

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA



03/15/2023

Devin Hamilton, Legal Assistant

**JULIE JENKINS,**  
**Petitioner,**

v.

**GEORGIA DEPARTMENT OF  
NATURAL RESOURCES  
ENVIRONMENTAL PROTECTION  
DIVISION,**  
**Respondent,**

**GEORGIA DEPARTMENT OF  
ECONOMIC DEVELOPMENT,**  
**Respondent-Intervenor,  
and**

**JOINT DEVELOPMENT AUTHORITY  
OF JASPER COUNTY, MORGAN  
COUNTY, NEWTON COUNTY, AND  
WALTON COUNTY,**  
**Respondent-Intervenor.**

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

**Agency Reference No.: 2314860**

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## FINAL DECISION

### **I. INTRODUCTION**

Petitioner Julie Jenkins (“Petitioner”) appealed the issuance of a stream buffer variance by the Director of the Respondent, the Georgia Department of Natural Resources, Environmental Protection Division (“Respondent” or “EPD”). The buffer variance was granted to the Georgia Department of Economic Development and the Joint Development Authority of Jasper County, Morgan County, Newton County, and Walton County (“Respondent-Intervenors” or “Applicants”). The hearing took place on February 14, 15, and 16, 2023.<sup>1</sup> Based on the following findings of fact and conclusions of law, the Director’s action is hereby **AFFIRMED**.

### **II. FINDINGS OF FACT<sup>2</sup>**

1.

The Applicants own property named Stanton Springs North located in Morgan County and Walton County, Georgia. Test. of Berry, T. 156:13-21. The Applicants are preparing Stanton Springs North for construction of an Electrical Vehicle Original Equipment Manufacturing facility. Test. of Berry, T. 201:11-12, 260:7-14; Ex. J-4, 934. Part of the construction requires a stream buffer variance under the Erosion and Sedimentation Act. Id.

2.

The Petitioner is trustee of the Albert Felton Jenkins, Jr. Testamentary Trust, which owns land in the vicinity of Stanton Springs North. See Written Test. of J. Jenkins, ¶¶ 1-2.

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<sup>1</sup> The Respondent received the Petitioner’s completed Petition for a Hearing on December 19, 2022. Pursuant to O.C.G.A. § 12-2-2(c)(2)(B), the hearing shall be held and the decision shall be rendered not later than 90 days after the date of the filing of the petition, in this case March 19, 2023.

<sup>2</sup> To the extent that certain findings of fact are more appropriately classified as conclusions of law, they should be so construed. To the extent that certain conclusions of law are more appropriately classified as findings of fact, they should be so construed.

3.

The total acreage of the Stanton Springs North site is approximately 1,978 acres, and the total area of potential buffer disturbance is 18.71 acres. Test. of Brown, Tr. 570:11-16, 586:21; Ex. J-4, 934; Ex. J-7, 1289. During site preparation, the Applicants identified three perennial streams as state buffered waters, including Rawlings Branch, Hunnicut Creek, and Dennis Creek. Ex. J-2, 1-3; Ex. J-4, 934, 955.

4.

The Applicants hired consultants Resource & Land Consultants (“RLC”) to conduct site visits and identify buffered state waters on Stanton Springs North. Test. of Brown, T. 515:25, 516:2-10; Ex. J-4, 934. The consultants performed the tasks together with the United States Army Corps of Engineers (“USACE”). Test. of Parr, T. 490-91:6-8; Test. of Brown, T. 505:22-25.

5.

On August 12, 2022, the Applicants submitted an application for a stream buffer variance for Stanton Springs North. Ex. J-3. Michael Berry, the manager of EPD’s Erosion and Sedimentation Unit, reviewed the application. Test. of Berry, T. 147:18.

6.

