

2015

## "Wrest" in Peace: The Effect of the Georgia Environmental Protection Division's "Wrested Vegetation Rule" on Coastal Salt Marshes

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### Recommended Citation

Donohue, Luke (2015) ""Wrest" in Peace: The Effect of the Georgia Environmental Protection Division's "Wrested Vegetation Rule" on Coastal Salt Marshes," *Georgia State University Law Review*: Vol. 32: Iss. 4, Article 5.  
Available at: <http://readingroom.law.gsu.edu/gsulr/vol32/iss4/5>

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**“WREST” IN PEACE: THE EFFECT OF THE  
GEORGIA ENVIRONMENTAL PROTECTION  
DIVISION’S “WRESTED VEGETATION RULE” ON  
COASTAL SALT MARSHES**

**Luke Donohue\***

Oh, what is abroad in the marsh and the terminal sea?  
Somehow my soul seems suddenly free  
From the weighing of fate and the sad discussion of sin,  
By the length and the breadth and the sweep of the  
marshes of Glynn.

Sidney Lanier, 1879<sup>1</sup>

INTRODUCTION

On Earth Day 2014, Jud Turner, the Director of Georgia’s Environmental Protection Division (EPD) made a seemingly innocuous announcement: The EPD would interpret the Erosion and Sedimentation Act (E&S Act) according to its literal, plain meaning. In a now-infamous memo, Turner clarified the agency’s “new” interpretation.<sup>2</sup> Specifically, the April 22, 2014 Memorandum (Earth Day Memo) interprets a key provision of the E&S Act explaining

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\* J.D. Candidate 2016, Georgia State University College of Law. Thank you to the many people who provided interviews, information, and guidance as I wrote my Note. Special thanks to Jud Turner and Mary Walker of the Environmental Protection Division, Bill Sapp of the Southern Environmental Law Center, Spud Woodward of the Coastal Resources Division, Joe Tanner and Harold Reheis of Joe Tanner & Associates, Professor Ryan Rowberry, and the Georgia State University Law Review.

1. Sidney Lanier, *The Marshes of Glynn*, in POEMS OF SIDNEY LANIER 29, 30 (Mary Lanier ed. 2007).

2. Memorandum from Judson H. Turner, Director, Env’tl. Prot. Div., Ga. Dep’t of Nat. Res., to Erosion and Sedimentation Local Issuing Auths. and Other Interested Parties (Apr. 22, 2014) [hereinafter Earth Day Memo] (on file with Georgia State University Law Review). The Memo was written to clarify how the EPD would interpret the statutory text of the E&S Act. The word “new” is used because prior to this announcement the EPD had been interpreting the text differently as it pertains to coastal salt marshes. See Memorandum from Carol A. Couch, Director, Env’tl. Prot. Div., Ga. Dep’t of Nat. Res., Erosion and Sedimentation Control Local Issuing Auths. and Other Interested Parties (July 8, 2004) [hereinafter Couch Memo, July 2004] (on file with author) (explaining that the June 14 memo “does not address identification of saltwater marsh boundaries and it is not to be used for determination of buffers for the saltwater marsh”).

how the EPD determines where “buffers” exist along the banks of state waters.<sup>3</sup> According to the E&S Act, “[t]here is established a [twenty-five-foot] buffer along the banks of all state waters, as measured horizontally from the point where vegetation has been wrested by normal stream flow or wave action . . . .”<sup>4</sup> Within this buffer, land cannot be developed, destroyed, or otherwise disturbed without first obtaining a permit from the EPD.<sup>5</sup>

According to the Earth Day Memo’s interpretation, the E&S Act requires a buffer only where two elements are present: (1) a bank to waters of the state, and (2) wrested vegetation.<sup>6</sup> The latter element proved to be controversial.<sup>7</sup> Unequivocally, Turner stated “[i]f

3. See Earth Day Memo, *supra* note 2; O.C.G.A. § 12-7-3(2) (2012) (defining buffer as “the area of land immediately adjacent to the banks of state waters in its natural state of vegetation, which facilitates the protection of water quality and aquatic habitat”).

4. 2004 Ga. Laws 352.

5. *Id.*; O.C.G.A. § 12-7-3(9) (2012) (“Land disturbing activity means any activity which may result in soil erosion from water or wind and the movement of sediments into state water or onto lands within the state, including, but not limited to, clearing, dredging, grading, excavating, transporting, and filling of land . . . .”) (internal quotations omitted); O.C.G.A. § 12-7-6(b)(15)(B) (2012) (“No land-disturbing activities shall be conducted within any such buffer; and a buffer shall remain in its natural, undisturbed state of vegetation . . . .”); O.C.G.A. § 12-7-7(a) (2012) (“No land-disturbing activities shall be conducted in [a buffer] . . . without the operator first securing a permit from a local issuing authority . . . .”); see also GA. COMP. R. & REGS. 391-3-7-.05 (2013) (outlining the procedures for obtaining a buffer permit, called a variance: “(1) Buffers on state waters are valuable in protecting and conserving land and water resources; therefore, buffers should be protected. The buffer variance process will apply to all projects legally eligible for variances and to all state waters having vegetation wrested from the channel by normal stream flow, provided that adequate erosion control measures are incorporated in the project plans and specifications and are implemented. The following activities do not require application to or approval from the Division: (a) stream crossings for water lines or stream crossing for sewer lines that occur at an angle, as measured from the point of crossing, within 25 degrees of perpendicular to the stream and cause a width of disturbance of not more than 50 feet within the buffer; or (b) where drainage structures must be constructed within the twenty-five (25) foot buffer area of any state water not classified as a trout stream; or (c) where roadway drainage structures must be constructed within the twenty-five (25) foot buffer area of any state waters or the fifty (50) foot buffer of any trout stream; or (d) construction of bulkheads or sea walls on Lake Oconee and Lake Sinclair where required to prevent erosion at the shoreline; or (e) construction of public water system reservoirs.”).

6. See Earth Day Memo, *supra* note 2 (neither “banks” nor “wrested” are defined in the text of the E&S Act). Instead, Director Turner relied on Webster’s Dictionary to define banks as “[t]he rising ground bordering a lake, river, or sea or forming the edge of a cut or hollow or as the slope of land adjoining a body of water” and wresting as “to pull, force, or move by violent wringing or twisting movements.” *Id.*

7. See, e.g., Steven D. Caley, *Earth Day ‘Present’ from Nathan Deal’s Administration Threatens to Destroy State’s Fragile Coastal Marshes*, SAPORTA REP. (Apr. 27, 2014, 8:52 PM), <http://saportareport.com/blog/2014/04/earth-day-present-from-nathan-deals-administration-threatens-to-destroy-states-fragile-coastal-marshes/>; Mary Landers, *Court Decision Revives Georgia Coastal Marsh Buffer*, SAVANNAH MORNING NEWS, (July 18, 2014, 12:01 PM), <http://savannahnow.com/news/2014->

wrested vegetation is not present, there is no buffer . . . .”<sup>8</sup> According to Turner, this interpretation is consistent with the literal meaning of the text.<sup>9</sup> The statutory language of the E&S Act applies a buffer to all state waters,<sup>10</sup> and the two-element buffer rule works well for many of these waters. After all, most state waters have clearly defined banks and some sort of vegetation.<sup>11</sup> For such waters, the “wrested vegetation” rule promulgated by the Earth Day Memo brought no significant change in procedure.<sup>12</sup> For coastal marshes, however, a myriad of complications arose.<sup>13</sup>

Determining where buffers exist along coastal marshes according to the Earth Day Memo’s new “wrested vegetation” rule was problematic. In fact, in many areas, coastal marshlands may lack wresting.<sup>14</sup> Prior to the Earth Day Memo’s wrested vegetation rule, local issuing authorities used a different test for establishing buffers along coastal marshes.<sup>15</sup> If the EPD were to only allow buffers where wrested vegetation was present, then coastal marshland would lose invaluable state protection—potentially opening the door to

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07-17/court-decision-revives-georgia-coastal-marsh-buffer#.U\_zv-ryVkwU; Mary Landers, *Editorial: Gov. Deal Must Stand for Marshland Protection*, SAVANNAH MORNING NEWS (Aug. 18, 2014, 11:43 AM), <http://savannahnow.com/opinion/2014-08-16/editorial-gov-deal-must-stand-marshland-protection>; Cecilia Moore, *A Threat Against Georgia’s Coast*, GA. POL. REV. (Aug. 3, 2014), <http://georgiapoliticalreview.com/a-threat-against-georgias-coast/>; *Coastal Counties Must Do the EPD’s Job*, SAVANNAH MORNING NEWS (May 25, 2014, 12:57 PM), <http://www.savejekyllisland.org/SMNMay252014ChathamReversesTurner.html>.

