credit must be used by EPD to ensure the closure and postclosure care of the SR51 Landfill and any necessary corrective action (R. Doc. No. 6, Joint Stipulation, Ex. 8). A second Order of the DeKalb Superior Court dated two weeks later dissolved a temporary restraining order previously entered by another Court in a separate proceeding, which had temporarily prevented SouthCrest Bank from releasing the proceeds of the Letter of Credit to EPD. That second Order incorporated the Consent Order and related Stipulation

of Facts and the Cown Affidavit, and was based on the same Georgia law applicable to letters of credit and the strict payment obligation of SouthCrest Bank as the grantor of the Letter of Credit to the EPD Director as the beneficiary of the Letter of Credit determined in the "four corners of the Letter of Credit" and Georgia letter of credit law in O.C.G.A. § 11-5-101-11-5-118. (R. Doc. No. 12, Ex. A, pg. 7). Neither of these Orders addressed in any way if the EPD could use the proceeds of the SR51 Landfill financial assurance funds for any purpose other than the stated statutory purpose of using those funds to ensure the maintenance, closure, and postclosure care of the SR51 Landfill. The Georgia Court of Appeals affirmed the DeKalb Superior Court Order adopting the EPD Consent Order granting summary judgment against SouthCrest Bank to collect the proceeds of the Letter of Credit, again based on the same grounds stated in the Consent Order applying Georgia letter of credit law (R. Doc. No. 12, Ex. B). The Georgia Court of Appeals also reviewed and affirmed that second Order of the DeKalb Superior Court on the same legal basis applying the terms of the SouthCrest Letter of Credit and the same Georgia law governing letters of credit (R. Doc. No. 12, Ex. C). The Georgia Supreme Court in a one-page Order declined to grant certiorari review of that second ruling of the Court of Appeals (R. Doc. No. 12, Ex. D).

In none of those rulings did the DeKalb Superior Court or the Georgia appellate courts make any ruling with respect to the financial assurance funds beyond the determination in the EPD Consent Order entered by the Dekalb Superior Court that EPD was entitled to enforce the Letter of Credit and receive the proceeds of the Letter of Credit from SouthCrest Bank. Neither the DeKalb Superior Court nor the Georgia appellate courts made any determination that the Director, the Solid Waste Trust Fund, or the State of Georgia "owned" those proceeds of the SouthCrest Bank Letter of Credit, or that the Financial Assurance Funds belong to the State of Georgia as asserted by the Director in the OSAH administrative proceeding and now in the Director's

arguments to this Court. Neither the DeKalb Superior Court Orders nor the rulings of the Georgia Court of Appeals affirming those Orders determined any rights or interest of Petitioner Metro Green to the Financial Assurance Funds. It was unknown to anyone at that time that Metro Green would thereafter become the owner and operator of the SR51 Landfill almost two years later in late January 2020 by a transfer of the EarthResources permit for the SR51 Landfill.

Neither the Orders of the DeKalb Superior Court nor the rulings of the Georgia Court of Appeals affirming those Orders made any determination of the legal interest or rights of EarthResources (or Metro Green by virtue of assignment from EarthResources) to make a claim to the Financial Assurance Funds in the unanticipated event the Director and EPD did not utilize the Financial Assurance Funds for the maintenance, closure, and postclosure care, or corrective action for the SR51 Landfill. The statutory and regulatory purpose, the purpose and intent of EPD and the Director, and the determination of the DeKalb Superior Court affirmed by the Georgia appellate courts, was that the Financial Assurance Funds and the collection of those funds by the Director through the SouthCrest Letter of Credit would be used by EPD to carry out the maintenance, closure and postclosure care of the SR51 Landfill.

The OSAH ALJ expressly acknowledged in her Final Decision and Order (Final Decision, R. Doc. No. 22) that the issue before her in the OSAH administrative proceeding, and now before this Court, is a different issue from the narrow issue decided in the DeKalb County proceedings concerning EPD's right to collect the proceeds of the SouthCrest Bank Letter of Credit. "The issue of what the Director may do with funds in the SWTF if circumstances changed and the SR51 Landfill no longer required closure was simply not litigated or determined in the injunction or interpleader actions" in the DeKalb County proceedings and related appeals. (Final Decision, R. Doc. No. 22, p. 25, paras. 31, 33). Again, Metro Green was not a party to those proceedings so

logically the rights of Metro Green under the relevant facts could not have been decided in those proceedings. The legal rights of EarthResources in the event the Director never used any of the proceeds of the SouthCrest Bank Letter of Credit for their intended purposes, and whether the Director has authority instead to utilize the proceeds of the SouthCrest Bank Letter of Credit for other purposes unrelated to the SR51 Landfill, simply were not issues in or decided by those proceedings. The misapplication by the OSAH ALJ of the Court rulings in those proceedings is addressed further herein in connection with the discussion of Respondent's challenge to Petitioner's standing.

