


Georgia Department of Natural Resources
Environmental Protection Division

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Judson H. Turner, Director
(404) 656-4713

April 22, 2014

MEMORANDUM

TO: Erosion and Sedimentation Local Issuing Authorities
Other Interested Parties

FROM: Judson H. Turner, Director
Environmental Protection Division 

RE: Buffer Determinations for Tidal Creeks and Saltwater Marshes
Under the Erosion and Sedimentation Act

Natural vegetative buffers around certain state waters are demonstrated to provide significant water quality benefits. Determining the presence of buffers in coastal Georgia presents challenges not found in other areas of the state. The purpose of this memorandum is to clarify the position of the Environmental Protection Division ("EPD") regarding coastal buffers. This communication supersedes the July 8, 2004 memorandum from Director Carol Couch.

Statutory Authority

The Erosion and Sedimentation Act ("E&S Act"), O.C.G.A. § 12-7-1, *et. seq.*, provides for the establishment of buffers as follows:

- "'Buffer' means the area of land immediately adjacent to the banks of state waters in its natural state of vegetation, which facilitates the protection of water quality and aquatic habitat." O.C.G.A. § 12-7-3(2).
- "There is established a 25 foot buffer along the banks of all state waters, as measured horizontally from the point where vegetation has been wrested by normal stream flow or wave action, except: . . ." O.C.G.A. § 12-7-6(b)(15)(A).

Therefore, in accordance with the E&S Act, two elements must be present to establish a buffer:

- A bank to waters of the state. While "banks" are not defined in the E&S Act, a workable definition is found in Webster's Dictionary as follows: "The rising ground bordering a lake, river, or sea or forming the edge of a cut or hollow or as the slope of land adjoining a body of water."
- Wrested vegetation. While wrested vegetation is not defined in the E&S Act, wresting is defined in Webster's Dictionary as "to pull, force or move by violent wringing or twisting movements."

Application in Coastal Georgia

The saltwater marshes along the Georgia Coast are a complex system of channels or creeks, interspersed with broad expanses of vegetation. This memorandum will address two particular situations unique to Coastal Georgia: buffers along tidal creeks and buffers at the interface between saltwater marsh and land.

Buffers along tidal creeks adjacent to uplands

Tidal creeks run both adjacent to uplands and throughout the saltwater marsh. In both cases the requirement of a bank to state waters is met. Further, examination of the vegetation will demonstrate wresting by stream flow, satisfying the second requirement. There is, therefore, a buffer present along most tidal creeks. The buffer determination is not dependent on the type of vegetation present, only on whether there is a bank to state waters and wrested vegetation.

A related issue regarding buffers along tidal creeks adjacent to uplands involves the construction of bulkheads. In some cases, bulkheads have been partially constructed from the water side avoiding land disturbance to the buffer. The plans for these bulkheads require tie-backs to the buffer area and backfilling to complete the project. The incomplete bulkhead is a temporary structure at best. The presence of a temporary or incomplete project does not eliminate the required buffer, nor the need to obtain a buffer variance. If the project as proposed requires a buffer variance, construction of a partially completed project does not remove the requirement to obtain the buffer variance.

Buffers to Saltwater Marshes

Previous EPD guidance established the marsh jurisdiction line determined by the Coastal Resources Division ("CRD") as the point from which the buffer established in the E&S Act is measured. The jurisdiction line is usually established by CRD based on the presence of one or more of 14 species of marsh plants or the presence of marsh peat deposits within the estuarine area.

A close review of this policy in light of the E&S Act reveals that all the requirements of the statute are not met in some cases. Saltwater marshes are waters of the state. Generally, the nexus between the marsh and the upland meets the definition of a bank to state waters. However, in many places there is no wresting of vegetation associated with saltwater marshes.

Henceforth, in accordance with the language of the E&S Act, buffers along saltwater marsh boundaries exist only if the vegetation is clearly wrested by stream flow or wave action. Buffer determinations under the E&S Act will no longer be based on CRD's jurisdiction line, but on evidence of wrested vegetation, and buffers will be measured horizontally from the point where vegetation has been wrested by stream flow or wave action. If wrested vegetation is not present, there is no buffer under the E&S Act.

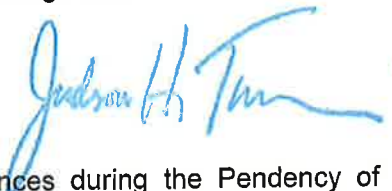
Georgia Department of Natural Resources
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August 12, 2014

MEMORANDUM

TO: Erosion and Sedimentation Local Issuing Authorities
Other Interested Parties

FROM: Judson H. Turner, Director
Environmental Protection Division 

SUBJECT: Evaluation of Stream Buffer Variances during the Pendency of the Tired Creek Appeal

On July 16, 2014 the Georgia Court of Appeals by a 4-3 margin reversed two separate decisions by superior courts concerning a stream buffer variance issued by EPD for a project in the Tired Creek watershed in Grady County. Contrary to EPD's application of the Erosion and Sedimentation Act's buffer provision, which the superior courts had affirmed, the Court of Appeals held that 25-foot buffers apply to all state waters, not just those "...where vegetation has been wrested by normal stream flow or wave action..." (OCGA 12-7-6(b)(15)(A)). The ruling in its entirety is available at the Court of Appeals of Georgia website at http://www.gaappeals.us/docket/results_one_record.php?docr_case_num=A14A0215.

This ruling has created confusion and uncertainty as to its applicability to land disturbing activities within buffers. Areas in questions may include, but are not limited to: freshwater wetlands, coastal wetlands and marshes, beaches, grassed swales, drainage channels without wrested vegetation, sea walls, vegetated ponds without wrested vegetation, and other waters without clear banks and wrested vegetation.

The state has asked the Georgia Supreme Court to review the Court of Appeals' ruling. During the pendency of this appeal, an applicant for a stream buffer variance that contains state waters that would be brought into question by the ruling may apply for a variance under the buffer rules that existed immediately prior to the ruling and will be evaluated as such by the EPD. These rules are available on the EPD website at: <http://epd.georgia.gov/erosion-and-sedimentation>. EPD will continue to make buffered state water determinations under existing protocols and recommends that the Local Issuing Authorities do the same. The applicant should be aware that third parties may very likely try to challenge any buffer variance determination or plan of mitigation made pursuant to this action.

For projects where the applicant delineates and the issuing authority agrees that there is a bank and wrested vegetation, such as a lake or stream, a 25-foot buffer (50-foot for trout streams) remains except as limited by the statutory exceptions and the project can continue under the buffer rules that existed immediately prior to the ruling (referenced above) and will be evaluated as such by the EPD.