8. See Earth Day Memo, *supra* note 2.

9. *Id.*

10. O.C.G.A. § 12-7-3(16) (2012) (“‘State waters’ includes any and all rivers, streams, creeks, branches, lakes, reservoirs, ponds, drainage systems, springs, wells, and other bodies of surface or subsurface water, natural or artificial, lying within or forming a part of the boundaries of the state, which are not entirely confined and retained completely upon the property of a single individual, partnership, or corporation.”).

11. See *infra* note 64.

12. See discussion *infra* Part II.

13. See, e.g., Susan Shipman, *Opinion, Former DNR Official—New Rule Will Harm Georgia’s Iconic Salt Marshes*, SAVANNAH MORNING NEWS (May 5, 2014, 12:46 AM), <http://savannahnow.com/column/2014-05-25/susan-shipman-former-dnr-official-new-rule-will-harm-georgias-iconic-salt-marshes#.VBt9Xi6VkwU>.

14. Interview with Mary Walker, Assistant Director, Ga. Env’tl. Prot. Div., in Atlanta, Ga. (June 10, 2015).

15. See Couch Memo, July 2004, *supra* note 2.

development immediately encroaching onto coastal shores.<sup>16</sup> Coastal marshes, in other words, would lose invaluable state protection.

The EPD's announcement that it would interpret an Act consistent with its literal meaning—seemingly an ordinary announcement of the obvious—triggered an extraordinary response. Director Turner's announcement set in motion a lengthy, complex effort to restore the buffers along coastal marshes: a battle of the buffers.<sup>17</sup> This effort encompassed all three branches of Georgia's government, environmental groups, lobbyists, and concerned citizens alike.<sup>18</sup> The rule sparked litigation, multiple appeals, public outcry, and, eventually, legislation.<sup>19</sup> The battle of the buffers showed a resilient effort to save Georgia's precious coastal marshes from destruction. This effort illuminated the ability of lawyers, judges, legislators, lobbyists, environmentalists, and citizens to come together, advocate for marsh protection, and accomplish something extraordinary.

Part I of this Note analyzes the E&S Act, including its syntax, structure, and past interpretations, and examines whether the wrested vegetation rule is the proper interpretation of the statute.<sup>20</sup> Part II analyzes the practical effects that the wrested vegetation rule would have on coastal marshes and other state waters with no wrested vegetation, establishing the indisputable importance of restoring the buffers.<sup>21</sup> Part III provides a timeline showing how the battle to restore the buffers progressed from the courts to the legislature, and how the buffers were eventually restored.<sup>22</sup>

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16. Shipman, *supra* note 13 (“This directive leaves the hundreds of thousands of acres of Georgia’s salt marsh vulnerable to the same contamination the Erosion and Sedimentation Act was written to prevent.”).

17. See discussion *infra* Part II.

18. See discussion *infra* Part II.

19. See discussion *infra* Part II. See also *Turner v. Ga. River Network*, 773 S.E.2d 706 (Ga. 2015) (litigation); O.C.G.A. § 12-7-6 (Supp. 2015) (legislation).

20. See *infra* Part II.

21. See *infra* Part III.B.

22. See *infra* Part III.

## I. BACKGROUND

The Georgia coastline spans 110 miles from the Savannah River on the north to St. Mary's River on the South.<sup>23</sup> The marshes along this coastline represent approximately one-third of the remaining salt marsh habitat on the East Coast of the United States.<sup>24</sup> These marshes are an invaluable resource. Coastal marshland covers 35.3% of Georgia's maritime eco-region, "a 1,295-square-mile area include[ing] the coastal barrier islands, salt marshes, and estuaries, as well as mainland environments within the zone of tidal influence."<sup>25</sup> Further proving the marshland's extraordinary importance, approximately 21% of this maritime region is protected by either state or federal statutes and agencies.<sup>26</sup>

The Georgia Legislature has continually acknowledged the importance of protecting and conserving Georgia's coastal marshes. In 1970, Georgia passed the Coastal Marshland Protection Act (CMPA) to limit the direct impact of development and degradation to coastal marshes.<sup>27</sup> In 1975, Georgia passed the Erosion and Sedimentation Act (E&S Act) to further protect state waters from harmful erosion and construction sedimentary runoff.<sup>28</sup> In 1997, Georgia passed the Georgia Coastal Management Act to grant Georgia's Department of Natural Resources the procedural tools needed to "ensure that the values and functions of coastal waters and

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23. LESLIE EDWARDS ET AL., *THE NATURAL COMMUNITIES OF GEORGIA* 511 (2013).

24. *Id.* at 511.

25. *Id.* at 511-12.

26. *Id.* at 512 (101,560 acres managed by the State of Georgia; 34,420 acres by the National Park Service; 29,971 acres by the U.S. Fish and Wildlife Service; 14,171 acres by the Department of Defense).

27. The Coastal Marshlands Protection Act, 1970 Ga. Laws 939, § 1 (codified as amended at O.C.G.A. § 12-5-280 (2012); O.C.G.A. § 12-5-281 (2012) ("[T]he management of coastal marshlands has more than local significance, is of equal importance to all citizens of the state, is of state-wide concern, and consequently is properly a matter for regulation under the police power of the state . . . and . . . activities and structures in the coastal marshlands must be regulated to ensure that the values and functions of the coastal marshlands are not impaired . . .")).

28. The Erosion and Sedimentation Act, 1975 Ga. Laws 994, § 2 (codified as amended at O.C.G.A. § 12-7-2 (2012) (declaring the statute's purpose "to strengthen and extend the present erosion and sediment control activities and programs of this state and to provide for the establishment and implementation of a state-wide comprehensive soil erosion and sediment program to conserve and protect the land, water, air, and other resources of this state."))).

natural habitats are not impaired.”<sup>29</sup> These statutes are but a few indicators that the Georgia Legislature considers coastal marshes an invaluable resource deserving of state protection.

Of course, many of these laws apply not only to coastal marshes but to all other state waters.<sup>30</sup> One such law is the E&S Act.<sup>31</sup> Originally passed to mitigate erosion risks caused by construction, the E&S Act, as passed in 1975, made no mention of buffers whatsoever.<sup>32</sup> The “buffer” language was added to the statute in 1989.<sup>33</sup> The 1989 version of the Act provided, “[a]n undisturbed natural vegetative buffer of 25 feet measured from the stream banks shall normally be retained adjacent to any state waters except where otherwise required by [this title].”<sup>34</sup> This “stream banks” language seemingly implies that buffers were only applicable to streams, despite the term “state waters”<sup>35</sup> appearing in the paragraph as well. The 1989 version, however, neither defines the term “buffer” nor provides any guidance as to how or where to measure them.<sup>36</sup> As a result, the EPD sought clarification on exactly where and for what types of state waters these buffers existed.