E. <u>Relevant Facts Subsequent to Conclusion of DeKalb County Proceedings.</u>

The proceeds of the SouthCrest Letter of Credit were deposited by the Director in a bank account for the Solid Waste Trust Fund on January 19, 2019. Despite the Financial Assurance Funds having been collected by the Director and deposited in the Solid Waste Trust Fund to provide for closure and postclosure care of the SR51 Landfill, for the following year until January 2020 and thereafter from January 2020 to the present date, no amount of the Financial Assurance Funds were utilized or have been utilized by the Director or EPD for the maintenance, closure, postclosure care, corrective action, or any other purpose or use for or in connection with the SR51 Landfill (Joint Stipulation R. Doc. No. 5, Stipulation No. 17; OSAH ALJ Final Decision and Order, R. Doc. "Undisputed Material Facts" Nos. 24, 25). As of January, 2020, for almost five years since 2015 the SR51 Landfill had not been maintained or monitored and the SR51 Landfill had not been closed or postclosure care commenced or any corrective action performed, and thus for that period of time the SR51 Landfill had been out of compliance with

the EPD Solid Waste Rules.[3] Despite having deemed the SR51 Landfill to have been abandoned by EarthResources, and despite the Director having collected the proceeds of the SouthCrest Bank Letter of Credit in order to carry out postclosure care and necessary corrective action for the SR51 Landfill, the Director did not revoke the Solid Waste Handling Permit for the SR51 Landfill which therefore continued to be held by EarthResources.

In January, 2020 Mitchell Stephens, the principal owner of Petitioner Metro Green, engaged in discussions with the Director and other EPD staff regarding the possibility of the Solid Waste Handling Permit for the SR51 Landfill being transferred to Metro Green since that Permit had not been revoked by EPD. An explanation of those discussions and the conditions imposed by the Director to approve the transfer of the SR51 Landfill Permit from EarthResources to Metro Green are set out in the Affidavit of Mitchell Stephens (R. Doc. No. 10). In spite of the Director having collected and deposited the $1,773,304.17 in financial assurance funds in a bank account of the Solid Waste Trust Fund, and despite none of those monies having been used by the Director or EPD for any purpose related to the SR51 Landfill during the intervening twelve months, the Director and EPD required as a condition of approving the transfer of the Permit for the SR51 Landfill to Petitioner that it must establish a new and full

[3] The EPD Solid Waste Rules, in Rule 391-3-4-.11(4), require the closure of a landfill facility be initiated within 180 following the last disposal of solid waste, recognizing the necessary environmental protection imperatives when the active operation of a waste disposal facility like the SR51 Landfill has ceased. It is noteworthy that the Director and EPD did not utilize the Financial Assurance Funds to comply with that Solid Waste Rule. The Director in the administrative proceedings and in these judicial review proceedings has acknowledged that it was not actually his intent to utilize the Financial Assurance Funds for the SR51 Landfill following deposit of those funds in the Solid Waste Trust Fund after collection from SouthCrest Bank. The Director instead adopted his current position that the instant those funds were deposited in the Solid Waste Trust Fund they became property of the State and EPD and therefore subject to the authority and discretion of the Director to be used thereafter for any purpose or purposes for which other funds in the Solid Waste Trust Fund are used by the Director and EPD.

replacement financial responsibility mechanism for the SR51 Landfill. The new financial assurance mechanism required by EPD from Petitioner was satisfied through a performance surety bond in the amount of over $1.9 million (Joint Stipulation R. Doc. No. 5, Stipulation Nos. 13 and 14 and Ex. 13; (Stephens Affidavit, R. Doc. No. 10, paras. 6 -7). That financial assurance mechanism would serve the same purposes as those financial assurance funds already received and held by the Director for the maintenance, closure, and postclosure care of the SR51 Landfill.

Since the Director under the Solid Waste Rules required the Permit for the SR51 Landfill could not be transferred to Petitioner without the consent of EarthResources which still held that Permit unrevoked by the Director, it was necessary for Metro Green, in order to accomplish transfer of the SR51 Landfill Permit by obtaining the consent of EarthResources to the Permit, to pay EarthResources that amount of money equal to the Financial Assurance Funds. That payment and consent resulted in the assignment by EarthResources to Metro Green of the legal interest and rights of EarthResources to seek release and return of the Financial Assurance Funds since no amount of those funds had been used by the Director or EPD and no longer were necessary for their designated use for the SR51 Landfill contemplated by O.C.G.A. § 12-8-27.2(a) (Stephens Affidavit, R. Doc. No. 10, paras. 3-4 and Ex. 1; Joint Stipulation R. Doc. No. 6, Ex. 2).

In addition to requiring that new financial assurance mechanism, the Director and EPD required Metro Green to enter into a Consent Order with EPD requiring Metro Green to bring the SR51 Landfill into compliance with the Solid Waste Rules and the approved Design and Operation Plan for the landfill, prior to commencing active operation (Stephens Affidavit, R. Doc. No. 10, paras. 5). Those activities were required to address the substantially deteriorated and un-monitored conditions at the SR51 Landfill over the preceding six years in order to bring

the SR51 Landfill into compliance with the Solid Waste Rules and its Solid Waste Handling Permit.

As a result of that new financial assurance mechanism established by Metro Green, the Financial Assurance Funds then being held by EPD in a bank account for the Solid Waste Trust Fund thereupon were no longer needed for their intended financial assurance purposes for the SR51 Landfill, and as confirmed in the discussions between Mr. Stephens and EPD were no longer intended by the Director and EPD for use of the benefit of the SR51 Landfill (Stephens Affidavit, R. Doc. No. 10, para. 7). Accordingly, Petitioner in verbal and written communications with the Director asserted a legal interest and right to those Financial Assurance Funds and requested those funds be released to Metro Green for beneficial uses intended by Metro Green for the SR51 Landfill (Stephens Affidavit, R. Doc. No. 10, paras. 8-9). The Director declined and insisted those funds upon being collected and deposited in a Solid Waste Trust Fund bank account had become property of the State and the Solid Waste Trust Fund and thus available for other uses by the Director and EPD. Those uses intended by the Director are unrelated to the SR51 Landfill or any purpose related to the SR51 Landfill, or to Metro Green's ownership and operation of the SR51 Landfill including its maintenance, closure, postclosure care, corrective action or other purposes for which those Financial Assurance Funds were established pursuant to O.C.G.A. § 12-8-27.2(a) (Joint Stipulation, R. Doc. No. 5-6, Stipulation Nos. 18-20 and Ex.15-18).

