IN THE COURT OF APPEALS
STATE OF GEORGIA

ALTAMAHA RIVERKEEPER, INC., Appellant, v. RAYONIER PERFORMANCE FIBERS, LLC, and RICHARD DUNN, DIRECTOR, ENVIRONMENTAL PROTECTION DIVISION, GEORGIA DEPARTMENT OF NATURAL RESOURCES, Appellees.	Application No.: A18A0594 Appeal from Superior Court of Wayne County Case Nos. 16-CV-0390 & 17-CV-0001

AMICI CURIAE BRIEF OF THE

GEORGIA INDUSTRY ENVIRONMENTAL COALITION, INC.;
GEORGIA PAPER AND FOREST PRODUCTS ASSOCIATION, INC.;
GEORGIA POULTRY FEDERATION;
GEORGIA MINING ASSOCIATION;
GEORGIA CONSTRUCTION AGGREGATE ASSOCIATION;
GEORGIA ASSOCIATION OF MANUFACTURERS;
METRO ATLANTA CHAMBER OF COMMERCE;
REGIONAL BUSINESS COALITION OF METROPOLITAN ATLANTA, AND
GEORGIA MUNICIPAL ASSOCIATION, INC.

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TABLE OF CONTENTS

The Georgia Industry Environmental Coalition, Inc., the Georgia Paper & Forest Products Association, Inc., the Georgia Poultry Federation, the Georgia Mining Association, the Georgia Construction Aggregate Association, the Georgia Association of Manufacturers, the Metro Atlanta Chamber of Commerce, the Regional Business Coalition of Metropolitan Atlanta, and the Georgia Municipal Association submit this *Amici Curiae* Brief in Support of Appellees Richard Dunn, Director of the Environmental Protection Division (Georgia EPD) of the Georgia Department of Natural Resources and Rayonier Performance Fibers (Rayonier PF).

INTRODUCTION

When the Georgia EPD issues a permit to discharge wastewater, known as a National Pollutant Discharge Elimination System (NPDES) permit, pursuant to the Clean Water Act (CWA) as implemented by the Georgia Water Quality Control Act (GWQCA) (O.C.G.A. 12-5-20 *et seq*.), the permit sets limits on "pollutants" the holder can discharge, where they discharge, when they discharge, how much they discharge, and what kind of treatment must be undertaken prior to discharge. The certainty in the long list of NPDES limits and conditions benefits everyone—the permittee, the Georgia EPD, the United States Environmental Protection Agency (U.S. EPA), environmental groups, and the Citizens of Georgia. Everyone knows what is both permitted and prohibited prior to discharging wastewater into waters of the State of Georgia.

In this case, the Altamaha Riverkeeper, Inc. (ARK or Appellant) asks this court to depart from this bedrock principle and insert an unprecedented level of uncertainty into the permitting process. Appellant proposes a subjective, non-scientific application of the narrative water quality standard for color and odor that would empower individuals, based on their own sensitivities and preferences, to set permit conditions and claim permit violations when their

use of the Altamaha River—in their sole opinion—is impacted due to the color or odor of the discharges from Rayonier PF's facility. Appellant supports the Administrative Law Judge's (ALJ) "*any* interference" interpretation of Georgia's "narrative" or non-numeric standard, which violates the GWQCA. Under this approach, if just one person "using" the Altamaha River—whether canoeist, fisher, or floater—experiences "*any* interference" with his or her "use" of the river as a result of the color, odor or other characteristic resulting from industrial discharges, that interference potentially would be a violation of the narrative water quality standard, a legal standard that would jeopardize permit compliance for all NPDES permit holders in the State of Georgia, including industrial permittees, local government permittees, and others.

Recognizing the need to strike a balance between sometimes competing, but legitimate uses of Georgia's waters, and acknowledging the ALJ's decision would "collapse the 'designated use' hierarchy into one classification requiring all waterbodies to meet the most stringent standard," the Superior Court rejected the ALJ's decision on appeal. R-7576. For the Superior Court, the ALJ's interpretation of the narrative standard would generate endless uncertainty for all Georgia NPDES permittees, which is why the court held that "[p]rotecting the use of water from 'unreasonable interference' rather than 'any interference' is reasonable and consistent with the [G]WQCA and its purpose." R-7578. Representing a broad coalition of regulated entities in the State, *Amici* respectfully ask this court to affirm the Superior Court's decision and ensure that all Georgia permittees can continue to operate with certainty and comply with a reasonable interpretation of the GWQCA.