In a 1993 official opinion directed to the EPD, the Office of the Attorney General of Georgia clarified the confusion.<sup>37</sup> The opinion determined whether the use of the term “stream banks” in the E&S Act limited the buffer requirement to bodies of flowing water, which would exclude coastal marshes.<sup>38</sup> The opinion stated that the term “stream banks” merely directed where the measurement of the buffer began.<sup>39</sup> The opinion further clarified “that the 25 foot undisturbed

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29. The Georgia Coastal Management Act, 1997 Ga. Laws 1037, § 1 (codified as amended O.C.G.A. § 12-5-321 (2012) (“[T]he coastal area of Georgia comprises a vital natural resource system . . . which has become vitally linked to the economy of Georgia’s coast and to that of the entire state.”)).

30. *See supra* notes 26–28, and accompanying text.

31. O.C.G.A. § 12-7-2 (2012).

32. 1975 Ga. Laws 994, 997–99.

33. 1989 Ga. Laws 1295, 1297.

34. *Id.*

35. *Id.*

36. *See id.* at 1295–1303.

37. 1993 Ga. Op. Att’y Gen. 93-7.

38. *Id.*

39. *Id.* (“The language directs that a vegetative buffer normally be retained adjacent to any state water. . . . It cannot be said that use of the term ‘stream banks’ limits the subsequent language which sets

natural vegetative buffer referenced in [the E&S Act] is normally to be retained adjacent to *any* state waters, including . . . coastal marshes."<sup>40</sup>

Were this the end of buffer legislation, the rule regarding coastal marshes would be quite simple: coastal marshes, falling under the category of "any state waters," would clearly be entitled to a twenty-five foot buffer. The E&S Act, however, was amended again in 1994, and the term "wrested vegetation" made its way into the statute via this amendment.<sup>41</sup> The E&S Act, as amended in 1994, established a twenty-five foot buffer along the "banks of any state waters, as measured from the point where vegetation has been wrested by normal stream flow or wave action . . . ."<sup>42</sup> The primary conflict between supporters and detractors of the EPD's wrested vegetation rule lies in the conflicting interpretations of the above quoted portion of the E&S Act.

The first interpretation issue of the text arose in 2004, after the E&S Act was again amended.<sup>43</sup> This amendment led to questions about the buffer's application, and then-EPD Director Carol Couch attempted to resolve in two somewhat contradictory directives.<sup>44</sup> The first memo, on June 14, 2004, stated—consistent with the Earth Day Memo—that buffers were only required along state waters with sufficient water flow to wrest vegetation and form a defined channel.<sup>45</sup> The second memo (Couch Memo), issued on July 8, 2004,

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forth to which waters the requirement applies.").

40. *Id.*; see *supra* note 10, for the definition of "state waters".

41. 1994 Ga. Laws 1650, 1654.

42. *Id.*

43. 2004 Ga. Laws 352, 352. The E&S Act was amended to require that variance applicants not increase the amount of pollutants in the stream or ensure the project will improve water quality. *Id.* at 353. The E&S Act was amended because the "recent surging economy and low interest rates have increased development in Georgia." Sue B. Smith, *Conservation and Natural Resources*, 21 GA. ST. U. L. REV. 8, 12 (2004). The law adopts "stronger buffer requirements to prohibit the increased runoff from impervious surfaces [that are] sending mud, trash, oil, and other pollutants into streams." *Id.*

44. Memorandum from Carol A. Couch, Director, Envtl. Prot. Div., Ga. Dep't of Nat. Res., to Erosion and Sedimentation Control Local Issuing Auths. and Other Interested Parties (June 14, 2004) [hereinafter Couch Memo, June 2004] (on file with the author). Her memo begins with the following: "This memo is to clarify certain issues concerning state waters, including the identification of state waters that require stream buffers . . ." *Id.*

45. *Id.* ("The determination of whether a buffer is required for state water is based solely on whether there is sufficient water to 'wrest' the vegetation from the banks of the stream, thereby forming a



stated—contradictory to the Earth Day Memo but ten years before its promulgation—that the wretched vegetation requirement did not apply to saltwater marshes.<sup>46</sup> The Couch Memo then promulgated a different process specifically for saltwater marshes, explaining that “[t]he boundaries of the saltwater marsh are determined by the Coastal Resources Division of the Department of Natural Resources (CRD) pursuant to the Coastal Marshland Protection Act and DNR Rules.”<sup>47</sup>

Rather than identifying wretched vegetation, the Couch Memo relied upon the CRD’s marsh jurisdiction lines,<sup>48</sup> which were determined to exist at the confluence of the upland and where one of fourteen marsh plants or marsh peat deposits were present.<sup>49</sup> Unfortunately, the Couch Memo did not cite to or otherwise identify any statutory support for this protocol.<sup>50</sup> Until the Earth Day Memo, buffer variances for coastal marsh from the EPD were issued according to the Couch Memo’s unofficial interpretation of the E&S Act, and the twenty-five-foot buffers were measured starting at the

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defined channel.”).

46. Couch Memo, July 2004, *supra* note 2 (explaining that the June 14 memo “does not address identification of saltwater marsh boundaries and it is not to be used for determination of buffers for the saltwater marsh”).

47. *Id.* (clarifying that “a twenty-five foot buffer is to be maintained between the permitted land-disturbing activity and the jurisdictional boundary of the saltwater marsh” as determined by the CRD).

48. The CRD adopts the jurisdictional line as delineated in The Coastal Marshland Protection Act, O.C.G.A. § 12-5-282 (2012). The line exists where coastal marshland meets the upland:

“Coastal marshlands” or “marshlands” means any marshland intertidal area, mud flat, tidal water bottom, or salt marsh in the State of Georgia within the estuarine area of the state, whether or not the tidewaters reach the littoral areas through natural or artificial watercourses. “Vegetated marshlands” shall include those areas upon which grow one, but not necessarily all, of the following: salt marsh grass (*Spartina alterniflora*), black needlerush (*Juncus roemerianus*), saltmeadow cordgrass (*Spartina patens*), big cordgrass (*Spartina cynosuroides*), saltgrass (*Distichlis spicata*), coast dropseed (*Sporobolus virginicus*), bigelow glasswort (*Salicornia bigelovii*), woody glasswort (*Salicornia virginica*), saltwort (*Batis maritima*), sea lavender (*Limonium nashii*), sea oxeye (*Borrchia frutescens*), silverling (*Baccharis halimifolia*), false willow (*Baccharis angustifolia*), and high-tide bush (*Iva frutescens*). The occurrence and extent of salt marsh peat at the undisturbed surface shall be deemed to be conclusive evidence of the extent of a salt marsh or a part thereof.

*Id.*

49. GA. COMP. R. & REGS. 391-2-3-.02 (2011) (adopting the definition of “coastal marshlands” in The Coastal Marshland Protection Act).

50. See Couch Memo, July 2004, *supra* note 2.

CRD marsh jurisdiction lines.<sup>51</sup> The EPD was aware of the discrepancies between the Act and the Couch Memo's interpretation for years. Perhaps the most direct and public challenge occurred in processing a permit application for a boat ramp in Chatham County.<sup>52</sup> After consulting with the Attorney General and analyzing the E&S Act, Director Couch sought to clarify the discrepancy.<sup>53</sup> He resolved the conflicting interpretations by publishing the Earth Day Memo and establishing conclusively that no buffers exist without the presence of wrested vegetation.<sup>54</sup>

## II. ANALYSIS

### A. *Analyzing the Erosion and Sedimentation Act*

An examination of the E&S Act's legislative intent, in combination with its statutory interpretation, indicates that the specific language of the E&S Act was not properly designed to protect coastal marshes.<sup>55</sup> Because the Act encompasses "*all state waters*," however, it does in fact govern coastal marsh protection.<sup>56</sup> According to the canons of statutory interpretation, especially that of "*expression unius est exclusion alterius*," the wrested vegetation rule is the proper interpretation of the E&S Act.<sup>57</sup> Director Turner's Earth Day Memo got it right. Although not the literal interpretation of the statute, the coastal marshland rule promulgated by the 2004 Couch Memo better accounts for the spirit of the law and allows for

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51. Earth Day Memo, *supra* note 2.

