

ENFORCEMENT

ENFORCEMENT

COMMON INTERPRETATION PROBLEMS UNDER THE CLEAN WATER ACT

CWA PROBLEMS

Because of the complexities of the law, many common misperceptions have put even the most diligent developers at risk of enforcement actions. As discussed above, it is critical to keep in mind the federal law prevails in all circumstances, after which state law prevails. Moreover, **reliance on legal interpretations by government officials where those interpretations have proven to be incorrect is *not* a defense to liability.**

EPD DIRECTOR CAN GRANT BUFFER VARIANCE

BUFFER VARIANCE

Only the EPD Director Can Grant a Buffer Variance For State Buffer Requirements

A common situation where a developer incorrectly relies on local official's interpretation of the law to his/her detriment involves the state buffer requirement. The law is very clear on this point. **Only the Director of EPD can issue variances to the state buffer requirements.** O.C.G.A. § 12-7-6(15); Opinion of the Office of the Attorney General of the State of Georgia, 90-40. 1990 Ga. AG LEXIS 65, 1990 Op. Atty. Gen. Ga. 82 (Dec. 3, 1990). This means in practicality that you cannot rely on the interpretation of the county for a buffer variance. However, many counties have their own buffer requirements that are more stringent than the state requirement. For example, counties may require a 50-foot buffer along all streams where the state requires only 25 feet (except for trout streams where a 50-foot buffer must be maintained). The local government can grant a buffer variance to the more stringent requirement if allowed by the local ordinance. However, this variance does not apply to the state buffer requirement.

STATE 25 FOOT BUFFER REQUIREMENT

STATE BUFFER

The Drainage Structure Exemption to the State 25-Foot Buffer Requirement Does Not Include Sediment Basins and is Limited to Those Circumstances Where the Structure is Necessary

The state buffer requirement contains an exemption for drainage structures. This provision is frequently misinterpreted to include sediment basins, or other similar structures. This exemption applies only to the following:

- [a] device composed of a virtually nonerodible materials such as concrete, steel, plastic or other such materials that conveys water from one place to another by intercepting the flow and carrying it to a release point for storm-water management, drainage control, or flood control purposes.

O.C.G.A. § 12-7-3(7); The Manual for Erosion and Sediment Control of Georgia, 5th Edition (2000) ("The Green Book), Appendix D, Model Soil Erosion and Sedimentation Control Ordinance, at 3. This is a *very limited definition* that does not include anything that traps water or sediment. See Memorandum from Carol A. Couch to Local Issuing Authorities, June 14th 2004 (hereinafter "EPD Memo"). Thus, it does not provide for an exemption for sediment ponds, dams, etc. Id.



ENFORCEMENT

STATE BUFFER STATE 25 FOOT BUFFER REQUIREMENT CONT'D

Furthermore, even assuming that an erosion control measure meets this limited definition, the exemption applies only under narrow circumstances. Specifically, it applies only where the drainage structure *must* be constructed. Specifically, state law creates the exemption only:

where a drainage structure or a roadway drainage structure **must** be constructed, provided that adequate erosion control measures are incorporated in the project plans and specifications and are implemented.

O.C.G.A. § 12-7-6 (b)(15) (emphasis added). Inasmuch as the language is clear that the exemption only applies where the structure “must” be constructed, an initial determination must be made in this regard. If the goals can be achieved through a less invasive process, **then the exemption does not apply**. Second, it only applies where “adequate erosion control measures” are contained in the plans. And finally, those measures must be *implemented*. Thus, in practical terms, this means that any local government in approving plans, taking enforcement or otherwise fulfilling their duties, must ensure that all E&S requirements have been met. Of course, regardless of whether the exemption applies, the developer must obtain any other necessary permits from the Corp of Engineers or elsewhere as needed.

DEFINITION DEFINITION OF STATE AND FEDERAL WATERS

The Definition of State And Federal Waters is Broad

The most common mistake in interpretation of the law occurs with respect to waters of the state and waters of the U.S. The General Permit is a **federal** permit and, as such, it applies to all waters of the U.S. In addition, it incorporates state law and therefore also applies to “waters of the State.” Frequently, local officials rely on maps that delineate “blue line” streams or other similar designations. In other circumstances, local officials determine that drainage ditches are not regulated and thus not subject to buffer requirements and other requirements of the General Permit and the Clean Water Act. This interpretation of the law is incorrect. Drainage ditches are clearly regulated under the Clean Water Act and, as such, subject to both §§ 402 and 404. First, based solely on state law, it is clear that the State intended to include drainage ditches. Specifically, the General Assembly adopted a broad definition of states waters, incorporated into GAR 100003, that includes:

any and all rivers, streams, creeks, branches, lakes, reservoirs, ponds, **drainage systems**, springs, wells, wetlands, and all other bodies of surface or subsurface water, natural or artificial, lying within or forming a part of the boundaries of the states which are not entirely confined and retained completely upon the property of a single individual, partnership, or corporation.

