

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JULIE JENKINS,

Petitioner,

v.

**GEORGIA ENVIRONMENTAL
PROTECTION DIVISION, JEFFREY
W. COWN,¹ DIRECTOR,**

Respondent,

**GEORGIA DEPARTMENT OF
ECONOMIC DEVELOPMENT;
JOINT DEVELOPMENT AUTHORITY
OF JASPER COUNTY, MORGAN
COUNTY, NEWTON COUNTY, AND
WALTON COUNTY,**

Intervenor-Respondents.

Case No. 2023-cv-378973

**Appeal from Docket No.:
2314860-OSAH-BNR-ES-60-Malihi**

FINAL ORDER ON PETITION FOR JUDICIAL REVIEW

This matter comes before the Court on Petitioner Julie Jenkins' Petition for Judicial Review of the decision of the administrative law judge (ALJ) affirming authorization of a stream buffer variance by the Director of the Environmental Protection Division, Georgia Department of Natural Resources (Director). Petitioner, the Director, and Intervenor-Respondents the Joint Development Authority of Jasper County, Morgan County, Newton County, and Walton County, and the Georgia

¹ As of August 16, 2023, Jeffrey W. Cown became Director of the Georgia Environmental Protection Division. Under O.C.G.A. § 9-11-25(d)(1), Jeffrey W. Cown is automatically substituted as a party.

Department of Economic Development (together the Applicants), submitted briefs to the Court. The Court held oral argument on August 25, 2023. Having considered the Parties' briefs and arguments, the record below, and the applicable law, the Court DENIES Petitioner's Petition for Judicial Review and AFFIRMS the ALJ's decision.

BACKGROUND

On November 2, 2022, the Director issued a stream buffer variance to Applicants pursuant to the Georgia Erosion and Sedimentation Act, O.C.G.A. § 12-7-1, *et seq.*, (the Act or the E&S Act) and the Rules for Erosion and Sedimentation Control, Ga. Comp. R. & Regs. r. 391-3-7, *et seq.* (the Rules). Final Decision Finding of Fact ¶ 10. The Applicants' property for which the stream buffer variance was granted is named Stanton Springs North. *Id.* at Finding of Fact ¶ 1. The Applicants are preparing the site for construction of an electric vehicle manufacturing facility. *Id.*

Petitioner challenged the issuance of the stream buffer variance by the Director at the Office of State Administrative Hearings (OSAH). On March 15, 2023, a Final Decision was issued by the ALJ, affirming the Director's authorization of the stream buffer variance. R. 2297-2309. Petitioner then filed a Petition for Judicial Review of the Final Decision in the Superior Court of Fulton County on April 18, 2023. Pursuant to O.C.G.A. § 50-13-19(g)-(h), this Court relies on the findings of fact of the ALJ.

As a preliminary matter, on August 21, 2023, Petitioner filed a motion to supplement the record, asking this Court to include two new exhibits: the Affidavit

of Jerry Franscoviak, who lives near the Stanton Springs North project site, dated August 17, 2023, and a Plan for Groundwater Recharge (Groundwater Recharge Report) dated February 10, 2022. The Court DENIES Petitioner's Motion to Supplement the Record. "O.C.G.A. § 50-13-19(f) establishes a two-prong test that must be met before a superior court can grant an application for leave to present additional evidence. The evidence sought to be introduced must be material, and good reason for failure to present such evidence at the [proceedings below] must be shown." *Golden v. Ga. Bureau of Investigation*, 198 Ga. App. 115, 117 (1990) (holding the superior court did not err in rejecting a request to supplement the record because the evidence sought to be introduced was either "not material or was or could have been introduced at the hearing."). Petitioner did not show that the new evidence is material or that she had good reasons for failing to present the evidence at the administrative hearing. *See id.*

STANDARD OF REVIEW

The "judicial review of an administrative decision is a two-step process; because the court reviewing an administrative decision must accept the agency's findings of fact if there is any evidence to support the findings, the court must first determine if there is evidence to support the factual findings; the court then, is statutorily required to examine the soundness of the conclusions of law drawn from the findings of fact supported by any evidence." *Handel v. Powell*, 284 Ga. 550, 552 (2008). Therefore, this Court accepts the facts in the Final Decision if they are supported by any evidence and conducts a *de novo* review of the conclusions of law to

determine if they are proper. As detailed below, this Court finds that the ALJ's findings of fact are supported by evidence in the record and holds that the ALJ properly applied the facts to the conclusions of law.

