BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

ALTAMAHA RIVERKEEPER, INC., FALL-LINE ALLIANCE FOR A CLEAN ENVIRONMENT, and SIERRA CLUB,	:	
Petitioners,	:	**Docket Nos.:** **OSAH-BNR-WQC-1031706-98-WALKER**
v.	:	**OSAH-BNR-WW-1031708-98-WALKER**
F. ALLEN BARNES, Director of the Environmental Protection Division of the Georgia Department of Natural Resources,	:	
Respondent,	:	
POWER4GEORGIANS, LLC,	:	
Respondent-Intervenor.	:	

ORDER

I. INTRODUCTION

Petitioners challenge two permits issued by Respondent, Director of the Georgia Environmental Protection Division, to Respondent-Intervenor, Power4Georgians, LLC, for operation of a coal fired power plant ("Plant Washington" or "plant") in Washington County, Georgia. Petitioners charge that the National Pollutant Discharge Elimination System Permit No. GA0039055 ("NPDES permit"), which allows Plant Washington to discharge wastewater into the Oconee River, is invalid based on six grounds. Petitioners also claim that water withdrawal Permit No. 150-0391-04 ("withdrawal permit"), which allows Plant Washington to withdraw surface water from the Oconee River for the purpose of refilling storage ponds and for cooling and processing water for the plant, is invalid based on four grounds. Petitioners have moved for summary determination on a number of their claims. Respondent and Respondent-

Intervenor (collectively "Respondents") also have moved to dismiss or for summary determination. The matter is now pending before the undersigned Administrative Law Judge of the Office of State Administrative Hearings.

II. MOTION FOR SUMMARY DETERMINATION

Summary determination in this proceeding is governed by Office of State Administrative Hearings ("OSAH") Rule 15, which provides, in relevant part:

> Any party may move, based on supporting affidavits or other probative evidence, for a summary determination in its favor upon any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination.

Ga. Comp. R. & Regs. 616-1-2-.15(1). On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact such that the moving party "is entitled to a judgment as a matter of law on the facts established." *Pirkle v. Envtl. Prot. Div.*, No. OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at *6–7 (OSAH Oct. 21, 2004) (citing *Porter v. Felker*, 261 Ga. 421 (1991)); *see Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res.*, 282 Ga. App. 302, 304–05 (2006) (noting that a summary determination is "similar to a summary judgment" and elaborating that an administrative law judge "is not required to hold a hearing" on issues properly resolved by summary adjudication). Further, pursuant to OSAH Rule 15(3):

> When a motion for summary determination is made and supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or other probative evidence, that there is a genuine issue of material fact for determination in the hearing.

Ga. Comp. R. & Regs. 616-1-2-.15(3). *See Lockhart v. Dir., Envtl. Prot. Div.*, No. OSAH-BNR-AE-0724829-33-RW, 2007 Ga. ENV LEXIS 15, at *3 (OSAH June 13, 2007) (citing *Leonaitis v. State Farm Mutual Auto Ins. Co.*, 186 Ga. App. 854 (1988)).

III. NPDES PERMIT

A. Procedural Background

The Petition sets forth six grounds upon which Petitioners contend the NPDES permit should be invalidated. In Count I, Petitioners assert that the NPDES permit is invalid because it fails to contain the necessary effluent limitations on the discharge of heat pollution. Count II alleges that the NPDES permit is invalid because the thermal modeling relied upon in issuing the NPDES permit is based on flawed assumptions. In Count III, Petitioners argue that the NPDES permit is invalid because it improperly imposes effluent limitations at an internal compliance check point instead of at the discharge point as required by law. Count IV alleges that the NPDES permit is invalid because it includes an effluent limit for pH in excess of state water quality standards. Count V alleges that the NPDES permit is invalid because it fails to comply with Georgia's Anti-Degradation Policy. In Count VI, Petitioners allege that the NPDES permit is invalid because it fails to comply with Georgia's narrative water quality standards.

Petitioners move for summary determination regarding Counts I, III, and IV of their Petition. Respondent-Intervenor moves for summary determination on Counts V and VI of Petitioners' claims. Respondent adopts Respondent-Intervenor's Motion and also moves to dismiss Counts V and VI.

B. Petitioners' Claims

The Federal Water Pollution Control Act ("Clean Water Act") was enacted to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Clean Water Act generally prohibits any discharge of pollutants into the waters of the United States without a permit. 33 U.S.C. § 1311(a). In Georgia, the administration of the NPDES permit program is delegated to Respondent, the Director of the Georgia Environmental Protection Division. O.C.G.A. § 12-5-23(c)(15); *see Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1525 (11th Cir. 1996) (finding that EPA authorized the State of Georgia to administer the NPDES permit program). Permits are issued under the Georgia Water Quality Control Act. O.C.G.A. §§ 12-5-20 *et seq.*

1. Counts I and IV

In Count I of the Petition, Petitioners charge that the NPDES permit is invalid because it fails to comply with the mandated effluent limitations for heated wastewater. Respondent-Intervenor has obtained an NPDES permit to discharge heated wastewater from Plant Washington via an approximately thirty-mile long discharge pipe to the Oconee River. (Resp't-Int.'s Ex. B, 2-1 to 2-2.)

Relying on Ga. Comp. R. & Regs. 391-3-6-.03(6)(c)(iv), Petitioners allege that the NPDES permit violates Georgia's water quality standards in that it permits wastewater discharge that exceeds a maximum of 90 degrees Fahrenheit and/or more than 5 degrees Fahrenheit above the ambient water temperature. Petitioners point to modeling submitted by Respondent-Intervenor demonstrating that Plant Washington will discharge a thermal plume in excess of the 5 degree limit year round. (Pet'r's Ex. 8, E-2, E-5; Pet'r's Ex. 13, tbl 2.) The modeling also

assumes that for much of the year the end of pipe temperature will exceed 90 degrees. (Pet'r's Ex. 1 § V.)

In Count IV of their Petition, Petitioners contend that the NPDES permit also is invalid because it allows Respondent-Intervenor to discharge pH in excess of established effluent limits. Petitioners look to Ga. Comp. R. & Regs. 391-3-6-.03(6)(c)(ii), that imposes an effluent limit for pH of discharge "[w]ithin the range of 6.0 - 8.5," noting that the NPDES permit allows Respondent-Intervenor to discharge wastewater with a pH range of 6.0 to 9.0. Relying on *Gwinnett County v. Lake Lanier Assoc.*, 265 Ga. App. 214, 225 (2004), *aff'd in part, rev'd in part on other grounds sub nom. Hughey v. Gwinnett County*, 278 Ga. 740 (2004), Petitioners assert that an NPDES permit cannot be issued to a discharger if it will cause, or have a reasonable potential to cause, exceedances of water quality standards.

