

391-3-7-.05 Buffer Variance Procedures and Criteria.

(1) Buffers on state waters are valuable in protecting and conserving land and water resources, therefore buffers should be protected. The buffer variance process will apply to all projects legally eligible for variances and to all state waters having vegetation wrested from the channel by normal stream flow, provided that adequate erosion control measures are incorporated in the project plans and specifications and are implemented. The following activities do not require application to or approval from the Division:

(a) stream crossings for water lines or stream crossing for sewer lines that occur at an angle, as measured from the point of crossing, within 25 degrees of perpendicular to the stream and cause a width of disturbance of not more than 50 feet within the buffer; or

(b) where drainage structures must be constructed within the twenty-five (25) foot buffer area of any state water not classified as a trout stream; or

(c) where roadway drainage structures must be constructed within the twenty-five (25) foot buffer area of any state waters or the fifty (50) foot buffer of any trout stream; or

(d) construction of bulkheads or sea walls on Lake Oconee and Lake Sinclair where required to prevent erosion at the shoreline; or

(e) construction of public water system reservoirs.

(2) Variance applications will be reviewed by the Director only where the applicant provides reasonable evidence that impacts to the buffer have been avoided or minimized to the fullest extent practicable and only in the following cases:

(a) The project involves the construction or repair of a structure which, by its nature, must be located within the buffer. Such structures include dams, public water supply intake structures, detention/retention ponds, waste water discharges, docks including access ways, boat launches including access ways, and stabilization of areas of public access to water; or

(b) The project will result in the restoration or enhancement to improve water quality and/or aquatic habitat quality; or

(c) Buffer intrusion is necessary to provide reasonable access to a property or properties; or

(d) The intrusion is for gravity-flow sewer lines that cannot reasonably be placed outside the buffer, and stream crossings and vegetative disturbance are minimized; or

(e) Crossing for utility lines, including but not limited to gas, liquid, power, telephone, and other pipelines, provided that the number of crossings and the amount of vegetative disturbance are minimized; or

(f) Recreational foot trails and viewing areas, providing that impacts to the buffer are minimal; or

(g) The project involves construction of one (1) single family home for residential use by the owner of the subject property and, at the time of adoption of this rule, there is no opportunity to develop the home under any reasonable design configuration unless a buffer variance is granted. Variances will be considered for such single family homes only if construction is initiated or local government approval is obtained prior to the effective date of this rule; or

(h) For non-trout waters, the proposed land disturbing activity within the buffer will require a permit from the United States Army Corps of Engineers under Section 404 of the federal

Water Pollution Control Act Amendment of 1972, 33 U.S.C. Section 1344, and the Corps of Engineers has approved a mitigation plan to be implemented as a condition of such a permit; or

(i) For non-trout waters, a plan is provided for buffer intrusion that shows that, even with the proposed land disturbing activity within the buffer, the completed project will result in maintained or improved water quality downstream of the project; or

(j) For non-trout waters, the project with a proposed land disturbing activity within the buffer is located in, or upstream and within ten linear miles of, a stream segment listed as impaired under Section 303(d) of the federal Water Pollution Control Act Amendment of 1972, 33 U.S.C. Section 1313(d) and a plan is provided that shows that the completed project will result in maintained or improved water quality in such listed stream segment and that the project has no adverse impact relative to the pollutants of concern in such stream segment; or

(k) For non-trout waters, the proposed land disturbing activity within the buffer is not eligible for a permit from the United States Army Corps of Engineers under Section 404 of the federal Water Pollution Control Act Amendment of 1972, 33 U.S.C. Section 1344, includes required mitigation in accordance with current EPD "Stream Buffer Variance Mitigation Guidance" document, and involves:

(1) piping, filling, or re-routing of non-jurisdictional Waters of the U.S.; or

(2) stream buffer impacts due to new infrastructure projects adjacent to state waters (jurisdictional and non-jurisdictional Waters of the U.S.). This criterion shall not apply to maintenance and/or modification to existing infrastructure, which are covered under 391-3-7.05(2)(a).

(3) If the buffer impact will be temporary, the buffer variance request shall include the following information at a minimum:

(a) A site map that includes locations of all state waters, wetlands, floodplain boundaries and other natural features, as determined by field survey.

(b) A description of the shape, size, topography, slope, soils, vegetation and other physical characteristics of the property.

(c) A dated and numbered detailed site plan that shows the locations of all structures, impervious surfaces, and the boundaries of the area of soil disturbance, both inside and outside of the buffer. The exact area of the buffer to be impacted shall be accurately and clearly indicated.

(d) A description of the project, with details of the buffer disturbance, including estimated length of time for the disturbance and justification for why the disturbance is necessary.

(e) A calculation of the total area and length of buffer disturbance.

(f) A letter from the issuing authority (if other than the Division and as applicable) stating that it is aware of the project.

(g) An erosion, sedimentation and pollution control plan, where applicable.

(h) Proposed mitigation, if any, for the buffer disturbance and a restoration and re-vegetation plan, if applicable.

(i) Any other reasonable information related to the project that the Division may deem necessary to effectively evaluate the variance request. Division shall determine if this information is needed within 20 business days of receipt.

