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Crisis in the Gulf of Mexico:

The Deepwater Horizon Oil Spill & The Oil Pollution Act

By Holly P. Cole, Esq., Andrea L. Pawlak, Esq., Jennifer L. Pennington, Esq. and Jared Sawyer<sup>1</sup>

The Deepwater Horizon Oil Spill:

On April 20, 2010, the Deepwater Horizon oil rig exploded at Canyon Block 252 off the coast of Louisiana. The explosion killed 11 workers and injured many others. Oil began gushing into the ocean when the blowout preventer ("BOP"), which was intended to prevent the release of oil in such an explosion, failed. The list of potentially responsible parties includes BP, PLC ("BP"), Transocean, Ltd. ("Transocean"), Halliburton and Cameron International ("Cameron"). BP leased the Deepwater Horizon from rig owner and operator, Transocean. Halliburton cemented the well's base but has claimed that it merely followed BP's instructions in doing so. Cameron made the blowout preventer ("BOP"), the "steel monsters" which are supposed to "guard the mouth of wells," for the Deepwater Horizon. In addition, the Minerals Management Service has come under sharp criticism for its lax regulatory policies, including letting "industry officials fill out their own inspection sheets," accepting "gifts, like tickets to sports events and pricey dinners, from oil companies, and, [i]n at least one case, an investigator may have conducted an inspection while tripping on meth."

Since the explosion, BP has tried a number of unsuccessful maneuvers to stop the flow of the oil. First, a dome-like object was lowered to try to cover the cracked pipe. The plan was abandoned after the dome crystallized. Next, a long tube was placed into the pipe in an attempt to siphon some oil to waiting surface tankers. According to BP, the siphoning was met with minor success but large volumes of oil continued to spill. Then, a procedure known as "Top Kill" was used to reduce the pressure of the well so that BP could permanently seal the pipe.

With only a 60-70 percent estimated success rate, this plan also failed. With this last failure, BP began more desperate methods, including soliciting suggestions for stopping the spill on its website. BP is now digging a relief well with an expected finish date in August 2010. Hundreds of lawsuits have already been filed against the parties involved.

An internal BP memorandum shows key sensors and tests indicated a problem with the pressure within the well leading up to the blow-out. The BOP, manufactured in 2001, was retrofitted for the Deepwater Horizon. Transocean had a safety report done in 2001 on the BOP which showed 260 possible failure scenarios with the equipment. The BOP was installed anyway. BP has acknowledged a series of troubling actions taken by the company. For instance, BP used a riskier method to seal the well before the blast for financial reasons. BP's CEO, Tony Hayward, has agreed that it is an "entirely fair criticism" to say that BP does not have the tools to handle a deepwater oil leak.

The Oil Pollution Act of 1990:

In the aftermath of the Exxon Valdez oil spill, Congress passed the Federal Oil Pollution Act of 1990 ("OPA"), 33 U.S.C.A. § 2701 et seq., which establishes a federal cause of action for the recovery of oil spill cleanup costs and compensation to those injured by such spills. The OPA "represents Congress's attempt to provide a comprehensive framework in the area of marine oil pollution." It does so by imposing strict liability on parties responsible for vessels or facilities from which oil is discharged for pollution removal costs and damages. To demonstrate that a party is liable for damages under OPA, a plaintiff must prove that: (1) defendant is a "responsible party"; (2) for the

“facility” or “vessel”; (3) from which oil was discharged; (4) into or upon the navigable waters or adjoining shorelines; and (5) that the discharge resulted in removal costs and damages.<sup>14</sup> The OPA requires the government to designate a responsible party.<sup>15</sup> In a series of statements since the explosion, the Obama Administration has identified BP as the “responsible party.”<sup>16</sup> The U.S. Coast Guard has since added Transocean to the list of “responsible parties.”<sup>17</sup>

While the OPA appears to create a straight-forward cause of action against a responsible party, it also has several complicated procedural components. Most notably, a party seeking damages under the OPA must first present the claim to the responsible party in accordance with OPA § 2713(a).<sup>18</sup> Section 2713 imposes a mandatory condition precedent to the existence of jurisdiction over private actions brought under the Act.<sup>19</sup> This is because the legislative intent of OPA was to encourage settlements and reduce litigation in oil spill cases.<sup>20</sup> BP has initiated a claims process whereby injured parties can make claims for damages (economic and personal) suffered as a result of the oil spilling into the Gulf.<sup>21</sup> In statements since April 20, 2010, BP has stated that it accepts responsibility and has promised to compensate people for all legitimate claims.<sup>22</sup> BP has set up claims centers along the Gulf Coast and posted an online claims form on its website.<sup>23</sup> However, the claims process has been hotly criticized. Gulf area residents complain that claims centers were without phones or computers a month after the explosion. Nonetheless, as of June 21<sup>st</sup>, BP said it has paid out over \$105 million from the 65,000 claims submitted in the Gulf Coast region.<sup>24</sup>

### Maritime Exoneration or Limitation of Liability:

Taking a different approach, Triton Asset Leasing GmbH, Transocean Holdings, LLC, Transocean Offshore Deepwater Drilling, Inc. and Transocean Deepwater, Inc. (collectively “Transocean”) filed a petition for exoneration or limitation of liability in the Southern District of Texas on May 13, 2010.<sup>25</sup> The court had a hearing at 12:30 p.m. that day regarding Transocean’s petition. Hon. Keith Ellison granted Transocean’s motion and limited Transocean’s liability to \$26 million.<sup>26</sup> Additionally, Ellison granted Transocean’s motion directing all claimants to file in Houston, Texas. A Motion to Transfer was filed on Friday, May 14, 2010, by Natalie Roshto, individually and as personal representative of Shane Roshto and her minor son, Blaine Rostho. She requested that Judge Ellison transfer the matter to the Eastern District of Louisiana which, she argued, is the site of the explosion and oil spill and is where most of the claimants and physical evidence are located. Roshto contended that she was the first to file suit regarding the explosion of the Deepwater Horizon. (Her husband, Shane Roshto, was aboard the Deepwater Horizon at the time of the explosion.) In her Motion, Roshto argued: “If ever a case presented

a local issue that should be decided at home, the destruction of the Louisiana economy and the environment that supports this economy is that issue.”

The Oil Pollution Act contains a savings provision for admiralty and maritime law claims, “[e]xcept as otherwise provided in th[e] Act.”<sup>27</sup> The Eleventh Circuit has held that claims brought pursuant to OPA are not subject to the constraints of these Limitation proceedings or Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims.<sup>28</sup> OPA explicitly supersedes the liability limits with respect to claims for cleanup costs and damages resulting from a discharge of oil and establishes its own schedule of liability limits for damages resulting from the oil discharge.<sup>29</sup> In addition, the Eastern District of Louisiana has held that OPA preempts general maritime law claims and that the parties asserting claims arising from oil spills must pursue claims covered under the OPA only against the party designated by the government as the responsible party, rather than against other parties involved in the incident.<sup>30</sup> Amidst the background of public and government outrage, Transocean has taken a step back stating the limitation will not apply to claims against it under the OPA.<sup>31</sup> On May 26, 2010, Judge Ellison clarified his decision in an Amended Order stating that its order “does not apply to any direct claims asserted against Petitioners under the Oil Pollution Act, 33 U.S.C. § 2701, *et seq.*”<sup>32</sup>

### OPA’s Procedural Requirements:

The OPA provides that if the party “to whom the claim is presented denies all liability for the claim, or the claim is not settled by any person by payment within 90 days after the date upon which (A) the claim was presented, or (B) advertising was begun pursuant to section 2714(b) . . . whichever is later, the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.”<sup>33</sup> A claim is defined in the OPA as “a request, made



in writing for a sum certain, for compensation for damages or removal costs resulting from an incident.<sup>34</sup> A court may dismiss a plaintiff's complaint for failure to adequately describe the nature or extent of the damages.<sup>35</sup>

In order to present a claim within the meaning of the OPA, courts have held that claimants must follow the U.S. Coast Guard regulations enacted pursuant to the OPA.<sup>36</sup> The OPA Interim Claims Regulations, 33 C.F.R. Part 136, set forth the requirements for the presentation, filing, processing, settlement and adjudication of claims for removal costs and damages under OPA made against the Fund. The regulations state that a claim must provide a general description of the nature and extent of the impact of the oil spill and the associated damages, a list of the damages with a "sum certain" attributed to each type of damage listed, and evidence to support the claim.<sup>37</sup> A claimant must include an accounting, including the source and value, of all other compensation received, applied for, or potentially available as a consequence of the incident out of which the claim arises including, but not limited to, monetary payments, goods or services, or other benefits.<sup>38</sup> There are a number of other specific requirements in the regulations for making a claim, including: (1) if at any time during the pendency of a claim against the Fund the claimant receives any compensation for the claimed amounts, the claimant shall immediately amend the claim, and (2) each claim must be signed in ink by the claimant and his or her counsel, if any.

33 C.F.R. § 136-233 sets forth the proof necessary to establish a claim for loss of profits or impairment of earning capacity. A claimant must establish the following:

- (a) That real or personal property or natural resources have been injured, destroyed or lost.
- (b) That the claimant's income was reduced as a consequence of injury to, destruction of, or loss of the property or natural resources, and the amount of that reduction.
- (c) The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established.
- (d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant receives as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.<sup>39</sup>

## Damages & Limitation of Liability Under OPA:

The OPA allows for suit in federal court should the claims process prove unsuccessful.<sup>40</sup> Claimants have three years to bring claims against a responsible party.<sup>41</sup> The venue provisions of the OPA permit claimants to proceed "in any district in which the discharge or injury or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process."<sup>42</sup>



The OPA allows a broad range of potential damages, including damages to real or personal property; subsistence use; federal, state, and local tax revenues; lost profits and earning capacity; and the cost of providing additional public services resulting from the spill.<sup>43</sup> Damages for loss of subsistence use of natural resources "shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources."<sup>44</sup> Damages to public services include "damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a State."<sup>45</sup>

The responsible party is also liable to a claimant for interest on the amount paid in satisfaction of a claim.<sup>46</sup> In addition, Section 2705(a) provides for the payment of interim damages.<sup>47</sup> The responsible party must advertise the procedures by which claims may be presented, and such advertisement "shall state that a claimant may present a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled and that payment of such a claim shall not preclude recovery for damages not reflected in the paid or settled partial claim."<sup>48</sup>

Despite the broad range of potential damages available under the OPA, there is a potential limitation set forth in Section 2704(a).<sup>49</sup> The Deepwater Horizon Spill falls under Section 2704(a)(3), which limits liability to \$75,000,000 in addition to the cost of removal for an offshore facility. Exceptions to the limitation of liability under OPA exist where "the incident

was proximately caused by—(A) gross negligence or willful misconduct of, or (B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party.”<sup>51</sup> In addition, OPA explicitly permits states to adopt laws imposing additional liability for oil spills above the liability limits established by the Act.<sup>52</sup>

On June 30, 2010, Senate Bill S. 3305—the Big Oil Bailout Prevention Liability Act of 2010—was approved by the Senate Environment and Public Works Committee.<sup>53</sup> If passed, the Bill would raise the liability cap to \$10 billion and would eliminate the liability cap for certain offshore facilities.<sup>54</sup> BP is also responsible for paying for the cleanup costs, including reimbursing the Coast Guard for its cleanup efforts.<sup>55</sup>

## Where to Litigate?

BP has asked the federal courts to appoint a special master to handle all the cases through the federal Multi-District Litigation program.<sup>56</sup> The Panel will hold a hearing on the matter on July 20, 2010 in Boise, Idaho.<sup>57</sup> Where civil actions pending in different districts involve one or more common questions of fact, the Judicial Panel on Multidistrict Litigation (“Panel”) may transfer them to any district for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C.A. § 1407, upon a determination by the Panel that transfer “will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of the actions.”<sup>58</sup> The Panel consists of “seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit.”<sup>59</sup> In the meantime, BP has asked an independent mediator to handle the claims process.<sup>60</sup>

## Status of the Deepwater Horizon Oil Spill:

The Coast Guard and BP have hired fishermen to use their boats in a program known as Vessels of Opportunity. The fishermen have laid booms, performed wildlife rescue, and collected oil. On May 21, 2010, the first public beach was closed due to the oil spill.<sup>62</sup> In Louisiana, thick globs of oil came ashore, far surpassing the occasional tar balls and light sheen that had been seen previously. Many reports indicate that the oil has entered the loop current in the Gulf.<sup>63</sup> This would circulate the oil down the western coast of Florida and through the Florida Keys. In early June, oil reached the pristine beaches of Florida’s Gulf Coast. State governments along the Gulf Coast have been strong with their criticism of BP’s efforts and the oil that is washing up on their beaches.

