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Environmental Protection Division  
Director's Office



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**DATE:** March 19, 2007

**TO:** Jim Ussery  
Deputy Director  
Environmental Protection Division

**FROM:** William R. Phillips *WRP*  
Senior Assistant Attorney General

**RE:** Erosion and Sedimentation Act – Authority to Require Compliance with  
NPDES General Permit Requirements

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**Background**

With a memorandum dated November 20, 2006, you provided background information on the above. You stated that conflicts exist between the approach used by city or county governments which are local issuing authorities (“LIAs”) under the Erosion and Sedimentation Act (“E&S Act”), and the approach used by EPD in implementing the E&S Act. Specifically, LIAs rely on the State Soil and Water Conservation Commission district offices (“SWCC Districts”) to review erosion and sediment control plans (“ESC Plans”) for adequacy under the E&S Act. The LIAs make ESC Plan approval decisions based on the SWCC District’s recommendation. Typically, the Districts approve ESC Plans that do not necessarily meet all applicable NPDES General Permit requirements. In contrast, EPD reviews applications for proposed land disturbing activities in areas where there is no LIA (“non-LIA areas”), and its review encompasses compliance with basic E&S Act requirements as well as requirements of the NPDES General Permit for Storm Water from Construction Activities (“State General Permit”). EPD also inspects construction sites in all geographic areas (LIA areas and non-LIA areas) for compliance with the NPDES General Permit, and enforces violations found.

The conflict arises when the construction site owner or operator has an LIA-approved ESC Plan and is complying with it, but is not also complying with additional State General Permit requirements. The site owner or operator is thus subject to EPD enforcement for such violations. Some of the SWCC Districts take the position that they do not have authority to review ESC Plans for compliance with additional State General Permit requirements. With this background, you asked the following question.

## Question

Are the SWCC Districts authorized and required to review ESC Plans for compliance not only with general provisions of the E&S Act but also with State General Permit requirements?

## Answer

The SWCC Districts are authorized to do so. The LIAs are required to insure that State General Permit requirements are included in the land disturbing permits they issue. The SWCC Districts should conduct the review to determine compliance with State General Permit requirements, as discussed below.

## Discussion

### A. E&S Act Provisions

The E&S Act is codified in O.C.G.A. §§12-7-1 *et seq.* Amendments were added in 2003, including amendments relating to the State General Permit. The intent of that Act is to strengthen and extend the present erosion and sediment control activities and programs of Georgia and to provide for the establishment and implementation of a state-wide comprehensive soil erosion and sediment control program to conserve and protect the land, water, air, and other resources of Georgia. O.C.G.A. §12-7-2.

The governing authority of each county and municipality must adopt an ordinance establishing procedures governing land disturbing activities, consistent with E&S Act standards. See O.C.G.A. §12-7-4.

Section 12-7-6(a) of the E&S Act first states that best management practices ("BMPs") as set forth in §12-7-6(b) shall be required for all land-disturbing activities. Proper design, maintenance, and installation of such BMPs is a defense to any allegation of non-compliance with paragraph (a)(2) of that section or any "substantially similar" terms contained in a permit for the discharge of storm water issued pursuant to O.C.G.A. §12-5-30(f) [that is, the State General Permit]. *Id.* Failure properly to design, install, or maintain BMPs constitutes a separate violation of any land-disturbing permit issued by an LIA or of the State General Permit. See O.C.G.A. §12-7-6(a)(3).

Subsection (b) of O.C.G.A. §12-7-6 adds:

The rules and regulations, ordinances, or resolutions adopted pursuant to this chapter [that is, the E&S Act] for the purpose of governing land-disturbing activities shall require, as a minimum, protections at least as stringent as the state general permit, and best management practices, ... as well as [elements in paragraphs (1)-(16)] .... (emphasis added)

No land-disturbing activities shall be conducted in this state (unless exempted under §12-7-17 of the E&S Act) without the operator first securing a land disturbing permit under the E&S Act. O.C.G.A. §12-7-7(a). E&S Act requirements are thus implemented through a land disturbing permit ("Land Disturbing Permit") program, administered by LIAs in their respective jurisdictions.<sup>1</sup> The "operator" who is required to submit the Land Disturbing Permit application, is defined as the party or parties that have operational control of construction project plans and specifications, including the ability to make modifications, or that have day-to-day operational control of activities necessary to ensure compliance with a storm water pollution control plan [under the State General Permit] for the site or other permit conditions. See O.C.G.A. §12-7-3(10.1).

