

# Carlton Fields

## Memorandum

TO: DAN WEEDE  
FROM: FRED RUSHING  
RE: RIPARIAN BUFFER  
DATE: JULY 26, 2013

### BACKGROUND

Both the state of Georgia and the city of Atlanta<sup>1</sup> have certain guidelines that must be followed by persons when having any involvement within or around a riparian buffer zone. The rules and regulations vary slightly amongst the two different entities, but both strive to protect buffer zones. Below are guidelines that should to be followed in order to avoid any civil penalties for unauthorized activities in these zones.

### DISCUSSION

#### **A. Buffer Zones Defined**

The state of Georgia has established a 25 foot buffer along the banks of all state waters. O.C.G.A. § 12-7-6(b)(15)(A). It is measured horizontally from the point where vegetation has been wrested by normal stream flow or wave action. *Id.* Likewise, there is a 50 foot buffer, as measured horizontally from the point where vegetation has been wrested by normal stream flow or wave action, along the banks of any state waters classified as "trout streams." O.C.G.A. § 12-7-6(b)(16).

In the city of Atlanta, a stream buffer shall have a 75-foot, natural, undisturbed, vegetative buffer. Atlanta, Ga., CODE § 74-303(a) (2013). It is measured perpendicularly and

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<sup>1</sup> The contact information for the city of Atlanta Watershed Management Department is as follows: Telephone number: (404) 330-6081; Fax number: (404) 658-6637; Email address for Margaret Tanner, Deputy Commissioner, Office of Watershed Protection: mtanner@atlantaga.gov

horizontally on both sides of the stream from the point of wrested vegetation. *Id.* Likewise, the city of Atlanta also requires that Wetlands remain in their natural state and have a minimum 25-foot, natural, undisturbed, vegetative buffer. Atlanta, Ga., CODE § 74-303(b) (2013). It is also measured horizontally and perpendicularly on all sides of the wetland. *Id.* Wetlands lying in part or in whole within a stream buffer shall have a buffer that includes the extent of the wetland within the stream buffer, plus the wetland buffer. *Id.*

To determine the correct measurement of the buffer, the city of Atlanta states that, if wrested vegetation is not present due to a human-made modification, removal, or replacement of the stream bank with a structure (e.g. concrete lining, gabions, retaining wall, or rip rap), the buffer shall be measured from the top of the structure, point of modification, or removal. Atlanta, Ga., CODE § 74-303(e) (2013).

## **B. Activities in Buffer Zone**

No land-disturbing activities shall be conducted within any buffer zones. O.C.G.A. § 12-7-6(b)(15)(B). A buffer shall remain in its natural, undisturbed state of vegetation until all land-disturbing activities on the construction site are completed. *Id.* Once the final stabilization of the site is achieved, a buffer may be thinned or trimmed of vegetation as long as a protective vegetative cover remains to protect water quality and aquatic habitat and a natural canopy is left in sufficient quantity to keep shade on the stream bed. *Id.*

The following are land disturbing activities<sup>2</sup> that are subject to the buffer zone requirements:<sup>3</sup> (1) any land-disturbing activity utilizing wheeled or tracked machinery and equipment resulting in soil erosion within the buffer; (2) construction of a ground level patio

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<sup>2</sup> The following information regarding land-disturbing activities was found in a memorandum by Jim Ussery that is posted on the Georgia Environmental Protection Department website.

<sup>3</sup> Ussery, Assistant Director, *Georgia Erosion and Sedimentation Act Minor Land-Disturbing Activity Guidelines Memorandum*, Revised September 2009, available at [http://www.gaepd.org/Files\\_PDF/techguide/wpb/GAEPD\\_ESAC\\_Minor\\_LandDisturbingActivities\\_Memo\\_2009.pdf](http://www.gaepd.org/Files_PDF/techguide/wpb/GAEPD_ESAC_Minor_LandDisturbingActivities_Memo_2009.pdf).

within the buffer; (3) construction of a barbeque pit on a concrete or asphalt slab or pad within the buffer; (4) construction of a swimming pool in the buffer; and (5) construction of a structural or decorative retaining wall within the buffer.<sup>4</sup>

There are some activities that have been labeled as minor land disturbing activities and they are exempt from the buffer zone requirements. For example, elevated structures such as decks, gazebos, patios, walkways, viewing platforms, and picnic shelters are exempt. Likewise, a previous ground level walkway approach to a dock or similar structure and the restoration of a buffer area after the removal of an existing structure (provided that no more than 100 square feet of the structure footprint is in the buffer and the buffer area is replanted with native vegetation) are included in this distinction. Also included in this non-exhaustive list, is maintenance or repair of existing structures, the failure of which would result in a threat to human health or state waters, such as sewer lines, water lines, dams, or gas lines.<sup>5</sup>

