PERSPECTIVES
on Georgia's Environment
A Publication of the Environmental Law Section of the State Bar of Georgia Summer 2017

Coal Ash Disposal: An Overview of Current Legal Requirements in Georgia

By April Lipscomb, Staff Attorney, Southern Environmental Law Center and
Chris Manganiello, Water Policy Director, Chattahoochee Riverkeeper

Introduction

In the early morning hours of Dec. 22, 2008, a dike failed at the Tennessee Valley Authority's Kingston Fossil Plant, sending 5.4 million cubic yards of coal ash into the Emory and Clinch Rivers and over 300 acres of land.[1] The ash knocked homes off their foundations, completely destroying three of them, and snapped trees in half. Luckily, there were no injuries. As the largest coal-ash spill in United States history, the Kingston spill released more coal ash into the environment than the Deepwater Horizon accident released oil into the Gulf of Mexico.[2]

Coal ash, or coal combustion residuals (CCR), is the waste left behind from burning coal to generate electricity and includes fly ash, bottom ash, boiler slag, and flue gas desulfurization waste.[3] The composition of coal ash varies, but it generally contains toxic heavy metals like arsenic, cadmium, chromium, lead, mercury, and selenium.[4] Coal-fired power plants across the country traditionally have stored coal ash in unlined settling ponds right next to rivers and lakes, separated only by earthen dams. Most of these coal ash ponds were constructed before modern environmental regulations or before the dangers posed by these storage practices were better understood, and many were built over streams or karst terrain. Karst topography is characterized by underground drainage features such as sinkholes and caves, not suitable for long-term storage of CCR. Indeed, not only have coal ash ponds released pollutants into adjacent waterways, they have also leached toxic metals such as arsenic into underlying soils and groundwater to hydrologically connected adjacent surface waters, as a federal judge recently ruled following a bench trial in Virginia.[5,6]

Here in Georgia, several significant spills and leaks have been reported from coal ash ponds at Georgia Power Company facilities. In the 1970s, coal ash ponds at Plant Mitchell in Albany drained repeatedly as a result of numerous sinkholes.[7] In 2002, a separate sinkhole opened beneath the coal ash pond at Plant Bowen in Cartersville, spilling 2.25 million gallons of ash-laden water into a tributary of Euharlee Creek.[8] In 2008, heavy rains caused 40 tons of coal ash to spill from Plant Bowen's pond and into a neighboring community.[9] More recently, a property owner allowed Georgia Power to excavate a portion of his land that ran along the edge of Plant McManus's pond after being told that coal ash constituents could have migrated onto his property with groundwater.[10]

The risks—and realities—of storing coal ash in unlined ponds next to waterways have prompted numerous laws and regulations aimed at preventing surface water and groundwater contamination from coal ash in the future. This article examines the current regulatory scheme for coal ash disposal, discusses current activities surrounding coal ash disposal in Georgia, and offers suggestions for improving coal ash regulations to better protect communities and drinking water resources from coal ash contamination.

Regulation of Coal Ash before the TVA's Kingston Spill

The federal Resource Conservation and Recovery Act (RCRA) generally governs the handling and disposal of industrial and household waste in this country, either through Subtitle C for hazardous waste or Subtitle D for solid waste.[11] But in 1980, the Bevill Amendment (part of the Solid Waste Disposal Act Amendments) temporarily exempted coal ash from all regulation under RCRA until the Environmental Protection Agency (EPA) conducted a formal risk assessment to determine whether coal ash should be classified as a solid waste or a hazardous waste.[12]

In the early 1980s, the EPA began studying coal ash, but it took decades and legal action before the agency reached any conclusions.[13] In 1993, the EPA decided that coal ash should not be regulated as a hazardous waste under Subtitle C of RCRA. Seven years later, in 2000, the EPA announced that it would revisit that determination and suggested establishing minimal standards for coal ash disposal under Subtitle D of RCRA.[14] The agency did neither.

The Aftermath of Kingston

Then, in December 2008, the dike at the TVA Kingston Fossil Plant failed, resulting in the most devastating coal-ash spill in the nation's history. In the wake of that catastrophe, the EPA promised "to gather critical coal ash impoundment information from electrical utilities nationwide, conduct on-site assessments to determine structural integrity and vulnerabilities, order cleanup and repairs where needed, and develop new regulations for future safety."[15]

In June 2010, the EPA released a draft rule that contained two options for regulating coal ash: the first option regulated coal ash as a hazardous waste under Subtitle C of RCRA; the second option regulated coal ash as a solid waste under Subtitle D, subjecting it to national minimal criteria.[16] Following a lengthy public comment period and litigation over the process, the EPA announced it would issue its final rule by Dec. 19, 2014.[17]

Just four days after EPA made that announcement, the third-largest coal ash spill in U.S. history occurred. On Feb. 2, 2014, a stormwater pipe underneath a coal ash pond at Duke Energy's retired Dan River Steam Plant in Eden, N.C. burst, causing the release of 39,000 tons of coal ash directly into the Dan River.[18]

With additional pressure exerted as a result of the Dan River spill, the EPA met its promised deadline of Dec. 19, 2014 and released its final CCR rule.[19] The final CCR rule regulates coal ash as non-hazardous, solid waste under Subtitle D of RCRA. Accordingly, the federal CCR rule establishes national minimum criteria for coal ash handling and disposal.[20] Notably, the EPA treats the rule as self-implementing: no federal permits are needed, states are not required to adopt the minimal standards, and EPA lacks authority to enforce the standards.[21] Instead, citizens or states may enforce the requirements under RCRA's citizen-suit provision.[22] The initial rule took effect on Oct. 19, 2015, and an amended version took effect on Oct. 4, 2016.[23]

The federal CCR rule applies to owners and operators of new and existing coal ash ponds and landfills that receive CCR generated from the combustion of coal at electric utilities and independent power producers.[24] The rule also applies to inactive coal ash ponds at active power plants if the ponds still contain CCR and liquids.[25] The rule does not apply to municipal solid waste landfills that receive CCR.[26] The minimum national standards established under the rule include location restrictions for coal ash ponds and landfills; design criteria, such as liners and leachate collection systems and periodic hazard and stability assessments; operating criteria, including plans to prevent CCR from becoming airborne; groundwater monitoring and corrective action requirements; closure and post-closure care requirements; and recordkeeping and notification requirements, among others.[27] The federal CCR rule also encourages and promotes the beneficial use of coal ash.[28]

Georgia's Coal Ash Regulations

Beginning in 2015, the Environmental Protection Division (EPD) of the Georgia Department of Natural Resources (DNR) began contemplating state-level regulations for the disposal of coal ash at power plants and in municipal solid waste landfills (MSWLs). To provide some perspective, Georgia Power Company has 29 coal ash ponds of various sizes at 11 different plants within Georgia.[29] The largest of the ponds, at Plant Scherer, occupies 553 acres and contains a staggering 2.95 billion gallons of wastewater.[30] The Crisp County Power Commission, the only other electric utility to own coal ash ponds in Georgia, has a coal ash pond along the Flint River at Lake Blackshear.

While EPD was drafting its CCR regulations, Republic Service's Broadhurst Environmental Landfill (Broadhurst) near Jesup, Georgia, became the leading example of the necessity for more stringent coal-ash regulations in Georgia, and the public's increasing awareness of coal-ash issues in general. In 2011, nearby residents discovered that toxic metals long-associated with coal ash had leached into the soil and groundwater in the vicinity of the Broadhurst facility.[31] The community was outraged by the lack of public notice of the contamination, and residents were alarmed that coal ash had been trucked to Broadhurst from out-of-state for years without their knowledge.[32] Significant public outcry led to the passage of legislation requiring MSWL operators to provide public notice to local governments of contamination that poses a danger to human health.[33]

The Broadhurst controversy did not stop there. The community also discovered that the landfill had applied for permits to build a rail spur through wetlands in order to receive up to 10,000 tons of coal ash per day.[34] Various groups in and around Jesup launched sophisticated campaigns aimed at stopping those permits and preventing the disposal of any coal ash at Broadhurst.

In light of the federal CCR rule, the enormous quantities of coal ash produced in the state, and recent disputes over the disposal of coal ash in MSWLs, EPD proposed adopting most of the federal CCR rule by reference and establishing a permitting program for utility-owned coal ash disposal facilities.[35] EPD's draft regulations, issued in July 2016, also included a few separate requirements for MSWLs receiving coal ash.[36] The DNR Board adopted the amendments essentially unchanged. Georgia's CCR regulations took effect on Nov. 22, 2016.[37]

The state regulations incorporate most of the federal CCR rule by reference, cover certain types of facilities not covered by the federal CCR rule, require permits for all utility-owned coal ash ponds and landfills, and require MSWLs receiving coal ash to incorporate a "CCR management plan" into their design and operation plans.[38] Generally, Georgia's CCR regulations are broader and stricter than the federal CCR rule in certain respects. Notably, Georgia's state-level regulations do not replace the federal CCR rule; energy utilities and independent power producers in Georgia are required to comply with both sets of regulations.

