

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

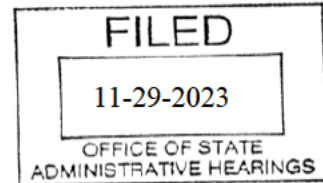
**SOUTH RIVER WATERSHED
ALLIANCE, INC.,
Petitioner,**

v.

**JEFFREY W. COWN, DIRECTOR ,
ENVIRONMENTAL PROTECTION
DIVISION, GA DEPT OF NATURAL
RESOURCES,
Respondent.**

**Docket No.: 2404045
2404045-OSAH-BNR-WQC-44-Howells**

Agency Reference No.: 2404045



**FINAL DECISION AND
ORDER GRANTING RESPONDENT’S MOTION TO DISMISS OR MOTION FOR
SUMMARY DETERMINATION AND DENYING PETITIONER’S MOTION FOR
SUMMARY DETERMINATION**

On July 20, 2023, Petitioner South River Watershed Alliance, Inc. (“SRWA”) filed a Petition for Hearing challenging the reissuance of three General Permits by Director of the Georgia Environmental Protection Division (“Director”).¹ SRWA filed its Amended Petition for Hearing on September 1, 2023. The Director filed his Motion to Dismiss or in the Alternative Motion for Summary Determination on September 19, 2023. SRWA also filed its Motion for Summary Determination on September 19, 2023. The parties filed their responses to the respective motions on October 13, 2023, and their reply briefs in support of their motions on October 27, 2023. For the reasons that follow, the Director’s Motion to Dismiss or in the Alternative Motion for Summary Determination is **GRANTED**, and SRWA’s Motion for Summary Determination is **DENIED**.

In his motion, the Director contends that SRWA’s Amended Petition for Hearing should

¹ The Petition for Hearing was sent to the Office of State Administrative Hearings (“OSAH”) on August 4, 2023. The undersigned issued a Notice of Hearing on August 8, 2023. The hearing was set for October 3, 2023. Thereafter, the parties submitted a Joint Motion to Continue the Hearing on the Merits and Enter Joint Proposed Scheduling Order. The parties’ motion was granted, and their proposed scheduling order was adopted.

be dismissed because SRWA lacks standing to bring this action. Specifically, the Director argues that SRWA has not asserted any injury that is traceable to the issuance of the 2023 General Permits and it has failed to show how a ruling in its favor would redress its alleged injury. In the alternative, the Director argues that he is entitled to summary determination because the Total Maximum Daily Loads account for future construction sites, the 2023 General Permits are adequately protective of water quality standards, and the requirements of the Environmental Protection Division (“EPD”) for impaired waters conform to law and have been approved by the U.S. Environmental Protection Agency (“U.S. EPA”).

SRWA, in its Motion for Summary Determination, asserts that the Director erred in reissuing the general permits for new construction sites because those permits would allow increased sediment into impaired streams or they will not ensure that the discharge will not cause or contribute to violating applicable water standards.

The Director’s Motion to Dismiss

In his motion to dismiss, the Director asserts that SRWA has failed to establish its standing to challenge the issuance of the 2023 General Permits.² “[T]he question of standing is a jurisdictional issue.” New Cingular Wireless PCS, LLC v. Ga. Dep’t of Revenue, 303 Ga. 468, 470 (2018). To establish standing to challenge an action of the Director, the person must show that they are aggrieved or adversely affected by an order or action of the Director in that “the challenged action has caused or will cause them [an] injury in fact” and “the injury is to an interest within the zone of interests to be protected or regulated by the statutes that the director is empowered to administer and enforce.” O.C.G.A. § 12-2-2(c)(3)(A). When there is an absence

² Under the Administrative Procedures Act, this administrative court has the authority to “dispose of motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground.” O.C.G.A. §§ 50-13-13(a)(6), 50-13-41(a)(2).

of state law, Georgia courts have looked to the United States Supreme Court precedent concerning Article III standing, to resolve issues of standing to bring a claim in Georgia courts. Ctr. for a Sustainable Coast, Inc. v. Turner, 324 Ga. App. 762, 764 (2013).

Thus, to prevail on the issue of standing, Petitioner must demonstrate: “(1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the [Director]; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” Id. (quoting Friends of the Earth v. Laidlaw Environmental Svcs, 528 U.S. 167, 180-81 (2000)). In order to survive a motion to dismiss, Petitioner must have alleged sufficient facts, accepted as true, to support a reasonable and plausible inference that Petitioner satisfies the elements of standing. See Hawse v. Page, 7 F.4th 685, 688-89 (8th Cir. 2021). Here, Petitioner has failed to allege sufficient facts to show an actual or imminent “injury in fact” that is traceable to the Director’s issuance of the 2023 General Permits.