52. Mary Landers, *EPD Director Speaks Out on Buffers*, SAVANNAH MORNING NEWS, (Aug. 22, 2014), <http://m.savannahnow.com/news/2014-08-22/epd-director-speaks-out-buffers#gsc.tab=0>; *see also* Interview with Mary Walker, *supra* note 14.

53. Earth Day Memo, *supra* note 2.

54. *Id.*

55. *See* discussion *infra* notes 56–75.

56. *See* 1993 Ga. Op. Att'y Gen. 93-7 (clarifying that "the 25 foot . . . buffer referenced in [the E&S Act] is normally to be retained adjacent to any state waters, including, but not limited to, ponds, lakes reservoirs, and coastal marshes"). It is worth noting that the definition of "state waters" makes no mention of marshes, despite being amended twice since the Attorney General Opinion. O.C.G.A. § 12-7-6(b)(15)(B) (2012).

57. *Expressio unius est exclusio alterius* is translated as "The express mention of one thing implies the exclusion of another." *See, e.g.,* Alexander Props. Grp., Inc. v. Doe, 626 S.E.2d 497, 500 (Ga. 2006).

appropriately comprehensive protection.<sup>58</sup> Thus, the E&S Act needed to be amended to reconcile the statute's literal text with the legislature's broader desire to protect coastal marshes as a subset of all state waters.

### 1. *Interpreting the Statutory History of the E&S Act*

The language of the E&S Act was not specifically designed to protect coastal marshland, but rather state waters traditionally consisting of flowing water.<sup>59</sup> The Georgia Legislature passed the E&S Act in 1975 to:

[P]rovide for the establishment and implementation of a Statewide comprehensive soil erosion and sediment control program to conserve and protect land, water, air and other resources of the State; . . . to provide minimum standards for rules and regulations, ordinances and resolutions governing land-disturbing activities; . . . to provide that certain land-distributing activities may not be carried out without a permit; . . . to provide for the review and approval of erosion and sediment control plans submitted pursuant to this Act . . . .<sup>60</sup>

The Act addressed the “widespread failure” of sediment and erosion control practices in “land clearing, soil movement, and construction activities.”<sup>61</sup> Specifically, the Act dealt with “soil erosion and sediment deposition onto lands and into waters within the watersheds of this State.”<sup>62</sup> “Watershed” is not defined in the statute.<sup>63</sup> The term,

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58. See Couch Memo, July 2004, *supra* note 2. Director Couch had previously published a Memo stating that buffers were to be determined based on the presence of wretched vegetation. Couch Memo, June 2004, *supra* note 44. In the second memo, she clarified that the June 14 memo “does not address identification of saltwater marsh boundaries and it is not to be used for determination of buffers for the saltwater marsh.” Couch Memo, July 2004, *supra* note 2. Director Couch also directly states that “[i]n accordance with the 1993 opinion by the State Attorney General, saltwater marshes are considered to be State waters when implementing the Georgia Erosion and Sedimentation Act of 1975.” *Id.*

59. See discussion *infra* notes 64–75.

60. 1975 Ga. Laws 994, 994–95.

61. *Id.* at 995.

62. *Id.* In the 1975 version, the term “state waters” is defined as “any and all rivers, streams, creeks,

however, typically refers to rivers, streams, and creeks rather than marshes.<sup>64</sup> Therefore, the legislature perhaps initially intended the Act to govern construction and other developmental projects along rivers, streams, and creeks.

The 1989 amendments further indicate the E&S Act was drafted to protect state waters other than coastal marsh.<sup>65</sup> In the paragraph mentioning buffers for the first time, the Act calls for “[a]n undisturbed natural vegetative buffer of 25 feet measured from the stream banks . . . adjacent to any state waters . . . .”<sup>66</sup> The word “stream” as a modifier to the word “banks” is another indication that the legislature was not expressly concerned with coastal marshes, because it clearly suggests the buffers only existed along “streams” with banks.<sup>67</sup> Using the word “streams” in this context indicates flowing water indicative of a river or creek, unlike the stationary waters of a coastal marsh.<sup>68</sup>

The 1989 amendment, adding the stream banks language, caused the EPD to seek statutory clarification from the Office of the

branches, lakes, reservoirs, ponds, drainage systems, springs, wells, and other bodies of surface or subsurface water, natural or artificial, lying within or forming a part of the boundaries of the State . . . .” *Id.* This definition makes no express mention of coastal marshes, and mirrors the definition of state waters in the current Act. *Id.*; The Erosion and Sedimentation Act, O.C.G.A. § 12-7-3(b)(16) (2012).

63. 1975 Ga. Laws 994, 994–1002.

64. *See, e.g.*, H.B. 1265, 144th Gen. Assemb., Reg. Sess. (Ga. 1997) (defining watershed as “a drainage area contributing to a river, lake, or stream”); *see also* FLA. STAT. § 373.403(12) (2014) (“‘Watershed’ means the land area which contributes to the flow of water into a receiving body of water.”); IOWA CODE § 466B.2 (2008) (“‘Watershed’ means a geographic area in which surface water is drained by rivers, streams, or other bodies of water.”); MICH. COMP. LAWS § 324.31101(g) (1995) (“‘Watershed’ means the drainage area of a stream.”); OR. REV. STAT. § 541.890(14) (2013) (“‘Watershed’ means the entire land area drained by a stream or system of connected streams such that all streamflow originating in the area is discharged through a single outlet.”).

65. *See* 1989 Ga. Laws 1295, 1297.

66. *Id.* The statute also creates an exception for state waters that would otherwise be protected by the Metropolitan River Protection Act or by O.C.G.A. § 12-2-8, which promulgates “minimum standards and procedures for protection of . . . stream and reservoir buffers. *Id.* Neither the Metropolitan River Protection Act nor O.C.G.A. § 12-2-8 mention coastal marshes.

67. 1989 Ga. Laws 1295, 1297.

68. The term “streams” is not specifically defined in the statute. *See* O.C.G.A. § 12-7-3 (2012). However, the Act clarifies that the buffers do not apply to ephemeral streams. O.C.G.A. § 12-7-6(b)(15)(A)(v) (2012) (defining ephemeral streams as a stream “[t]hat under normal circumstances has water flowing only during and for a short duration after” rain). By implication, this definition suggests that the normal—“non-ephemeral”—streams have flowing water throughout the year.

Attorney General.<sup>69</sup> That the EPD felt it necessary to seek clarification supports a conclusion that the text of the Act was ambiguous on its face. For the first time, the Georgia Attorney General's official opinion interpreted "any state waters" within the E&S Act to include coastal marshes.<sup>70</sup> During the following legislative session, the E&S Act was again amended to then include the wrested vegetation language.<sup>71</sup>

Adding the wrested vegetation language was not, however, the only addition to the buffer requirement.<sup>72</sup> The exact wording of the buffer requirement became "[I]and-disturbing activities shall not be conducted within 25 feet of any state waters, as measured *from the point where vegetation has been wrested by normal stream flow or wave action . . .*"<sup>73</sup> The addition of the phrase "or wave action" paired with the removal of the term "stream banks" suggests the legislature understood that buffers were required for coastal marshes.<sup>74</sup> Considered in conjunction with an Attorney General opinion establishing that state waters includes coastal marshland, the E&S Act clearly includes marshland among the categories of state waters requiring a buffer.<sup>75</sup> The question thus becomes whether the wrested vegetation rule is a proper interpretation of the buffer requirement, and whether the rule restricts buffer applicability only to coastal marshland wrested by wave action or flowing water. These questions would be answered by the courts.