The WIIN Act

In response to concerns over how the federal CCR rule could be enforced, as well as questions surrounding how state and federal CCR regulations interact, Congress passed Section 2301 of the Water Infrastructure Improvements for the Nation Act (WIIN Act), P.L. 114-322, in December 2016.[39] Section 2301 authorizes states to implement and enforce the federal CCR rule through EPA-approved state permit programs. State programs must be at least as protective as the federal CCR rule, and EPA may regulate coal ash in states that choose not to implement state permitting programs and in states whose permitting programs are deemed inadequate.[40] On May 1, 2017, EPA Administrator

Scott Pruitt sent a letter informing states that EPA is working on guidance for state permitting programs.[41]

Under this regulatory scheme, Georgia would likely seek EPA's approval for its coal ash permitting program. But the future of the federal CCR rule is unclear. On May 12, 2017, the Utility Solid Waste Activities Group, a consortium of utility operating companies, filed a petition asking EPA Administrator Scott Pruitt to reconsider broad sections of the federal CCR, asserting they are overly burdensome.[42] And other groups have encouraged the modification, revision, and/or repeal of the federal CCR rule in comments submitted to EPA following recent Executive Orders on regulatory reform.[43]

So what does that mean for coal ash disposal in Georgia?

Even if the federal CCR rule is eventually modified or repealed, electric utilities and independent power producers in Georgia will still have to comply with EPD's regulations. And that effort is already underway.

In 2016, Georgia Power announced plans to cease operating and storing coal ash in all 29 of its coal ash ponds within three years, in ways it has characterized as going above and beyond its legal requirements.[44] The utility also stated it will excavate the ash from 17 of the ponds that are directly next to rivers and lakes.[45] The ash from those ponds will be relocated to a permitted landfill, consolidated with ash in remaining ponds that will be closed in place, or recycled for beneficial use.[46] Georgia Power did not specify whether any ash would be relocated to MSWLs in Georgia. The company's remaining 13 ponds, among its largest in size by far, will be closed in place using "advanced engineering methods," which involves installing purportedly impermeable concrete barriers intended to restrict or isolate the ponds from groundwater,[47] although the precise technical specifics have not been made publicly available.

As of the date of this article, at least six MSWLs have EPD-approved CCR management plans and may receive or continue to receive coal ash.[48] Notably, Broadhurst has withdrawn its permit applications for the rail spur, noting that it wants to be a good neighbor and has no plans to receive coal ash in the near future. It does not have an approved CCR management plan.

Additional Recommendations for Protecting Surface and Ground Water

The federal CCR rule and Georgia's CCR permitting program are critical steps in the right direction to prevent future catastrophic coal ash spills and to minimize groundwater contamination, providing a long-overdue minimal level of requirements where none had previously existed. Yet several concerns remain. First, toxic heavy metals from coal ash ponds throughout the nation and in Georgia have seeped into adjacent soils and underlying groundwater.[49] Neither the federal CCR rule nor Georgia's solid waste regulations prohibit the continued use of existing, unlined coal ash ponds, unless the ponds fail to meet certain siting and other requirements. Similarly, both sets of regulations allow coal ash ponds to be closed by dewatering the ponds and then capping the ponds in place. Even if ponds are closed with as-yet unspecified "advanced engineering methods," uncertainty remains concerning whether those ponds will feature adequate (or any) bottom liners, which consequently poses unnecessary risk of groundwater and other contamination.

The best option for preventing sudden spills and slower releases of CCR pollutants to the environment via groundwater is to require all coal ash be excavated and disposed of in lined, permitted landfills away from surface water and groundwater resources, as is being done in South Carolina.[50]

A second concern involves the coal ash pond closure process. During that process, all of the water in coal ash ponds must be removed, a process known as dewatering. Coal ash pond water contains a wide variety of heavy metals, with a relatively higher concentration of pollutants contained within the lower levels of these waste storage ponds. The federal CCR rule and Georgia's CCR regulations are silent on the dewatering process. Although the Clean Water Act requires National Pollutant Discharge Elimination System (NPDES) permits for the release of pollutants from surface waters adjacent to these ponds, which includes releases stemming from dewatering activities, Georgia Power has not sought, and EPD has not yet required, a separate or modified NPDES permit for these dewatering activities to date. Rather, Georgia Power has obtained state agency approval to perform additional wastewater treatment at pond dewatering sites as set forth in "Dewatering Plans" that require periodic monitoring, but that impose no effluent limitations and whose terms are not subject to advance public notice or opportunity for public comment.

Finally, the disposal of coal ash in MSWLs has stirred up significant local opposition in Georgia, particularly in Jesup. Although coal ash disposal in lined, permitted landfills is preferred over wet storage in ponds, not all MSWLs are suited for coal ash disposal. MSWLs receiving coal ash should have to meet the same location restrictions as CCR landfills owned by utilities, which is not currently the case. For instance, no MSWL receiving coal ash should be constructed with a base that is less than five feet from the uppermost aquifer. In addition, MSWLs receiving significant amounts of coal ash should be required to apply for a major permit modification of their existing solid waste handling permits, triggering public notice and comment. By notifying the public and giving them an opportunity to participate, the state can avoid another Broadhurst.

Conclusion

Over the next year, expect to see a lot of movement at the federal, state, and local levels concerning coal ash disposal, whether through litigation, rulemaking, legislation, public hearings, or community-led events. Clean water and human health are not partisan issues. All across Georgia, communities adjacent to coal ash ponds and landfills, and the people who seek fishable, drinkable, and swimmable water should engage. The future of our communities and the environment is too important.

(Endnotes)

1 Duane Gang, *5 Years After Coal-Ash Spill, Little Has Changed*, USA Today, Dec. 22, 2013), *at* https://www.usatoday.com/story/news/nation/2013/12/22/coal-ash-spill/4143995/.

2 *Id.*

3 EPA, Coal Ash Basics, https://www.epa.gov/coalash/coal-ash-basics.

4 EPA, Hazardous & Solid Waste Mgmt. System; Identification & Listing of Special Wastes; Disposal of Coal Combustion Residuals

from Electric Utilities; Proposed Rule, 75 Fed. Reg. 35,127, 35,138 (Jun. 21, 2010).

5 *Id.* at 35,146.

6 *Sierra Club v. Virginia Electric and Power Co. d/b/a Dominion Virginia Power*, No. 2:15-CV-112, 2017 WL 1095039 (E.D. Va. March 23, 2017). Defendant has subsequently filed a Notice of Appeal and Plaintiff has filed Notice of Cross Appeal as of April 2017.

7 Willoughby Mariano, *Ga.'s Coal Ponds a 'Lurking Disaster'*, The Atlanta Journal-Constitution, Nov. 7, 2015, *at* http://www.myajc.com/news/state--regional/georgia-coal-ponds-lurking-disaster/1gnfrTkZSpxYQMbsD7pAkN/.

8 *Id.*

9 *Id.*

10 Terry Dickson, *Power Plant Coal Ash Removal Will Take Until 2018*, The Florida Times-Union, May 23, 2017, *at* http://jacksonville.com/news/georgia/2017-05-23/power-plant-coal-ash-removal-will-take-until-2018.

11 *See* Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, 6921 through 6949a (2017)

12 *See* EPA, *supra* note 4, at 35,136.

13 *Id.* at 35,136–37.

14 *Id.* at 35,137.

15 Press Release, EPA, EPA Announces New Action to Prevent Coal Ash Releases (Mar. 9, 2009), *available at* https://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/b2856087389fb82485257574007409c1!OpenDocument.

16 EPA, *supra* note 4, at 35,127.

17 Consent Decree at 5, Appalachian Voices v. McCarthy (D.D.C. 2014) (No. 1:12-cv-523), *available at* http://earthjustice.org/sites/default/files/files/044-1-Consent-Decree.pdf.

18 Bruce Henderson, *Timeline: Dan River Coal Ash Spill*, The News & Observer, Feb. 20, 2015, *at* http://www.newsobserver.com/news/local/article10883951.html.

19 *See* EPA, Hazardous & Solid Waste Mgmt. System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,301 (Apr. 17, 2015).

20 *Id.*

21 https://www.epa.gov/coalash/frequent-questions-about-coal-ash-disposal-rule.

22 *Id.*

23 EPA, Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities, https://www.epa.gov/coalash/coal-ash-rule.

24 40 C.F.R. § 257.50(b).

25 *Id.* § 257.50(c).

26 *Id.* § 257.50(i).

27 *Id.* §§ 257.50 through 257.107.

28 *Id.* § 257.53 (definition of beneficial use); *see also* https://www.epa.gov/coalash/coal-ash-reuse (Coal ash can be recycled and incorporated into building materials, such as concrete, roofing materials, and bricks.).

29 https://www.georgiapower.com/environment/ash.cshtml.

30 Todd Barber, Report of Annual Inspection of CCR Surface Impoundment 1 (Aug. 27, 2015) (on file with author).

31 Dan Chapman, *Ga. to Consider Own Rules for Handling Toxic Coal Ash*, The Atlanta Journal-Constitution, May 11, 2016, *at* http://www.myajc.com/news/state--regional-govt--politics/georgia-consider-own-rules-for-handling-toxic-coal-ash/KsnPVKGocKMO3e1Q03z9YL/.

32 *See* Dan Chapman, *Coal Ash Landfill Riles S. Ga.*, The Atlanta-Journal Constitution, Apr. 9, 2016, *at* http://www.ajc.com/news/state--regional/coal-ash-landfill-riles-south-georgia/87SeFI3rYDRzmhEWGsKI9O/.

33 Ga. Code Ann. § 12-8-24.3.

34 Chapman, *supra* note 31.

35 Environmental Protection Division, Georgia Department of Natural Resources, *Proposed Amendments to the Rules of the Dep't of Natural Res. Envtl.Prot. Div. Relating to Solid Waste Mgmt., Ch. 391-3-4*, *at* https://epd.georgia.gov/sites/epd.georgia.gov/files/Proposed percent20Rule.pdf.

