

IN THE SUPERIOR COURT OF BULLOCH COUNTY  
STATE OF GEORGIA

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OGEECHEE RIVERKEEPER, INC., )  
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 Petitioner, )  
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 )  
 v. )  
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 )  
 JUDSON H. TURNER, Director of the )  
 Environmental Protection Division, )  
 Georgia Department Of Natural )  
 Resources, )  
 )  
 Respondent, and )  
 )  
 )  
 KING AMERICA FINISHING, INC. )  
 )  
 )  
 Respondent-Intervenor. )

*Jessie Ricketts*  
CLERK OF COURT

CIVIL ACTION NO: 1B12CV196T

**FINAL ORDER**

This matter is before the Court on a petition for judicial review filed by Petitioner Ogeechee Riverkeeper, Inc., hereinafter referred to as "ORK," challenging a final decision by an Administrative Law Judge, hereinafter referred to as "ALJ," upholding the September 21, 2011 Consent Order entered into by Respondent Judson H. Turner, Director of the Environmental Protection Division of the Georgia Department of Natural Resources, hereinafter referred to as "EPD," and Respondent-Intervenor King America Finishing, Inc., hereinafter referred to as "KAF."

ORK filed its brief in support of its petition for judicial review on June 5, 2012. The EPD and KAF each filed their brief in opposition on June 25, 2012. On July 2, 2012, ORK filed its reply brief in support of its petition for judicial review. A hearing was held on July 9, 2012, and now having considered the argument of counsel, the record in this case, and the law, the Court finds and concludes as follows:

**STANDARD OF REVIEW**

This Court's review of the final decision of the ALJ is "appellate" in nature. O.C.G.A. §50-13-19. The clearly erroneous standard of review to be applied by the superior court prevents a de novo determination of evidentiary questions leaving only a determination of whether the facts found by the ALJ were supported by any evidence. *Commissioner of Ins. v. Stryker*, 218 Ga. App. 716 (1995). However, the Court

is required to examine the soundness of the conclusions of law drawn from the findings of fact supported by any evidence; thus a determination that the findings of fact are supported by the evidence does not end judicial review of an administrative decision. *See, Pruitt Corp. v. Ga. Dep't of Cmty. Health*, 284 Ga. 158 (2008).

The Director's issuance of a Consent Order is the challenged action. On September 21, 2011, the EPD entered into a consent order with KAF; said order being issued following a fish kill that occurred on the Ogeechee River on or about May 20, 2011. Among other provisions, the Consent Order requires KAF to implement a Supplemental Environmental Project, hereinafter referred to as "SEP," totaling at least \$1,000,000.00 in value. ORK filed a Petition for Hearing to invalidate the Consent Order on October 21, 2011. ORK argues that the Consent Order is procedurally deficient because it was entered without public notice and comment. Both the EPD and KAF contend that ORK lacks standing to challenge the validity of the Consent Order.

### ANALYSIS

Under the rules and regulations governing the Georgia Department of Natural Resources, the Director of the EPD is required to put out for public notice and public comment any consent order which contains a compliance schedule which lasts over one year. Ga. Comp. R. & Regs. R. 391-1-3-.01 (2) (a) (2). ORK contends that the Consent Order contains a compliance schedule exceeding one year in length. The EPD disagrees and argues that a compliance schedule denotes a time period within which a violator is permitted to take action to move from a state of noncompliance to a state of compliance. In finding that the Consent Order was not a compliance schedule, but rather was a submission deadline for the SEPs, the ALJ held that the Consent Order contained no schedule in which KAF would move from a state of noncompliance to a state of compliance. This Court disagrees. While the Consent Order never specifically stated that KAF was non-compliant with the terms of its permit, the Consent Order referenced not only a laundry list of violations, but also found that KAF's discharge from their facility produced objectionable conditions which interfered with legitimate water use in violation of Georgia law.<sup>1</sup>

The Consent Order provided that KAF would have 18 months to either implement the approved SEP plan and/or pay to the State of Georgia the sum of \$1,000,000.00. Under a plain reading of the rules, as the time period in which to comply is longer than one year, the EPD was required to put the Consent Order out for public notice and comment. The Court finds this to be true notwithstanding the fact that the Consent Order itself provided that the provisions contained therein would not constitute a finding, adjudication, or evidence of the alleged violation of any law rule, or regulation by KAF, or an admission of

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<sup>1</sup> Consent Order, pages 11-12; *citing*, Ga. Comp. R. & Regs. § 391-3-6-.03 (5)(c).

liability thereof. The language contained in the Consent Order expressly shows that the EPD was and is aware of the continued violations of KAF in violation of its NPDES permit. Under Georgia law, the term “schedule of compliance” is defined as follows...[a]ny person who obtains an NPDES Permit or other discharge permit pursuant to the Act but who is not in compliance with applicable effluent standards and limitations or other requirements contained in such permit at the time same is issued, shall be required to achieve compliance with such standards and limitations or other requirements in accordance with a schedule of compliance. Ga. Comp. R. & Regs. § 391-3-6-.06(10).

Here, there is no dispute that KAF was violating the terms of its NPDES permit. However, rather than make an affirmative finding and/or take enforcement action against KAF for its violations, the EPD entered into a Consent Order which has not corrected the harmful actions of KAF. A decision which condones inactivity on the part of the EPD can only lead to a continuation of the harm previously caused by KAF. It is an a priori finding of this Court that a harm once done, which is unaffected by an order of the EPD, continues to be a demonstrative harm. Although it appears that the EPD was attempting to remedy the alleged harm, its actions were done without the opportunity of public notice and comment. The perfunctory solution of the EPD to such a significant problem causes the Court to recall the words of a pop culture philosopher: “Do or do not. There is no try.”<sup>2</sup>

As the sole mission of ORK and its members is the protection, preservation and improvement of the water quality of the Ogeechee River basin, the ALJ found that the participation of the individual members of ORK was not necessary in this proceeding and that ORK met the standing requirements as outlined in *Hunt v. Washington Annie Adv., Commn.* 432 U.S. 333, 343 (1977). Notwithstanding this finding, the ALJ went on to hold that ORK was not “aggrieved or adversely affected by any order or action of the Director” and therefore did not have standing to the challenge that action or order. *See*, O.C.G.A. § 12-2-2(c)(2)(A).

In holding that ORK was not adversely affected by the Consent Order, the ALJ, while finding that ORK had in fact sustained an injury, found that the injury was not caused by the EPD’s issuance of the Consent Order. *Citing, Davis v. Jackson*, 239 Ga. 262 (1977). Again, the Court disagrees. ORK has established not only a record supporting a finding of injury caused by degraded water quality leading to a fish kill, but ORK has also shown a continuing harm which is being caused to the waters of the Ogeechee River. As addressed above, the Consent Order did nothing to abate the harm and therefore allowed the

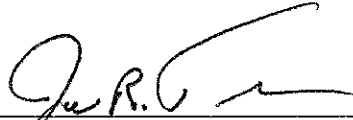
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<sup>2</sup> Yoda.

injury to continue such that ORK has shown that its interests have been adversely affected by the issuance of the Consent Order.

**WHEREFORE**, it is the holding of this Court that the Consent Order is invalid for a lack of public hearing and that ORK has standing to bring this action. The case is **REMANDED** to the ALJ for findings not inconsistent with this decision.

It is so **ORDERED** this 19 day of July, 2012.



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**JOHN R. TURNER**  
Judge, Superior Court of Bulloch County  
Ogeechee Judicial Circuit