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69. 1993 Ga. Op. Att'y Gen. 93-7 (explaining that this opinion was "in response to [the EPD's] request for an official opinion from this office regarding the interpretation of the term 'stream banks' as used" in the E&S Act). Specifically, the opinion's issue was "whether the use of the term 'stream banks' limits the required buffer to bodies of flowing water so as to exempt ponds, lakes, reservoirs, and coastal marshes." *Id.*

70. *Id.* (stating also that use of the term stream banks does not limit the application of the buffers to streams with banks).

71. 1994 Ga. Laws 1650, 1654.

72. *Id.*

73. *Id.* (emphasis added). This language remained unchanged in the pre-2015 statute. See 2004 Ga. Laws 352.

74. 1994 Ga. Laws 1650, 1654.

75. See *Undercoffer v. Colonial Pipeline Co.*, 152 S.E.2d 768, 771 (Ga. Ct. App. 1966) (stating that "[f]rom the addition of words it may be presumed that the legislature intended some change in the existing law").

## 2. *The Battle Begins: Environmentalists Take to the Courts*

Even before the announcement of the Earth Day Memo, environmental groups, including the Georgia River Network, were challenging the interpretation of the E&S Act in the courts.<sup>76</sup> In *Georgia River Network v. Turner*, river groups challenged a permit granted in area of freshwater wetlands lacking wretched vegetation.<sup>77</sup> This case would serve as the vehicle through which the courts interpreted the Act and thus the wretched vegetation rule as well. In the initial administrative action, the Administrative Law Judge (ALJ) held for the River Groups, concluding that the E&S Act requires a buffer for all state waters, including coastal marshes and wetlands with no wretched vegetation.<sup>78</sup> The ALJ also held that the wretched vegetation language represented one way, but not the only way, to measure where the buffers began.<sup>79</sup> In response, two separate actions were filed in Fulton and Grady County Superior Courts to challenge the ALJ's ruling.<sup>80</sup> Both superior courts reversed the ALJ, interpreting the buffer requirement—in agreement with the EPD—as requiring the presence of wretched vegetation.<sup>81</sup> The River Groups then challenged the superior courts' rulings in the Georgia Court of Appeals.<sup>82</sup>

The court of appeals disagreed with the superior courts, holding instead that the wretched vegetation language “merely specifies the location of the buffer.”<sup>83</sup> Analyzing both the syntax and structure of the E&S Act, the court held that “[t]his interpretation would hold that buffer protection is afforded in fits and starts, should the line of

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76. Ga. River Network, Docket No. OSAH-BNR-EPD-ES-1308374-60-Miller, at 2 (Office of State Admin. Hearings Jan. 14, 2013).

77. *Id.*

78. *Id.* at 11–12.

79. *Id.* at 17.

80. Grady Cty. Bd. of Comm'rs v. Ga. River Network, No. 13-V-036 (Super. Ct. Grady Cty. May 30, 2013), *rev'd sub nom.*, Ga. River Network v. Turner, 762 S.E.2d 123 (Ga. Ct. App. 2014), *rev'd*, 773 S.E.2d 706 (Ga. 2015); Turner v. Ga. River Network, No. 2013-CV-227212 (Super. Ct. Fulton Cty. May 16, 2013), *rev'd*, 762 S.E.2d 123 (Ga. Ct. App. 2014), *rev'd*, 773 S.E.2d 706 (Ga. 2015).

81. *Grady Cty. Bd. of Comm'rs*, No. 13-V-036, at 16; *Turner*, No. 2013-CV-227212, at 19.

82. Ga. River Network v. Turner, 762 S.E.2d 123 (Ga. Ct. App. 2014).

83. *Id.* at 130 (deciding that “[t]o treat the language . . . as the Superior Courts did, would be to hold that no buffer is required along the banks of streams, rivers, and lakes that have rocky or sandy shores where lines of wretched vegetation cannot be found”).

wrested vegetation not be continuous, an absurdity not intended by the legislature.”<sup>84</sup> In making this determination, the majority relied on the fact that the wrested vegetation language was not “expressly in the list of exceptions”<sup>85</sup> within the statute but rather “in a subordinate clause that addresses measurements.”<sup>86</sup> The majority also held, however, that the statute was “internally inconsistent” because it did not “set out an alternative to its provision that buffers are to be measured.”<sup>87</sup>

The majority thus propounded two contradictory holdings. First, they held the wrested language does not establish a rule because it is not an express exception.<sup>88</sup> Second, they held the wrested language is just one of multiple methods for identifying the location of the buffer.<sup>89</sup> Under the principle of *expression unius est exclusio alterius*, if the Act—as interpreted by the majority—expressly mentions only one method for measuring a buffer, it impliedly excludes any others. Thus, it cannot be true that the wrested vegetation language is simply one means for determining buffer location because the E&S Act makes no mention of any additional means. The majority’s first holding—that the wrested vegetation language does not create a definitive rule—cannot be supported in the face of the Act’s failure to provide for any other means to determine the location of the buffer.<sup>90</sup> Such an interpretation would,

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84. *Id.* The Court of Appeals must “look diligently for the intention of the General Assembly and . . . follow the literal language of the statute unless it produces contradiction, absurdity, or such an inconvenience as to insure that the legislature meant something else.” *Id.* at 129 (quoting Judicial Council of Ga. v. Brown & Gallo, LLC, 702 S.E.2d 894, 897 (Ga. 2010)).

85. See 2004 Ga. Laws 352. The Act lays out an enumerated list of exceptions to which the buffer provisions do not apply. *Id.* at 353. According to the court, if waters without wrested vegetation were to be exempt from the Act the wrested vegetation language would appear among the other exceptions. *Ga. River Network*, 762 S.E.2d at 130.

86. *Ga. River Network*, 762 S.E.2d at 130–31; see 2004 Ga. Laws. 352, 353 (setting out a list of exceptions to which the buffer does not apply). The majority in *Ga. River Network* held that the wrested vegetation rule, in effect, created a seventh exception. See *Ga. River Network*, 762 S.E.2d at 131.

87. *Ga. River Network*, 762 S.E.2d at 131.

88. *Id.*

89. *Id.* at 130.

90. *Id.* Morton v. Bell, 452 S.E.2d 103, 104 (Ga. 1995) (applying the principle of *expressio unius est exclusio alterius*). A similar maxim, *expressum facit cessare tacitum*, is often applied to statutes. Roman v. Terrell, 393 S.E.2d 83, 86 (Ga. Ct. App. 1990). This maxim suggests that if some things (of many) are expressly mentioned “the inference is *stronger* that those omitted are intended to be excluded than if none at all had been mentioned.” Bailey v. Lumpkin, 1 Ga. 392, 404 (1846).

in the words of the majority, render the E&S Act “internally inconsistent.”<sup>91</sup>

Therefore, the wrested vegetation rule must be the proper interpretation of the E&S Act’s buffer requirement. As the dissent points out, the wrested vegetation language is “a participial phrase that modifies the term ‘buffer.’”<sup>92</sup> If the Legislature intended the wrested vegetation language to only establish one method for measuring the buffer, it would have included others.<sup>93</sup> It must then have been the legislature’s intention that the wrested vegetation language determines which state waters require buffers and which do not.<sup>94</sup>

The cardinal rule in statutory construction is where the language of the statute is “susceptible of but one natural and reasonable construction, [a] court . . . must construe it according to its terms.”<sup>95</sup> Here, the most “natural and reasonable construction” of the E&S Act indicates the wrested vegetation language properly creates a two-element rule because the language is contained in a participial phrase modifying “buffer,” and because the statute provides no other methods of measurement.<sup>96</sup>

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91. *Ga. River Network*, 762 S.E.2d at 131. The Court of Appeals’ statutory analysis also assumes that the statute is ambiguous, as courts should only analyze intent and structure in such cases. *Chase v. State*, 681 S.E.2d 116, 118 (Ga. 2009) (“Where the language of a statute is plain and susceptible to only one natural and reasonable construction, courts must construe the statute accordingly.”). This Note argues the language is not ambiguous and that the wrested vegetation rule is the only natural and reasonable construction of E&S Act.