Petitioners' reliance on Ga. Comp. R. & Regs. 391-3-6-.03(6)(c)(iv) and 391-3-6-.03(6)(c)(ii) is misplaced. In making their arguments, Petitioners confuse water quality standards with effluent limitations. Effluent limitations are "restrictions[s] or prohibition[s] established under the Act on quantities, rates or concentrations, or other constituents which are discharged from point sources into the waters of the State, including, but not limited to, schedules of compliance and whole effluent biological monitoring requirements." Ga. Comp. R. & Regs. 391-3-6-.06(2)(g). In contrast, water quality standards are designed to ensure the adequate protection of Georgia waters. Ga. Comp. R. & Regs. 391-3-6-.03; *see Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) ("'Effluent limitations' are promulgated by the EPA and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. 'Water quality standards' are, in general, promulgated by the States and establish the desired condition of a waterway.") (internal citations omitted).

Water quality standards apply to the water bodies themselves but do not directly govern discrete discharges into those water bodies.[1] Ga. Comp. R. & Reg. 391-3-6-.03(6); *see also* 40 C.F.R. § 131.2 ("A water quality standard defines the water quality goals of a water body. . . ."). Georgia law requires the instant segment of the Oconee River to meet the water quality standards set out at Ga. Comp. R. & Regs. 391-3-6-.03(6)(c).[2] Thus, the water quality standard for temperature and pH are relevant in the NPDES context not because they establish specific restrictions on discrete discharges but in determining whether cumulative discharges will result in a change to the water body that can cause an exceedance of state water quality standards. *See EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204–05 & n.12 (1976); *Lake Lanier*, 265 Ga. App. at 225 (finding that water quality standards "serve as a guideline for setting applicable limitations in individual discharge permits").

Pursuant to the applicable water quality standards, the "temperature of the receiving waters" may "[a]t no time" be increased above the regulatory threshold, Ga. Comp. R. & Regs. 391-3-6-.03(6)(c)(iv), and the water body must maintain a pH of "[w]ithin the range of 6.0 - 8.5." Ga. Comp. R. & Regs. 391-3-6-.03(6)(c)(ii). Petitioners have not presented evidence that the discharges under the NPDES permit would alter the temperature and pH of the receiving waters.

In contrast, Respondent offers evidence that "the worst-case temperature analyses show that there is no reasonable potential for the Plant Washington effluent to result in an exceedance

[1] In fact, the effluent standards contained in Ga. Comp. R. & Reg. 391-3-6-.06 do not reference either temperature or pH.

[2] To establish water quality standards, Georgia must designate the use or uses, such as water supply, recreation, fishing, etc., for each water body and determine the water quality criteria necessary to support those designated uses. 40 C.F.R. § 131.2–.3(b). This criteria becomes the "water quality standard" for water bodies with that use classification. 40 C.F.R. § 131.3(i).

of the instream temperature standard in the river." (Dec. Neal, ¶ 27.)[3] As to pH levels, the estimated average discharge from Plant Washington will be 7.0 pH, and the estimated maximum daily pH is 8.0 pH. (Dec. Neal ¶¶ 12–17, Ex. 3 att. 3 § V.) Based on this evidence, Respondents maintain that "there is no reasonable potential for the effluent from Plant Washington to exceed the water quality standard for pH." (Dec. Neal, ¶ 15.) "Even under highly conservative assumptions, fully mixed effluent from the Plant Washington discharge at 9.0 pH would have the potential to raise the pH of the receiving waters to a maximum of 7.9 pH," which remains "well below the instream standard of 8.5." (Dec. Neal ¶ 16.)

Petitioners also claim that the NPDES permit should require Respondent-Intervenor to construct a mixing zone. Georgia's mixing zone regulation specifies that the discharger must take all practical steps necessary and appropriate to fully and homogeneously disperse the discharge:

> Effluents released to streams or impounded waters shall be fully and homogeneously dispersed and mixed insofar as practical with the main flow or water body by appropriate methods at the discharge point. Use of a reasonable and limited mixing zone may be permitted on receipt of satisfactory evidence that such a zone is necessary and that it will not create an objectionable or damaging pollution condition.

Ga. Comp. R. & Regs. 391-3-6-.03(10). If the permitting authority determines that such steps will not appropriately disperse the effluent, it may take the added step of requiring a designated mixing zone to ensure that discharge will not damage the water body.

Respondent-Intervenor has specified what steps it will take to fully and homogeneously disperse the discharge. (Dec. Neal ¶ 10–11.) After considering these steps, Respondent determined that a defined mixing zone was not needed. (Aff. Kane ¶¶ 25–27.) Thus, for

[3] Although Petitioners objected to the use of Mr. Neal's declaration, the undersigned finds the declaration sufficient under Ga. Comp. R. & Regs. 616-1-2-.15(1).

summary determination purposes, Respondent has presented sufficient evidence to demonstrate that it had a reasonable basis to conclude that a mixing zone was not necessary.

Respondents have adduced sufficient probative evidence to create issues of material fact regarding Counts I and IV. Accordingly, Petitioners' Motion for Summary Determination as to Counts I and IV of the Petition is **DENIED.**

2. Count III

The NPDES permit covers two outfalls—Outfall 1 and Outfall 1A. Outfall 1 discharges directly into the Oconee River. Outfall 1A is the discharge of cooling tower blowdown[4] into an equalization basin. After retention in the equalization basin for several days, the cooling tower blowdown then is pumped through a thirty-mile pipeline before being discharged into the Oconee River at Outfall 1. (Dec. Neal ¶ 27; Resp't-Int.'s Ex. B.) The NPDES permit limit imposes effluent limitations on certain pollutants at Outfall 1 (pH, floating solids, and visible foam) and separate effluent limitations on other pollutants at Outfall 1A (chlorine, chromium, and zinc). (Pet'r's Ex. 2, 2–3.)