ANALYSIS

I. Stream Buffer Variance Application Review and Authorization

Petitioner argues the ALJ erred by holding that the stream buffer variance application review and authorization met the regulatory requirements of Rule 391-3-7-.05. Specifically, Petitioner claims that the ALJ erred because the application did not comply with nine requirements of Rule 391-3-7-.05, EPD did not consider all factors under Rule 391-3-7-.05(5), and that the stream buffer variance did not meet all the requirements under Rule 391-3-7-.05(7). As further described below, this Court finds that ALJ did not err and that the stream buffer variance was validly authorized.

a. Site Map of State Waters

Petitioner first claims that the stream buffer variance application did not identify all state waters at Stanton Springs North because the site map did not include a far western portion of Rawlings Branch, in violation of Rule 391-3-7-.05(3)(a). The ALJ properly found the application did not seek approval from EPD for a buffer variance to conduct land disturbing activity adjacent to the far western portion of Rawlings Branch and, therefore, whether Rawlings Branch was included on the site map is irrelevant. *See* Final Decision Finding of Fact ¶6, n.3. All state waters at the property under consideration for the variance were described in the site

map. If the Applicants intend to disturb a stream buffer in the far western portion of Rawlings Branch in the future, they will need to submit a new stream buffer variance application to EPD. *See* T. 638:25-639:19; Final Decision at Finding of Fact ¶6.

b. Certification Letter from the Local Issuing Authority

Petitioner next alleges the application did not contain a written certification from an “officer” of Walton County that the officer personally inspected the Stanton Springs North site, determined whether state waters were at the site, and that a stream buffer variance was needed, as required by Rule 391-3-7-.05(3)(f).² Because Petitioner failed to raise this issue before OSAH, it is not at issue on judicial review.

The issues this Court may consider on judicial review are limited to those raised before the agency. O.C.G.A. § 50-13-19 (c) and (g); *Ga. Board of Dentistry v. Pence*, 223 Ga. App. 603, 607 (1996) (citing, *Dept. of Public Safety v. Foreman*, 130 Ga. App. 71, 72 (1973)). Petitioner did not raise the issue in her original petition, first amended petition, or second amended petition in OSAH. R. 3-9, 541-58. Nor did she raise it in response to the ALJ’s Jan. 23, 2023, Scheduling and Prehearing Order (Prehearing Order), in which the ALJ directed the parties to file “an in-depth outline of the issues and contentions, including specific statutes or rules or other sources of law upon which each issue is based.” R. 490. The Prehearing Order stated that “the hearing will be *strictly limited* to the issues listed below: 1. legal issue presented, 2.

² Rule 391-3-7-.05(3)(f) requires a “[l]etter from the issuing authority (if other than the Division and as applicable) stating that the issuing authority has visited the site and determined the presence of state waters that require a buffer and that a stream buffer variance is required as per the local erosion and sedimentation control ordinance.”)

specific legal authority, 3. relevant facts, 4. relief sought.” *Id.* (emphasis added). Petitioner failed to allege this claim in her outline of the issues and contentions she submitted in response to the Prehearing Order, which referenced only her Second Amended Petition. R. 644-49. The only mention during the entire administrative action of a letter from Walton County was a passing reference during examination by Petitioner’s counsel of Michael Berry, the manager of EPD’s Erosion and Sedimentation Unit. T. 59-60. Considering the omission of the issue in any filing at OSAH, the Petitioner’s counsel’s passing reference did not raise the issue sufficiently below. Therefore, this matter is not properly before this Court.

c. Site Plan of Impervious Surfaces and Buildings.

