Water Management Laws in Georgia
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I. Water Sharing Agreements/Interstate Compacts: The Example of the Tri-state Water Negotiations

As water resources come under increased demand due to, among other factors, population rise and climatic conditions, states across the nation – even on the relatively water-rich east coast – have been focusing more on protecting the water resources within their borders. As a result, the negotiation of interstate and even international water sharing agreements will likely become increasingly common to ensure an equitable apportionment of these precious resources. Here in Georgia, the effort has focused to a large extent on the tri-state water negotiations between Florida, Georgia, and Alabama. We can anticipate the negotiation of formal agreements with Tennessee and South Carolina in the future as well.

An incentive for negotiating an interstate/international water compact and allocation agreement is to prevent litigation in which the Supreme Court would ultimately decide the equitable apportionment between the states. An upfront agreement can also avoid piecemeal litigation around individual allocation decisions, such as that arising from the allocation of water in Lake Lanier.

A. **Interstate Compacts and Related Litigation:**

1. Interstate Compacts: In the Tri-state Water Negotiations, Congress passed compacts by joint resolution in 1997 for the Alabama-Coosa-Tallapoosa (ACT) and Appalachicola-Chattahoochee-Flint (ACF) basins. Under the compacts, the three states would develop allocation formulae for equitably apportioning surface waters in both basins. The deadline for agreement on these allocation formulas was extended many times, but, as of August 31 of this year, the deadline for the ACF was allowed to expire. The negotiations on the ACT allocation formula continues, but now the focus in the ACF basin has shifted to pending litigation in federal district court related to water allocation in Lake Lanier.

2. Current Litigation: In 1990, Alabama sued Georgia and the U.S. Army Corps of Engineers over Georgia's plan to construct a large reservoir that Alabama felt would negatively impact its surface water supplies. That litigation was stayed pending negotiations under the compact. With expiration of the ACF compact, the stay was lifted and that litigation is continuing in federal district court in Alabama (see State of Alabama v. United States Army Corps of Engineers, CV-90-BE-1331-E (N.D. Ala. 1990)).

The judge in the Alabama case recently issued an order granting an injunction against the Corps and Georgia preventing them from entering a settlement in the DC District Court in a case involving long-term contracts for municipal water use in Lake Lanier of water that previously was used for hydropower (see Southeastern Federal Power Customers, Inc. v. Caldera et al., 1:00CV02975 (D.D.C. 2000)). A similar dispute over use of water in Lake

Lanier is before the federal district court for the Northern District of Georgia (see State of Georgia v. United States Army Corps of Engineers et al., 2.01-CV-0026-WCO).

Florida has threatened to sue in the Supreme Court for an equitable apportionment of waters in the ACF basin. The Supreme Court has original jurisdiction over controversies involving two or more states. Florida will have to show that the controversy deals with a direct interest of the state and that its interests have been negatively impacted. If the Supreme Court agrees and accepts the case, then Georgia would have to show by clear and convincing evidence that the benefits of its diversion of water in the basin outweigh any harm that may result downstream to Florida. The Supreme Court generally appoints a Special Master to work through the difficult task of weighing the various interests of the states.

B. Relevant Federal and State Laws and Regulations

1. National Environmental Policy Act (NEPA)- Under NEPA, major federal actions such as the re-allocation or apportionment of waters between states would need to go through specific procedural requirements. While application of NEPA does not necessarily change the outcome of a federal decision on apportionment, it would require consideration of impacts from the project and alternatives to the proposed action.

2. Clean Water Act- The focus of the federal Clean Water Act is on controlling, and ultimately eliminating, the discharge of pollutants into waters of the United States. Attempts have been made to argue that the Act requires certain minimum instream flows to be maintained in order to protect the chemical, physical, and biological integrity of waters in a particular basin.

3. Endangered Species Act (ESA)- The ESA essentially prohibits federal agency action that jeopardizes the continued existence of a listed threatened or endangered plant or animal species. There are approximately sixty-three listed plant and animal species in the ACF and ACT basins. In a recent case involving water allocation decisions in the Klamath River basin, the court decided that water appropriated for irrigation must be kept instream to protect endangered salmon species during a period of drought. Failure to maintain these instream flows because of irrigation withdrawals had led to a massive fish kill on the Klamath.

