

March 2012

CONSERVATION AND NATURAL RESOURCES Control of Soil Erosion and Sedimentation: Establish "Best Management Practices" as Standard for General Permits for Land-Disturbing Activities

Georgia State University Law Review

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>

 Part of the [Law Commons](#)

Recommended Citation

Georgia State University Law Review, *CONSERVATION AND NATURAL RESOURCES Control of Soil Erosion and Sedimentation: Establish "Best Management Practices" as Standard for General Permits for Land-Disturbing Activities*, 12 GA. ST. U. L. REV. (2012).
Available at: <https://readingroom.law.gsu.edu/gsulr/vol12/iss1/46>

This Peach Sheet is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact mbutler@gsu.edu.

CONSERVATION AND NATURAL RESOURCES

Control of Soil Erosion and Sedimentation: Establish "Best Management Practices" as Standard for General Permits for Land-Disturbing Activities

CODE SECTIONS: O.C.G.A. §§ 12-5-30, 12-7-6, -8, -17
(amended)
BILL NUMBER: SB 375
ACT NUMBER: 14
GEORGIA LAWS: 1995 Ga. Laws 150
SUMMARY: The Act grants authority to the Director of the Environmental Protection Division of the Department of Natural Resources to impose either effluent limitations or best management practices for erosion and sedimentation control in general water pollution discharge permits. Additionally, the Act requires, as a minimum, that rules and regulations governing land-disturbing activities incorporate best management practices regarding erosion and resulting sedimentation buildup.
EFFECTIVE DATE: March 27, 1995¹

History

The erosion of soil from construction sites and other land-disturbing activities in Georgia is regulated, in part, under the Erosion and Sedimentation Act of 1975.² Under that statute, a permit is required for most forms of land-disturbing activities.³ The regulatory scheme created by the Erosion and Sedimentation Act placed limits on the amount of sedimentation that could be discharged in rain water draining from areas disturbed by

-
1. The Act became effective upon approval by the Governor.
 2. See 1975 Ga. Laws 994 (codified at O.C.G.A. §§ 12-7-1 to -18 (1992)).
 3. *Id.* (codified at O.C.G.A. § 12-7-7 (1992)). Exemptions from permit requirements for certain types of land-disturbing activities are found in O.C.G.A. § 12-7-17. 1994 Ga. Laws 1650 (codified at O.C.G.A. § 12-7-17 (1992)).

construction.⁴ Compliance with permits issued under this system formerly required that storm-water discharges from construction sites not exceed certain numeric turbidity levels.⁵ Specifically, the statute prohibited discharges of storm water with turbidity levels⁶ greater than "50 nephelometric turbidity units higher than the turbidity level of the receiving stream immediately upstream from the storm-water runoff discharge at the time of such discharge."⁷

This system of tying compliance to numeric turbidity levels, however, proved difficult to administer.⁸ To enforce permit requirements, the Environmental Protection Division (EPD) of the Department of Natural Resources (DNR) had to monitor turbidity levels during a period of rainfall and compare samples with the natural turbidity of the stream or lakes affected.⁹ If impermissibly high levels of turbidity were found in the discharge, enforcement for a permit violation could begin, but by that time the damage to the stream or lake would have occurred.¹⁰

The Erosion and Sedimentation Act is not the only statute with which Georgia currently regulates water quality. The discharge of pollutants into waters is also governed by the federal Clean Water Act.¹¹ Under the Clean Water Act, entities which discharge pollutants must obtain a permit issued under the National Pollutant Discharge Elimination System (NPDES).¹² The Environmental Protection Agency (EPA) is authorized to delegate the issuance of these permits to state

4. 1989 Ga. Laws 1295 (formerly found at O.C.G.A. § 12-7-6(18) (1992)).

5. *Id.*

6. Turbidity is a measure of the amount of light that can pass through a given medium (in this case storm water) and, thus, is a derivative measure of the concentration of sediment or silt in water. Telephone Interview with David Word, Associate Director of Environmental Protection Division, Department of Natural Resources (Apr. 27, 1994). [hereinafter Word Interview].