Petitioner next alleges error because she claims the buffer variance application did not contain a site plan showing impervious surfaces and buildings. The evidence supports the ALJ’s finding that the application “included a site plan of the structures and impervious surfaces.” Final Decision Finding of Fact ¶ 12. The ALJ properly held that the application complied with Rule 391-3-7-.05(3)(c) because it includes, “a detailed site plan showing the structures and impervious surfaces in both the preferred design and the site plan shown in the post-construction stormwater plan.” Final Decision Conclusion of Law ¶ 5; *see also* Final Decision at Finding of Fact ¶ 12. In making that determination, the ALJ considered testimony from Mr. Berry and Alton Brown,³ who each testified that the Revised Application contained a site map

³ Alton Brown is the Principal at the Applicants’ consultant. Mr. Brown testified on behalf of the Applicants at the administrative hearing.

showing where buildings and impervious surfaces would be located. *See* Final Decision at Finding of Fact ¶¶ 11, 12; T. 95, 549-50. The record also includes the Revised Application and the site map for the post-development storm study, which each also show a site map of the buildings and impervious surfaces. *See* Final Decision Finding of Fact ¶6; Exhibit J-4, 1116; Exhibit J-17.

d. Justification for Encroachment on the Stream Buffer

Petitioner next alleges the buffer variance application did not contain a detailed justification for why it was necessary to encroach on the buffer area, as required by Rule 391-3-7-.05(3)(d). The evidence in the record supports the ALJ's finding of fact and conclusion of law regarding this issue. This includes the testimony of Mr. Brown, who testified the chosen configuration is in the area of the property that was already heavily impacted, and Mr. Ralph Forbes, one of Applicants' consultants, who discussed how the site layout was also driven by topography of the land and planned use of the developed structure. T. 552-53; 584-85; 587-89. The ALJ also reviewed the Revised Application, which gave a detailed description as to why the chosen configuration was the one where the impacts to the buffer were avoided or minimized to the fullest extent practicable. *See* T. 552-53; Exhibit J-4, 942-43, 1022-37, 1176.

e. Signed Statement for Section 404 Permit

Next, Petitioner claims the application was deficient because it did not contain a signed statement from Applicants stating they would submit a copy of the permit granted by the United States Army Corps of Engineers (USACE) under Section 404

of the Clean Water Act to EPD, as required by Ga. Comp. R. & Regs. 391-3-7-.05(4)(a)(4). The ALJ properly held this claim is moot. Mr. Berry testified at the hearing that EPD received a copy of the USACE Section 404 permit from the Applicants. T. 651; Exhibit J-27. Further, pursuant to the requirements of O.C.G.A. § 12-2-2(c)(2)(B), the buffer variance was stayed during the administrative proceedings. Therefore, the USACE Section 404 permit was received before any buffer disturbance occurred.

f. Buffer Mitigation Plan

Petitioner alleges that the buffer variance application did not include a buffer mitigation plan meeting the requirements of Rule 391-3-7-.05(4)(b) because the mitigation plan included only a general statement of intent to use best management practices (BMPs) and off-site mitigation credits and because it failed to address groundwater recharge. The ALJ properly determined that the application met the requirements of Ga. Comp. R. & Regs. 391-3-7-.05(4)(b) based on Revised Appendix A, the Erosion, Sedimentation and Pollution Control Plan (Erosion Control Plan), the post-construction stormwater management plan, and the calculations of legacy credits to be purchased by Applicants. Final Decision Conclusion of Law ¶11.

The ALJ examined the post-construction stormwater management plan and found that it contained permanent BMPs to protect water quality of the streams by capturing and treating the stormwater for Total Suspended Solids and other pollutants of concern. Final Decision Conclusion of Law ¶ 11; see Exhibit J-12. Mr.

