DUPLICATE

IN THE SUPERIOR COURT OF SPALDING COUNTY

STATE OF GEORGIA

OGEECHEE RIVERKEEPER, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil File Action No. 13V-41
	)	
JUDSON H. TURNER, Director of the	)	
Environmental Protection Division of the	)	
Georgia Department of Natural Resources,	)	
	)	
Defendant.	)	
_____	)	

FINAL JUDGMENT

This matter having come before the Court for a hearing on the merits on February 26, 2013, and the Court having duly considered the evidence, the pleadings, motions, briefs, and

arguments of the parties, the Court now finds that there is no legal or factual basis for the relief requested in Plaintiff's Petition for Mandamus, and that Plaintiff's request for mandamus relief should be denied and its Petition for Mandamus dismissed for the following reasons.

THE FACTS

On November 13, 2012, Plaintiff Ogeechee Riverkeeper ("Plaintiff" or "ORK") filed its Petition for Mandamus seeking a writ of mandamus requiring Judson H. Turner, ("the Director") Director of the Georgia Environmental Protection Division ("EPD") to order King America Finishing to cease its operation of the company's Screven County facility flame retardant lines. At the hearing of the case on its merits, the parties stipulated to the following facts:

1. The facility at issue is a fabric finishing facility operated by King America Finishing and located at Georgia Highway 17, Sylvania, Screven County, Georgia.
2. On September 29, 2000, Georgia EPD issued National Pollutant Discharge Elimination System ("NPDES") permit number GA0003280 ("the Permit") to King Finishing Company, a Division of Spartan Mills.
3. On January 30, 2002, that Permit was transferred to King America Finishing, Inc. (See also, Defendant's Ex. D-2.)
4. On August 30, 2005, the Permit was administratively extended by the Director of EPD.
5. In April 2006, King America Finishing began operating two flame retardant fabric finishing lines and discharging its altered wastewater into the facility's wastewater treatment system without notifying the Watershed Protection Branch of EPD or seeking an NPDES permit amendment, in apparent violation of law.
6. On or around May 20, 2011, EPD was notified of a fish kill in the Ogeechee River.

7. Between May 23, 2011 and June 3, 2011, EPD conducted an evaluation inspection of the King America Finishing facility during which it discovered the alteration in King America's processing as a result of the operation of the flame retardant fabric finishing lines.
8. On June 16, 2011, EPD hand delivered two letters to King America Finishing identifying several actions the company was required to take. (See also Defendant's Ex. D-6 and D-7.)
9. On June 17, 2011, following discussions with EPD, King America temporarily ceased operation of the flame retardant finishing lines.
10. In a letter dated July 19, 2011, then-EPD Director F. Allen Barnes informed King America that he did not object to a resumption of King America operations at the facility subject to twelve (12) stipulations as well as adherence to the previous requirements imposed by EPD. (See also Defendant's Ex. D-8.)
11. On August 12, 2011, King America submitted an application for the re-issuance of the Permit, which included the wastewater from the flame retardant lines.
12. On September 21, 2011, the Director and King America entered into a Consent Order relating to King America's modification of its operations and the resulting unauthorized discharge of wastewater into the facility's wastewater treatment system which ultimately is discharged into the Ogeechee River. (See also Defendant's Ex. D-5.)
13. On October 21, 2011, ORK initiated an administrative action to challenge the 2011 Consent Order.

14. On March 20, 2012, an Administrative Law Judge with the Office of State Administrative Hearings affirmed the issuance of the 2011 Consent Order and dismissed ORK's administrative challenge.

15. ORK sought judicial review from superior court of the ALJ's Final Decision.

16. On July 19, 2012, the Superior Court of Bulloch County reversed the decision of the ALJ and declared the 2011 Consent Order invalid because of a failure to provide a public notice and comment period.

17. The Director did not seek appellate review of the Superior Court's decision.

18. On August 10, 2012, EPD issued a draft NPDES permit that for the first time would have authorized the discharges from the flame retardant lines. (See also Defendant's Ex. D-3.) ORK filed a challenge to this permit on the grounds, inter alia, that an anti-degradation analysis was necessary. Prior to any rulings by the administrative law judge, EPD withdrew the permit on October 16, 2012, in order to have King America conduct an anti-degradation analysis. (See also Defendant's Ex. D-9.)

