

Georgia Department of Natural Resources
Environmental Protection Division

2 Martin Luther King Jr., Drive, Suite 1152 East Tower, Atlanta, Georgia 30334
Judson H. Turner, Director
(404) 656-4713

January 14, 2013

BY ELECTRONIC MAIL AND U.S. MAIL

Tetra Tech, Inc.
Attn: ACF WCM
61 Saint Joseph Street, Ste 550
Mobile, AL 36602-3521

Re: Notice of Intent to Revise Scope of Draft Environmental Impact Statement for Updating the Water Control Manuals 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

Comments of the State of Georgia

Dear Sir or Madam:

The State of Georgia submits these comments in response to the Federal Register Notice of October 12, 2012 (77 Fed. Reg. 62,224) regarding the U.S. Army Corps of Engineers' (the "Corps") proposed revisions to the scope of the Draft Environmental Impact Statement ("EIS") for the Corps' update of the water control plans and manuals (collectively, "WCM") for the Apalachicola-Chattahoochee-Flint ("ACF") River Basin.

This is the Corps' third scoping notice concerning the EIS for the ACF WCM. The Corps' prior 2010 Scoping Report expressed the Corps' intent only to consider as action alternatives reservoir operations that restricted withdrawals and releases for water supply to those allowed under a July 2009 Order of the District Court in *In re Tri State Water Rights Litigation*, Civil Action No. 3:07-mdl-1

(M.D.Fla.)(the “MDL District Court Order”). The United States Court of Appeals for the Eleventh Circuit reversed the MDL District Court Order, and the Corps then determined that it possesses statutory authority to operate Lake Lanier to meet Georgia’s projected water supply demands as set forth in the May 16, 2000 request of the State of Georgia to the Assistant Secretary of the Army (the “Georgia Water Supply Request,” or “Request”). Accordingly, the Corps now must decide whether and how it will meet Georgia’s future water supply needs. The Corps’ deliberation over the Georgia Water Supply Request affects the scope of the EIS that the Corps must undertake for the WCM.

I. Georgia’s Prior Scoping Comments and Basis for Additional Comments

The Corps first solicited comments on the scoping of the ACF WCM on September 19, 2008. In scoping meetings that followed that notice, the Corps announced that the new WCM would merely document then-current operations. Thus, the Corps would not study as an alternative accommodating Georgia’s future water needs or modifying the Revised Interim Operating Plan for Jim Woodruff Dam (“RIOP”). In comments that it submitted on November 21, 2008, Georgia pointed out that limiting the scope of the EIS in this manner would violate the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, (“NEPA”) and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (“APA”), and would produce a deficient WCM that promptly would be rendered obsolete.

The Corps issued a second notice and request for comments on scoping in November 2009 in reaction to the MDL District Court Order. The MDL District Court Order provided that, absent congressional action or interstate agreement, as of July 19, 2012, the Corps would have to eliminate virtually all water supply withdrawals from Lake Lanier and limit releases from Lake Lanier during non-peak hydropower periods to no more than 600 cfs. The Corps announced that in light of the MDL District Court Order, in terms of water supply, the action alternative(s) for the ACF WCM would be restricted to the withdrawals and releases from Lake Lanier that were allowed under the MDL District Court Order. Georgia provided written comments stating that, notwithstanding the MDL District Court Order, the failure by the Corps to include as an action alternative operations to meet Georgia’s future water supply demands would violate NEPA and produce a meaningless document. The Scoping Report that the Corps issued in March

2010 restricted the alternatives to those that complied with the MDL District Court Order, but it did seem to acknowledge that the Corps would have to account for the serious economic implications of so restricting water supply, stating that “it is clear that the issues of greatest concern are the potential for significant impacts on socioeconomics, water resources, and biological resources.” Scoping Report at 96-97.

The United States Court of Appeals reversed the MDL District Court Order in June 2011, finding that reservoir operations to support water supply—at least water supply withdrawals from the river below Lake Lanier if not also direct withdrawals from the lake—were authorized under the River and Harbor Act of 1946, and that the Water Supply Act of 1958 gave the Corps additional water supply authority. The Court of Appeals directed the Corps to reconsider the Georgia Water Supply Request, first to determine whether the Corps has authority to grant the Request, and then, if the Corps determines it has such authority, to evaluate under NEPA the effects of granting the Request. Earlier this year, the Corps formally rendered the determination that it has authority to grant the Georgia Water Supply Request.

On October 12, 2012, the Corps published notice of its intent to revise the scope of the EIS for a second time, this time, finally, to “consider a broader range of water supply alternatives, including both current levels of water supply withdrawals and increased withdrawals, from Lake Lanier and downstream at Atlanta, that have been determined to be within the Corps’ legal authority.” 77 Fed. Reg. 62,224.

These comments are directed at the revised scope that the Corps has proposed. Georgia will not repeat comments that it has made in response to past scoping notices. To the extent that they are not modified herein or superseded by intervening events, however, Georgia’s prior comments stand, and Georgia asks that they remain in the record and that the Corps take them into consideration.

II. Comments on Proposed Revisions to Scope

A. In Assessing All Alternatives, the Corps' Must Take Into Account Georgia's Future Water Supply Needs

Pursuant to the order of the Court of Appeals, and having determined that it has legal authority to do so, the Corps has made the correct decision to study as an action alternative allowing withdrawals from Lake Lanier and making releases from Lake Lanier to meet the projected water supply demands included in the Georgia Water Supply Request. The Corps must decide how it will accommodate Georgia's future water supply demands, and it only makes sense to coordinate the decision on Georgia's Water Supply Request with the WCM update so that the WCM reflects that decision. Thus, the NEPA analysis for the WCM update and Georgia's Water Supply request should be consolidated in a single EIS. Moreover, to avoid the delay and unnecessary expenditure of resources associated with serial updates to the WCM, the EIS should look at modifications of reservoir operations over time to meet water supply needs well into the future.