Petitioner has not Demonstrated an Actual or Imminent “Injury in Fact” that is Traceable to the Director’s Issuance of the 2023 General Permits

In compliance with the Clean Water Act, EPD implements the National Pollutant Discharge Elimination System (“NPDES”) permitting program. That authority was delegated to EPD by the U.S. EPA. An NPDES permit is required when a person proposes to discharge pollutants into surface waters. 33 U.S.C. § 1342(a)(1); O.C.G.A. § 12-5-30. This includes the discharge of stormwater and sediment from construction activity. See 40 C.F.R. § 122.26(a)(9)(i)(B), (b)(15). The Director is authorized to issue general permits for the discharge of pollutants from categories of sources. O.C.G.A. § 12-5-30(f). At issue in this case is the Director’s issuance of the three 2023 General Permits which cover stormwater discharges associated with construction activity. (See Petitioner’s Amended Petition for Hearing, ¶ 3.)

To be covered under one of the 2023 General Permits, the applicant submits a Notice of Intent (to be covered under the general permit), in lieu of an application. 40 C.F.R. § 122.28(b)(2)(i); Ga. Comp. R. & Regs. 391-3-6-.16(3)(c). The general permit must specify when a discharge under the permit is authorized. 40 C.F.R. § 122.28(b)(2)(iii); Ga. Comp. R. & Regs. 391-3-6-.16(c)(3).

The factual allegations pertinent to the question of standing are contained in two paragraphs of Petitioner's Amended Petition for Hearing, and which state, as follows:

45.

[SRWA] is aggrieved or adversely affected by the EPD Director's reissuance of the general permits. . . .

47.

[SRWA] is a Georgia nonprofit corporation dedicated to protecting water quality in the South River watershed, including Intrenchment Creek, Snapfinger Creek, and the South River through enforcement, advocacy, water quality testing, land and river cleanups, and environmental education. [SRWA's] members use these streams and use public lands surrounding these streams for their aesthetic, scenic, and recreational values. The general permits will increase sediment discharges into these streams and lessen the aesthetic, scenic, and recreational values for [SRWA's] members, including Jacqueline Echols, Ph.D., and Margaret Spalding. [SRWA's] members, including Jacqueline Echols, Ph.D., and Margaret Spalding, are concerned that the general permits will allow construction activities that further delay the time for Intrenchment Creek, Snapfinger Creek, and the South River to be free from sediment which interferes with supporting aquatic life.

(Petitioner's Amended Petition for Hearing, ¶¶ 45, 47.)

The facts alleged by Petitioner are insufficient to show an actual or imminent (not conjectural or hypothetical) injury in fact that is traceable to the Director's issuance of the 2023 General Permits. While the Director has issued the 2023 General Permits, those permits do not become effective until after a person or entity planning construction submits a Notice of Intent to be covered by one of the general permits. If no construction is planned or commenced, there will be no discharges under the general permits. Petitioner's Amended Petition for Hearing is completely devoid of any allegations regarding any current or planned construction in the area of Intrenchment Creek, Snapfinger Creek, or the South River. Without any planned or current construction, Petitioner's alleged injury in fact is merely conjectural or hypothetical. In other words, if no one ever makes use of the 2023 General Permits in the area of Intrenchment Creek, Snapfinger Creek, or the South River, then there will not be an increase in sediment due to construction activity.

Even if the undersigned were to consider the Director's standing argument under a summary determination standard, Petitioner still fails to aver specific facts establishing an actual or imminent "injury in fact" that is traceable to the Director's issuance of the 2023 General Permits. The one affidavit submitted by Petitioner, in response to the Director's standing argument, contains no specific facts regarding any planned or current construction in the South River watershed. Instead, the only thing mentioned in the affidavit is, as follows: "Sediment from construction sites has lessened my recreational and aesthetic enjoyment of water segments within the South River watershed, including the South River and Intrenchment Creek. I'm concerned these impacts to these streams will be worsened if construction sites continue to discharge sediment" (Aff. of Jacqueline Echols, Ph.D., ¶ 10.) The allegation of an "injury in fact" in the affidavit remains

conjectural and hypothetical without any specific facts showing an actual or imminent injury in fact traceable to the Director's issuance of the 2023 General Permits. See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 886-89, 899 (concluding that the affidavits did not set forth sufficient specific facts to survive summary judgement). There is no way to know when the sediment from "construction sites" allegedly lessened the affiant's recreational and aesthetic enjoyment of water segments within the South River watershed. There is no way to know if those were permitted or unpermitted construction sites or whether any current or planned construction site has submitted a Notice of Intent to be covered by the 2023 General Permits. Consequently, there is no way to know if the alleged injury is traceable to the challenged action (i.e., the Director's issuance of the 2023 General Permits).