19. On October 16, 2012, EPD issued a proposed revised Consent Order with King America relating to the modification of its operations and the resulting unauthorized discharge of wastewater into the facility's wastewater treatment system which ultimately is discharged into the Ogeechee River. The revised Consent Order is currently in the public notice and comment period and a public hearing on the Consent Order is scheduled for March 5, 2013.

20. King America has continued operating its two flame retardant lines without a modified NPDES permit in effect.

During the February 26, 2013, hearing the Court received the testimony of Defendant's witness, Dr. Elizabeth Booth, the Program Manager of EPD's Watershed Planning and Monitoring Program. Dr. Booth testified that the nonpermitted fire retardant lines, when initially discovered by EPD and tested by EPD, were discharging unlawful levels of pollutants directly into the Ogeechee River. Dr. Booth testified to the extensive measures that the company had implemented at EPD's direction and oversight to monitor and test both its discharge and the Ogeechee River. Dr. Booth also testified that the company with cooperating with EPD and that the monitoring and testing results showed that the company's discharge was neither toxic nor violating water quality standards. Other than the stipulated facts, Plaintiff introduced no evidence at the hearing. Nevertheless, Plaintiff seeks a writ of mandamus from this Court ordering the Director to order the company to cease operation of its flame retardant lines. Plaintiff's request gives no indication as to whether or when the Director should allow the company to recommence operation of those lines.

CONCLUSIONS OF LAW

1. The Director raises two threshold issues that would, if applicable, defeat Plaintiff's request for mandamus without the need of this Court evaluating the request under mandamus case law. First, the Director asserts that Plaintiff has no standing to maintain this action. In support of his contention, the Director cites to the Supreme Court case of *Scanlon v. State Bar of Georgia,* 264 Ga. 251 (1994). The *Scanlon* case involved an individual seeking to compel General Counsel for the State Bar of Georgia to initiate disciplinary proceedings against an attorney. In dismissing the motion to compel such an action, the Supreme Court determined that General Counsel's decision whether or not to commence such proceedings against an

attorney was "analogous to the discretion exercised by a prosecutor in our criminal justice system in deciding which defendants to prosecute and which cases to dismiss prior to indictment." *Id.* at 252-253. In reaching its decision, the Supreme Court held that: "A citizen does not have a judicially cognizable interest in the prosecution or nonprosecution of another and, hence, lacks standing to contest the prosecuting authority's policies when the citizen is neither prosecuted nor threatened with prosecution [Cits.]." *Id.* at 253.

The Director also asserts that Plaintiff has an adequate remedy at law, the existence of which acts as an absolute bar to a mandamus action. "[I]n order for mandamus relief to be granted, Appellants must also show that they have no alternative adequate remedy at law. *Hall v. Nelson*, 282 Ga. 441, 443 (3)(2007)." *Sotter v. Stephens*, 291 Ga. 79, 85 (2012).

The Director points out that the federal Clean Water Act contains what is known as a "citizen-suit" provision that allows private citizens such as Plaintiff to bring their own enforcement action against a violator of the Clean Water Act ("CWA") in federal court when the citizen believes that the regulatory agency is not diligently prosecuting an enforcement action against the violator. 33 U.S.C. § 1365. In support of his contention that this is an adequate remedy at law, the Director refers this Court to a decision of the Supreme Court of the United States in which that Court declared: "Congress empowered private citizens to bring suit in federal court against alleged violators of the Act. 33 U.S.C. § 1365. ... The citizen-suit provision is a critical component of the CWA's enforcement scheme, as it 'permit[s] citizens to abate pollution when the government cannot or will not command compliance.' *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987)." *Env'l Conservation Org. v. City of Dallas*, 529 F. 3d 519, 525-526 (5th Cir. 2008). The

Director asserts that, because this legal remedy was specifically created for situations where the regulatory agency "cannot or will not command compliance," as in this case, it must be considered an adequate remedy at law.

The Court agrees with the Director on both grounds and finds that Plaintiff lacks standing to compel the Director to bring a specific enforcement action against King America Finishing, and that Plaintiff is barred from seeking mandamus relief because it has an adequate remedy at law which was created precisely for situations such as this one. Notwithstanding this conclusion, the Court will nevertheless still evaluate the merits of Plaintiff's mandamus request.