This Court disagrees with the conclusion of the OSAH ALJ that the "changed circumstances" described above subsequent to the DeKalb County proceedings and deposit of the Financial Assurance Funds either determine or affect the determination by this Court of the proper construction of Code Section 12-8-27.2(a) and 12-8-27.1 with respect to the authority and

obligations of the Director related to financial assurance funds required for landfills. The Court also disagrees those "changed circumstance" explain or contradict the explanation and construction of the Director and EPD in the DeKalb County proceedings with respect to those Code Sections. The fundamental issue for decision by this Court in this *de novo* judicial review remains whether the financial assurance funds established for the SR51 Landfill, and the financial responsibility mechanisms for other landfills in accordance with the requirements of the Georgia Solid Waste Act and Rules of the Director and EPD, when those financial assurance funds have not been utilized by the Director and EPD and are no longer necessary to be utilized for their intended purposes for the maintenance, closure, postclosure care, or corrective action for that landfill, can thereupon be appropriated by the Director by reason of that circumstance for other public purposes of EPD and the Solid Waste Trust Fund. The parties agree this Court's determination of that issue hinges on the proper statutory interpretation of Code Sections 12-8-27.1 and 12-8-27.2(a).

F. The Erroneous Construction of Code Sections 12-8-27.2(a) and 12-8-27.1 by the Director and the OSAH ALJ.

Georgia rules of statutory construction require the Court to construe related statutes together in *pari materia*, to harmonize and give meaning to all parts of the relevant statutory provisions, and to construe a statute in a manner that does not make certain provisions superfluous or produce contradiction, unreasonableness, or absurd results or an indication the legislature meant something else. *Richardson v Phillips*, 309 Ga. App. 773, 777 (2011); *Williams v Bear's Den, Inc*., 214 Ga. 240, 242 (1958); *Butterworth v Butterworth*, 227 Ga. 301, 303-04 (1971); *Georgia River Network v Turner*, 328 Ga. App. 381, 390 (2014); *Judicial Council of Georgia v Brown & Gallo*, 288 Ga. 294, 296-297 (2010). The cardinal rule for the

construction of statutes is to ascertain the intent of the General Assembly in enacting the law, O.C.G.A. §1-3-1(a). Legislative intent must be determined from the consideration of the statute as a whole. When construing a statute all words in the statute are to be given their ordinary meaning. O.C.G.A. § 1-3-1(b). *Hood v Perdue*, 540 F. Supp. 2d 1350, 1358 (N.D. Ga. 2008), citing *Williams v Bear's Den, Inc*., *supra,* 214 Ga. at 242 and *Porter v Food Giant, Inc*., 198 Ga. App. 736, 738 (1991). The Director does not dispute that these are the applicable Rules for this Court's construction of these relevant Code Sections in the Georgia Solid Waste Act. Further, in the construction of statutes and regulations the Court is not required to give judicial deference to an interpretation asserted by the agency unless the Court is unable to determine the meaning of the legal text at issue by application of these rules of statutory construction. *City of Guyton v Barrow*, 305 Ga. 799, 803-04 (2019) The Court does not find it necessary here to defer to the Director's desire construction of these Code Sections, which for reasons discussed below the Court does not find to be their proper construction and legislative intent.

The provisions in Code Section 12-8-27.2(a), mirrored in the Georgia Department of Natural Resources Solid Waste Rule 391-3-4-.13(3), are clear by their plain language that financial responsibility mechanisms are required and intended for the maintenance, closure, and postclosure care and corrective action for "such facility", clearly referring to the facility for which that financial assurance mechanism was provided by its owner or operator. The amount of that financial assurance mechanism is calculated based on the estimated closure, postclosure care, and corrective action costs for that specific landfill for which the financial assurance mechanism is being provided. 40 C.F. R. Part 258, Subpart G, incorporated in Georgia Solid Waste Rule 391-3 -4 -.13.

Code Sections 12-8-27-.2(a) and 12-8-27.1 were enacted by the Georgia legislature at the same time the legislature enacted the Georgia Solid Waste Management Act and are consecutive Code Sections in the Act. The provisions in subsection (b) of Code Section 12-8-27.1, which grant authority to the Director to call in and "implement" the financial assurance mechanism for a landfill which the Director has determined the owner or operator is unwilling or unable "to maintain, operator, or close a 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" incorporates the same language and same stated purposes for financial assurance mechanisms as Code Section 21-8-27.2(a). Those provisions in 21-8-27.2(a) and 21-8-27.1(b) read together are consistent and harmonious as to those purposes of financial assurance mechanisms and their proceeds. In the Court's view the construction of Code Section 12-8-27.1 argued by the Director would make those provisions in subsection (b) mere surplusage, if the Director could call in a landfill's financial responsibility mechanism but then use those monies for other purposes of EPD determined by the Director. The similar language and the same purposes for financial assurance funds described in Code Sections 12-8-27.2(a) and 12-8-27.1(b) are also reflected in Code Section 21-8-27.1(a)(2) which contains the same environmental protection objectives with respect to landfills by authorizing the utilization of deposited in the Solid Waste Trust Fund for a particular landfill to provide for preventative or corrective action "including but not limited to closure and postclosure care" and corrective action where the owner or operator is unwilling or unable to perform corrective action for a release of contaminants at such disposal facility.