Petitioners argue that the NPDES permit is invalid because the fact sheet required under 40 C.F.R. § 124.56 did not set forth the exceptional circumstances making the internal monitoring point at Outfall 1A necessary. In certain cases, an internal monitoring point is permissible under NPDES regulations. Under 40 C.F.R. § 122.45(h)(1):

> [w]hen permit effluent limitations or standards imposed at the point of discharge are impractical or infeasible, effluent limitations or standards for discharges of pollutants may be imposed on internal waste streams before mixing with other

[4] Plant Washington will heat water in boilers by burning coal; the steam will drive turbines to generate electricity. After the steam is used it will be cooled in towers, and then pumped back to boilers where the process is repeated. When the water is run through the same pipes repeatedly, constituents in the water form deposits in the pipes. Consequently, to treat these deposits, water will be "blown down" to keep pipes from becoming clogged. The water expelled from the pipes is called "cooling tower blowdown." (Resp't-Int.'s Opp. Pet'r's Mot. Sum. Det. 3–6.)

> waste streams or cooling water streams. In those instances the monitoring required by [40 C.F.R.] § 122.48 shall also be applied to the internal waste streams.

However, effluent limits on internal waste streams "will be imposed only when the fact sheet under [40 C.F.R. § 124.56] sets forth the exceptional circumstances which make such limitations necessary, such as when the final discharge point...would make detection or analysis impracticable." 40 C.F.R. § 122.45(h)(2). The fact sheet did not list any such exceptional circumstances in this case.

Respondents maintain it was proper to locate the point of compliance at Outfall 1A. (Dec. Neal ¶ 35.) "Monitoring at the discharge point" is "impractical" in the instant case because Plant Washington is subject to the New Source Performance Standards ("NSPS") set forth in 40 C.F.R. § 423.15. (Respt's Res. Pet'r's Mot. Sum. Det. 10.) These standards specifically address the water quality of cooling tower blowdown, as distinguished from other waste streams. 40 C.F.R. § 423.15(j). Pursuant to NSPS standards, "[t]he quantity of pollutants discharged in cooling tower blowdown shall not exceed the quantity determined by multiplying the flow of cooling tower blowdown" by the regulatory concentrations specified for chlorine, chromium and zinc. 40 C.F.R. § 423.15(j)(1). As the specific regulation pertaining to NSPS requirements and cooling tower blowdown would control the more general provisions in 40 C.F.R. § 122.45(h), Respondents argue that they are obligated to monitor certain effluents at Outfall 1A.

Even if Respondents are correct in their contention that the NSPS requires them to monitor certain effluents at Outfall 1A, this requirement does not diminish Respondent's obligation also to comply with the direction of 40 C.F.R. § 122.45(h)(2). Respondents' argument that 40 C.F.R. § 423.15(j)(3) supersedes the requirements under 40 C.F.R. § 122.45(h)(2) is unavailing, as they have provided no legal support for this assertion. Further,

contrary to Respondent's argument that compliance with 40 C.F.R. § 122.45(h)(2) is discretionary, it appears that the only discretion afforded the permitting authority under 40 C.F.R. § 423.15(j)(3) is the discretion to allow engineering calculations in lieu of monitoring. In violation of 40 C.F.R. § 122.45(h)(2), the NPDES permit fact sheet contains no explanation of "exceptional circumstances" justifying the use of an internal monitoring point. For the aforementioned reasons, Petitioners' Motion for Summary Determination as to Count III is **GRANTED.**

3. **Count V**

In Count V of their Petition, Petitioners contend that the NPDES permit is invalid because it fails to comply with Georgia's Anti-Degradation Policy. Maintaining Petitioners have failed to state a cognizable claim, Respondents move to dismiss. Respondents also move for summary determination.

Georgia's Anti-Degradation Policy provides:

> Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the division finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the division's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the division shall assure water quality adequate to protect existing uses fully. Further, the division shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

Ga Comp. R. & Regs. 391-3-6-.03(2)(b)(ii).

Petitioners state both a substantive and a procedural claim regarding the Anti-Degradation Policy. First, they argue that the lowering of water quality allowed by the NPDES

permit will not maintain and protect the water quality of the Oconee River. (Pet. ¶¶ 73–74.) Petitioners also complain of procedural violations, in that Respondent issued the NPDES permit without the requisite finding under the Anti-Degradation Policy that lower water quality is necessary to accommodate important economic or social development. (Pet. ¶ 75.)

In cases contesting the issuance of a license or permit, Petitioners are required to suggest "permit conditions or limitations which the petitioner believes required" to cure the alleged violations. Ga. Comp. R. & Regs. 391-1-2-.05(1)(g) ("Rule 5(1)(g)"). As to the substantive claim, that the lowering of water quality allowed by the NPDES permit will not maintain and protect the water quality of the Oconee River, Petitioners fail to suggest permit conditions or limitations that would cure any violation of the Anti-Degradation Policy.

Petitioners argue that Rule 5(1)(g) is inapplicable because they are only alleging a procedural violation of the Anti-Degradation Policy under *Coosa River Basin Initiative v. Couch*. No. OSAH-BNR-ES-0713085-57-Malihi, 2007 Ga. ENV LEXIS 6, *3, *18 (OSAH Feb. 13, 2007). *Coosa River* does stand for the proposition that a Petitioner may plead a purely procedural claim, such as a failure to provide public notice, that would not be subject to the pleading requirement of Rule 5(1)(g). However, as *Longleaf Energy Associates, LLC v. Friends of Chattahoochee, Inc.* directed, Petitioners may not couch substantive challenges as procedural claims in order to evade the requirements of Rule 5(1)(g).[5] 298 Ga. App. 753, 765–66 (2009). To the extent Petitioners assert that the NPDES permit violates Georgia's Anti-Degradation

[5] In *Longleaf,* the Court of Appeals examined the pleading requirements articulated in Rule 5(1)(g). 298 Ga. App. 753. The *Longleaf* Court held that, under Rule 5(1)(g), "a claim must provide notice specific enough to enable a timely informed response from opposing parties and a prompt ruling by the ALJ." *Id.* at 766 (citations omitted). Expressly noting that "[t]his pleading requirement is not comparable to the liberal pleading requirements applicable when a civil action is commenced under the Civil Practice Act," *Longleaf* affirmed the holding of the Administrative Law Judge that a Petition contesting the emission limitations under which the permit was issued must contain the suggested emission limitations needed to make the permit valid. *Id.* The *Longleaf* Court determined that Rule 5(1)(g) "plainly placed the burden on the Challengers to suggest the emission limitations which they believed would make the permit valid." *Id.*

Policy, Petitioners are required by Rule 5(1)(g) to articulate, at the pleading stage, how and to what extent the NPDES permit should be revised so that it would be in compliance.