2. "Mandamus is an extraordinary remedy used to compel the performance of an official duty." *Vargas v. Morris et al.*, 266 Ga. 141 (1996). While the writ of mandamus is available to require a public officer to perform acts and duties imposed by law upon such officer, the writ will not lie to compel such an officer to do an act not clearly commanded by law. *Tucker et al. v. Wilson*, 198 Ga. 474, 476 (1944). Thus a petitioner for mandamus does not make out a *prima facie* case until he proves a clear legal duty imposed on the defendant to do the thing he is asked to do. *Poole v. Duncan*, 202 Ga. 255, 257 (1947). In the absence of a clear mandatory duty, mandamus may also issue in a situation where a public official, exercising his discretion, does so in such a manner that his actions should be considered of a "gross abuse of discretion." *Gilmer County et al. v. City of East Ellijay*, 272 Ga. 774, 777 (2000). However, if there is "any evidence" supporting the actions of the public officials, there can be no finding of "gross abuse of discretion." *City of Roswell v. Fellowship Christian School*, 81 Ga. 767, 768 (2007).

Plaintiff's admits that there is no express provision in the law governing the Director's action that unambiguously requires him to do what Plaintiff is requesting this Court to order

him to do. Instead, Plaintiff relies on certain Supreme Court decisions that refer to mandamus being available in cases where a public official is required to perform a certain act either "expressly, or by necessary implication." *See Gilmer County v. City of East Elijay*, 272 Ga. 774, 776 (2000). While several decisions use that phrase, Plaintiff has provided this Court with no appellate decision wherein the "necessary implication" basis for mandamus has been applied. In reviewing the statutes relevant to this case, the Court finds that there is no mandatory duty on the Director, express or by necessary implication, to act as Plaintiff requests.

In fact, such an "implication" cannot logically or legally exist – much less be considered "necessary" – in the face of the express provisions of the Act. Plaintiff's argument, by its nature of attempting to discern an "implied" mandatory duty, requires this Court to engage in an act of ascertaining legislative intent by means of statutory construction. However, it is well settled that, while ascertaining legislative intent is the cardinal rule in statutory construction, when the language of the statute is plain, unambiguous, and "susceptible of but one natural and reasonable construction, [a] court . . . must construe it according to its terms. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent." *Hollowell v. Jove*, 247 Ga. 678, 681 (1981). Furthermore, it is also well-settled that "where the language of an Act is plain and unequivocal, judicial construction is not only unnecessary but is forbidden." *City of Jesup v. Bennett*, 226 Ga. 606, 609 (1970). The provisions of the Georgia Water Quality Control Act relating to the Director's enforcement actions are plain and unequivocal.

Code section 12-5-25 states that: "The division shall have authority to investigate any apparent violation of any provision of this article and *to take any action authorized by this*

article which it deems necessary and *may*, after a public hearing has been provided, institute proceedings of mandamus or other proper legal proceedings to *enforce this article*." (Emphasis added.) In addition, Code section 12-2-2(c)(6) (emphasis also added) provides:

> Notwithstanding any other law to the contrary, whenever the division determines that a violation of any provision of this title or any rule or regulation promulgated pursuant to this title relating to those laws to be enforced by the division has occurred, *the division shall be required to attempt by conference, conciliation, or persuasion to convince the violator to cease such violation*. If the director finds that the public health, safety, or welfare requires emergency action and incorporates a finding to that effect in his or her order, such order may summarily provide for the immediate cessation of any activity constituting such violation. *Whether negotiated or directed, such order shall specify the alleged violation and shall prescribe a reasonable time for corrective action to be accomplished.*

Plaintiff would have this Court rule that, under the Act, the Director has a mandatory duty "by implication" to order a violator to immediately cease operation yet Plaintiff has failed to distinguish how such an implied duty can exist when the Director is *expressly* obligated by the law to "conference, conciliate, and persuade" the violator to cease the violation *before taking an enforcement action* and to provide reasonable time for corrective action to occur. *See Reheis v. AZS Corporation,* 232 Ga. App. 852, 855 (1998)(the Director is under a duty to make efforts to obtain a violator's compliance before taking unilateral enforcement action).

The Court does find the Director has an express duty under this sentence of O.C.G.A. 12-2-2(c)(6): "Whether negotiated or directed, such order shall specify the alleged violation and shall prescribe a reasonable time for corrective action to be accomplished." The Director's duty under law is not quite as plaintiff claims. The Director has a legal duty to follow the prescribed statutory process, exercising his discretion in proceeding.

