IN THE SUPERIOR COURT OF FORSYTH COUNTY
STATE OF GEORGIA

FORSYTH COUNTY, GEORGIA, Petitioner, v. UPPER CHATTAHOOCHEE RIVERKEEPER, INC., Respondent.	CIVIL ACTION FILE NO.: 11CV-1284
F. ALLEN BARNES, Director of the Georgia Environmental Protection Division, Petitioner, v. UPPER CHATTAHOOCHEE RIVERKEEPER, INC., Respondent.	CIVIL ACTION FILE NO.: 11CV-1312

FORSYTH COUNTY GEORGIA
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CLERK SUPERIOR COURT

ORDER

The above-styled actions came before the Court on September 8, 2011 for consolidated oral argument as to Forsyth County's and the Director of the Georgia Environmental Protection Division's ("EPD") *Petitions for Judicial Review*. The Court, having considered arguments of counsel, briefs filed in support of, and in opposition to, the determinations made by Kristin L. Miller, Administrative Law Judge ("ALJ"), the Court ORDERS as follows:

This matter is before the court on Petitioners' challenge to the revisions made by the ALJ to a previously issued wastewater treatment plant discharge permit, NPDES permit No. GA0038954 (the "Permit"), by the Director of EPD to Forsyth County. The Permit authorizes Forsyth County to expand wastewater discharge from the Fowler plant and authorizes, for the first time, discharge from the newly constructed Shakerag plant. The two plants are expected to discharge their combined wastewater, from a single point source, into the Chattahoochee River.

Specifically, Forsyth County and the EPD seek judicial review of the ALJ's *Order on Motions for Summary Determination* dated December 8, 2010, and *Final Decision* dated June 1, 2011. The Petitioners claim that reversal is warranted because the ALJ: (1) exceeded her authority and committed legal error rejecting EPD's interpretation of Georgia's anti-degradation rule as documented in the Official Implementing Procedures on file with the U.S. EPA; (2) applied an incorrect legal standard in determining whether the Chattahoochee River discharge will "degrade" water quality; (3) exceeded her authority and committed error by adopting a new legal standard of "economic feasibility" as the bases for the establishment of effluent limitations; (4) incorrectly concluded that the "upset defense" is available to Forsyth County; and (5) exceeded her authority by ordering the Director of EPD to make specific revisions to the subject discharge permit. The Court will address each claim of error, in turn, as may be necessary.

PROCEDURAL POSTURE

A. Forsyth County, Georgia v. Upper Chattahoochee Riverkeeper, Inc., et al., Civil Action File No.: 11CV-1284

EPD issued the Permit under the National Pollutant Discharge Elimination System ("NPDES"), to Forsyth County on August 18, 2010. The Permit authorized Forsyth County to discharge up to six million gallons per day[1] of treated wastewater into the Chattahoochee River from Forsyth County's Fowler and Shakerag Wastewater Reclamation facilities. As issued by the EPD, the Permit established limits of 200 colony-forming units per 100 milliliters ("cfu/100mL") and 0.3 milligrams per liter ("mg/L") for fecal coliform bacteria and phosphorous, respectively. Concerned with the potential for water quality degradation in the Chattahoochee River as a consequence of the establishments of these discharge levels, Upper Chattahoochee River Keeper, Inc. ("UCR") filed a six-count *Petition for Hearing* with the Office of State Administrative Hearings on or about September 22, 2010. See *Upper Chattahoochee Riverkeeper, Inc. v. F. Allen Barnes, et al. (OSAH-BNR-WQC-1107476-60-Miller).* In that action, UCR asserted that the issuance of the Permit to Forsyth County was improper and should be reversed. In support of this position UCR principally argued that: (a) Forsyth County failed to perform an anti-degradation analysis as otherwise required by DNR Rules 391-3-6-.03(2)(b)(ii) and 40 CFR § 131.12(a); (b) EPD failed to find that degradation of water quality was necessary to accommodate important economic or social development pursuant to DNR Rule 391-3-6-.03(2)(b)(ii) and 40 CFR § 131.12(a); (c)EPD failed to assure that the highest statutory and regulatory requirements for all now and existing point sources would be

[1] This six million gallons maximum-authorized discharge limit is comprised of 2.25 million gallons of discharge, per day, from the Fowler facility and an additional 3.75 million gallons of discharge, per day, from the Shakerag facility.

achieved; (d) that the Permit violated the federal Clean Water Act's anti-backsliding prohibition in that the newly issued permit failed to achieve the same water quality standards of prior permits; (e) that the Permit will allow fecal coliform level which will reduce and impair the Chattahoochee River's recreational uses; and (f) the issuance of the Permit was arbitrary and capricious.