(j) Application shall be on forms provided by the Division by 1-1-05.

(4) If the buffer impact will be permanent, the buffer variance request shall include all of the information in Sections (3)(a) thru (j) above, with the exception of (3)(h). A buffer variance request with permanent impact shall also include the following additional information:

(a) For non-trout waters, a copy of the permit application, supporting documentation, and proposed mitigation plan, if applicable, as submitted to the United States Army Corps of Engineers under Section 404 of the federal Water Pollution Control Act Amendment of 1972, 33 U.S.C. Section 1344, if applicable.

(b) A buffer mitigation plan addressing impacts to critical buffer functions, including water quality, floodplain, watershed and ecological functions based on an evaluation of existing buffer conditions and predicted post construction buffer conditions pursuant to Section (7)(c) herein.

(c) A plan for stormwater control once site stabilization is achieved, where applicable.

(d) For variance requests made under Sections (2)(i) and (2)(j), the application shall include the following water quality information:

(1) For variance requests under Section (2)(i), the application must include documentation that post-development conditions of the project will meet the four primary (water quality, downstream channel protection, overbank flood protection, and extreme flood protection) performance requirements in the Georgia Stormwater Management Manual or the equivalent.

(2) If the proposed variance is in, or within 10 linear miles of and upstream of, a stream segment listed as impaired under Section 303(d) of the federal Water Pollution Control Act Amendment of 1972, 33 U.S.C. Section 1313(d), the application must include predicted pollutant loading under pre- and post-development conditions as estimated by models accepted by the Division. In addition, the applicant must document how the proposed project is in compliance with the TMDL implementation plan, if available, as required in Subsection 391-3-7-.05(5)(i).

(5) Upon receipt of a completed application in accordance with Sections 391-3-7-.05(3) or 391-3-7-.05(4), the Division shall consider the completed application and the following factors in determining whether to issue a variance:

(a) The shape, size, topography, slope, soils, vegetation and other physical characteristics of the property; and

(b) The locations of all state waters on the property as determined from field inspection; and

(c) The location and extent of buffer intrusion; and

(d) Whether reasonable alternative project designs, such as the use of retaining walls, are possible which do not require buffer intrusion or which require less buffer intrusion; and

(e) Where the buffer impact is temporary, the buffer restoration plan is low or no maintenance, and the plan provides net gain in buffer value/function (i.e. water quality, floodplain, watershed, ecological perspectives), the application will be approved unless the Director declines the application based on the exceptional existing buffer value/function; and

(f) Whether issuance of the variance is at least as protective of natural resources and the environment, and including wildlife habitat; and

(g) The current condition of the existing buffer, to be determined by:

1. The extent to which existing buffer vegetation is disturbed;
2. The hydrologic function of the buffer;
3. Stream characteristics such as bank vegetative cover, bank stability, prior channel alteration, or sediment deposition; and

(h) The extent to which the encroachment into the buffer may reasonably impair buffer functions.

(i) The value of mitigation activities conducted pursuant to this rule, particularly Subsections 391-3-7-.05(7)(c) and 391-3-7-.05(7)(d) herein, and shall take regional differences into consideration on-site or downstream, to be determined by development techniques or other measures that will contribute to the maintenance or improvement of water quality, including the use of low impact designs and integrated best management practices, and reduction in effective impervious surface area; and

(j) The long-term water quality impacts of the proposed variance, as well as the construction impacts. For applications made under Subsections 391-3-7.05(2)(i) or 391-3-7-.05(2)(j), the following criteria, which reflect regional differences in the state, shall be used by the Director to assist in determining whether the project seeking a variance will, when completed and with approved mitigation, result in maintained or improved water quality downstream of the project and minimal net impact to the buffer:

1. Division will assume that the existing water quality conditions are commensurate with an undeveloped forested watershed unless the applicant provides documentation to the contrary. If the applicant chooses to provide baseline documentation, site and/or stream reach specific water quality, habitat, and/or biological data would be needed to document existing conditions. If additional data are needed to document existing conditions, the applicant may need to submit a monitoring plan and have it approved by the Division prior to collecting any monitoring data. Existing local data may be used, if available and of acceptable quality to the Division.

2. The results of the predicted pollutant loading under pre- and post-development conditions as estimated by models accepted by the Division indicate that existing water quality conditions will be maintained or improved.

3. Projects for which a land disturbing activity is proposed within the buffer of a 303(d) listed stream, or upstream and within 10 linear miles of a 303(d) listed stream, the results of the model demonstrate that the project has no adverse impact relative to the pollutants of concern in such stream segment.

(6) Within 60 days of receipt of a complete buffer variance application, the Division will either provide written comments to the applicant or propose to issue a variance. When the Division proposes to issue a variance, it will send out a public advisory to all citizens and groups who request to receive the advisories. The applicant will then publish a notice in the legal organ of the local jurisdiction. The public advisory and public notice shall describe the proposed buffer modification, the location of the variance, where the public can go to review site plans, and where comments should be sent. The public shall have 30 days from the date of publication of the notice in the legal organ to comment on a variance proposal.