A procedure set by statute is that the appropriate SWCC District must approve an ESC Plan before the LIA may issue a permit allowing the proposed land disturbing activity. O.C.G.A. §12-7-7(e).

The EPD Director may certify a local government as an LIA if it has, among other things:

... enacted ordinances which meet or exceed the standards, requirements, and provisions of this chapter [that is, the E&S Act] and the state general permit, except that the standards, requirements, and provisions of the ordinances for monitoring, reporting, inspections, design standards, turbidity standards, and education and training shall not exceed the state general permit requirements .... (emphasis added)

O.C.G.A. §12-7-8(a)(1). The "state general permit" means the NPDES general permit or permits for storm-water runoff from construction activities as are now in effect or as may be amended or reissued. O.C.G.A. §12-7-3(15). The LIA must also regulate both primary and secondary permittees as such terms are defined in the state general permit, and amend its ordinance(s) within twelve months of any amendments to the E&S Act. O.C.G.A. §12-7-8(a)(2).

The SWCC Districts or the SWCC must periodically review the actions of the local governments certified as LIAs, and may provide technical assistance to them and notify EPD and request EPD investigation if any deficient or ineffective LIA program is found. See O.C.G.A. §12-7-8(b). EPD may also review the actions of local governments certified as LIAs, including administration and enforcement of the LIA's [E&S Act] ordinance(s), notify the LIA of any deficiencies found, and if the LIA does not correct them within thirty days, revoke the local government's certification as an LIA. See O.C.G.A. §12-7-8(c).

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<sup>1</sup> In non-LIA areas no land disturbing permit is required, but the terms of the State General Permit shall apply. See O.C.G.A. §12-7-7(c). Thus, in those areas EPD regulates land disturbing activities through DNR Board rules that meet E&S Act requirements and through the State General Permit. See *id.* and O.C.G.A. §12-7-5.

The DNR Board promulgates rules and regulations setting requirements and standards for certification of a county or municipality as an LIA. O.C.G.A. §12-7-8(c). The pertinent DNR Rule requires that for certification as an LIA, a city or county must have: "... adopted an ordinance which demonstrates compliance with the provisions in Title 12, Chapter 7 of the Official Code of Georgia [that is, the E&S Act]." Comp. Ga. R. and Regs. §391-3-7-.09.

EPD may initiate E&S Act enforcement actions where the LIA has failed to secure compliance. O.C.G.A. §12-7-8(d).

Land Disturbing Permit applications must conform to E&S Act rules and [LIA] ordinances, be accompanied by the applicant's ESC Plan, and be accompanied by:

... such supportive data as will affirmatively demonstrate that the land-disturbing activity proposed will be carried out in such a manner that the minimum requirements set forth in Code Section 12-7-6 shall be met.

O.C.G.A. §12-7-9(a). As mentioned, Section 12-7-6 requires compliance with the State General Permit, as well as other E&S Act substantive requirements set forth therein. No permit shall be issued unless the LIA determines that the ESC Plan meets Section 12-7-6 requirements and all applicable fees have been paid. O.C.G.A. §12-7-9(b).

Under O.C.G.A. §12-7-9(c) the LIA must make Land Disturbing Permit approval decisions within 45 days of a complete application. Section 12-7-10 of the E&S Act states:

Except as otherwise provided by Code Section 12-7-7, immediately upon receipt of an application for a [land disturbing] permit the application and [ESC Plan] ... shall be referred to the appropriate [SWCC] district wherein such land-disturbing activities are proposed to take place, for its review and approval or disapproval concerning the adequacy of the ... [ESC Plan] proposed by the applicant.