Berry testified at the administrative hearing that on-site mitigation was included for the site. T. 232-33.

Petitioner's allegations regarding groundwater recharge considerations are irrelevant to review of the Director's issuance of the stream buffer variance. Neither the Act nor the Rules mention groundwater recharge and it is not a required element of buffer variance application assessment. Mr. Berry testified that he has never considered groundwater recharge during the stream buffer variance process, and that buffers apply only to streams with vegetation wrested by normal stream flow, not groundwater. T. 108-10, 636-37.

g. Post-Construction Stormwater Control Plan

Petitioner next alleges the application did not contain a post-construction stormwater control plan as required by Ga. Comp. R. & Regs. 391-3-7-.05(4)(c). The ALJ properly determined the application included a post-construction stormwater management plan that complies with Ga. Comp. R. & Regs. 391-3-7-.05(4)(c). Final Decision Finding of Fact ¶ 17; Final Decision Conclusion of Law ¶12. The ALJ reached his conclusion based on the testimony of Mr. Berry, who stated the application contained a proper post-construction stormwater plan, and exhibits showing the post-construction stormwater plan submitted in the application. *Id.*; see T. 644-46; Exhibit J-16; Exhibit J-17. Furthermore, the ALJ reviewed Revised Appendix A, which discusses the post-construction stormwater plan submitted in the application. See Exhibit J-7, 5-6; Exhibit J-5.

Petitioner claims the application was incomplete because the post-construction stormwater plan was submitted after the stream buffer variance went on public notice. However, Revised Appendix A, which includes a discussion of the post-construction stormwater plan, was submitted before the variance went on public notice. And the public also had the opportunity to review any changes to the post-construction stormwater plan made after the public notice by making a request through the Georgia Open Records Act. *See* O.C.G.A. § 50-18-70 *et seq.*

h. Minimizing Impacts to the Buffer

Next, Petitioner alleges the application did not contain reasonable evidence that nothing could be practicably done to minimize impacts to the buffer, as required by Ga. Comp. R. & Regs. 391-3-7-.05(2), that EPD did not properly follow Rule 391-3-7-.05(5)(d) and (7)(a-c) because the Applicants did not consider whether there were reasonable alternatives such as a retaining wall that would require less intrusion, and that the Rules were not followed because the Applicants relied on mitigation bank credits instead of doing on-site mitigation.

As relied upon by the ALJ, whether something is practicable depends “upon whether it is feasible, taking into consideration all the surrounding factors and circumstances.” *Smart Growth-Forsyth Cnty. v. Couch*, No. OSAH-BNR-ES-0707202-60-Howells, 2007 Ga. ENV. LEXIS at *31 (Mar. 2, 2007). The ALJ’s findings of fact demonstrate that the impact to the buffer at the site was avoided or minimized to the fullest extent practicable.

The ALJ examined the selection of this particular site. Based on the Revised Application, the ALJ determined the Applicants considered five different locations throughout the state for the facility. Final Decision Finding of Fact ¶13; *see* Exhibit J-4, 6, 1084-1113. The Revised Application showed “there were multiple practicability requirements to meet the needs of the manufacturing facility, including distance from an international airport, reasonable commuting distance for a skilled workforce, near a large engineering university, at least 1,700 acres, developable area to support the facility, free from encumbrances to timeline, access to utilities, and access to transportation and shipping infrastructure.” Final Decision Findings ¶13; *see* Exhibit J-4, 1023-24. Based on this evidence, the ALJ determined Stanton Springs North was the only practicable option that meets all the necessary criteria. *See* Final Decision Findings ¶¶ 13-14, Final Decision Conclusions ¶9; Exhibit J-4, 1023-29.

