

WHO OWNS ALABAMA’S COOSA RIVER? CITIZENS’ IMPACT
ON THE TRI-STATE WATER WARS MUTED BY PRIVATE
OWNERSHIP OF RIPARIAN RIGHTS

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I. THE MIGHTY COOSA RIVER

Alabama’s Coosa River originates in northwestern Georgia, just near enough to the Atlanta metropolitan area to be ensnared in the Tri-State Water Wars dispute between Georgia, Florida, and Alabama. These three states share four rivers: the Coosa and Tallapoosa Rivers, which become the Alabama River and empty into Mobile Bay (the Alabama-Coosa-Tallapoosa Basin, or “ACT”), and the Chattahoochee and Flint Rivers, which become the Apalachicola River and empty into Apalachicola Bay (the Apalachicola-Chattahoochee-Flint Basin, or “ACF”).¹

Of these four contested rivers, the Coosa is the largest, covering the most land at 10,148 square miles and carrying the most water of the four rivers with an average discharge of 15,950 cubic feet per second at its mouth.² The Coosa has the largest number of large reservoirs, at eight.³

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¹ *ACF & ACT Basins Map*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/southeast/drought/archive/pdf/ACF-ACTBasinsMap.pdf> (last visited Mar. 3, 2016).

² U.S. GEOLOGICAL SURVEY, WATER-DATA REPORT 2009: COOSA RIVER AT WETUMPKA, AL, SURFACE-WATER RECORDS (2009).

About half of the water leaving the Coosa River for the Alabama River flows across the Georgia-Alabama border.⁴ Lastly, the Coosa Valley has a high average rainfall of fifty-two to sixty-four inches annually, fairly evenly distributed throughout the year.⁵

Historically, the Coosa is a remarkably biodiverse river: 147 species of fish are known to have called the Coosa their home.⁶ Some suggest that the mussel and snail diversity of the Coosa River prior to the construction of dams would have ranked amongst the greatest in the world.⁷ Of the ninety-one snails historically found in the Coosa, eighty-two of them were endemic (found nowhere else in the world).⁸ Likewise, eleven of the fifty-three species of mussels historically found in the Coosa were endemic.⁹ On the whole, Alabama ranks first in the nation for aquatic biodiversity.¹⁰

Sadly, the damming of the Coosa River contributed to what state and federal biologists consider the greatest extinction event in recent times.¹¹ Mollusks, the phylum¹² including mussels and snails, felt the full brunt of the dams' impact.¹³ Thirty-six species of snails perished from the

³ Counting reservoirs of 3000 surface acres or more, the Chattahoochee River has four with Lake Lanier, West Point Lake, Lake Harding, and Walter F. George Lake; the Tallapoosa has Lake Wedowee and Lake Martin; the Flint River has Lake Blackshear; Lake Seminole is considered a lake of both the Chattahoochee and Flint Rivers, which converge in the impounded area. See U.S. ARMY CORPS OF ENG'RS, MASTER WATER CONTROL MANUAL UPDATE, APALACHICOLA-CHATTAHOOCHEE-FLINT RIVER BASIN xiv – xvii (2015). The Coosa River Basin's lakes larger than 3000 acres include Lake Allatoona, Carters Lake, Weiss Lake, H. Neely Henry Lake, Logan Martin Lake, Lay Lake, Lake Mitchell, and Lake Jordan. See U.S. ARMY CORPS OF ENG'RS, MASTER WATER CONTROL MANUAL UPDATE, ALABAMA-COOSA-TALLAPOOSA RIVER BASIN xiv–xvii (2014).

⁴ GA. ENVTL. PROT. DIV., GA. DEP'T NATURAL RES., COOSA RIVER BASIN MANAGEMENT PLAN 1998, at 2-14 (1998) (estimating mean annual discharge of the Coosa River at the state line at between 6700 and 8200 cubic feet per second).

⁵ *Id.* at 2-3.

⁶ MAURICE F. METTEE ET AL., FISHES OF ALABAMA AND THE MOBILE BASIN 22 (1996).

⁷ JOHN HALL & BETH YOUNG, HEADWATERS: A JOURNEY ON ALABAMA'S RIVERS 104 (2009).

⁸ *Coosa River*, OUTDOOR ALABAMA, ALA. DEP'T OF CONSERVATION & NATURAL RES., <http://www.outdooralabama.com/coosa-river> (last visited Mar. 3, 2016).

⁹ *Id.*

¹⁰ R. SCOT DUNCAN, SOUTHERN WONDER: ALABAMA'S SURPRISING BIODIVERSITY 2 (2013) (noting that Alabama ranks first in the nation in several major taxa including fishes, snails, mussels, turtles, and crayfishes).

¹¹ U.S. FISH & WILDLIFE SERV., RECOVERY PLAN FOR MOBILE RIVER BASIN AQUATIC ECOSYSTEM 6 (2000); WATERS INVESTIGATION PROGRAM, GEOLOGICAL SURVEY OF ALA., RESULTS OF QUALITATIVE SAMPLING FOR PROTECTED MUSSEL SPECIES AT SELECTED STATIONS IN THE CAHABA AND COOSA RIVERS, ALABAMA 2 (2005).