7. 1989 Ga. Laws 1295, § 3, at 1297-98 (formerly found at O.C.G.A. § 12-7-6(18) (1992)).

8. Word Interview, *supra* note 6.

9. Telephone Interview with Rep. Denny M. Dobbs, House District No. 92 (Apr. 27, 1994) [hereinafter Dobbs Interview].

10. *Id.*

11. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1387 (1988)).

12. *Id.* (codified at 33 U.S.C. § 1342 (1988)).

environmental authorities.¹³ The State of Georgia was given such authority by the EPA on June 28, 1974,¹⁴ and Georgia implemented its NPDES permitting system through provisions of the Georgia Water Quality Control Act.¹⁵

Until 1987, however, the NPDES did not expressly regulate the discharge of soil and sediment.¹⁶ The Water Quality Act, adopted by Congress in 1987, added storm-water discharges to the category of pollutants requiring a NPDES permit.¹⁷ Georgia was then able to regulate storm-water discharges through the NPDES as well as through the Erosion and Sedimentation Act of 1975.¹⁸

On September 23, 1992, the EPD issued a draft NPDES general permit that authorized discharges from any construction activity in Georgia that disturbed five or more acres.¹⁹ The draft general permit required those engaging in such construction activities to prepare storm-water pollution prevention plans and to utilize best management practices to control soil erosion and sedimentation, but expressly stated that numeric turbidity limits in the Erosion and Sedimentation Act did not have to be met.²⁰

After public comment, General Permit No. GAR 100000 was adopted by the EPD on November 19, 1992.²¹ Terry Hughey, a

13. *Id.*

14. Hughey v. JMS Dev. Corp., 38 Env't Rep. Cas. (BNA) 1568, 1570 (N.D. Ga. 1993).

15. 1974 Ga. Laws 599 (codified at O.C.G.A. § 12-5-23(15) (1992)).

16. Hughey, 38 Env't Rep. Cas. (BNA) at 1570.

17. Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified at 33 U.S.C. § 1342 (1988)).

18. Hughey, 38 Env't Rep. Cas. (BNA) at 1570. At the time of its enactment, the Water Quality Act only imposed permit requirements on construction activities which disturbed more than five acres or were part of a larger development. *See id.* at 1569. A moratorium was imposed on requiring permits for other discharges until October 31, 1992. *Id.* at 1570. That moratorium was extended by the Water Resources Development Act to October 1, 1994. *Id.* Both the EPA and the states were required under the Water Quality Act to develop requirements for NPDES storm discharge permits, but neither the EPA nor the EPD did so until late 1992. *Id.* at 1570-71.

19. *In re* The Conservation Soc'y, Inc. and Terry D. Hughey, No. DNR-EPD-WQ-AH5-92, 1993 WL 376625, at *1-2 (Ga. Bd. Nat. Res. Sept. 24, 1993).

20. *Id.* at *5.

21. *Id.* at *1, 3.

Gwinnett County resident, appealed the issuance of the permit to the Board of Natural Resources, complaining that the general permit did not require compliance with the numeric turbidity limits.²² In its opinion, the Board noted that state rules require that general permits incorporate any limitations in Georgia law which are more stringent than federal NPDES requirements.²³ The Board held that the numeric turbidity requirements contained in Code section 12-7-6(18) of the Erosion and Sedimentation Act were more stringent requirements, and as such, were required to be incorporated into the general permit.²⁴ As a direct result of this holding, the EPD was required to include numeric turbidity requirements in any regulation it wished to impose on land-disturbing activities.²⁵

Given the problems with numeric turbidity requirements, the EPD approached Senator Mark Taylor and suggested legislation which would remove the numeric turbidity limits from the Erosion and Sedimentation Act and grant the EPD discretion to require only best management practices in NPDES general permits.²⁶

SB 375

The Act amends two Code sections to remove numeric turbidity level requirements and to grant broad discretion to the EPD in regulating erosion and sedimentation problems created by land-disturbing activities.²⁷ Two additional provisions, which amended other Code sections, were added to the bill during the legislative process.²⁸ Those provisions grant the EPD more authority to enforce locally issued permits and to loosen certain

22. *Id.* at *3. Hughey also filed suit against JMS Development Corporation in federal court under the citizen suit provision of the Clean Water Act. *Hughey*, 38 Env't Rep. Cas (BNA) at 1569. The suit involved discharges from Rivercliff Place subdivision into the Yellow River which ran adjacent to Hughey's property. *Id.* at 1568-69.