The ALJ also considered the configuration of the proposed development. Final Decision Findings ¶14. During the hearing, Mr. Brown testified that the selected configuration minimized buffer impacts because the chosen configuration is in the area of the property that was already heavily impacted and did not contain natural habitats. T. 552-53. Another of the Applicants’ consultants testified that in determining site layout, Applicants’ consultants tried “to maintain buffers of each areas, keep the wooded areas, and then try to minimize what we could onto the impact.” T. 587-89. Although Petitioner’s expert Matthew Birchmier, testified that building a rail spur bridge would have had less of an impact on the buffer than the

Applicant's chosen configuration, the ALJ found the weight of that evidence unpersuasive. Final Decision Findings ¶15; *see* T. 400-02.

The evidence supports the ALJ's finding that the mitigation measures to be made by the Applicants comply with Rule 391-3-7-.05(4)(b) and are included in the Revised Appendix A to the application, the Erosion Control Plan, the post-construction stormwater management plan, and the calculation of credits to be purchased to the applicants. Final Decision Conclusions ¶11; *see* Exhibit J-12.

i. Erosion Control Plan

Petitioner claims the Erosion Control Plan was inadequate because: (1) it did not meet the requirements of O.C.G.A. §§ 12-7-6(a)(1) and (b) or Ga. Comp. R. & Regs. 391-3-7-.05(1) by not complying with the Georgia Manual on Erosion and Sediment Control (Manual);⁴ and (2) Ga. Comp. R. & Regs. 391-3-7-.05(5) was not met because the Erosion Control Plan was not at least as protective as the stream quality protections the existing buffers.

A stream buffer variance application must include an Erosion Control Plan and may be granted when the application as a whole—including that Erosion Control Plan—shows that “adequate erosion control measures are incorporated in the project plans and specifications and are implemented.” Ga. Comp. R. & Regs. 391-3-7-.05(1). Mr. Berry testified that, for the purpose of a stream buffer variance assessment, the evaluation of the Erosion Control Plan includes whether that plan has “had sheets that pertain[] to the buffering encroachments,” shows “the limits of

⁴ The Manual is also known as the “Green Book.” T. 30.

disturbance...inside the buffer, outside the buffer,” provides “BMPs,” has a “site visit certification signed by the design professional or his or her designee” and is properly stamped and sealed. T. 639-40. Mr. Berry testified that the Erosion Control Plan met the requirements for issuing a stream buffer variance. *See* T. 640-41. Additionally, the Erosion Control Plan provided in the Revised Application, shows adequate erosion control measures. *See* Exhibit J-4, 975-1013.

The E&S Act and Rules do not require that the Erosion Control Plan comply with the Manual for the purposes of a stream buffer variance. Mr. Berry testified that for the purposes of determining whether a stream buffer application is complete, EPD does not need to evaluate whether the Erosion Control Plan complied with the Manual. *See* Final Decision Conclusions ¶¶ 6; T. 31-34; 640-41.

Petitioner claims his expert witness Brian Wellington showed the Erosion Control Plan was inadequate. That testimony, however, focused entirely on Dr. Wellington’s assessment about the Erosion Control Plan’s consistency with the standards in the Manual. *See* T. 448-55. The ALJ found the weight of that evidence unpersuasive. Final Decision Conclusions ¶ 7.

The ALJ properly determined the application showed the erosion control measures were adequate by including an Erosion Control Plan as required by Rule 391-3-7-.05(3)(g), and that the Erosion Control Plan contains adequate BMPs for Rawlings Branch.

II. Site Plan Change

Petitioner alleges that the ALJ should have vacated the stream buffer variance because the Applicants made a change in the site plan after the stream buffer variance was issued which she alleges is contrary to the requirements of Ga. Comp. R. & Regs. 391-3-7-.05(6)(b).

Petitioner did not raise this claim below, so it is not before this Court for judicial review. It was not raised in the Original Petition, First or Second Amended Petition, or Outline of Issues. R. 03-09, 541-58. Nor was it raised at the administrative hearing. Petitioner is therefore precluded from introducing this new argument on judicial review. See O.C.G.A. § 50-13-19 (c) and (g); *Pence*, 223 Ga. App. at 607.