The National Oceanic and Atmospheric Administration (“NOAA”) partnered with the Environmental Protection Agency, U.S. Department of the Interior and U.S. Department of Homeland Security have launched [www.GeoPlatform.gov/gulfresponse](http://www.GeoPlatform.gov/gulfresponse) to provide “near-real time information about the response effort” and an interactive map of “the oil spill’s trajectory, the position of NOAA’s research ships, spilled oil’s coastal location and the areas closed to shipping.”<sup>64</sup>

Another serious criticism is in regards to the dispersant BP is using to attempt to disperse the oil. Lisa P. Jackson, the

Administrator of the U.S. Environmental Protection Agency issued a letter to BP on May 26, 2010 stating that BP’s response to the EPA’s directive that BP analyze whether it could use less toxic dispersants “was insufficient.”<sup>65</sup> She stated: “We believe the response lacked sufficient analysis and focused more on defending your initial decisions than on analyzing possible better options.”<sup>66</sup> She also reiterated the directive to BP “to take immediate steps to significantly scale back the overall use of dispersants. . . . Because so much is still unknown about the potential impact of dispersants, BP should use no more dispersant than is necessary.”<sup>67</sup> Finally, she complained that BP was not operating “openly and transparently.”<sup>68</sup>

The long-term impact of the oil spill is unknown. The immediate impact is staggering. While reports vary significantly on how much oil is being discharged each day, government officials confirmed on June 15, 2010 that new data showed an estimated 35,000 to 60,000 barrels of oil per day leaking beneath the gulf. Government estimates say the spill has already surpassed the Exxon Valdez spill of 1989.<sup>69</sup> The Deepwater Horizon oil spill is certainly one of the most, if not the most, serious modern environmental catastrophe. This article does not consider other potential causes of action, including the Outer Continental Land Shelf Act or state statutory or common laws, which may create viable additional claims for the businesses and individuals affected by the oil spill.

### (Endnotes)

- 1 Ms. Cole, Ms. Pawlak and Ms. Pennington are attorneys at Schulten Ward & Turner, LLP (“SWT”). Mr. Sawyer is a law clerk at SWT and provided research assistance for this article. Kevin L. Ward, Esq. and Martin A. Shelton, Esq., partners at SWT, provided oversight and guidance in the preparation of this article. Messrs. Ward and Shelton have been engaged by multiple businesses and individuals affected by the oil spill to bring claims against the responsible parties. Contact information is available at [www.swtlaw.com](http://www.swtlaw.com).
- 2 Christopher Beam, *The Buck Stops Over There: Whom Should We Blame For The Oil Spill In The Gulf? Take Your Pick?*, *Slate* (May 25, 2010), available at [www.slate.com/id/2254979](http://www.slate.com/id/2254979) (last visited June 15, 2010).
- 3 *Id.*
- 4 Associated Press, *Oil Blowout Preventers Known to Fail, Investigation Into Cutoff Valves Like One in Gulf of Mexico Spill Show Repeated Failures, Weakened Regulations* (May 8, 2010), available at [www.cbsnews.com/stories/2010/05/08/national/main6469368.shtml](http://www.cbsnews.com/stories/2010/05/08/national/main6469368.shtml) (last visited June 15, 2010).
- 5 Beam, *supra* note 2.
- 6 U.S. House of Representatives Memorandum, 111th Cong., “Key Questions Arising from Inquiry into the Deepwater Horizon Gulf of Mexico Oil Spill” (Rep. Henry A. Waxman and Rep. Bart Stupaz) (5/25/2010).
- 7 RB Falcon, *Deepwater Horizon BOP Assurance Analysis* (March 2001), available at <http://markimoore.com/bp-media/docs/TRO-Deepwater.Horizon.BOP.Assurance.Analysis.March.2001.pdf>.
- 8 *Id.*

- 9 BP Used Riskier Method to Seal Well Before Blast (May 26, 2010), available at <http://www.nytimes.com/2010/05/27/us/27rig.html?hp=&adxnnl=1&adxnnlx=1274976008-pMMbFobjaDiRhyZIZoFZ7w> (last visited June 15, 2010).
- 10 BP “Not Prepared” For Deep-Water Spill, *FinancialTimes.com*, available at <http://www.ft.com/cms/s/0/e1e0e21c-6e53-11df-ab79-00144feabdc0.html> (last visited June 2, 2010).
- 11 See U.S.C. § 2701 et seq.; *Tanguis v. M/V Westchester*, 153 F. Supp.2d 859, 867 (E.D. La. 2001), citing *Nat’l Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atlantic Corp.*, 924 F. Supp. 1436 (E.D. Va. 1996).
- 12 See, e.g., *Rice v. Harken Exploration Co.*, 89 F.Supp.2d 820, 822 (N.D.Tex.1999) (looking at the Congressional Record).
- 13 See 33 U.S.C. § 2702(a); *Metlife Capital Corp. v. M/V Emily S.*, 132 F.3d 818, 820-21 (1st Cir. 1997); *Rice*, 89 F.Supp.2d at 823; *Gabarick v. Laurin Maritime (America) Inc.*, 623 F. Supp.2d 741, 744-45 (E.D.La.2009).
- 14 33 U.S.C. § 2702(a).
- 15 33 U.S.C. § 2714.
- 16 Speech of President Barack Obama, available at <http://thehill.com/blogs/blog-briefing-room/news/95529-obama-bp-responsible-for-paying-costs-of-oil-spill> (last visited May 2, 2010).
- 17 Liability Issues Surrounding the Gulf Coast Oil Disaster, U.S. House of Representatives, 111th Cong. (May 27, 2010) (Testimony of Rachel Giesber Clingman, Acting Co-General Counsel, Transocean).
- 18 See *Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., Inc.*, 51 F.3d 235, 238 (11th Cir. 1995) (rejecting argument that section 2713(a) presentation requirement is limited to claims against the Oil Spill Liability Trust Fund (“Fund”).
- 19 In some instances, which do not apply here, claimants may proceed directly to the Fund and then subrogate to the United States the claims against the responsible party. See 33 U.S.C. § 2715.
- 20 See H.R. Rep. No. 242, 101st Cong., 1st Sess., pt. 2, at 66 (1989); 135 Cong. Rec. H 7962, 7965 (statements of Rep. Hammerschmidt and Rep. Lent); see also *Gabarick*, 623 F.Supp.2d at 747-48; *Johnson v. Colonial Pipeline Co.*, 830 F. Supp. 309, 310 (1993).
- 21 “How to Make a Claim” available at <http://www.bp.com/sectiongenericarticle.do?categoryId=9033791&contentId=7062345>.
- 22 *Id.*
- 23 *Id.*
- 24 Faster BP Claims Payouts in Weeks, Says New Fund Chief, *International Business Times*, available at <http://www.ibtimes.com/articles/29819/20100622/faster-bp-claims-payouts-in-weeks-says-new-fund-chief.htm> (last visited June 21, 2010).
- 25 See *In Re The Complaint & Petitioner of Triton Asset Leasing GmbH, Transocean Holdings, LLC, Transocean Offshore Deepwater Drilling, Inc., and Transocean Deepwater, Inc., as Owner, Managing Owners, Owners Pro-Hac Vice, and/or Operators of the MODU Deepwater Horizon, In a Cause For Exoneration From Or Limitation Of Liability*, United States District Court, Southern District of Texas, Houston Division, CAFN 10-1721 [Doc. 1] [hereinafter “*In Re Triton*”].
- 26 Order Approving Ad Interim Stipulation, *In re Triton* [Doc. 08].
- 27 33 U.S.C.A. § 2751(e)(1).
- 28 See *Bouchard*, 147 F.3d at 1344.
- 29 See 33 U.S.C. § 2704; *Bouchard*, 147 F.3d at 1347.
- 30 See *Gabarick*, 623 F.Supp.2d at 741.
- 31 See Letter from Frank A. Piccolo, Esq. to Judge Keith P. Ellison, dated May 25, 2010, *In re Triton* [Doc. 59] (“In accordance with your Order of today, we take this opportunity on behalf of the Limitation Petitioners to advise the Court that it was never Petitioners’ intention to limit, hinder or enjoin any direct claim under OPA brought against Petitioners.”)
- 32 Amended Order Directing Claimants to File and Make Proof of Claims, Directing the Issuance of Monition, and Restraining Prosecution of Claims, *In re Triton* [Doc. 61].
- 33 33 U.S.C. § 2713; see also *Boca Ciega Hotel*, 51 F.3d at 240; *Bouchard Transp. Co., Inc. v. Updegraff*, 147 F.3d 1344, 1350 (11th Cir. 1998); *Gabarick*, 623 F. Supp.2d at 750-51; *Rice*, 89 F.Supp.2d at 823.
- 34 33 U.S.C. § 2701(3); see also *Boca Ciega Hotel*, 51 F.3d at 237-38.
- 35 See *Johnson*, 830 F. Supp. at 311.
- 36 See 57 Fed. Reg. 36314 (1992) (codified at 33 C.F.R. 136); *Johnson*, 830 F. Supp. at 311.
- 37 33 C.F.R. §§ 136.105, 136.109.
- 38 33 C.F.R. § 136.113.
- 39 33 C.F.R. § 136-233.
- 40 See *Gabarick*, 623 F. Supp.2d at 748.
- 41 33 U.S.C. § 2717(f); see also 33 C.F.R. § 136.101(a) (i).
- 42 33 U.S.C. § 2717(b); see also *Bouchard*, 147 F.3d at 1351.
- 43 33 U.S.C. § 2701(5); 33 U.S.C.A. § 2702(b).
- 44 33 U.S.C. § 2702(b)(2)(C).
- 45 33 U.S.C. § 2702(b)(2)(F).
- 46 33 U.S.C. § 2705(a).
- 47 33 U.S.C. § 2705(a).
- 48 33 U.S.C. § 2714(b)(1)& (2).
- 49 33 U.S.C. § 2704(a).
- 50 Section 2713(d) of the Act provides that “If a claim is presented in accordance with this section, including a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund.” 33 U.S.C. § 2713(d). The maximum amount that may be paid by the Fund with respect to any single incident is \$1 billion. See *Bouchard*, 147 F.3d at 1350, n.8, citing 26 U.S.C. §

# OSAH Reporter

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## Landfill Permitting

***Southern States-Bartow County, Inc. v. F. Allen Barnes, Director, Environmental Protection Division***, Docket No. OSAH-BNR-SW-1014459-33-Miller. On April 1, 2010, Hon. Kristin L. Miller upheld the Director of EPD's denial of Southern States' solid waste handling permit application for a proposed construction and demolition landfill in Bartow County. Although Bartow County had verified that the proposed landfill was consistent with its own Joint Solid Waste Management Plan ("JSWMP"), EPD disagreed based on the fact that the landfill would be located within one mile of a significant groundwater recharge area. Both Southern States and the Director moved for summary determination. Southern States argued that only Bartow County, and not the Director, had the authority under Georgia's Comprehensive Solid Waste Management Act ("GCSWMA") to determine whether a proposed facility is consistent with Bartow County's JSWMP. Miller denied Southern States' motion, relying on both express provisions within the GCSWMA and underlying legislative intent to conclude that the Director has the authority under the GCSWMA to make an independent determination as to whether the proposed landfill was consistent with the County's JSWMP. Miller then held that, based on the undisputed facts, the Director properly determined that facility would be located within one mile of a significant groundwater recharge area and was therefore not consistent with the express terms of Bartow County's JSWMP. Although the evidence indicated that the County had intended to exempt the proposed landfill from its JSWMP, Judge Miller concluded that County's intent could not trump the express terms of the plan. For these reasons, Miller granted summary determination in favor of the Director.

## Prevention of Significant Deterioration

### Air Permitting

***Friends of the Chattahoochee, Inc., et al. v. F. Allen Barnes, Director, Environmental Protection Division***, Docket No. OSAH-BNR-AQ-0732139-60-Howells. On April 2, 2010, Hon. Stephanie Howells affirmed the Director of EPD's issuance of a Prevention of Significant Deterioration ("PSD") air quality permit for the construction and operation of the Longleaf Energy Station, a 1200 MW coal-fired power plant to be built in Early County. Howells previously affirmed the Director's issuance of the permit in a January 2008 decision, but that decision was overturned and remanded to OSAH by the Georgia Court of Appeals to reconsider the evidence under the correct standard of review. *See Longleaf Energy Associates, LLC v. Friends of the Chattahoochee, Inc., et al.*, 298 Ga. App. 753 (2009). On remand, Howells revisited the petitioners' eight challenges to the permit's best available control technology ("BACT") emission limitations for sulfur dioxide, nitrogen oxides, sulfuric acid mist, and particulate matter as well as the additional impacts analysis conducted by EPD. After reconsidering the evidence under a de novo standard of review without affording any deference to EPD, Howells reaffirmed her previous decision and held that the petitioners failed to carry their burden to prove that the permit should not have been issued.

9509(c)(2)(A)(i).

51 33 U.S.C.A. § 2704 (c).

52 33 U.S.C. § 2718; Bouchard, 147 F.3d at 1347.

53 Senators Push BP Accountability, As EPW Committee Lifts Liability Cap (July 1, 2010), available at <http://onthehillblog.blogspot.com/2010/07/senators-push-bp-accountability-as-epw.html> (last visited July 7, 2010).

54 Id.

55 Stephen Ohlemacher, Congress frees cleanup money for Gulf oil spill (June 10, 2010), available at [http://news.yahoo.com/s/ap/20100610/ap\\_on\\_bi\\_ge/us\\_gulf\\_oil\\_spill\\_cleanup\\_fund](http://news.yahoo.com/s/ap/20100610/ap_on_bi_ge/us_gulf_oil_spill_cleanup_fund) (last visited June 15, 2010).

56 In Re: Oil Spill By the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, U.S. Judicial Panel on Multidistrict Litigation, MDL-2179, Washington [hereinafter "In Re MDL"]; see also <http://www.legalnewsline.com/news/227212-bp-seeks-mdl-in-houston-for-deepwater-horizon-cases> (BP is asking the courts to stay proceedings until the MDL and proper forum are established).

57 See supra n. 66 at In Re MDL.

58 28 U.S.C.A. § 1407 (a).

59 Id. at (d).

60 Dow Jones Newswires, BP to Name Independent Mediator to Review Oil-Spill Claims (May 26, 2010), available at <http://www.nasdaq.com/asp/company-news-story.aspx?storyid=201005261543dowjonesdjonline000663&title=bpto-name-independent-mediator-to-review-oil-spill-claims>.