36 *Id.*

37 Ga. Comp. R. & Regs. r. 391-3-4-.10 (2016).

38 Ga. Comp. R. & Regs. r. 391-3-4-.07(5) & 391-3-4-.10.

39 42 U.S.C. § 6945(d).

40 *Id.*

41 Press Release, U.S. Environmental Protection Agency, EPA Promotes Cooperation with States to Facilitate Safe Disposal of Coal Ash (May 1, 2017), *at* https://www.epa.gov/newsreleases/epa-promotes-cooperation-states-facilitate-safe-disposal-coal-ash.

42 Michael Biesecker, *Utilities Group Petitions EPA Head to Upend Coal Ash Rule*, ABC News, May 12, 2017, *at* http://abcnews.go.com/Politics/wireStory/utilities-group-petitions-epa-head-upend-coal-ash-47381567.

43 *See, e.g.*, http://www.publicpower.org/files/Evaluation percent20of percent20Existing percent20Regulations_APPA_Final_Comments_051217 percent20.pdf; http://www.electric.coop/wp-content/uploads/2017/05/NRECA-Comments-Identifying-Burden-Reduction-Opportunities-under-E.O.-13777-15-May-17.pdf.

44 Press Release, Georgia Power Company, Ga. Power to Cease Operations of All Coal Ash Ponds within 3 Years (Jun. 13, 2016), *at* www.georgiapower.com/environment/docs/ccr/061316-Georgia-Power-to-cease-operations-of percent20-all-coal-ash-pond.docx.

45 Press Release, Georgia Power Company, Ga. Power Continues to Make Progress on Ash Pond Closures (Oct. 12, 2016), *at https://southerncompany.mediaroom.com/2016-10-12-Georgia-Power-continues-to-make-progress-on-ash-pond-closures*.

46 *Id.*

47 *Id.*

48 https://epd.georgia.gov/coal-combustion-residuals-ccr-management-plans.

49 Ethan Goemann, Surveying the Threat of Groundwater Contamination from Coal Ash Ponds, 25 Duke Envtl. L. & Pol'y F. 427, 433, 438 (2015) (describing groundwater contamination at coal ash ponds throughout the country and in North Carolina).

50 http://www.southeastcoalash.org/about-coal-ash/find-your-state/south-carolina/ (discussing how South Carolina's three power utilities, South Carolina Electric and Gas, Duke Energy, and Santee-Cooper, agreed to remove all coal ash from unlined pits throughout the state, approximately 20 million tons in total).

The opinions expressed within *Perspectives on Georgia's Environment* are those of the authors and do not necessarily reflect the opinions of the State Bar of Georgia, the Environmental Law Section, the Section's executive committee or editor.

2017 Environmental Law Section Officers

CHAIR
Jennifer Simon
Kazmarek Mowrey Cloud Laseter LLP
1230 Peachtree Street N.E., Suite 3600
Atlanta, GA 30309
(404) 812-0126
jsimon@kmcllaw.com

SECRETARY
Patrick McShane
City of Atlanta Department of Law
55 Trinity Avenue, SW Suite 5000
Atlanta, GA 30303
(404) 546-4156
mpmcshane@atlantaga.gov

SECRETARY
Jennifer Culler
Fulton County Attorney's Office
141 Pryor Street SW Suite 4038
Atlanta, GA 30303
(404) 612-0234
jennifer.culler@fultoncountyga.gov

TREASURER
Kevin Harris Jeselnik
Chattahoochee Riverkeeper, Inc.
916 Joseph Lowery Blvd., Suite 3
Atlanta, GA 30318
(404) 352-9828
kjeselnik@chattahoochee.org

MEMBER-AT-LARGE:
Laura Benz
Laura W. Benz, LLC
185 Fulton Court
Peachtree City, GA 30269
(678) 778-2448
laura@lwbenz.comu

IMMEDIATE PAST CHAIR
Richard A. Horder
Kazmarek Mowrey Cloud Laseter LLP
Promenade, Suite 3600
1230 Peachtree Street, NE
Atlanta, GA 30309
(404) 812-0843
rhorder@kmcllaw.com

The New EPA

David Montgomery Moore[1]

The incoming administration of President Donald Trump will preside over the 50th anniversary of the U.S. Environmental Protection Agency (EPA). During the preceding five decades, the EPA has made great progress (and been largely successful by international comparison) in providing and ensuring clean air, water, and land, and protecting citizens, public health, and the environment. Despite these successes, the EPA faces perhaps the most significant and sweeping changes in its history if current events are any guide.

Rulemakings, budget requests, and executive branch actions provide insight into what this "New EPA" will look like. The following is a brief glance at the expected changes and direction at EPA, and ideas on how environmental law practitioners can best adjust to the change.

Appointments

Political appointments are underway. Undoubtedly the most important, and most indicative of the New EPA's future direction, is that of former Oklahoma Attorney General Scott Pruitt to serve as the EPA's 14th Administrator. As Oklahoma Attorney General, Pruitt's office handled Concentrated Animal Feeding Operations under Oklahoma's authorized Federal Clean Water Act program,[2] chemical and hazardous substance disposal and releases under Oklahoma's delegated Resource Conservation and Recovery Act (RCRA) program,[3] legacy releases from smeltering operations, and the recovery of state natural resource damages, under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[4] and several actions involving aquatic species impacts such as fish and mussel kills.

Aside from Administrator Pruitt, however, very few upper management appointments are complete. Of particular note though, the President nominated Susan Parker Bodine, current Counsel to the Senate Environment and Public Works Committee, to become Assistant Administrator. Ms. Bodine, who has experience in the private sector as an attorney at Covington & Burling and a partner at Barnes & Thornburg, was formerly the Assistant Administrator for EPA's Office of Solid Waste and Emergency Response under the George W. Bush administration. Additionally, George Sugiyama, formerly chief counsel for Sen. Jim Inhofe, R-Okla, has been appointed Deputy Assistant Administrator for Policy.

Regional Administrators have also yet to be named and confirmed. Indeed, EPA has a history of taking some time with regional administrator appointments.[5] The last Region 4 Administrator appointment took over seven months, and it is not uncommon for an appointment to take longer during a change in political party in the Executive branch. For the short term, this means that most major policy, enforcement, and discretionary budget decisions will have to be made in EPA Headquarters in Washington, D.C. Somewhat interestingly, President Trump appears to be following a similar path as the prior administration in terms of Headquarters' role in major policy issues.

News reports also suggest that the Trump Administration is considering consolidating EPA's 10 regions to 8 as both a cost saving measure and to reflect a Federalist policy of state-led permitting and enforcement. Indeed, the appointments to date signal a move toward greater state autonomy and the integration of EPA with larger federal governmental policy directives. They also highlight what will surely be an increased emphasis on coordination with Congress, and other federal agencies such as Office of Management and Budget, the Council on Environmental Quality, as well as the Interior, Defense, and Commerce departments.

Budget

Early reports of a budget cut of up to 31 percent for EPA's Fiscal Year 2017 (FY17) budget[6] have not materialized, with Congress returning the majority of EPA's FY16 budgetary funding through a Continuing Resolution approved in early May. Specific funding decisions by the White House and EPA, however, do lend insight into the Trump Administration's priorities.

The Administration released the 'America First' budget in February 2017 which called for decreases in EPA's budget, specifically in areas involving rural water and wastewater loans ($498 million reduction from the 2017 annualized Continuing Resolution level). For FY18, the America First budget proposed $5.8 billion for EPA, down from $7.8 billion in 2015, and anticipates a workforce reduction of 3,200 from the roughly 15,000 civil servants currently at EPA. It also discontinues funding for climate change programs, reduces the Superfund budget by $300 million from its almost $1 billion FY16 level, and reduces the Office of Enforcement and Compliance Assistance (OECA) budget by 25 percent.

However, the America First budget calls for $2.3 billion for the State Revolving Funds (SRF), an increase of $300 million from the Obama Administration's budget, signaling a policy intent to support state implementation of water and drinking water programs and state autonomy in enforcement.[7] The SRF provides financing for wastewater and drinking water infrastructure.

New Initiatives

Many New EPA policies have been initiated by White House Executive Orders (EO). For instance, on February 28, the President issued an Executive Order[8] addressing the contentious EPA "Waters of the United States" Rule, directing EPA to adopt the Justice Scalia plurality opinion in *Rapanos v. United States* in future rulemakings on Clean Water Act jurisdiction.[9] EPA had relied almost exclusively on Justice Kennedy's opinion in *Rapanos*, an opinion which not joined by any other justice. On May 15, EPA developed a "Waters of the United States" website which states EPA's intent of recodifying the definition, which had been in place for decades and is currently effective as per the 6th Circuit Court of Appeals stay of rule challenges.[10]

President Trump has also focused on energy policy. On March 15, the White House announced it would reconsider automobile emission standards for cars and light trucks. On March 28, the President signed EO13783, providing for 'Immediate Review

of All Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources.' EO13783 targeted the Obama-era Clean Power Plan, which EPA later announced that it would initiate proceedings to suspend, revise or rescind based upon the results of the review.[11] Indeed, Administrator Pruitt recently met with Congressional Coal Caucus members announcing on May 22 that "the war on coal is over."[12]

The new Administration has also more broadly targeted regulatory reform. On Jan. 30, the President signed EO13771 requiring removal of two regulatory provisions for each new federal rule.[13] EO13771 required each agency to develop implementation guidance by March and a regulatory reform report by April. EO13771 also requires that agencies (including EPA) consider effects on jobs, outdated rules, cost benefit, inconsistency with federal policy or tax provisions. While not receiving much popular press coverage, EO13771 is intended to instill a level of coordination in federal policy amongst the varying agencies. EPA issued a federal register notice accepting comment on regulatory reform by May 15 and is evaluating potential regulatory modifications.

