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Georgia Court of Appeals Reverse Superior Court Decisions; Rules E&SA Buffer Requirement Applies Even When No "Wrested Vegetation"

In an unfortunate 4-3 decision, the Georgia Court of Appeals reversed two superior court rulings on the buffer requirement under the Erosion & Sedimentation Act, holding that the buffer requirement still applies even when there is no "wrested vegetation." This has potentially serious implications for development, as it will limit the ability of developers to build on or utilize land near open waters.

According to King & Spalding attorney Lewis Jones, who has been involved in this case for some time and has filed amicus briefs on behalf of the Council for Quality Growth and other vested partners in both the Superior Courts and the Court of Appeals: **"If not corrected, this decision could have serious practical consequences for the development community. For example, activities currently regulated by the Army Corps of Engineers under the nationwide permit program will now require a variance from the EPD director. This could cause serious delays, because only certain types of projects are even eligible for a variance, and there's mandatory waiting period and a public comment period before a variance can be granted."**

The Council for Quality Growth partnered with several other trade associations dedicated to the economic well-being of the State to file an amicus brief as a friend of the court on behalf of EPD Director Turner and the Grady County Board of Commissioners. The amicus brief was filed in the Superior Courts and the Court of Appeals. To read the amicus brief, click [HERE](#).

The case in question stems from a buffer variance that the Georgia EPD granted to the Grady County government that would allow the County to construct a 960-acre fishing lake that had been authorized by the U.S. Army Corps of Engineers. The County needed to construct a dam to build this lake, and several acres of wetlands and miles of streams would be destroyed as a result. The buffer variance approved by EPD allowed the County to encroach upon the 25-foot vegetative buffer required by the Erosion and Sedimentation Act adjacent to streams on the site. The Georgia River Network and American Rivers filed suit to challenge the buffer variance, and the Administrative Law Judge (ALJ) reversed the variance. Under the judicial review that followed, the Superior Courts of Fulton County and Grady County issued orders to reverse the ALJ's decision.

This split decision by the Georgia Court of Appeals now reverses the opinions of the two superior courts and holds that the buffer requirement still applies. To see the Court of Appeals ruling, click [HERE](#).

One small piece of good news in the midst of this disappointing decision is that the majority in the Court of Appeals acknowledged an argument submitted by King & Spalding that the buffer requirement only applies to open waters, and does not apply to wetlands. The question of whether the buffer requirement applies to wetlands was left open to be decided in a future case. Jones also noted that it is unclear whether Grady County or the Georgia EPD will try to appeal this decision to the Georgia Supreme Court, nor is it clear whether this ruling could affect the EPD Director's new policy regarding marshland buffers.

The EPD Director has 10 days from this decision to either request reconsideration of the ruling, or to notify the Court of Appeals that he intends to appeal before the GA Supreme Court. If the Director does not take either of these steps, the current ruling will become final without further review.

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11:30 am
Westin Atlanta
Perimeter North



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We appreciate the work of Lewis Jones and all of our partners who jointly filed this amicus brief and who have served as friends of the court in favor of the EPD and Grady County. The Council for Quality Growth will continue to monitor this issue, and will inform members of new developments.

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