

Responses to Comments Received During the Public Comment Period
November 4, 2015 – December 9, 2015
Regarding Proposed Amendments to the Rules for Erosion and Sedimentation Control,
Chapter 391-3-7

1) Comment: Definition of maintenance and serviceable are too broad and must include limits on reconstruction after facilities are damaged, deteriorated, or degraded.

Response: The definitions for “maintenance” and “serviceable” are copied verbatim from the statute. Each project site will be evaluated on a case by case basis in accordance with the definitions in the proposed rules.

2) Comment: Replacement of natural vegetation should be required.

Response: Restoration of the buffer to a naturally vegetated state or to currently existing conditions is one of the forms of mitigation listed in paragraph 391-3-7-.05(7). Restoring the site to existing conditions was added because there are sites where restoring the site to a naturally vegetated site is not practical or safe. In most cases this is the re-grassing of utility or roadway easements. Mitigation proposed for a project will be reviewed based on the conditions at the project site and the type of project proposed. This is consistent with the statute. See O.C.G.A. Sec. 12-7-6.(b)(4), which states “Whenever feasible, natural vegetation shall be retained, protected, and supplemented.”

3) Comment: EPD should adopt a program of buffer variance impact assessment to determine the individual and cumulative impact of approved variance activities. Findings should then be used to revise rules and administrative practices to ensure the goal of protecting water quality and aquatic habitat are honored.

The goal of protecting water quality and/or aquatic habitat cannot be achieved while there remains no regulation of petrochemicals (yard chemicals) within the buffer.

Response: EPD monitors and protects Georgia’s waters through a number of programs under the Clean Water Act. Section 305(b) of the Clean Water Act requires EPD to assess and describe the quality of its waters every two years in a report called the 305(b) report. Section 303(d) of the Clean Water Act requires EPD to publish every two years a list of all of the waters that are not meeting their designated uses and that need to have a TMDL(s) developed for them. EPD produces a combined 305(b)/303(d) report. In addition, Federal Regulations 40 CFR 131.20 require Georgia to review and revise its water quality standards from time to time, but at least once every three years. As part of this triennial review process, EPD solicits for additional monitoring data from interested groups and the general public. This data forms the basis for EPD’s assessment of the water quality of Georgia waters.

4) Comment: It appears that these rules accept shoreline engineering as an approved erosion control method, and that if such methods are approved, under EPD’s administration of these rules, they may substitute for the function of the entire buffer.

Response: EPD’s “Streambank and Shoreline Stabilization Guidance” encourages the use of “preferred” (non-structural and/or bio-engineering) or “acceptable” (vegetative and/or bio-engineering practices with one of more structural components) stabilization practices. Structural practices (structural methods with limited or minimally functional vegetation or no re-vegetation) are discouraged but are sometimes necessary to address erosion problems. Projects that propose structural methods such as hard armoring are required to provide additional mitigation as per the guidance.

5) Comments: Variance by rule of 500 square feet is excessive.

There are entirely too many exceptions or opportunities for variances in the rules.

Response: The 500 square feet threshold is verbatim from Senate Bill 101 and is required to be in the proposed rules. The exceptions and variances by rule are specifically included in, and authorized by, Senate Bill 101.

6) Comment: The rules aren’t clear if historic erosion problems need to be properly demonstrated for an applicant to receive a variance for shoreline stabilization.

Response: The existence and extent of an erosion problem is one component of the variance application review and will be considered during the review of the application.

7) Comment: The only changes that should have been included in the proposed rules are changes that are necessary to implement the recent amendments to the E&S Act as set forth in Senate Bill 101 or to correct any provisions in the existing regulations that are not consistent with other requirements of the Act. The rule changes that were originally proposed by EPD would have more accurately implemented Senate Bill 101, and thus were much stronger than the current version of the proposed regulations.

Response: The proposed Rules closely follow the language of SB 101 and provide necessary clarification to allow for the efficient and effective processing of buffer variance applications. EPD notes that the commenter prefers the original stakeholder draft proposal. However, the proposed rules fully accomplish the directives in Senate Bill 101.