61 <http://www.deepwaterhorizonresponse.com/go/doc/2931/542683>.

62 Public Beach in Louisiana Closed as Oil Washes Ashore, available at <http://www.foxnews.com/us/2010/05/21/month-outrage-gulf-oil-spill-grows/5/21/2010>.

63 Gulf Oil is in the Loop Current, Experts Say, available at <http://news.nationalgeographic.com/news/2010/05/100518-gulf-mexico-oil-spill-loop-current-science-environment> (5/18/2010).

64 See Mapping the Response to BP Oil Spill in the Gulf of Mexico, available at [www.GeoPlatform.gov/gulfresponse](http://www.GeoPlatform.gov/gulfresponse) (6/15/2010).

65 Letter from Lisa P. Jackson to David Rainey, Vice President of Gulf of Mexico Exploration, BP Exploration and Production, dated May 26, 2010, available at [www.epa.gov/bpspill/dispersants/Rainey-letter-052610.pdf](http://www.epa.gov/bpspill/dispersants/Rainey-letter-052610.pdf), at p. 1.

66 Id.

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68 Id.

69 Scientists: Gulf oil spill surpasses Exxon Valdez, available at <http://content.usatoday.com/communities/greenhouse/post/2010/05/scientists-say-well-leaking-at-least-twice-as-much-oil-as-original-estimates/1> (5/27/2010).

# HSRA Rule Changes Result in Lower Risk Reduction Standards, Greater Cost in Cleanup

By Steven W. Hart, P.G., and L. Loring Pitts III, PhD

Achieving and maintaining compliance with numerical standards for soil and groundwater is often a difficult and challenging task. This challenge is compounded when the numerical standards themselves become “moving targets” based on revised regulations, new toxicity data, and/or changing protocols for calculating the standards. Though the goal of human health and environmental protection is sound, fluctuating permissible contaminant levels can frustrate responsible parties, and may result in an unnecessary increase in the cost of cleanups due to overly stringent standards.

Two separate but concurrent actions may result in revised cleanup standards for certain substances in Georgia’s soil and groundwater. Changes to the Georgia Hazardous Site Response Act (HSRA) rules became effective last year and, as discussed below, may result in lower soil and groundwater standards in some instances. These changes are delineated in the HSRA technical guidance published on the Georgia Environmental Protection Division (EPD) website.<sup>1</sup> Further, the United States Environmental Protection Agency (U.S. EPA) is considering changes to the drinking-water Maximum Contaminant Levels (MCLs) for several chemicals, which may affect both the regulatory standards for groundwater and the soil standards that consider leaching to groundwater.

## HSRA Rules Changes

On October, 28, 2009, the Georgia Board of Natural Resources approved proposed rule amendments to HSRA.<sup>2</sup> The proposed rule amendments were developed<sup>3</sup> to (a) update the Rules for Hazardous Site Response based on changes to HSRA, the Uniform Environmental Covenant Act, and the Safe Drinking Water Act, (b) change the hierarchy for the selection of the toxicity values used in calculation of risk reduction standards (RRS), (c) eliminate outdated information, and (d) correct citations and errors in tables.

On first review, the proposed rule amendments may not appear to have a significant impact on HSRA standards. In fact, the proposed rule amendments increase the flexibility for HSRA Notification for carbon disulfide in soil by allowing background values to be considered instead of just the detection limit.<sup>4</sup> However, we have seen that the revised regulations can, in some instances, result in lower permissible contaminant levels / more restrictive cleanup standards. By and large, these consequences were largely unforeseen by the regulated community.

The most significant impact on the HSRA standards results from the revised hierarchy of human health toxicity values recommended for use in risk assessments, as revised by the EPA on December 5, 2003.<sup>5</sup> Prior to that date, the hierarchical sequence

was (1) the EPA’s Integrated Risk Information System (IRIS), (2) the EPA’s Health Effects Assessment Summary Tables (HEAST), and (3) other peer-reviewed toxicity values. The revised hierarchy evaluates toxicity factors in the following order: (1) IRIS, (2) U.S. EPA’s Provisional Peer Reviewed Toxicity Values (PPRTV), and (3) other peer-reviewed toxicity values. By updating the hierarchy to match the EPA’s hierarchy, Georgia EPD meant to ensure that the most current toxicological data were being used to calculate cleanup standards protective of human health.

The demotion of the HEAST values to a lower level in the hierarchy is appropriate, as the HEAST values had not been updated since 1997 and were not available to on-line users outside the EPA. Chemical-specific PPRTV values, conversely, are developed and revised on an ongoing basis by the Office of Research and Development, the National Center for Environmental Assessment, and the Superfund Health Risk Technical Support Center as requested by the EPA.<sup>6</sup> However, though these risk assessments undergo external peer review, their development does not include EPA and interagency review as does the IRIS assessments. Yet, in utilizing the most current information and methodologies, the PPRTVs are generally considered the best quantification of the dose-response scientific data that is available at the time they are developed. The PPRTV database is not open to users outside the EPA, but PPRTVs for chemicals without IRIS values are available on EPA Region 3’s Regional Screening Levels website.<sup>7</sup> EPA Region 4 has, moreover, approved the use of the Region 3 Screening Level Tables as a source of toxicity values. The revised hierarchy of IRIS followed by PPRTV thus accords with the goal of aligning environmental and health protection with the highest degree of scientific certainty in the quantification of permissible contaminant levels.

However, the third level in the new revised hierarchy, the “other peer-reviewed toxicity values,” presents potential problems. The use of other peer reviewed toxicity value tables can result in stricter cleanup standards than found under the IRIS or PPRTV tables – an unintentional byproduct of this new hierarchy. These toxicity factors were developed using different scientific review parameters and including additional health risk factors. For instance, the Regional Screening Level Tables provide several sets of “other peer-reviewed toxicity values” for chemicals and exposure routes that are not covered by IRIS and PPRTV, including the Agency for Toxic Substances and Disease Registry (ATSDR) Minimal Risk Levels (MRLs) – limited to non-cancer effects only – and California EPA (Cal EPA) Chronic Reference Exposure Values. In some cases (e.g., ethylbenzene), cancer slope factors not otherwise available in IRIS or PPRTV are available from Cal EPA and will result in much lower permissible clean up goals if used in the calculations for cleanup standards.



The Cal EPA toxicity values have undergone an extensive literature review and a rigorous data analysis using up-to-date guidance and methods, and they have been peer reviewed, but they have not been subject to an EPA program review, federal interagency review, or an external peer review with a public notice and comment period as have been the IRIS values and, to a lesser extent, some PPRTVs. Therefore, the Cal EPA values and their classification of a chemical as carcinogenic have a higher level of uncertainty than the IRIS and PPRTV values and classifications.

Further, the specific wording in the revised HSRA Rules reads, “[v]alues are to be taken from the current version of IRIS or, if not listed in IRIS, from the current version of PPRTV. Where data are not available from IRIS or PPRTV and appropriate, peer-reviewed data are otherwise available, values may be derived using the procedures described in RAGS, Part A and in consultation with the Director.”<sup>8</sup> This language can be read to imply that it is at the discretion of the responsible party whether or not to use the other, peer-reviewed toxicity values, subject to the approval of the Director. However, Georgia EPD requires use of the toxicity values listed in the Regional Screening Level Tables. In some cases, this has resulted in lower contaminant levels and more stringent cleanup standards than were previously applicable, leading to greater costs for corrective actions.

## Case Study

Consider, as an example, a hypothetical Georgia chemical manufacturing facility that experienced a release of total xylenes, a volatile organic compound. The Type 1 (default residential) RRS for total xylenes in groundwater is 10 mg/L, based on the current MCL. However, groundwater at the facility contained total xylenes at concentrations up to 20 mg/L, requiring corrective action under the HSRA Rules.

Commercial-grade xylene may contain as much as 15% ethylbenzene.<sup>9</sup> Therefore, it is not surprising that groundwater with 20 mg/L of total xylenes would also contain some ethylbenzene.

The chemical properties, such as evaporation rate and solubility in water, of the two substances are different, so the concentration of ethylbenzene dissolved in groundwater, even if it were 15% of the mass released, should not be expected to be 15% of the total xylenes concentration. In this hypothetical case, the concentration of ethylbenzene in groundwater is assumed to be 2 mg/L. The Type 1 RRS for ethylbenzene is 0.7 mg/L, based, like that for total xylenes, on the current MCL.

The hypothetical facility initiated a remedial action as required by the HSRA Rules. After a significant investment of time, effort, and dollars (a good portion of which went into satisfying the investigative and reporting requirements associated with HSRA), the facility achieved a 50% reduction in groundwater concentrations, and total xylenes concentrations were below 10 mg/L and in compliance with the Type 1 RRS. However, the concentrations of ethylbenzene, although also reduced by 50% to below 1 mg/L, still exceeded the Type 1 RRS of 0.7 mg/L.

The HSRA Rules allow facilities that cannot meet the Type 1 (default residential) RRS to alternately develop site-specific standards. The Type 2 RRS for groundwater is based on the lower of the limits for the cancer and the non-cancer risk to residential receptors, calculation of which incorporates the reference doses and cancer slope factors found in IRIS and the PPRTV. Neither of these sources classifies ethylbenzene as a carcinogen; IRIS lists ethylbenzene as a Class D substance (“not classifiable as to human carcinogenicity”).

Using the reference doses provided in IRIS, the calculated non-cancer limit for ethylbenzene in groundwater is 1.58 mg/L. However, because neither IRIS nor the PPRTV (nor HEAST before that) have cancer slope factors for ethylbenzene, a cancer standard cannot be calculated, and the resulting Type 2 RRS for ethylbenzene is 1.58 mg/L, based on the non-cancer risk. Because the ethylbenzene concentration in groundwater at the facility (1 mg/L) is less than this Type 2 standard, the facility would be able to certify compliance with the Type 2 standard (Type 1 for total xylenes) and be de-listed from the Hazardous Site Inventory.

However, the Regional Screening Level Tables include cancer slope factors for ethylbenzene developed by Cal EPA. Although these slope factors are the result of Cal EPA’s literature review and data analysis, and have been peer reviewed, the data have not been reviewed by IRIS, have not been subject to a federal interagency review, and have not gone through an external peer review with public notice and a comment period. Further, even a cursory review of the toxicological data supporting the slope factors questions the conclusions of Cal EPA as to the carcinogenic nature of ethylbenzene.

The risk standard for cancer calculated using the Cal EPA slope factors is 0.019 mg/L. Because the Type 2 RRS for groundwater

is the lower of the non-cancer (1.58 mg/L) and cancer (0.019 mg/L) risks, the Type 2 RRS would be 0.019 mg/L, a value lower than both the Type 1 standard (0.7 mg/L) and the concentration in groundwater at the facility (1.0 mg/L). Therefore, additional corrective action would still be required to clean the site up to the ethylbenzene standard.

To summarize this case study, the use of the suggested “other peer-reviewed values” from the Regional Screening Level Tables would reduce the Type 2 standard for ethylbenzene in groundwater from 1.58 mg/L to 0.019 mg/L. Because this value is lower than the Type 1 RRS (0.7 mg/L), the potential benefit of having “site specific” compliance standards is gone.

The impact of the “other peer-reviewed values” is not limited to this case study or to ethylbenzene. The Regional Screening Level Tables now list Cal EPA cancer slope factors for 75 compounds not considered to be carcinogens by IRIS or PPRTV, including naphthalene. The Regional Screening Level Tables also list a cancer slope factor for hexavalent chromium via the ingestion pathway developed by the New Jersey Department of Environmental Protection based on National Toxicity Program data.

Finally, it should be recognized that the use of “other peer-reviewed values” was part of the HSRA regulations before the 2009 rule changes. However, the new requirement to consider the “other peer-reviewed values” has led to the U.S. EPA Region 3 Regional Screening Level Tables becoming an essential reference, and the inclusion of the listed “other peer-reviewed values” in the Regional Screening Level Tables has negated some of the previous flexibility that the regulated community once enjoyed in the development of the HSRA RRSs.

## Changes to MCLs

In another development related to the development of RRSs, the EPA is considering changes to the drinking-water MCLs for several chemicals, including the common contaminants tetrachloroethene and trichloroethene. Because Type 1 (default residential) RRSs are often based on MCLs, it is possible that a change in the MCLs may also result in lower RRSs if the revised values are adopted by Georgia EPD in future HSRA Rule amendments. These MCL changes will affect sites in programs such as RCRA, CERCLA, and others.

In the March 29, 2010, Federal Register,<sup>10</sup> the EPA published the results of their Six-Year Review of Maximum Contaminant Levels (MCLs) for regulated contaminants. Their findings indicated that the MCLs for trichloroethene (TCE) and tetrachloroethene (PCE) are based on their laboratory Practical Quantitation Limits (PQLs), while their health-based MCL Goals (MCLGs) are zero because of their carcinogenicity. Although a Risk Assessment for these contaminants is underway, EPA still feels that health benefits may be realized now by lowering the PQL, and hence the MCL, for TCE and PCE. More specifically, EPA is suggesting that, based on the laboratory data that they have reviewed, the PQL can be reduced to as low as 0.0005 mg/L (i.e., 500 parts per trillion) and still be meaningful. This, in turn, would reduce the MCLs by a factor of 10 (i.e., from 0.005 to 0.0005 mg/L). This obviously could affect many facilities regulated under RCRA and other programs. If EPA changes the MCL, it would not be surprising if state programs

like Georgia’s HSRA would change their cleanup goals to follow suit. This could influence many ongoing remediation projects and render many current cleanups impracticable.