INTEREST AND IDENTITY OF *AMICI*

Amici are industrial, agricultural, business, and manufacturing organizations that represent a broad range of interests throughout the State of Georgia affected by this case. Collectively, *Amici* hold hundreds of permits under the CWA's NPDES permitting program, which are issued by the Director of EPD. The outcome of this case directly affects all of the NPDES permits in the State of Georgia if the Superior Court's decision is overturned.

The following organizations submit this brief:

The Georgia Industry Environmental Coalition, Inc. (GIEC) was formed in 1992 as an organization of diverse industries subject to environmental regulation in Georgia. Its mission is to serve as a technically-based advocate for Georgia industry by promoting environmental regulations and policies founded on protection of human health and the environment, sound science, and cost/benefit principles. GIEC member companies represent the manufacturing, mining, utilities, transportation, and agriculture industries in Georgia.

The Georgia Paper and Forest Products Association, Inc. is a trade association comprising 12 companies who own and operate pulp/paper mills and other forest-products manufacturing facilities in Georgia. Paper and forest products are a critical industry in the State.

The Georgia Poultry Federation is a trade association representing poultry growers, processors, and allied industry in Georgia, the nation's leading poultry-producing state.

The Georgia Mining Association, Inc. is a trade association comprising approximately 35 mining companies and 180 associated companies. It promotes the responsible development of Georgia's mineral and natural resources.

The Georgia Construction Aggregate Association is an association of aggregate producers and related companies dedicated to advocating on behalf of the construction aggregates industry.

The Georgia Association of Manufacturers is the statewide trade association that represents a wide variety of Georgia's manufacturing businesses, collectively employing more than half the state's manufacturing workforce, in legislative, regulatory and public relations matters. Founded in 1900, the Georgia Association of Manufacturers also provides seminars, services and guidance to manufacturers on a wide range of issues, including, but not limited to, human resources, workforce development, public utility rates and energy, safety and health, employee benefits, environmental quality and taxation.

The **Metro Atlanta Chamber of Commerce** is an organization representing the Atlanta region, which includes promoting sound public policy. The Chamber serves as a catalyst for a more prosperous and vibrant region. The Chamber is committed to being an active voice for the business community and serving as an advocate for a competitive business climate.

The **Regional Business Coalition of Metropolitan Atlanta, Inc.** (RBC) is an organization of 16 local Chambers of Commerce throughout the metro Atlanta region. RBC member chambers represent over 10,000 businesses that collectively employ over 1 million metro Atlanta residents. The RBC's primary goal is to represent the interests of RBC chamber members on public policy issues impacting our transportation, water and air quality and to advocate for solutions that improve metro Atlanta's quality of life and economic vitality.

The **Georgia Municipal Association, Inc.** (GMA) was formed in 1933 and is the only statewide organization representing interests of municipalities in Georgia. GMA is a voluntary,

non-profit organization that provides advocacy, education, employee benefit services and technical consulting to its members. GMA's current membership of 521 municipal governments includes at least 291 who hold NPDES permits. These municipal permit holders rely upon clear, definite standards in taxing and budgeting to provide appropriate and effective water, wastewater and stormwater treatment.

PART I: FACTUAL BACKGROUND

Appellant strayed far from the Administrative Law Judge's (ALJ) findings of fact in portions of its brief, selectively incorporating multiple "facts" not found in the ALJ's Final Decision. *See e.g.* Appellant's Brief, at 1-2, 4-5, 8-11 (including testimony from its own witnesses not incorporated into the ALJ's findings and selective images of the Altamaha River which the ALJ found may "sharpen the contrast between colors and does not fully reflect the view from the river," R-26). To the extent Appellant included testimony and demonstratives that go beyond the ALJ's findings of fact, such additions should not be considered or serve as a basis for any decision by this court. A summary of the ALJ's findings of fact follows.

The Rayonier PF operates a dissolving kraft pulp plant on the banks of the Altamaha River in Jesup, Georgia. Rayonier PF is the world's largest producer of wood fiber products known as "cellulose specialty pulp," which is used in a variety of goods from plastics to cosmetics, to ice cream and toothpaste. R-9, ¶ ¶ 1-2. Like many Georgia manufacturers in rural towns like Jesup, Rayonier PF is one of the area's largest employers, directly employing 750 people and indirectly supporting an additional 1,500 jobs and creating a total economic impact on the region of nearly one billion dollars per year. *Id.* at ¶ 3.

