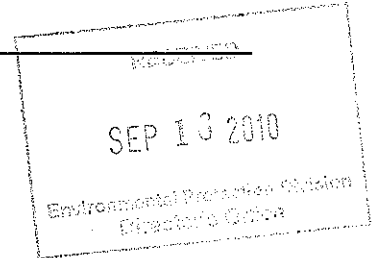


**IN THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

UPPER CHATTAHOOCHEE)
RIVERKEEPER, INC.)
)
Petitioner,)
)
v.)
)
ENVIRONMENTAL PROTECTION)
DIVISION, GEORGIA DEPARTMENT)
OF NATURAL RESOURCES,)
)
Respondent.)

CASE NO. _____



**PETITION FOR HEARING TO APPEAL AND
INVALIDATE NPDES PERMIT NO. GA0038954**

INTRODUCTION

1.

This petition challenges the issuance by the Georgia Environmental Protection Division (“EPD”) of Permit No. GA0038954 (“the Permit” or “the Fowler/Shakerag Permit”) on August 18, 2010. (A true and correct copy of the Permit is attached hereto as Exhibit “A”). The Permit authorizes Forsyth County to discharge 6 million gallons per day (MGD) of wastewater to the Chattahoochee River from Forsyth County’s Fowler and Shakerag facilities. Such discharge will occur directly into the Chattahoochee River National Recreation Area, which is utilized by thousands of individuals each year for fishing, kayaking and other water-contact based sports and recreation. The Permit threatens the present and future health of the Chattahoochee River without proper study, modeling, and analysis and in direct violation of federal and state law.

2.

The Petitioner opposes the Permit because it violates provisions of the federal Clean Water Act (“CWA”), 33 U.S.C. § 1251 et seq., and implementing regulations, the Georgia Water

Quality Control Act (“GWCA”), §§ 12-5-20 et seq., and the Rules of the Georgia Department of Natural Resources (“DNR”).

STATEMENT OF JURISDICTION/INTERESTS OF PETITIONER

3.

This action is brought pursuant to O.C.G.A. § 12-2-2(c)(2) and 12-5-43, and DNR Rule 391-1-3-.02(1), authorizing any person who is aggrieved or adversely affected by any order or action of the Director of EPD (“Director”), including the issuance of a permit by the Director, to obtain a review of the Director’s order or action.

4.

This action stays the effectiveness of the Permit pursuant to DNR Rule 391-1-2-.07 and O.C.G.A. § 12-2-2(c)(2)(B).

5.

Petitioner Upper Chattahoochee Riverkeeper, Inc. (“UCR”) is a nonprofit corporation organized under the laws of the State of Georgia with over 4,800 members, its primary office in Atlanta, Georgia, and an additional office in Gainesville, Georgia. UCR’s mission is to advocate and secure the protection and stewardship of the Chattahoochee River and its tributaries and watershed, in order to restore and conserve their ecological health for the people, fish and wildlife that depend on the river system. The Permit authorizes Forsyth County to discharge 6 MGD of wastewater into the Chattahoochee River and UCR’s members recreate in, on, and near the area of the proposed discharge. The quality of the Chattahoochee River affects the recreational, aesthetic and environmental interests of UCR’s members. The interests of UCR’s members have been, are being, and will be adversely affected by the Permit because pollutants discharged into the Chattahoochee River pursuant to the Permit will degrade the Chattahoochee

River's water quality, injure and destroy aquatic life in the Chattahoochee River enjoyed by UCR's members, and harm the aesthetic enjoyment of these waters by UCR's members.

REGULATORY STRUCTURE AND BACKGROUND

6.

In 1972, Congress passed the CWA, 33 U.S.C. §§ 1251 et seq., "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). In order to achieve this objective, § 301 of the CWA prohibits the discharge of any pollutants into "waters of the United States" except in accordance with standards promulgated and permits issued under other sections of the CWA. 33 U.S.C. §§ 1311(a) and 1311(b)(1)(C). Pursuant to § 303(c) of the CWA, "[s]uch standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter." 33 U.S.C. § 1313(c)(2)(a). The antidegradation policy of the CWA has been adopted in both federal and state regulations which require that existing uses of state waters and the level of water quality necessary to protect those uses must be enhanced, "maintained and protected." 40 C.F.R. § 131.12(a); DNR Rule 391-3-6-.03(2) (providing that "[t]he purposes and intent of the State in establishing Water Quality Standards are to provide enhancement of water quality and prevention of pollution").