Code Section 12-8-27.1(b) does not simply read in the event the Director determines a landfill has been abandoned that the Director may "call in" or "collect" the proceeds of the relevant financial responsibility mechanism. They provide the Director may "implement" the

financial assurance funds provided through that financial responsibility mechanism for that landfill determined by EPD to have been abandoned by its owner and operator. Applying the ordinary meaning and usage of the word "implement", that term is defined in Websters Dictionary as meaning to "carry out, accomplish, esp to give practical effect to and ensure actual fulfillment by concrete measures" *(https://www.merriam-webster.com/dictionary/implement)*. The legislature's use of the word "implement" evinces a legislative intent that the Director is expected and required to utilize financial assurance funds collected by means of a financial assurance mechanism for the abandoned landfill facility to carry out those stated activities in Code Section 12-8-27.1(b) to close the facility and carry out postclosure care or corrective action utilizing those funds, when the owner or operator no longer has the willingness or ability to carry out those necessary actions for the landfill. Again, those are the same stated purposes of financial assurance funds required by Code Section 12-8-27.2(a).

The language and provisions in Code Section 12-8-27.2(a) and the language in provisions in 12-8-27.1(b) and 12-8-27.1(a)(2) read together are consistent and harmonious. Construed reasonably and in accordance with the rules of statutory construction, the Court is of the opinion the related provisions in those Code Sections evidence a legislative intent that the financial assurance funds established and designated for a particular landfill to assure those funds are available to EPD after being collected and deposited in the Solid Waste Trust Fund by the Director to carry out the maintenance, closure, postclosure care, and any necessary corrective action for that landfill facility. That was the very construction of these Code Sections and the purposes of the Financial Assurance Funds established for the SR51 Landfill that was acknowledged and explained by the Director and EPD to the courts in the DeKalb County proceedings.

Contrary to those representations to the Court in the DeKalb County proceedings, and inconsistent with a reasonable and consistent reading of the similar and consistent provisions in Code Sections 12-8-27.2(a) and 12-8-27.1, it is now the Director's position that financial assurance funds established and designated for a specific landfill lose their identity for those purposes immediately upon deposit in the Solid Waste Trust Fund. The Director argues those funds thereby are no longer financial assurance funds and instead become monies belonging to the State and become general funds of the Solid Waste Trust Fund to be utilized by the Director and EPD for entirely different purposes and public uses determined in the discretion of the Director.

The Director asserts that such authority to appropriate the Financial Assurance Funds for other purposes of EPD and the Solid Waste Trust Fund is derived by implication from the sentence in Code Section 12-8-27.1(b) which provides financial assurance funds upon being called in and collected by the Director "shall be deposited in the solid waste trust fund". The Director has not responded to or disputed the contention of Petitioner that the Solid Waste Trust Fund is identified in that sentence for "deposit" of the proceeds of a financial responsibility mechanism collected by the Director, for the reason that the solid waste trust fund is the logical and available fund in which monies received by EPD may be deposited and held until use by the Director and EPD for their intended purposes for the landfill for which those funds were established, similar to an escrow account. The Director also attempts to support his position, again by implication, from language in Code Section 12-8-27.1(a) where it reads "[t]he monies deposited in such fund pursuant to this Code section … may be expended by the Director…". But again, those purposes include in subsection (a)(2) taking preventative or corrective actions where the owner is unwilling or unable to perform corrective action "including but not limited to

closure and postclosure care of a disposal facility", consistent with those purposes stated in Code Section 12-8-27.2(a) and 12-8-27.1(b).

Moreover, if the legislature's intent by these Code Section was as argued by the Director, it is reasonable to expect the legislature would have and it easily could have said so by expressly granting that authority to the Director, in either Code Section 12-8-27.1(b) or subsection (a), and not merely by the means of the implication upon which the Director's position depends. Expressing such a legislative intent would have been as simple as causing the last sentence in subsection (b) to read: "The proceeds from any applicable financial responsibility mechanisms shall be deposited in the solid waste trust fund and may be utilized by the Director for any purpose authorized under the provisions of subsection (a) of this Code Section." Or, such an intent could have been expressed by the legislature in subsection (a) of Code Section 12-8-27.1 by causing it to read: "The moneys deposited in such fund pursuant to this Code Section including monies collected by the Director by implementing a financial responsibility mechanism as provided in subsection (b), … may be expended by the director…".

The rules of statutory construction also instruct that a statute should be construed in a manner so as not to lead to potentially unreasonable or absurd consequences. *Georgia River Network v Turner, supra,* 328 Ga. App. at 390. According to the Director's interpretation, the Director could have elected not to use the Financial Assurance Funds for the SR51 Landfill to provide corrective action even for a release of contaminants from the SR51 Landfill discovered either prior to January, 2019 when the Director collected the proceeds of the SouthCrest Letter of Credit or discovered during the period between January, 2019 and January, 2020 after collecting the Financial Assurance Funds. Or, the Director after collecting the proceeds of the SouthCrest Letter of Credit could have already budgeted and utilized those funds for unrelated purposes of

EPD and the Solid Waste Trust Fund, but subsequently have a need for those funds for use to perform remediation of contamination at or around the unmaintained and unmonitored SR51 Landfill, in which event the solid waste trust fund or State taxpayers would be left to fund the necessary clean-up, closure, and postclosure care of the SR51 Landfill. These examples of potential unreasonable and undesirable consequences of the Director's desired construction of these Code Sections weigh against a conclusion the Director's proposed construction accurately reflects the legislative intent of these Code Sections.