Originally, RLC included a far western portion of Rawlings Branch labeled as an ephemeral stream on the site map it was preparing for the application. Test. of Parr, T. 511:1-5. However, during the field site visit with a USACE representative in July 2022, USACE told RLC to remove the western portion of Rawlings Branch from the site map. Test. of Parr, T. 511:5-7, 512:8-13.<sup>3</sup>

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<sup>3</sup> See O.C.G.A. § 24-8-802 (hearsay may be admitted as legal evidence under Georgia’s civil evidence rules if the opposing party does not object). This Court makes no determination regarding whether the far western portion of Rawlings Branch should have been indicated as a state water on the site map. That fact is not relevant to the determination that the stream buffer variance was properly issued for the buffered state waters that were included in

7.

In its first review, EPD identified several missing items in the application and informed the Applicants they needed to submit additional items. Test. of Berry, T. 229:12-17, 637:20-638:1. On August 17, 2022, the Applicants submitted a revised application to EPD that included the missing elements identified in the initial review. Ex. J-4. After reviewing the application again, EPD identified additional information that was needed, and on August 26, 2022, it requested the Applicants submit additional information. Ex. J-5. In response, the applicants provided a Revised Application Form and Revised Appendix A. Test. of Berry, T. at 234:22-23; Ex. J-5, J- 6, J-7.

8.

After reviewing the second revised application, EPD determined it was complete and met all requirements for the grant of a buffer variance. Test. of Berry, T. 651:16-17, 651:20-22, 669:18-21. On September 9, 2022, EPD placed the application on public notice for 30 days to allow public comments on the proposed activity. Test. of Berry, T. 651:18-20; Ex. J-8. The sole comment received during the public comment period was made by JoEllen Artz. Test. of Berry, T. 654:11-17; Ex. J-9. EPD sent the comment to the Applicants, who responded and addressed the commenter's concerns. Test. of Berry, T. 654:12-13; Ex. J-13.

9.

Although the application did not contain a signed statement certifying that the Applicants would give EPD a copy of the 404 permit once it was issued, as required by Ga. Comp. R. & Regs. 391-3-7-.05(4)(a), the Applicants submitted a copy of their application for a 404 permit. Ex. J-4, 1017-38. Later, in December 2022, Applicants sent EPD a copy of their 404 permit when the

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the variance application. If that feature is a buffered state water, and if the Applicants wish to conduct land disturbing activity in that area, submission of another stream buffer variance application would be necessary. See Test. of Berry, T. 638:25-639:19.

USACE issued it. Test. of Berry, T. 651:10-13; Ex. J-27, 1-71.

10.

Satisfied that all requirements for a buffer variance were met, Michael Berry recommended that the Director approve the stream buffer variance. Test. of Berry, T. 651:22-23; Ex. J-2. On November 2, 2022, the Director granted a stream buffer variance for Stanton Springs North. Ex. J-1.

11.

EPD considers an Erosion and Sedimentation Pollution Control Plan (“ESPCP”) to be adequate for the purposes of a buffer variance when it contains the cover page of the ESPCP, all sheets pertaining to plans to disturb buffered streams, best management practices (“BMPs”) showing the limits of disturbance, disturbances inside and outside the buffer, site visit certification by a design professional or his designee stating they visited the site prior to creating the ESPCP, and the design professional's seal and signature. Test. of Berry, T. 640:11-641:4. EPD reviewed the ESPCP for Stanton Springs North and determined it to be adequate because it contained all of the components required for a buffer variance and proper BMPs for Rawlings Branch. Test. of Berry, T. 641:5-15; Ex. J-4, 975-80, 987, 996, 1012-13.

12.

The application included a site plan of the structures and impervious surfaces. Test. of Berry, T. 95:4-16; Test. of Brown, T. 549:11-550:2. Specifically, the Applicants’ preferred design and the site plan shown in the post-construction stormwater plan each showed the plan of the structures and impervious surfaces for the future development. Ex. J-4, 1116; Ex. J-17, 1.

13.

The Applicants considered five different locations in Georgia to build the facility. Ex. J- 4,

1084-1113. 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. Ex. J-4, 1023-24. Stanton Springs North was determined to be the only option meeting all of the necessary criteria. Ex. J-4, 1023-29.

14.