¹² Phylum is the taxonomic rank above class and below kingdom.

¹³ HALL & YOUNG, *supra* note 7, at 74 (noting that because mollusks are not very mobile, individual specimens cannot move out of a natural river that is being dammed).

Coosa River, over twenty of which were endemic.¹⁴ Four genera¹⁵ of freshwater snails also went extinct.¹⁶ Half of the twenty-eight freshwater mussel species extinctions and all thirty-six of the freshwater snail extinctions known to have occurred in the United States since European settlement occurred in the Mobile River Basin.¹⁷ In total, Alabama has lost over 100 aquatic species.¹⁸

Large fish, such as the Alabama Sturgeon (*Scaphirhynchus suttkusi*), have been pushed to the brink of extinction.¹⁹ On the Coosa River alone there are currently twenty-four endangered aquatic species, fifteen threatened species, and four candidate species awaiting federal protection under the Endangered Species Act.²⁰ Overall, Alabama ranks second in the nation, only behind Hawaii, for the number of species that have become extinct, and fourth in the nation for the number of species that are at risk of becoming extinct in the near future.²¹

The Coosa flows through mostly rural areas of Georgia and Alabama.²² It begins in Rome, Georgia at the confluence of the Oostanaula and Etowah Rivers. The Etowah has a particularly close proximity to Atlanta, which has made it a target for water supply coveted by the metro area.²³ The Coosa only flows directly through four medium-sized cities whose thirst it can easily quench: Rome, at the river's origin; Gadsden, once the "Queen City of the Coosa"²⁴; Pell City, at the interstate crossing between Atlanta and Birmingham; and Wetumpka, at the river's terminus. Only eighteen roads²⁵ cross the

¹⁴ U.S. FISH & WILDLIFE SERV., *supra* note 11, at 9.

¹⁵ Genera or genus is the taxonomic rank above species and below family.

¹⁶ Mary C. Freeman et al., *Status and Conservation of the Fish Fauna of the Alabama River System*, 45 AM. FISHERIES SOC. SYMP. 557, 571 (2005).

¹⁷ U.S. FISH & WILDLIFE SERV., *supra* note 11, at 9.

¹⁸ ALA. DEP'T OF CONSERVATION & NATURAL RES., ALABAMA'S COMPREHENSIVE WILDLIFE CONSERVATION STRATEGY 4 (2005).

¹⁹ *Listing of the Alabama Sturgeon*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/daphne/Fact_Sheets/alsturg.pdf (last visited Mar. 29, 2016).

²⁰ ERIC SPADGENSKE, U.S. FISH & WILDLIFE SERV., THREATENED, RARE, AND ENDANGERED SPECIES IN THE COOSA RIVER BASIN 6, *available at* http://www.cleanwaterpartnership.org/uploadedFiles/File/portfolio_Document_1319050309.pdf (last visited Feb. 14, 2016).

²¹ ALA. DEP'T OF CONSERVATION & NATURAL RES., *supra* note 18, at 4.

²² *Id.* at 143. The Coosa Basin land use distribution is seventy percent forested, nineteen percent agricultural, and five percent urban according to Alabama Department of Conservation and Natural Resources.

²³ Marianne English, *Shoal Creek Reservoir Plans May 'Endanger' Dawson Forest*, 90.1 WABE ATLANTA'S NPR STATION, <http://news.wabe.org/post/shoal-creek-reservoir-plans-may-endanger-dawson-forest> (last visited Mar. 29, 2016).

²⁴ *The Modern City*, 3 INT'L MONTHLY 9 (1918).

²⁵ Bridges by county in Alabama include Chilton (two road crossings into Coosa County), Cherokee (two road crossings), Elmore (two road crossings), Etowah (six road crossings), Shelby (one road crossing into Talladega County), and St. Clair (three road crossings into Talladega County). Floyd County in Georgia has two road crossings.

Coosa River on its 286-mile journey through ten counties, during which it drops in elevation by 454 feet.²⁶ For the Coosa to be in the middle of an urban water battle is uncharacteristic of its course and, considering the river's calm and settled nature, its spirit.