As a further example, EarthResources provided the SouthCrest Letter of Credit as a financial assurance mechanism to ensure the SR51 Landfill would be maintained, closed, and provided postclosure care and corrective action if necessary by EPD utilizing the proceeds of that Letter of Credit in the event EarthResources became unable to carry out those activities at the SR51 Landfill for protection of the environment. If these Code Sections were construed to give the Director discretion not to use those financial assurance funds to address conditions at the SR51 Landfill if groundwater or surface water contamination were discovered migrating from the SR51 Landfill, EarthResources could face third-party claims and liability to adjoining property owners arising from the environmental conditions created by the SR51 Landfill. In that event EarthResources would be left without any available recourse against the Director or EPD who used the EarthResources financial assurance funds elsewhere.

As stated by EPD Land Protection Branch Chief Jeff Cown in his Affidavit submitted in the DeKalb County proceedings: "[I]rrevocable 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 postclosure care of a landfill deemed closed* in violation of the Georgia Solid Waste

Management Rules", quoted in the ALJ's Final Decision R. 22, at page 4, paragraph 9. The OSAH ALJ in her Decision acknowledged the intent and purpose of financial assurance funds as explained by the Director and EPD to the Superior Court of DeKalb County, but then omitted from her construction of these operative Code Sections a meaningful discussion of EPD's own admitted construction and understanding of these Code Sections with respect to the purposes for financial responsibility requirements in the Solid Waste Act and Rules.

If the Director's desired construction of these Code Sections were accepted, the Director could utilize the Financial Assurance Funds to make grants to local governments in another part of the State for clean-up of illegal tire dumps, or use the funds for public recycling education, or to fund operation of the Solid Waste Trust Fund for such purposes as training courses, purchases of supplies and other ordinary office expenditures, vehicle purchases, attendance at industry meetings, and/or hiring new employees, or for any number of such uses unrelated to the environmental protection purposes of financial assurance funds for the particular landfill for which they are intended, including purpose which this Court notes are not specified in Code Section 12-8-27.1(a). The broad scope of the actual uses by the Director and EPD of funds in Solid Waste Trust Fund are demonstrated in the record (Affidavit and Supplemental Affidavit of Robert C. Norman and attached Exhibits (R. 11, 13-14, and 18; Ruoff Affidavit, R. 12 attachment, para. 9). The OSAH ALJ noted that Code Section 12-8-27.1(a) "limits expenditures to specifically defined purposes" but failed to recognize or acknowledge in her decision that broad scope of purposes for which funds in the Solid Waste Trust Fund are actually used by the Director and EPD. (Final decision and Order, R. Doc. No. 22, p. 14, para. 9).

The OSAH ALJ in her construction of these Code Sections accepting the Director's arguments focused on Code Sections 12-8-27.1(a) and 12-8-27.1(c) and the last sentence in 12-8-

27.1(b), while giving no meaningful effect to the consistent provisions in Code Section 12-8-27.2(a) and in the first sentence in 12-8-27.1(b). Without supporting explanation or logic, the OSAH ALJ concluded "neither the statute nor the Rule limits the expenditure of financial assurance funds deposited into the Solid Waste Trust Fund to a specific site." She discounted the plain language "of such facility" in Code Section 12-8-27.2(a) by analogizing that language to automobile liability insurance premiums where "the insurance company is not required to use only the premiums paid by the insured to cover damage or injury he has caused" (Final Decision and Order, R. 22, pg. 22, para. 25). The Court fails to see logic in that analogy. The OSAH ALJ's analysis begins with her premise the Solid Waste Trust Fund is a "pool of funds" and thus must also include financial assurance funds designated for the maintenance, closure, and postclosure care of a designated landfill facility after those funds have been deposited in the Solid Waste Trust Fund. However that conclusion gives not weight to the first lengthy sentence in that subsection referring to the stated purposes for the Director's authority to implement financial responsibility mechanisms. Further, this Court does not view such an analysis that begins with the conclusory premise the Solid Waste Trust Fund is only a "pool of funds" to be proper statutory construction. The OSAH ALJ also does not provide any explanation of how she construed the last sentence in subsection (b) to mean the simple act of the Director depositing in a bank account the proceeds of a financial assurance mechanism created for a specific landfill converts those funds into property of the State to be used for other purposes unrelated to the landfill facility for which those financial assurance funds were established.

The OSAH ALJ concluded the construction of these Code Sections argued by Petitioner "would prohibit the Director's ability to address the most pressing solid waste problems in the State". The Court disagrees with that conclusion. First, the provisions in Code Section 12-8-

27.2(a), and the provisions in the first sentence in of Code Section 12-8-27.1(b) authorizing the Director to call in and implement financial responsibility mechanism where the owner or operator is unwilling or unable 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," clearly evidence a legislative determination that landfills in this State that have been abandoned by the owner or operator are "pressing solid waste problems" if those described activities were not carried out. The OSAH ALJ recognized in her decision that is the purpose of financial responsibility mechanisms, as explained in the Cown Affidavit, to "protect EPD, the environment, and the citizens of Georgia by ensuring funds are available when necessary to cover closure and postclosure of a landfill deemed closed in violation of the Georgia Solid Waste Management Rules". Second, the records shows that, apart from the financial assurance funds and the proceeds of other landfill financial responsibility mechanisms that might be called in by the Director, millions of dollars from other funding sources for the Solid Waste Trust Fund (State of Georgia tire fees, enforcement penalties received by EPD, legislative appropriations) are available to address the environmental protection purposes stated in subsection (a) of Code Section 12-8-27.1. [4]