a. Rayonier PF Treatment Process and the Altamaha River and its Use

The pulping process at the plant involves distilling cellulose to its purest form and removing nearly all impurities, which generates wastewater. The plant's wastewater streams require treatment before the plant discharges to the Altamaha River, a 130-mile river that flows from the confluence of the Ocmulgee and Oconee Rivers in Wheeler County, Georgia, to the Atlantic Ocean in Darien, Georgia. R-10, ¶ 4. The River near and downstream from the Rayonier PF plant is largely undeveloped. R-11, ¶ 5. Rayonier PF uses an aerated stabilization basin secondary treatment process to treat wastewater by sending it to aeration basins to agitate the wastewater and increase the oxygen levels in the wastewater, which assists with a biological treatment process to remove nutrients and other organic materials from the wastewater. R-19-20, ¶¶ 17-19**.** Rayonier PF discharges about 50 to 60 million gallons per day of treated wastewater, which, given the size of the Altamaha River, represents less than one percent of the River's flow during average flow conditions and approximately five percent during low flow conditions. R-33, ¶ 25.

The ALJ established in her findings that this portion of the Altamaha is used for a variety of recreational uses including fishing, boating, kayaking, camping, hunting, and picnicking, and is the site of a number of large fishing tournaments. R-24, ¶ 26. Even when witnesses saw "dark stains" in the River over a holiday weekend, people were still camping, picnicking, and fishing. R-29, ¶ 33. Frequent fishing occurs often in the area below the Rayonier PF outfalls and downstream of the plant, and, in fact, more people fish downstream of the plant than upstream. R- 42-43, ¶¶ 53-54. These facts were critical to the Superior Court's application of the narrative standard and its finding that Rayonier PF's discharges do not unreasonably

interfere with legitimate uses of the River so as to violate the narrative water quality standard, as further discussed below. *See* R-7578.

b. Rayonier PF NPDES Permit and History

Rayonier PF's wastewater discharges to the Altamaha River are authorized under a Georgia NPDES permit issued by the Director of EPD pursuant to the CWA and the GWQCA. For the past several decades, Rayonier PF has operated under an NPDES discharge permit, and Rayonier PF and EPD have a long history of working together to address issues with Rayonier PF's discharges, including color and odor, the subjects of this litigation.

In 2001, EPD issued an NPDES permit to Rayonier PF that required weekly monitoring for color, a color study, and the development of best management practices to control color. R-46, ¶ 58. ARK challenged the 2001 permit, and in 2005, ARK and Rayonier PF reached a settlement agreement. R-46 ¶ 58. EPD and Rayonier PF entered a consent order in March 2008 requiring Rayonier PF to implement a Color Reduction Plan estimated to cost Rayonier PF between $65-75 million. R-46-47, ¶ 59. The consent order also required Rayonier PF to meet progressively more stringent annual average color discharge limits, including final limits of 250 tons per day on an annual average or 115 percent of Rayonier PF's actual color performance for the preceding 12 months. R-46-47, ¶ 59. Rayonier PF met these color discharge requirements and, by March 2016, the plant's annual average discharge was reduced to 157 tons per day. R-25-16, ¶ 28.

On February 18, 2015, EPD issued a draft renewal permit for the Rayonier PF plant and provided a copy of the draft permit to U.S. EPA, as required by the CWA. 33 U.S.C. §1342(d)(1); R-48, ¶ 61. If U.S. EPA files an objection to a draft permit, EPD must resolve the objection to

U.S. EPA's satisfaction or request a hearing before U.S. EPA within 90 days of receiving the objection. U.S. EPA objected to the draft permit due to its concerns that Rayonier PF's discharges may have a reasonable potential to cause or contribute to a violation of Georgia's narrative water quality standards for color, odor, and turbidity. R-48, ¶ 61. In response to this objection, EPD added daily maximum and daily average effluent limits for color, revised the reasonable potential analysis for turbidity, color, and odor and made revisions to the requirement that Rayonier PF undertake a river study to determine the impact of the effluent on the color of the river, use of the river, and health of fish populations. R-52-53, ¶¶ 65-66.

In light of these improvements, U.S. EPA removed its objection to the Rayonier PF NPDES Permit and EPD issued the final NPDES permit (the Permit) on December 29, 2015. R-45, ¶ 57. On January 27, 2016, despite the changes requested by U.S. EPA having been incorporated into the Permit, ARK appealed the Permit issuance. R-54, ¶ 68.

c. Permit Appeal, ALJ Decision, and Superior Court Opinion

ARK's petition for a hearing alleged the Permit was invalid because it failed to ensure compliance with the "narrative" water quality standards for color, odor, and turbidity – notwithstanding the fact that U.S. EPA was satisfied with respect to this component of the Permit. Although no regulations provide for numeric standards for these parameters, ARK proposed specific numeric limits for each of these parameters in its petition. Alternatively, ARK suggested the Permit should include a provision requiring compliance with water quality standards as an enforceable condition in the Permit.