By Executive Memorandum dated Jan. 20, 2017, all agencies (including EPA) were directed by the President's Chief of Staff to freeze regulatory actions in three ways: published final rules were to be delayed by 60 days, proposed rules were to be withdrawn, and new rules were not to be issued until a department or agency head appointed or designated by the President had approved the proposal or final action.[14] Freezing regulatory actions is not uncommon at the outset of a new administration, particularly in a party change. The Executive Memorandum means that delegations are changed and directs agencies to ensure that executive authority is vested in new administration appointees or their further delegates. EPA has noticed the regulatory freeze by Federal Register notice.[15]

Some select EPA regulatory freezes involve the CERCLA Hazardous Ranking System subsurface intrusion rules, formaldehyde emission standards under Title VI of the Toxic Substances Control Act (TSCA),[16] Clean Air Act (CAA) dispersion modeling for ozone and fine particulate matter, rules increasing requirements for applicators regarding restricted use pesticides under the Fungicide, Insecticide, and Rodenticide Act (FIFRA),[17] and changes to EPA's administrative procedures regarding assessment of penalties, appeals, motions and default under the Administrative Procedures Act.[18]

Recent EPA Federal Register notices and actions reflect the policies of state autonomy, with a number of state authorization and delegation modifications and revisions to state implementation plans, in addition to the more typical notices under FIFRA, TSCA, permits, and other renewals. Among the notable actions are EPA's May 10, EPA proposed to accept Kentucky's fine particulate matter infrastructure plan.[19] On May 11, EPA also proposed to accept Texas Emissions Banking and Trading Programs modifications under the CAA to provide for emissions credits, trading, and general program flexibility.[20]

In the area of Superfund, in addition to the budget cuts, on May 10 Administrator Pruitt issued an announcement centralizing decision-making for all CERCLA cleanups with remedies estimated to cost $50 million or more at EPA Headquarters.[21] Administrator Pruitt recently established a Superfund task force with Region 3 as lead to overhaul a number of CERCLA policies including prospective purchaser agreements, bona fide purchasers, and remedy selection, reducing overhead and administrative costs and reexamining the necessary level of EPA oversight.[22]

A Federal Register search shows just over 200 APA rulemaking actions or regulatory notices by EPA since the inauguration. The vast majority are state program amendments, many under Clean Air Act State Implementation Plan provisions. Examples include Clean Air Act section 110(l) noninterference demonstrations and removal of associated requirements. Several states have successfully obtained relief from some of the more controversial or contested federal guidelines. In Georgia, for example, EPA has accepted a proposal to approve SIP revisions to remove requirements for heavy duty diesel engines to meet California Air Resources Board emissions criteria. 82 Fed. Reg. 22,095 (May 12, 2017).

Enforcement is continuing. In April, EPA settled a CAA and Emergency Planning and Right to Know Act enforcement action with a $1.3 million penalty regarding allegations relating to a seafood company. On May 17, EPA settled a CAA enforcement action with a $2.5 million penalty for alleged hazardous air emissions at a bulk liquid facility in Deer Park, Texas. On May 22, EPA and a railroad announced an agreement regarding remediation at three abandoned uranium mines near Prewitt, New Mexico.

Suits Against EPA

Without a doubt, EPA will be sued regarding regulatory actions, non-actions, non-discretionary duties, and individual policies and actions. Indeed, EPA is one of the most sued governmental entities. With an arbitrary and capricious standard of review, and an (arguably) eroding Chevron deference,[23] EPA's record in defending its actions is favorable. The days of sue-and-settle are gone, a practice heavily criticized by the bar, Administration and Administrator Pruitt. Professional environmental non-profits report high charitable donations and high level of activity since the election.

We are already seeing a change in posture of lawsuits. In Region II, EPA was sued by environmental groups in May over its oversight and regulation of combined sewer discharges in New York City. Environmental groups have more typically used the CWA in direct suits against the discharges, signaling a potential change in strategy. In Region 4, environmental groups announced a suit against EPA regarding the State of Alabama's Stormwater programs in early May, an issue which has been contested for years. The timing of this new litigation sends a message regarding administration policy and actions.

Conclusion

Trump Administration actions to date clearly point to greater state autonomy and role in environmental protection. The New EPA will be more streamlined, less likely to engage in disputes with state regulators, and less likely to second-guess state enforcement and regulatory decisions. The New EPA will likely continue some forms of carbon emission controls, which will probably be decided in the courts. Federal Register notices to date indicate support for flexibility in state regulatory approaches and program revisions that in many cases had been contemplated for some time. Federal environmental statutes have not been amended, and EPA's responsibility and oversight role remains, but is likely to be implemented by smaller EPA staff with an anticipated deferential posture with respect to state decision-making.

(Endnotes)

1 David Montgomery Moore is a Partner at Smith, Gambrell & Russell, LLP practicing in environmental, energy, and regulatory matters. Dave has served in three EPA offices: D.C., where he was responsible for nationally significant enforcement matters in EPA Regions 3, 7 and 9; served in Region 4 and Region 2, received three EPA medals for superior service and was lead counsel for matters involving water, drinking water, hazardous substances, oil and gas exploration and development. Dave served during Republican and Democratic administrations, worked directly with Regional Administrators, General Counsels, Administrators and Assistant Administrators, and has worked with the Speaker of the House, state and federal elected representatives on environmental, energy, and regulatory policy and matters. Dave is an adjunct professor at the nationally acclaimed Emory School of Law, and was a clinical professor at Emory's environmental clinic. He currently represents clients across the United States in energy and environmental matters. Dave has served as counsel regarding Everglades World Heritage environmental matters, interstate water disputes in the Southeast and Great Lakes, multi-billion dollar sewer and wastewater systems, multi-billion corporate construction programs, and construction, permitting and licensing for power facilities including fossil and renewables in the hydropower, biomass and solar areas.

2 33 U.S.C. §§ 1251 *et seq.*

3 42 U.S.C. §§ 6901 *et seq.*

4 42 U.S.C. §§ 9601 *et seq.*

5 "Still no takers for 'notoriously sticky' regional administrator post" (Greenwire December 23, 2013).

6 FY17 covers the October 2016 to October 2017 fiscal year.

7 'America First, A Budget to Make America Great Again' (Office of Management and Budget, May 2017).

8 *See* Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, available at https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic

9 *Rapanos v. United States*, 547 U.S. 715 (2006)

10 EPA Launches New 'Waters of the U.S.' Website (EPA, May 15, 2017).

11 82 Fed. Reg. 16,329 (April 4, 2017).

12 *See* https://www.worldcoal.com/coal/24052017/epa-the-war-on-coal-is-over/

13 82 Fed. Reg. 17,793 (Apr. 14, 2017).

14 https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies

15 82 Fed. Reg. 14,324 (Mar. 30, 2017).

16 15 U.S.C. §§ 2601 *et seq.*

17 7 U.S.C. §§ 136 *et seq.*

18 5 U.S.C. §§ 701 *et seq*

19 82 Fed. Reg. 21,751 (May 10, 2017).

20 82 Fed. Reg. 21,966 (May 11, 2017).

21 Revisions to CERCLA Delegations of Authority 14-2 Responses and 14-21A Consultation, Determinations, Reviews and Selection of Remedial Actions at Federal Facilities (EPA, May 9, 2017).

22 Prioritizing the Superfund Program, Administrator General Pruitt (May 22, 2017).

23 See H.R.5, Regulatory Accountability Act of 2017; United States v. Nichols, 784 F.3d 666 (10th Cir. 2015)(Gorsuch Dissent).

The State Bar has three offices to serve you.

HEADQUARTERS
104 Marietta St. NW
Suite 100
Atlanta, GA 30303
404-527-8700
800-334-6865
Fax 404-527-8717

SOUTH GEORGIA OFFICE
244 E. 2nd St.
Tifton, GA 31794
229-387-0446
800-330-0446
Fax 229-382-7435

COASTAL GEORGIA OFFICE
18 E. Bay St.
Savannah, GA 31401
912-239-9910
877-239-9910,
Fax 912-239-9970

Challenges Continue for Pipeline Construction at the State Level

By Buck Dixon*

Opposition to new pipeline construction has increased over the past few years coinciding with changes in our country's energy needs and sources. Beginning with the Keystone XL project and carrying through to the Dakota Access Pipeline, opposition to pipeline projects is on a national stage. Local opposition for projects has always been in play, however, and perhaps no more so than with the acquisition of land for the pipeline right-of-way (ROW) and the potential use of eminent domain authority. When planning, routing, and constructing pipelines, companies prefer to negotiate and acquire ROW without resorting to the exercise of eminent domain. In some instances, the use of eminent domain is unavoidable, but the ability to exercise it varies between natural gas and oil pipelines, and further varies state by state.

Over the past few years, a number of states including Georgia have enacted legislation that may further limit the ability for liquid pipeline operators to exercise eminent domain authority.[1] In other states, like Arkansas and Kentucky, such efforts have been unsuccessful.[2] These legislative pushes have typically come in response to specific proposed pipeline projects in the respective states. This article summarizes these developments, with a focus on Georgia's newly expanded eminent domain law.