23. *See generally In re The Conservation Soc'y, Inc. and Terry D. Hughey*, No. DNR-EDP-WQ-AH5-92, 1993 WL 376625 (Ga. Bd. Nat. Res. Sept. 24, 1993).

24. *Id.* at *8.

25. *See id.*

26. Telephone Interview with Sen. Mark Taylor, Senate District No. 12 (Apr. 27, 1995) [hereinafter Taylor Interview].

27. *See* O.C.G.A. §§ 12-5-30(f), 12-7-6 (Supp. 1995).

28. O.C.G.A. §§ 12-7-8, -17 (Supp. 1995).

restrictions on residential construction near the banks of trout streams.²⁹

Allowing Best Management Practices In Lieu of Numeric Turbidity Limits

Section 1 of the Act amends Code section 12-5-30(f) by adding language allowing the EPD to include effluent limitations or, alternately, best management practices in NPDES general water pollution discharge permits.³⁰ The amended language states that a showing of “infeasible” effluent limits is not required before the EPD opts for best management practices as the appropriate standard.³¹ The Act requires, however, that when issuing NPDES general permits, the EPD make reference to the best management practices minimum requirements imposed by amended Code section 12-7-6 of the Erosion and Sedimentation Act.³²

As originally drafted by the EPD and introduced by Senator Taylor, SB 375 granted the EPD discretion in imposing best management practices without a showing that effluent limitations were infeasible.³³ The EPD had surveyed other states and discovered that the best management practices requirement was the most relevant standard for controlling soil erosion through NPDES permits.³⁴ The EPD believed that best management practices would be the standard eventually set by the EPA itself.³⁵

The requirement that the EPD make reference to the best management practices minimum requirements of Code section 12-7-6 under the Erosion and Sedimentation Act was initially added in the substitute offered by the Senate Natural Resources Committee and ultimately adopted.³⁶ This additional provision

29. Taylor Interview, *supra* note 26.

30. O.C.G.A. § 12-5-30(f) (Supp. 1995).

31. *Id.*

32. *Id.*

33. SB 375, as introduced, 1995 Ga. Gen. Assem.

34. Word Interview, *supra* note 6. The EPD, in its survey of other states, discovered only seven states that still used numeric effluent limitations. Word Interview, *supra* note 6. States employing best management practices include Florida, North Carolina, and South Carolina. Word Interview, *supra* note 6.

35. Word Interview, *supra* note 6.

36. SB 375 (SCS), 1995 Ga. Gen. Assem.; O.C.G.A. § 12-7-6(b) (Supp.

was included to satisfy the environmental lobby's concerns that discretionary development of best management practices might be too open ended.³⁷

Best Management Practices Requirements

Section 2 of the Act amends the Erosion and Sedimentation Act of 1975 by replacing, in its entirety, Code section 12-7-6, which established minimum requirements for rules and regulations governing land-disturbing activities.³⁸ The former Code section 12-7-6 required "sound conservation and engineering practices" to minimize erosion and sedimentation and listed several distinct steps which constituted such practices.³⁹ One of those steps, found in former subsection (18), was the prevention of discharges that exceeded numeric turbidity limits.⁴⁰ With SB 375, the EPD sought to remove these requirements because of their difficulty in application and their automatic incorporation into any NPDES permit requirement.⁴¹ Consequently, those requirements are omitted in new Code section 12-7-6.⁴²

New Code section 12-7-6 changes the standard for rules and regulations to one of "best management practices, including sound conservation and engineering practices."⁴³ All of the specific steps that were required as sound conservation and engineering practices in former Code section 12-7-6, other than prevention of discharges reaching certain numeric turbidity levels, are retained.⁴⁴

New Code section 12-7-6 defines "properly designed" best management practices as those practices designed to control soil erosion from any rainfall up to and including a twenty-five year

1995).