The EPA solicited comments on the proposed changes to the PQLs through May 30, 2010. The next step, following the end of the public comment period, is a more detailed analysis of health effects, analytical and treatment feasibility, occurrence, benefits, costs, and other regulatory matters relevant to deciding whether the MCL should be revised. Upon conclusion of this analysis, a Final Rule will be issued. There has been much momentum over the past several years to lower the permissible levels for these two contaminants, so reduced MCLs may be seen as early as this year.

In summary, it is clear that cleanup goals or risk reduction standards under HSRA are moving targets, usually shifting to lower values. Decisions made in California or other jurisdictions can cause lower cleanup standards in Georgia that result in more expensive cleanups and more compressed times for closure. Yet, it is not clear that these lower risk reduction standards necessarily result in a dramatic improvement in human health and/or a reduction in environmental impact.

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### (Endnotes)

- 1 <http://www.gaepd.org/Documents/hsraguide.html>
- 2 The proposed rule amendments became effective on December 15, 2009, yet it should be noted that the revised rules have not been updated on Georgia EPD’s website as of June 1, 2010.
- 3 Statement of Rationale, Rules for Hazardous Waste Management (undated), prepared by Georgia Department of Natural Resources, Environmental Protection Division.
- 4 According to Georgia EPD’s Synopsis of Proposed Revisions to Georgia’s Rules for Hazardous Site Response – 391-3-19, “This revision will allow property owners to determine if a detection of carbon disulfide is naturally occurring or not. If they determine it is naturally occurring, the property owner is not required to notify.”
- 5 Human Health Toxicity Values in Superfund Risk Assessments, U.S. EPA OSWER Directive 9285.7-53, December 5, 2003.
- 6 Identification and Selection of Toxicity Values/ Criteria for CERCLA and Hazardous Waste Site Risk Assessments in the Absence of IRIS Values, Risk Assessment Provisional Values Subgroup Issue Paper, April 23, 2007, prepared by ECOS-DoD Sustainability Work Group - Emerging Contaminants Task Group.
- 7 [http://www.epa.gov/reg3hwmd/risk/human/rb-concentration\\_table/index.htm](http://www.epa.gov/reg3hwmd/risk/human/rb-concentration_table/index.htm).
- 8 §391-3-19 Appendix III Table 3.
- 9 Agency for Toxic Substances and Disease Registry (ATSDR) Public Health Statement for Xylene, CAS # 1330-20-7, August 2007.
- 10 75 Fed. Reg. 59 (2010).

# Interbasin Transfers of Water

By Dargan “Scott” Cole, Sr. and William Bradley Carver

## Interbasin Transfers of Water

Population growth, environmental constraints, and climate change can adversely affect our water supply systems’ ability to keep up with demand. Officials with state and local jurisdictions struggle to evaluate demand-side solutions, such as conservation, rationing, and growth management; and supply-side solutions, such as capture and control of water via additional storage either through reservoirs or aquifer storage and recovery. One potential solution, the interbasin transfer of water, continues to intrigue water supply managers and generate controversy with downstream users and landowners.

The Georgia Comprehensive State-wide Water Management Plan (the “Plan”) defines an interbasin transfer as “the 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.”<sup>1</sup> The Plan defines the river basin from which the withdrawal or diversion occurs as the “donor” basin or “basin of origin” and the river basin to which all or a portion of the water is diverted and returned as the “receiving” basin.<sup>2</sup>

## Benefits of Interbasin Transfers

Interbasin transfers of water are a management practice that addresses water supply and/or water quality needs in some parts of the receiving basin.<sup>3</sup> While many political controversies and fierce litigation arise out of proposed or actual use of interbasin transfers of water, interbasin transfers have a long history of use around the world. From nearly the time that we could construct aqueducts, mankind has moved water from one basin to another to, among many other uses:

- Increase supply to meet growing residential and commercial demand;
- Increase supply to meet new and additional agricultural demands;
- Increase supply to meet growing hydropower demands;
- Increase flow to increase the assimilative capacity of the water body;
- Protect urban and agricultural land from flooding; and
- Manage waste water concerns.

In the United States, eight of the ten largest population centers use interbasin transfers. For example:

New York City, the most populous metropolitan area in the United States, expanded its water system in the 1950s and 1960s to include an interbasin transfer of water from the Delaware River for public water supply purposes.

In Illinois, the Chicago Sanitary and Shipping Canal transfers water from the Great Lakes Basin to the Mississippi River Basin. The Canal was built to avoid a threat to public health from raw sewerage infiltrating the public drinking water supply in Lake Michigan. It does so by moving sewerage “upstream” to the Illinois River.

In southern California, the Los Angeles Aqueduct, completed in 1913; the Colorado River Aqueduct, completed in 1941; and the All American Canal, built in the 1930’s, all transfer millions of gallons of water per day from the Colorado River to southern California to provide water supply to residents of the Los Angeles area and for agricultural irrigation. In the 1960’s and 1970’s the California State Water Project was constructed to transfer water from northern to southern California.

In Texas, interbasin transfers are a common means of increasing public water supply in major metropolitan areas, including Dallas/Fort Worth and Houston.

South Florida, including Miami, has historically relied upon water from sources such as Lake Okeechobee and the Everglades to recharge the region’s underground source of drinking water, the Biscayne Aquifer.

In Georgia, the Atlanta metropolitan area encompasses portions of five different river basins, the Coosa, Chattahoochee, Flint, Ocmulgee, and Oconee river basins. Interbasin transfers among these five river basins are common.

In the 1930’s, Quabbin Reservoir was constructed in the Chicopee River Watershed, part of the Connecticut River system, in order to serve the needs of the Boston metropolitan area.

Interbasin transfers also serve smaller communities. For example, North Carolina has authorized upstream transfers of water from the Catawba River Basin of 33 million gallons per day for Charlotte and 10 million gallons per day for the cities of Concord and Kannapolis.

## Impacts of Interbasin Transfers

The examples listed above demonstrate the widespread use and multiple benefits of interbasin transfers, including enabling the receiving basin to meet increased residential, industrial and agricultural demands for water supply. Interbasin transfers may, however, have adverse impacts on water resources in both the donor and receiving basins and on opportunities for reasonable water use in the donor basin.<sup>4</sup> For example, in the ongoing litigation before the United States Supreme Court over the Catawba River, South Carolina claims that the upstream interbasin transfers approved by North Carolina deprive South Carolina of its equitable share of the Catawba River’s water, particularly during periods of drought or low river flow.

Potential impacts to a donor basin as a result of reduced stream flow may include changes to:

- natural flow regime;
- water quality and the ability of the source water body to assimilate pollutants;
- habitat for native aquatic communities of fish and wildlife, including threatened and endangered species;

- wetlands and riparian habitat;
- availability of water-based recreational activities; and
- aesthetic qualities.

## Legislation Regarding Interbasin Transfers

Many times, the response to actual or proposed interbasin transfers of water has been new legislation that prohibits or limits future transfers. Examples of such legislation include the following:

- The Great Lakes St. Lawrence River Basin Water Resources Compact, an eight-state compact signed into law October 3, 2008 by President George Bush, governs the use of water within the Great Lakes region and prohibits interbasin transfers, except for:
  - diversions to areas outside the basin but within communities that lie partially within the basin;
  - diversions of water from one Great Lakes watershed to another Great Lakes watershed; and
  - diversions of water to communities that lie outside the basin but within a county that lies partially within the basin, but only upon unanimous approval by the multistate council created by the Compact.<sup>5</sup>
- In Georgia, the legislation creating the fifteen-county Metropolitan North Georgia Water Planning District prohibits the interbasin transfers of water from outside the District to meet water supply demands within the District.<sup>6</sup> However, while interbasin transfers from outside the District are prohibited, proposed legislation would require the State to study the feasibility of a system of interbasin interconnections within the District to provide redundant supply for essential water needs.<sup>7</sup>

In those jurisdictions where interbasin transfers are allowed, proposed interbasin transfers must satisfy certain criteria to ensure: (1) the demand in the receiving basin is real and cannot economically be met by sources within the basin, and (2) the benefits to the receiving basin outweigh the impacts to the basin of origin. Examples include the following:

- In Texas, the Texas Commission on Environmental Quality must consider several factors before it can grant a permit for an interbasin transfer.<sup>8</sup> These include the:
  - need for water in the basin of origin and the receiving basin for up to 50 years;
  - availability and feasibility of practical alternative supplies in the receiving basin;
  - amount and purposes of use in the receiving basin;
  - measures and efforts in the receiving basin to avoid waste and conserve water;
  - measures and efforts in the receiving basin to put the water to beneficial use;
  - projected economic impact in each basin;
  - projected environmental impact in each basin; and

- mitigation or compensation proposed by the applicant for the basin of origin.<sup>9</sup>

- In Florida, when determining whether the public interest is served by a transfer of groundwater from one water district to another,<sup>10</sup> or surface water from one county to another,<sup>11</sup> the governing board or department must consider:

- the proximity of the proposed water source to the area of use;
- all water bodies geographically closer to the area of use that are technically and economically feasible for transport and use;
- all economically and technically feasible alternatives, including desalination, conservation, reuse, and aquifer storage and recovery;
- the potential environmental impacts;
- existing and reasonably anticipated regional sources of water and conservation;
- consultation with the involved local governments; and
- the value of existing capital investment in water infrastructure by the applicant.<sup>12</sup>

- In South Carolina, no person is allowed to transfer more than five percent of the calculated annual 7Q10 flow<sup>13</sup> or one million gallons of water per day, whichever is less, without first obtaining a permit from the South Carolina Department of Health and Environmental Control (“SCDHEC”). SCDHEC cannot issue a permit for an interbasin transfer if the transfer would result in a violation of the water classification standard system or the stream classification system or if the transfer would adversely affect the public health and welfare.<sup>14</sup> When evaluating a permit application, SCDHEC shall protect water quality in the donor basin and consider:

- the present and reasonably foreseeable future water needs of the losing basin and its ability to respond to emergencies;
- the foreseeable water needs of the receiving basin, including conservation and efficiency of use;
- the beneficial impacts on the State and local subdivisions of the State;
- the feasibility of alternative sources of supply;
- the impact on interstate water use; and
- whether the proposed transfer will have any beneficial or detrimental impact on navigation, hydropower generation, fish and wildlife habitat, aesthetics and recreation.<sup>15</sup>

## Controversy and Litigation

Anywhere an interbasin transfer is proposed, a public controversy or litigation is likely to follow. In Florida, for example, opposition to the transfer of water from the relatively water-rich portions of northern Florida to southern Florida to meet growing

agricultural and residential demand is a recurring source of intrastate controversy.

The states of Georgia, Florida and Alabama have been engaged in the “Tri-State Water Litigation” for twenty years. The litigation concerns the U.S. Army Corps of Engineers’ management of the federal reservoirs, Lake Lanier and Lake Allatoona, for water supply. The issue of interbasin transfers is one of many issues at stake in this long-running dispute.

As previously mentioned, the states of North Carolina and South Carolina are engaged in litigation before the Supreme Court of the United States to equitably apportion or allocate the water in the Catawba River. South Carolina brought suit against North Carolina as a result of proposed transfers of water from the Catawba River to other river basins.

## Where do we go from here?

Any debate concerning the future expansion or limitation of the use of interbasin transfers will center on several key policy considerations.

First, should agricultural or residential growth in a particular watershed be limited by the amount of water that can be captured and controlled within that basin?

The State of Florida has effectively endorsed such a limitation as part of its growth management and concurrency requirements for water supply. Because of relative water scarcity and the uncertainty of future interbasin transfers, Florida statutes require local governments to consult with water suppliers to ensure that adequate water supplies will be in place and available to serve a new development by the time the local government issues the development’s certificate of occupancy.<sup>16</sup>

Second, if growth in a basin is to be limited by that basin’s natural water supply, how is the available water to be apportioned between human and aquatic demands?

Numerous regulatory programs address the issue of apportionment of water supply. For example, Georgia’s Board of Natural Resources adopted an instream flow policy on May 23, 2001 which sets forth the policies and procedures for determining the minimum flows required below new withdrawals to protect aquatic habitat. The Federal Energy Regulatory Commission establishes minimum downstream discharge flows for all hydropower production reservoirs as part of the permitting process. Likewise, when reviewing federal permits the U.S. Fish & Wildlife Service may require minimum flows downstream of a project (i.e., water supply reservoir) to protect habitat for threatened and endangered species.

Third, should water in a basin be reserved for use in the basin even when there is no foreseeable demand?

This policy consideration is at the core of the recent debate over the transfer of water from the Tennessee River basin to meet increasing municipal demand in Georgia, Alabama and Mississippi. Supporters of the proposed interbasin transfer cite a May 2004 study which concluded that a billion gallons of water a day can be withdrawn from the Tennessee River basin without adversely impacting the operation of its system of reservoirs.<sup>17</sup> This study

and the more recent drought have heightened the interest in investigating a potential interbasin transfers for municipal use in Georgia. It remains to be seen whether this type of evidence will be sufficient to persuade legislators to pursue and regulatory authorities to approve this interbasin transfer.

