



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

**ALTAMAHA RIVERKEEPER, INC., and)
SATILLA RIVERWATCH ALLIANCE,)
INC. d/b/a SATILLA RIVERWATCH,)**

Petitioners,)

v.)

**CAROL COUCH, DIRECTOR)
ENVIRONMENTAL PROTECTION)
DIVISION, GEORGIA DEPARTMENT)
OF NATURAL RESOURCES)**

Respondent.)

**DOCKET NO:
OSAH-BNR-ES-0710689-60-GATTO**

FINAL DECISION

COUNSEL: Donald D. J. Stack, Esq., Kurt D. Ebersbach, Esq., for Petitioner

Thurbert E. Baker, Attorney General, Isaac Byrd, Deputy Attorney General, John E. Hennelly,

Senior Assistant Attorney General, James D. Coots, Assistant Attorney General, for Respondent.

GATTO, Judge.

I. INTRODUCTION

This administrative action was brought before the Court by Petitioners Altamaha Riverkeeper/ Coastkeeper®, Inc., and Satilla Riverwatch Alliance, Inc., D/B/A Satilla Riverkeeper® challenging a buffer variance issued by Respondent Carol A. Couch, Ph.D., Director (“Director”) of the Environmental Protection Division (“E.P.D.”) of the Georgia Department of Natural Resources to Robert M. Torras, Sr. (the “Developer”), on behalf of Atlanta Southeast Enterprises, LLC for a site known as Aiken Island, in the City of Brunswick, Glynn County, Georgia pursuant to the “Georgia Erosion and Sedimentation Act of 1975” (the “Act”), O.C.G.A. § 12-7-1, *et. seq.* The Court has jurisdiction to hear this action pursuant to

Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." For the reasons indicated below, the decision of the Director to grant the variance is **REVERSED**.

II. FINDINGS OF FACT

This is an appeal of a stream buffer variance issued by the EPD Director with respect to a site located on what is known as Aiken Island in Brunswick, Glynn County, Georgia ("the Aiken Island Site"). Aiken Island ("the Site") is peninsula of land covering approximately two acres that is located west of Newcastle Street near downtown Brunswick. The Site lies immediately adjacent to Academy Creek, which is a water of the State, as well as salt marsh regulated under the Coastal Marshlands Protection Act ("Marsh Act"). (PWD 3, ¶ 19).¹

The buffer application for the buffer variance was reviewed and approved by EPD under the provisions of the Erosion and Sedimentation Act of 1975 and EPD's E&S Rules promulgated pursuant to that Act. During the 18 months prior to the filing of the Aiken Island application, EPD had conducted enforcement efforts at the Site in response to complaints about alleged erosion and sediment (E&S") conditions and lack of adequate E&S controls in violation of the E&S Act and/or General Permit for construction activities. (RWD 1, ¶¶ 3, 12-14, 17, 18; Exs. R 19(A)-(C), 37).

On or about July 13, 2004, Rhonda Knight, who was at that time a coastal permit coordinator with the Coastal Resources Division ("CRD") of the Georgia Department of Natural Resources ("DNR") received an anonymous call reporting possibly illegal filling activities on Aiken Island. (Tr. 297). Knight visited the Site and observed some of the plants that are listed as marsh plants under the Marsh Act. However, there had been so much fill deposited by the Developer that many of the plants were covered up. (Tr. 305). Knight sent an email to John Wynne, who was at that time employed as an erosion and sediment control specialist with the

EPD, suggesting that he investigate the Site for possible marsh and buffer violations. (RWD 1, ¶ 12; Ex. R 19(B)). During his August 4, 2004 site visit, Wynne observed evidence of prior land-disturbing activity that he estimated to have exceeded one acre, as well as areas of sediment runoff, which indicated that minimal Best Management Practices (“BMPs”) were not being met. He also observed what appeared to be impacts within the 25-foot buffer required under State law. However, Wynne did not know exactly where the 25-foot buffer was located because he did not know the location of the jurisdictional line or “JD line” from which the buffer must be measured. (Tr. 430-31). Wynne took several photographs showing, among other things, that silt fences were not properly trenched in and were not being properly maintained; that some silt fences were completely overwhelmed; and that silt and dirt appeared to be moving into the surrounding marsh. (Tr. 431-33; Ex. R 19(C)).