### **C. Permits and Encroachments**

A variance in a buffer zone is allowed under Georgia law with the issuance of a permit. The director shall consider granting a variance where the landowner provides a plan satisfactory to the director that shows that, even with the proposed land-disturbing activity within the buffer, the completed project will result in maintained or improved water quality downstream of the project.<sup>6</sup>

The state of Georgia requires that a variance application be accompanied by the applicant's erosion and sediment control plans and by supportive data that will affirmatively

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<sup>4</sup> Construction of a seawall with land-disturbing activities occurring in the buffer, backfilling any new seawall construction within the buffer, paving with poured or prefab concrete or asphalt, any project or combination of projects occurring within the same calendar year on the same property resulting in more than 100 square feet of any elevated structures or previous ground level walkways within or extending into the buffer are also considered land-disturbing activities.

<sup>5</sup> The total disturbance must be less than 100 square feet.

<sup>6</sup> Guidelines attached to buffer variance/encroachment application. Both applications, with the requisite guidelines attached, are included in the binder.

demonstrate that the land-disturbing activity proposed will be carried out in a manner that the minimum requirements are met. O.C.G.A. § 12-7-9(a). All applications shall contain a certification stating that the plan preparer or the designee thereof visited the site prior to creation of the plan or that such a visit was not required in accordance with the rules and regulations established by the board. *Id.* Permits shall be issued or denied as soon as practicable after the application has been filed, but in any event not later than 45 days thereafter. O.C.G.A. § 12-7-9(c).

Under the code of the city of Atlanta, the commissioner may authorize an encroachment to allow development within the buffer upon a showing by the applicant that due to site-specific conditions, the buffer would result in a hardship or extreme hardship. Atlanta, Ga., CODE § 74-306 (2013). These authorized encroachments shall not be granted if they reduce the buffer to a width less than the minimum standards established by the state of Georgia and federal law. Atlanta, Ga., CODE § 74-306(c)(1) (2013).

Likewise, authorized encroachments shall not be granted for a distance, location, or activity that is greater than necessary to alleviate a hardship or extreme hardship. Atlanta, Ga., CODE § 74-306(c)(2) (2013). The actions of a property owner that has created a hardship or extreme hardship shall not constitute grounds for granting an authorized encroachment. Atlanta, Ga., CODE § 74-306(c)(3) (2013). Similarly, authorized encroachments shall not be granted for wells, on-site sewage management systems, detention ponds, or underground stormwater detention facilities.<sup>7</sup> Atlanta, Ga., CODE § 74-306(c)(5) (2013).

It is required that authorized encroachments be designed to maximize the area of the buffer where sheet flow discharge of stormwater occurs. Atlanta, Ga., CODE § 74-306(c)(7) (2013). The sheet flow of stormwater through the entire buffer shall be the goal of the design. *Id.*

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<sup>7</sup> Except upon a showing by the applicant of an extreme hardship.

However, where redirection of stormwater is necessary for drainage control, vegetated swales shall be utilized where practicable. *Id.*

Lastly, mitigation is required as a condition for the grant of an authorized encroachment in order to ensure that post-development conditions are at least as protective of water quality as pre-development conditions. Atlanta, Ga., CODE § 74-306(d) (2013). Mitigation must be proposed by the applicant in accordance with guidance prepared by the department of watershed management. *Id.* Mitigation must include stormwater quality improvement measures or stormwater quantity reduction,<sup>8</sup> stream or wetland restoration, buffer revegetation, reduction of run-off beyond pre-development levels, removal of existing impervious surfaces, buffer compensation, or green infrastructure or low impact development practices. Atlanta, Ga., CODE § 74-306(c)(1)-(7) (2013).

#### **D. Best Management Practices**

Best management practices are required for all land-disturbing activities. O.C.G.A. § 12-7-6(a)(1). Failure to properly design, install, or maintain best management practices shall constitute a violation of any land-disturbing permit issued by a local issuing authority or of any state general permit.<sup>9</sup> O.C.G.A. § 12-7-6(a)(3).

The rules and regulations, ordinances, or resolutions adopted 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, including sound conservation and engineering practices to prevent and minimize erosion and resultant sedimentation. O.C.G.A. § 12-7-6(b). Georgia law requires that the stripping of vegetation, re-grading, and other

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<sup>8</sup> Measures are specified by the Georgia Stormwater Management Manual.