After each party submitted briefs, the ALJ held a hearing over seven days, including a visit to the Rayonier PF facility. The hearing included both lay and expert witnesses who

testified regarding water quality in the Altamaha River, the treatment process at Rayonier PF, and use patterns and impressions of the impact of the plant on the Altamaha River.

The ALJ issued its Final Decision on the Permit appeal on September 30, 2016 and rejected many of ARK's arguments. Regarding color, however, the ALJ held that "the preponderance of the evidence proved that the color of the discharge continues to be noticeable and distinct from the receiving water during low flow conditions." R-63. Regarding odor, the ALJ held "the preponderance of the evidence showed that there is some odor in the effluent, separate from the ambient odors from the plant and the lagoons, which is detectable and offensive, especially during low flow conditions." R-63. Citing no legal standard, the ALJ held that "legitimate uses of the Altamaha during low flow is [sic] likely to be hindered due to the aesthetic objections of local residents and visitors" and required EPD to develop color and odor limits under low flow conditions. R-68.

Following the ALJ's Final Decision, both Rayonier PF and EPD sought judicial review. The cases were combined and heard by the Superior Court of Wayne County. Judge Stephen D. Kelly issued his Order on March 17, 2017 reversing the ALJ's Final Decision and affirming the issuance of Rayonier PF's NPDES permit. The Superior Court held that where "the color levels set in the Permit are reasonable and consistent with the EPD's interpretation of the standard and the need to balance the competing uses of the river, the Court finds that, despite evidence of minor interference with the use of this portion of the river at low flow conditions, such interference would not be unreasonable in light of the need to accommodate multiple uses of the river and maximize the State's water resources for all people." R-7578. Based on the extensive findings of fact by the ALJ, as cited by the Superior Court, the Court applied the facts

to the proper interpretation of the narrative standard and held that "Rayonier's discharge does not unreasonably interfere with legitimate uses of the river so as to violate the narrative water quality standard." R-7578.

PART II: ARGUMENT AND CITATION OF AUTHORITY

When EPD issues an NPDES permit, the Division is specifically implementing enforceable conditions and limits for discharging wastewater. Yet no NPDES permit can be enforced unless it is reasonable. If the Permit is not subject to consistent interpretation, no one can determine the actual scope and extent of terms and conditions contained in the NPDES permit. If an NPDES permit is not reasonable, permit holders would not be able to operate and "use" the rivers along with other users as intended by the Georgia Legislature.

The Superior Court recognized the ALJ's decision would wreak havoc on EPD's enforcement standards for NPDES permits in the State of Georgia by handing over interpretation of NPDES permits to the general public, rather than allowing EPD to provide the consistent and reasonable interpretation and application of the narrative standard. Even more fundamentally, the Superior Court's adoption of a reasonable interference standard for the narrative standard ensures the standard does not reprioritize the permitted "uses" of surface waters in Georgia as held by the ALJ. Appellant now asks this court to undo the Superior Court's well-reasoned holding and, once again, remove EPD's control over Georgia's NPDES permitting program. *Amici* ask this court to preserve Georgia's NPDES permitting program by upholding the Superior Court's decision.

I. The Superior Court Correctly Interpreted the Narrative Standard

Appellant claims the Superior Court erred in utilizing a reasonableness standard when interpreting the term "interfere" in Georgia's narrative water quality standard for color and odor. That standard provides that: "All waters shall be free from material related to municipal, industrial or other discharges which produce turbidity, color, odor or other objectionable conditions which interfere with legitimate water uses." Ga. Comp. R. & Regs. 391-3-6-.03(5)(c). Instead, Appellant believes the term "interfere" in the narrative standard should be interpreted to prohibit "all interference" with legitimate water uses. Appellant's Brief, at 21. The Superior Court's "unreasonable interference" interpretation of the narrative standard is the only application of the standard that provides the certainty critical to Georgia's NPDES permitting program. Allowing the use of a subjective, individual user legitimate use interference standard would create uncertainty for every NPDES permit in Georgia, would conflict with the GWQCA, would undermine EPD's role in implementing Georgia's CWA permitting program, and would make Georgia's designated uses mere surplusage.

a. The "all interference" interpretation of the narrative water quality standard would create endless uncertainty in NPDES permits.