The Applicants considered four different on-site configurations, and the preferred on-site configuration avoided and minimized impacts to the buffer to the fullest extent practicable and provided for the smallest lineage of buffer disturbed. See Ex. J-4, 1114-19.

15.

The Petitioner proposed alternatives to the Applicants' plans. Mr. Matthew Williams, an expert in the fields of civil engineering and conceptual design, including rail design, opined that it was possible for the railway line at the site to cross a buffered pond by building a bridge over the pond, rather than filling in the pond. Test. of M. Williams, Tr. 400:14-401:12. However, Mr. Williams conceded that the proposed bridge was conceptual and did not account for the actual site design. Mr. Williams "did not design the bridge." Although he "showed a potential bridge crossing," Mr. Williams "was not privy to the overall site design, or the details of the site design, including the rail spur." Test. of Williams, T. 406:17-407:1. Given the limited scope of Mr. Williams' analysis, the Court finds that his opinions failed to demonstrate that there was any practicable alternative design of the railway plans that would have lesser impacts to the buffers on the site.

16.

Dr. Brian Wellington, an expert in the fields of hydrology and review of ESPCPs, offered testimony that the ESPCP submitted by the Applicants contained inadequate erosion control measures. Test. of B. Wellington, Tr. 455:12-24. Dr. Wellington analyzed the ESPCP in relation to the Georgia Erosion and Sediment Control Manual, known as the “Green Book.” Test. of B. Wellington, Tr. 451:1-10.<sup>4</sup> However, for purposes of the stream buffer program, ESPCPs are not reviewed for specific compliance with the Green Book. Test. of M. Berry, Tr. 31:3-34:1; Test. of J. Hackney, Tr. 286:16-287:11, 298:22-199:13.

17.

In addition to the reasons set forth previously, the buffer variance application was deemed complete because it included the following:

- (a) Details of the buffer disturbance, as required by Ga. Comp. R. & Regs. 391-3-7-.05(3)(d), because a description of the buffer disturbance is included in Revised Appendix A and a map of the preferred on-site configuration plan. Ex. J-4, 1116; Ex. J-7, 1-2; Test. of Berry, T. 646:12-647:24.
- (b) Justification for the stream buffer disturbance that showed the buffer disturbance could not practicably be avoided or minimized, as required by Ga. Comp. R. & Regs. 391-3-7-.05(3)(d), because the chosen configuration is in the area of the property that was already heavily impacted and did not contain natural habitats, such as the areas with “massive ponds that aren’t natural.” Test. of Brown, T. 552:21-553:21.
- (c) A discussion of the mitigation measures to be taken, as required by Ga. Comp. R. & Regs. 391-3-7-.05(4)(b), in Revised Appendix A, the ESPCP, the post-construction stormwater management plan, and

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<sup>4</sup> The Green Book is mentioned in O.C.G.A. § 12-7-6(a), which sets forth best management practices for land-disturbing activities. Code Section 12-7-6(b) requires “protections at least as stringent as the state general permit; and best management practices, including sound conservation and engineering practices to prevent and minimize erosion and resultant sedimentation, which are consistent with, and no less stringent than, those practices contained in the ‘Manual for Erosion and Sediment Control In Georgia’ published by the State Soil and Water Conservation Commission as of January 1 of the year in which the land-disturbing activity was permitted,” and then provides a list of seventeen requirements, one of which is the establishment of a buffer, which is set forth in § 12-7-6(b)(15)(A)(ii).

calculations of legacy credits to be purchased by Applicants. Test. of Berry, T. 643:4-644:13; Ex. J-4, 1037-38, 1120-63; Ex. J-7, 4-6; Ex. J-16, 1-13; Ex. J-17, 1. The post-construction stormwater management plan also contains permanent BMPs to protect water quality of the streams by capturing and treating the stormwater for Total Suspended Solids and other pollutants of concern. Test. of Berry, T. 653:24-654:9; Ex. J-16, 1-13; Ex. J-17, 1.