Specifically, this statute means the Director must attempt conference, conciliation, or persuasion, at least in a nonemergency situation; but if violation of the law continues beyond a

"reasonable time" the Director does have a legal duty to enter an order, "whether negotiated or directed" to at least ameliorate the continuing violation of law by "corrective action". The Director has done so in this case, as shown above, undertaking lawful orders and executing his statutory duty. See facts related in items 12 and 19 above. The legislature has settled a very heavy responsibility on the Director to act wisely in the public interest by affording the Director such broad discretion. The legislature and the Director are both authorized by law to make these "guns or butter" economic decisions, balancing the externalities of pollution --- our innocent children will swim in an ocean we are allowing to contain some small quantity of formaldehyde and other pollutants --- against the benefits of industry --- the parents of those same innocent children have jobs and our workers including brave firefighters have fire retardant clothing. These are legislative and executive policy decisions, not judicial decisions, equating social costs against social benefits. All these arguments are grist for the mill for legislative and executive decision making in establishing statutes and administrative regulations. By contrast, the paramount duty of a judge is to follow the law.

The Court notes in passing that although the EPD Board is authorized under O.C.G.A. 12-5-23(a)(F) and (N) to promulgate "rules and regulations" (as authorized but not required by O.C.G.A. 12-5-23(a)(1)) "providing uniform procedures and practices to be followed relating to the ... revocation ... and ... termination of permits (and general permits) for the leakage of any pollutant into the waters of the state", no such rules or regulations have been presented or argued by either party so apparently none exist that are operative. In the absence of any delimiting administrative regulation, the statute clearly gives the Director the broadest discretion. Again, this is a legislative policy decision. The EPD Board is authorized but not

required by the legislature to establish "uniform procedures and practices to be followed relating to the ... revocation ... of permits". O.C.G.A. 12-5-23(a)(1) The Court has no legal authority to write and enact mandatory enforcement regulations that the EPD Board itself has no legal duty to write or enact.

Further undermining Plaintiff's arguments, in enacting the Georgia Water Quality Control Act, the General Assembly expressly declared its intent to "confer *discretionary* administrative authority upon the Environmental Protection Division." O.C.G.A. § 12-5-21(c)(emphasis added). Nothing in the Water Quality Control Act provides otherwise. In addition to the "conference, conciliate, and persuade" requirement, Code section 12-2-2(c)(6) also provides:

> If the director finds that the public health, safety, or welfare requires emergency action and incorporates a finding to that effect in his or her order, such order may summarily provide for the immediate cessation of any activity constituting such violation.

Clearly, even under emergency circumstances, this provision affords enforcement discretion to the Director. That Code section *expressly* states that the Director "*may*" summarily order the immediate cessation of any activity constituting a violation "*[i]f the director finds that the public health, safety, or welfare requires emergency action.*" As such, Plaintiff's suggested implied duty cannot possibly exist in the face of this statute's express provisions. Plaintiff contends that the Director's duty to order the cessation of a violation is both mandatory and without regard to any finding of danger to the public health, safety, or welfare. That is in direct contradiction to the express requirements of this statute.

A similar conflict arises between Plaintiff's position and yet another express statutory provision. Code section 12-5-42(a) provides: "Whenever the division determines that any

person is discharging ... [pollutants] ... into any waters of the state in a degree which prevents the water from meeting the established standards of water purity, *the division shall act to secure the person's cooperation in the reduction or elimination of the detrimental effects of the discharge*." (Emphasis added.) That same Code section further provides in paragraph (c): "Whenever any person refuses to cooperate with the efforts of the director to reduce pollution, the director *may* issue an order to bring about the reduction or elimination of the pollution. ... However, before issuing or enforcing such an order, the director *shall* allow any person a reasonable time to make the necessary financial arrangements or make other necessary preparations for the elimination of the pollution." O.C.G.A. § 12-5-42(c)(emphasis added).

Plaintiff would have this Court rule that the Director has an "implied" mandatory duty to order a *cooperative* violator, who is working with EPD to correct its violation, to cease its operations while the Act clearly and expressly states that the Director's authority to act against an *uncooperative* violator is discretionary and must allow for reasonable time to eliminate the pollution. Plaintiff's interpretation of the "implied" law is not only inconsistent with the express provisions of the Act, if implemented it would deprive the Director of the right to make enforcement judgments, which is perhaps the most valuable resource available to him in securing compliance with the law once a violation has occurred. The Legislature has clearly recognized that every situation must be dealt with according to its factual circumstances and has given the Director discretionary enforcement authority to adjust to those circumstances. Consequently, Plaintiff's argument as to "implied duty" cannot be a reasonable interpretation of legislative intent in light of the express language used in the Act and this Court will not construe the Act in such a way as to lead to unreasonable and contrary results. *GECC v. Brooks,*

242 Ga. 109 (1978)(Statutes will not be given unreasonable construction resulting in consequences not contemplated by the Legislature).