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## (Endnotes)

- 1 Plan at 10 (available at [http://www.georgiawatercouncil.org/Files\\_PDF/water\\_plan\\_20080109.pdf](http://www.georgiawatercouncil.org/Files_PDF/water_plan_20080109.pdf)).
- 2 Id.
- 3 Id. at 26.
- 4 Plan at 26.
- 5 U.S. Public Law 110-342, 122 Stat. 3739 at Art. 4, Sec. 4.9 (2008)
- 6 O.C.G.A. § 12-5-584(f).
- 7 Senate Bill 442, 150th Gen. Assembly, 2nd Sess. (Ga. 2010)
- 8 Tex. Water Code Ann. § 11.085 (2009).
- 9 Id. at § 11.085(c)(1-3).
- 10 Fla. Stat. § 373.2295 (2009).
- 11 Id. at § 373.223.
- 12 Id. at § 373.223 (3)(a-g).
- 13 Annual “7Q10” Flow refers to the lowest 7-day flow in any 10-year period.
- 14 S.C. Code Ann. § 49-21-30(D)(a) (2009).
- 15 Id. at § 49-21-30(C)(1-12).
- 16 Fla. Stat. § 163.3180(2)(a) (2009).
- 17 See Tennessee Valley Authority, Programmatic Environmental Impact Statement: Tennessee Valley Authority Reservoir Operations Study, Record of Decision at Appendix D9 (May 2004) (available at [http://www.tva.gov/environment/reports/ros\\_eis/ros\\_rod.pdf](http://www.tva.gov/environment/reports/ros_eis/ros_rod.pdf)).

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# AGENDA

Presiding: *Adam G. Sowatzka*, Program Chair, Baker Donelson, Atlanta

## FRIDAY, JULY 30, 2010

- 7:30 **REGISTRATION AND CONTINENTAL BREAKFAST**  
(All attendees must check in upon arrival. A jacket or sweater is recommended.)
- 8:00 **INTRODUCTION AND PROGRAM OVERVIEW**  
*Adam G. Sowatzka*
- 8:15 **KEYNOTE**  
*F. Allen Barnes*, Director, Georgia Environmental Protection Division, Georgia Department of Natural Resources, Atlanta
- 8:45 **IMPACT OF THE RECESSION ON ENVIRONMENTAL ISSUES**
- **Decommissioning and Demolition**  
*Rob Rivera, P.E.*, Supervising Engineer, Brown and Caldwell, Atlanta
  - **Bankruptcy Discharge for Environmental Cleanup Obligations: The Impact of *US v. Apex Oil***  
*Kevin T. Beswick*, U.S. Environmental Protection Agency, Region 4, Atlanta (Invited)
- 9:30 **SUSTAINABILITY ROUNDTALE**  
**Moderator:**  
*Tracey Yount*, Sustainable Development Practice Area Leader, AECOM, Atlanta  
**Panelists:**  
*Ciannat M. Howett*, Director, Sustainability Initiatives, Emory University, Atlanta  
*Richard Leahy*, Sr. Director, Environmental Compliance, Wal-Mart Stores, Inc., Bentonville, AR  
*Erin Meezan*, Vice President, Sustainability, Interface, Inc., Atlanta
- 10:30 **BREAK**
- 10:45 **GEORGIA WATER CONTINGENCY TASK FORCE**  
*Tim Lowe*, Lowe Engineers, Co-Chair of Governor Perdue's Water Contingency Task Force, Atlanta
- 11:15 **CLIMATE CHANGE**  
*C. W. "Mack" McGuffey*, Troutman Sanders LLP, Atlanta  
*Douglas A. Henderson*, Troutman Sanders LLP, Atlanta  
*Les A. Oakes*, King & Spalding LLP, Atlanta
- 12:15 **RECESS**
- 6:30 **RECEPTION**

## SATURDAY, JULY 31, 2010

- 7:30 **CONTINENTAL BREAKFAST**
- 8:00 **WELCOME FROM THE CHAIR-ELECT**  
*James B. Griffin*, Law Offices of Wm. Thomas Craig, Covington
- 8:15 **ETHICS**  
*Hon. T. Penn McWhorter*, Judge, Superior Court, Piedmont Judicial Circuit, Winder
- 9:15 **WETLANDS**
- **The Clean Water Act and Delineation Manual: Update**  
*Bruce A. Pruitt, Ph.D.*, Nutter & Associates, Athens
  - **Reservoir Permitting**  
*Laura Wahoske Benz*, Law Offices of Wm. Thomas Craig, Covington
- 10:15 **BREAK**
- BREAK OUT SESSION I**
- 10:30 **SESSION A: ENVIRONMENTAL CRIMINAL LAW**  
*Richard E. Glaze*, Senior Attorney, US EPA Region 4, Atlanta (Invited)  
*Maureen O'Mara*, Special Agent in Charge, US EPA Region 4, Atlanta, (Invited)
- SESSION B: NATURAL RESOURCE DAMAGES**
- **An Introduction to NRD under CERCLA**  
*David M. Meezan*, Mowrey, Meezan, Coddington & Cloud LLP, Atlanta
  - **Environmental Damage Assessments and Net Environmental Benefit Analysis**  
*Joseph P. Nicolette*, Environ, Atlanta
- BREAK OUT SESSION II**
- 11:15 **SESSION A: ALTERNATIVE DISPUTE RESOLUTION—A CASE STUDY INVOLVING A STORMWATER DISPUTE**  
*Leah J. Knowlton*, Epstein Becker Green, P.C., Atlanta  
*Rick Evans*, General Counsel, John Wieland Homes, Smyrna
- SESSION B: SOLID AND HAZARDOUS WASTE HOT TOPICS**
- **Coal Ash Impoundments: EPA's New Regulations and Enforcement Initiative**  
*Graham Elliott, Ph.D.*, Senior Geotechnical Engineer, Golder Associates, Atlanta
  - **Perchlorate Regulatory Update**  
*Jennifer Kolbe, Ph.D., P.E.*, M.W.H. Americas, Inc., Alpharetta
- 12:00 **ADJOURN**



### CANCELLATION POLICY

Cancellations reaching ICLE by 5:00 p.m. the day before the seminar date will receive a registration fee refund less a \$15.00 administrative fee. Otherwise, the registrant will be considered a "no show" and will not receive a registration fee refund. Program materials will be shipped after the program to every "no show." Designated substitutes may take the place of registrants unable to attend.

### SEMINAR REGISTRATION POLICY

Early registrations must be received 48 hours before the seminar. ICLE will accept on-site registrations as space allows. However, potential attendees should call ICLE the day before the seminar to verify that space is available. All attendees must check in upon arrival and are requested to wear nametags at all times during the seminar. ICLE makes every effort to have enough program materials at the seminar for all attendees. When demand is high, program materials must be shipped to some attendees.

# Georgia General Assembly 2010: Environmental Issues Wrap-Up

By Brad Carver, Scott Cole and Chad Wingate (Hall Booth Smith & Slover, P.C.)

The 2010 Legislative Session saw several successful and unsuccessful attempts to protect water quality, create a culture of water conservation and plan for future water supply. The General Assembly passed legislation that will reduce man-influenced erosion in perennial streams, ease the permitting process for new water supply reservoirs, create a new funding source for energy and water efficiency measures, and require new water conservation measures across the State. Legislation did not pass that would have exempted state and local governments from storm water utility fees, limited interbasin transfers of water, and encouraged public-private partnerships for new water supply reservoirs. Although interbasin transfer legislation did not pass this year, the Chairmen of both the House and Senate Natural Resource & Environment Committees have committed to study the subject this summer and fall.

In addition to taking up issues of water supply and water quality, the General Assembly passed legislation dealing with other environmental issues and the State's budget woes. Specifically, bills passed that will shift funds from water projects to the general budget, create a new source of funding for public transportation, encourage recycling at existing landfills, and allow local governments to more easily grant conservation easements over real property.

Below is a brief description of the major pieces of environmental legislation that passed or failed to pass in the General Assembly's 2010 Legislative Session.

## PASSED

### HB 207 - Off-Road Vehicles

HB 207 prohibits the driving of off-road vehicles within any perennial stream, except when directly crossing a stream. The goal is to prevent "mud-bogging," which harms surface water quality.

### HB 244 – GEFA: Return Funds

### to State

This legislation will allow the Georgia Environmental Facilities Authority ("GEFA") to return funds to the state treasury by securitizing GEFA's Georgia Fund loan portfolio. HB 244 includes the Governor's proposal to sell a portion of the GEFA loans on Wall Street in order to raise approximately \$290 million to help balance the state budget. GEFA loans are valued at \$676 million and are made by the state to local governments at low interest rates to finance infrastructure projects. HB 244 also changes the name of GEFA to the "Georgia Environmental Finance Authority."

### HB 277 - Transportation Funding

HB 277 increases funding for trains and buses. More transit options mean fewer cars on our roads polluting the air. The bill allows Georgians to vote, by region, to levy a new penny sales tax to fund regional transportation projects. A roundtable of local officials in each region will draft a list of specific projects for the ballot, with a vote coming as early as 2012. The bill also temporarily lifts restrictions on how MARTA spends its own sales tax money, which will enable the cash-strapped transit system to avoid some of the significant service cuts planned for July.



## HB 406 – Drinking Water Projects: Service Delivery Strategies

HB 406 allows a proposed drinking water supply reservoir, or a withdrawal, treatment or distribution facility associated with a reservoir that serves an incorporated area in one or more counties, to receive GEFA funding even if the reservoir or facility is not part of a verified service delivery strategy. Service delivery strategies are agreements among local governments to avoid the unnecessary duplication of services. Within one year after the reservoir or facility becomes operational, local governments and authorities in the affected county or counties must update their service delivery strategy to be consistent with water supply arrangements resulting from the operation of the new reservoir or new withdrawal, treatment or distribution facility associated with a reservoir. By requiring an update of the service delivery strategy to include the project, the bill by-passes to often politically charged negotiations regarding the delivery of services by mandating an outcome.

## HB 1059 – Solid Waste Management

This bill allows the addition of a recovered materials processing facility to an existing disposal facility to be processed as a minor permit modifications. A “Recovered Materials Processing Facility” is a facility engaged solely in the storage, processing, and resale or reuse of recovered materials. Making addition of this type of operation at an existing landfill a minor modification of the existing permit encourages recycling by shortening the permitting process.

## HB 1388 – Development Authorities: Energy Efficiency Loans

HB 1388 authorizes, but does not require, downtown development authorities and city or county development authorities to provide financing to property owners via property-assessed clean energy (“PACE”) bonds for the purpose of installing or modifying improvements to their property that reduce the energy or water consumption on such property or to install an improvement to such property that produces energy from renewable resources. PACE bonds can be repaid via an annual assessment on the property tax bill.

## SB 370 – Water Stewardship Act of 2010

SB 370 sets forth a comprehensive scheme to promote what the bill describes as a “culture of water conservation” in Georgia. The bill is expected to save hundreds of millions of gallons of water every day, and there is hope that it will help make positive strides in the Tri-State water negotiations. Key provisions include:

- A permanent statewide restriction on outdoor watering between 10 a.m. and 4 p.m., when evaporation is greatest, with exemptions for only certain businesses, including golf courses and farms;
- Mandatory installation of high efficiency toilets and shower heads in all new construction;
- A requirement for new apartment buildings and retail centers to charge each tenant for individual water usage, which many believe will cause customers to reduce the amount of water they use;
- New categories of agricultural and groundwater withdrawal

permits—active, inactive, and unused;

- A Joint Committee on water supply to conduct an comprehensive analysis of the State’s strategies for new water supply, current and future needs, and other options for water supply enhancement.

## SB 380 – Reservoirs: GEFA

SB 380 requires GEFA to issue a request for proposal (“RFP”) for the development of a thorough and detailed engineering study to support the creation of an emergency water supply plan covering every qualified system within the Metropolitan North Georgia Water Planning District. The emergency plan will evaluate risks and, where feasible, plan for a district-wide interconnection reliability target for immediate implementation of approximately 35 percent of the annual average daily demand and a long-range district-wide interconnection reliability planning goal of approximately 65 percent of the annual average daily demand. In addition, this legislation authorizes GEFA to make grants and loans to local governments for expanding existing permitted reservoirs.

## SB 390 – Local Government: Conservation Easement & Leasing of Public Property

SB 390 allows a city to protect municipally-owned property by directly subjecting it to a conservation easement without having to dispose of the property through prescriptive public sale provisions.

## DID NOT PASS

## HB 316 – Storm Water Utility Fees

This legislation would have exempted state government facilities from the obligation to pay storm water utility fees imposed by any county, municipality, or local government authority.

## HB 1301 – Inter-basin Transfer Restrictions

HB 1301 would have created rigorous criteria for the permitting of interbasin water transfers. The bill counted groundwater transfers as potential interbasin transfers subject to its restrictions. Although HB 1301 did not pass, the Chairmen of the Senate’s Natural Resources and Environment Committee, Sen. Ross Tolleson (R-Perry), and the House’s Natural Resources and the Environment Committee, Rep. Lynn Smith (R-Newnan), have committed to study the issues of interbasin transfers before the next session. The issues surrounding interbasin transfers of water in Georgia are discussed in more detail in a separate article in this same Newsletter.

## SB 321 - Public-Private Partnerships

SB 321 would have expanded existing authorization for local governments to contract with private entities for the planning, permitting, construction and operation of new public water supply reservoirs. In addition, this legislation would have authorized GEFA to support and facilitate initial planning and permitting activities.

# Counting Down to 2012: Update on the Tri-State Water Wars

By Gilbert B. Rogers, Senior Attorney, Southern Environmental Law Center

## Introduction

The water wars between Georgia, Alabama, and Florida have now entered their twentieth year. It was in 1990 that Alabama filed the first of what would become numerous lawsuits among the three states, the U.S. Army Corps of Engineers, the Fish and Wildlife Service, various hydropower interests, and local governments in metropolitan Atlanta and downstream. At stake are the waters in the Apalachicola-Chattahoochee-Flint (“ACF”) and the Alabama-Coosa-Tallapoosa (“ACT”) river basins, which together sustain millions of people in cities such as Atlanta, Columbus, Bainbridge, Albany, Rome, Gadsden, Montgomery, Mobile, and Apalachicola, along with some of the most productive shellfish populations in the country.