Utilizing the "all interference" interpretation of the narrative standard proposed by Appellant (similar to the ALJ's "any interference" interpretation) would jeopardize existing NPDES permits held by local governments, agricultural operations, and industry by creating an individual person standard that would completely undermine the permitting process. Appellant's Brief, at 21; R-66. *Amici* write to point out the practical implications of Appellant's interpretation of the standard and illustrate for the court how unreasonable and unworkable such a standard would be. As the Superior Court recognized, "[t]he ALJ's interpretation would

require EPD to manage the State's water resources to meet the subjective wishes of water users with the highest water quality expectations." R-7576. Allowing such a standard would subject the regulated community to continuous uncertainty.

For example, at the permitting stage, under the standard advocated by Appellant, it would be impossible for EPD to know whether the conditions it is incorporating into the permit would be sufficiently stringent to satisfy the narrative standard. In other words, EPD would need to attempt to impose permit conditions sufficient so that all interference with any potential user's use of the waterbodies to which the facility would discharge would be protected. Under such a scheme, EPD would be forced to include permit conditions unhinged from any scientific basis. If a permit meeting the "all interference" standard could even be drafted, the recipient of such a permit would live in limbo for the life of the permit, awaiting challenges from individual recreational users whose subjective uses were interfered with due to the color or odor of the water.

Appellant claims that under the ALJ's holding, mere allegations of interference would not suffice and that "the impact must be such that their use is actually hindered or disrupted." R. 66; Appellant's Reply Brief, at 12-13. Practically speaking, all this means is that a fisherman who sought to fish in the Altamaha River chose not to because he found the river to be too colorful or odorous. That perception would constitute actual hindrance or disruption under the ALJ's and Appellant's proposed application of the narrative standard. Meanwhile, a permittee could be expending substantial time, money, and effort to comply with all permit limits in its permit and still face such claims. This regulatory whipsaw is simply an unworkable approach to permitting.

Appellant argues the Superior Court did not understand the ALJ's Final Decision and the Superior Court's claim that a single person's complaint could overturn a permit is not consistent with logic of the ALJ's Final Decision. Appellant's Brief, at 29-30. To the contrary, the Superior Court simply took the ALJ's and Appellant's applications of the narrative standard to their logical conclusions. If the subjective, "all interference" or "any interference" standards were to be applied as Appellant advocates, odor or color interference with a single person's willingness to recreate on the Altamaha River in the vicinity of Rayonier PF's discharge would meet the "*all* interference" standard (i.e. *all* interference would include interference with one person's willingness to recreate). That very real possibility is precisely why reasonableness must be a component in determining interference under the narrative standard, why Appellant's "all interference" standard is unworkable, and why EPD, not individual users, must be the arbiter of compliance with the narrative standard.

To allow otherwise would subject every permittee to an endless onslaught of permit challenges based on a person's (or persons') specific tolerance for odorous or colorful water. As the Georgia Supreme Court has noted, "[i]t is the duty of the court to consider the results and consequences of any proposed construction and not so construe a statute as will result in unreasonable or absurd consequences not contemplated by the legislature. The construction must square with common sense and sound reasoning." *State v. Mulkey*, 252 Ga. 201, 201 (Ga. 1984); *Upper Chattahoochee Riverkeeper, Inc. v. Forsyth Cnty.*, 318 Ga. App. 499, 502 (2012) (applying rules of statutory interpretation when construing agency regulations). Using an individual, subjective interpretation of the narrative standard creates an undefined, unachievable, and unreasonable permit condition impossible for local governments, industry

and agricultural operations to meet. Accordingly, an unreasonable interference standard, interpreted and applied by EPD, is the only commonsense application of the narrative standard. In fact, EPD is currently in the process of clarifying the language in the narrative standard to only prohibit turbidity, color, odor, or other objectionable conditions which "unreasonably interfere with" the designated uses of the water body, which EPD considers merely a clarification of the current rule.[1]

b. Appellant's "all interference" interpretation conflicts with the GWQCA.

Not only are the practical implications too severe to allow for an "all interference" application of the narrative standard, such an interpretation of the narrative standard directly conflicts with the GWQCA. As EPD states in its brief, the context of the narrative water quality standard is critical to interpreting interference. EPD Brief, at 16. That context begins with the GWQCA, which is the statute providing authority for the promulgation of the narrative standard. O.C.G.A. 12-5-23(a)(1). For the Superior Court, the GWQCA recognizes that the regulations promulgated under the GWQCA "consider and protect the public's interest in a variety of sometimes-competing legitimate uses." R-7576. The court concluded: the GWQCA regulations "do not give priority to one public interest over another, and they explicitly recognize that in some instances, legitimate uses such as recreation must be adjusted to accommodate industrial and municipal discharges." *Id.*

As the GWQCA provides, "the water resources of the state shall be utilized prudently for the maximum benefit of the people" to "restore and maintain a *reasonable* degree of purity in the waters of the state" and "to require where necessary *reasonable* usage of the waters of the

