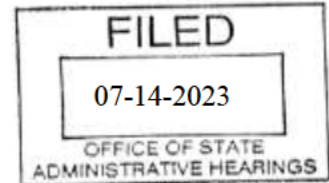


**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA**

**IN RE HAMISH CALDWELL, DALIA  
JUDOVITZ,**  
                    **Petitioners.**

*Petition for Direct Appeal to the Georgia  
Office of State Administrative Hearings*

**Docket No.: 2330344  
2330344-OSAH-DIRECT APPEAL-  
PET\_EPD-44-Boggs**



**FINAL ORDER**

**I. INTRODUCTION**

On June 12, 2023, Petitioners Hamish Caldwell and Dalia Judovitz (“Petitioners”) used an OSAH Form 2 to file a Petition for Direct Appeal with the Office of State Administrative Hearings (“OSAH” or “Court”). On June 13, 2023, the undersigned Administrative Law Judge ordered the Georgia Department of Natural Resources, Environmental Protection Division (“EPD”) to respond to the petition within ten (10) business days. The EPD timely filed its response in opposition to the petition on June 28, 2023. That same day, the Petitioners submitted a written reply to the EPD’s response.

Having reviewed the parties’ submissions and the relevant law, and for the reasons stated below, the Petition for Direct Appeal is **DENIED**.

**II. PURPOSE OF PETITIONS FOR DIRECT APPEAL**

An OSAH Form 2 is used to submit what is known as a “Petition for Direct Appeal.” These petitions may be filed with this Court when the following occurs:

- (1) A party seeks a hearing before this Court to challenge an adverse action taken by a state agency;
- (2) The party has submitted a request for a hearing to that agency; and
- (3) after at least thirty (30) days (or a shorter period allowed by law), that agency does not send the hearing request to this Court for docketing and

scheduling.

O.C.G.A. § 50-13-41(a)<sup>1</sup>; Ga. Comp. R. & Regs. 616-1-2-.03(2). In essence, a Petition for Direct Appeal is a party's way of asking this Court to proceed with scheduling an administrative hearing, even if the agency delays sending the original hearing request to this Court.

The granting or denial of a petition for direct appeal "shall be within the Court's discretion." Ga. Comp. R. & Regs. 616-1-2-.03(2)(d). That said, a Judge with this Court can preside over a hearing only if she has authority to do so under the law. Pursuant to the Administrative Procedure Act ("APA"), this Court's jurisdiction is limited to "contested cases." O.C.G.A. §§ 50-13-2(2), 50-13-41(a)(1). A "contested case," in turn, is defined as a proceeding "in which the legal rights, duties, or privileges of a party are required by law to be determined . . . after an opportunity for hearing." *Id.* § 50-13-2(2).

Furthermore, the Court's determination on a petition for direct appeal shall not be based on the merits of the purported contested case. Ga. Comp. R. & Regs. 616-1-2-.03(2)(d).

### III. UNDISPUTED FACTS

Based on both parties' submissions, the following facts appear undisputed:

1. An individual named Charles Aubry filed an application with the EPD for a stream buffer variance, identified in documents as variance BV-044-22-09 ("hereinafter "Variance").

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<sup>1</sup> The operative statutory language is as follows (emphasis added):

Whenever a state agency authorized by law to determine contested cases initiates or receives a request for a hearing in a contested case which is not presided over by the agency head or board or body which is the ultimate decision maker, the hearing shall be conducted by the Office of State Administrative Hearings, and such hearings shall be conducted in accordance with the provisions of this chapter and the rules and regulations promulgated under this article. **Whenever an agency under this paragraph receives a request for a hearing in a contested case, such agency shall forward such request for a hearing to the Office of State Administrative Hearings within a reasonable period of time not to exceed 30 days after receipt of such request, and if the agency fails to do so, the party requesting the hearing may petition the Office of State Administrative Hearings for an order permitting such party to file a request for a hearing directly with the Office of State Administrative Hearings.**

O.C.G.A. § 50-13-41(a)(1).