In addition to the substantive claim, the Petition also states a procedural violation of the Anti-Degradation Policy in that Petitioners allege Respondent issued the NPDES permit without the requisite finding under the Anti-Degradation Policy that lower water quality was necessary to accommodate important economic or social development.

Respondent-Intervenor submitted an Anti-Degradation Report prepared by MACTEC Engineering and Consulting, dated January 19, 2009. (Resp't-Int's Mot. Sum. Det. Ex. A app. F.) On March 25, 2010, MACTEC submitted an Anti-Degradation Report Supplement providing additional evidence and analysis. (Resp't-Int.'s Opp. Pet'r's Mot. Sum. Det. Ex. B.) After considering the Report and Report Supplement, Respondent issued the NPDES permit to Respondent-Intervenor on April 8, 2010. (Resp't-Int.'s Opp. Pet'r's Mot. Sum. Det. Ex. C.)

The NPDES permit states under the "Permit Rationale" that Respondent "concurs with the findings of this Antidegradation Review" and that "[t]he discharge is not expected to degrade water quality below levels necessary to protect existing uses. . . ." (Resp't-Int.'s Mot. Sum. Det. Ex. D, 3.) Notwithstanding Petitioners' procedural claim, Respondent explicitly determined that any lowering of water quality was outweighed by the socioeconomic benefit as "[l]ocal employment, tax-base growth and regional economic development are expected to be positively enhanced as a result of the construction of the plant," such that "any lower[ing] of water quality caused by the discharge is outweighed by the socioeconomic benefits to the community."

The undersigned **GRANTS** Respondents' Motion to Dismiss as to Petitioners' substantive claims. Given the explicit findings made in the Permit Rationale, and Petitioners failure to offer probative evidence establishing a genuine issue of material fact for determination

at the hearing, the undersigned also **GRANTS** Respondents' Motion for Summary Determination as to Petitioners' procedural claim.

4. Count VI

In Count VI, Petitioners assert that the NPDES permit is invalid because Respondent failed to comply with the narrative water quality standards set forth in the regulations implementing the Georgia Water Quality Control Act. (Pet. ¶¶ 79–84.) Petitioners allege that the NPDES permit does not include conditions necessary to prevent "turbidity, color, odor or other objectionable conditions which interfere with legitimate water uses" under Ga. Comp. R. & Regs. 391-3-6-.03(5)(c), or to prevent "turbidity which results in a substantial visual contrast in a water body due to a man-made activity" under Ga. Comp. R. & Regs. 391-3-6-.03(5)(d). Petitioners further allege that the discharge authorized by the NPDES Permit "will likely cause scouring of the riverbed, increased turbidity, aerial spray, strong currents, and other objectionable conditions" in violation of these narrative water quality standards. (Pet. ¶ 81.) Respondents move to dismiss Count VI pursuant to Rule 5(1)(g), arguing the Petition is deficient in suggesting "permit conditions or limitations which the petitioner believes [are] required to implement the provisions of the law under which the permit or license was issued" under Rule 5(1)(g).

In the instant case, Petitioners satisfy this threshold requirement. Petitioners specify two suggested permit conditions: (1) "limiting the maximum velocity of the water (to approximately 6 ft/s or an amount to be determined by the finder of fact at the administrative hearing)," and (2) "requiring all feasible technology to prevent the objectionable conditions (including an appropriate designed multiport diffuser or other technology to be determined at the

administrative hearing)." (Pet. ¶ 84.) These permit limitations provide sufficient notice "specific enough to enable a timely informed response from opposing parties and a prompt ruling by the ALJ." *Longleaf*, 298 Ga. App. at 766 (citation omitted). For the aforementioned reasons, the undersigned **DENIES** Respondents' Motions as to Count VI.

IV. WATER WITHDRAWAL PERMIT

A. Procedural Background

Petitioners also challenge the withdrawal permit issued by Respondent to Respondent-Intervenor. The withdrawal permit authorizes Plant Washington to withdraw surface water from the Oconee River in the Oconee River Basin for the purpose of refilling storage ponds and for cooling and processing water for the plant. The Petition sets forth four grounds upon which Petitioners contend the withdrawal permit should be invalidated. In Count I, Petitioners assert that the withdrawal permit is invalid because Respondent failed to consider downstream agricultural uses in determining the non-depletable flow of the Oconee River. Count II alleges that the withdrawal permit is invalid because Respondent failed to consider potential downstream uses in determining the non-depletable flow. In Count III, Petitioners argue that the use of water authorized in the withdrawal permit is inconsistent with Georgia's riparian rights system. Count IV alleges that the withdrawal permit fails to comply with the procedures for permitting interbasin transfers under Georgia Law.

Petitioners move for summary determination regarding Counts I, II, and IV of their Petition. Respondent-Intervenor moves to dismiss Counts II and III under Rule 5(1)(g) and also for summary determination as to Counts III and IV. Respondent adopts Respondent-Intervenor's Motions and also moves to dismiss Counts III and IV.

B. Petitioners' Claims

1. Count I

The Georgia Water Quality Control Act ("GWQCA") requires that most persons withdrawing more than 100,000 gallons per day on a monthly average from surface waters in Georgia obtain a withdrawal permit from Respondent. O.C.G.A. § 12-5-31(a)(1)(A). In determining whether to grant a permit, O.C.G.A. § 12-5-31(g) requires Respondent to:

> take into consideration the extent to which any withdrawals, diversions, or impoundments are reasonably necessary, in the judgment of the director, to meet the applicant's needs and shall grant a permit which shall meet those reasonable needs; provided, however, that the granting of such a permit shall not have unreasonably adverse effects upon other water uses in the area . . . .

Under the GWQCA, Respondent must issue a permit for an applicant's reasonable water withdrawal needs provided that the granting of such a permit does not have an "unreasonably adverse effect" on other water uses in the area. The statute defines other uses as "including but not limited to public use, farm use, and potential as well as present use. . . ." O.C.G.A. § 12-5-31(g).