[1] *See* EPD Proposal to DNR Board, submitted December 6, 2017 *available at:* https://epd.georgia.gov/chapter-391-3-6-rules-water-quality-control (last visited January 17, 2018).

state and *reasonable* treatment of sewage, industrial wastes, and other wastes prior to their discharge into such waters." O.C.G.A. § 12-5-21 (emphasis added). As the Superior Court notes, the cardinal rule in interpreting statutes and regulations is to glean the drafter's intent. R-7575 *citing Georgia Pub. Serv. Comm'n v. Alltell Georgia Communications Corp.*, 227 Ga. App. 382, 384-385 (1997); O.C.G.A. § 1-3-1(a); *Carrol v. Ragsdale*, 192 Ga. 118, 120 (1941). EPD carried out the intent of the Georgia Legislature in applying the purposes of the GWQCA to its application of the narrative water quality standard. It would be difficult to infer from this language that the Georgia Legislature intended anything other than the reasonable application of the narrative water quality standard.

c. <u>The plain language of "interfere" requires interpretation and EPD's interpretation was reasonable and should be given deference</u>.

The critical term in this case "interfere" in the narrative water quality standard for odor and color is not defined or explained in Georgia's water quality regulations. The standard simply fails to specify what odor or color increases would "interfere" with legitimate uses, or whether that level changes depending on the legitimate use to which it is being compared. Largely for this reason, EPD was required to apply and interpret the intent and purpose of the language in the context of the statutory and regulatory scheme in which the standard exists. As the ALJ readily admitted, "[t]he plain meaning of the term 'interfere' is subject to many interpretations, depending on its context." R-66. EPD, utilizing the statutory purposes in the GWQCA, and realizing the real-world implications of its interpretation, applied the narrative water quality standard as prohibiting unreasonable interference. Where an agency has resolved an ambiguity, courts must defer to an agency's resolution "so long as the agency has resolved the ambiguity in the proper exercise of its lawful discretion, and so long as the agency

has resolved it upon terms that are reasonable in light of the statutory text." *Tibbles v. Teachers Retirement Sys. of Georgia*, 297 Ga. 557, 558-59 (2015); *see also* R-7575. Here it was within EPD's authority to interpret the standard and its interpretation is reasonable, so this court should uphold the Superior Court's finding that "EPD's interpretation of the standard is reasonable and in accord with the statutory and regulatory purposes and the context of the standard as a whole." R-7576. Appellant seeks to remove interpretation of the narrative standard from EPD's sound state-wide judgment, and instead allow individual users (or groups of users), to determine whether permittees are in compliance with the narrative standard. EPD should be the arbiter of compliance with Georgia's water quality standards, including the narrative standard, if Georgia is to maintain a reasonable NPDES permitting program.

d. Industrial use is a legitimate use.

Appellant claims the Superior Court "misconstrued the balance" in the narrative water quality standard between different uses of the Altamaha River. Appellant's Brief, at p. 17. The text of the narrative water quality standard strikes no such balance. The GWQCA establishes that industry is specifically permitted to "use" waters of the State, and neither the Permit, nor any interpretation of the narrative standard should be able to redefine, reprioritize or narrow that long-standing tenet of Georgia water law. Regulations implementing the GWQCA acknowledge that both "industrial" and "recreational" uses are "reasonable and necessary uses" and "legitimate uses." Ga. Comp. R. & Regs. R. 391-3-6-.03(3)(j). The Superior Court recognized that the GWQCA "clearly contemplates that the different uses of the State's water resources may, at times and in certain waterbodies, conflict with one another." R-7576. The court further stated that "the law obligates EPD to manage this resource and interpret the law

in a manner consistent with that purpose. Indeed, while the purpose of the [G]WQCA is to protect the State's water resources, they must be maximized and EPD must take a reasonable approach to regulation." R-7576.

Rather than apply the plain language of Georgia regulations which clearly includes industrial use as "reasonable and necessary" use among other "legitimate uses," Appellant makes a tortured interpretation of Georgia's legitimate uses to argue that industrial uses, which include discharge of wastewater to Georgia waterbodies where such discharges are in compliance with EPD issued and U.S. EPA approved NPDES permits, "are prohibited . . . from interfering with itself." Appellant's Reply Brief, at 11. Again, Appellant ignores Georgia's designated uses which specifically articulate the appropriate level of water quality to be applied to each waterbody segment in order to meet the scientifically-determined designated use, including the protection of legitimate uses in that waterbody segment. Instead, Appellant asks the court to apply a separate interpretation of "legitimate uses" as the term is used in the narrative standard. *Id.* To the extent Georgia's water quality standards strike a balance between uses, that balance is struck in the state's designated uses, not in the narrative water quality standard and this court should not accept Appellant's invitation to interpret "legitimate uses" as not applying to industrial uses in the narrative standard.

e. Georgia's designated uses would be undermined by the "all interference" application of the narrative water quality standard.