8) Comment: Recommendation for requiring mitigation regardless of whether buffer impacts are minor or major.

Response: The rules were amended in 2012 to clarify the activities that require mitigation, in response to a buffer variance challenge and resulting advice from the Attorney General’s office. The minor impact category, which is limited to actions that maintain existing grade and yield no additional above-ground man-made materials or structures, was developed to address projects, such as utility and roadway easements, where natural vegetation is impractical and in some cases a public hazard. In these

cases re-vegetation is determined to be at least as protective of natural resources and the environment and no additional mitigation is necessary or required.

- 9) Comments:** Paragraphs 391-3-7-.05(5)(d) and 391-3-7-.11(5)(d) in the existing and proposed rules contain a criterion that should be applied by the EPD Director in evaluating a variance application that states “Whether reasonable alternative project designs, such as the use of retaining walls, are possible which do not require buffer intrusion or which require less buffer intrusion [.]” These paragraphs should be modified so that it does not create a disincentive for the construction of living shorelines.

Exempt or provide streamlined permitting for living shoreline projects.

Response: The language in Paragraphs 391-3-7-.05(5)(d) and 391-3-7-.11(5)(d) was developed to discourage the piping of streams where a retaining wall installed at the buffer line would allow the stream to remain daylighted. The language as written does not create a requirement to use retaining walls and does not create a disincentive for the construction of living shorelines.

Completely exempting living shoreline projects would likely require amending the E&S Act. The construction of a living shoreline often requires substantial earth-moving to create a stable bank for the “living” portion to establish itself, thereby creating the potential for erosion and sedimentation impacts.

- 10) Comments:** Paragraphs 391-3-7-.05(5)(f) and 391-3-7-.11(5)(f) in the existing and proposed rules states that the Director should take the current condition of the buffer into consideration in deciding whether to grant a buffer variance. This implies that if the condition of the buffer area is poor, the Director should be more inclined to grant the variance. This is the opposite of what should happen. . . this provision as written creates an incentive for a developer to degrade a buffer before applying for a buffer variance to improve chances of securing a variance.

Paragraph 391-3-7-.11(7)(d)(1) provides that mitigation can include “[r]estoration of the buffer to a naturally vegetated state to the extent practicable.” This provision should be clarified. To the extent a variance applicant has destroyed portions of a buffer, the applicant should restore those areas as part of the project. That restoration work should not be considered mitigation.

Response: The condition of the buffer is just one consideration in the buffer review process and would most likely not be the deciding factor in whether a buffer variance is issued. Paragraph (c) clearly states that “mitigation is required for all major buffer impacts and shall offset the buffer encroachment and any loss of buffer function”. Paragraph (d) offers a list of methods that may be used to reach that end result. Violations of the E&S Act are subject to enforcement action under the E&S Act.

11) Comment: Paragraph 391-3-7-.05(6) of the proposed rules eliminates the existing requirement that EPD publish public notices in the legal organ or each of the counties where the buffer disturbance will occur. This is unacceptable. Only a very small percentage of Georgians have signed up to receive public notices. Removing this notice requirement intrudes upon private property rights and due process for Georgians who are either new to the state or unaware of the process required to receive notices from EPD.

Response: Public notice (in any form) of buffer variances is not required by the E&S Act; however, EPD values and encourages public involvement. The changes proposed streamline and modernize the public notice process by eliminating a duplicative notice in the legal organ that was adopted prior to widespread use of the internet and electronic mail notification systems. The U.S. EPA is also moving away from using legal organs to publish public notices (see EPA-HQ-OAR-2015-0090, “Revisions to the Public Notice Provisions in Clean Air Act Permitting Programs”) by allowing website posting and email notification in lieu of using the legal organ. The public notices will continue to be posted on EPD’s web page and mailed to persons on the mailing list. In the future, EPD plans to implement a new online system for notices that would allow any person to manage their subscription to online notices of interest as they see fit.