- (d) A post-construction stormwater management plan, as required by Ga. Comp. R. & Regs. 391-3-7-.05(4)(c). Test. of Berry, T. 644:14-646:11; Ex. J-16, 1-13; Ex. J-17, 1.

18.

Petitioner's challenge to the stream buffer variance included the following issues:

1. Whether the Buffer Variance Application was complete, accurate, and not misleading and otherwise fully compliant with legal requirements as to its content.
2. Whether the Erosion and Sedimentation Pollution Control Plan ("ESPCP") contained in the buffer variance application was adequate.
3. Whether GAEPD staff and the GAEPD Director's actions with respect to the buffer variance application were compliant with legal requirements.
4. Whether Intervenor-Respondents and their consultants and contractor have failed to comply with the conditions subsequent to buffer variance.

19.

On February 3, 2023, Respondent and Intervenor-Respondents filed a motion arguing that Petitioner's Outline of Issues and Contentions presented issues that are beyond the scope of this hearing. On February 10, 2023, the Court issued an Order as follows:

As to Petitioner's Issue 2, the motion is DENIED in part. The Court declines at this time to exclude all evidence related to this issue. Rather, the scope of the inquiry on this issue will be limited as follows: whether the buffer variance request included an acceptable erosion, sedimentation and pollution control plan. See Ga. Comp. R.



Regs. 616-1-2-.22. Regarding Petitioner's Issue 4, allegations that the permit holder has violated the permit requirements are outside the scope of this hearing. Accordingly, the motion to exclude evidence is GRANTED.

### III. CONCLUSIONS OF LAW

1.

These proceedings are de novo, and the administrative law judge, who has "all the powers of the ultimate decision maker in the agency," must make "an independent determination on the basis of the competent evidence presented at the hearing." O.C.G.A. § 50-13-41(b); Ga. Comp. R. & Regs. 616-1-2-.21(1), (3). In addition, "the evidence on the issues in a hearing shall not be limited to the evidence presented to or considered by the agency prior to its decision." Ga. Comp. R. & Regs. 616-1-2-.21(3). The Petitioner bears the burden of proof in this matter, and that burden must be carried by a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.07(1)(a), .21(4). To succeed in this challenge, the Petitioner must prove that the variance was "wrongfully issued." See Hughey v. Gwinnett County, 278 Ga. 740, 741 (2004); Coastal Marshlands Protection Committee v. Altamaha Riverkeeper, Inc., 315 Ga. App. 510, 511-15 (2012); Ga. Comp. R. & Regs. 616-1-2-.07(1)(a).

2.

As set forth in O.C.G.A. § 12-2-2:

Any person who is aggrieved or adversely affected by any order or action of the director shall, upon petition to the director within 30 days after the issuance of such order or the taking of such action, have a right to a hearing before an administrative law judge of the Office of State Administrative Hearings[.]

O.C.G.A. § 12-2-2(c)(2)(A). Code Section 12-7-6(b)(15)(A) establishes "a 25 foot buffer along the banks of all state waters," with certain exceptions, including "where the director determines to allow a variance that is at least as protective of natural resources and the environment." O.C.G.A.

§ 12-7-6(b)(15)(A)(ii). A “buffer” is defined as “the area of land immediately adjacent to the banks of state waters in its natural state of vegetation, which facilitates the protection of water quality and aquatic habitat.” O.C.G.A. § 12-7-3(2).

3.

EPD Rule 391-3-7-.05 sets forth the buffer variance procedures and criteria. “Variance applications will be reviewed by the Director only where the applicant provides reasonable evidence that impacts to the buffer have been avoided or minimized to the fullest extent practicable. . . .” Ga. Comp. R. & Regs. 391-3-7-.05(2). Depending on whether the buffer impact will be major or minor, the variance request must contain certain information, at a minimum. Ga. Comp. R. & Regs. 391-3-7-.05(3), (4). The request at issue in this case concerns a major buffer impact, and therefore the requirements set forth in Sections 3(a) through (k) (excepting 3(h)) and Section 4 apply. Id.