Petitioner has Failed to Demonstrate Redressability

Petitioner has also failed to establish that it is likely, as opposed to speculative that its alleged injury will be redressed by a favorable decision from this administrative court. Ctr. for a Sustainable Coast, Inc. v. Turner, 324 Ga. App. 762, 767-68 (2013). Although not styled as a prayer for relief, Petitioner wants the general permits to distinguish between discharges into impaired streams with and without remaining pollutant load allocations for sediment. (Petitioner's Amended Petition for Hearing, ¶54.) Petitioner also wants the general permits to clarify that coverage is not authorized for storm water discharges into biota-impaired streams with no remaining waste load allocation for sediment. (Id.)

The undersigned administrative law judge ("ALJ") has the powers of the referring agency, which, in this case, is the Board of Natural Resources. Upper Chattahoochee Riverkeeper, Inc. v. Forsyth County, 318 Ga. App. 499, 506-07 (2012). Only the Director has the authority to issue stormwater permits and to prescribe the terms of those permits. See O.C.G.A. § 12-5-30. The

undersigned may not require the Director to include specific terms in the general permits. Upper Chattahoochee, 318 Ga. App. at 506-07.

Furthermore, even if the undersigned were to reverse the Director's reissuance of the general permits, Petitioner has not demonstrated that it is likely, as opposed to merely speculative that its alleged injury will be redressed by such a reversal. In response to the Director's Motion to Dismiss or in the Alternative Motion for Summary Determination, Petitioner asserts that a favorable decision (i.e., a reversal of the Director's reissuance of the general permits), would cause or compel the Director "to reissue permits with terms 'necessary to achieve state water quality standards' and terms that require an applicant to show that there are 'sufficient remaining pollutant load allocations to allow for the discharge.'" (Aff. of Jacqueline Echols, Ph.D., ¶ 12; see also Petitioner's Response to Respondent's Motion to Dismiss and Motion for Summary Determination, p. 11.)

Petitioner's requested relief hinges on 40 C.F.R. § 122.4(i). Section 122.4 of Title 40 of the Code of Federal Regulations states, in pertinent part, as follows:

No permit may be issued:

(i) To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. ***The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards*** or is not expected to meet those standards even after the application of the effluent limitations required by sections 301(b)(1)(A) and 301(b)(1)(B) of CWA, and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, ***must demonstrate***, before the close of the public comment period, that:

(1) There are sufficient remaining pollutant load allocations to allow for the discharge; and

(2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards. ***The Director may waive the submission of information by the***

new source or new discharger required by paragraph (i) of this section if the Director determines that the Director already has adequate information to evaluate the request. An explanation of the development of limitations to meet the criteria of this paragraph (i)(2) is to be included in the fact sheet to the permit under § 124.56(b)(1) of this chapter.

40 C.F.R. 122.4(i) (emphasis added).

In Petitioner's Amended Petition for Hearing, its Motion for Summary Determination, its Response to Respondent's Motion to Dismiss and Motion for Summary Determination, and its Reply Brief Supporting Petitioner's Motion for Summary Determination, Petitioner cites and relies on the specific language in 40 C.F.R. § 122.4(i)(1) about "sufficient remaining pollutant load allocations for the discharge." That provision does not require the Director to incorporate such a restriction into the general permits. Rather, it requires a new source or discharger to demonstrate certain things before it may obtain a permit. However, Petitioner has not addressed the following language: "The Director may waive the submission of information by the new source or new discharger required by paragraph (i) of this section if the Director determines that the Director already has adequate information to evaluate the request." 40 C.F.R. § 122.4(i)(2). Because the Director may waive the requirement for a new source to demonstrate (1) "sufficient remaining pollutant load allocations to allow for the discharge" and (2) "existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards," it makes any such demonstration discretionary. Like in Center for a Sustainable Coast, Petitioner's requested relief is discretionary and therefore, Petitioner has failed to demonstrate that its alleged injury will likely be redressed, even if the undersigned reversed the Director's reissuance of the general permits. See Ctr. for a Sustainable Coast, 324 Ga. App. at 768.

Petitioner has failed to establish it has standing to challenge the Director's issuance of the

2023 General Permits. Accordingly, the Director's Motion to Dismiss (or Motion for Summary Determination) based on Petitioner's lack of standing is **GRANTED** and Petitioner's Amended Petition for Hearing is **DISMISSED**.

The Director's Motion for Summary Determination, on grounds other than standing, is **DENIED as moot**.

Petitioner's Motion for Summary Determination is **DENIED as moot**.

SO ORDERED, this 29th day of November, 2023.

Stephanie M. Howells

Stephanie M. Howells
Administrative Law Judge