The OSAH ALJ also relied for her construction of these Code Sections on language contained in 12-4-75(3) with respect to bonds for surface mining operations, which provides that the Director may expend a portion of a recovered or forfeited bond "as is necessary to complete

[4] The Court notes that 12-8-27.1 was amended by the Georgia legislature in 2021 to require, effective as of July 1, 2022, that all tire fees collected in the State pursuant to subsection (h) of Code Section 12-8-40.1 may no lingered by funneled by the legislature for other purposes and instead must be dedicated to the Solid Waste Trust Fund for use for the purposes stated in subsection (c) of that new Code Section 12-8-27.1. That new Code Section retains in subsection (e) the current provisions in Code Section 12-8-27.1(b) discussed herein.

such mining operator's responsibilities under the mining land use plan." The Court disagrees that language in the Georgia Surface Mining Act supports the ALJ's construction of these relevant Code Sections. The Court does not discern any substantive difference in the meaning or the objective of that language related to mining permits and the language in Code Sections 12-8-27.2(a) and 12-8-27.1(b) that financial responsibility mechanisms for landfills are required and may be collected by the Director when a landfill becomes abandoned to ensure the satisfactory maintenance, closure, and postclosure care "of such facility" or to carry out any corrective action which may be required. The OSAH ALJ in her construction of these Code Sections also reached over into Code Section 12-8-37.1, which refers to the "corpus" of the Solid Waste Trust Fund being available for grants or loans to counties and cities. The Court does not view financial assurance funds collected and deposited for a particular landfill to be part of the "corpus" or "principal" of the Solid Waste Trust Fund made up of such other funds intended for the general purposes of the Solid Waste Trust Fund as determined by the Director and the Board of Natural Resources. The Court does not view that Code Section as detracting from this Court's above analysis of the legislative intent in these applicable Code Sections, or as support for a reasonable or correct construction of these Code Sections to authorize the Director to appropriate and utilize financial assurance funds established and collected by the Director for a particular landfill to supplement the general budget of the Solid Waste Trust Fund for uses for purposes entirely unrelated to that landfill. Again, if that had been the intent of the legislature in Code Section 12-8-27.1, the legislature could have and considering the language in Code Sections 12-8-27.2(a) and 12-8-27.1(b) reasonably would have made that intent clear by additional language to that effect in Code Section 12-8-27.1(a) and/or 12-8-27.1(b).

After careful consideration of the language of these Code Sections and applying the rules for statutory construction and the respective arguments of the parties regarding construction of these Code Sections, and having determined errors were committed by the OSAH ALJ in construing these Code Sections, it is this Court's opinion that the construction of these Code Sections argued by Petitioner more reasonably reflects the language and the likely legislative intent of these Code Sections with respect to the priority for utilizing the proceeds of a financial responsibility mechanism established for a particular landfill for the maintenance, closure, postclosure care, and corrective action for that particular landfill. That purpose is expressly stated in Code Section 12-8-27.2(a) and repeated stated in Code Section 12-8-27.1(b), whereas, the construction of the these Code Sections argued by the Director and accepted by the OSAH ALJ would require this Court to engage in a significant implication of authority to the Director to utilize financial assurance proceeds deposited in the Solid Waste Trust Fund which is not expressly granted in Code Section 12-8-27.1. Implication of such authority also would be inconsistent with the provisions in the first sentence of Code Section 12-8-27.1(b).

This construction of these Code Sections is consistent with their construction by Respondent in the DeKalb County proceedings and consistent with the use of the financial Assurance Funds for the SR51 Landfill contemplated in the court rulings in those proceedings. A construction of these Code Sections in the manner argued by Respondent would have no reasonable relationship or necessary governmental purpose with respect to funding of the Solid Waste Trust Fund for accomplishing the other beneficial objectives of the Solid Waste Trust Fund. A ruling by this Court which is consistent with the legislative intent evident from these Code Sections and the corresponding EPD Solid Waste Rules --that a financial assurance mechanism designated for a particular landfill must be used for purposes of that facility if it

becomes abandoned in order to ensure protection of the environment from the impact of that facility-- will in no way detract from the other purposes for which funds in the Solid Waste Trust Fund received from the sources described in Code Section 12-8-27.1(a) may be utilized by the Director and EPD. To construe these Code Sections in a manner argued by the Director in the Court's opinion also would result in an unreasonable and unjustified financial windfall to the Solid Waste Trust Fund and unjust enrichment of the State and EPD, and cause unreasonable and unjustified injury to Petitioner and its operation of the SR51 Landfill based on the facts.

In addition, the Court agrees with Petitioner that construction of these Code Sections in the manner suggested by the Director to allow the Financial Assurance Funds established and collected for the benefit of the SR51 Landfill and surrounding environment as contemplated by the statutory and rule provisions governing financial responsibility mechanisms for landfills, may be used instead for other, unrelated public purposes of EPD and the Solid Waste Trust Fund. Would raise a significant constitutional issue under the taking clause in Article I, Section III, Paragraph I of the Georgia Constitution. Such a construction of these Code Sections enabling the Director to utilize such financial assurance funds created by the owners or operators of landfills for the purposes contemplated in Code Section 12-8-27.2(a) for other unrelated public purposes of EPD and the Solid Waste Trust Fund, after being called and collected by the Director, would effectively impose on those landfill owners and operators an unfair and unanticipated financial burden of paying for things completely unrelated to their own landfill such as cleaning up illegal tire dump created by others, funding grants issued by EPD to local governments for their solid waste management needs, or merely for operational and administrative expenses of EPD and the Solid Waste Trust Fund. All of these purposes are unrelated to the reasons and objectives for which the owner or operator was required to establish the financial responsibility mechanism for

its particular landfill in the first place. However, as the Court agrees with Petitioner's construction of these applicable Code Sections, it is not necessary for this Court to reach a decision of Petitioner's taking claim in Enumeration of Error No. 4 in the Petition for Judicial Review. *See, Garner v Harrison,* 260 Ga. 866, 869 (1991) (a statute should be construed if possible in such a way as to find it constitutional).