37. Word Interview, *supra* note 6.

38. O.C.G.A. § 12-7-6 (Supp. 1995).

39. 1975 Ga. Laws 994 (formerly found at O.C.G.A. § 12-7-6 (1992)).

40. *Id.*

41. Word Interview, *supra* note 6; see also *In re The Conservation Soc'y, Inc. and Terry D. Hughey*, No. DNR-EDP-WQ-AH5-92, 1993 WL 376625, at *8 (Ga. Bd. Nat. Res. Sept. 24, 1993).

42. See O.C.G.A. § 12-7-6 (Supp. 1995).

43. *Id.* § 12-7-6(b).

44. Compare 1994 Ga. Laws 1650 (formerly found at O.C.G.A. § 12-7-6 (1992)) with O.C.G.A. § 12-7-6 (Supp. 1995).

rainfall event.⁴⁵ Failure to properly design, install, or maintain best management practices is a violation of any land-disturbing NPDES general permit issued.⁴⁶ Any discharge of increased turbidity storm-water runoff into a stream that results from this failure is also a violation of such permits on each occasion it occurs.⁴⁷ However, the proper design, installation, and maintenance of the required best management practices is established by the new Code section as an absolute defense to any action for violations of permits.⁴⁸

As originally drafted by the EPD and introduced by Senator Taylor, SB 375 would have stricken the numeric turbidity limits contained in former Code section 12-7-6 and replaced them with a provision requiring best management practices to be included as part of "sound conservation and engineering practices" in any regulation or permit.⁴⁹ The original Taylor/EPD provisions included the language that expressly labelled failure to design, install, or maintain those best management practices as a violation of the permits issued.⁵⁰ The bill, as introduced, also established that discharges resulting from failure to design, install, or maintain best management practices are permit violations.⁵¹ However, rather than establishing compliance with best management practices as a complete defense to an action for permit violations, the bill, as originally drafted, considered utilization of these practices as only proof of compliance with the permit.⁵²

The substitute version of SB 375, offered by the Senate Committee on Natural Resources, took more drastic steps in attempting to amend Code section 12-7-6 by changing its

45. O.C.G.A. § 12-7-6(a)(1) (Supp. 1995). A twenty-five year rainfall event is the heaviest rainfall activity that would be expected in an average twenty-five year period. Word Interview, *supra* note 6. The Manual for Erosion and Sediment Control in Georgia, in some instances, only sets out practices useful for controlling ten-year rainfall events that are not as severe. Word Interview, *supra* note 6.

46. O.C.G.A. § 12-7-6(a)(2) (Supp. 1995).

47. *Id.* § 12-7-6(a)(3).

48. *Id.* § 12-7-6(a)(1).

49. SB 375, as introduced, 1995 Ga. Gen. Assem.

50. *Id.*

51. *Id.*

52. *Id.*

structure.⁵³ The Committee's substitute version created subsection (a) in which best management practices, as defined in subsection (b), would be required for all land-disturbing activities.⁵⁴ In this new subsection (a), proper design, installation, and maintenance of best management practices was established as a complete defense to any action for noncompliance with a permit, rather than just proof of compliance with the permit.⁵⁵

New subsection (a) also inserted language that defined properly designed best management practices as those designed to avoid erosion from any rainfall event up to and including a twenty-five year rainfall event.⁵⁶ This latter provision was added to gain some certainty that any best management practices chosen would provide sufficient protection from erosion and sedimentation and was offered as a response to the environmental lobby.⁵⁷ Originally, a requirement that would avoid erosion from a one-hundred year rainfall event had been proposed, but both the Home Builders Association of Georgia and the Department of Transportation opposed it.⁵⁸ These organizations would have preferred the use of a ten-year rainfall event, but were willing to accept the twenty-five year rainfall requirement.⁵⁹ The Senate committee substitute left intact the provisions of SB 375, as introduced, which stated that failure to use best management practices and discharges resulting from those failures would be considered permit violations.⁶⁰