The Superior Court correctly recognized that Georgia's designated uses create the hierarchy of water quality protection, not the narrative water quality standards. R-7576. As the Superior Court noted, to allow the narrative water quality standard for odor and color to be applied "to meet the subjective wishes of water users with the highest water quality

expectations" would "collapse the 'designated use' hierarchy into one classification requiring all waterbodies meet the most stringent standard." R-7575. This is precisely the outcome Appellant seeks. But to give both the designated uses and the narrative water quality standard effect, the court held, the narrative standard must be interpreted in a reasonable manner. Otherwise, Georgia's designated uses are "mere surplusage." R-7576. Appellant notes in its Reply Brief that the specific, designated use criteria are meant to apply "in addition to the general criteria" which apply to "all waters." Appellant's Reply Brief, at 6; Ga. Comp. R. & Regs. 391-3-6-.03(6). However, the designated uses "are necessary and shall be required for the specific water usage." *Id.* If the general criteria are applied as Appellant requests, the specific criteria would no longer be necessary, as explicitly required by the regulations, because the narrative, general criteria, subjectively applied based on each individual user's preference under Appellant's proposed application, would supplant the data-driven designated uses. *Id.* In other words, among the many designated uses involving human interaction with waterbodies, such as fishing and recreation, the general criteria would negate such designated uses in favor of a level of water color and/or odor that does not deter or interfere whatsoever with a specific user's willingness to carry out his or her preferred activity in or around the waterbody. That interpretation would undermine the designated uses, many of which involve human interaction with waterbodies.

Georgia's water quality standards include "designated uses" (e.g., drinking water supplies), criteria limiting the amount of particular pollutants (e.g., lead) that may be present in waterbodies without impairing the prescribed designated use, and an antidegradation policy, prohibiting future degradation of the waterbody. 40 C.F.R. § 131.11. EPD applies these criteria

by looking at the designated use assigned to a waterbody (e.g., fishing, recreational, etc.), then translating the criteria into permit limits that will protect the applicable designated use of that particular waterbody. Ga. Comp. R. & Regs. 391-3-6.03(6); 40 C.F.R. § 131.2.

In determining the designated use appropriate for each waterbody, EPD "must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, *industrial*, and other purposes including navigation." 40 C.F.R. § 1310(a) (emphasis added). EPD evaluates existing instream water uses and the level of water quality necessary to protect those existing uses and assigns each waterbody a designated use consistent with the data it analyzed to determine the quality of the waterbody segment. Ga. Comp. R. & Regs. 391-3-6.03(2)(b)(i). EPD then submits the list of designated uses to U.S. EPA for approval. 33 U.S.C. § 1315(b). As approved by U.S. EPA, Georgia has the following designated uses for its waterbodies: (1) Wild and Scenic Rivers; (2) Drinking Water Supplies; (3) Recreation; (4) Fishing, Propagation of Fish, Shellfish, Game or Other Aquatic Life, and (5) Coastal Fishing. Ga. Comp. R. & Regs. 391-3-6.03(6).

EPD then applies its criteria based on the designated use for the waterbody and the stringency of the criteria required for the waterbody to continue to meet that designated use. For example, higher water quality is necessary for waterbodies designated for drinking water supplies, whereas less stringent water quality is required for coastal fishing. *See* Ga. Comp. R. & Regs. 391-3-6.03(6).

The designated use for the portion of the Altamaha River relevant to this case is fishing. Waterbodies designated for this use are meant to support the "propagation of fish, shellfish, game and other aquatic life; secondary contact recreation in and on the water; or for any other

use requiring a lower water quality." Ga. Comp. R. & Regs. 391-3-6-.03(6)(c). Secondary contact means "incidental contact with the water, wading, and occasional swimming." *Id.* at .03(3)(k). This is the lowest designated use of Georgia's designated uses in terms of water quality requirements. R-52, FN 39.

An "all interference" interpretation of Georgia's narrative water quality standard for odor and color would catapult this section of the Altamaha River from the lowest designated use in Georgia, to a designated use that exceeds even the highest designated use in the state hierarchy. As EPD has pointed out "the narrative standards should not be interpreted to convert the designated use to some higher use, such as recreation." R-52, FN 39. Any other interpretation would rewrite the designated uses where there was reasonable potential for a narrative water quality criteria exceedance for odor or color.

f. Appellant's attempts to look outside the GWQCA are irrelevant and unpersuasive.