G. **The OSAH ALJ's Erroneous Determination of Petitioner's Standing.**

Petitioner acknowledges that in order to establish standing to assert its claim to the Financial Assurance Funds it must satisfy the provisions in O.C.G.A. § 12-2-2(c)(3)(A), which provide that 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." It is the Court's opinion that Petitioner satisfies these requirements for standing. First, Petitioner is the current owner and operator of the SR51 Landfill as owner Petitioner will be injured if those financial assurance funds posted specifically for the SR51 Landfill are used for unrelated purposes. Second, Petitioner has standing by virtue of the assignment of the interest and claim of EarthResources to the Financial Assurance Funds through which Petitioner stands in the shoes of EarthResources. The facts in the record show the Financial Assurance Funds have not been used in any amount by the Director and EPD for the SR51 Landfill, and are no longer necessary to be used by the Director or EPD for the SR51 Landfill in view of the complete replacement financial assurance mechanism established by Petitioner upon transfer of the SR51 Landfill Permit.

During the oral argument in the hearing on this Petition for Judicial Review, counsel for the Director acknowledged that the question of Petitioner's standing is intertwined with the

Court's determination of the proper construction of these applicable Code Sections. As the Court has determined that Petitioner under the facts has a legal interest and a rightful claim to the Financial Assurance Funds, and that the Director's and State do not have ownership of those monies, and the Director's denial of Petitioner's claim to those funds which Petitioner challenged in the original Petition for Hearing to the Office of Administrative Hearing and in the Petition for Judicial Review clearly would cause cognizable financial and other "injury in fact" to Petitioner. Petitioner would be denied the benefit of over $1.7 million in Financial Assurance Funds for use for their original and intended purposes for the benefit of the SR51 Landfill now owned and operated by Petitioner, for Petitioner's maintenance closure, postclosure care, and any necessary corrective action at the SR51 Landfill and for other uses benefiting the operation of the SR51 Landfill including but not limited to waste recycling activities.

Under Georgia law the determination of a party's standing is based on the contents of its complaint (in this instance the Petition) and the facts of record relevant to the injury claimed by the Petitioner arising from the challenged action and decision of the Director. Standing is evaluated based on whether the party asserting the claim is alleging an actual or threatened injury in fact. *Jordon v Department of Natural Resources, Environmental Protection Division*, 357 Ga. App. 625, 629 -30 (2020); *Georgia River Network v Turner*, 328 Ga. App. 381, 386 (2014), incorporating U.S. Supreme precedent to evaluate the "injury in fact" standard.[5] It is the Court's opinion that Petitioner has demonstrated the requisite injury in fact necessary to assert its claim

[5] The Court notes that these Georgia appellate court decisions, as well as the decision in *Pres. Alliance of Savannah v Norfolk Southern Corp*., 202 Ga. App. 116, 117 (1991) cited by the OSAH ALJ, address the subject of standing in a somewhat different context involving environmental plaintiffs and environmental organizations asserting an injury to the environment or similar interest such as historic preservation.

that the Director improperly denied Petitioner's legal interest in and rightful claim to the Financial Assurance Funds.

The erroneous conclusions of the OSAH ALJ with respect to Petitioner's standing to assert its claim to the Financial Assurance Funds in large part were based on the misapplication of the court rulings in the proceedings in the DeKalb Superior Court. The OSAH ALJ determined that since Metro Green was not a party to the SouthCrest Letter of Credit it was not entitled to receive the proceeds of the Letter of Credit and thus cannot make a claim to those monies. Petitioner never claimed an interest in or right to receive the proceeds of the Letter of Credit itself. Instead, Petitioner's injury arises from the Director's denial of its rightful claim to the Financial Assurance Funds collected by the Director, after none of those funds were used by the Director for the benefit of the SR51 Landfill or surrounding environment, and no longer are necessary to be used for those purposes, because Petitioner has fully replaced and provided a new financial responsibility mechanism for the SR51 Landfill which assures the purposes in O.C.G.A. § 12-8-27.2(a) and 12-8-27.1(b) will be satisfied.

The OSAH ALJ also held that Petitioner did not have standing by virtue of the assignment to it of the rights of EarthResources to assert a claim to the Financial Assurance Funds under those circumstances. That conclusion was based on an erroneous premise that the decisions in the DeKalb County proceedings "ended any claim that EarthResources and its affiliates had to the money". However, as previously discussed, the rulings in those proceedings determined only that EPD had a legal right to collect the proceeds of the SouthCrest Letter of Credit based on the terms of that Letter of Credit and applicable Georgia letter of credit law. Those rulings did not determine that EarthResources "had no right to the funds" and thus there was "nothing for EarthResources to transfer to Metro Green", if as subsequently occurred the

Financial Assurance Funds have never been used by the Director or EPD for the benefit of the SR51 Landfill as was contemplated in those court rulings and by the Director and EPD at the time of those rulings. Again, the OSAH ALJ correctly concluded that "[t]he issue of what the Director may do with funds in the SWTF if circumstances changed and the SR51 Landfill no longer required closure was simply not litigated or determined in the injunction or interpleader action".