The GWQCA also requires the Board of Natural Resources to promulgate rules to "establish a reasonable system of classification for application in situations involving competing uses, existing or proposed, for a supply of available surface waters."[6] O.C.G.A. § 12-5-31(e). As stated in the rules, excepting an emergency water shortage, "[n]o permit will be issued by the Director which authorizes the depletion of the instream flow."[7] Ga. Comp. R. & Regs. 391-3-6-

[6] The rules established by the Board of Natural Resources to implement O.C.G.A. § 12-5-31(e) and (g) are codified at Ga. Comp. R. & Regs. 391-3-6-.07.

[7] The rule provides an exception for periods of Emergency Water Shortage as described in Ga. Comp. R. Regs. 391-3-6-.07(12).

.07(4)(b)(9)(iii)(I). The rules define "instream flow" as "that minimum continuous flow reserved to the Surface Waters of the State at or immediately downstream of the point of withdrawal, diversion, or impoundment." Ga. Comp. R. & Regs. 391-3-6-.07(2)(i). In cases where a permitted withdrawal might result in adverse impacts to other water users, the instream flow requirement is set at the non-depletable flow, which is defined as the "7Q10 flow plus an additional flow needed to ensure the availability of water to downstream users."[8] Ga. Comp. R. & Regs. 391-3-6-.07(2)(k).

Respondent has issued Respondent-Intervenor a permit to withdraw water from the Oconee River to utilize in Plant Washington's cooling tower system and other plant processes. (Resp't-Int.'s Mot. Sum. Det. Ex. A; Neal Aff. ¶¶ 6-7, Ex. 1, 2-1 through 2-2.) Per the terms of the withdrawal permit, the majority of the withdrawn water will be consumed at the Plant, with any remaining balance returned to the Oconee River. (Resp't-Int.'s Mot. Sum. Det. Ex. C 4-3.) The withdrawal permit establishes minimum flows in the Oconee River and includes the requirement that Respondent-Intervenor cease surface water withdrawals whenever the river flows below the specified minimum, or non-depletable, flow levels. (Resp't-Int.'s Mot. Sum. Det. Ex. A, 2 ¶ 3.)

In Count I of the Petition, Petitioners assert the withdrawal permit should be invalidated because of Respondent's failure to consider and allocate flow for downstream agricultural users in its calculation of non-depletable flow. Respondents deny Petitioners' allegations. Although the withdrawal permit does not explicitly allocate individual amounts of water for the different types of water uses, Respondents note that the withdrawal permit includes the collective amount of 34 cubic feet per second ("cfs") in the non-depletable flow calculation to ensure the

[8] "7Q10 flow" is defined as "the lowest average stream flow expected to occur for seven consecutive days with an average frequency of once in ten years." Ga. Comp. R. & Regs. 391-3-6-.07(2)(j).

availability of water to all downstream users—including agricultural users. (Resp't-Int.'s Mot. Sum. Det. Ex. A, 2 ¶ 3.) In calculating this amount, Respondent went beyond its normal course of practice and considered not only users that were beyond the first contributing tributary to the Oconee River, but also users in an area approximately thirty miles downstream of the proposed withdrawal point. (Aff. Burdette ¶¶ 11–13.)

Further, Respondent maintains that agricultural uses were specifically considered when determining the collective non-depletable flow. (Aff. Burdette ¶ 11.) Respondent estimated that the three farm users identified would need a total of 0.3 cfs of water during the growing season. (Aff. Burdette ¶ 14.) The amount needed, 0.3 cfs, is three-tenths of one percent of the non-depletable flow at the point of the proposed withdrawal—so minute as to be "virtually not detectable." (Aff. Burdette ¶¶ 14–15.) Additionally, one of the industrial users initially considered by Respondent in calculating the non-depletable flow is no longer in operation, thus increasing the availability of water for agricultural users. (Respt-Int.'s Stmt. Mat. Facts as to Water Withdrawal Permit ¶ 4.) Respondents also submit the affidavit of Larry Neal, who offers his expert opinion that the non-depletable flow in the withdrawal permit includes sufficient flow to ensure the availability of water to downstream users, including but not limited to public use, farm use, and potential as well as present uses, while maintaining the 7Q10 flow downstream. [9] (Respt-Int.'s Opp. Pet'r's Mot. Summ. Det. Ex. E, Dec. Neal ¶¶ 9–10.)

The affidavit testimony submitted by Respondents demonstrating that it considered downstream agricultural uses and allotted sufficient flow so as to cause no adverse effects to these uses establishes a genuine issue of material fact for determination at a hearing. *See, e.g.*, *Hammond v. City of Warner Robins*, 224 Ga. App. 684, 692 (Ga. Ct. App. 1997) ("[O]pinion

evidence in opposition to a motion for summary judgment can be sufficient to preclude a grant of summary judgment.") (internal citations omitted). Accordingly, Petitioners' Motion for Summary Determination as to Count I of the Petition is **DENIED.**

2. Count II

a. Petitioners' Motion for Summary Determination on Count II

Petitioners allege that the withdrawal permit is invalid because Respondent did not consider whether the water withdrawals would have an unreasonably adverse effect on potential downstream uses in calculating its non-depletable flow determination. In failing to allot for potential uses, Respondent's non-depletable flow does not "assure that the supply is adequate to meet the multiple needs of the citizens of the state as can be reasonably projected for the term of the permit. . . ." O.C.G.A. § 12-5-31(h). The instant Petition seeks remand of the withdrawal permit to the Director "with instructions to set a non-depletable flow based on a procedure that includes an allocation of flow for future downstream uses in a reasonable amount to be determined by the finder of fact at the administrative hearing." (Pet. ¶ 48.)

In opposition, Respondents maintain that Petitioners' pleadings fail to demonstrate "unreasonably adverse effects upon other water uses in the area" under O.C.G.A. § 12-5-31(g). When evaluating a new water withdrawal permit application, Respondent generally considers known potential users, i.e., existing users who have applied for an increase in their existing permitted capacity or other new applicants for water withdrawal from a site in the area downstream of the proposed site under evaluation. (Aff. Burdette ¶ 16.) Respondent determined

[9] Respondents also allege that the non-depletable flow is unlikely to have an adverse impact on additional uses because EPD did not account for Plant Washington's average return flows to the Oconee River of 1.55 mgd, or 2.4 cfs, in its calculation of Non-Depletable Flow. (Respt-Int.'s Opp. Pet'r's Mot. Summ. Det. Ex. E, Dec. Neal ¶ 22.)

that there were no such "potential" users downstream to take into consideration. (Aff. Burdette ¶ 16.)