GAR 100003 I.B. (52) (emphasis added). While drainage systems are not defined, common sense dictates that this definition would encompass drainage ditches. Regardless, a search of Georgia case law reveals that “ditches” are considered to be a



Keeping Watch Over Our Waters



ENFORCEMENT

ENFORCEMENT

DEFINITION OF STATE AND FEDERAL WATERS CONT'D

DEFINITION

part of "drainage systems." See e.g., City of Dublin v. Hobbs, 126 S.E.2d 655 (Ga. 1962); City of Macon v. Cannon, 79 S.E.2d 816 (Ga. App. 1954). As such, it is clear that drainage ditches are included. It is also significant to note that, within the definition of waters of the State, there is *no* distinction between intermittent, perennial or ephemeral waters.

Recently, EPD identified many of the common mistakes made in identifying state waters. EPD specifically stated that **the following factors are not to be considered in state water determinations:**

- **Whether a stream appears on a topographical map as a solid or dashed blue line (the presence of a blue line is an indication of state waters, but not all streams are mapped as blue lines);**
- **Whether the stream originates on the property;**
- **Whether a stream that originates on the property flows into another stream before it leaves the property;**
- **The amount of water in the stream at any given time, i.e. under normal conditions;**
- **The watershed area, unless a scientific correlation between wooded vegetation and watershed area has been made by the Issuing Authority; or**
- **The absence of observable aquatic life.**

EPD Memo, at 2. And again, remember that reliance upon a government official's determination that something is not a state water will not shield you from liability should that determination be made in error.

Regardless of the definition provided under state law, GAR 100003 is a federal permit and, as such, U.S. waters must be protected. Under federal law, waters of the U.S. are defined broadly. U.S. v. TGR Corp., 171 F.3d 762, 764(2nd Cir. 1999) (noting that the U.S. Supreme Court has explicitly recognized Congressional intent to define waters of the U.S. broadly). In fact, the Eleventh Circuit has recognized that Congress intended to regulate the discharge of pollutants "into all waters that may eventually lead to waters affecting interstate commerce." U.S. v. Eidson, 108 F.3d 1336, 1342 (11th Cir. 1997). Congress recognized that water moves in "hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." Id. (citing S.Rep. No. 92-313, at 77 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3742-43). As such, ditches that eventually lead to waters affecting interstate commerce are clearly waters of the U.S. for the purposes of the Clean Water Act. Id.; North Carolina Shellfish Growers Ass'n v. Holly Ridge Assoc., LLC, 278 F.Supp.2d 654, 672 (citing U.S. v. Deaton, 332 F.3d 698 (4th Cir. 2003)).

This broad definition is necessary if the Clean Water Act is to meet the Congressional goal of cleaning up our nations water ways. As recognized by the Eleventh Circuit, "[p]ollutants are equally harmful whether they travel only man-made or natural routes." Eidson, 108 F.3d at 1342.



ENFORCEMENT

DEFINITION

DEFINITION OF STATE AND FEDERAL WATERS CONT'D

It is also significant that U.S. waters include intermittent streams **and** ephemeral streams. Id. “Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage.” Id. In fact, the only issue is whether the tributary would flow into the navigable body of water “during significant rainfall.” Id.

State Waters Include Lakes, Ponds, Reservoirs and Marshes

State law provides that the 25 foot buffer be measured from the “stream banks.” O.C.G.A. § 12-7-6(16). In 1993, the Georgia Attorney General clarified that the use of “the term ‘stream banks’ merely directs where the measurement of the buffer shall begin” and “it cannot be said that use of the term ‘stream banks’ limits the subsequent language which sets forth to which waters the requirement applies.” 1993 Op. Atty. Gen. Ga. 17. He explained that “[w]hen the Act applies to less than all state waters, the General Assembly used language other than ‘state waters.’” Id. Based on this analysis, the Attorney General issued the official opinion of the State that “the 25 foot undisturbed natural vegetative buffer referenced in [the Act] is normally to be retained adjacent to any state waters, *including, but not limited to, ponds, lakes, reservoirs, and coastal marshes.*” Id. (emphasis added).