2. The Variance’s application was subject to a public-comment period. The Petitioners jointly submitted comments by email on December 9, 2022. At least four other individuals also submitted public comments.
3. In a letter dated February 28, 2023, the EPD notified Mr. Aubry that his “Request for Variance under the Provisions of O.C.G.A. § 12-7-6(b)(15)” had been approved.
4. The EPD issued letters dated March 20, 2023, to individuals who submitted public comments on the Variance, including the Petitioners (“March 20 Letter(s)”). The letter addressed to the Petitioners included a copy of written responses to their written public comments, as drafted by Mr. Aubry’s consultant. The letter stated the EPD had reviewed the applicant’s responses and was “satisfied that [the Petitioners’] concerns have been adequately addressed.” The letter also stated the EPD had granted the Variance application, and a copy of the approval letter dated February 28, 2023, was enclosed. The letters issued to the other public commenters were essentially identical in their content to the one addressed to the Petitioners.
5. The EPD’s March 20 Letter to the Petitioners was mailed to their address at 1366 The By Way Northeast in Atlanta, Georgia. The Petitioners did not receive the letter until March 27, 2023.
6. The March 20 Letters for at least three of the other public commenters appear to have been addressed to the commenters’ email addresses, rather than a street mailing address.
7. In a letter dated April 14, 2023, the Petitioners submitted a joint Petition for Hearing to the EPD to challenge the Variance’s approval. In their hearing petition, they explained they were making this appeal “within thirty days of the EPD-provided notice date of 20 March 2023.”
8. The EPD rejected the Petitioners’ Petition for Hearing as untimely. As of this date, the Court has not received a case referral related to this matter.

(See Case File, OSAH Form 2 and attachments, filed Jun. 12, 2023; Agency Response to Notice of Filing and Order for Agency Response, filed Jun. 28, 2023; Email Correspondence regarding Agency Response, filed Jun. 28, 2023.)

#### **IV. PARTIES’ ARGUMENTS**

In their Petition for Direct Appeal, the Petitioners assert they submitted their Petition for Hearing “within 30 days” of their actual notice of the Variance’s approval, which came in the form of the March 20 Letter. The Petitioners further contend that, despite having “repeated interactions”

with EPD staff, during which they expressed their desire to be notified about the agency's decision on the Variance application, the EPD nonetheless delayed notifying them about the Variance's approval. As a result, the EPD "denied [them] the statutory time to file a petition for hearing and so denied [them] the reasonable opportunity to pursue [their] right of due process." The Petitioners seek direct appeal to receive a hearing before this Court, in light of the EPD's "appearance of being biased and unreasonable." (See Case File, OSAH Form 2 and attachments, filed Jun. 12, 2023.)

In its response to the Petition for Direct Appeal, the EPD states it only refers "timely" hearing petitions to this Court in accordance with the controlling law. That law holds that the 30-day period for appeals started after the EPD issued its decision on the Variance application, on February 28, 2023. As such, the Petitioners' hearing petition, submitted to the EPD in April 2023, fell outside that 30-day appeal window that closed on March 30, 2023. The EPD further contends that the law did not require the agency to notify the Petitioners, or any other public commenter, about the Variance's approval. While the EPD did send the Petitioners a letter addressing their submitted public comments on the Variance, that letter was "merely a courtesy." Lastly, the EPD highlights the Petitioners' own admission that they learned of the Variance's approval on March 27, 2023; hence, they still had a few days to file a timely appeal before the 30-day window closed on March 30, 2023. (See Case File, Agency Response to Notice of Filing and Order for Agency Response, filed Jun. 28, 2023.)

In their reply to the EPD's response, the Petitioners emphasize that they had inquired with the EPD about its decision on the Variance "a mere 8 days" before the Variance was approved, at which point they were told the decision might take months. Thus, "[they] had no reason to start making daily inquiries or to believe the [V]ariance issuance was imminent." The Petitioners further allege they had been treated differently by the EPD, in that at least one other public

commenter received a “courtesy” letter via email on March 20, 2023, while the Petitioners never got an emailed letter but instead had to wait for a mailed copy to arrive on March 28, 2023. The Petitioners stated that the “EPD actions, while technically in compliance with the laws, . . . appear extremely suspicious and intentionally misleading.” (See Case File, Agency Response to Notice of Filing and Order for Agency Response, filed Jun. 28, 2023.)

## V. ANALYSIS

The scope of review on any Petition for Direct Appeal is narrow. This Court must examine whether a state agency has a legal duty to refer a hearing request to this Court. The answer to that question, in turn, will determine whether this Court has legal authority to compel the agency to refer said hearing request. See O.C.G.A. § 50-13-41(a); Ga. Comp. R. & Regs. 616-1-2-.03(2).

In this matter, the analysis begins with an examination of Georgia environmental law. The EPD’s director is authorized to “grant, deny, revoke, or amend” all variances provided for in the laws enforced by the EPD. O.C.G.A. § 12-2-2(c)(1)(A). As noted on the approval letter, the Variance at issue concerns provisions of the Georgia Erosion and Sedimentation Act of 1975, O.C.G.A. § 12-7-1 et seq., which call for “a 25 foot buffer along the banks of all state waters.” Id. § 12-7-6(b)(15)(A), (C). The Board of Natural Resources is authorized to adopt rules containing the specific criteria for the granting or denying of these stream buffer variances. Id. § 12-7-6(C).