Appellant erroneously suggests this court should look to other, wholly unrelated statutes under the purview of the Board of Natural Resources, rather than look to the intent of the GWQCA. Appellant's Brief at 21. Surprisingly, the ALJ did the same thing. R-64-65.

First, Appellant cites to Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(1), which regulates air emissions under wholly separate statutory authority under the Georgia Air Quality Control Act, O.C.G.A. § 12-9-1 *et seq*. Then Appellant cites to groundwater withdrawal regulations, before going even further afield in citing the Coastal Marshland Protection Act. None of these statutes has any bearing on the interpretation of the narrative standard, as the Superior Court correctly recognized. R-7274. The Superior Court properly looked to the GWQCA to interpret the

narrative standard and this court should not be led astray by Appellant's far-reaching and unpersuasive grasps for support.

II. The Superior Court Applied the Facts of the Case to the Reasonable Interference Narrative Water Quality Standard

In a Hail Mary to establish error in the Superior Court's holding, the Appellant overlooks the court's clear attribution to the ALJ's findings of fact to assert that the Superior Court made its own factual findings. According to Appellant, the Superior Court was required to remand the case to the ALJ to apply the standard to the evidence. Appellant's Brief, at p. 34. From the Superior Court's Order, it is clear the court relied entirely on the facts established by the ALJ in applying the narrative water quality standard using the appropriate "reasonable interference" standard. In the Superior Court's footnote 33, the court identifies the four paragraphs of facts in the ALJ's holding upon which it relies. R-7578.

It cannot be disputed that the ALJ made significant factual findings. In the ALJ's 64-page opinion, she devoted 47 pages to findings of fact, including findings from both lay and expert witnesses familiar with the uses of the Altamaha River near Rayonier PF. The Superior Court relied on these factual findings in its holding, yet no facts have been disputed in this case. Despite Appellant's lengthy recitation of "facts" in its brief, many of which were not factual findings made by the ALJ, no party has challenged the factual findings of the ALJ. Among those findings are that this portion of the Altamaha River is used extensively for fishing, boating, paddling, and other recreation including occasional swimming and wading; one of the most popular access points on the entire Altamaha River, Jaycee's Landing, is just upstream from the Rayonier PF plant; and more people fish downstream of the Rayonier PF plant outfall than upstream. R-24, 29, 42-43, ¶¶ 26, 33, 53-54.

For the Superior Court, these facts, as established by the ALJ, showed only "minor interference" and did not establish an unreasonable interference with other legitimate uses of the River including fishing and recreation "in light of the need to accommodate multiple uses of the River and maximize the state's water resources for all people." R-7578. Contrary to Appellant's suggestion otherwise, the Superior Court was interpreting and applying the narrative standard. The interpretation and application of regulations is a question of law reviewed de novo on appeal. *Forsyth Cnty.*, 318 Ga. App. at 502. The Superior Court acted within its authority in applying the facts as established by the ALJ to its interpretation of the narrative standard.

III. The Superior Court's Decision Provides the Certainty that Permittees Need to Ensure Environmental Compliance

As a matter of policy, the Superior Court's decision takes a reasonable approach to applying the narrative standard under the GWQCA. If an environmental permit is not subject to consistent interpretation and reasonable application of standards, permittees will never know whether they are operating within the scope of terms and conditions contained in the NPDES permit and in compliance with the GWQCA.

Applying the facts and considering applicable law, the Superior Court reached the correct legal conclusion and practically the only workable application of the standard, that: "[p]rotecting the use of water from 'unreasonable interference' rather than 'any interference' is reasonable and consistent with the [G]WQCA and its purpose." R-7578. To apply the ALJ's or the Appellant's interpretation of the narrative standard would create endless uncertainty for all Georgia NPDES permittees. The Superior Court's application of the narrative standard ensures that this will be the case by allowing EPD, with its technical expertise and practical experience,

to be the arbiter of compliance with the narrative standard, rather than individual waterbody users. This correct legal conclusion reflects the best public policy for the State of Georgia.

CONCLUSION

Amici respectfully request that this court affirm the Superior Court's decision and ensure that all Georgia permittees can continue to operate with certainty and comply with a reasonable interpretation of the GWQCA.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing *AMICI CURIAE* BRIEF IN SUPPORT OF APPELLEES by email and by first-class mail of a copy of same upon:

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RULE 24 CERTIFICATION

This submission does not exceed the word count limit imposed by Rule 24.

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