7.

The Administrator of the EPA is charged with the overall administration of the CWA. Section 402 of the CWA authorizes the EPA to issue permits for the discharge of pollutants into waters of the United States when certain conditions are met. 33 U.S.C. § 1342. This permitting authority has been delegated to the Georgia EPD pursuant to § 402 of the Act. 33 U.S.C. § 1342. Upon delegation, the EPA and EPD entered into a Memorandum of Agreement setting out the requirements for the State's regulatory authority under the CWA.

8.

The Georgia EPD now issues NPDES permits to qualifying persons under state law authority granted by the Georgia Water Quality Control Act (“GWQCA”), §§ 12-5-21, et seq., specifically, O.C.G.A. § 12-5-30. In 1964, the Georgia General Assembly enacted the GWQCA, Ga. L. 1964, p. 416, in order to “restore and maintain a reasonable degree of purity in the waters of the State, and to require where necessary, reasonable treatment of sewage, industrial wastes, and other wastes prior to their discharge into the waters of the State.” (*Id.* at 417.)

LEGAL AND FACTUAL ISSUES PRESENTED

Count I – The Permit Is Invalid Because Forsyth County Failed to Perform an Antidegradation Analysis in Violation of the State and Federal Antidegradation Regulations

9.

Petitioner incorporates Paragraphs 1-8 as specifically set forth herein.

10.

The Permit is invalid because it violates the State and federal antidegradation regulations. DNR Rules 391-3-6-.03(2)(a)-(b); 40 C.F.R. § 131.12(a) (incorporated into State law by DNR Rule 391-3-6-.03(2)(b)).

11.

The State of Georgia’s antidegradation regulation provides in pertinent part:

- (a) The purpose and intent of the State in establishing Water Quality Standards are to provide enhancement of water quality and prevention of pollution; to protect the public health or welfare in accordance with the public interest for drinking water supplies, conservation of fish, wildlife and other beneficial aquatic life, and agricultural, industrial, recreational, and other reasonable and necessary uses and to maintain and improve the biological integrity of the waters of the State.

- ...
- (b)(ii) 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, after full satisfaction of the intergovernmental coordination and public participation provisions of the division's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the division shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

DNR Rules 391-3-6-.03(2)(a)- (b).

12.

The section of the Chattahoochee River into which the Permit authorizes Forsyth County to discharge wastewater is a high quality water with existing water quality better than the minimum levels established in the State of Georgia's water quality standards.

13.

The discharge authorized by the Permit will degrade the water quality in the area of the discharge into the Chattahoochee River because the ambient water quality of the River is better than the quality of the permitted discharge. For example, the discharge of wastewater authorized by the Permit will increase the levels of phosphorus and fecal coliform in the River. The increased phosphorus levels will adversely impact aquatic organisms in the Chattahoochee River.

14.

Despite the degradation of water quality that would result from the discharge of wastewater authorized by the Permit, EPD failed to require Forsyth County to perform an antidegradation analysis as required by DNR Rules 391-3-6-.03(2)(b)(ii) and thus the Permit was

issued in violation of such Rule and the federal antidegradation rule, 40 C.F.R. § 131.12(a), and is therefore unlawful.

15.

Accordingly, the Permit should be invalidated and remanded to EPD with instructions to revise the Permit such that (1) the monthly average limit for total phosphorus is lowered to .08 mg/l, (2) the monthly average limit for fecal coliform is lowered to 2 cfu per 100 ml, (3) a condition is included in the Permit requiring Forsyth County to perform a full and complete antidegradation analysis before constructing the facility, and a review of the analysis by EPD to determine whether the discharge authorized by the Permit will degrade water quality of the receiving water, with authorization to construct the facility contingent on a finding by EPD that the discharge will not degrade the water quality of the receiving water, and (4) a condition is included in the Permit requiring Forsyth County to perform a full and complete antidegradation analysis prior to each expansion of the discharge to 3.0 MGD, 4.5 MGD, and 6.0 MGD, with each expansion of the discharge contingent on a finding by EPD that the expanded discharge will not degrade the water quality of the receiving water.

