

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

JILL WYSE	)	
	)	
Petitioner,	)	Docket Number:
	)	
	)	
v.	)	
	)	
ENVIRONMENTAL PROTECTION	)	
DIVISION, GEORGIA DEPARTMENT	)	
OF NATURAL RESOURCES, by and through	)	
its Commissioner,	)	
	)	
Respondent.	)	

**PEITION FOR HEARING**

1. This Petition, filed by Jill Wyse (hereinafter "Petitioner"), appeals Consent Order No. EPD - WQ-5412 (hereinafter "the Consent Order") issued by the Director of the Georgia Department of Natural Resources' Environmental Protection Division (hereinafter the "EPD") to Walker County for violations of the Georgia Water Quality Control Act (hereinafter the "WQCA") and the Georgia Department of Natural Resources Rules and Regulations (hereinafter the "Rules") associated with the construction activity known as Durham Trail Phase 3 (hereinafter the "Site" or "Trail"), located in Walker County, Georgia. A true and correct copy of the Consent Order is attached hereto as Exhibit 1.

**STATEMENT OF JURISDICTION**

2. This action is brought pursuant to O.C.G.A. §§ 12-2-2(c), 12-7-16, 12-5-43 and 50-13-13 and Chapter 391-1-2 *et seq.* of the Rules, authorizing any person that is

aggrieved or adversely affected by an action of the Director of the Environmental Protection Division (hereinafter the "Director") to petition for judicial review.

3. O.C.G.A. §§ 12-2-2 and 12-5-43 provide that whenever any person is aggrieved or adversely affected by any order or action of the Director, such person may request and obtain a hearing by filing a petition no later than thirty (30) days after issuance of the Director's order or action.

4. Pursuant to O.C.G.A. §§ 12-2-2 and 12-5-43, Petitioner hereby petitions for a hearing because Petitioner has been aggrieved and adversely affected by an action of the Director. Specifically, Petitioner has been aggrieved and adversely affected by the Director's issuance on September 7, 2012 of Consent Order No. EPD-WQ-5412. See Exhibit 1.

5. This Petition is filed within thirty (30) days of the issuance of the Consent Order by the Director on September 7, 2012, or if the last day of such time period is a day on which the Clerk's office is closed, on or before the end of the next business day, as required by statutory law.

#### **PETITIONER'S INTEREST**

6. The Petitioner owns property on Rock Creek in Walker County, Georgia approximately one mile downstream from the Site. Since the purchase of this property in 1998, Petitioner uses, enjoys, recreates, as well as derives aesthetic enjoyment from, the waters, adjacent habitat, and dependent aquatic life and wildlife that are and will be affected by the Director's decisions challenged in this action. The Petitioner has recreational, aesthetic and economic interests in Rock Creek and its fish and other

wildlife, which are and will be directly and irreparably injured by the degradation of these areas as authorized by the Director's decision challenged in this action.

7. In addition, Petitioner has an interest in seeing the provisions of the WQCA and the Rules upheld and followed so Petitioner can enjoy and exercise Petitioner's informational and procedural rights, including the right to educate herself and the public about environmental concerns and policy issues affecting Rock Creek, as well as the right to have environmental decision-making carried out in accordance with the evaluative requirements of applicable law and regulation.

8. The Petitioner is aggrieved and adversely affected by the Director's decision to issue the Consent Order to Walker County. The Consent Order fails to protect Rock Creek from deposition of significant additional sediment, fails to provide adequate passage for fish that migrate through the Rock Creek system and fails to restore a vegetative buffer along the effected portion of Rock Creek. The Consent Order also fails to contain specificity with regard to the Supplemental Environmental Project (hereinafter "SEP") that Walker County will undertake. The solution that has been chosen by EPD fails to restore Rock Creek and leaves property owners with greatly diminished fisheries. Supplemental environmental project funds should be used to restore Rock Creek to its original location so that trout will be able to move above and below the Durham Trail.