12) Comment: Paragraph 391-3-7-.11(2)(i) of the proposed rules requires that the applicant for a variance should supply a plan “that shows that, even with the proposed land disturbing activity within the buffer, the completed project will result in maintained or improved water quality.” This provision implies that as long as a completed project “maintains” water quality, it should receive a buffer variance. This ignores one of the key purposes of a buffer which is to reduce the amount of sediment reaching a waterbody during construction. This provision should be rewritten to include the construction phase of a project.

Response: Paragraph 391-3-7-.11(2) states that “The buffer process will apply to all projects legally eligible for variances, provided that adequate erosion control measures are incorporated in the project plans and specifications and are implemented. Variance applications will be reviewed by the Director only in the following cases[.]” Paragraph 391-3-7-.11(2)(i) is just one of the 11 criteria that the Director will consider for a buffer variance. The rules require the use of adequate erosion control measures during construction regardless of the criteria requested in the variance application. Additionally, the marsh buffer is just one of 17 best management practices established by the E&S Act at § 12-7-6(b).

13) Comment: Paragraphs 391-3-7-.11(3)(a) and 391-3-7-.11(5)(a) of the proposed rules state that the site map supplied by a variance applicant should include “locations of all state waters, wetlands, floodplain boundaries and other natural features...” This requirement implies that wetlands are not state waters, which is not the case for most wetlands. This provision should be redrafted to reflect this distinction.

Response: EPD disagrees with the commenter that the current language implies that wetlands are not state waters. The language clarifies that isolated wetlands that may not be state waters should also be included.

14) Comment: Paragraph 391-3-7-.11(9)(a)(2) states that if the entire buffer impact for a proposed project is less than 5,000 square feet, the project can qualify for variance by rule. There is no basis for the inclusion of this statement in the variance by rule section and it should be removed. This is an impermissible expansion of the requirements laid out in Senate Bill 101.

Response: The proposed Rule is not an expansion of the requirements laid out in Senate Bill 101 which states: “Provide for variances by rule, subject to specified conditions, for certain categories of activities within the buffer that will have minimal impact on the water quality or aquatic habitat of the adjacent marsh.” The law provides for multiple categories of activities. A project that is less than 5,000 square feet that meets the definition of a minor impact was developed as a category of activity within the buffer as per Senate Bill 101. Note that in addition to the size limitation, the definition for a “Minor Buffer Impact” means an impact that upon completion yields no additional above ground, man-made materials or structures within the buffer and maintains the original grade.

15) Comment: Paragraph 391-3-7-.11(9)(d) includes the notification requirement for variances by rule. This should be changed to provide a public notice so that citizens and affected property owners will know that the coastal marshlands buffer will be impacted.

Response: Consistent with SB 101, the Rule outlines eligibility requirements and conditions for approval of variances by rule. The notification is a public record and available for review upon request to EPD or the LIA.

16) Comment: Application for variance by rule should include a description of how the applicant attempted to avoid and minimize the buffer impact before seeking a variance. It should also include a mitigation plan.

Response: If the activity meets the requirements for a variance by rule, the impact has been determined to have minimal impact on the water quality or aquatic habitat and therefore does not require a separate avoidance, minimization and/or mitigation plan beyond what is already required in paragraph 391-3-7-.11(9)(g).

17) Comment: Paragraph 391-3-7-.11(9)(g)(6) states that applicants should consider following the Georgia Stormwater Management Manual and the Coastal Supplement to the Georgia Stormwater Management Manual. Applicants should be required to follow them.

Response: Applicants within Municipal Separate Storm Sewer System (MS4) areas are required comply with these documents through a local ordinance. However, in rural

areas, for small projects, these requirements could be impractical. As such it is appropriate for the manual to be incorporated as guidance but not as a requirement.

18) Comment: More specifically define buffer impact to mean a land disturbing activity. Some activities such as underground utility installation by boring, for instance, are not impacts to the buffer.

Response: The suggested change is not appropriate because not all buffer impacts are land disturbing activities.

19) Comment: Paragraph 391-3-7-.11(2)(g) states that variances will only be considered for single family homes if construction is initiated or local government approval is obtained prior to January 10, 2005. What is the rationale for this date?