Count II – The Permit Is Invalid Because EPD Did Not and Cannot Find That the Degradation in Water Quality Authorized by the Permit Is Necessary to Accommodate Important Economic or Social Development

16.

Petitioner incorporates Paragraphs 1-15 as specifically set forth herein.

17.

Pursuant to the State and federal antidegradation rules, water quality must be maintained and protected unless EPD “finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the division’s continuing planning process, that *allowing lower*

water quality is necessary to accommodate important economic or social development in the area in which the waters are located.” DNR Rules 391-3-6-.03(2)(b)(ii) (emphasis added); see also 40 C.F.R. § 131.12(a).

18.

EPD failed to find that the lowering of water quality allowed by the Permit is necessary to accommodate important economic or social development in the area in which the Chattahoochee River is located. In addition, EPD cannot make any such finding because the Fowler and Shakerag facilities are capable of removing more pollutants than the Permit requires and thus the degradation of water quality authorized by the Permit is not necessary to accommodate important economic or social development.

19.

Accordingly, the Permit violates the State and federal antidegradation regulations and is unlawful. The Permit should be invalidated and remanded to EPD with instructions to revise the Permit such that (1) the monthly average limit for total phosphorus is lowered to .08 mg/l, (2) the monthly average limit for fecal coliform is lowered to 2 cfu per 100 ml, (3) a condition is included in the Permit requiring Forsyth County to perform a full and complete antidegradation analysis before constructing the facility, and a review of the analysis by EPD to determine whether the discharge authorized by the Permit will degrade water quality of the receiving water, with authorization to construct the facility contingent on a finding by EPD that the discharge will not degrade the water quality of the receiving water, and (4) a condition is included in the Permit requiring Forsyth County to perform a full and complete antidegradation analysis prior to each expansion of the discharge to 3.0 MGD, 4.5 MGD, and 6.0 MGD, with each expansion of the

discharge contingent on a finding by EPD that the expanded discharge will not degrade the water quality of the receiving water.

Count III – The Permit Is Invalid Because EPD Has Failed to Assure That There Shall Be Achieved the Highest Statutory and Regulatory Requirements for All New and Existing Point Sources

20.

Petitioner incorporates Paragraphs 1-19 as specifically set forth herein.

21.

As explained above, the State and federal antidegradation rules require EPD to “assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources.” DNR Rule 391-3-6-.03(2)(b)(ii); 40 C.F.R. § 131.12(a)

22.

The Fowler/Shakerag Permit contains monthly average limits for Forsyth County’s discharge of pollutants into the Chattahoochee River. Specifically, it contains a monthly average limit for phosphorus of 0.3 milligrams per litre (“mg/L”). Phosphorus is a nutrient that when discharged in wastewater into a waterbody can cause, among other things, algal blooms, the reduction of oxygen necessary to support fish and aquatic organisms, the stimulation of harmful microbial growth in water, and can cause toxic and other adverse impacts to fish and aquatic organisms.

23.

The Permit also contains a monthly average limit for fecal coliform of 200 colony forming units (“cfu”) per 100 ml. Fecal coliform is an “indicator bacteria” indicating the presence of fecal contamination (*i.e.*, human or animal waste) containing microbiological organisms such as pathogenic bacteria, viruses, and protozoa that cause illnesses in humans. The

draft Environmental Information Document for Forsyth County's Fowler/Shakerag facilities expressly provides that the design discharge limits "would result in the discharge meeting the urban reuse criterion of 23 colonies/100 ml or less of fecal coliform bacteria" (DEID at p. 3-4), however, the Permit's 200 cfu per 100 ml limit is almost ten times *less* stringent than the design criteria.

24.

Permits issued by EPD for numerous other facilities in the Upper Chattahoochee River Basin contain pollutant limits for phosphorus and fecal coliform that are significantly *more stringent* than the limits in the Fowler/Shakerag permit. For example, NPDES Permit No. GA0038130 authorizing Gwinnett County to discharge into Lake Lanier contains monthly average limits of 0.08 mg/l for phosphorus and 2 cfu per 100 ml for fecal coliform; NPDES Permit No. GA0038440 authorizing the Cauley Creek Water Reclamation facility to discharge into Cauley Creek, a tributary to the Chattahoochee River, contains monthly average limits of 0.13 mg/l for phosphorus and 23 cfu per 100 ml for fecal coliform and the Cauley Creek facility uses the same membrane treatment technology to be utilized by the Fowler and Shakerag facilities; and NPDES Permit No. GA0021156 authorizing the City of Gainesville to discharge into Flat Creek contains monthly average limits of 0.13 mg/l for phosphorus and 23 cfu per 100 ml for fecal coliform.