Therefore, this Court concludes as a matter of law that the Director is under no mandatory duty, either express or by necessary implication, to take the action Plaintiff is requesting this Court to order him to take.

3. Plaintiff's final argument is that, even in the absence of a mandatory duty to act, mandamus is appropriate when the Director abuses his discretion in acting and claims that the Director has abused his discretion in this case. The actual standard to be applied in a mandamus case is not a finding of an "abuse of discretion," it is a finding of a "gross abuse of discretion." "[Mandamus] is a discretionary remedy that courts may grant only when the petitioner has a clear legal right to the relief sought or the public official has committed a gross abuse of discretion. In general, mandamus relief is not available to compel officials to follow a general course of conduct, perform a discretionary act, or undo a past act." *Schrenko v. DeKalb County School Dist.*, 276 Ga. 786, 795 (2003)(internal citations omitted).

Given the regulatory structure created by the statutes, and in light of the evidence presented to this Court, it is clear that the Director has not grossly abused his discretion in this case. "A discretionary act ... calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed. [Cites.]" *Schulze v. DeKalb County*, 230 Ga. App. 305, 308 (1998). If there is "any evidence" to support the Director's exercise of discretion in his choice of enforcement methods, then there can be no "gross abuse of discretion" to justify the issuance of a writ of mandamus. *City of Roswell v. Fellowship Christian School*, 81 Ga. 767, 768 (2007).

Plaintiff has provided no evidence in support of its assertion and no analysis of why this Court should find that the Director grossly abused his discretion by choosing to impose strict discharge limits, mandate toxicity testing and frequent monitoring of the discharge, impose a $1 million civil penalty or Supplemental Environmental Project, and direct King America to submit all the information necessary for EPD to evaluate a modification of its existing NPDES permit, rather than shutting the facility down for the year and a half it would take to process its permit modification. On the contrary, such choices are the very essence of the reasonable exercise of discretion and are consistent with the statutory provisions of the Act.

Upon a finding of a possible violation of the Act, the Director attempted by "conference, conciliation, or persuasion to convince the violator to cease such violation" and issued (and is the process of reissuing) "a negotiated order" which "specif[ies] the alleged violation and [prescribes] a reasonable time for corrective action to be accomplished" as required by O.C.G.A. § 12-2-2(c)(6). The Director convinced the company to cease its operation in order to conduct an evaluation of its discharge, and only stated that he did not object to the resumptions of operations when he was convinced the discharge was not toxic nor violating water quality standards. The Director further required the company to conduct frequent sampling and toxicity testing both during the shut-down period and after the resumption of operations as contemplated by O.C.G.A. § 12-5-27. That Code section provides:

> Whenever ... determining whether any person is in violation of ... this article; or encouraging or ensuring compliance with ...this article, the director may, by order, permit, or otherwise in writing, require the owner or operator of a facility of any type which results in the discharge of pollutants into the waters of the state to:
>
> (1) Establish and maintain records;
>
> (2) Make reports;
>
> (3) Install, use, and maintain monitoring equipment or methods, including, where appropriate, biological monitoring methods;

(4) Sample such discharge, in accordance with such methods, at such locations, at such intervals, and in such manner as the director shall prescribe; and
(5) Provide such other information as he may reasonably require.

Because there is evidence that the Director acted reasonably under the circumstances and consistent with the provisions of the Georgia Water Quality Control Act, there is no basis to find that the Director grossly abused his discretion in this case.

THEREFORE, IT IS HEREBY **ORDERED** that Plaintiff's request for mandamus relief be denied and its Petition for Mandamus be dismissed.

SO ORDERED this 13th day of March, 2013.

Judge Christopher C. Edwards
Spalding County Superior Court
Griffin Judicial Circuit

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Final Judgment by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Hutton Brown, Esq.
Steven D. Caley, Esq.
GreenLaw
104 Marietta Street, Suite 430
Atlanta, Georgia 30303

Don Stack, Esq.
Jenny Culler, Esq.
Stack & Associates, P.C.
Suite 1200
260 Peachtree Street, NW
Atlanta, Georgia 30303

John E. Hennelly
Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300

This 13th day of March, 2013.

Kaye L. Mrozinski

Kaye L. Mrozinski
Judicial Assistant to Judge Edwards