As the tri-state litigation has moved forward, the states have weathered several severe droughts, the most recent of which was one of the worst in history for both Georgia and Alabama. In addition, in 2009, Georgia experienced record rainfalls, including devastating floods in the upper Chattahoochee River basin. Georgia has become creative in crafting potential solutions to Atlanta’s water supply issue that do not involve significant reliance on the Chattahoochee River, including moving the state border and withdrawing and piping water from the Tennessee River.

Much has been written about the water wars, the most comprehensive of which is Stephen E. O’Day et al., *Wars between the States in the 21st Century: Water Law in an Era of Scarcity*, 10 *Vt. J. Envtl. L.* 230 (2009). Since that article was published, the most significant development in the tri-state litigation occurred: Judge Paul Magnuson’s ruling on July 17, 2009 that the United States Army Corps of Engineers was illegally allowing water to be withdrawn from Lake Sidney Lanier for water supply. Judge Magnuson set a three-year deadline for the Corps to obtain Congressional approval to allow the lake to be used for water supply, after which water supply withdrawals would revert to 1970s levels. This article examines the legal lay of the land one year into the 2012 deadline set by Judge Magnuson.

## History of the Water Wars<sup>1</sup>

The tri-state litigation has been most active in the ACF basin. The ACT litigation is currently on hold in the Northern District of Alabama. Rather than states suing one another directly, by and large the lawsuits have all targeted the Army Corps of Engineers (“Corps”) as

a defendant, with states intervening as plaintiffs or defendants. The history below focuses primarily on the ACF litigation, which has now been consolidated and is pending before Judge Magnuson in the Middle District of Florida. Prior to consolidation, the litigation had included proceedings in district and appellate courts in Alabama, Georgia, Florida, and the District of Columbia.

The Corps received congressional approval to build a hydropower project north of Atlanta on the Chattahoochee River under the Rivers and Harbors Act of 1945.<sup>2</sup> The authorization for the project was amended by the Rivers and Harbors Act of 1946 to allow the construction of Buford Dam, thereby creating Lake Lanier.<sup>3</sup> The construction of Buford Dam was completed in 1956.<sup>4</sup>

During the 1970s, the Corps permitted some water stored in Lake Lanier to be reserved for local water supply.<sup>5</sup> In fact, the Corps later entered into contracts with several water supply providers, including the Atlanta Regional Commission (“ARC”); the cities of Cumming, Gainesville and Buford, Georgia; and Gwinnett County, Georgia (collectively, “Water Supply Providers”), allowing them to withdraw water for a fee from Lake Lanier and the Chattahoochee River downstream from the dam.<sup>6</sup> Then, in 1989, the Corps announced plans to seek congressional approval to enter into permanent water storage contracts with the Water Supply Providers to help meet the growing water demands of metropolitan Atlanta.<sup>7</sup> Having suffered droughts throughout the 1980s, and concerned that the Corps’ plan would disrupt and ultimately reduce water flow to downstream states, Alabama and Florida objected to the plan.<sup>8</sup>



Lake Lanier at full pool.

In 1990, the State of Alabama filed suit against the Corps in the Northern District of Alabama to oppose the Corps' water plan, marking the beginning of what would become known as the "Tri-State Water Wars."<sup>9</sup> In that same year, the litigation was stayed to allow for negotiations between the states.<sup>10</sup> The negotiations lasted throughout the 1990s as Georgia, Alabama, and Florida worked to put together the ACF and ACT Compacts (collectively, the "Compacts"), which did not allocate water between the states but rather have been widely described as essentially agreements to agree.<sup>11</sup> In 1997, with the approval of Congress and President Clinton, Georgia, Alabama, and Florida entered into the ACF Compact,<sup>12</sup> and Georgia and Alabama entered into the ACT Compact.<sup>13</sup> The two Compacts, which contain identical language, had the stated purpose of "promoting interstate comity, removing causes of present and future controversies, equitably apportioning the surface waters of the [ACF/ACT], engaging in water planning, and developing and sharing common data bases."<sup>14</sup> Under the Compacts, until an allocation formula was approved, water withdrawals, diversions, and consumption could continue, and even increase, to satisfy water demands.<sup>15</sup> The states voted to extend the Compacts several times, but the ACF and ACT Compacts expired in September 2003 and August 2004, respectively, with no permanent agreements having been reached.<sup>16</sup>

Meanwhile, Georgia sought to obtain more water for municipal and industrial use, primarily in the rapidly growing metropolitan Atlanta area.<sup>17</sup> In 2000, Governor Roy Barnes made a written water supply request to the Corps asking that the Corps commit to releasing more water from Lake Lanier until 2030 to assure a reliable water supply to the growing metro Atlanta area.<sup>18</sup> After receiving no response for nine months, Georgia filed suit in the U.S. District Court for the Northern District of Georgia in February of 2001, arguing the Corps was interfering with Georgia's use of its own water in Lake Lanier.<sup>19</sup>

At about the same time, in December of 2000, a group of power companies brought suit in the U.S. District Court for the

District of Columbia arguing that the Corps was managing water in Lake Lanier in such a way that it improperly inflated the price of electricity they were required to pay to hydropower producers.<sup>20</sup>

Noting the direct impact to its water – namely the ecological impact on Apalachicola Bay and the oyster and other shellfish populations there – Florida intervened in the litigation.<sup>21</sup> Pointing to the diverse ecology of Apalachicola Bay, Florida argued that reducing the downstream flow of Lake Lanier would seriously threaten many endangered species, including species of mussels and gulf sturgeon, as well as the bay's oyster populations and fishing economy as a whole.<sup>22</sup> Additionally, in *Georgia v. U.S. Army Corps of Engineers*, Florida argued that Georgia's lawsuit was wholly improper, as the ACF Compact was designed to be the exclusive mechanism to resolve disputes in the basin.<sup>23</sup> In fact, one of the major difficulties in the water compact negotiations was that, while Georgia and Alabama were willing to guarantee a specific minimum river flow for Florida, Florida rejected that plan on the basis that natural fluctuations in flow are necessary to protect the ecology in the Bay.<sup>24</sup>

Although the primary parties in the litigation are the three states themselves, other interested parties have intervened, including the Lake Lanier Association and the Atlanta Regional Commission, which includes the cities of Atlanta, Gainesville, and Marietta, as well as Fulton, DeKalb and Cobb counties.<sup>25</sup> In an effort to reconcile conflicting opinions on the magnitude of the problem, and relying on the National Environmental Policy Act ("NEPA"),<sup>26</sup> the ARC has urged the Corps of Engineers to conduct a comprehensive scientific study of the hydrology of the ACF basin, specifically looking at the impacts of water withdrawals from Lake Lanier on downstream users.<sup>27</sup>

## A. The Alabama Case: *State of Alabama v. United States Army Corps of Engineers*<sup>28</sup>

In 1990, Alabama filed suit against the Corps in the Northern District of Alabama (the "Alabama Court") challenging the Corps' management of Carters Lake and Lake Allatoona, part of the ACT, and Lake Lanier, part of the ACF.<sup>29</sup> Alabama, which is downstream from those reservoirs and relies on water from the ACT and ACF River Basins, alleged that it was being injured by the Corps' mismanagement of the water resources.<sup>30</sup> Specifically, Alabama alleged that the Corps failed to comply with NEPA<sup>31</sup> because it did not properly assess the environmental impacts before it entered into contracts with the Water Supply Providers for withdrawals from Lake Lanier.<sup>32</sup>

Within a month after the filing, Florida – which, like Alabama, relies on the downstream flow of the ACF – sought to intervene as a plaintiff, and Georgia and ARC sought to intervene as defendants on the side of the Corps.<sup>33</sup> In September of 1990, Alabama and the Corps jointly moved for a stay of proceedings (the "1990 Stay") to attempt to negotiate an agreement among the parties and the proposed intervenors, Florida and Georgia.<sup>34</sup> As a condition of the 1990 Stay, the Corps agreed not to execute any contracts regarding the subject of the action without written permission from Alabama and Florida.<sup>35</sup> The stay was granted and several times extended.<sup>36</sup> Litigation in the Alabama case remained dormant until 2003.



Apalachicola Bay live oyster bed

## B. The D.C. Case: *Southeastern Federal Power Customers, Inc. v. Caldera*<sup>37</sup>

In December of 2000, Southeastern Federal Power Customers, Inc. (the “Hydropower Customers”) – a consortium of electric power suppliers who purchase hydropower generated at Buford Dam and other federal projects – filed suit against the Corps in the U.S. District Court for the District of Columbia (the “D.C. Court”).<sup>38</sup> The Hydropower Customers alleged that the Corps was without authority to allow the withdrawal of water from Lake Lanier for local and industrial usage, because water supply was not an authorized purpose of the Buford Dam project.<sup>39</sup> Pursuant to the Water Supply Act of 1958,<sup>40</sup> the Corps charges beneficiaries of projects such as Buford Dam and Lake Lanier for the benefits provided.<sup>41</sup> The charges are calculated based on the ratio of the quantity of water allocated to storage for a particular use to the cost of a project’s construction and operation.<sup>42</sup> The Hydropower Customers argued that the Corps was overcharging for hydropower generated by Buford Dam because the prices had not been adjusted to reflect the increased withdrawals for water supply, which diminished the amount of water flowing through Buford Dam to generate hydropower.<sup>43</sup> Further, the Hydropower Customers sought an injunction compelling the Corps to limit the uses of Buford Dam and Lake Lanier to those authorized by statute or, in the alternative, to grant the Hydropower Customers financial concessions to make up for the inequity in its payment schedule.<sup>44</sup>

In February of 2001, Georgia and the Water Supply Providers moved to intervene.<sup>45</sup> The next month, the Hydropower Customers and the Corps agreed to allow Georgia and the Water Supply Providers to participate in mediation.<sup>46</sup> In 2003, after nearly two years of negotiations, the Hydropower Customers, the Corps, Georgia, and the Water Supply Providers reached a settlement agreement (the “D.C. Agreement”), under which the Corps agreed to enter into interim contracts with the Water Supply Providers to lease them water storage space in Lake Lanier.<sup>47</sup> In return, the Water Supply Providers would pay higher fees for the storage to compensate the Hydropower Customers for lost hydropower.<sup>48</sup> The interim contracts were issued for a period of 10 years, with the option to renew for 10 years, but the Corps would seek authorization from Congress to make them permanent contracts.<sup>49</sup> The parties filed the D.C. Agreement with the court on January 16, 2003.<sup>50</sup>

## C. The Alabama and D.C. Cases Converge

In the same month that the D.C. Agreement was filed, Alabama and Florida revived the Alabama case when the states asked the Alabama Court for a preliminary injunction and declaration that the D.C. Agreement was null and void as a violation of the 1990 Stay.<sup>51</sup> Alabama and Florida then moved to intervene in the D.C. Case to challenge the D.C. Agreement, claiming that the Corps lacked the necessary statutory authority to enter into the D.C. Agreement and that the terms of the D.C. Agreement violated a number of federal statutes, including NEPA and the Endangered Species Act.<sup>52</sup>

In September of 2003, eight months after the D.C. Agreement was filed, the Corps gave the required notice to unilaterally trigger the end of the 1990 Stay in the Alabama Case.<sup>53</sup> But on October 15, 2003, the Alabama Court found that the Corps had violated

the 1990 Stay by entering into the D.C. Agreement and entered a preliminary injunction prohibiting the Corps from filing or implementing the D.C. Agreement or entering into any other new water storage or withdrawal contracts affecting the ACF.<sup>54</sup>

Notwithstanding its October 15, 2003, order, in November of 2003 the Alabama Court ordered that all activity in the Alabama Case be stayed until the judge in the D.C. Case issued an order deciding the validity of the D.C. Agreement.<sup>55</sup> The D.C. Court then held a hearing in which the Hydropower Customers, the Water Supply Providers, the Corps, and Georgia argued in favor of the D.C. Agreement.<sup>56</sup> Alabama and Florida, which had been permitted to intervene in the D.C. Case, opposed the D.C. Agreement arguing that it violated various federal environmental statutes.<sup>57</sup>

In February of 2004, the D.C. Court entered an order (“D.C. Order”) declaring that the D.C. Agreement was “valid and approved, and may be executed and filed and thereafter performed in accordance with its terms, provided, however, that the preliminary injunction entered by the Alabama Court on October 15, 2003, is first vacated.”<sup>58</sup> Then, notwithstanding that its approval of the D.C. settlement expressly depended on the Alabama Court lifting its injunction, the D.C. Court dismissed the D.C. Case as moot in light of the settlement.<sup>59</sup>

## D. D.C. Appeals

Alabama and Florida appealed the D.C. Court’s approval of the D.C. Agreement.<sup>60</sup> In March of 2005, the U.S. Court of Appeals for the D.C. Circuit issued an opinion holding that the lower court’s February 2004 decision did not render all claims moot because it only conditionally approved the D.C. Agreement, and the Alabama Court could still decide to lift the preliminary injunction.<sup>61</sup> The D.C. Circuit also vacated the lower court’s dismissal of the D.C. Case, saying that it was not a final decision on the merits.<sup>62</sup> Finally, because the D.C. Order was not final, the D.C. Circuit dismissed the appeal for lack of appellate jurisdiction.<sup>63</sup>



The Lake Lanier side of Buford Dam.