Petitioners do not submit any evidence of potential uses omitted from Respondent's consideration. Instead, Petitioners assert that Respondent should set a "buffer" for unknown potential users when calculating non-depletable flow. Respondent rejects Petitioners' proposed buffers, arguing that it cannot apply an arbitrary flow number to its calculation of non-depletable flow in order to accommodate unknown potential users, because such a determination would likely not survive a due process challenge.[10] *See Fairfax MK, Inc. v. City of Clarkston*, 274 Ga. 520, 523 (2001) (due process requires that a "regulation be neither arbitrary nor capricious") (citations omitted). Respondents also offer the affidavit of Larry Neal, who, notwithstanding Respondents' determination that there were no identified potential uses, offers his expert opinion that the non-depletable flow in the withdrawal permit includes sufficient flow to ensure the availability of water to downstream users, including but not limited to public use, farm use, and potential as well as present uses, while maintaining the 7Q10 flow downstream. (Respt-Int.'s Opp. Pet'r's Mot. Summ. Det. Ex. E, Dec. Neal ¶¶ 9–10.)

Based on the Respondents' evidence, they have established a genuine issue of material fact for determination at hearing. Accordingly, Petitioners' Motion for Summary Determination is **DENIED.** *See, e.g., Hammond*, 224 Ga. App. at 684 (Ga. Ct. App. 1997).

b. Respondents' Motion for Dismissal of Count II

In cases contesting the issuance of a license or permit, Petitioners are required to suggest "permit conditions or limitations which the petitioner believes required" to cure the alleged violations. Ga. Comp. R. & Regs. 391-1-2-.05(1)(g) ("Rule 5(1)(g)"). As noted, in *Longleaf* the Court of Appeals examined the pleading requirements articulated in Rule 5(1)(g). 298 Ga. App. at 753. The *Longleaf* Court held that, under Rule 5(1)(g), "a claim must provide notice specific enough to enable a timely informed response from opposing parties and a prompt ruling by the ALJ." *Id.* at 766 (citations omitted).

Respondents move for dismissal of Count II of the Petition, arguing that Petitioner has not complied with the provisions of Rule 5(1)(g). Respondent-Intervenor contend that to survive Rule 5(1)(g) scrutiny, the Petition must suggest a specific non-depletable flow sufficient to accommodate all present and future downstream users. Again relying on *Coosa River*, Petitioners argue that since they are simply alleging a procedural violation of the application process, Rule 5(1)(g), and thus *Longleaf*'s analysis, are inapplicable. 2007 Ga. ENV LEXIS 6, *3, *18. *Coosa River* stands for the proposition that a Petitioner may plead a purely procedural claim, such as a failure to provide public notice, that would not be subject to the pleading requirement of Rule 5(1)(g). However, as *Longleaf* directed, Petitioners may not couch substantive challenges as procedural claims to evade the requirements of Rule 5(1)(g) if the gravamen of each claim is a substantive issue.[11] 298 Ga. App. at 765-66 (concluding that the thrust of each claim was "emission limitations, or lack thereof, in the permit.").

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[10] Should any unknown potential uses arise, Respondents also point to the GWQCA's provision that the Director may modify a permit if he should determine that the quantity of water allowed to be withdrawn under an existing permit "would prevent other applicants from reasonable use of surface waters. . . ." O.C.G.A. § 12-5-31(k)(6), (7).

[11] Petitioners raise a constitutional argument as well, suggesting that Respondents' interpretation would also deny Petitioners "unfettered access to courts and the constitutional guarantee of due process." Pursuant to Ga. Comp. R. & Regs. 616-1-2-.22(3), the undersigned is not authorized to resolve a constitutional challenge to statutes or rules, but preserves this challenge for the record.

Despite Petitioners' insistence that Count II merely states a procedural claim, the essence of Petitioners' claim is substantive—that the withdrawal permit will have an unreasonably adverse effect on potential water uses in the area. While Petitioners suggest that Respondent should set a "buffer amount" to account for potential uses, they offer no recommendation as to this amount. Petitioners are entitled to challenge the sufficiency of the non-depletable flow in the withdrawal permit; however, Rule 5(1)(g) obligates them to disclose the specified amount that the flow must be in order to protect potential downstream users.[12] Therefore, the undersigned **GRANTS** Respondents' Motion to Dismiss.

3. Count III

In Count III of the Petition, Petitioners assert that the withdrawal permit is invalid because it is "inconsistent with notions of reasonable use and the reasonable exercise of riparian property rights." (Pet. ¶ 53.) Petitioners raise two alleged inconsistencies. First, they claim that the withdrawal permit will impair the ability of downstream riparians to exercise their riparian property rights. Second, they contend that the withdrawal permit violates a common law rule prohibiting the use of water on non-riparian land. Petitioners ask that the withdrawal permit be remanded to Respondent "with instructions to follow a procedure for limiting the withdrawal and use of surface water that is consistent with notions of reasonable riparian use." (Pet. ¶ 54.)

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[12] The undersigned notes that Petitioners have not presented any evidence thus far of any potential users in the area downstream from the withdrawal point.

Respondents move to dismiss Count III of the Petition, arguing Petitioners would not be entitled to relief under any state of provable facts.[13] Respondents contend that water withdrawal permitting is governed by statute and rule, rather than by common law.

Given the statutory scheme in place, the undersigned agrees with Respondents that water withdrawal permitting is not subject to "notions" of riparian rights. Even if the Petitioners were correct in their contention that the Respondent is obligated to consider Georgia's common law of riparian rights in permitting decisions, Petitioners' arguments would fail. Under Georgia law, "[e]ach riparian proprietor is entitled to a reasonable use of the water, for domestic, agricultural and manufacturing purposes; provided, that in making such use he does not work a material injury to the other proprietors." *Pyle v. Gilbert*, 245 Ga. 403, 405 (1980) (citation and emphases omitted).