III. Exclusion of Irrelevant Evidence Related to Erosion Control Plan

Petitioner alleges the ALJ's decision to limit evidence related to the adequacy of the Erosion Control Plan was "arbitrary and capricious." Specifically, Petitioner claims the ALJ should have allowed evidence about whether the Erosion Control Plan complied with the Manual and alleged violations of the Erosion Control Plan after the stream buffer variance was issued by the Director. *Id.*

Petitioner asks this Court to apply the wrong standard of review for evidentiary rulings made by an ALJ. An ALJ's evidentiary rulings are subject to an abuse of discretion standard of review, not arbitrary and capricious. Administrative law judges are given broad discretion to make evidentiary rulings and exclude evidence that is not relevant, material, or unduly repetitious. O.C.G.A. § 50-13-15(1). On appeal, courts "will affirm an administrative agency's decision regarding the

competency or relevancy of evidence absent a manifest abuse of discretion.” *Jackson Elec. Mbrshp. Corp. v. Ga. PSC*, 294 Ga. App. 253, 260 (2008). “Moreover, [a] trial court is prohibited from undertaking a de novo determination of evidentiary questions and should instead determine whether the facts found by the Tribunal are supported by any evidence.” *T-Mobile South, LLC v. Crittenden*, 364 Ga. App. 523, 531 (2022).

The ALJ properly determined evidence for the adequacy of the Erosion Control Plan should be limited to whether the buffer variance application included an acceptable Erosion Control Plan for the purposes of a stream buffer variance. When EPD is evaluating whether a stream buffer variance application is complete, the review is necessarily limited to the elements of the Erosion Control Plan that bear on the buffer variance itself. T. 640-41. This does not include whether the Erosion Control Plan conforms to the requirements of the Manual. *See* Ga. Comp. R. & Regs. 391-3-7-.05(2); T. 31-34, 640-41.

The ALJ also properly ruled evidence pertaining to alleged violations of the Erosion Control Plan that occurred after the stream buffer variance was issued should be excluded because that evidence is not relevant to the issuance of the stream buffer variance. While EPD has enforcement responsibilities under the E&S Act and Rules, enforcement and compliance are separate issues and are outside the scope of determining whether *issuance* of a stream buffer variance is proper. *See, e.g.*, O.C.G.A. § 12-5-23(a)(1)(O); O.C.G.A. § 12-5-30(f).

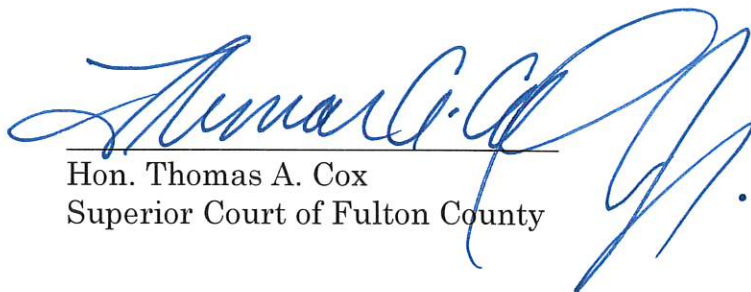
IV. Variance under the Administrative Procedure Act

Lastly, Petitioner alleges the Applicants should have sought a variance to the stream buffer rules under O.C.G.A. § 50-13-9.1. Petitioner failed to raise this claim before OSAH. Therefore, this matter is not properly before this Court. O.C.G.A. § 50-13-19 (c) and (g); *Pence*, 223 Ga. App. at 607.

CONCLUSION

For the reasons stated herein, this Court has determined that the ALJ properly affirmed the Director's authorization of the stream buffer variance. Therefore, Petitioner's Petition for Judicial Review is DENIED, and the ALJ's decision is AFFIRMED.

This 11th day of September, 2023.



Hon. Thomas A. Cox
Superior Court of Fulton County