#### **APPLICABLE LAW AND REGULATORY STRUCTURE**

9. To help achieve its goal of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters, the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (CWA), established a permitting scheme known as the National Pollutant Discharge Elimination System ("NPDES"). [33 U.S.C. § 1342(a)]

10. Under Environmental Protection Agency ("EPA") regulations, an NPDES permit is required for "any discharge of 'pollutants' from any 'point source' into 'waters of the United States.'" [40 C.F.R. § 122.1]
11. The CWA allows states to implement their own permit programs when authorized by the EPA. [33 U.S.C. § 1342(b)]
12. In the State of Georgia, the authority to issue NPDES permits has been delegated to the EPD, and the state law granting EPD the authority to issue NPDES permits is the WQCA. [O.C.G.A. § 12-5-23(a)(5)]
13. The WQCA recognizes that "[t]he people of the State of Georgia are dependent upon the rivers, streams, lakes, and subsurface waters of the state for public and private water supply and for agricultural, industrial, and recreational uses. It is therefore declared to be the policy of the State of Georgia that the water resources of the state shall be utilized prudently for the maximum benefit of the people, in order to restore and maintain a reasonable degree of purity in the waters of the state and an adequate supply of such waters, and to require where necessary reasonable usage of the waters of the state and reasonable treatment of sewage, industrial wastes, and other wastes prior to their discharge into such waters." [O.C.G.A. § 12-5-21(a)]
14. The WQCA further provides that "the government of the state shall assume responsibility for the quality and quantity of such water resources and the establishment and maintenance of a water quality and water quantity control program adequate for present needs and designed to care for the future needs of the state. . . ." [O.C.G.A. § 12-5-21(a)]

15. The WQCA entrusts the responsibility of protecting the state's water resources with the Environmental Protection Division of the Georgia Department of Natural Resources. [O.C.G.A. § 12-5-21(b)]
16. The Board of Natural Resources sets pollutant limitations and administers the general permitting processes for the discharge of pollutants into waters of the state. [O.C.G.A. § 12-5-23(a); Chapter 391-3-6-.06 of the Rules]
17. The Director of the EPD administers and enforces the rules and regulations promulgated under the WQCA, and has the power to issue, modify, or revoke permits for discharges of pollutants to the waters of the state. [O.C.G.A. § 12-5-23(b); Chapter 391-3-6-.01 *et seq.* of the Rules]
18. The EPD has the authority to investigate and enforce the WQCA. [O.C.G.A. § 12-5-25]
19. The Director of EPD is authorized to require monitoring, recording, and reporting of discharges of pollutants to state waters. [O.C.G.A. § 12-5-27]
20. It is illegal to discharge pollutants to the waters of the state without a permit. [O.C.G.A. § 12-5-29; O.C.G.A. § 12-5-30]
21. Any person seeking to modify a facility resulting in the discharge of pollutants to waters of the state must obtain a permit. [O.C.G.A. § 12-5-30(a)]
22. The violation of the WQCA or any permit limitation or condition is punishable by a fine of up to \$50,000.00 per day per violation and that a separate and later incident creating a violation within a 12 month period shall be liable for a fine of up to \$100,000.00 per day for each day during which such violations continues. [O.C.G.A. § 12-5-52]

23. The Board of Natural Resources has promulgated rules and regulations that establish the standards for water quality. [Chapter 391-3-6 *et seq.* of the Rules]
24. These standards are explicitly meant to enhance water quality, to prevent pollution, and to protect fish and other aquatic life, among other things. [Chapter 391-3-6-.03(2) of the Rules]
25. All waters shall be free from material related to municipal, industrial or other discharges which produce turbidity, color, odor or other objectionable conditions which interfere with legitimate water uses. [Chapter 391-3-6.03(5)(c) of the Rules]
26. Chapter 391-3-6.16 of the Rules provides for the issuance of a general permit for storm water discharge from construction sites; and on August 1, 2008, the General Permit No. GAR100002 entitled "Authorization To Discharge Under The National Pollutant Discharge Elimination System Storm Water Discharge Associated With Construction Activity For Infrastructure Construction Projects" (hereinafter "the Permit" or "General Permit No. GAR100002"), became effective. Part IV (ii) of the Permit establishes a 50-foot buffer on all waters of the State designated as trout streams and establishes limits on construction activities within the buffer without first obtaining a stream buffer variance.
27. No person shall construct an impoundment in Secondary Trout Waters without the approval of the Division. [Chapter 391-3-6.03(15)(a)(iii) of the Rules]
28. Rock Creek is a designated trout stream. [Chapter 391-3-6.03 (15)(b) of the Rules]
29. Conservation of fish, wildlife and other beneficial aquatic life and improvement of the biological integrity of the waters of the State are among the purposes of the State's establishment of water quality standards. [Chapter 391-3-6.03(2)(a) of the Rules]

30. Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. [Chapter 391-3-6.03(2)(b)(i) of the Rules]

31. Fishing and propagation of fish are water use classifications for which the criteria of the Rules are applicable. [Chapter 391-3-6.03(4)(c) of the Rules]

#### FACTUAL BACKGROUND

32. The Site, developed by Walker County in cooperation with private landowners, is part of a recreational trail network, a portion of which is located on an abandoned rail corridor. The rail corridor was constructed circa 1889 and the United States Interstate Commerce Commission certified abandonment of the related rail line on January 24, 1951. In connection with the abandonment, the subject railway company physically vacated the premises, removing all rails, ties, bridges and other removable fixtures in 1951, and the corridor was reclaimed by the adjoining landowners and maintained as private property up to the completion date of the Site. The former rail corridor runs along the side of and in very close proximity (within fifty feet in many places) to Rock Creek, a designated trout stream. The Site includes a crossing of Rock Creek constructed by the deposition of rock and other materials directly into the open channel of the stream by Walker County.

33. On or about March 22, 2012, Walker County graded an area adjacent to Rock Creek in the buffer zone, removing the natural vegetation, and began excavating from the creek bank the intake of a nonfunctioning culvert that had been unused since abandoned by the railroad sixty-one (61) years earlier. Such grading and excavation resulted in the discharge of sediment that inundated the stream for miles downstream from the Site.

Such construction activity was performed by Walker County without obtaining a stream buffer variance and without utilizing any Better Management Practices (BMP's) or any erosion and sediment controls.

34. At the time (March 22, 2012) of the construction activity described in preceding paragraph and for many years prior thereto, Rock Creek flowed in an open channel at the location of the Site, having reestablished its natural course over the decades since the railroad abandonment. Simultaneous with the excavation and grading in the buffer zone, Walker County began depositing rock, dirt and other pollutants directly into the open channel of Rock Creek to form an embankment to serve as a creek crossing for the trail.

35. On March 26, 2012, a representative of the EPD visited the site and Walker County agreed to a voluntary stop work order.

36. On or about March 29, 2012, Walker County filed a Notice of Intent (NOI) to comply with General Permit No. GAR100002 for the Site.

37. On April 3, 2012, the EPD notified Walker County's design professional, CTI, that an Erosion, Sedimentation and Pollution Control Plan (ESPP) should be submitted to the EPD for review, that EPD office had concern with the silt and substrate removal from the creek and that the EPD had notified U.S. Army Corps of Engineers of Site. The EPD also informed CTI that the only work that could be done at the Site until the 14 day notice period ran and the permit became effective was stabilization of the Site.

38. On April 13, 2012 (Friday), a representative of Walker County telephoned the EPD and asked for and received authorization to continue the work at the Site, giving as a reason that it was imperative that the project be completed as soon as possible to avoid expiration of certain grant funding.

39. On April 14 and 15, 2012 (Saturday and Sunday), Walker County resumed work on the Site and deposited additional quantities of rock, dirt and other pollutants directly into the open channel of Rock Creek, filling approximately one hundred linear feet of the previously open channel that had contained the natural flow of Rock Creek, and completing the embankment designed to serve as a creek crossing for the trail. The flow of the creek was directed through the recently excavated historic railroad culvert that had not been used for sixty-one years, and an overflow pipe eight feet in diameter and forty feet in length was installed in the embankment that blocked the natural flow of the creek. It is impossible for trout and other aquatic life to travel upstream through such overflow pipe due to its elevation and they cannot travel through the excavated ancient culvert due to the extreme fall in elevation at its intake. Walker County still had not submitted an ESPCP at this time.

40. On April 19, 2012, representatives of the EPD, the project engineering firm, and Walker County met at the Site. During such meeting, Al Pierce with CTI (project engineer) represented to the EPD that a dirt roadbed, recently graded by Walker County on private property and running generally parallel to the trail on the east side of Rock Creek, had served as construction easement for the Site. However, it was later (June 7, 2012) determined that Walker County had again violated the buffer zone on April 14 and 15, 2012 by using the abandoned railroad bed on the west side of Rock Creek (not part of the Site disclosed by Walker County) to transport heavy equipment and materials to the location of the in-stream embankment construction. Dump trucks and other heavy equipment made repeated trips to and from the Site, driving directly through the stream and causing additional discharges of sediment.