Both UCR and Forsyth County filed *Motions for Summary Determination.* The ALJ denied UCR's motion in its entirety. The ALJ granted Forsyth County's *Motion for Summary Determination* as to all counts except count two which concerned UCR's claim that EPD failed to find that degradation of water quality was necessary to accommodate important economic or social development pursuant to DNR Rule 391-3-6-.03(2)(b)(ii) and 40 CFR § 131.12(a). Upon consideration of the one remaining claim, the ALJ issued her *Final Decision* on June 1, 2011, which remanded the NPDES Permit to the Director of EPD for reissuance with revised monthly average discharge limits of 23 cfu/100mL for fecal coliform bacteria and 0.08 mg/L for total phosphorous.

Dissatisfied with the ALJ's *Final Decision*, Forsyth County filed its *Petition for Review* with this Court on June 28, 2011, pursuant to O.C.G.A. §§ 50-13-19(b), 50-13-20.1, and 12-2-1(d).

B. <u>F. Allen Barnes, Director of Environmental Protection Division of the Department of Natural Resources of the State of Georgia v. Upper Chattahoochee Riverkeeper, Inc., Civil Action File No.: 11CV-1312</u>

Though filed as a separate *Petition for Judicial Review*, this proceeding appears to be identical to the one filed by Forsyth County in Superior Court *Civil Action File No.: 11CV-1284.* In the administrative proceedings below the Director of EPD was

the named Respondent to UCR's *Petition for Hearing* and Forsyth County intervened. Both the Director of EPD and Forsyth County sought judicial review by this Court. Forsyth County sought judicial review, first, even though it was an intervenor in the administrative proceeding below. The Court will address the two *Petitions for Judicial Review* simultaneously as they effectively assert the same claims of error.

ALJ'S FACTUAL FINDINGS AND CONCLUSIONS OF LAW

A. Order on Motions for Summary Determination

The ALJ denied UCR's *Motion for Summary Determination* in all respects. The ALJ, however, granted Forsyth County's *Motion for Summary Determination* as to counts 1, 3, 4, 5, and 6 of UCR's *Petition for Hearing*. Therefore, the only count to which Forsyth County's *Motion for Summary Determination* was not granted was count two. That count of the *Petition for Hearing* concerns UCR's claim that EPD failed to find that degradation of water quality was necessary to accommodate important economic or social development pursuant to DNR Rule 391-3-6-.03(2)(b)(ii) and 40 CFR § 131.12(a). The ALJ concluded in her order on Forsyth County's *Motion for Summary Determination* that,

> as part of [EPD's] antidegradation review, [EPD] was required to assess whether the level of pollutants in the permitted discharge would result in degradation of the receiving water, and if so, whether such degradation was `necessary to accommodate important economic and social development [pursuant to] DNR Rule 391-3-6-.03(2)(b)(ii) [and] 40 C.F.R. § 131.12(a)(2). Since EPD considered only whether a new or expanded discharge was necessary and not whether and to what degree a degradation of water quality was necessary, a genuine issue of material fact remains for determination as to Count II.

The ALJ painstakingly walked the litigants through her detailed analysis. The ALJ defined the meaning of the phrase "lower water quality" as used in the Georgia antidegradation rule (Ga. Comp. R. & Regs. R. 391-3-6-.03(2)(b)(ii)). The ALJ concluded that "lower water quality" in the DNR rule is "understood to mean a degradation of the quality of the receiving water, *as measured by the levels of pollutants*, in the area of the discharge." (Emphasis supplied). Based upon this conclusion, the ALJ determined that EPD "improperly defined 'lower water quality' to mean a new or expanded discharge." That is, a lower water quality determination requires a comparison between the existing ambient river quality with the expected impact of expected pollutant levels in the proposed discharge. The ALJ considered EPA guidance documents in reaching this conclusion.[2] Having made this determination, the ALJ then considered whether lower water quality is necessary to accommodate important economic and social development pursuant to EPD's tier-2 implementation procedures. Tier-2 analysis for publicly owned systems provides, in relevant part, that:

> The applicant for a new or expanded (increase in loading) surface water discharge from a publicly owned sewerage system must demonstrate that the proposed new facility or expansion is [1] necessary for [(a)] social or [(b)] economic development and [2] prepare an acceptable alternative analysis comparing the proposed discharge alternative with an equivalently sized "no discharge" alternative such as slow rate land application (LAS) and/or urban reuse system.

[2] For example, the ALJ considered EPA's Water Quality Standards Handbook: Second Edition § 4.5 (EPA 823-B-94-005, Aug. 1994) and EPA memorandum.