New subsection (b), added the substitute, set best management practices as a minimum requirement for any rules, regulations, or permits established to control soil erosion and specifically required that best management practices be "no less stringent than[] those practices contained in the 'Manual for Erosion and Sediment Control In Georgia' published by the Georgia Soil and Water Conservation Commission as of January 1 of each year."⁶¹

53. SB 375 (SCS), 1995 Ga. Gen. Assem.

54. *Id.*

55. *Id.*

56. *Id.*

57. Word Interview, *supra* note 6.

58. Word Interview, *supra* note 6.

59. Word Interview, *supra* note 6.

60. Compare SB 375, as introduced, 1995 Ga. Gen. Assem. with SB 375 (SCS), 1995 Ga. Gen. Assem.

61. SB 375 (SCS), 1995 Ga. Gen. Assem.

The reference to the manual was added at the request of environmental groups and was intended, once again, to establish more certain standards under the Act.⁶²

While the bill was on the floor of the Senate, two amendments were offered to change the provisions of new subsection (b).⁶³ Senator Johnny Isakson of the 21st District, at the request of the Home Builders Association of Georgia, amended the substitute to expressly state that best management practices need only be as stringent as the requirements of the "Manual for Erosion and Sediment Control in Georgia" published at the time a given project was permitted.⁶⁴ The Isakson amendment responded to the concerns of homebuilders that more stringent practices might be imposed after construction on a permitted project had begun.⁶⁵

Senator Michael J. Egan of the 40th District offered a second floor amendment which would have required that those engaging in land-disturbing activities prove compliance with best management practices by clear and convincing evidence before use of such practices would be available as a defense to actions for violations.⁶⁶ The Egan amendment was requested by the environmental lobby and was an attempt to impose a stricter burden on developers when facing citizen suits for enforcement.⁶⁷ An argument was made, however, that requiring such a high level of proof would impose a higher standard on those who discharge soil than on those who discharge toxins.⁶⁸ Consequently, the Egan amendment failed to gain acceptance.⁶⁹

The Senate committee substitute made a blanket change of terms from "streams" to "waters," and this change was ultimately adopted in the Act.⁷⁰ Environmental lobbyists and the EPD encouraged this change to broaden the scope of regulation to waters that do not flow, such as lakes and marshlands.⁷¹

62. Word Interview, *supra* note 6.

63. SB 375 (SFA), 1995 Ga. Gen. Assem.

64. Telephone Interview with Susanne Williams, Home Builders Association of Georgia (Apr. 27, 1995) [hereinafter Williams Interview].

65. *Id.*

66. SB 375 (SFA), 1995 Ga. Gen. Assem.

67. Williams Interview, *supra* note 64.

68. Word Interview, *supra* note 6.

69. See O.C.G.A. § 12-7-6 (Supp. 1995).

70. SB 375 (SCS), 1995 Ga. Gen. Assem.; O.C.G.A. § 12-7-6 (Supp. 1995).

71. Word Interview, *supra* note 6.

EPD's Authority to Pursue Violators

Code section 12-7-8 was amended by the Act in an attempt to broaden the EPD's ability to pursue violations of permits issued by local governments under the Erosion and Sedimentation Act.⁷² The new version of Code section 12-7-8 no longer requires that a local government authority submit a written request to the EPD before the EPD may institute compliance enforcement for permit violations.⁷³ Thus, the EPD is granted more autonomy in pursuing violations of local permits.⁷⁴

This amendment to Code section 12-7-8 first appeared as section 3 of the Senate Committee on Natural Resources' substitute.⁷⁵ It was added at the request of the environmental lobby and was part of a total package of changes designed to make SB 375 more appealing to environmental interests.⁷⁶ The entire concept of the Erosion and Sedimentation Act revolves around locally issued permits and local enforcement,⁷⁷ but for various reasons some groups believed that local enforcement had been less than thorough.⁷⁸ By removing the requirement of a written request, the EPD could more effectively pursue permit violations that local governments were unable or unwilling to pursue.⁷⁹

Single Family Residence Exemptions

The Act amends Code section 12-7-17(a)(4), relating to exemptions for certain types of land-disturbing activities from the requirements of the Erosion and Sedimentation Act.⁸⁰ The previous Code section 12-7-17 exempted construction of a single-family residence, not part of a "larger project," from many