On August 11, 2004, Kelie Moore, a technical assistant employed by CRD, received a telephone message of an alleged marsh fill on Aiken Island. Several days later, on August 17, 2004, Ms. Moore visited Aiken Island with other CRD officials and with officials from Respondent EPD’s Coastal District Office. (RWD 4, ¶¶ 15-16). During the site visit, Moore observed that several loads of dirt had been dumped along the perimeter of the island. She observed a line of new-looking silt fence surrounding the island and a line of older silt fence that was one to five feet outside (marshward) of the new fence in most areas. The fresh fill dirt was abutting the new newer, inner silt fence in many places, had overtopped or pushed over the inner silt fence in several areas, and was abutting the outer silt fence. The fill dirt had also overtopped or pushed over the outer silt fence in four areas, spilling dirt into marsh vegetation. (RWD 4, ¶ 36). Moore interviewed the Developer, who informed her that he had recently placed 104 dump

¹ “PWD” refers to Petitioners’ Written Direct Testimony. “RWD” refers to Respondent’s Written Direct Testimony.

truck loads of fill dirt on the upland portion of the island, which the Developer considered to include everything within the outermost (marshward) line of silt fence. (RWD 4, ¶ 41).

During the August 17, 2004 site visit, EPD officials instructed the Developer to leave in place the fill dirt that was already within 25 feet of the upland side of the silt fence, to slope the dirt to a 3:1 angle, and to spread grass seed and mulch over the area. (RWD-4, ¶46; Ex. R 9; Tr. 437). On December 16, 2004, Moore visited the Site again and observed sixteen (16) blowouts of the silt fence marking the old JD line. (Tr. 286).

In February 2005, more than six months after his initial visit to Aiken Island, Wynne received word that the Developer had taken no action to stabilize the Site despite EPD's instruction that he do so back in August 2004. Wynne also discovered that the Developer had not yet filed a Notice of Intent ("NOI") under the General Permit covering storm water discharges associated with land disturbing activities and did not yet have an erosion plan. Wynne visited the Site and noted that while silt fence still existed along the perimeter of the island, it was not properly trenched in, and therefore served "little or no practical use as a safeguard to prevent sediment from leaving the Site and entering adjacent state waters." Wynne then wrote the Developer advising of these deficiencies and directing him to file an NOI and accompanying erosion and sediment control plan with EPD. (Tr. 437-39; Ex. R 38).

As of April 2005, EPD still had not received an NOI or erosion plan for the Site. On April 14, 2005, Wynne returned to the Site and discovered that "there was still no attempt to improve BMPs at the Site or to stabilize the buffer area." He "saw what appeared to be no attempt at improving the conditions out there." Wynne observed silt fence blowouts and resulting deposition of sediment into the surrounding marsh. He also noted that the 25-foot buffer had been "filled in most areas." Based upon these observations, Wynne issued the Developer a

Notice of Violation (“NOV”). He also recommended that EPD proceed with the next level of enforcement action – a consent order. (Tr. 442-43; Exs. R 39, 40).

On or about September 12, 2005, nearly fourteen (14) months to the day after the initial complaint received by Knight, and Wynne returned to the Site and found that the buffer was still not stabilized. (Tr. 444). Moore also returned to the Site on September 12, 2005 to double check the area of suspected marsh impact noted during her visit three days earlier. She observed workers with a backhoe scooping out built-up sediments from the silt fence along the south side of the island. Moore told the workers that they “did not have to use a backhoe” and that a hand shovel would be better, but the workers told her that the Developer had instructed them to use a backhoe because it “was faster.” Moore stopped by the Developer’s office on her way out of the Site, advising him that his backhoe method of silt fence maintenance was digging out too much dirt and to use hand shovels “in the future.” (Ex. RW D 4, ¶ 80).