Based on the foregoing, meeting Georgia's future water supply needs should be identified within the EIS as an element of the purpose and need for the updated WCM. Within the EIS, the Corps must "specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. Georgia's future water supply needs as articulated in the Water Supply Request properly fall within this definition. As a consequence, all alternatives should be evaluated against the criterion of whether and how they accomplish the purpose of meeting Georgia's projected water needs.

Any alternatives that do not involve releases to support up to 408 mgd of withdrawal from the Chattahoochee River above the Peachtree Creek confluence and 297 mgd withdrawal from Lake Lanier by 2040 must account for the economic, environmental, and sociological effects of other water projects that the State or local water systems will have to develop to meet the shortfall. NEPA guidance issued by the Council on Environmental Quality provides that where an alternative would result in predictable actions by others, this consequence of the alternative should be included in the EIS. *See Council on Environmental Quality, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy*

Act Regulations,” Question 3, 46 Fed. Reg. 18026, 18027 (1981). The substantially higher cost and environmental impact of projects to replace Lake Lanier likely render some or all of those alternatives unfeasible. The Corps does not have to include as an action alternative any alternative that is not feasible. *See Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 432 (10th Cir. 1996) (finding that Federal Aviation Administration was not required to consider certain alternatives to runway expansion because implementing the alternatives would be infeasible); *Coalition for Lower Beaufort County v. Alexander*, 434 F.2d 293 (D. D.C. 1977), *aff’d mem.*, 584 F.2d 558 (D.C. Cir. 1978) (holding that Corps was not required to consider alternative site for pier where alternative site would have required the dredging of a three-mile channel and was foreclosed by its expense and by environmental and navigational problems).

B. Georgia Has Submitted Updated Information in Support of the Georgia Water Supply Request

The Georgia Water Supply Request included the best available information as of May 2000 on projected population growth and future water demands that would be dependent on Lake Lanier. As more than twelve years have passed since Georgia submitted the Request, Georgia has collected updated population, water use, projections for water supply use, as well as updated analysis of the effects of granting Georgia’s Water Supply Request. The data that Georgia has collected confirms that Georgia’s water demands from Lake Lanier will reach 705 mgd, including 408 mgd river withdrawal and 297 withdrawal from Lake Lanier, within a reasonable planning horizon of approximately 25-30 years. The State of Georgia submitted this information to the Assistant Secretary of the Army on January 11, 2013. A copy of Georgia’s submission to the Assistant Secretary is attached as Exhibit A. In addition, Georgia is in the process of completing an economic analysis of the Georgia Water Supply Request. Georgia anticipates that the economic analysis will be completed by the end of the first quarter of 2013, at which time it will be provided to you for consideration for the EIS.

C. The Corps Should Study Alternatives to the Current RIOP

The State of Georgia continues to believe that the Corps should consider, as part of the EIS process for the WCM, alternatives to the RIOP. Although the Corps has modified the RIOP to be more protective of both system storage and

affected endangered species, recent science demonstrates that the flow requirements and thresholds used in the RIOP are based on overestimations of the biological needs of the protected species in the Apalachicola River at the expense of needs upstream. This has resulted, in part, from the use of indirect or surrogate measures based on limited scientific information on biological needs; direct measures based on recent science can and should be utilized. Doing so will provide the basis for alternatives to the RIOP that offer equal or even better results for the protected species, while producing higher reservoir levels.

The State of Georgia requests that the Corps at least carefully reexamine the RIOP using better refined performance measures. Georgia suggests that the Corps apply the following principles in evaluating the RIOP and alternatives:

1. Develop objective, direct, measurable, quantifiable, and scientifically-defensible performance measures;
2. Consider performance measures in the entire ACF Basin as a whole, instead of just those in the Apalachicola River, when evaluating alternatives;
3. Use these performance measures to compare and evaluate all alternatives in a consistent manner;
4. Favor alternatives that demonstrate improved performance related to multiple purposes or interests while also achieving performance measures with the greatest efficiency of individual project and system reservoir storage; and
5. Restrain from drawing conclusions or formulating operations based on incomplete data or insufficient scientific understandings.

Using performance measures that were developed using Corps and FWS data, the State of Georgia has developed an alternative to the RIOP. We will refer to this alternative as the "Georgia Contemplation." The Georgia Contemplation reflects the goal of targeting the highest amount of sustainable Gulf sturgeon spawning habitat and largest amount sustainable flood plain connectivity during the Gulf sturgeon spawning period; optimizing the amount of preferred habitat for

U.S. Army Corps of Engineers, Mobile District
Comments on Revised Scoping of EIS for WCM Update
January 14, 2013
Page 7

the Fat threeridge mussel; and conserving system storage to meet water supply and other authorized reservoir purposes.

Georgia EPD presented the Georgia Contemplation to the Corps, the Fish and Wildlife Service, and various ACF Basin stakeholders at a recent workshop. I have attached a narrative description of the Georgia Contemplation and slides illustrating its effectiveness in comparison with the RIOP. Georgia recommends that the Georgia Contemplation described in these attachments be considered as an alternative to the RIOP in the EIS process for the WCM.

III. Conclusion

Georgia requests that you give the foregoing comments and the comments expressed in Georgia' prior Comment Letters careful consideration in scoping the EIS for the update of the WCM for the Corps' projects in the ACF Basin. Please contact me if you have any questions or if I can be a resource for additional information that would assist you in this process.

Respectfully Submitted,



Judson H. Turner

Director

Georgia Environmental Protection Division

Attachments