<sup>9</sup> For example, the director may require, in accordance with regulations adopted by the board, reasonable and prudent monitoring of the turbidity level of receiving waters into which discharges from land-disturbing activities occur.

development activities be conducted in such a manner so as to minimize erosion. O.C.G.A. § 12-7-6(b)(1). Also, cut and fill operations must be kept to a minimum, and development plans must conform to topography and soil type, so as to create the lowest practicable erosion potential. O.C.G.A. § 12-7-6(b)(2)-(b)(3). Whenever feasible, natural vegetation shall be retained, protected, and supplemented. O.C.G.A. § 12-7-6(b)(4). The disturbed area and the duration of exposure to erosive elements shall be kept to a practicable minimum. O.C.G.A. § 12-7-6(b)(5). Disturbed soil shall be stabilized as quickly as possible. O.C.G.A. § 12-7-6(b)(6). Temporary vegetation or mulching shall be employed to protect exposed critical areas during development. O.C.G.A. § 12-7-6(b)(7). Permanent vegetation and structural erosion control measures must be installed as soon as practicable. O.C.G.A. § 12-7-6(b)(8).

To the extent necessary, sediment in run-off water must be trapped by the use of debris basins, sediment basins, silt traps, or similar measures until the disturbed area is stabilized. O.C.G.A. § 12-7-6(b)(9). Adequate provisions must be provided to minimize damage from surface water to the cut face of excavations or the sloping surfaces of fills. O.C.G.A. § 12-7-6(b)(10). Cuts and fills may not endanger adjoining property. O.C.G.A. § 12-7-6(b)(11). Fills may not encroach upon natural watercourses or constructed channels in a manner so as to adversely affect other property owners. O.C.G.A. § 12-7-6(b)(12). Grading equipment must cross flowing streams by the means of bridges or culverts, except when such methods are not feasible, provided, in any case, that such crossings must be kept to a minimum.<sup>10</sup> O.C.G.A. § 12-7-6(b)(13).

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<sup>10</sup> Land-disturbing activity plans for erosion and sedimentation control shall include provisions for treatment or control of any source of sediments and adequate sedimentation control facilities to retain sediments on site or preclude sedimentation of adjacent waters beyond the requisite levels.

### **E. Relationship between Georgia law and Atlanta Code**

The City of Atlanta Stream Buffer shall overlay the state waters buffer requirements created by Official Code of Georgia. Atlanta, Ga., CODE § 74-314(1) (2013). If an applicant applies to EPD for a state waters buffer variance, the applicant must also apply with the city of Atlanta for an authorized encroachment.<sup>11</sup> *Id.* The commissioner shall not grant an authorized encroachment to stream buffers otherwise regulated by the Environmental Protection Division, Department of Natural Resources, or the state of Georgia (pursuant to O.C.G.A. § 12-2-8) absent the grant of a stream buffer variance from EPD. Atlanta, Ga., CODE § 74-314(2) (2013). Receiving a stream buffer variance from EPD is not grounds for the commissioner to grant a similar authorized encroachment. Atlanta, Ga., CODE § 74-314(3) (2013). In the event of a conflict between or among any provisions of this article, or any other laws, regulations, or policies, the requirements that are most protective of water quality shall apply. Atlanta, Ga., CODE § 74-314(g) (2013).

### **F. Penalties**

Upon a showing by the director that a person has engaged in or is about to engage in any prohibited act or practice not allowed under Georgia law, a permanent or temporary injunction, restraining order, or other order shall be granted without the necessity of showing the lack of an adequate remedy at law. O.C.G.A. § 12-7-13. Likewise, a civil penalty can be administered for a violation of this law. Georgia law authorizes a civil penalty up to \$2,500.00 per day for each violation. O.C.G.A. § 12-7-15. Also, Georgia law allows any local issuing authority to adopt rules and regulations, ordinances, or resolutions which contain stream buffer requirements that exceed the minimum requirements set forth under Georgia law. O.C.G.A. § 12-7-6(c).

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<sup>11</sup> These applications may be considered concurrently.

## CONCLUSION

To avoid civil penalties it is imperative that there are not any major land-disturbing activities occurring in the buffer zone. If there are major land-disturbing activities occurring in the buffer zone there needs to be a variance applied for with the state of Georgia and possibly an encroachment request with the city of Atlanta. When applying for a variance or encroachment, it is required that the best management practices are being used along with the appropriate mitigation measures.<sup>12</sup>

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<sup>12</sup> All relevant documentation is included in the accompanying binder. The documents include the state of Georgia and city of Atlanta buffer encroachment applications. The encroachment applications include guidelines attached to the back of each application. There is also a memorandum included that discusses how to determine the presence of state waters that require a buffer. Also included is the memorandum from Jim Ussery discussing what is considered major and minor land-disturbing activities. Lastly, the Georgia statute and a document concerning revegetation guidelines are also included.