Background

As a prefatory matter, it is important to understand that natural gas and oil pipelines do not always have the same condemnation rights available to them. First, they follow different siting processes. Interstate natural gas pipelines go through a permitting and siting process that is governed by the Federal Energy Regulatory Commission (FERC), whereas liquid pipelines address permitting and siting on a state by state basis. A number of states have FERC-like processes in place to manage the construction of interstate liquid pipelines in their states, such as Colorado, Kansas, Kentucky, Missouri, Ohio, Texas, and Georgia. Second, although both types of pipeline projects may have to rely on the exercise of states' eminent domain authority to acquire land, their ability to do so differs. The Natural Gas Act confers a federal right of eminent domain to projects once they obtain a FERC Certificate, but there is no corollary federal right of eminent domain for interstate liquid pipelines. In addition, many state statutes consider gas pipelines to be "public utilities" that are conferred eminent domain authority, whereas liquid pipelines are not.

Georgia's Liquid Pipeline Legislation

A year after the Georgia legislature instituted a moratorium on liquid pipeline companies exercising eminent domain powers until June 30, 2017, Georgia passed legislation in the 2017 session to expand existing permitting requirements for new liquid pipeline projects in the state. Georgia Governor Nathan Deal signed final legislation into law on May 9, 2017, which becomes effective on July 1, 2017.

This original liquid pipeline legislation was introduced as Senate Bill (SB) 191, but after a lengthy legislative process that included numerous amendments and bill versions, the legislation emerged as a Senate substitute to House Bill (HB) 413. The legislation codifies new requirements for companies wishing to construct new liquid pipelines or extend existing ones. It also charges the Georgia Environmental Protection Division (EPD) and the Georgia Department of Transportation (DOT) to promulgate rules and regulations addressing these issues. The legislation further establishes new requirements for exercising eminent domain. As explained below, these requirements are more expansive than those in current law and project proponents should be aware of state laws that limit or prohibit the use of eminent domain for liquid pipelines.

EPD Permits for Construction of New Liquid Pipelines

Since 1995, Georgia law has required liquid pipeline operators to obtain permits from EPD for new pipeline construction before exercising eminent domain.[3] HB 413 now adds a requirement that companies must obtain a permit irrespective of whether they intend to exercise eminent domain powers.[4] In addition, while EPD was previously authorized to promulgate rules for application requirements but HB 413 now expressly articulates and expands those requirements for a new pipeline or an extension of an existing pipeline by a distance of greater than one linear mile.[5] HB 413 also clarifies that companies must obtain a permit in addition to and not in place of other state or federal permits or authorizations.[6]

In their permit applications, pipeline companies must now provide siting information, including a map showing the proposed route.[7] The applicant must also include information about cultural resources, geological and hydrologic features, and the presence of threatened or endangered species along the proposed route.[8] Additionally, to the extent EPD rules and regulations require, the applicant must provide information described in the federal Environmental Protection Agency's Environmental Impact Statement (EIS) regulations.[9] The applicant must also provide evidence of financial responsibility, and any other information EPD rules and regulations may require.[10]

HB 413 also includes notice requirements for permit applicants.[11] Within ten days of applying for a permit, the applicant must provide public notice of filing the application in the legal organ of each county through which the proposed route passes.[12] The applicant must also provide written notice to all landowners whose property is within 1,000 feet of the proposed route.[13] HB 413's notice requirements differ from existing EPD regulations, which require EPD, and not the applicant, to provide public notice of the application.[14] Additionally, HB 413 specifies how notice must be provided (*i.e.*, published in the legal organ of each country through which the proposed route passes and to landowners within 1,000 feet of proposed route). In contrast, EPD's current

regulations do not provide such detail or require that landowners along the route receive notice of the application.[15] The only notice to landowners currently required by existing EPD regulations is notice of a pipeline company gaining access to their land to conduct surveys to determine environmental and engineering suitability of the site for pipeline placement.[16]

When deciding to grant or deny a permit application, HB 413 instructs the EPD Director to determine whether the project "is consistent with and not an undue hazard to [Georgia's] environment and natural resources . . . ."[17] In the event a person believes he or she is aggrieved or adversely affected by the Director's decision to approve or deny a permit application, the person has the right to a hearing before an administrative law judge (ALJ) if he or she files a petition within thirty days of the Director's decision.[18]

By July 1, 2018, the Board of Natural Resources (the Board) must promulgate rules and regulations to enforce these new statutes.[19] The bill directs the Board to promulgate rules and regulations establishing an application review process which does not exceed 150 days.[20] If the Director fails to act on an application within 150 days, the application is deemed approved.[21] The Board must also adopt provisions instituting a nonrefundable application fee, and provisions requiring that public meetings be held prior to any action on permits.[22] The Director may not grant a permit until the Board adopts these rules and regulations, which, as stated above, must include numerous provisions not currently implemented by EPD.[23]

DOT Certificates of Public Convenience and Necessity

HB 413 also expands the requirements a company desiring to exercise its eminent domain power must meet to obtain a Certificate of Public Convenience and Necessity (Certificate) from the Georgia Transportation Commissioner.[24] While pipeline operators have been statutorily required to obtain a Certificate of Public Convenience and Necessity since 1995, HB 413 codifies what information must be included in an application.[25] As explained below, applicants must include, among other information, descriptions of the proposed route and the public convenience and necessity supporting the proposed route, and demonstrate that the use of eminent domain may be necessary to construct the pipeline, and that "public convenience and necessity for the petroleum pipeline justifies the use of the power of eminent domain."[26] Also, as with EPD permits, HB 413 excepts from the requirement to obtain a Certificate, extension projects less than or equal to one linear mile.[27]

HB 413 also codifies notice requirements, whereas the existing statute merely empowers the Transportation Commissioner to prescribe notice regulations.[28] Georgia DOT's current regulatory notice provision requires notice of the Certificate application to be published in the Atlanta Journal-Constitution and in a newspaper in the county/counties through which the proposed route passes within ten days of an application being filed.[29] Under HB 413, the applicant must within ten days of applying for a Certificate provide public notice of filing the application in the legal organ of each county through which the proposed route passes, and must also provide written notice to all landowners whose property is within the proposed route.[30] Unlike newly-codified O.C.G.A. § 22-3-83(c)(2), DOT's current regulations do not require that landowners within the proposed route receive personal notice of the application.[31]

As with the EPD permit, Certificate applicants must provide siting information, including a map showing the proposed route.[32] In addition, applicants must describe the public convenience and necessity supporting the proposed route, list the proposed pipeline corridor's width (which may not exceed one-third of a mile), demonstrate that using eminent domain may be necessary for construction, and show that the public convenience and necessity justifies using eminent domain.[33]

The Superior Court of the county in which the pipeline company has an agent and place of doing business may review the Transportation Commissioner's decision to issue or deny a Certificate.[34] Those seeking review must file a petition within thirty days of the Commissioner's issuance or denial of the Certificate.[35]

By July 1, 2018, DOT must promulgate rules and regulations for enforcing the code section, including provisions for a review process that does not exceed 120 days.[36] This provision provides for similar limitations on EPD permits: (1) an application is deemed approved if the Commissioner fails to act on it within 120 days; (2) DOT must adopt provisions for a nonrefundable application fee and for public meetings to be held prior to action on Certificates; and (3) the Commissioner cannot issue a Certificate until DOT promulgates the required rules and regulations.[37]

Eminent Domain

Under HB 413, companies may not exercise eminent domain unless and until they obtain both an EPD permit and a DOT Certificate.[38] Additionally, HB 413 requires companies to deliver written notice to landowners whose property may be condemned prior to initiating or threatening to initiate eminent domain proceedings.[39] While these requirements are consistent with current statutes and regulations, as described above, the processes for pipeline operators to obtain the requisite EPD permit and DOT Certificate to exercise eminent domain are now more extensive.

South Carolina Legislation

In the 2016 legislative session, the South Carolina General Assembly passed Senate Bill 868 (S868), which wholly restricts liquid pipeline companies from exercising eminent domain power.[40] The bill was signed into law and became effective on June 3, 2016. This law stemmed from a July 1, 2015 South Carolina Attorney General Opinion requested by the Aiken County Legislative delegation which found that "no South Carolina court to date . . . has construed § 58-7-10 as bestowing the power of eminent domain upon an oil pipeline company" and a temporary moratorium on new oil pipelines similar to that issued in Georgia.

S868 stated that "Section 58-7-10 was not intended to confer the right of eminent domain to a private, for-profit company, including a publicly traded for-profit company, that is not defined as a 'public utility' . . . ."[41] Given that petroleum pipeline companies are not defined as such, they may no longer exercise eminent domain authority in South Carolina.

Other States' Legislative Efforts

Efforts to limit pipeline operators' ability to exercise eminent domain authority have recently failed in at least two states. In 2014, two bills proposed in the Kentucky legislature that sought to narrow the use of eminent domain were unsuccessful. HB 31

would have excluded natural gas liquids from the definition of "oil or gas" as used in the state's eminent domain statute.[42] The bill died after crossing over to the Kentucky State Senate. SB 14 would have allowed eminent domain authority to be used only in cases where the condemner was a utility regulated by the State Public Service Commission (*i.e.*, only intrastate gas pipelines).[43] That bill, which shared similarities with South Carolina's S868, died before making it out of the Senate Judiciary Committee.