The adopted rules for buffer variances are contained in Subject 391-3-7 of the Georgia Comprehensive Rules and Regulations, “Erosion and Sedimentation Control.” The rules state that, upon receipt of a stream buffer variance application, the EPD will either “provide written comments to the application or propose to issue the variance.” Ga. Comp. R. & Regs. 391-3-7-.05(6). Once the EPD proposed to issue the variance, it issues a public notice. Id. 391-3-7-.05(6)(a). The public then has 30 days from the date of publication of the public notice to comment

on the proposed buffer variance, before the EPD makes its final decision. Id.

“Any person who is aggrieved or adversely affected by any order or action of the [EPD] director”—including the approval of variances—“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 assigned under Code Section 50-13-40 and acting in place of the Board of Natural Resources.” O.C.G.A. § 12-2-2(c)(2)(A) (emphasis added). See also Ga. Comp. R. & Regs. 391-1-2-.03 (requiring petitions for hearing to be filed “within the time required by applicable law or Rule”). “Upon receipt of a *timely* petition for hearing” on an approved variance, the EPD director shall forward the petition to the Attorney General with a request that the petition be transmitted to this Court for adjudication. Ga. Comp. R. & Regs. 391-1-2-.06 (emphasis added); see also id. 391-1-2-.01(a), O.C.G.A. § 12-2-2(c)(1)(A).

Based on the above, the Petitioners’ 30-day clock for requesting a hearing started running once the EPD director “took the action” of approving the Variance. See O.C.G.A. § 12-2-2(c)(2)(A). The Petitioners do not dispute that the Variance was approved on February 28, 2023; hence, the EPD is correct that, as a matter of law, the Petitioners’ hearing petition dated April 14, 2023, was untimely by at least 15 days.

In essence, the Petitioners argue here that their hearing petition’s untimeliness should not prevent them from having a hearing before this Court. Their arguments, however, do not persuade this Court that it has authority under the controlling statutes and regulations to compel the EPD director to refer their untimely petition for an administrative hearing.

First, as discussed above, the EPD director is mandated by Regulation 391-1-2-.06 to refer only “timely” petitions for hearing to this Court. In Georgia, courts interpret administrative

regulations using the same methodology applicable to statutory construction. See City of Guyton v. Barrow, 305 Ga. 799, 805 (2019) (holding that principles of statutory construction apply to all positive legal rules, including agency regulations) (citing Ga. Dep’t of Cmty. Health v. Northside Hosp., 295 Ga. 446 (2014)). Applying longstanding tenets of statutory construction, the Court first notes that the plain meaning of the modifier “timely” refers to the hearing petition “coming early or at the right time” or “in time.”<sup>2</sup> See Redmond Park Hosp. LLC v. Floyd Health Care Mgmt., 360 Ga. App. 469, 473 (2021) (holding that, if statutory text is “clear and unambiguous,” the text is afforded its plain meaning). Accordingly, a “timely petition” is one that is received within the 30-day window following a variance’s approval, as outlined in Code Section 12-2-2. Furthermore, Regulation 391-1-2-.06’s expression of one thing (a *timely* petition) implies the exclusion of another (an *untimely* petition). See Turner v. Ga. River Network, 297 Ga. 306, 309 (2015) (discussing the statutory-construction tenet *expression unius est est exclusio alterius*). In short, timeliness is a prerequisite for a petition’s referral to this Court under Regulation 391-1-2-.06.<sup>3</sup>

Second, the Petitioners argue the EPD’s actions led to delayed notification about the Variance’s approval and thus deprived them of the full 30-day appeal period. However, the Court cannot identify—and the Petitioners do not cite to—any statute or regulation that required the EPD or its director to notify the Petitioners about the Variance’s approval. While the EPD must post

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<sup>2</sup> See MERRIAM-WEBSTER DICTIONARY, “timely,” available at <https://www.merriam-webster.com/dictionary/timely> (last accessed Jul. 14, 2023).