72. Word Interview, *supra* note 6.

73. Compare 1994 Ga. Laws 1650 (formerly found at O.C.G.A. § 12-7-8(d) (1992)) with O.C.G.A. § 12-7-8 (Supp. 1995).

74. Word Interview, *supra* note 6.

75. SB 375 (SCS), 1995 Ga. Gen. Assem.

76. Word Interview, *supra* note 6.

77. See O.C.G.A. §§ 12-7-4, -8 (Supp. 1995).

78. Word Interview, *supra* note 6.

79. Word Interview, *supra* note 6. Ironically, the EPD has little reason to use the amended provision to seek enforcement since larger penalties are available for violations of NPDES permits, which are directly under the regulatory authority of the EPD. Word Interview, *supra* note 6.

80. O.C.G.A. § 12-7-17 (Supp. 1995).

requirements.⁸¹ Representative Denny M. Dobbs, however, offered an amendment, which was ultimately adopted in the Act, changing the “larger project” language to “platted subdivision, a planned community, or an association of other residential lots consisting of more than two lots.”⁸² His amendment was intended to close a loophole created by the ambiguity of the term “larger project.”⁸³ In the past, developers had purchased and built residences one at a time to avoid the requirements of the Erosion and Sedimentation Act.⁸⁴ The new language is intended to close that loophole and exempt only isolated residences built without any relation to the construction of other residences.⁸⁵ Previous Code section 12-7-17 also exempted construction of a single-family residence from all requirements imposed under the Erosion and Sedimentation Act, except those imposed under Code section 12-7-6, which prohibited land-disturbing activity within one-hundred feet of waters designated as trout streams.⁸⁶ The new exemption, however, contained in the amended Code section 12-7-17(a)(4), exempts construction of a single-family residence from all requirements of the Erosion and Sedimentation Act other than the use of best management practices.⁸⁷ Thus, the previous prohibition on activity within one-hundred feet of trout waters is no longer in effect for such projects; however, the new Code section imposes a buffer requirement of fifty feet from primary trout waters and fifty feet from secondary trout waters, which may be reduced to twenty-five feet upon approval of a variance.⁸⁸ There is also a nonwaivable twenty-five foot buffer

81. 1994 Ga. Laws 1650 (formerly found at O.C.G.A. § 12-7-17(4)(B) (1992)).

82. SB 375 (HFA), 1995 Ga. Gen. Assem.; O.C.G.A. § 12-7-17(a)(4) (Supp. 1995).

83. Dobbs Interview, *supra* note 9.

84. Dobbs Interview, *supra* note 9.

85. Dobbs Interview, *supra* note 9.

86. 1994 Ga. Laws 1650 (formerly found at O.C.G.A. § 12-7-6(16) (1992)). The 100-foot buffer zone had proven to be a serious constraint on individual landowners in North Georgia. Williams Interview, *supra* note 64. Some landowners faced situations in which either their lots did not leave adequate space for construction outside the buffer zone or suffered from natural features which only permitted construction inside the buffer zone. Williams Interview, *supra* note 64.

87. O.C.G.A. § 12-7-17(a)(4) (Supp. 1995).

88. *Id.*

for first order trout streams regardless of whether they are primary or secondary streams.⁸⁹ The impetus to remove the one-hundred foot buffer zone requirement from single-family residence projects began with HB 350 and was supported by Speaker Thomas B. Murphy of the 18th District.⁹⁰ HB 350, however, was unsuccessful, and the provision which appears in SB 375 was added by Representative Bob Hanner of the 159th District on the floor of the House.⁹¹ The original proposal would have removed any buffer zone requirement, but resistance from Lieutenant Governor Pierre Howard in the Senate prompted the inclusion of a smaller buffer zone than was previously required.⁹²

Mark A. McCarty

89. *Id.*

90. Williams Interview, *supra* note 64; HB 350, as introduced, 1995 Ga. Gen. Assem.

91. Compare HB 350, as introduced, 1995 Ga. Gen. Assem. with SB 375 (HFA), 1995 Ga. Gen. Assem.

92. Williams Interview, *supra* note 64.