Petitioners' argument that Georgia law prohibits the use of water on non-riparian land outside the basin of origin is based on a common law rule explicitly abandoned by the Georgia Supreme Court in *Pyle*, 245 Ga. at 411 (holding that the "right to the reasonable use of water . . . on non-riparian land can be acquired" under Georgia law). Further, the General Assembly has expressly authorized the Director to "authorize the withdrawal and transfer of surface waters across natural basins. . . ." O.C.G.A. § 12-5-31(n).[14]

Petitioners offer no suggestion that any riparian owner has come forward to allege that the withdrawal permit will impair the owner's ability to exercise riparian property rights or that there is evidence of injury. Moreover, potential aggrieved riparians have the opportunity to file a

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[13] Although the OSAH Rules do not specifically reference a motion to dismiss, Ga. Comp. R. & Regs. 616-1-2-.16(3) permits a party to file motions if filed at least ten days prior to the date set for the hearing or presented as soon as the need or opportunity for the motion becomes reasonably foreseeable.

[14] Respondents also contend that Count III must be dismissed under Rule 5(1)(g). As stated, under Rule 5(1)(g), Petitioners must suggest permit conditions or limitations to cure violations alleged in a Petition. *Longleaf*, 298 Ga. App. at 766. As the understand determines Petitioners cannot state a claim, compliance with the Rule would be futile.

civil adjudication in Superior Court. *Cf. Galaxy Carpet Mills, Inc. v. Massengill*, 255 Ga. 360, 361–62 (1986) ("[T]he Georgia Water Quality Control Act does not undertake to alter the general rules of law in regard to private nuisances, and will neither aid nor hinder a private individual in an action to enjoin a nuisance.") (citation omitted); O.C.G.A. § 12-5-46 (the issuance of a permit "shall [not] be construed to alter or abridge any right of action, existing in law or equity, civil or criminal . . .").

For the foregoing reasons, the undersigned **GRANTS** Respondents' Motions to Dismiss and/or for Summary Determination.

4. Count IV

Petitioners assert the withdrawal permit violates the GWQCA because Respondent failed to comply with the procedures for surface water withdrawal permits involving interbasin transfers. The withdrawal permit authorizes Respondent-Intervenor to withdraw up to 16 million gallons per day of surface water from the Oconee River in the Oconee River Basin and transfer the withdrawn water through a thirty mile pipeline to the Plant Washington site located in the Ogeechee River Basin. Plant Washington will consume most of the withdrawn water, and will return an average of 1.55 million gallons a day to the Oconee River. (Pet. Ex. A.) Petitioners argue that this surface water transfer constitutes an interbasin transfer, subjecting the withdrawal permit to heightened procedures under the GWQCA. Respondents maintain that the withdrawal permit does not authorize an interbasin transfer. Both parties move for summary determination.

When a surface water withdrawal permit authorizes an interbasin transfer, the legislature imposes additional requirements upon Respondent before it may grant the permit. O.C.G.A. § 12-5-31(n). Respondent must (1) give consideration to existing uses and applications for permits

which do not involve interbasin transfers, (2) allocate a reasonable supply of surface water to existing users and applications not involving interbasin transfers, (3) provide public notice of the proposed withdrawal permit for an interbasin transfer of water, and (4) hold a public hearing on the interbasin transfer if sufficient public interest exists. *Id.*, *see also* Ga. Comp. R. & Regs. 391-3-6-.07(14(a)-(c).

Respondents acknowledge that they did not comply with interbasin transfer procedures under O.C.G.A. § 12-5-31(n), but deny that Plant Washington's water withdrawal plan effects an interbasin transfer. Ga. Comp. R. & Regs. 391-3-6-.07(2)(m) defines an "interbasin transfer" as "a withdrawal or diversion in which water used is **returned** to a different basin than that from which it is withdrawn or diverted." (emphasis added). As none of the water withdrawn from the Oconee River for use at Plant Washington will be returned to a different basin, it will either be consumed at the plant site or returned to the Oconee River, Respondents conclude that the statutory provisions governing interbasin transfers are inapplicable. (Pet. ¶ 51; Neal Aff. ¶ 7.)

Petitioners maintain that Respondents' reliance on Ga. Comp. R. & Regs. 391-3-6-.07(2)(m) is misplaced for two reasons. First, they argue the GWCQA defines interbasin transfer more broadly than the rule as any "withdrawal and transfer of surface waters across natural basins," whether or not the surface waters are returned to the donor basin. O.C.G.A. § 12-5-31(n). Second, Respondents point to the Georgia Comprehensive State-wide Water Management Plan's broader definition of an interbasin transfer as superseding the definition articulated in Ga. Comp. R. & Regs. 391-3-6-.07(2)(m).

Petitioners look first to the General Assembly's creation of a permitting process applicable to the "withdrawal and transfer of surface waters across natural basins" in O.C.G.A. § 12-5-31(n). Subsection 12-5-31(n)(1) specifically directs that "[t]he director shall give due

consideration to competing existing uses and applications for permits which would not involve interbasin transfers...." From this language, Petitioners reason that the legislature has determined that any "withdrawal and transfer of surface waters across natural basins," not just a withdrawal or diversion in which water used is returned to a different basin than that from which it is withdrawn or diverted as stated by the rule, would constitute an interbasin transfer. *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992) (when interpreting a statute, a court should abide by the canon that "a legislature says in a statute what it means and means in a statute what it says").

Petitioners also turn to the Georgia Comprehensive State-wide Water Management Plan ("Plan") in support of a broader definition of interbasin transfer, which Petitioners argue supersedes that of Ga. Comp. R. & Regs. 391-3-6-.07(2)(m). The Plan "lays out statewide policies, management practices, and guidance for regional planning." Plan, Purpose at 7. Under the Plan's Guiding Policies, "[w]ater use and management, including decisions regarding water permits, will proceed under these terms as resource assessments are conducted and regional water plans are developed." Plan, Guiding Policies at 9 ¶ 7. The Plan specifically defines "interbasin transfer" as "a withdrawal or diversion of water from one river basin, followed by use and/or return of some or all of that water to a second river basin. . . ." Plan, Definitions at 10 ¶ 21. Under the Plan's broader definition of an interbasin transfer, an interbasin transfer is effected when water is either used or returned to a second basin. Given that the water is being withdrawn from the Oconee basin will be used in the Ogeechee basin, the surface water transfer contemplated in the instant withdrawal permit would constitute an interbasin transfer under the Plan.