92. *Ga. River Network*, 762 S.E.2d at 131 (Andrews, J., dissenting). The *Georgia River Network* case resulted in a four-three split between the judges on the Georgia Court of Appeals: Presiding Judge Barnes, Presiding Judge Doyle, and Judge Boggs concurring with Judge McFadden in the majority; Judge Andrews, Judge Ray, and Judge Branch dissenting in the minority. *See generally id.*

93. *Bailey*, 1 Ga. at 403–04 (stating that if some things (of many) are expressly mentioned, the assumption is greater that those omitted are meant to be excluded rather than if none at all had been mentioned).

94. *Chase*, 681 S.E.2d at 120 (stating that “[t]he best indicator of the General Assembly’s intent is the statutory text it actually adopted”).

95. *Hollowell v. Jove*, 279 S.E.2d 430, 433 (Ga. 1981) (quoting *Rayle Elec. Membership Corp. v. Cook*, 25 S.E.2d 574, 575 (Ga. 1943)).

96. *Id.*; *Ga. River Network*, 762 S.E.2d at 131 (Andrews, J., dissenting).



*a. Incorporating Legislative Intent*

Although the wrested vegetation rule was the proper interpretation of the E&S Act, it did not properly afford coastal marshland the protections intended by the legislature.<sup>97</sup> In holding against the wrested vegetation rule, the court of appeals reasoned that “[i]t is our duty to resolve [the E&S Act’s inconsistencies] so as to give effect to the intent of the General Assembly.”<sup>98</sup> The Legislature’s intent—to “strengthen and extend the present erosion and sediment control activities and programs of this state” and “to protect the land, water, air and other resources of this state”—<sup>99</sup> is in fact upheld by the court of appeals’ ruling.<sup>100</sup> As the dissent in *Georgia River Network v. Turner* denotes, however, the court should not “re-write the buffer provision to achieve what [the court] believe[s] is a more desirable level of environmental protection.”<sup>101</sup> Thus, although finding against the wrested vegetation rule does provide more comprehensive environmental protection, it was not the court’s role to do so in contradiction of the statute’s text.

In August 2014, Director Turner appealed to the Supreme Court of Georgia and circulated another directive instructing local issuing authorities to continue to follow the Earth Day Memo during the appeal process and to only require variances where wrested vegetation is present.<sup>102</sup>

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97. See O.C.G.A. § 12-7-2 (2012).

98. *Ga. River Network*, 762 S.E.2d at 131.

99. O.C.G.A. § 12-7-2 (2012). The Best Management Practices set out by the Act describe and explain how the Act is to be effectuated. O.C.G.A. § 12-7-6. One such “Best Management Practice” is the buffer requirement. O.C.G.A. § 12-7-6(b)(15)(A). This section’s introductory paragraph states that these Best Management Practices—including buffers—are “required for all land-disturbing activities.” O.C.G.A. § 12-7-6(a)(1). “Land-disturbing activities” is defined in the statute as “any activity which may result in soil erosion from water or wind and the movement of sediments into *state water*.” O.C.G.A. 12-7-3(9) (emphasis added). Thus, the act uses a set of best management practices, which includes buffers, to prevent the erosion of *state water*, a phrase that includes coastal marshland.

100. *Ga. River Network*, 762 S.E.2d at 131; see also Mark A. McCarty, *Conservation and Natural Resources*, 12 GA. ST. U. L. REV. 39, 47 (1995).

101. *Ga. River Network*, 762 S.E.2d at 132 (Andrews, J., dissenting); see also *State v. Fielden*, 629 S.E.2d 252, 257 (Ga. 2006) (explaining that “under our system of separation of powers” courts do not have the authority to “rewrite statutes”).

102. Petition for Writ of Certiorari, *Turner v. Ga. River Network*, 2014 Ga. S. Ct. Briefs LEXIS 303 (Aug. 25, 2014) (No. S14C1781); see Memorandum from Judson H. Turner, Director, Env’tl. Prot. Div., Ga. Dep’t of Nat. Res., to Erosion and Sedimentation Local Issuing Auths. and Other Interested Parties

### 3. *The Fate of the Buffers Moves to the State's Highest Court*

The Supreme Court of Georgia held oral argument in January 2015.<sup>103</sup> Attorney Nels Peterson,<sup>104</sup> arguing on behalf of Mr. Turner and the Environmental Protection Division, argued for a plain reading of the E&S Act's text.<sup>105</sup> "All types of state waters," he remarked, "have buffers that are measured from the point of wrested vegetation."<sup>106</sup> In Mr. Peterson's opinion, the opposition's reading of the statute adds a provision allowing the EPD to create alternative measurement points where no wrested vegetation is present.<sup>107</sup> The General Assembly, however, created no such provision when it wrote the Act. About halfway into the EPD's argument, Justice Harold Melton asked, "So where there is no wrested vegetation, there is no buffer?"<sup>108</sup> The answer was a definitive yes.<sup>109</sup>

Attorney Charles Cork III, arguing for the River Network, argued that the buffer should be measured starting from the bank for all state waters without vegetation.<sup>110</sup> Some of the Justices clearly did not accept this proposition. For example, Justice Keith Blackwell posited that the Legislature laid out a definitive measurement point via the wrested vegetation language.<sup>111</sup> Justice Robert Benham expressed concern that perhaps the court of appeals overstepped its powers by interfering with the legislative process in the absence of extreme

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(Aug. 12, 2014) [hereinafter Earth Day Memo] (on file with Georgia State University Law Review) (explaining that local issuing authorities should continue to follow the Earth Day Memo because the Court of Appeals decision "has created confusion and uncertainty as to its applicability to land disturbing activities within buffers").

103. See *Turner v. Ga. River Network*, 773 S.E.2d 706 (Ga. 2015).

104. Mr. Peterson argued in his capacity as Solicitor General for the State of Georgia. At the time of publication, Mr. Peterson is a judge on the Georgia Court of Appeals.

105. See Oral Argument, *Turner v. Ga. River Network*, 773 S.E.2d 706 (Ga. 2015) (video recording on file with author).

106. *Id.* at 2:55.

107. *Id.* at 3:33.

108. *Id.* at 10:09.

109. *Id.* at 10:13. The Grady County Board of Commissioners, also a party to the case, argued beginning at 14:07. *Id.* at 14:07.

110. *Id.* at 20:28.