41. On May 1, 2012, the EPD issued a Notice of Violation (NOV) to Walker County. Such NOV failed to identify issues associated with the newly constructed creek embankment with overflow pipe, including the effective impoundment of the trout population created thereby. Such NOV also failed to address the Walker County's violations of the trout stream buffer zone on the west side of Rock Creek and the related ongoing discharge of sediment resulting from Walker County's land disturbing activities on the abandoned railroad bed (section not identified by Walker County as part of the Site).

42. On May 23, 2012, the EPD conducted a follow-up investigation and visited the site and measured the disturbed area and buffer encroachments; however, the EPD failed to identify buffer zone violations that had been committed on the west side of Rock Creek. See preceding paragraph.

43. On August 30, 2012, CTI Engineers, Inc., submitted a revised Corrective Action Plan (CAP). Such CAP was defective in that, among other things, it failed to properly acknowledge that Rock Creek had reestablished its course to a natural open channel state many years prior.

44. On September 7, 2012, the Director fully executed the Consent Order at issue.

45. On September 24, 2012, Walker County continued work on the Site pursuant to its CAP; however, in connection therewith, Walker County committed additional trout stream buffer zone violations by causing heavy equipment traffic on the abandoned railroad bed on the west side of Rock Creek (not part of the Site disclosed by Walker County) without any attempt to stabilize the area or to control erosion and the discharge of sediment by use of silt fencing and other BMP's.

## **LEGAL ARGUMENT AND ISSUES FOR APPEAL**

46. Paragraphs 1 through 45 above are herein incorporated by reference as if rewritten in their entirety.

47. The Consent Order executed by the EPD does not properly identify the damage to Rock Creek, a designated trout stream, caused by Walker County nor does it adequately address and provide for correction of such damage.

48. The Consent Order, as issued, must be invalidated and remanded to the EPD because the EPD acted arbitrarily and capriciously, and contrary to law, when it issued the Consent Order because, inter alia, the Consent Order:

(a) Fails to properly identify Walker County's deposition of rock, dirt and other pollutants in the open channel of Rock Creek for the purpose of constructing an embankment to serve as a creek crossing for the Trail as a discharge of pollutants into the State's waters.

(d) Fails to identify that Walker County's construction of an embankment in the open channel of Rock Creek, a designated trout stream, blocking the natural flow of the stream and forcing it through a historic railroad culvert abandoned and unused for sixty-one years, effectively created an illegal impoundment in trout waters of the State in that the ability of trout and other aquatic life to migrate up stream was eliminated.

(e) Fails to require appropriate re-vegetation of the trout stream buffer zone where such vegetation was removed by Walker County.

(f) Fails to protect Rock Creek from continuing deposition of sediment due to inadequate or the absence of appropriate stabilization of areas disturbed by Walker County.

(g) Fails to restore Rock Creek and leaves property owners with greatly diminished fisheries.

(h) Fails to provide a time frame for completion of any Supplemental Environmental Projects (SEP's) that Walker County may choose to complete as allowed in the Consent Order.

(i) Fails to require any corrective action with respect to the conditions described in (a) and (b) above.

ACCORDINGLY, Petitioners pray that:

A. The Court find that the Director's issuance of the Consent Order was arbitrary and capricious and otherwise not in accordance with the law;

B. The Court find that the Consent Order is invalid because its terms include an "agreement to agree" with respect to the SEP's allowed by the Order in connection with satisfaction of the monetary settlement;

C. The Court find that the Consent Order is arbitrary and capricious because the Director improperly utilized this consent order to allow what amounts to illegal and unauthorized after-the-fact variance;

D. The Court find that the Director, by issuance of the after-the-fact variance improperly evaded his responsibility to review information about the impacts of the release of pollutants into state waters and to consider those impacts prior to allowing a variance of the general prohibitions against changing existing instream water uses,

constructing an impoundment in trout waters of the State and harming the environment of trout and other aquatic life and their ability to propagate;

E. The Court find that the Consent Order issued by the Director be vacated and remanded to the Director for further consideration; and

F. The Court grant Petitioner any further relief to which Petitioner is entitled.

Respectfully submitted this 9<sup>th</sup> day of October, 2012

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Jill Wyse – Petitioner

Jill Wyse