Id. The SWCC District must approve or disapprove a plan within 35 days of receipt and failure to do so shall be considered an approval of the pending ESC Plan. Id. Thus, the LIA has 45 days to approve or disapprove the Land Disturbing Permit application, of which 35 may be used by the SWCC District to review the application and ESC Plan.

## B. Analysis

The SWCC Districts have express statutory authority to review Land Disturbing Permit applications and ESC Plans, and to approve ESC Plans. The Georgia Supreme Court has held that: "[a]n administrative body, created by an act of the legislature, has only such powers as are expressly or by necessary implication conferred upon it." Bentley v. State Board of Medical Examiners, 152 Ga. 836 (1922). The Bentley court also held that a

body such as the Medical Board has such implied powers only as are "reasonably necessary" to execute the express powers conferred. 152 Ga. at 838, citing Railroad Commission v. Macon Railway &c. Co., 151 Ga. 256, 258, 106 S.E. 282 (1921). See also Bryant v. Employees Retirement System of Georgia, 216 Ga. App. 737 (1995); Floyd County Board of Commissioners v. Floyd County Merit System Board, 246 Ga. 44 (1980); Ledbetter Bros., Inc. v. Floyd County, 237 Ga. 22, 226 S.E. 2d 730 (1976).

The Land Disturbing Permit application has to include an ESC Plan and supportive data demonstrating that both sets of requirements will be met. It is my understanding that the substance of the Land Disturbing Permit application is shown on the ESC Plans, which are sets of drawings that show locations and types of BMPs and that give compliance instructions to the site operator who conducts or controls the land disturbing activities. Since the SWCC Districts are expressly required to review such applications and make ESC Plan approval decisions that are binding on the LIA, since the ESC Plan contains the substance of the application, and since the applications must demonstrate compliance with the State General Permit, it is reasonably necessary for the SWCC Districts to review the applications for compliance with requirements of the State General Permit. Accordingly, the SWCC Districts have authority to review Land Disturbing Permit applications and ESC Plans for compliance with State General Permit requirements.

An additional basis for this conclusion is that the E&S Act gives responsibilities to the SWCC Districts that require that SWCC Districts be knowledgeable about E&S Act requirements, including State General Permit requirements. First, the SWCC Districts have to review Land Disturbing Permit applications. Second, the LIAs may not issue any Land Disturbing Permit if the SWCC District objects to it. Third, the SWCC Districts may provide technical assistance to LIAs. Fourth, SWCC Districts have an oversight role along with EPD, to insure that LIAs are administering their E&S Act programs properly. This statutorily-required expertise is an additional reason why it is reasonably necessary for the SWCC Districts to review Land Disturbing Permit applications for compliance with State General Permit requirements.

Also, the E&S Act gives the SWCC Districts thirty-five out of the forty-five days allowed for Land Disturbing Permit application review. The LIA has to forward the application to the SWCC District, receive the District's review results, and issue (or deny) the Permit, within the ten days it has left. This constitutes a third basis for concluding that it is reasonably necessary for the entire substantive review of the applications to be conducted by the SWCC Districts -- as a matter of relative timing allowed by the E&S Act.

Further, the approach of having the SWCC Districts conduct the complete review carries out the E&S Act legislative intent to provide for the establishment and implementation of a state-wide comprehensive soil erosion and sediment control program to conserve and protect the land, water, air, and other resources of Georgia. It would be unnecessarily cumbersome to have one set of drawings for basic E&S Act requirements, and another set

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for compliance with additional State General Permit requirements. Such an approach would make review and compliance efforts more difficult for the LIAs, the site operators, and EPD. Compliance would be more readily achieved when the operator works from only one set of drawings.

EPD has developed a checklist that it uses for determining State General Permit compliance. This checklist should be used by the SWCC Districts to insure consistent review statewide, and to avoid the conflict mentioned in the Background above.

Although not required before SWCC District review of Land Disturbing Permit applications can include State General Permit elements, EPD may want to develop (perhaps in consultation with the State Soil and Water Conservation Commission) a proposed rule on this to present to DNR. The proposed rule would make clear that the SWCC Districts' review includes compliance with State General Permit elements.

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