25.

Accordingly, EPD has violated the State and federal antidegradation regulations by failing to assure that the highest statutory and regulatory requirements are achieved, and Fowler/Shakerag Permit is therefore unlawful. The Permit should be invalidated and remanded to EPD with instructions to revise the Permit such that (1) the monthly average limit for total

phosphorus is lowered to .08 mg/l, (2) the monthly average limit for fecal coliform is lowered to 2 cfu per 100 ml, (3) a condition is included in the Permit requiring Forsyth County to perform a full and complete antidegradation analysis before constructing the facility, and a review of the analysis by EPD to determine whether the discharge authorized by the Permit will degrade water quality of the receiving water, with authorization to construct the facility contingent on a finding by EPD that the discharge will not degrade the water quality of the receiving water, and (4) a condition is included in the Permit requiring Forsyth County to perform a full and complete antidegradation analysis prior to each expansion of the discharge to 3.0 MGD, 4.5 MGD, and 6.0 MGD, with each expansion of the discharge contingent on a finding by EPD that the expanded discharge will not degrade the water quality of the receiving water.

Count IV—The Permit Violates the Clean Water Act’s Anti-Backsliding Prohibition

26.

Petitioner incorporates Paragraphs 1-25 as specifically set forth herein.

27.

The Clean Water Act’s “anti-backsliding” prohibition provides that “a permit may not be renewed, reissued, or modified . . . to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.” 33 U.S.C. § 1342(o) (emphasis added); see also 40 C.F.R. § 122.44(l). The Clean Water Act’s anti-backsliding prohibition and the federal anti-backsliding regulation are incorporated into Georgia law by DNR Rules 391-3-6-.06(4)(b) and (8)(c).

28.

Currently, Forsyth County’s Fowler facility operates under NPDES Permit No. GA0038695 which was issued on December 10, 2007 and authorizes a cold weather discharge

from the facility to Big Creek, a tributary of the Chattahoochee River. Permit No. GA0038695 contains a monthly average discharge limit for phosphorus of 0.13 mg/l and a monthly average discharge limit for fecal coliform of 23 cfu per 10 ml.

29.

As explained above, Permit No. GA0038954 for the combined Fowler/Shakerag facilities' discharge directly into the Chattahoochee River contains (1) a monthly average discharge limit for phosphorus of 0.3 mg/l—such limit is over two times *less* stringent than Permit No. GA0038695 for the Fowler facility, and (2) a monthly average discharge limit for fecal coliform of 23 cfu per 10 ml—such limit is almost ten times *less* stringent than Permit No. GA0038695 for the Fowler facility.

30.

Accordingly, the Fowler/Shakerag Permit is invalid because it violates the Clean Water Act's anti-backsliding prohibition, 33 U.S.C. § 1342(o), and the corresponding federal and State regulations. See 40 C.F.R. § 122.44(l); DNR Rules 391-3-6-.06(4)(b) and (8)(c). The Permit should be invalidated and remanded to EPD with instructions to revise the Permit such that (1) the monthly average limit for total phosphorus is lowered to .13 mg/l, and (2) the monthly average limit for fecal coliform is lowered to 23 cfu per 100 ml.

**Count V – The Permit Is Invalid Because It Authorizes
A Discharge of Fecal Coliform That Will
Impair The Chattahoochee River's Designated Recreational Use**

31.

Petitioners incorporate Paragraphs 1-30 as specifically set forth herein.

32.

DNR has designated the section of the Chattahoochee River into which the Permit authorizes Forsyth County to discharge wastewater as a recreational water body. See DNR Rule 391-3-6-.03(14). In fact, the Permit authorizes a discharge directly into the Chattahoochee River National Recreation Area, which is utilized by thousands of individuals each year for fishing, kayaking and other water-contact based sports and recreation, including members of the Petitioner.

33.

In DNR Rule 391-3-6-.03(6)(b), the Department of Natural Resources Board does not recommend “water contact sports in proximity to sewage or industrial waste discharges regardless of treatment requirements.”