4.

The Court concludes that the Applicants’ buffer variance application is complete and meets the regulatory requirements of Ga. Comp. R. & Regs. 391-3-7-.05(3)(a-g and j-k).

5.

The buffer variance application 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. Thus, the application complies with Ga. Comp. R. & Regs. 391-3-7-.05(3)(c).

6.

A buffer variance was properly granted because “adequate erosion control measures are incorporated in the project plans and specifications and are implemented.” Ga. Comp. R. & Regs. 391-3-7-.05(1). The application includes an ESPCP as required by Ga. Comp. R. &

Regs. 391-3-7-.05(3)(g), and the ESPCP contains adequate BMPs for Rawlings Branch. Ga. Comp. R. & Regs. 391-3-7-.05.

7.

EPD has authority to review the ESPCP submitted with a stream buffer application and is the proper entity to conduct that review. O.C.G.A. §§ 12-7-6(b)(15)(A)(ii) (granting authority to the Director to issue stream buffer variances); 12-7-7(e) (only mandating that the local issuing authority or Georgia Soil and Water Conservation Commission review ESPCPs for purposes of land disturbance permits issued by local issuing authorities). Dr. Wellington’s opinions failed to demonstrate that the ESPCP submitted with the application was inadequate or unacceptable in the stream buffer variance context.

8.

The application includes details of the buffer disturbance in Revised Appendix A and a map of the preferred on-site configuration plan as required by Ga. Comp. R. & Regs. 391-3-7-.05(3)(d).

9.

The application includes an explanation of the justification for the stream buffer disturbance that showed the buffer disturbance could not practicably be avoided or minimized as required by Ga. Comp. R. & Regs. 391-3-7-.05(3)(d). The Director’s review was conducted in accordance with Ga. Comp. R. & Regs. 391-3-7-.05(2), and the applicant provided reasonable evidence that impacts to the buffer have been avoided or minimized to the fullest extent practicable. 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, 2007 WL 828294 at \*11 (Mar. 2, 2007).

10.

The Petitioner's contention that the application was incomplete because it did not contain a signed statement certifying that the Applicants would give EPD a copy of the 404 permit once it was issued, as required by Ga. Comp. R. & Regs. 391-3-7-.05(4)(a), is moot because EPD was provided a copy of the 404 permit.

11.

The application includes a discussion of the mitigation measures to be made in Revised Appendix A, the ESPCP, the post-construction stormwater management plan, and the calculations of legacy credits to be purchased by Applicants, as required by Ga. Comp. R. & Regs. 391-3-7-.05(4)(b). Additionally, the post-construction stormwater management plan contains permanent BMPs to protect water quality of the streams by capturing and treating the stormwater for Total Suspended Solids and other pollutants of concern.

12.

The application includes a post-construction stormwater management plan as required by Ga. Comp. R. & Regs. 391-3-7-.05(4)(c).

13.

The ESPCP for the buffer variance was complete and lawful because it provided adequate erosion control measures and met the requirements for a buffer variance.

14.

The Petitioner failed to show by preponderance of the evidence that EPD improperly

moved forward in the buffer variance process, improperly put the buffer variance application on public notice, or did not consider all of the required factors in a buffer variance. The public notice in this matter complied with Ga. Comp. R. & Regs. 391-3-7-.05(6)(a) because it described the proposed buffer encroachment, the location of the project, where the public could review site plans, and where comments should be sent and gave the public 30 days from the date of publication to comment on the proposed buffer variance.

**IV. DECISION**

The Court concludes that the Petitioner has failed to carry her burden of proof to show that the variance was wrongfully issued. EPD properly reviewed the completed application and considered the factors set forth in Ga. Comp. R. & Regs. 391-3-7-.05(5) before the Director issued the buffer variance. Accordingly, the Director's issuance of the stream buffer variance is **AFFIRMED**.

**SO ORDERED**, this the 15<sup>th</sup> day of March, 2023.

*Michael Malihi*

**Michael Malihi, Judge**