Whether a Water is “Navigable” is Irrelevant

Another common misperception is that the Clean Water Act applies only to navigable waters. While the text of the Act refers to “navigable waters,” it further defines this term to include “the waters of the United States, including the territorial seas.” 33 U.S.C. §1362(7) This phrase, in turn, has been interpreted very broadly to include waters “that would not be deemed navigable under the classical understanding of that term.” U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985); see also Eidson, 108 F.3d at 1341 (stating that “we can easily dispose of appellants’ contention that the drainage ditch was not a ‘navigable water’ solely because it was not navigable-in-fact.”).

The responsibility for administering and enforcing the CWA is shared by the Army Corps of Engineers and the EPA. Both the Army Corps and EPA enacted regulations that mirror the Code of Federal Regulations (CFR) definition of “Waters of the United States.” The CFR definition includes, among other things: all interstate waters and wetlands; all intrastate lakes, rivers, and streams the use, degradation, or destruction of which could affect interstate commerce; all waters from which fish or shellfish could be taken; any wetlands or tributaries adjacent to such waters. 40 C.F.R. § 122.2

Accordingly, the federal courts have consistently found that the CWA applies to non-navigable waters: “Indeed, the principle that Congress has the authority to regulate discharges into non-navigable tributaries in order to protect navigable waters has long been applied to the Clean Water Act...The [Army] Corps has pursued this goal by regulating non-navigable tributaries and their adjacent wetlands. This use of delegated authority is well within Congress’s traditional power over navigable waters.” U.S. v. Deaton, 332 F.3d 698 (4th Cir. 2003).



Keeping Watch Over Our Waters



ENFORCEMENT

ENFORCEMENT

DEFINITION OF STATE AND FEDERAL WATERS CONT'D

DEFINITION

Instream Sediment Basins Are Rarely (if ever) Allowed

Another common misperception is that sediment basins can and should be used. However, the U.S. EPA Region IV has stated that upland controls should be used instead of instream measures to treat stormwater. In fact, the United States Environmental Protection Agency (EPA) Region IV opposes:

the creation of stormwater treatment works in waters of the United States for the *express purpose of treating storm water discharges*, in lieu of requiring upland controls to reduce the discharge of pollutants. The Region also opposes the use of waters of the United States as conveyance for stormwater discharges that do not meet water quality standards.

Region IV Guidance for Reconciling Storm Water Management and Water Quality and Resource Protection Issues (6/23/04), at 5. Of course, Region IV recognizes that an “exceptional” circumstance may exist that precludes the use of upland controls. Id. Under these “exceptional” circumstances, Section 404(b)(1) must be satisfied. See also North Carolina Shellfish Growers Assoc. v. Holly Ridge Associates, LLC, 278 F.Supp.2d 654 (E.D.N.C. 2003) (holding that check dams and similar devices require a 404 permit). However, EPA will express objections to Section 404 permit applications that seek to impound waters to provide storm water management or conveyance in lieu of implementing required upland controls. Guidance, at 5. Moreover, the Clean Water Act does not allow for the discharge of fill materials (as would occur with a sediment pond:

[if] there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

40 C.F.R. § 230.10. And finally, **all** waters of the U.S. are subject to the Clean Water Act, including drainage ditches, ephemeral streams and so on. Thus, federal law rarely – if ever – provides for the placement of sediment basins in waters of the U.S.

Regardless, under **state** law, there are no exemptions for sediment ponds from the state buffer requirements as they do **not** qualify as drainage structures. EPD Memo, at 2. Regardless, that exemption is irrelevant because it is the State’s position that “[t]he use of in-stream ponds to intentionally trap sediment during land disturbing activity is in violation of this section of the Act [O.C.G.A. § 12-7-6(b)(14)] and is not allowed.” Id.



GET THE DIRT OUT

Erosion + Sediment Control

ENFORCEMENT

THANKS

SPECIAL THANKS TO

Sally Mason
The Community Foundation for Greater Atlanta
U.S. EPA, Region IV and Headquarters
The Turner Foundation
Georgia Civil Justice Foundation
Donahue Studios, Inc.
Newfields
Southwings

We thank our sponsors for supporting this important program. The purpose of this program is to educate citizens about environmental laws and regulations. In doing so, neither UCR nor GCLPI advocate any particular position and the support for this program is intended solely to educate citizens of Georgia in the law and the process for participation by citizens in the legal process. ☺



Keeping Watch Over Our Waters