> [3] The EPD will not approve the proposed discharge unless the alternative analysis indicates that the LAS or other "no discharge alternatives" are not economically and/or technically feasible. The EPD will make a determination regarding the feasibility of alternatives analysis, but may be supplemented with other information or date. Feasibility decisions will be based on best professional judgment and economic guidance for water quality standards provided by the U.S. Environmental Protection Agency. . . .

State of Georgia Antidegradation Implementation Procedures, Part IV, Sect. 1(b). In applying the tier-2 analysis the ALJ focused on the only contested element of the overall tier-2 scheme: the no-discharge feasibility analysis. The ALJ specifically concluded that:

> [b]ased on [EPA] . . . guidance . . ., and the absence of any guidance from EPD . . . a necessity determination requires an analysis of both the technical and economic feasibility of alternative levels of treatment, *in addition to* an analysis of no-discharge permit alternatives." (Emphasis supplied).

Because the ALJ found that the EPD's antidegradation review failed to undertake this complete enhanced analysis, the ALJ found that the requirements of the Georgia antidegradation rule were not satisfied. The ALJ accordingly denied the *Motion for Summary Disposition* on this issue as a genuine issue of material fact remained as to whether the permit levels represented a necessary degradation of water quality based on an analysis of technical and economic feasibility or alternative treatment levels.

B. Final Decision

Relying on her prior findings and conclusions contained in the order on *Motions for Summary Determination*, as noted above, the ALJ addressed Count 2, the only

remaining claim, during the final evidentiary hearing: whether the permitted discharge levels for fecal coliform bacteria and phosphorous represented a *necessary* degradation of water quality based on an analysis of technical and economic feasibility or alternative treatment levels. The ALJ's analysis separately addresses fecal coliform bacteria and phosphorous discharge limits.

At the outset, the ALJ rejected Forsyth County's and EPD's position that antidegradation review is not required unless a proposed discharge limit will *significantly* degrade the water quality in the receiving water. The ALJ declined to read into the text of the Georgia antidegradation rule (391-3-6-.03) or EPD's implementation procedures such "significance" element. Therefore, the ALJ concluded that ***any*** lowering of water quality in the receiving water would trigger an antidegradation review. [*Final Decision* at p. 28]

As to fecal coliform bacteria, the ALJ found that UCR requested a permit discharge level for fecal coliform bacteria not in excess of 2 cfu/100mL. The permit authorized a discharge limit of 200 cfu/100mL. The existing background level of fecal coliform bacteria was found to be 53 cfu/100mL. Despite finding that the 200 cfu/100mL limit was identical to the DNR rule for "recreational waters," the ALJ concluded that the plant potentials could technically and economically support a discharge limit not to exceed 23 cfu/100mL which would effectively place the discharge limits well below even the already-existing fecal coliform background levels shown to exist at that time. For purposes of judicial economy, the ALJ ultimately concluded that rather than remanding the matter to EPD for further antidegradation review, the

ALJ would herself revise the permit and set specific discharge limits as to fecal coliform bacteria . The ALJ set the new fecal coliform bacteria level at 23 cfu/100mL. [*Final Order* at p. 29; *Order on Motions for Summary Determination* at p. 22]

As to the phosphorous levels, the ALJ found the permitted discharge level to be 0.3 mg/L. The ALJ found that phosphorous discharge at this level would also degrade the ambient water quality of the receiving water. UCR requested the ALJ to set the permit level for phosphorous at 0.08 mg/L. The ALJ conducted a tier-2 anti-degradation review. Having conducted the tier-2 review, the ALJ found that it was technically feasible for the Fowler and Shakerag facilities to meet a 0.08 mg/L discharge level. But to achieve this discharge level, these plants would be required to augment the treatment of their discharge with chemicals. Moreover, the ALJ found that the cost of chemical augmentation would not render phosphorous discharge levels of 0.08 mg/L economically infeasible.

Dissatisfied with the rulings made by the ALJ, Forsyth County and the Director of EPD now seek judicial review in this Court.

ANALYSIS OF CLAIMS ON APPEAL TO SUPERIOR COURT

When considering a *Petition for Judicial Review* arising from the decision of an ALJ the Superior Court applies the any evidence standard to findings of facts. Gwinnett County v. Lake Lanier Ass'n, 265 Ga. App. 214, 218 (2004). The reviewing court must construe the evidence in favor of the decision rendered by the ALJ. Id. This standard of review prevents a *de novo* determination of evidentiary questions. With respect to conclusions of law, the Superior Court applies a *de novo* standard of

review. Further, the reviewing court when considering an administrative appeal on a petition for judicial review is limited to those issues raised in the administrative proceedings below preserved for judicial review and cannot consider issues raised for the first time on judicial review. Id. at 223.