A bill that was not passed into law in Arkansas this year shared similarities with both the Georgia and South Carolina legislation. Like South Carolina's S868, Arkansas HB 2086 would have prohibited liquid pipeline operators from exercising eminent domain powers.[44] Like Georgia's HB 413, Arkansas' HB 2086, would have required operators to obtain a permit from the state prior to exercising eminent domain.[45]

Given the dramatic increase in the country's energy sources, and the need for new pipelines to efficiently transport products to consumers, against the backdrop of increased opposition and activism designed to defeat these projects, it is likely that we will see more state legislation similar to the bills described above in the coming years.

** Buck Dixon is a member of the pipeline practice at Troutman Sanders LLP, along with Bob Hogfoss, Catherine Little, and Annie Cook. The pipeline practice provides legal advice nationwide to oil and natural gas pipeline companies and has done so for more than a quarter century. They regularly counsel clients with respect to pipeline safety and environmental regulatory compliance, enforcement defense and adjudication. They maintain a website with regular alerts regarding legal issues facing the pipeline industry, http://www.pipelaws.com/.*

(Endnotes)

1 *See, e.g.*, 2017 Ga. Laws 263 (codified at O.C.G.A. §§ 12-17-1–6, 22-3-80–85 (effective July 1, 2017)); 2016 S.C. Acts 205 (codified at S.C. Code Ann. § 58-7-10).
2 *E.g.*, H.B. 31 (Ky. 2014); S.B. 14 (Ky. 2014); H.B. 2086 (Ark. 2017).
3 Ga. Comp. R. & Regs. 391-3-23-.07(1).
4 O.C.G.A. § 12-17-2.
5 *Compare* O.C.G.A. § 22-3-88 (effective through June 30, 2017), *with* O.C.G.A. § 12-17-1–6.
6 O.C.G.A. § 12-17-2.
7 O.C.G.A. § 12-17-3(a).
8 *Id.*
9 *Id.*
10 *Id.*
11 O.C.G.A. § 12-17-3(b).
12 *Id.*
13 *Id.*
14 *Compare* O.C.G.A. § 12-17-3(b), *with* Ga. Comp. R. & Regs. 391-3-23-.07(4).
15 *See* Ga. Comp. R. & Regs. 391-3-23-.07(4).
16 Ga. Comp. R. & Regs. 391-3-23-.06(1)–(2).
17 O.C.G.A. § 12-17-4(a).
18 O.C.G.A. § 12-17-5.
19 O.C.G.A. § 12-17-6.
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
24 O.C.G.A. § 22-3-83(a).
25 O.C.G.A. § 22-3-83(b).
26 *Id.*
27 O.C.G.A. § 22-3-80(3).
28 O.C.G.A. § 22-3-87(b)(2) (effective through June 30, 2017).
29 Ga. Comp. R. & Regs. 672-13-.05(1).
30 O.C.G.A. § 22-3-83(c).
31 *See* Ga. Comp. R. & Regs. 672-13-.05(1).
32 O.C.G.A. § 22-3-83(b).
33 *Id.*
34 O.C.G.A. § 22-3-83(f).
35 *Id.*
36 O.C.G.A. § 22-3-83(g).
37 *Id.*
38 O.C.G.A. § 22-3-84.
39 *Id.*
40 2016 S.C. Acts 205 (codified at S.C. Code Ann. § 58-7-10).
41 *Id.*
42 H.B. 31 (Ky. 2014).
43 S.B. 14 (Ky. 2014).
44 H.B. 2086 (proposed amendments to Ark. Code Ann. § 23-15-101).
45 *Id.* (proposed Ark. Code. Ann. § 23-15-107).

***Perspectives on Georgia's Environment* is looking for authors of new content for publication.**

If you would like to contribute an article or have an idea for content, please contact Patrick McShane at mpmcshane@atlantaga.gov

The Tri-State Water Wars – Nearly 30 Years Running and Still Going Strong

By Patrick McShane, Assistant City Attorney, City of Atlanta Department of Law

I. Introduction

For nearly 30 years, Georgia has been embroiled with Alabama and Florida in disputes over the water resources of the Apalachicola-Chattahoochee-Flint (ACF) River Basin and Alabama-Coosa-Tallapoosa (ACT) River Basin. These disputes have often focused on metropolitan Atlanta's water use and, in particular, the management of Lake Lanier (in the ACF Basin) and Allatoona Lake (in the ACT Basin) by the U.S. Army Corps of Engineers (the Corps) for water supply. Metro-Atlanta depends on these two reservoirs for nearly 80 percent of its water supply, so the management decisions of the Corps are critical to the metro region.

The Tri-State Water Wars began in 1990, when the State of Alabama sued the Corps to prevent the agency from providing additional water supply storage in Lake Lanier and Allatoona Lake. Georgia and Florida joined the fray shortly thereafter and, over the past three decades, this dispute has spawned a multitude of lawsuits in venues across the three states and Washington, D.C. Currently, there are five active water wars cases, including an original action between Florida and Georgia before the U.S. Supreme Court.

This article summarizes the history of the water wars and provides an update on the current state of play. While the end of the Tri-State Water Wars may not be in sight, some extremely important milestones are approaching, including a decision from the U.S. Supreme Court regarding the equitable apportionment of water between Georgia and Florida, and action from the Corps to complete a reallocation of storage in Lake Lanier to meet Georgia's long-term water supply needs.

II. The Contested River Basins

A. The Apalachicola-Chattahoochee-Flint River Basin

The ACF River Basin begins in the north Georgia mountains with the headwaters of the Chattahoochee River. The Chattahoochee flows south, forming Lake Lanier at Buford Dam just north of Atlanta and continuing southwest towards Alabama, where the river's western bank marks the border between Alabama and Georgia. At the Georgia-Florida border, the Chattahoochee River is joined by the Flint River, which rises south of Atlanta and flows through the central part of Georgia, to form Lake Seminole at Jim Woodruff Dam. Nearly 74 percent of the ACF River Basin is in Georgia, with 15 percent in Alabama and just 11 percent in Florida.

Lake Lanier and the Chattahoochee River below it are the primary water supply sources for metropolitan Atlanta. As a large reservoir near the headwaters of the Chattahoochee River, Lake Lanier has a relatively small drainage area (about 5 percent of the drainage area of the ACF River Basin) and is therefore very slow to refill following a drought. The cities of Cumming, Buford, and Gainesville, as well as Gwinnett County, withdraw water directly from the reservoir for water supply. Other municipalities, including the Atlanta-Fulton County Water Resources Commission, DeKalb County, the Cobb County-Marietta Water Authority, and the City of Atlanta, depend on downstream water releases from Buford Dam to the Chattahoochee River for water supply.

B. The Alabama-Coosa-Tallapoosa River Basin

Just west of the ACF River Basin is the ACT River Basin, which rises in the mountains of north Georgia and Tennessee with the Etowah and Oostanaula Rivers. The Corps operates Allatoona Dam on the Etowah River near Cartersville, Georgia, which is a crucial water supply source for the Cobb County-Marietta Water Authority and the City of Cartersville. On the Oostanaula River, the Corps operates Carters Dam, which provides water supply for the City of Chatsworth. The Etowah and Oostanaula converge near Rome, Georgia, to form the Coosa River, which flows into Alabama. Near Montgomery, Alabama, the Coosa River is joined by the Tallapoosa River to form the Alabama River, which flows to the Gulf of Mexico at Mobile Bay. In addition to the Corps projects mentioned above, Alabama Power Company owns and operates a number of hydroelectric projects in the ACT River Basin.

III. History of Litigation in the ACF And ACT River BasinS

As early as the 1970s, it was clear that a long-term plan was needed for ensuring the water supply of metropolitan Atlanta. In 1973, the U.S. Senate authorized a comprehensive report, known as the Metropolitan Atlanta Area Water Resources Management Study (MAAWRMS), to develop recommendations for Atlanta's future water supply. The final MAAWRMS report recommended the construction of a new "reregulation" dam downstream of Lake Lanier to capture water released from Lanier for water supply withdrawals. Further study by the Corps, however, demonstrated that reallocating reservoir storage in Lake Lanier to water supply would be a more cost effective and less environmentally damaging means to secure Atlanta's water supply. In 1989, the Corps prepared a post-authorization change (PAC) report and a draft environmental assessment, which recommended reallocating about 207,000 acre-feet of storage in Lake Lanier to water supply for metro-Atlanta. Throughout this period of study, the Corps coordinated with local municipalities to develop interim water supply contracts to address increasing water supply needs in the ACF River Basin until a long-term solution could be implemented.

Meanwhile, in the ACT River Basin, water supply needs were also increasing. In 1981, the Cobb County-Marietta Water Authority requested additional water supply storage space in Allatoona Lake to accommodate future water needs. In 1989, the Corps completed a draft Water Supply Reallocation Report and final environmental assessment to increase Cobb-Marietta's water supply storage in Allatoona Lake. Thus, by 1990, the Corps stood ready to reallocate water storage space in both Allatoona Lake and Lake Lanier to meet metro-Atlanta's long-term water supply needs.