111. Oral Argument at 21:53, *Turner v. Ga. River Network*, 773 S.E.2d 706 (Ga. 2015) (video recording on file with author). Justice Blackwell aptly pointed out that the General Assembly appealed the bank measurement proposed by the River Network in 1994 when they added the term wrested vegetation. *Id.* at 22:03.

unreasonableness.<sup>112</sup> Mr. Cork, however, countered that the EPD's interpretation leaves meaningless the Act's establishment clause because that clause clearly states that all state waters shall have a buffer.<sup>113</sup> In the words of Mr. Cork, "there is a buffer along all state waters. That is our position."<sup>114</sup> Echoing the court of appeals opinion, Mr. Cork decisively stated "[the Commission's] reading of the statute is absurd."<sup>115</sup>

The Supreme Court of Georgia published its decision on June 15, 2015.<sup>116</sup> In an opinion delivered by Justice Robert Benham, the court reversed the decision of the court of appeals.<sup>117</sup> The opinion states correctly that "the Court of Appeals erred because the literal language of the statute does not require a buffer for state waters alongside banks without wrested vegetation."<sup>118</sup> Consistent with the above analysis, the opinion chides the court of appeals for overstepping its bounds, "courts cannot construe [the E&S Act's text] to force an outcome that the legislature did not expressly authorize."<sup>119</sup> Concluding the opinion for the majority, Justice Benham writes that "[i]n order for the buffer requirement to apply to state waters alongside banks without wrested vegetation, the legislature would need to take action to amend the statute."<sup>120</sup> As the Supreme Court of Georgia properly held, the battle to restore the buffers needed to change venues from the courts to the halls of the legislature.

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112. *Id.* at 31:20.

113. *See id.* at 21:41.

114. *Id.* at 23:23.

115. *Id.* at 33:35.

116. *See Turner v. Ga. River Network*, 773 S.E.2d 706 (Ga. 2015).

117. *See id.* Justice Benham, joined by Justices Hines, Hunstein, and Blackwell reversed the judgment of the Court of Appeals. *Id.* at 706. Chief Judge H. Gibbs Flanders, sitting by designation in place of Justice David Nahmias, also joined the majority. *Id.* at 709. Justice Melton dissented. *Id.* (Melton, J., dissenting). In his dissent, Justice Melton adopts the opinion of the River Networks that the Legislature intended to provide buffers for all state waters. *Id.* at 710.

118. *Id.* at 708.

119. *Id.* at 709.

120. *Id.*

#### 4. *Why the Legislature Should Adopt Carol Couch's 2004 Interpretation*

EPD Director Carol Couch's 2004 Couch Memo, while unsupported by the text of the E&S Act, better accounts for the Legislature's intention to protect coastal marshland.<sup>121</sup> Until Earth Day 2014, buffers along coastal marshes were measured using the CRD's marsh jurisdiction lines.<sup>122</sup> These jurisdictional lines are determined pursuant to the Coastal Marsh Protection Act (CMPA) in addition to DNR rules and regulations.<sup>123</sup> The CMPA similarly requires developers or private property owners to get a permit before they can develop.<sup>124</sup> However, CMPA permits are required "within the estuarine area" rather than "along the banks of state waters."<sup>125</sup>

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121. Couch Memo, June 2004, *supra* note 44. The E&S Act currently does not indicate that coastal marshland is awarded, or deserve, a different measurement system. O.C.G.A. § 12-7-3 (2012).

122. Earth Day Memo, *supra* note 2 (stating that "[t]his communication supersedes the July 8, 2004 memorandum from Director Carol Couch); Couch Memo, July 2004, *supra* note 2 (explaining that "[t]he twenty-five foot buffer required in the Erosion and Sedimentation Act is measured from the marsh jurisdiction line. In other words, a twenty-five foot buffer is to be maintained between the land-disturbing activity and the jurisdictional boundary of the saltwater marsh").

123. Couch Memo, July 2004, *supra* note 2 ("The boundaries of the saltwater marsh are determined by the Coastal Resources Division of the Department of Natural Resources pursuant to the Coastal Marshland Protection Act and DNR Rules."); O.C.G.A. § 12-5-280 (2012) (The marsh jurisdiction line exists where coastal marshland meets the upland.).

Coastal marshlands or marshlands means any marshland intertidal area, mud flat, tidal water bottom, or salt marsh in the State of Georgia within the estuarine area of the state, whether or not the tidewaters reach the littoral areas through natural or artificial watercourses. Vegetated marshlands shall include those areas upon which grow one, but not necessarily all, of the following: salt marsh grass (*Spartina alterniflora*), black needlerush (*Juncus roemerianus*), saltmeadow cordgrass (*Spartina patens*), big cordgrass (*Spartina cynosuroides*), saltgrass (*Distichlis spicata*), coast dropseed (*Sporobolus virginicus*), bigelow glasswort (*Salicornia bigelovii*), woody glasswort (*Salicornia virginica*), saltwort (*Batis maritima*), sea lavender (*Limonium nashii*), sea oxeye (*Borrichia frutescens*), silverling (*Baccharis halimifolia*), false willow (*Baccharis angustifolia*), and high-tide bush (*Iva frutescens*). The occurrence and extent of salt marsh peat at the undisturbed surface shall be deemed to be conclusive evidence of the extent of a salt marsh or a part thereof.

GA. COMP. R. & REGS. 391-2-3-.02 (2011) (adopting the language of the Coastal Marshland Protection Act, O.C.G.A. § 12-5-282(3)).

124. O.C.G.A. § 12-5-286(a)(1) (Supp. 2015).

125. *Id.* (stating that "[n]o person shall remove, fill, dredge, drain, or otherwise alter any marshlands or construct or locate any structure over marshlands in this state within the estuarine area thereof without first obtaining a permit . . ."). Estuarine area is defined as "all tidally influenced waters, marshes, and marshlands lying within a tide-elevation range from 5.6 feet above mean tide level and below." O.C.G.A. § 12-5-282(7) (2012).

The CMPA also empowers the CRD to conclusively determine marsh jurisdiction lines.<sup>126</sup> Once the CRD determines its marsh jurisdiction line, any development between that line and the water requires a permit.<sup>127</sup> Additionally, the E&S Act, as interpreted by the Couch Memo, required an additional permit for any development within a twenty-five-foot buffer from that marsh jurisdiction line outward towards the upland.<sup>128</sup> Issuing buffers according to the Couch Memo creates a simple, coherent scheme. Once the marsh jurisdiction line is determined, any development between that line and the water would need a CMPA permit and any development within twenty-five feet of that line and the upland would need an E&S Act permit.<sup>129</sup>

Coastal marshland, because it is different than other state waters, requires a rule specifically designed to account for these differences. Unlike other waters, where boundary lines “may be potted on flat, tangible, visible surfaces, boundaries of marshlands, which must be determined by the tide phenomenon, create new problems.”<sup>130</sup> Whereas rivers and streams have visually determinable banks and easily identifiable wretched vegetation, marsh boundaries are not always fixed or visible.<sup>131</sup> As a result, a hardline, black-and-white rule for coastal marshland is ineffective. By their very nature,

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126. O.C.G.A. § 12-5-286(a) (Supp. 2015).