In 2006, the D.C. Court entered final judgment<sup>64</sup> and another appeal ensued. In February of 2008, the D.C. Circuit found for Alabama and Florida, holding that under the Water Supply Act of 1958<sup>65</sup> the Corps must obtain prior congressional approval before undertaking “major ... operational changes.”<sup>66</sup> Further, because the D.C. Agreement’s reallocation of Lake Lanier’s storage space constituted a major operational change on its face and was not authorized by Congress, the D.C. Circuit reversed the D.C. Court’s approval of the D.C. Agreement.<sup>67</sup> In May of 2008, the D.C. Circuit denied a petition for rehearing.<sup>68</sup> Georgia petitioned the United States Supreme Court for a writ of certiorari on August 13, 2008.<sup>69</sup>

In November 2008, the Department of Justice filed its response to the State of Georgia’s petition for certiorari. Surprisingly, the DOJ acknowledged that the D.C. Circuit erred in setting aside the settlement agreement, “inaccurately determined the percentage change in the allocation of water” at Lake Lanier, and otherwise “improperly resolved” the “intensely factual question” of whether the implementation of the proposed settlement agreement would result in a major operational change.<sup>70</sup> Despite these assertions, the Justice Department’s brief urged the Supreme Court to deny the petition for writ of certiorari for three reasons. First, DOJ argued that the Corps had not taken any final agency action regarding water allocation so that there was no administrative record to review, and therefore hearing the case would “be both unnecessary and premature.”<sup>71</sup> Second, the Justice Department asserted that the decision below was not a question of substantial importance as there is “no conflict among the courts of appeals on the requirements of the Water Supply Act or the definition of major operational change,” and because the “precise issues presented here are very unlikely to recur.”<sup>72</sup> Finally, the Justice Department contended that the D.C. Circuit correctly applied precedent when it determined that Alabama and Florida had standing.<sup>73</sup> The Supreme Court denied certiorari on January 12, 2009.<sup>74</sup>

## E. Alabama Appeals and New Claims from Florida

In December of 2003, Georgia, the Corps, and ARC (which was not yet a party) appealed the Alabama Court’s October 15, 2003 preliminary injunction order.<sup>75</sup> In April of 2004, the Eleventh Circuit decided that, because the D.C. Court’s order approving the D.C. Settlement was issued during the pendency of the appeal in the Alabama case, it would stay the appeal to permit the Corps, Georgia, and Gwinnett County to file a motion in the Alabama Court seeking dissolution or modification of the preliminary injunction based upon the D.C. Order.<sup>76</sup> In February of the following year, the Alabama court declined to dissolve the injunction.<sup>77</sup> In finding that the D.C. Order had not caused any change in circumstances that would justify lifting the injunction, the Alabama Court said:

This court entered the injunction at issue because Alabama and Florida succeeded on the merits of demonstrating that negotiations that led to the D.C. agreement violated this court’s September 19, 1990 stay Order and, therefore, was unenforceable as against public policy; the injunction was necessary to prevent irreparable injury; the potential harm caused by the settlement agreement outweighed any harm the injunction might cause the defendants; and the

injunction was not adverse to the public interest.<sup>78</sup>

The Alabama Court also recognized that the 1990 Stay was vacated by the Corps’ September 2003 notice to that effect, but accorded that fact no weight because the Corps’ “transgression” had already occurred.<sup>79</sup>

In 2005, after another appeal, the Eleventh Circuit issued an opinion holding that the Alabama Court’s October 15, 2003 order granting the preliminary injunction against the D.C. Agreement and its February 18, 2005 order refusing to dissolve the injunction were abuses of discretion.<sup>80</sup> In vacating the injunction, the court found that Alabama and Florida did not establish either an imminent threat of irreparable harm or a substantial likelihood of prevailing on the merits.<sup>81</sup> Both states petitioned for certiorari to the U.S. Supreme Court, but the Court denied certiorari on Alabama and Florida’s argument that the Eleventh Circuit should have affirmed the injunction on the basis of the All Writs Act.<sup>82</sup>

In early 2006, Florida filed a Motion for Preliminary Injunction of Endangered Species Act Claims in the Alabama Court, which was denied for failure to show that the Corps’ actions caused an unlawful “take” of federally protected species.<sup>83</sup> Then, in March of 2007, all claims in the Alabama Case relating to the ACF River Basin were transferred to the Middle District of Florida to be consolidated with three other cases to become the Tri-State Water Wars Litigation.<sup>84</sup> The ACT claims remained in the Northern District of Alabama, and Florida was dismissed as an Intervenor Plaintiff. The ACT claims are still pending in the Northern District of Alabama.

## F. The Georgia Cases: Georgia v. U.S. Army Corps of Engineers<sup>86</sup>

The Corps’ failure to act on Georgia’s 2000 request asking the Corps to commit to making increased releases of water from Buford Dam until the year 2030 to assure a reliable municipal and industrial water supply to the Atlanta region resulted in Georgia’s lawsuit against the Corps in the Northern District of Georgia.<sup>87</sup> In February of 2001, after waiting approximately nine months for a response from the Corps, Georgia filed suit against the Corps in the Northern District of Georgia (the “Georgia Court”) (“Georgia I”).<sup>88</sup> The suit sought (1) an order compelling the Corps to grant its water supply request; (2) a declaration that the Corps has the authority, without additional congressional authorization, to grant the request; (3) a declaration that the Corps is subject to state law, which mandates that the Corps grant Georgia’s request; and (4) a declaration that, if applicable federal law prohibits the Corps from granting Georgia’s requests, then such federal law is unconstitutional on its face or as applied by the Corps.<sup>89</sup>

Florida filed a motion to intervene as a defendant and simultaneously filed a motion to dismiss or abate the proceedings, arguing that Georgia was seeking to effect a de facto partial apportionment of the water in the ACF Basin in violation of the ACF Compact.<sup>90</sup> Florida also asserted that if Georgia’s request was granted, less water would be available for uses in Florida.<sup>91</sup> The Georgia Court denied Florida’s motion to intervene on the ground that Florida has no legal interest in the subject matter because the controversy involved only intrastate water allocation and that the case would not impair Florida’s ability to protect its interests via the

ACF Compact or an equitable apportionment claim in the United States Supreme Court.<sup>92</sup>

The Hydropower Customers also filed a motion to intervene as a Defendant, arguing that, unlike hydropower, municipal and industrial water supply is not an established purpose of the Buford Dam project, and that granting Georgia's water supply request would reduce the availability of hydropower to their members.<sup>93</sup> The Hydropower Customers' motion to intervene was denied on the grounds that the case involved only the legal standards applicable to Lake Lanier and the legal relationship between the Corps and Georgia with respect to water allocation.<sup>94</sup> The Georgia Court further noted that denying the Hydropower Customers' motion to intervene would not preclude them from enforcing their rights under their contracts with the Corps.<sup>95</sup>

In August of 2002, the Eleventh Circuit reversed the Georgia Court's denial of Florida's and the Hydropower Customers' motions to intervene and remanded the case.<sup>96</sup> The court reasoned that "[a]lthough the remedy sought in Georgia's lawsuit may occur within Georgia's borders, it will have a practical effect upon water flowing in the Chattahoochee River ... to which Florida has a right."<sup>97</sup>

Meanwhile, in April of 2002, the Corps denied Georgia's water supply request, saying it lacked "legal authority to grant Georgia's request without additional legislative authority, because the request would involve substantial effects on project purposes and major operational changes."<sup>98</sup> Subsequently, motions to intervene by the Lake Lanier Association, Alabama, and the Water Supply Providers were granted, and Georgia I was abated and administratively closed pending final judgment in the Alabama case.<sup>99</sup> In April 2007, Georgia I was transferred to the Middle District of Florida for consolidation in the Tri-State Water Rights Litigation.<sup>100</sup>

In another case filed in June of 2006, *Georgia v. Army Corps of Engineers* ("Georgia II"),<sup>101</sup> the State of Georgia sought judicial review of the Corps' issuance of its March 2006 "Interim Operations at Jim Woodruff Dam and Release to the Apalachicola River In Support of Listed Mussels and Gulf Sturgeon" ("IOP").<sup>102</sup> The IOP, which was issued in connection with the Corps' initiation of formal consultation with the United States Fish and Wildlife Service ("FWS") under section 7 of the ESA,<sup>103</sup> set certain rules for the Corps' operation of the federal reservoirs in the ACF, including Lake Lanier, for the purpose of providing sufficient flow for three different aquatic species.<sup>104</sup> Georgia argued that the IOP involved the release of too much water downstream, was arbitrary and capricious, and exceeded the Corps' authority.<sup>105</sup> Alabama, Florida, and the Water Supply Providers were allowed to intervene.<sup>106</sup> Georgia II was subsequently transferred to the Middle District of Florida for consolidation in the Tri-State Water Rights Litigation.<sup>107</sup>

## G. Consolidation of Cases: *In re Tri-State Water Rights Litigation*<sup>108</sup>

In the spring of 2007, Georgia I, Georgia II and the ACF Claims in the Alabama case were consolidated in the Middle District of Florida (the "Florida Court"), along with *Florida v. U.S. Fish and Wildlife Service*.<sup>109</sup> In the latter case, the State of Florida sought review of a September 2006 Biological Opinion by the FWS concluding consultation with the Corps pursuant to Section 7 of

the ESA.<sup>110</sup> The Biological Opinion ("BiOp") addressed the impact of the Corps' reservoir operations in the ACF on the three protected species discussed in the IOP.<sup>111</sup> The BiOp concluded that the IOP was not likely to adversely affect the species.<sup>112</sup> Florida argued that the BiOp was arbitrary and capricious and sought an injunction directing FWS to withdraw the BiOp and prepare a new one that complies fully with the ESA.<sup>113</sup>

Judge Paul A. Magnuson of the District of Minnesota was appointed to hear the consolidated cases. The issues were divided into two categories. One category consisted of issues surrounding the use of Lake Lanier for water supply, including the original purposes of the reservoir and the Water Supply Act of 1958. The second category consisted of the Corps' overall management of the ACF system, including compliance with NEPA and the Endangered Species Act. In August of 2008, Judge Magnuson ordered that, in light of the D.C. Circuit's February 2008 decision that some of the water-supply contracts constitute a major operational change for which the parties are required to seek congressional approval, and in light of the issuance of the revised IOP and BiOp in June of 2008, he would first consider the statutory authorization issues, rather than issues surrounding the BiOp.<sup>114</sup>

## The Magnuson Decision – July 17, 2009

After briefing and a hearing on the first phase of the litigation in May 2009, Judge Magnuson issued a momentous ruling in the case on July 17, 2009.<sup>115</sup> The court first conducted a review of the legislative history behind the authorization of Buford Dam and concluded that the dam was authorized only for flood control, navigation, and hydropower, and not for water supply.<sup>116</sup> Having reached that conclusion, the court turned to the Water Supply Act of 1958, which allows federal reservoirs to be used for water supply even if they were not originally authorized for such use, provided that "[m]odifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage [for water supply] which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress..."<sup>117</sup> The court found that the decision by the Corps to allocate waters in Lake Lanier for water supply constituted a major operational change that seriously affected the project's original purposes and that therefore the Corps was required to obtain congressional approval before moving forward with the water supply contracts.<sup>118</sup>

Magnuson gave the parties three years from the date of the opinion to obtain congressional approval to use Lake Lanier for water supply. At the end of three years, absent congressional approval, the Corps must return to operating the dam as it did in the mid-1970s, which is the time after which the court determined that the lake began to be improperly used for water supply.<sup>119</sup>

Since that decision was issued, the Georgia parties have appealed to the Eleventh Circuit, which agreed that it had jurisdiction over the case on January 20, 2010.<sup>120</sup> The appeals court stated that Judge Magnuson's opinion constituted a final judgment insofar as it was dispositive of the Georgia I case, and it accepted pendent jurisdiction over the other cases affected by the opinion because they were inextricably intertwined.<sup>121</sup> The appeal is currently in

the middle of briefing, with both the Georgia parties and the federal defendants having submitted grounds for Judge Magnuson's decision to be reversed. These include the draconian nature of the district court's order, the parties' contention that Lake Lanier was in fact authorized for water supply, and the argument that water supply withdrawals are still authorized by the Water Supply Act even if the lake was not originally authorized for such a use. Alabama and Florida filed responses to the briefs in June 2010, and briefing will continue through the summer.

Meanwhile, the multi-district litigation is continuing in the district court. Phase 2 of the litigation, which revolves around the Corps' Revised Interim Operating Plan, was briefed during the spring of 2010, with a hearing on June 8, 2010. Virtually all non-federal parties have challenged the Corps' operating plan, alleging that it violates NEPA and, according to Florida, the Endangered Species Act. A ruling on Phase 2 of the litigation could once again significantly change the legal landscape in this complex and high-stakes case over the future of interstate water allocation in the Southeast.