Response: This criterion was initially adopted to discourage the design of common developments so that the development of an individual lot at a later date would require a buffer variance. January 10, 2005 is the effective date of the rule (391-3-7-.05(2)(g)) that introduced the criterion; a lot platted or approved after that date would not be eligible for a buffer variance.

20) Comments: The rules refer to the “Stream Buffer Variance Mitigation Guidance” as required. The Act does not require mitigation. Such mitigation is irrelevant to impacts to the buffer which do not degrade hydrologic functions, water quality or aquatic habitat of the marsh after land disturbing activities are complete (e.g. temporary impacts).

The buffer is required by the E&S Act and is only in effect during land disturbing activities. The buffer is a best management practice to prevent soil erosion, sedimentation and pollution during land disturbing activities only. To impose criteria which mitigate post construction functions is over-reaching and beyond the scope of the Act.

Response: The EPD Director can only issue a variance that is at least as protective of natural resources and the environment. Mitigation may be necessary in order to result in a project that is at least as protective of natural resources and the environment. Post construction measures are considered part of mitigation. Additionally, O.C.G.A. § 12-7-6(b)(4) calls for natural vegetation to be retained, protected, and supplemented, where feasible, so it is clear that impacts after construction are considered by the Act. The DNR Board has also recognized the multiple benefits of buffers in paragraph 391-3-6-.05(7)(c), including: temperature control (shading); streambank stabilization; trapping of sediments, if any; removal of nutrients, heavy metals, pesticides and other pollutants; aquatic habitat and food chain; terrestrial habitat, food chain and migration corridor; and buffering of flood flows. These functions occur and accrue benefits to Georgians both during and after construction.

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21) Comment: The proposed rules require a reply within 60 days of receipt of a complete buffer variance application. The proposed rules should require a reply for all submittals, whether staff deems them complete or not.

Response: Comment noted. Typically, an incomplete application receives a written reply.

22) Comment: The Commenter supported moving forward with the rules, but expressed concern that they will create an unduly burdensome process for marshfront property owners. Instead of considering the special circumstance of the coast, and crafting a rule that takes account of those circumstances and provides protection appropriate for the circumstances, the draft rules simply replicate, almost entirely, the rules now in place for stream buffer variances. This was not the intent of the General Assembly.

Response: The proposed Rules closely follow the language of SB 101 and provide necessary clarification to allow for the efficient and effective processing of buffer variance applications in the coastal area. The proposed rules include a number of exemptions, as well as a variance by rule program, which are available only in the coastal area. The proposed rules strike an appropriate balance between requirements on the developer and protection of state waters as required by the E&S Act.

23) Comment: A definition for living shorelines should be added to the Rules.

Response: Adding a definition is not necessary at this time.

24) Comment: Clarify that paragraph 391-3-7-.11(2)(g) only applies to the construction of single family homes when such construction disturbs more than one acre.

Response: Paragraph 391-3-7-.11(2)(g) would also apply to single family homes that disturb less than one acre because, although these projects are exempt from Land Disturbing Permits under O.C.G.A. § 12-7-17(4), they must adhere to the minimum requirements, including buffers, in O.C.G.A. § 12-7-6(b).

25) Comment: Paragraph 391-3-7-.11(2)(h) requires a U.S. Army Corps of Engineers 404 mitigation plan. Some 404 permits do not require mitigation, such as most Nationwide Permits. Those projects would not be eligible to apply for a buffer variance. This language should be reworded.

Response: 40 CFR 1508.20 outlines the types of mitigation acceptable for 404 permitting. Compensatory (e.g., purchase of credits) mitigation is just one type of mitigation. In addition, the project may also qualify for one of the other eligible criteria including paragraph 391-3-7-.11(2)(j), which allows for a variance for alteration within the buffer that has been authorized pursuant to a permit issued by the U.S. Army Corps of Engineers.

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26) Comment: Recommendation to add “allowing natural migration of shorelines” to the list of buffer functions.

Response: The list already includes “buffering of flood flows” and “bank stabilization.” No additional functions were deemed necessary to add at this time.

27) Comment: Questions were raised about sequencing for projects permitted by the U.S. Army Corps of Engineers.

Response: This will be handled administratively and doesn’t require a rule change.