The Plan was ratified by the General Assembly in 2008,[15] and explicitly states that it will "not change or replace current statutory provisions for permitting of water withdrawals...or replace the rules promulgated under those statues." Plan, Purpose at 7. Based on this language, Respondents maintain that the Georgia Plan is not "self-implementing." Respondents also point to the Plan's language calling on the Board of Natural Resources to "consider, upon adoption of this plan, amending its rules and regulations to provide that, in evaluating a permit application for a new interbasin transfer, the Director should consider the factors specified in Ga. Comp. R. & Regs. 391-3-6-.07(14) as well as [criteria enumerated in the Plan]." Plan, Interbasin Transfers: Implementation Actions at 26 ¶ 2. The Plan only directs the Board of Natural Resources to consider—not adopt—the enumerated factors in amending its rules and regulations. As the Board of Natural Resources has not modified Ga. Comp. R. & Regs. 391-3-6-.07(2)(m), Respondents argue the definition under Ga. Comp. R. & Regs. 391-3-6-.07(2)(m) is still in effect and controls the outcome of this proceeding.[16]

Following the Georgia Plan's enactment, the legislature amended O.C.G.A. § 12-5-31(n) to state:

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[15] On February 6, 2008, the General Assembly ratified the Georgia Comprehensive State-wide Water Management Plan ("Plan") when it passed House Resolution 1022, which states:

> (1) That the comprehensive state-wide water management plan adopted by the Water Council on January 8, 2008, on file in the office of the director of the Environmental Protection Division, and submitted to the General Assembly on January 14, 2008, is hereby ratified pursuant to Code Section 12-5-525 of the O.C.G.A.;
> (2) That such nonstatutory plan shall have force and effect;
> (3) That in the event any provision of such nonstatutory plan irreconcilably conflicts with any current or future statute enacted by the General Assembly, then, to the extent of the conflict, the provisions of such statute shall control;
> (4) That this resolution shall become effective upon its approval by the Governor or upon its becoming law without such approval; and
> (5) That all laws and parts of laws in conflict with this resolution are repealed.

[16] The DNR Rule was promulgated under the authority of Georgia Water Quality Control Act, O.C.G.A. § 12-5-20 *et seq.*, the same Act that was amended in 2008 to require the director to be bound by any state-wide water plan provided under the Comprehensive State-wide Water Management Planning Act. Ga. Comp. R. & Regs. 391-3-6-.07 was last amended in 1996.

> In the consideration of applications for permits which if granted would authorize the withdrawal and transfer of surface waters across natural basins, the director shall be bound by any factors related thereto under Article 8[17] of this chapter **or any state-wide water plan provided pursuant thereto**....

(emphasis added). Further, under Article 8,

> The division shall make all water withdrawal permitting decisions in accordance with this chapter, the comprehensive state-wide water management plan that has been approved or enacted by the General Assembly as provided by this article, and [other considerations].

O.C.G.A. § 12-5-522(e). Notwithstanding Respondent's assertions that the Plan is not self-implementing, it is not the Georgia Plan itself, but the language in O.C.G.A. § 12-5-31(n) amended after the ratification of the Plan, that is controlling. Section 12-5-31(n) mandates that "the director shall be bound ...by any state-wide water plan" in considering applications for permits, which if granted would authorize the withdrawal and transfer of surface waters across natural basins. The withdrawal permit at issue does authorize the withdrawal and transfer of surface waters across natural basins. Accordingly, pursuant to the statute Respondent is bound by the Plan – and its more expansive definition of interbasin transfers.

The rules of statutory construction call on courts to look for the General Assembly's intent and to give each word its ordinary significance, O.C.G.A. § 1-3-1(b), and "[t]he construction of language and words used in one part of the statute must be in the light of the legislative intent as found in the statute as a whole." *Bear's Den*, 214 Ga. at 242 (citation omitted); *see also City of Rincon v. Couch*, 276 Ga. App. 567 (2005) (plain language of statute authorized EPD to deny permit application); *Bd. of Natural Res. v. Walker County*, 200 Ga. App. 301, 305 (1991) (individual EPD regulation must be read "in conjunction with the entire

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[17] Article 8 is the Comprehensive State-wide Water Management Planning Act directing the Environmental Protection Division to develop and propose a comprehensive state-wide management plan consistent with certain policies.

regulatory scheme").[18] Moreover, an agency "is authorized only to take action that carries into effect those laws already passed by the General Assembly; it has no constitutional authority to legislate, and it certainly is not authorized to establish rules that conflict with legislation." *North Fulton Med. Ctr. v. Stephenson*, 269 Ga. 540, 543 (1998) (citations omitted); *see also Sawnee Elec. Membership Corp. v. Pub. Serv. Comm'n,* 273 Ga. 702, 706 (2001) (agency's interpretation must reflect the plain language of the statute or comport with the legislative intent).

Inasmuch as O.C.G.A. § 12-5-31(n) directs Respondent to make all water withdrawal permitting decisions in accordance with the Plan, the DNR Rule's definition is superseded by the definition in the Plan. For the foregoing reasons, Petitioner's motion for summary determination is **GRANTED** and Respondents' motions for summary determination are **DENIED.**

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[18] Petitioners point out that Ga. Comp. R. & Regs. 391-3-6-.07(2)(m) creates perverse incentives for transferors to consume all the withdrawn and transferred water from the donor basin, rather than returning any of it to the surface waters of Georgia. *See Haugen v. Henry County*, 277 Ga. 743, 746 (2004) ("'The judiciary has the duty to reject a construction of a statute which will result in unreasonable consequences or absurd results not contemplated by the legislature.") (Citation omitted).

V. CONCLUSION

In OSAH-BNR-WQC-1031706-98-Walker, the NPDES permit, Petitioners' Motions for Summary Determination as to Counts I and IV of the Petition are **DENIED.** Petitioners' Motion for Summary Determination as to Count III of the Petition is **GRANTED**. Respondents' Motions for Dismissal and/or Summary Determination are **GRANTED** as to Count V and **DENIED** as to Count VI.

In OSAH-BNR-WW-1031708-98-Walker, the water withdrawal permit, Petitioners' Motions for Summary Determination as to Counts I and II are **DENIED.** Petitioners' Motion for Summary Determination as to Count IV of the Petition is **GRANTED**, and Respondents' Motion for Summary Determination as to Count IV is **DENIED.** Respondents' Motions for Dismissal and/or Summary Determination of Counts II and Count III are **GRANTED.** Based on the aforementioned rulings, the hearing scheduled for these cases is hereby removed from the calendar.

SO ORDERED, this 23rd **day of July, 2010.**

Ronit Walker

RONIT Z. WALKER
Administrative Law Judge