October 19, 2005, Wynne visited the Site again and observed that there were washouts in part of the buffer area as well as a sink hole located at the southwestern portion of the peninsula. Mr. Wynne took several photographs showing that the buffer area still had not been stabilized. (Tr. 447, 452; Ex. R 23). Moore visited the Site the following day and observed a bulldozer and backhoe moving fresh dirt into an area on the southeast end of the island that appeared to have been excavated to an elevation near that of the surrounding marsh. She also observed standing water and a silt fence that had collapsed along a small tributary leading to Academy Creek. Because these observations “concerned her,” Moore contacted the Developer and asked him to accompany her to the Site. (Ex. RWD 4, ¶ 84). The Developer told Moore that the entire area had “collapsed” over the weekend. He further explained that the area had not been excavated but rather, the dirt had sunk into the ground. The Developer informed Moore that he

had brought in another 22 truckloads of dirt to build the area back up. (Ex. RWD 4, ¶ 85; Exs. R 14(A)-(D)).

On November 23, 2005, EPD wrote the Developer referencing the meeting in the fall of 2004 at which it had been agreed that the 25- foot buffer would be established by sloping the area to minimize erosion and vegetating as part of the overall development plans for the Site. The letter noted that this “activity has not been completed as of this date.” The letter instructed the Developer to complete an application for a buffer variance and advised that the criterion making the project eligible for a variance was “restoration or enhancement to improve water quality and/or aquatic habitat quality.”(RWD-1, ¶¶ 1, 19, 20, 23-28, 31, 32; Exs. R 10, 21(B)(1)-(3), 38-42).

The Developer of the Site applied for a variance as directed by EPD enforcement personnel. . (RWD-1 ¶¶ 34, 35; Ex. R 42). The Director ultimately approved that request on the recommendation of EPD staff that had determined that restoration of the already destroyed buffer would be at least as protective of the environment than the destroyed buffer without restoration. (RWD-3, ¶¶ 30, 37). This variance decision made by the EPD Director formed the basis for Petitioners’ action before this Court.

III. CONCLUSIONS OF LAW

Under the Erosion and Sedimentation Act of 1975, the Director may grant a variance to conduct land-disturbing activities within the 25 foot buffer along the banks of state waters only if it is consistent with the criteria contained in if the E&S Rules.² See O.C.G.A. § 12-7-6(b)(15)(C). The E&S Rules authorizes the review of variance applications by the Director

² Pursuant to the Act, the Board of Natural Resources adopted E&S Rules that contain specific criteria for the grant or denial by the Director of requests for variances.

“only where the applicant provides reasonable evidence that impacts to the buffer have been avoided or minimized to the fullest extent practicable.” E&S Rule 391-3-7-.05(2).

Petitioners argue that there was no such evidence presented to the Director. The Court agrees. It is clear from the record that the Developer repeatedly disturbed the buffer and failed to stabilize it even after EPD directed him to do so in August 2004, resulting in two Notices of Violation issued by EPD. Although it appears that EPD initially pursued a restoration approach, in August 2004, it directed the Developer to restore and stabilize the buffer. The Developer ignored this direction for more than a year, at which point EPD directed him to pursue a buffer variance.³ The Court therefore concludes that based upon the Developer’s conduct leading up to the submission of the variance application, and the Developer’s obvious failure to take reasonable steps to avoid or minimize impacts to the buffer to the fullest extent practicable prior to submission of the variance application, the applicant did not provide the Director with reasonable evidence that impacts to the buffer had been avoided or minimized to the fullest extent practicable. Therefore, the Court concludes that the Director improperly granted the variance application. Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT the decision of the Director to grant the buffer variance is **REVERSED**.

SO ORDERED THIS 3rd day of July, 2007.



JOHN B. GATTO, Judge

³ The Court agrees with Petitioners that a restoration plan, enforced if necessary through a consent order, would have been the better approach in this case. By requiring a variance, EPD slowed down necessary remedial work for almost another year. In the interim, additional impacts to State waters occurred.