(7) In all cases in which a buffer variance is issued, the following conditions shall apply:

(a) The variance shall be the minimum reduction in buffer width necessary to provide relief. Streams shall not be piped if a buffer width reduction is sufficient to provide relief.

(b) Disturbance of existing buffer vegetation shall be minimized.

(c) Required mitigation shall offset the buffer encroachment and any loss of buffer functions. Where lost functions cannot be replaced, mitigation shall provide other buffer functions that are beneficial. Buffer functions include, but are not limited to:

1. temperature control (shading);
2. streambank stabilization;
3. trapping of sediments, if any;
4. removal of nutrients, heavy metals, pesticides and other pollutants;
5. aquatic habitat and food chain;
6. terrestrial habitat, food chain and migration corridor; and
7. buffering of flood flows.

(d) Mitigation should be on-site when possible. Depending on site conditions, acceptable forms of mitigation may include but are not limited to:

1. Restoration of the buffer to a naturally vegetated state;
2. Bioengineering of channels to reduce bank erosion and improve habitat;
3. Creation or restoration of wetlands;
4. Stormwater management to better maintain the pre-development flow regime (with consideration given to downstream effects) that exceeds the requirements of applicable ordinances at the time of application;
5. Reduction in pollution sources, such as on-site water quality treatment or improving the level of treatment of septic systems;
6. Other forms of mitigation that protects or improves water quality and/or aquatic wildlife habitat;
7. An increase in buffer width elsewhere on the property;
8. Mitigation required under a Clean Water Act Section 404 or Nationwide permit issued by the U.S. Army Corps of Engineers;
9. Those described in the most recent publication of the Georgia Stormwater Management Manual.

(e) Forms of mitigation which are *not* acceptable include:

1. Activities which are already required by the Georgia Erosion and Sedimentation Act, such as the minimal use of best management practices;
2. Activities, which are already required by other federal, state and local laws, except as described in 391-3-7.05(7)(d) above. Corps of Engineers mitigation is acceptable.

(f) The Division will not place a condition on a variance that requires a landowner to deed property or the development rights of property to the state or to any other entity. The landowner may voluntarily preserve property or the development rights of property as a mitigation option with the agreement of the Division.

(8) If a variance issued by the Director is acceptable to the issuing authority, the variance shall be included as a condition of permitting and therefore becomes a part of the permit for the proposed land disturbing activity project. If a stream buffer variance is not acceptable to the issuing authority, the issuing authority may issue a land disturbing permit without allowing encroachment into the buffer.

(9) A general variance is provided for piping of trout streams with an average annual flow of 25 gpm or less.

(10) To obtain this general variance in Section 391-3-7.05(9) for encroaching on the buffer of a trout stream, the applicant must submit information to the issuing authority or EPD if there is no issuing authority demonstrating that the average annual flow in the stream is 25 gpm or less. There are two acceptable methods for making this determination.

(a) The USGS unit area runoff map may be used to determine the threshold acreage that will produce an average annual flow of 25 gpm or less.

(b) The applicant may submit a hydrologic analysis certified by a Registered Professional Engineer or Geologist that presents information sufficient to estimate that the average annual flow of each stream to be piped is 25 gpm or less with a high level of certainty.

(11) Any stream piping performed in accordance with this general variance in Section 391-3-7.05(9) shall be subject to the following terms:

(a) The total length of stream that is piped in any one property shall not exceed 200 feet.

(b) Any project that involves more than 200 ft of piping will require an individual variance for the entire project. The general variance may not be applied to a portion of a project; e.g., it is not permissible to pipe 200 ft of a stream under the general variance and seek an individual variance for an additional length of pipe.

(c) The downstream end of the pipe shall terminate at least 25 ft before the property boundary.

(d) The applicant for a Land Disturbing Activity Permit shall notify the appropriate issuing authority of the precise location and extent of all streams piping as part of the land disturbing activity permit application. The issuing authority (if other than the Division) shall compile this information and convey it to the Division annually.

(e) Where piping of a stream increases the velocity of stream flow at the downstream end of the pipe, appropriate controls shall be employed to reduce flow velocity to the predevelopment level. Plans for such controls must be submitted as part of the land disturbing activity permit.

Authority O.C.G.A. Secs. 12-2-24, 12-7-5. **History.** Original Rule entitled "Minimum Requirements" adopted. F. Apr. 6, 1977; eff. Apr. 26, 1977. **Repealed:** New Rule entitled "Land Disturbing Activities Within the 100 Year Flood Plain" adopted. F. Dec. 12, 1989; eff. Jan. 1, 1990. **Repealed:** New Rule entitled "Buffer Variance Procedures and Criteria" adopted. F. Nov. 2, 2000; eff. Nov. 22, 2000. **Amended:** F. Dec. 12, 2000; eff. Jan. 1, 2001. **Amended:** F. Nov. 5, 2003; eff. Nov. 25, 2003. **Amended:** F. Dec. 20, 2004; eff. Jan. 9, 2005. **Amended:** F. Nov. 19, 2010; eff. Dec. 9, 2010.