Under the Georgia Water Quality Control Act, O.C.G.A. § 12-5-20 et seq., and the federal Clean Water Act, 33 USC § 1251 et seq., discharge of a pollutant from a point source into waters of Georgia is prohibited when not in compliance and accordance with a NPDES permit. O.C.G.A. § 12-5-30; 33 USC §§ 1311(a).

The Petitioners claim that the ALJ exceeded her authority by rejecting EPD's interpretation of Georgia's anti-degradation rule as documented in the official implementation procedures on file with the U.S. EPA. In support of this claim the Petitioners argue that (a) the feasibility standard created by the ALJ is not required by the Georgia anti-degradation rule; (b) that not only did the ALJ exceed her authority but also usurped the authority of the DNR Board by reinstating a standard previously rejected by the DNR Board; (c) the ALJ improperly concluded the existing Georgia anti-degradation program does not meet minimum federal requirements; and (d) the "new" standard imposed by the ALJ supersedes and negates many other U.S. EPA standards.

In effect, Petitioners argue that the ALJ expanded the focus of the tier-2 antidegradation implementation procedure from a determination of whether or not to allow a new or expanded discharge into a determination focused on the necessity of setting effluent limits at a specific or particular level. That is, the Petitioners take

issue with the level of granularity through which the ALJ focused her review. The relevant DNR rule provides as follows:

> Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the division finds . . . that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. . . .

DNR 391-3-6-.03(2)(b)(ii). The Georgia Department of Natural Resources, through the Water Protection Brach of the EPD, has developed antidegradation implementation procedures. The implementation procedures provide guidance to the EPD in the EPD's implementation of the rules. The parties agree that the Chattahoochee River qualifies as a "high quality" waterbody. Part IV(B) of the implementation procedures applies to "new or expanded point sources." Because the subject point sources are "publicly owned domestic systems," Part IV(B)(1)(b) of the implementation procedures applies, e.g., a tier-2 analysis. A proper tier-2 antidegradation implementation analysis for publicly owned domestic systems involves the following steps of analysis when a permit applicant seeks issuance of a permit for a new facility or increased discharge:

<u>Step 1</u>

Show that the new facility or increased discharge is *necessary* for: (a) social; or (b) economic development;

-AND-

Conduct an *alternative analysis* comparing: (a) proposed discharge alternative with/to (b) an equivalent sized "no discharge" alternative.

Step 2

Based upon the results from Step 1, EPD should not approve or issue the permit unless: the *alternative analysis* indicates that the no discharge alternative is *not* (a) economically feasible and/or (b) technically feasible.

As stated in the implementation procedure, "[t]he antidegradation review process is triggered at such time as a new or expanded point sources is proposed for discharge to surface waters. . . . [And] [t]he application for discharge to surface waters will only be considered if the *additional wastewater capacity* has socio-economic justification and the less degrading alternatives are determined to be economically or technically feasible." (Emphasis supplied). The parties are at loggerheads with respect to the meaning and application of the regulation and implementing procedure.

Petitioners urge this Court to interpret the rule to say that "allowing [the discharge] is necessary to accommodate important economic or social development." Comparatively, UCR urges this Court to interpret the rule to focus on the necessity of the degradation of the water quality and not the necessity of the expansion in discharge capacity. Telling to UCR's argument, however, is UCR's application of the above-listed implementing procedure. UCR argues that the feasibility analysis

requires an analysis of the economic and technical feasibility of *alternative treatment levels* (i.e., permit discharge levels) as compared to a feasibility study concerning the *no-discharge alternative.*

Having carefully examined the regulations and implementing procedures, the Court finds that the focus of the antidegradation review and its feasibility analysis is targeted to the capacity of the additional wastewater, as a whole, and does not focus on the particular limits of certain chemicals or organisms in the additional wastewater. To make a determination as to necessity under Reg. 391-3-6-.03 ("allowing lower water quality is *necessary*") a feasibility analysis must be conducted under the state's implementing procedure. The ALJ, however, interpreted this implementation procedure in the same manner as UCR. The ALJ found the implementing procedure to be "insufficient" to actually protect the receiving water's quality and engrafted EPA recommendations into it. The ALJ cited to a June 17, 2005 letter from the Director of EPA Region 4, James D. Giattina. In that letter, Giattina stated that "EPA *recommends* a thorough evaluation of available alternatives to avoid a lowering of water quality." (Emphasis supplied). Giattina cited to the EPA's 1998 Advance Notice of Proposed Rulemaking to support his recommendation. The ALJ understood the EPA letter and proposed rule to mean that the necessity determination contained in the state regulation requires an analysis of not only the technical and economic feasibility of no-discharge alternatives but also technical and economic feasibility of alternative treatment levels (i.e., permit discharge levels). The effect of the ALJ's actions resulted in an *enhanced* antidegradation review.