For that same reason, the OSAH ALJ's determination that Petitioner, standing in the shoes of EarthResources, is collaterally estopped from litigating its claim to the Financial Assurance Funds also is erroneous (Final Decision, R. Doc. No. 22, pg. 17, para. 16). The right of EarthResources to assert an interest in and claim to the Financial Assurance Funds arising from the events subsequent to the Director's collection of those funds by calling in the SouthCrest Letter of Credit was not an issue in question in the DeKalb Superior Court proceedings. That issue was not actually litigated and determined in the DeKalb County proceedings, was not an issue essential to the outcome of those proceedings, and EarthResources did not have a full opportunity to litigate that issue in the DeKalb proceedings, all of which are requirements for the application of collateral estoppel, as acknowledged by the OSAH ALJ in her decision. *See, Marta v Maloof*, 304 Ga. App. 824, 829 (2010) (setting out the requirements for application of collateral estoppel). The right of EarthResources to seek return of those funds on the grounds the funds have never been used by the Director for any purposes of the SR51 Landfill for which they were established by EarthResources and collected by the Director through the SouthCrest Letter of Credit has not been litigated or decided. Again, that right was legally assigned to Metro Green and is an additional basis for Metro Green's standing to assert a rightful claim to those funds.

This Court also does not agree with the argument of the Director and the conclusion of the OSAH ALJ with respect to the "zone of interest" component of the test for standing. The OSAH ALJ in her decision recognized that a fundamental purpose of the Solid Waste Management Act and Rules, and in particular O.C.G.A. § 12-8-27.2(a) and Solid Waste Rule 391-3-4-.11, 391-3-4-.12, and 391-3-4-.13, is protection of the environment, by ensuring funds are available for the maintenance, closure, postclosure care, and corrective action for a solid waste landfill where the operator is unable to carry out those objectives and therefore the Director and EPD have determined to implement the landfill's financial assurance mechanism under Code Section 12-8-27.1(b). Financial assurance mechanisms and their use for the purposes specified in Code Section 12-8-27.2(a) for the landfill for which the particular financial assurance mechanism was established by the owner and operator, and the use of those financial assurance funds for those intended purposes for environmental protection purposes, are clearly relevant and important to the declared policy and legislative intent of the Solid Waste Management Act in O.C.G.A. § 12-8-27.1(a) that "solid waste facilities do not degrade the quality of the environment by reason of the location, design, method or operation, or other means…" Thus, determination of the issues raised by Petitioner in the Petition for Judicial Review in this Court's opinion fall squarely within the zone of interests to be protected or regulated by the Solid Waste Act and Rules.

Conclusion and Judgment of the Court

For all of the above reasons, the action and decision of the Director and the decision of the agency by the OSAH Administrative Law Judge are hereby reversed. This Court holds that Petitioner Metro Green Franklin, LLC has a legitimate interest in and a rightful claim to the

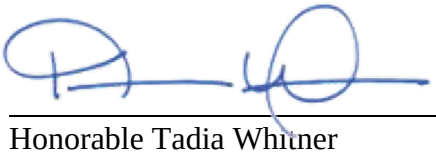
Financial Assurance Funds currently held by the Director in a bank account for the Solid Waste Trust Fund. Under the proper construction and legislative intent of Code Section 12-8-27.2(a) and 12-8-27.1, neither the State, the Solid Waste Trust Fund, nor the Director in his capacity as Trustee of the Solid Waste Trust Fund have unconditional ownership of the Financial Assurance Funds which are the proceeds of the SouthCrest Letter of Credit. At this point, those Financial Assurance Funds will only be used for their intended purposes of benefiting the SR51 Landfill if those monies are released by the Director from the Solid Waste Trust Fund to Petitioner for use by Petitioner for the SR51 Landfill and its operation, maintenance, closure, postclosure care, and any necessary corrective action.

By the terms in O.C.G.A. § 12-8-27.1(a), the Director of EPD is required to serve as the Trustee of the Solid Waste Trust Fund, and in that capacity the Director has the authority and a duty to assure that financial assurance funds collected pursuant to his authority in subsection (b) of that Code Section for the purposes intended by that Code Section and Code Section 12-8-27.2(a). Moreover, the Director under Code Section 12-8-23.1 setting out the powers and duties of the director has broad authority to carry out the purposes of the Solid Waste Act and Rules, and the Director possess incidental and inherent authority in the Court's opinion to release the Financial Assurance Funds to Petitioner under the facts and based on this Court's construction of the applicable Code Sections. In addition, O.C.G.A. § 12-8-23.1 specifically includes the power "to collect and disburse all fees and funds authorized or imposed by" the Solid Waste Management Act. O.C.G.A. § 12-8-23.1(18).

Accordingly, it is the final JUDGMENT of this Court that within thirty (30) days from the date of this Final Order and Judgment that Respondent is hereby ORDERED to disburse the sum of $1,773,304.14, which represents the subject Financial Assurance Funds held by

Respondent for the benefit of the SR51 Landfill, from the Solid Waste Trust Fund bank account to Petitioner Metro Green Franklin, LLC. This judgment shall begin accruing post judgment interest at the statutory rate on the thirty-first (31st) day following the entry of this Final Order and Judgment.

SO ORDERED, this 22nd day of March, 2022



Honorable Tadia Whitner
Judge, Superior Court of Gwinnett County

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