Before the Corps could take final action, however, the State of Alabama initiated the Water Wars by suing the Corps in the U.S. District Court for the Northern District of Alabama.[1] Florida and Georgia moved to intervene in the case, and the Corps deferred making a decision on water supply storage while the three States negotiated. On Jan. 3, 1992, the States and the Corps entered into a Memorandum of Agreement to study the water resources of the ACF and ACT River Basins with the goal of negotiating a water allocation formula for the basins. The 1992 Memorandum of Agreement was eventually replaced by Interstate River Basin Compacts that were signed into law by President Clinton in 1997. Under the interstate compacts, the three States continued to study the river basins and attempted to reach an agreement on a water allocation formula.

While the States were attempting to negotiation a water allocation formula, new law suits were being filed. In 2000, Southeaster Federal Power Customers, Inc., sued the Corps in the Federal District Court for the District of Columbia alleging that increased withdrawals from Lake Lanier diminished hydropower production without proper compensation to electrical utilities.[2] In 2001, Georgia also filed suit against the Corps challenging the Corps' denial of Georgia's updated request for the reallocation of storage space in Lake Lanier for water supply.[3]

Ultimately, the states' efforts to reach a water sharing agreement failed and the interstate compacts expired in 2003 (ACF Compact) and 2004 (ACT Compact). Following the expiration of the interstate compacts, the litigation over the ACF and ACT River Basins in the Northern District of Alabama resumed and numerous other cases were filed challenging the Corps' management and operation of its reservoirs.[4] In 2007, all of the cases involving the ACF River Basin (except the *SeFPC* case which was then on appeal) were consolidated in the federal district court for the Middle District of Florida.[5] Claims related to the ACT River Basin remained in the Middle District of Alabama.

The consolidated ACF River Basin case was divided in two phases, with the first phase addressing the Corps' authority to operate Lake Lanier for water supply. On July 17, 2009, the district court issued an order holding that, absent congressional approval, the Corps lacked the legal authority to reallocate storage space in Lake Lanier to water supply.[6] Further, the court held that the Corps lacked the authority to allow the ongoing direct withdrawals from the lake and the additional water releases for downstream water users. Imposing a remedy the court itself described as "draconian," the court gave the States three years to seek the necessary Congressional approval. If the parties could not obtain this approval, the Corps was required to operate Lake Lanier based on the "baseline" operations from the mid-1970s, which would greatly reduce water releases for downstream withdrawals and only the cities of Gainesville and Buford would be authorized to withdraw water from the reservoir. This decision put the water supply of millions of people in jeopardy and the cost to develop an equivalent water supply source and re-plumb Atlanta would have cost billions.

The U.S. Court of Appeals for the Eleventh Circuit reversed the trial court's order.[7] On June 28, 2011, the Eleventh Circuit dismissed all challenges by Alabama, Florida and others to the Corps' operation of Lake Lanier for water supply. It then held that water supply was an authorized purpose of Lake Lanier under the 1946 legislation authorizing its construction—that is, that Congress understood that the reservoir would be used to provide an "assured" source of water supply for metropolitan Atlanta and that these needs would have to be increased as the region developed. In addition, the Circuit Court found that the Water Supply Act of 1958 provided the Corps with additional authority for water supply, including direct withdrawals from the reservoir. On remand to the Corps, the Court directed the Corps to reconsider Georgia's water supply request in light of the Court's holding regarding the Corps' authority for water supply operations at Lake Lanier.[8] In 2012, the Corps' Chief Counsel issued a legal opinion finding that the Corps had the authority to fully meet Georgia's water supply request.[9]

Following the Eleventh Circuit's decision, in 2012 the Northern District of Alabama dismissed Alabama's parallel challenges to the Corps' operations at Allatoona Lake, holding that the Corps had not taken final agency action regarding operation of the project for water supply..[10] Thus, 22 years after the initiation of the Water Wars litigation, the final claims stemming from Alabama's 1990 suit were dismissed.[11]

IV. Active Litigation in the ACF River Basin

A. Florida sues for equitable apportionment in the U.S. Supreme Court

The pause in litigation following the Eleventh Circuit's decision in the ACF Basin and the dismissal of Alabama's claims in the ACT Basin was short lived. In October 2013, the State of Florida filed an original petition in the U.S. Supreme Court for leave to file a complaint against Georgia seeking an equitable apportionment of the water resources of the ACF River Basin.[12] The U.S. Supreme Court granted Florida's petition and appointed Ralph Lancaster, an attorney from Maine, as Special Master over the case. Early in the case, Special Master Lancaster made it clear that he expected the case to proceed without delay by setting a very aggressive timeline for the case.

In February 2015, the United States informed the Special Master that it would not waive sovereign immunity or intervene in the case. The United States did, however, participate as amicus curiae. Shortly thereafter, the State of Georgia filed a motion to dismiss, arguing that the United States, due to its management of the ACF River Basin through the Corps, was a required party that could not be joined to the case.[13] Georgia argued that the case should be dismissed because the Court could not grant effective relief without being able to bind the Corps' actions. On June 19, 2015, the Special Master denied Georgia's motion to dismiss based primarily on the lack of facts, but left open the possibility of revisiting the issue as the case developed.[14]

Trial was held in Portland, Maine from late October 2016 to early December 2016. Following trial, the States submitted post-trial briefs and the Special Master issued his report on February 14, 2017.[15] In his report, Special Master Lancaster recommended that the U.S. Supreme Court deny Florida's request:

> "Because the Corps is not a party, no decree entered by this Court can mandate any change in the Corps' operations in the Basin. Without the ability to bind the Corps, I am not persuaded that the Court can assure Florida the relief it seeks. I conclude that Florida has not proven by clear and convincing evidence that its injury can be redressed by an order equitably apportioning the waters of the Basin."[16]

The Special Master's report has been distributed to the U.S. Supreme Court and the Court has set the briefing schedule for the States to file "exceptions" to the report. Initial exceptions were due on May 31, 2017, and reply briefs and sur-reply briefs are due on July 31, 2017, and Aug. 30, 2017, respectively.[17] Following receipt of the exceptions, it is very likely the Court will schedule oral argument in the case before issuing its decision.

B. Litigation over the Corps' Water Control Manual

In addition to Florida's original action seeking to apportion the waters of the ACF River Basin, there is new litigation over the Corps' management of the ACF River Basin based on recently updated water control manuals. While the prior litigation over the ACF River Basin described above was still pending, in 2007 the Corps announced that it would begin updating the water control manuals for the basin.[18] The water control manuals were grossly out of date, with the master manual dating from 1958 and manuals for the individual projects having been completed in the 1970s and 1980s. Following the Eleventh Circuit Court of Appeal's decision in *In re Tri-State Water Rights Litigation*, the Corps revised the scope of the water control manual update to include consideration of Georgia's water supply request from Lake Lanier.[19]

On March 30, 2017, the Acting Assistant Secretary for the Army for Civil Works signed a record of decision adopting an updated master water control manual for the Corps' ACF reservoirs, including Lake Lanier.[20] Among other things, the new manual will accommodate withdrawals from Lake Lanier and the Chattahoochee River to meet metropolitan Atlanta's long-term (year 2050) water supply needs.

Shortly after the record of decision was signed, Alabama filed suit in federal court in Washington, D.C. to challenge the Corps' decision.[21] Alabama's complaint challenges the Corps' decision to meet metropolitan Atlanta's current and future water supply needs. Among other things, Alabama alleges that the Corps' decision exceeds its legal authority and unlawfully gives too much priority to water supply relative to other purposes.

In addition to Alabama's suit, the National Wildlife Federation, Florida Wildlife Federation, and Apalachicola Bay and River Keeper filed a joint suit on April 27, 2017, challenging the Corps' water control manuals.[22] These groups claim that the Corps failed to properly consider the impacts of the agency's actions on fish and aquatic ecosystems and failed to mitigate harm from its operations.

V. Active Litigation in the ACT River Basin

A. Challenges to the Corps' Water Control Manuals

Like in the ACF Basin, beginning in 2007 while litigation in the ACT Basin was ongoing, the Corps began updating the water control manuals for the ACT Basin.[23] The Corps sought public comment regarding the scope of the water control manual updates and the topics of water supply and water quality received the most comments.[24] Specific comments included that the Corps should consider requests for the reallocation of storage space in Allatoona Lake for water supply.

In 2013, the Corps released its draft water control manual and Environmental Impact Statement (EIS).[25] In the draft EIS, however, the Corps stated that it would not consider the reallocation of storage space to water supply because "there is no conceivable proposal that both states [*i.e.*, Georgia and Alabama] would support."[26] While the State of Georgia and water supply stakeholders in metropolitan Atlanta objected to the Corps' decision to not consider water supply needs, the Corps, finalized its final water control manual and EIS in 2015 without addressing water supply needs for metro-Atlanta.[27]

The State of Georgia, the Atlanta Regional Commission, and the Cobb County-Marietta Water Authority sued the Corps in federal court in Georgia asking for an order directing the Corps to answer the water supply requests at Allatoona Lake by a date certain.[28] In addition, the Georgia parties asked the court to invalidate the Corps' environmental impact statement for failing to study water supply issues. The Georgia parties filed a summary judgment brief in August 2016 and briefing on the motion is complete. The district court will hold a hearing in August 2017 and a decision is expected later this year.

Meanwhile, in May 2015, the State of Alabama, Alabama Power Company, and other water users in Alabama also filed suit in federal court in Washington, D.C. to challenge the new ACT manual.[29] The suit challenges Georgia's water supply withdrawals as well as operations that could reduce releases from Allatoona Lake. The Alabama parties claim that the Corps has allowed the Cobb County-Marietta Water Authority to take too much water from Allatoona Lake, that greater emphasis must be given to downstream navigation and hydropower generation, and that the Corps must release additional water to assimilate pollution in Alabama. The State of Georgia, the Atlanta Regional Commission, and the Cobb County-Marietta Water Authority have intervened in the case. Summary judgment briefing is scheduled to be completed in December 2017.