Applying this enhanced antidegradation review, the ALJ determined that the tier-2 analysis also required "an additional analysis of *alternative treatment levels* applied to the permitted discharge" to "show that lower water quality resulting from the permitted discharge is actually necessary" under the lens of a the economic and technical feasibility analysis. (Emphasis supplied). The ALJ's additional requirement is not a part of the implementation procedure. Nowhere in the tier-2 implementation procedure is the applicant for a new facility and/or increased discharge permit required to make a showing that alternative treatment permit *levels*, to improve the water quality, are economically or technically feasible. All that is required is a comparison of the proposed new/increased discharge to a no-discharge alternative and if the no-discharge alternative is technically or economically feasible then it should be pursued by the applicant instead of the new/additional discharge alternative. It is through this extra step that the ALJ reaches the level of granularity to balance the particular effluent limits to social or economic necessity - - and this Court finds that to have been improper as a matter of law.

The ALJ exceeded the scope of her authority. When the EPD receives a petition for hearing EPD must forward it to OSAH for assignment to an ALJ. O.C.G.A. § 50-13-41(a)(1); Ga. Comp. R. & Regs. 391-1-2-.06 and 616-1-2-.03. The ALJ has exclusive jurisdiction to review contested cases relating to EPD actions. O.C.G.A. § 50-13-41. The ALJ's decision is considered the final decision of the Board of Natural Resources without further agency action, O.C.G.A. § 12-1-2(b), even though OSAH is independent of state administrative agencies. O.C.G.A. § 50-13-40(a). The ALJ may

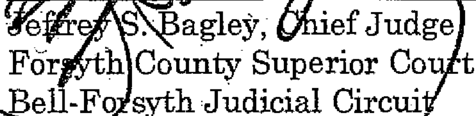
make any disposition of the matter as is available to the Board of Natural Resources of the Department of Natural Resources. The ALJ could not set the discharge limits by essentially applying an enhanced antidegradation review based upon EPA recommendations which were never codified and approved as a federal or state regulation following notice and comment.

The ALJ erred by ordering the director of EPD to revise the discharge permit. The Board of Natural Resources sets the *general* policies, rules and regulations to govern the work of the Department of Natural Resources and the duties of its employees. O.C.G.A. § 12-2-24. The Board of Natural Resources has not promulgated rules with respect to specific effluent limits for phosphorous or fecal coliform bacteria. The Board of Natural Resources is not authorized to set specific effluent limits. That is the sole function of the Director of EPD. See O.C.G.A. §§ 12-5-30(a) - (c). With that in mind, it is important to note that the ALJ only has the power of the referring agency. The "referring agency" in this instance is the Board of Natural Resources. Thus, the ALJ cannot, as a matter of law, set specific effluent limits.

Even if the Court were to find that the ALJ had the power to set specific effluent limits, a permit applicant has a vested right to consideration of the application on the basis of the law as it exists at the time of the filing of the application. See, e.g., Recycle & Recover, Inc. v. Georgia Bd. of Natural Resources, 266 Ga. 253 (1996). Thus, even if the Board of Natural Resources had the authority to, and decided to, set specific limitations, the Board of Natural Resources may not apply a new law or regulation retroactively. Likewise, the ALJ, reviewing the

propriety of the issuance of a discharge permit, cannot, mid-stream, apply new rules to the permit application as those rules have not been subjected to public comment and debate. See O.C.G.A. §§ 50-13-3(b) and 50-13-4. Thus, under the most liberal reading of the laws and regulations, the ALJ exceeded her authority as a matter of law. The Court therefore **GRANTS** the *Petitions for Judicial Review*, and pursuant to O.C.G.A. § 50-13-19(h), hereby **REVERSES** the June 1, 2011 *Final Decision* of the ALJ and **REMANDS** the matter to the ALJ for further proceedings. The ALJ, on remand, shall apply the antidegradation review standard as codified in EPD's implementing procedures without reference to, or consideration of, the EPA guidance documents or application of an enhanced antidegradation review, and the ALJ shall further comply with all the other directives of the Court included in this Order.

IT IS SO ORDERED, this 30th day of September, 2011.



Jeffrey S. Bagley, Chief Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

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