127. *Id.* Permits are granted by the Coastal Marshlands Protection Committee. O.C.G.A. § 12-5-283(a) (2012) (“The committee shall issue all orders and shall grant, deny, revoke, and amend all permits and leases provided for by this part.”). The board is comprised of the Commissioner of Department of Natural Resources (DNR) and four persons selected by the Board of the DNR. *Id.*

128. Couch Memo, June 2004, note 44.

129. See discussion *infra* Part III.

130. Note, *Regulation and Ownership of the Marshlands: The Georgia Marshlands Act*, 5 GA. L. REV. 563, 580 (1971).

131. AARON L. SHALOWITZ, *SHORE AND SEA BOUNDARIES* 89 (1962). The author explains:

Boundaries determined by the course of the tides involve two engineering aspects: a vertical one, predicated on the height reached by the tide during its vertical rise and fall, and constituting a tidal plane or datum, such as mean high water, mean lower water, etc.; and a horizontal one, related to the line where the tidal plane intersects the shore to form the tidal boundary desired . . . . The first is derived from tidal observations alone, and . . . [t]he second is dependent on the first, but is also affected by natural processes of erosion and accretion, and the artificial changes made by man. A water boundary determined by tidal definition is thus *not a fixed, visible mark on the ground . . . but represents a condition of the water’s edge during a particular instant of the tidal cycle.*

*Id.* (emphasis added).

marshland boundaries change over time.<sup>132</sup> Recognizing the changing nature of marshland boundaries, the CRD re-evaluates its jurisdiction lines periodically to reflect any changes.<sup>133</sup> Thus, the Couch Memo's interpretation of the E&S Act's buffer requirement accurately accounts for the fluctuating nature, lack of clear boundaries, and other differences between coastal marsh and other state waters. Consistent with the aforementioned analysis, the E&S Act required an amendment by the legislature to incorporate the buffer determinations delineated by the Couch Memo. Luckily, that is exactly what the legislature did.

##### 5. *The Fate of the Buffers Moves to the Capitol*

After oral arguments were heard, but before the Supreme Court of Georgia issued its decision, the process to amend the E&S Act began. In February 2015, Senator Ben Watson (R-1st) introduced Senate Bill 101 (SB 101) to "provide for a buffer against coastal marshlands."<sup>134</sup> The Bill added an exception to the E&S Act specifically for coastal marshland: "There is established a [twenty-five] foot buffer along coastal marshlands, as measured horizontally from the coastal marshland-upland interface, as determined in accordance with [The Coastal Marshland Protection Act] . . . ." <sup>135</sup> This exception is consistent with the Couch Memo and the pre-Earth Day procedures for establishing buffers.<sup>136</sup> The bill in fact draws directly from the Couch Memo's language and its incorporation of the upland/marshland delineation line from the CMPA.<sup>137</sup>

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132. *Id.*

133. GA. COMP. R. & REGS. 391-2-3-.02 (2011).

134. *See* S.B. 101, 2015 Gen. Assemb., Reg. Sess. (Ga. 2015) (as enacted), <http://www.legis.ga.gov/legislation/en-US/Display/20152016/SB/101>; *see also* S.B. 101, 2015 Gen. Assemb., Reg. Sess. (Ga. 2015) (as introduced), <http://www.legis.ga.gov/legislation/en-US/Display/20152016/SB/101>.

135. S.B. 101 (as introduced). This new provision includes exceptions, including where the EPD Director determines to allow a variance that is at least as protective of natural resources, for routine maintenance of existing roads, and for the maintenance of golf course ponds. *Id.* The current version of the bill is O.C.G.A. § 12-7-6 (Supp. 2015).

136. *See generally* Couch Memo, June 2004, note 44.

137. *Id.*

The substantive portion of SB 101's marsh exception remained unchanged through the legislative process. The Senate changed the language of the exceptions and the House amended the bill to provide for a rulemaking procedural mechanism.<sup>138</sup> The Legislature removed one exception originally in SB 101.<sup>139</sup> This exception would have exempted projects that already had a 404 permit in place from the buffer permit requirement.<sup>140</sup> Apart from those changes, SB 101 sped through the General Assembly. As evidence of how highly Georgia legislators value coastal marshland, the Georgia Conservancy and Georgia Chamber of Commerce penned a joint letter endorsing the Bill—something one representative stated he had never seen before.<sup>141</sup> SB 101 was introduced in February 2015, unanimously passed in the house on March 26, 2015, and passed in the senate the very next day.<sup>142</sup> SB 101 was sent to the Governor on April 8th, 2015—less than a year after EPD Director Turner issued the wrested vegetation rule invalidating marsh protection.

According to the EPD, SB 101 was important because it provided the statutory authority that the Couch Memo lacked to protect Georgia's invaluable coastal marshland under the E&S Act.<sup>143</sup> While the EPD may have agreed with the policies behind the Couch Memo, its duty as an agency is to implement laws as they are written.<sup>144</sup> SB 101 aligned the EPD's policy to protect coastal marshland with the text of the E&S Act, providing clarity not only to citizens along the coast who may need to apply for a buffer permit, but also to the permit-issuing authorities.<sup>145</sup> To do so, SB 101 simply mirrored the Couch Memo's interpretation—the way issuing authorities had understood coastal marsh buffers for a decade leading up to Earth

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138. S.B. 101, 2015 Gen. Assemb., Reg. Sess. (Ga. 2015) (enacted).

139. Compare S.B. 101 (as passed), with S.B. 101 (as introduced).

140. *Id.*

141. Walter C. Jones, *Georgia House Passes Compromise Marsh Buffer*, SAVANNAH MORNING NEWS (Mar. 26, 2015, 1:55 PM), <http://savannahnow.com/news/2015-03-26/georgia-house-passes-compromise-marsh-buffer>.

142. See Georgia House of Representatives Voting Record, S.B. 101 (Mar. 26, 2015); Georgia Senate Voting Record, S.B. 101 (Mar. 27, 2015).

143. Interview with Mary Walker, *supra* note 14.

144. *Id.*

145. *Id.*

Day 2014.<sup>146</sup> As the Act now stands, coastal marshlands receive the same protections as before the Earth Day Memo. The Battle of the Buffers thus resulted in a sound victory for the state, the environmental groups, and the marshes alike.

#### CONCLUSION

In a time where litigation moves at a snail's pace and legislation moves even slower, the Battle of the Buffers lasted only thirteen months. In April 2014, Director Turner's Earth Day Memo announced the wrested vegetation rule and in May 2015, SB 101 went into effect. This complex journey involved all three branches of Georgia's government. First, the judicial branch took on the buffers. The wrested vegetation litigation moved from an administrative hearing, to Fulton County Superior Court, to the Georgia Court of Appeals, and to the Supreme Court of Georgia. The high court ultimately issued the correct decision: Jud Turner was right and the plain meaning of the Act's text mandated that buffers only exist where wrested vegetation is present. Regardless of whether the Couch Memo was a more favorable policy, the Act had to be interpreted as written. The court's decision correctly applied the canons of statutory interpretation and valiantly demarcated the roles of court and legislature: the former to say what the law is and the latter to change the law if what is said fails to equate what is intended.

The executive branch dealt with the buffers as well. First, the EPD issued an interpretation consistent with the text of the Statute. State agencies are charged with implementing the laws, not changing them. Although controversial, the EPD thus performed its constitutional duty. The EPD's involvement did not end there. From the beginning, the EPD supported SB 101 as an effort to protect Georgia's coastal marshland. It is not often that agencies assist in the legislative effort to reverse their actions. The EPD's support of SB 101 and ultimate implementation of its changes indicates that the agency and its

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146. *Id.*



Director Jud Turner respects the role the EPD plays in protecting Georgia's natural resources and especially Georgia's invaluable coastal marshland. Though it may appear facially ironic, the battle to restore marsh buffers could not have been won without the efforts of the same agency that invalidated marsh protection in the first place.

Finally, the legislative branch effectively ended the battle of the buffers. SB 101, introduced by a senator from coastal Savannah, resoundingly restored the buffers around coastal marshland and removed the possibility that creative developers could abuse the wrested vegetation rule in order to develop along coastal marshes. SB 101 moved quickly through the house and senate and even passed in the house unanimously. Passing legislation is a complicated system: partisan differences, special interest and lobbying groups, and outside pressures often result in a slow moving and ineffective process. But when it came to restoring marshland protection, both sides of the aisle came together and efficiently and effectively took action. Georgia has always taken an unwavering stance on protecting its coastal marshes and SB 101 all but reinforces that stance.