B. The Cobb County-Marietta Water Authority sues the Corps to protect its water rights

In addition to the litigation concerning the updated water control manual, the Cobb County-Marietta Water Authority recently sued the Corps over the Corps' failure to recognize certain water rights held by the Authority.[30] Over the last decades while the Corps' consideration of the Authority's request for additional water supply storage stalled, the Authority developed additional methods to expand its available water supply by creating "made inflows"—that is, reclaimed water that is returned to Allatoona Lak for reuse and water released from storage in the Authority's upstream water supply reservoir, which flows downstream to Allatoona Lake for withdraw through its existing water supply intake. Under Georgia law and the Authority's water supply permit, the Authority has the exclusive right to impound these flows in Allatoona Lake and withdraw them as needed.[31] The Corps, however, has refused to recognize the Authority's right to this water and instead allocates nearly 96 percent of it to other users, including the Corps itself.

In February 2017, the Cobb County-Marietta Water Authority sued the Corps seeking an order vacating the Corps' water allocation system and requiring the Corps to implement an accounting method that properly recognizes the Authority's water rights.[32] The Corps recently filed an answer to the Authority's complaint, but a scheduling order has not yet been issued by the Court.

VI. Conclusion

Since at least 1990, Georgia, Florida, and Alabama have been actively engaged in the Tri-State Water Wars. While there have been

some important milestones recently, including the Corps' decision to grant Georgia's water supply request for Lake Lanier, there are still five active cases pending. In the coming months and years, we can expect additional important decisions including a decision from the U.S. Supreme Courts regarding Florida's suit for an equitable apportionment of the waters of the ACF Basin and a decision regarding whether the Corps has unreasonably delayed in acting on the Cobb County-Marietta Water Authority's request for additional water supply from Allatoona Lake. Overall, these and other important decisions will further the progress of the longstanding dispute, but, after nearly 30 years of litigation, the dispute is still very active with no clear end in sight.

(Endnotes)

1 *Alabama v. U.S. Army Corps of Engineers*, No. CV-90-H-01331 (N.D. Ala., Complaint filed June 28, 1990).

2 *SeFPC v. Caldera*, No. 00-2975 (D.D.C., Complaint filed Dec. 12, 2000).

3 *Georgia v. U.S. Army Corps of Engineers*, No. 01-cv-0026 (N.D. Ga., Complaint filed Feb. 7, 2001).

4 *See, e.g.*, *Georgia v. Army Corps of Engineers*, No. 1:06-cv-1473 (N.D. Ga., Complaint filed June 20, 2007); *Florida v. Army Corps of Engineers*, No. 4:06-410 (N.D. Fla., Complaint filed Sept. 6, 2006); *Columbus v. Army Corps of Engineers*, No. 4:07-cv-00125 (M.D. Ga., Complaint filed Aug. 13, 2007); *Apalachicola v. Army Corps of Engineers*, No. 4:08-cv-00023 (M.D. Fla., Complaint filed Jan. 15, 2008).

5 *In Re Tri-State Water Rights Litigation*, No. 3:07-md-00001 (M.D. Fla., Transfer Order Mar. 21, 2007).

6 *In Re Tri-State Water Rights Litigation*, No. 3:07-md-00001 (M.D. Fla., Order July 17, 2009).

7 *In Re MDL-1824 Tri-State Water Rights Litigation*, 644 F.3d 1160 (11th Cir. 2011).

8 The Eleventh Circuit subsequently denied Alabama and Florida's request for a hearing before the full panel of the Court. *In Re MDL-1984 Tri-State Water Rights Litigation*, No. 09-14657 (11th Cir., Order Sept. 16, 2011). In June 2012, the U.S. Supreme Court effectively upheld the Eleventh Circuit's decision by denying Alabama and Florida's request for review. U.S. Supreme Court Order List (June 25, 2012).

9 U.S. Army Corps of Engineers, Memorandum for the Chief of Engineers, Authority to Provide for Municipal and Industrial Water Supply from the Buford Dam/Lake Lanier Project, Georgia (June 25, 2012), *available at* http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/2012ACF_legalopinion.pdf.

10 *Alabama v. U.S. Army Corps of Engineers*, No. CV-90-H-01331 (Order, July 3, 2012).

11 Following the Northern District of Alabama's dismissal of Alabama's claims related to the reallocation of water storage in Allatoona Lake for water supply, Alabama had one remaining claim related to the Corps' permitting of a new water supply reservoir for Cobb-Marietta. Alabama agreed to dismiss this final claim in late 2012. *Alabama v. U.S. Army Corps of Engineers*, No. CV-90-BE-01331 (Joint Stipulation Dismissing Remaining Claims, Oct. 19, 2012).

12 *Florida v. Georgia*, No. 142 Orig. (Petition Oct. 1, 2013). All pleadings in *Florida v. Georgia* are available at the Special Master's docket: http://www.pierceatwood.com/florida-v-georgia-no-142-original.

13 *Florida v. Georgia*, No. 142 Orig. (Motion to Dismiss for Failure to Join a Required Party, Feb. 17, 2015).

14 *Florida v. Georgia*, No. 142 Orig. (Order on State of Georgia's Motion to Dismiss for Failure to Join a Required Party, June 19, 2015).

15 *Florida v. Georgia*, No. 142 Orig. (Report of the Special Master, Feb. 14, 2017).

16 *Id.* at 3.

17 *Florida v. Georgia*, No. 142 Orig. (Order, Apr. 7, 2017). The U.S. Supreme Court's docket for the case is available here: https://www.supremecourt.gov/search.aspx?filename=/docketfiles/22o142.htm.

18 U.S. Army Corps of Engineers, Intent to Prepare Draft Environmental Impact Statement for Revised Water Control Manuals for the Alabama-Coosa-Tallapoosa River Basin, 72 Fed. Reg. 63561 (Nov. 9, 2007).

19 U.S. Army Corps of Engineers, Notice of Intent To Revise Scope of Draft Environmental Impact Statement for Updating the Water Control Manual for the Apalachicola-Chattahoochee-Flint River Basin To Account for the U.S. Court of Appeals for the Eleventh Circuit Ruling and a June 2012 Legal Opinion of the Corps' Chief Counsel Regarding Authority To Accommodate Municipal and Industrial Water Supply From the Buford Dam/Lake Lanier Project, 77 Fed. Reg. 62224 (Oct. 12, 2012).

20 U.S. Army Corps of Engineers, Record of Decision, Apalachicola-Chattahoochee-Flint River Basin Master Water Control Manual Update and Water Supply Storage Assessment, Alabama, Florida, and Georgia (Mar. 30, 2017), *available at* http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/ACF percent20ROD percent20Signed percent2030 percent20March percent2017.pdf?ver=2017-03-30-142329-577.

21 *Alabama v. U.S. Army Corps of Engineers*, Civil Action No. 1:17-cv-607 (D.D.C. filed Apr. 5, 2017).

22 *National Wildlife Federation, et al., v. U.S. Army Corps of Engineers*, Civil Action No. 1:17-cv-00772 (D.D.C. filed Apr. 27, 2017).

23 U.S. Army Corps of Engineers, Intent To Prepare Draft Environmental Impact Statement for Revised Water Control Manuals for the Alabama-Coosa-Tallapoosa River Basin, 72 Fed. Reg. 63561 (Nov. 9, 2007).

24 U.S. Army Corps of Engineers, Alabama-Coosa-Tallapoosa River Basin Water Control Manual Updated and Environmental Impact Statement, Scoping Report, 3-3 (Jan. 2009).

25 U.S. Army Corps of Engineers, Draft Environmental Impact Statement, Update of the Water Control Manual for the Alabama-Coosa-Tallapoosa River Basin in Georgia and Alabama (Mar. 2013), *available at* http://www.sam.usace.army.mil/Missions/Planning-Environmental/ACT-Master-Water-Control-Manual-Update/ACT-Document-Library/.

26 *Id.* at ES-4.

27 U.S. Army Corps of Engineers, Final Environmental Impact Statement, Update of the Water Control Manual for the Alabama-Coosa-Tallapoosa River Basin in Georgia and Alabama (Oct. 2014), *available at* http://www.sam.usace.army.mil/Missions/Planning-Environmental/ACT-Master-Water-Control-Manual-Update/ACT-Document-Library/.

28 These separate cases have been consolidated under the style *Georgia v. U.S. Army Corps of Engineers*, Civil Action No. 1:14-cv-3593 (N.D. Ga.).

29 Individual cases have been consolidated under *Alabama v. U.S. Army Corps of Engineers*, Civil Action No. 1:15-cv-696 (D.D.C.).

30 *Cobb County-Marietta Water Authority v. U.S. Army Corps of Engineers*, Civil Action No. 1:17-cv-0400 (N.D. Ga.).

31 Ga. Comp. R. & Regs. r. 391-3-6-.07(16); Georgia Environmental Protection Division, Permit to Withdraw, Divert or Impound Surface Water, No. 008-1491-05 (Nov. 7, 2014).

32 *Cobb County-Marietta Water Authority v. U.S. Army Corps of Engineers*, Civil Action No. 1:17-cv-0400 (N.D. Ga., Complaint filed Feb. 1, 2017).