#### (Endnotes)

- 1 The synopsis of the litigation through 2008 is derived largely from Stephen E. O'Day et al., *Wars between the States in the 21st Century: Water Law in an Era of Scarcity*, 10 *Vt. J. Envtl. L.* 230 (2009).
- 2 *Rivers and Harbors Act of 1945*, Pub. L. 19, 59 Stat. 17 (1945).
- 3 *Rivers and Harbors Act of 1946*, Pub. L. 595, 60 Stat. 634 (1946).
- 4 *Southeastern Fed. Power Customers, Inc. v. Harvey*, 400 F.3d 1, 2 (D.C. Cir. 2005).
- 5 *Southeastern Fed. Power Customers, Inc. v. Caldera*, 301 F. Supp. 2d 26, 28 (D.D.C. 2004).
- 6 *Id.*; *Harvey*, 400 F.3d at 2.
- 7 *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1122 (11th Cir. 2005).
- 8 *Caldera*, 301 F. Supp. at 29.
- 9 *Alabama v. U.S. Army Corps of Eng'rs*, 382 F.Supp. 2d 1301, 1304 (N.D. Ala. 2005).
- 10 *U.S. Army Corps of Eng'rs*, 424 F.3d at 1123.
- 11 Josh Clemons, *Interstate Water Disputes: A Roadmap for States*, National Sea Grant Law Center, 2004, available at <http://masglp.olemiss.edu/acf.htm> (last visited June 22, 2010); Alabama Rivers Alliance, *Waters Wars Background*, <http://www.alabamarivers.org/current-work/water-wars/water-wars-background> (last visited June 22, 2010).
- 12 *Apalachicola-Chattahoochee-Flint River Basin Compact*, Pub. L. No. 105-104, 111 Stat. 2219 (1997) [ACF Compact]; O.C.G.A. § 12-10-100; Ala. Code § 33-19-1; Fla. Stat. § 373.71 (1997).
- 13 *Alabama-Coosa-Tallapoosa River Basin Compact*, Pub. L. No. 105-105, 111 Stat. 2233 (1997) [ACT Compact]; O.C.G.A. § 12-10-110; Ala. Code § 33-18-1.
- 14 ACF Compact, *supra* note 12, at art. I; ACT Compact, *supra* note 13, at art. I.
- 15 ACF Compact, *supra* note 12, at art. VII; ACT Compact, *supra* note 13, at art. VII.
- 16 *Southeastern Fed. Power Customers, Inc. v. Caldera*, 301 F. Supp. 2d 26, 29 (D.D.C. 2004); Press Release, Office of Governor Bob Riley, *Riley: Georgia Positions Unacceptable* (Aug. 2, 2004), available at <http://www.governorpress.state.al.us/pr/pr-2004-08-02-01-watercompact.asp>.
- 17 *Georgia v. U.S. Army Corps of Eng'rs*, 223 F.R.D. 691, 693 (N.D. Ga. 2004).
- 18 *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1247 (11th Cir. 2002).
- 19 *Georgia v. U.S. Army Corps of Eng'rs*, No. 2:01-cv-0026 (N.D. Ga. filed Feb. 7, 2001). Georgia sought (1) an order compelling the Corps to grant its water supply request; (2) a declaration that the Corps has the authority, without additional congressional authorization, to grant its request; (3) a declaration that the Corps is subject to state law insofar as it does not conflict with federal law and that state law mandates that the Corps grant the request; and (4) a declaration that, if applicable federal law prohibits the Corps from granting Georgia's request, then such federal law is unconstitutional on its face or as applied to the Corps.
- 20 *Southeastern Fed. Power Customers, Inc. v. U.S. Army Corps of Eng'rs*, No. 1:00-cv-02975 (D.D.C. Oct. 9, 2003); *Caldera*, 301 F.Supp.2d at 30.
- 21 *Southeastern Fed. Power Customers, Inc. v. U.S. Army Corps of Eng'rs*, No. 1:00-cv-02975 (D.D.C. Oct. 9, 2003) (order granting Florida's motion to intervene); *Alabama v. U.S. Army Corps of Eng'rs*, No. 1:90-cv-01331 (N.D. Ala. Sept. 10, 2003) (order granting Florida's motion to intervene).
- 22 See *Alabama v. U.S. Army Corps of Eng'rs*, No. 1:90-cv-01331 (N.D. Ala. Jan. 31, 2006) (brief in support of Florida's motion for preliminary injunction on Endangered Species Act claims); *Alabama v. U.S. Army Corps of Eng'rs*, 441 F. Supp. 2d 1123, 1125 (N.D. Ala. 2006).
- 23 *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1248 (11th Cir. 2002).
- 24 *Id.* at 1250.
- 25 *Georgia v. U.S. Army Corps of Eng'rs*, 223 F.R.D. 691, 692 (N.D. Ga. 2004).
- 26 42 U.S.C. § 4321 et seq.
- 27 Andy Peters, *New Water Plan Floats No One's Boat*, *Fulton County Daily Report*, June 17, 2008, at 11.
- 28 *Alabama v. U.S. Army Corps of Eng'rs*, No. 1:90-cv-01331 (N.D. Ala. filed June 28, 1990).
- 29 *Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1304 (N.D. Ala. 2005).
- 30 *Id.*
- 31 42 U.S.C. § 4321 et seq.
- 32 *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1123 (11th Cir. 2005).
- 33 *U.S. Army Corps of Eng'rs*, 382 F. Supp.2d at 1304.
- 34 *U.S. Army Corps of Eng'rs*, 424 F.3d at 1123.
- 35 *Id.*
- 36 *U.S. Army Corps of Eng'rs*, 382 F. Supp. at 1304-

- 1305.
- 37 Southeastern Fed. Powers Customers Inc. v. Caldera, No. 1:00-cv-02975 (D.D.C. filed Dec. 12, 2000).
- 38 Southeastern Fed. Powers Customers, Inc. v. Caldera, 301 F. Supp. 2d 26, 30 (D.D.C. 2004).
- 39 Id.
- 40 43 U.S.C. § 390(b).
- 41 Caldera, 301 F. Supp.2d at 29.
- 42 Id.
- 43 *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1124 (11th Cir. 2005).
- 44 Caldera, 301 F. Supp. 2d at 30.
- 45 Southeastern Fed. Power Customers, Inc. v. Harvey, 400 F.3d 1, 2 (D.C. Cir. 2005).
- 46 Caldera, 301 F. Supp. 2d at 30.
- 47 Harvey, 400 F.3d at 3.
- 48 Id.
- 49 Id.; *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1124 (11th Cir. 2005).
- 50 Harvey, 400 F.3d at 3.
- 51 *U.S. Army Corps of Eng'rs*, 424 F.3d at 1124; *Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1305 (N.D. Ala. 2005); Caldera, 301 F. Supp. 2d at 30.
- 52 Caldera, 301 F. Supp. 2d at 28.
- 53 *U.S. Army Corps of Eng'rs*, 424 F.3d at 1125.
- 54 *U.S. Army Corps of Eng'rs*, 382 F. Supp.2d at 1306.
- 55 *U.S. Army Corps of Eng'rs*, 424 F.3d at 1125; Harvey, 400 F.3d at 3.
- 56 *U.S. Army Corps of Eng'rs*, 424 F.3d at 1126.
- 57 Id.
- 58 Southeastern Fed. Powers Customers, Inc. v. Caldera, 301 F. Supp. 2d 26, 35 (D.D.C. 2004).
- 59 **U.S. Army Corps of Eng'rs**, 424 F.3d at 1126 n.13.
- 60 Harvey, 400 F.3d at 2.
- 61 Id. at 4.
- 62 Id.
- 63 Id.
- 64 Southeastern Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316, 1320 (D.C. Cir. 2008).
- 65 43 U.S.C. § 390(b).
- 66 Geren, 514 F.3d at 1318.
- 67 Id.
- 68 Southeastern Fed. Power Customers v. Geren, No. 06-5080 (D.C. Cir. May 15, 2008) (order denying petition for rehearing).
- 69 Petition for Writ of Certiorari, *Georgia v. Florida*, 129 S. Ct. 898 (S. Ct. August 13, 2008) (No. 08-199).
- 70 Brief for the Federal Respondents in Opposition at 5, *Georgia v. Florida*, 129 S. Ct. 898 (Nov. 17, 2008) (No. 08-199).
- 71 Brief for the Federal Respondents in Opposition, supra note 70, at 8-9.
- 72 Brief for the Federal Respondents in Opposition, supra note 70, at 10.
- 73 Brief for the Federal Respondents in Opposition, supra note 70, at 11-12.
- 74 *Georgia v. Florida*, 129 S. Ct. 898 (2009).
- 75 *Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1306 (N.D. Ala. 2005).
- 76 *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1127 (11th Cir. 2005).
- 77 *Alabama v. U.S. Army Corps of Eng'rs*, 357 F. Supp. 2d 1313, 1320-1321 (N.D. Ala. 2005).
- 78 Id. at 1317.
- 79 Id. at 1317 n.3.
- 80 *U.S. Army Corps of Eng'rs*, 424 F.3d at 1136.
- 81 Id. at 1133.
- 82 *Alabama & Florida v. U.S. Army Corp of Eng'rs*, 547 U.S. 1192 (2006).
- 83 *Alabama v. Army Corps of Eng'rs*, 441 F. Supp. 2d 1123, 1124 (N.D. Ala. 2006).
- 84 *Georgia v. U.S. Army Corps of Eng'rs*, No. 2:01-cv-00026 (N.D. Ga. Apr. 6, 2007) (order by Judicial Panel on Multi-District Litigation transferring Georgia I to the Middle District of Florida).
- 85 *Alabama v. U.S. Army Corps of Eng'rs Eng'rs*, No. 1:90-cv-01331 (N.D. Ala. Apr. 19, 2007) (order severing ACT claims and dismissing Florida as an Intervenor Plaintiff).
- 86 *Georgia v. U.S. Army Corps of Eng'rs*, No. 2:01-cv-00026 (N.D. Ga. filed Feb. 7, 2001); *Georgia v. U.S. Army Corps of Eng'rs*, No. 1:06-01473 (N.D. Ga. filed June 20, 2006).
- 87 *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1247 (N.D. Ga. 2002).
- 88 *Georgia v. U.S. Army Corps of Eng'rs*, No. 2:01-cv-00026 (N.D. Ga. filed Feb. 7, 2001).
- 89 Id. at 1248.
- 90 Id. at 1247.
- 91 Id.
- 92 Id.
- 93 Id.
- 94 Id. at 1249.
- 95 Id.
- 96 Id. at 1242.
- 97 Id. at 1251.
- 98 Id. at 1249.
- 99 *Georgia v. U.S. Army Corps of Eng'rs*, No. 2:01-cv-00026 (N.D. Ga. July 20, 2004) (order granting motion to abate proceeding and motion to intervene).
- 100 *Georgia v. U.S. Army Corps of Eng'rs*, No. 2:01-cv-00026 (N.D. Ga. Apr. 6, 2007) (order by Judicial Panel on Multi-District Litigation transferring Georgia I to the Middle District of Florida).
- 101 *Georgia v. U.S. Army Corps of Eng'rs*, No. 1:06-01473 (N.D. Ga. filed June 20, 2006).
- 102 Georgia II Complaint at 4, *Georgia v. U.S. Army Corps of Eng'rs*, No. 1:06-01473 (N.D. Ga. June 20, 2006).
- 103 Endangered Species Act, 16 U.S.C. § 1531 et seq.
- 104 Georgia II Complaint, supra note 102, at 4-5.
- 105 Georgia II Complaint, supra note 102, at 5.
- 106 *Georgia v. U.S. Army Corps of Eng'rs*, No. 1:06-01473 (N.D. Ga. Nov. 6, 2006) (order granting motion to intervene); *Georgia v. U.S. Army Corps of Eng'rs*, No. 1:06-01473 (N.D. Ga. Nov. 8, 2006) (order granting motion to intervene).

- 107 *Georgia v. U.S. Army Corps of Eng'rs*, No. 1:06-01473 (N.D. Ga. Apr. 10, 2007) (transfer order).
- 108 *In re Tri-State Water Rights Litig.*, No. 3:07-md-00001 (M.D. Fla. transferred Mar. 21, 2007).
- 109 *Florida v. U.S. Fish & Wildlife Serv.*, No. 4:06-410 (N.D. Fla. filed Sept. 6, 2006).
- 110 Florida Complaint, *Florida v. U.S. Fish & Wildlife Serv.*, No. 4:06-410 (N.D. Fla. filed Sept. 6, 2006).
- 111 Florida Complaint, *supra* note 110, at 1-2.
- 112 Florida Complaint, *supra* note 111, at 2.
- 113 Florida Complaint, *supra* note 110, at 2-3. On June 19, 2008, the Florida Department of Environmental Protection sent a 60-Day Notice of Intent to Sue Pursuant to the Endangered Species Act. This was Florida's fourth such letter since 2004. The letter indicates that Florida intends to sue the Corps for violations of the ESA Sections 7 and 9 "arising from the Corps' management of reservoirs in the Apalachicola-Chattahoochee-Flint River Basin." The letter alleges that "[t]he Corps' operation continues to jeopardize the threatened Gulf sturgeon, endangered fat threeridge and threatened purple bankclimber." See Letter from Florida Department of Environmental Protection to Federal Officials (June 19, 2008) (providing 60-day notice of intent to sue pursuant to the Endangered Species Act). The Endangered Species Act issues Florida raises were heard by Judge Magnuson in the consolidated litigation described *infra* on June 8, 2010.
- 114 *In re Tri-State Water Rights Litig.*, No. 3:07-md-0001 (M.D. Fla. Aug. 12, 2008) (order granting motion to lift suspension of the present scheduling order and flip phases I and II).
- 115 *In re Tri-State Water Rights Litig.*, 639 F. Supp.2d 1308 (M.D. Fla. 2009).
- 116 *In re Tri-State Water Rights Litig.*, 639 F. Supp.2d at 1347.
- 117 43 U.S.C. § 309b(d).
- 118 *In re Tri-State Water Rights Litig.*, 639 F. Supp.2d at 1347-1355.
- 119 *Id.* at 1355.
- 120 *In re MDL-1824 Tri-State Water Rights Litig.*, No. 09-14657-GG, slip. op. at 4-5 (11th Cir. Jan. 20, 2010).
- 121 *Id.*

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