34.

Fecal coliform is a bacteria indicating the presence of fecal contamination (*i.e.*, human or animal waste) containing microbiological organisms such as pathogenic bacteria, viruses, and protozoa that cause illnesses in humans. Swimming in water with measurable fecal coliform levels can be harmful to human health.

35.

The Permit sets a monthly geometric mean limit of 200 cfu per 100 ml for fecal coliform for the 6 MGD discharge to the Chattahoochee River under the Permit. (Ex. A). The Permit, therefore, authorizes Forsyth County to discharge fecal coliform up to a monthly geometric mean of 200/100 ml, which allows the County to discharge fecal coliform levels on as many as 15 days a month which cause the receiving water to be dangerous for swimming and other body contact recreation.

36.

Therefore, the Permit authorizes discharges of fecal coliform that will interfere with the designated swimming use of the Chattahoochee River, and is invalid under DNR Rule 391-3-6-.03(6)(b) and under the State and federal antidegradation regulations. DNR Rule 391-3-6-.03(2)(b); 40 C.F.R. § 131.12(a).

37.

The Permit should be invalidated and remanded to EPD with instructions to revise the Permit such that the monthly average limit for fecal coliform is lowered to 2 cfu per 100 ml.

Count VI –EPD’s Issuance of the Permit Was Arbitrary and Capricious

38.

Petitioner incorporates Paragraphs 1-37 as if specifically set forth herein.

39.

The EPD acted arbitrarily and capriciously in issuing the Permit because Forsyth County has failed to establish a need for the additional treatment capacity provided for by the Permit.

40.

The EPD acted arbitrarily and capriciously in issuing the Permit because an adequate alternatives analysis was not performed by Forsyth County.

41.

The Permit should be invalidated and remanded to EPD with instructions to revise the Permit such that (1) the monthly average limit for total phosphorus is lowered to .08 mg/l, (2) the monthly average limit for fecal coliform is lowered to 2 cfu per 100 ml, and (3) a condition is included in the Permit requiring Forsyth County to perform a full and complete antidegradation analysis before constructing the facility, and a review of the analysis by EPD to determine

whether the discharge authorized by the Permit will degrade water quality of the receiving water, with authorization to construct the facility contingent on a finding by EPD that the discharge will not degrade the water quality of the receiving water, and (4) a condition is included in the Permit requiring Forsyth County to perform a full and complete antidegradation analysis prior to each expansion of the discharge to 3.0 MGD, 4.5 MGD, and 6.0 MGD, with each expansion of the discharge contingent upon a finding by EPD that the expanded discharge will not degrade the water quality of the receiving water.

SUGGESTED PERMIT CONDITIONS

As set forth above, Petitioner states that, in order to comply with State and federal law, Permit No. GA000038954 should be revised such that (1) the monthly average limit for total phosphorus is lowered to .08 mg/l, (2) the monthly average limit for fecal coliform is lowered to 2 cfu per 100 ml, (3) a condition is included in the Permit requiring Forsyth County to perform a full and complete antidegradation analysis before constructing the facility, and a review of the analysis by EPD to determine whether the discharge authorized by the Permit will degrade water quality of the receiving water, with authorization to construct the facility contingent on a finding by EPD that the discharge will not degrade the water quality of the receiving water, and (4) a condition is included in the Permit requiring Forsyth County to perform a full and complete antidegradation analysis prior to each expansion of the discharge to 3.0 MGD, 4.5 MGD, and 6.0 MGD, with each expansion of the discharge contingent on a finding by EPD that the expanded discharge will not degrade the water quality of the receiving water.

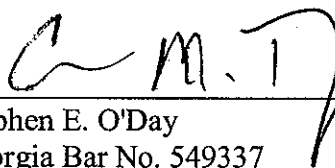
PRAYER FOR RELIEF

WHEREFORE, the Petitioner prays for:

- (a) a hearing before an administrative law judge on the issues set forth in the Petition;
- (b) a declaration that Permit No. GA000038954 is unlawful for the reasons set forth in the Petition;
- (c) an order invalidating Permit No. GA000038954;
- (d) an order providing instructions to EPD on remand; and
- (e) such other and further relief to which Petitioner is entitled.

Respectfully submitted this 16th day of September, 2010.

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