<sup>3</sup> Rule 391-1-2-.06 goes on to state that the EPD’s referral of a petition to this Court “is not a determination . . . that the petitioner is entitled to a hearing. Rather, referral of a petition for hearing to OSAH shall constitute a request that such issues be decided by the ALJ [Administrative Law Judge] and a hearing conducted pursuant to state law, if applicable.” Ga. Comp. R. & Regs. 39-1-1-2-.06. At first blush, this provision seems to suggest this Court could adjudicate a petition’s timeliness in the context of an administrative hearing, following a case referral. However, the fact that the same regulation limits the EPD director to referring only “timely” petitions signals that timeliness has been excluded from such preliminary consideration by the ALJ. See Barrow, 305 Ga. at 805 (“The primary determinant of a text’s meaning is its context . . .”).

public notice about a “proposed” variance issuance, there simply is no mandate for any type of notice once a variance is approved following the public-comment period. Moreover, the Court could not identify any statute or regulation that requires the EPD to either notify public commenters once a variance is approved, or send them letters in response to their comments. Hence, the EPD’s issuance of the March 23 Letter to the Petitioners—which they did not receive until March 27, 2023—did not run afoul of the controlling statutes and regulations.

Third, the Petitioners contend their untimely petition should be excused based on the overall circumstances, given that they learned about the Variance application weeks after its approval despite asking the EPD to be notified of updates. Indeed, laws governing administrative proceedings with other state agencies do offer exceptions for late requests for relief. See, e.g., Ga. Comp. R. & Regs. 375-1-1-.06(2)(d) (allowing Department of Driver Services to grant extensions on untimely hearing requests “for good cause shown”); O.C.G.A. § 46-2-59(c) (stating that no untimely application for leave to intervene in Public Service Commission proceeding shall be granted “except for good cause shown”). But in this matter, the statutes and regulations controlling the approval of the Variance do *not* provide such exceptions or any other mechanism to toll or stop the 30-day appeal clock. See Hynes v. State, 341 Ga. App. 500, 511-12 (2017) (declining to “add words not found in the statute” when statute is otherwise silent on a particular matter). Cf. In the Appeal of Jared Cunningham, 2021 Minn. App. Unpub. LEXIS 980, No. A21-0036, at \*8-10 (Ct. App. Minn. Dec. 20, 2021) (declining to recognize a good-cause exception for an untimely administrative-hearing request, as the court “cannot . . . add words to a statute that the legislature purposely omits or inadvertently overlooks”).

Fourth, even if the Court had statutory or regulatory authority to excuse the Petitioners’ untimely hearing petition, the fact remains that the Petitioners learned of the Variance’s approval



on March 27, 2023, which fell within the 30-day appeal window with about three days to spare. And while they argue they did not get a full 30 days to appeal, the Petitioners otherwise offer no explanation on why they failed to submit their petition in the time they had prior to the deadline.

Lastly, the Petitioners raise arguments alleging a denial of due process, as well as arbitrary and capricious treatment by the EPD. The Due Process Clause of the Fourteenth Amendment to the United States Constitution states that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1; see also Ga. Dep’t of Human Servs. v. Steiner, 303 Ga. 890, 895 (2018). The U.S. Supreme Court’s interpretation of this clause recognizes two kinds of constitutional protection: procedural due process and substantive due process. McKinney v. Pate, 20 F.3d 1550, 1555 (11th Cir. 1994) (citing Zimmeron v. Burch, 494 U.S. 113, 125 (1990)). “Fundamental fairness is the touchstone of due process.” Meadows v. Settles, 274 Ga. 858, 859 (2002) (citation and quotation omitted).

To the extent the Petitioners are arguing that the EPD’s application of the existing law to this matter violated their due-process rights, the Court cannot agree. As discussed above, the EPD’s decision not to refer the Petitioners’ hearing petition to this Court was in compliance with Code Section 12-2-2 and Rule 391-1-2-.06. Furthermore, because no controlling statute or regulation required the EPD to notify the Petitioners of the Variance’s approval—or even to provide a response to their public comments—any differences in how the March 20 Letters were issued does not equate to a violation of existing procedure.

Moreover, to the extent the Petitioners argue that the existing statutory and regulatory schemes *themselves* are deficient and violate the Due Process Clause, such arguments comprise a facial constitutional challenge that is beyond the jurisdiction of this Court. See Ga. Comp. R. & Regs. 616-1-2-.22(3) (stating that this Court “is not authorized to resolve constitutional challenges

to statutes or rules.”)

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In summary, the Court cannot identify any legal authority by which it can compel the EPD to refer the Petitioners’ untimely hearing petition for adjudication. Absent such authority, the Court cannot grant the Petitioners the relief they request here.

## VI. CONCLUSION

For the foregoing reasons, the Petition for Direct Appeal is **DENIED**.

**SO ORDERED**, this 14th day of July, 2023.

*Lisa Boggs*  
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**Lisa Boggs**  
**Administrative Law Judge**