4. Safe Drinking Water Act- While the negotiations under the Tri-state compact have involved surface water allocation, groundwater resources for municipal water use are largely regulated under the Safe Drinking Water Act and comparable state laws.

5. Other Federal and State Laws that Might Be Applied- Although the statutes listed above are the most obviously relevant, this is by no means an exclusive list. Other statutes related to the operation of dams and irrigation districts may be relevant, such as the federal Reclamation Act, Water Supply Act, or Flood Control Act. Other potentially relevant laws include federal and state wildlife resource protection statutes, including the Marine Mammal Protection Act, the Bald and Golden Eagle Protection Act, the Migratory Bird Treaty Act, the Fish & Wildlife Coordination Act, and Georgia's

Endangered Wildlife Act. Finally, the common law public trust doctrine might also be applied to interstate water allocations. The public trust doctrine recognizes the state government's fiduciary obligation to preserve navigable waters and submerged lands for the use and benefit of the public.

II. Interbasin Transfers

The federal statutes described above and any existing compacts may affect the ability of a state to conduct interbasin transfers. However, the authority to regulate interbasin transfers rests largely on the states.

Georgia's surface water withdrawal statute requires the EPD Director only to "give due consideration" to existing uses and applications that do not involve interbasin transfers before granting a permit for such a transfer. O.C.G.A. § 12-5-31(n)(1). The EPD Director must also give notice in the form of a press release for issuance of interbasin transfer permits. O.C.G.A. § 12-5-31(n)(2).

For the sixteen-county area in the Metropolitan North Georgia Water Planning District, Georgia law provides that the District, in formulating its water supply plan, "shall neither study nor include in any plan any interbasin transfer of water from outside the district area." O.C.G.A. § 12-5-584(f).

III. Water permit trading/marketing

The selling or marketing of water permits is currently not authorized by Georgia law. Georgia water law is rooted in the common law tradition of riparianism, now modified by statute to provide increased state oversight of withdrawals. This mixture of common law doctrine with state law regulation, such as exists in Georgia, has been referred to as "regulated riparianism." The principal concept in riparian law is that water is a public resource that belongs in common to the people of the state. A landowner who makes use of that water does not "own" the water, but simply has a right to make reasonable use of the water (a usufructory right). Thus, the fundamental legal principles underlying Georgia's regulated riparian system run counter to the private selling or marketing of water permits, which would convey more absolute property rights.

Georgia's statutory law provides EPD with certain powers with respect to water withdrawal permits, including powers to modify, suspend and revoke withdrawal permits (see, e.g., O.C.G.A. §§ 12-5-31, 12-5-96, 12-5-105, Ga. Comp. Rules and Regs 391-3-2-.05 (groundwater)). Permits from the state are required for withdrawals of more than 100,000 gallons per day on a monthly average. The permits are issued free of charge, and the law does not transfer to the permit recipient any property right to the water or water permit upon issuance of the permit beyond the right to reasonable use of the water.

IV. Comprehensive statewide water planning

Georgia statutory law currently does not authorize development of a comprehensive statewide water plan. However, on October 20, 2003, Governor Sonny Perdue issued an Executive Order creating the Georgia Water Resources Council comprised of the commissioners or directors of various state agencies to develop recommendations for the contents and scope of a comprehensive water resources management plan. The Council must submit its recommendations before the 2004 legislative session in anticipation of the General Assembly passing water planning legislation.

Current Georgia statutory law does provide for development of river basin management plans, O.C.G.A. §§ 12-5-520 – 12-5-525. Such plans are put together for each river basin by EPD and adopted by the Board of Natural Resources. Permitting activities must be consistent with the adopted plans, but the plans themselves need not contain any one specific goal. Goals of the plans "may include" educating the public, reducing pollution, improving aquatic habitat, and providing recreational benefits.

Current Georgia law also requires a water plan be developed for the sixteen-county Metropolitan North Georgia Water Planning District. The water withdrawal laws also allow for the creation of water development and conservation plans, O.C.G.A. §§ 12-5-31(h), 12-5-96(e).

Thus, while current law provides for some limited water planning, the Governor's Executive Order and the proposals for legislation in this upcoming session envision a more comprehensive approach to water planning that considers issues of both quantity and quality for both surface and groundwater resources in Georgia.