

October 21, 2004

**Via Facsimile, Electronic Mail And U.S. Mail**

Lawrence W. Hedges  
Manager, Nonpoint Source Program  
Georgia Department of Natural Resources  
Environmental Protection Division  
4220 International Parkway, Suite 101  
Atlanta, GA 30354

**Re: Proposed Amendments to Georgia's Rules for Erosion and Sedimentation Control**

Dear Mr. Hedges:

The Southern Environmental Law Center (SELC) submits the following comments concerning the Environmental Protection Division's (EPD's) proposed amendments to Georgia's Rules for Erosion and Sedimentation Control, Rule 391-3-7. SELC is a nonprofit legal organization dedicated to protecting the natural resources of the Southeast. Improving water quality in Georgia continues to be one of our highest priorities.

SELC recognizes the importance of natural buffer systems. Among other things, buffers function to:

- Provide shade that reduces water temperatures;
- Filter sediments and other contaminants;
- Reduce unhealthy nutrient loads of streams;
- Stabilize stream banks with natural vegetation;
- Curb erosion;
- Provide riparian habitat;
- Protect fish habitat;
- Maintain aquatic food webs; and
- Provide recreational opportunities.

These multiple functions highlight the importance of maintaining strict protections against encroachment into these valuable components of Georgia's watersheds. EPD must make management of these resources a high priority, in both the enforcement and implementation of this and other water protection rules. Contrary to the hopes of some developers, engineers, and consultants, Senate Bill 460 was not a blank check for

development projects to occur within the buffer. EPD must take its role seriously in carefully reviewing variance applications and in ensuring adherence to high standards of water quality. This means that EPD must have the staff and resources necessary to both evaluate variance applications and enforce them once issued. We are concerned with the historic lack of staffing in this important area of water protection, and we trust that EPD will bring more resources both to review variance applications with the proper scrutiny and to enforce any violations that may occur.

We are still unclear as to how EPD will evaluate whether and how water quality downstream of a development project will be “maintained or improved.” EPD currently lacks the resources to rigorously evaluate variance applications pursuant to the procedures outlined in the proposed rules. A model of water quality impacts is an insufficient proxy for making such a showing. Periodic monitoring is the more practicable alternative, so that EPD and the public can ascertain whether in fact water quality has been maintained or improved following buffer intrusion. Monitoring submissions from the applicant both before and after the project will allow EPD to properly enforce the orders and variances issued pursuant to these proposed rules.

Senate Bill 460 lists three new categories of activities that may be eligible for an individual variance. One of these categories is those projects that have a mitigation plan that has been “approved” by the Corps of Engineers as part of the Section 404 permit process under the Clean Water Act. See O.C.G.A. § 12-7-6(b)(15)(C)(i). Yet the proposed rules state that the Corps of Engineers need only “receive” such a plan. Rule 391-3-7-.05(2)(h). This language must be amended to recapture the intent of the legislation, which calls for approval – not merely receipt – of a Section 404 mitigation plan as a pre-condition to obtaining a variance.

The final rules should reinstate the provision currently found at Rule 391-3-7-.05(3). We ask for clarification as to why this provision has been omitted. Common sense dictates that a variance applicant should not benefit by creating a hardship on its own property, which in turn gives rise to the need to obtain a buffer variance.

We offer the following specific language changes that correspond to the comments outlined above:

#### **391-3-7-.01 Definitions**

(x) – The word “any” should be added, so that a temporary buffer impact is one that “does not impair *any* buffer functions.”

#### **391-3-7-.05 Buffer Variance Procedures and Criteria**

(2)(h) – This language should be exactly as in it appears SB 460 and should state that the “Corps of Engineers has *approved* a mitigation plan” instead of just “received” a plan. The language in the proposed rules makes the rules less

stringent than the statute, and that is not permitted. The rules may be more stringent, but not less.

(3) – This “hardship” language was removed because the “hardship” criterion was removed, but there is no reason to eliminate this important idea from the rules. Applicants should not be able to receive a variance if they have created the need for one (for example, by platting lots that will require buffer variances for construction to occur). In place of the deleted “hardship” language, we suggest, *“Variances will not be considered when, following the adoption of this rule, the actions of any property owner of a given property have created the particular conditions giving rise to the need for a buffer variance.”*

(4)(d) – This is confusing as written. We suggest striking introductory text to 4(d), and renumber/letter so that (4)(d)1 and 2 become (4)(d) and (4)(e) respectively. Also, the new (e) should read “For variance requests under Sections (2)(i) and (2)(j) . . . .”

(5)(f) – This poorly worded sentence makes more sense if it reads, “. . . protective of the natural resources and the environment, *including wildlife habitat*; and . . . .”

(5) – We suggest adding a new section between the existing (g) and (h) that requires EPD to evaluate the impairment to buffer functions. We suggested the following language: *“The extent to which the encroachment into the buffer will impair buffer functions.”*

(5)(h) – The introductory text here is confusing. This section can be made more clear by deleting the introductory text and combine (h)1 and 2 into a new 5(h) that reads: *“Development techniques or other measures that will contribute to the maintenance or improvement of water quality, including the use of low impact designs, integrated best management practices, and reduction in effective impervious surface area; and”*

(5)(i) – The term “regional differences” is ambiguous and needs to be clarified for both EPD and the public to know which differences are contemplated.

(7)(c) – Change language of the first sentence to be more firm: *“Required mitigation shall offset the buffer encroachment and any loss of buffer functions.”*

(8) – There are currently two (8)s that should be combined. The text of the first one is currently combined with (7)(f). It should be broken out and combined with the existing (8).

### **391-3-7-.08 Enforcement**

(1) - To ensure that EPD can require corrective action if it discovers that conditions of variances or orders have not been followed, change the *new*

language to read “*but also includes the authority for the Division to require corrective action and/or remediation of conditions creating adverse water quality impacts or that are otherwise in violation of these rules, regulations and authorizing statutes or any orders or variances issued thereunder.*”

Thank you for your consideration of these comments. We look forward to continuing to participate in this rulemaking process and in the effort to protect Georgia’s water resources.

Sincerely yours,

Ciannat M. Howett  
Director, Georgia/Alabama Office

GBR/gnd

cc: Dr. Carol Couch, Director, Georgia Environmental Protection Division