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**Gwinnett County v. Lake Lanier Ass'n, Nos. A03A2340, A03A2341, A03A2342, 2004 Ga. App. LEXIS 63 (Ga. Ct. App. Jan. 16, 2004)**

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adjacent to the pond; Slusher petitioned for an administrative hearing challenging the permit. The District denied Slusher's petition, and Slusher appealed to the Florida Court of Appeals contending the District should not have issued the permit due to the adverse effects the well had on his pond.

Rule 40E-2.301(1)(f) of the Florida Administrative Code ("Code") requires a well applicant to give reasonable assurances that a proposed water use will not interfere with presently existing legal uses. Section 1.8 of the Basis of Water Review for Water Use Applications within the South Florida Water Management District ("Basis") defines "existing legal use" of water as a water use that is authorized under a District water use permit or is existing and exempt from permit requirements. The District interpreted the last part of this definition to mean *expressly* exempt from permit requirements. However, because the definition of "existing legal use" was clear and unambiguous, the court determined the District misconstrued its own rule by adding the *expressly* requirement, and therefore did not give deference to the District's interpretation. Thus, because the District previously conceded that no permit was necessary for the pond, Slusher's use of the pond qualified as an existing legal use. Furthermore, no record existed that Martin County gave any reasonable assurances that their well would not interfere with Slusher's existing legal use.

The District further concluded that Section 3.6 of Basis—stating that a well permit should be denied only if significant reduction in water levels in an adjacent water body would occur to the extent that the designed function is impaired—should also preclude Slusher from relief. However, the original owner of the land provided undisputed testimony that the pond's designed function was to raise fish. Therefore, because the loss of the pond water impaired the designed purpose of the pond, the court found that the District's argument that the permit was properly issued was without merit. Thus, the court reversed the District's decision to issue Martin County a permit to operate a well because the District misinterpreted its own rules.

*Aimee Wagstaff*

## GEORGIA

**Gwinnett County v. Lake Lanier Ass'n, Nos. A03A2340, A03A2341, A03A2342, 2004 Ga. App. LEXIS 63 (Ga. Ct. App. Jan. 16, 2004)** (holding (1) the Environmental Protection Division need not give public notice after changes are made to a permit draft to release highly treated wastewater into a lake, (2) the party challenging a permit must affirmatively prove a violation of anti-degradation regulations, and (3) the permit at issue was not invalid for failure to require limits on mercury and properly limited effluent fecal coliform and phosphorous).

Gwinnett County ("Gwinnett") applied to the Georgia Environmental Protection Division ("EPD") for a National Pollution Discharge Elimination System ("NPDES") permit to discharge highly treated wastewater into Lake Lanier. The EPD gave public notice of the permit application and allowed public comment on the permit draft, which described the discharge location as near Buford Dam in Lake Lanier. The EPD issued the permit to Gwinnett after revising the discharge point to the North Advanced Water Reclamation Facility ("North Plant"). The North Plant discharged effluent near Buford Dam into Lake Lanier. The EPD allowed no further public comment on the revised permit before issuing the final permit. An administrative law judge ("ALJ") affirmed the EPD's issuance of the permit after an evidentiary hearing. Lake Lanier Association, Terence D. Hughey, Upper Chattahoochee Riverkeeper Fund, Inc., and the Sierra Club (collectively "Association") sought review of the ALJ's decision in the Superior Court of Hall County. The court reversed the ALJ's decision that the EPD must give additional public notice for the revisions made to the original draft permit, and decided Gwinnett must carry the burden of proving the absence of violations of anti-degradation regulations. However, the trial court affirmed the ALJ's rulings that the permit required no specific limits for mercury in the effluent, and that the permit set proper limits on fecal coliform and phosphorus.

Gwinnett appealed the reversals of the ALJ's decisions by the trial court to the Georgia Court of Appeals. The court of appeals agreed with the ALJ's decision that the EPD did not need to give new notice, regarding the changes made to the permit draft before issuing the NPDES permit. State regulations require the EPD to provide public notice of the NPDES permit application with a period of public comment before issuing the permit. The permit draft, issued in the public notice, need only contain a general description of the discharge point and the body of water absorbing the discharge. Here, the EPD gave proper notice and accepted public comment. The court also noted that state regulations allow the EPD to appropriately change or revise the discharge point after the comment period without giving additional notice. Therefore, the court of appeals found the EPD gave sufficient public notice and reversed the trial court's decision requiring additional notice.

The court of appeals also decided that the ALJ correctly found the Association failed to prove violations of anti-degradation regulations. State anti-degradation regulations require applicants for an NPDES permit to demonstrate justification of water quality changes to the EPD before the EPD issues the permit. Once the EPD issues the final permit, any party challenging the permit must prove by a preponderance of evidence that the permit holder failed to demonstrate justification of water quality changes. The court held that the trial court erred when it shifted the burden of proving whether a violation of the regulations occurred from the Association to Gwinnett. The court also held that the trial court erroneously substituted its

judgment of the facts for the ALJ's judgment regarding whether a violation of the anti-degradation regulations occurred. The ALJ's decision must be upheld unless clearly erroneous, and the court held that the ALJ made sufficient factual findings to support its ruling. Therefore, the court reinstated the ALJ's finding that no violations of the anti-degradation regulations occurred.

Next, the Association claimed the permit should include limits on mercury. The court affirmed the trial court's decision not to require limits for mercury in the permit, stating NPDES permits only limit pollutants that may possibly cause harm. Specifically Gwinnett presented expert testimony at the ALJ hearing showing (1) no mercury present in the influent coming into the treatment plant, (2) the plant could reduce any mercury that may appear in the influent to safe levels, and (3) if testing ever detected mercury in the effluent then the EPD would impose mercury limits.

The Association also claimed that the limits for phosphorus and fecal coliform would not protect Lake Lanier's designated uses of swimming and fishing. The court held that the limits for phosphorus and fecal coliform stipulated in the permit complied with all water quality regulations, and the Association's claim lacked support by any evidence in the record. Therefore, the court of appeals reversed the trial court rulings concerning public notice and anti-degradation regulations, and affirmed the trial court's findings relating to effluent limits of mercury, phosphorus, and fecal coliform.

*David B. Oakley*

## HAWAII

**In re Wai'ola O Moloka'i, Inc., 83 P.3d 664 (Haw. 2004)** (holding although private commercial real estate developer's proposed economic development plan constituted a "reasonable-beneficial" water use, Commission on Water Resource Management properly denied developer a water use permit pursuant to common law and statutory authority).

The Department of Hawaiian Home Lands ("DHHL"), the Office of Hawaiian Affairs, ("OHA"), and other individuals appealed directly to the Supreme Court of Hawai'i, challenging a Commission on Water Resource Management ("Commission") decision granting Wai'ola O Moloka'i ("Wai'ola") and its parent company Moloka'i Ranch, Ltd. ("MR") (collectively "MR-Wai'ola") a water use permit and authorizing the Commission chairperson to issue well construction and pump installation permits. DHHL, OHA, and the others argued (1) the Commission erred in finding that MR-Wai'ola satisfied the requisite conditions for obtaining a water permit for a "new use"; (2) the Commission's decision violated the State's duty to protect DHHL's