It was once said with some truth that the Coosa River's bends "touch every farm in the valley."²⁷ For every section of the mighty Coosa that flowed calmly past expansive farms, it also showcased sections of raging river that thundered over menacing rapids with well-deserved names like Devil's Staircase, Hell's Gap, and Butting Ram Shoals.²⁸ The *Laura Moore*, with Captain Cummins Lay at the helm, is the only powered boat in history to have successfully navigated the entire length of the Coosa River, a testament to both the river and the Captain.²⁹ Captain Lay's achievement will stand for some time as the Coosa's dams prevent boat passage now and will continue to do so until the inevitable undamming of the river. Although dams were built to last a long time on a generational timescale (e.g., Lay Dam is over 100 years old³⁰), the Coosa River flows on a timescale measured in millions of years.³¹

The days of steamboats moving down the Coosa carrying cotton crops from the fertile, expansive Coosa Valley farmland gave way to the development of hydroelectricity as the Alabama Power Company constructed eight dams that formed six reservoirs beginning at the Georgia-Alabama state line, holding the river captive every mile until it reached Wetumpka.³² Not a single mile of the Coosa River in Alabama was left untouched by the impact of "Big Hydro."³³ With the construction of these federally-licensed dams came changes in riparian ownership that fundamentally altered the State's ability to manage its water resources.³⁴

The control Alabama Power Company wields over the Coosa River extends well into the politics of water management. A division of Southern Company, Alabama Power exerts similar control over the

²⁶ U.S. ARMY CORPS OF ENGINEERS, MASTER WATER CONTROL MANUAL FINAL DRAFT, ALABAMA-COOSA-TALLAPOOSA RIVER BASIN 2-3 (2013).

²⁷ HARVEY H. JACKSON III, RIVERS OF HISTORY 1 (1995).

²⁸ *Id.* at 1, 3.

²⁹ *Id.* at 132.

³⁰ *Lay Dam Facts*, ALA. POWER CO., <https://apcshorelines.com/our-lakes/lay/> (last visited Dec. 2, 2015).

³¹ HALL & YOUNG, *supra* note 7, at 4.

³² JACKSON, *supra* note 27, at 3, 173-90.

³³ *Id.*

³⁴ The Federal Energy Regulatory Commission ("FERC") licenses Alabama Power Company's dams. *Overview: Hydro Relicensing*, ALA. POWER CO., <http://www.alabamapower.com/community/lakes/hydro/home.asp> (last visited Mar. 3, 2016).

Tallapoosa River and portions of the Black Warrior River, and the company recognizes itself as “the largest water manager in the state.”³⁵

Three entities operate the major dams in Alabama. Alabama Power Company owns or operates seven hydropower dams on the Coosa, four dams on the Tallapoosa River, and three dams on the Black Warrior River.³⁶ The Tennessee Valley Authority, a federally-owned corporation, operates nine dams on the length of the Tennessee River.³⁷ The U.S. Army Corps of Engineers (the “Corps”) operates three dams on the Alabama River,³⁸ five on the Tombigbee River,³⁹ as well as two dams on tributaries of the Coosa River in Georgia. The extensive damming of these rivers has left behind a significantly altered ecosystem.⁴⁰

Alabamians use the Coosa River in a variety of manners that enrich their way of life. Not least among them is fishing. The Coosa River, being close to the original and current home of the Bass Anglers Sportsman Society, has hosted eight Bassmaster Classics.⁴¹ Of the thirteen lakes on the Alabama Bass Trail, five of them are on the Coosa River.⁴² The Coosa’s lakes attract lake homeowners who live or

³⁵ Letter from Matthew W. Bowden, Vice President of Environmental Affairs, Alabama Power Company, to J. Brian Atkins, Division Director, Alabama Office of Water Resources (Nov. 1, 2012), <http://adeca.alabama.gov/Divisions/owr/awawg/Comments/Alabama%20Power%20Company,%20Matthew%20Bowden.pdf>.

³⁶ *Our Lakes & Dams*, ALA. POWER CO., <https://apcshorelines.com/our-lakes/> (last visited Dec. 2, 2015).

³⁷ The dams include Fort Loudoun Dam, Watts Bar Dam, Chickamauga Dam, Nickajack Dam, Guntersville Dam, Wheeler Dam, Wilson Dam, Pickwick Dam, and Kentucky Dam. *Hydroelectric*, TENN. VALLEY AUTH., <https://www.tva.gov/Energy/Our-Power-System/Hydroelectric> (last visited Mar. 3, 2016).

³⁸ The dams include Robert F. Henry Lock & Dam, Millers Ferry Lock & Dam, and Claiborne Lock & Dam. *Alabama River Lakes Project Map*, U.S. ARMY CORPS OF ENG’RS, <http://www.sam.usace.army.mil/Portals/46/docs/recreation/OP-BA-A/new%20ARL%20brochure.pdf> (last visited Mar. 3, 2016).

³⁹ The dams include John C. Stennis Lock & Dam, Tom Beville Lock & Dam, Howell Heflin Lock & Dam, Demopolis Lock & Dam, and Coffeeville Lock & Dam. *Tennessee-Tombigbee Basin Map*, U.S. ARMY CORPS OF ENG’RS, <http://water.sam.usace.army.mil/tenntom.gif> (last visited Mar. 3, 2016).

⁴⁰ Freeman et al., *supra* note 16, at 560 (suggesting that approximately seventy-four percent of the Alabama River, eighty-seven percent of the Coosa River, and twenty-nine percent of the Tallapoosa River are now pools of water in reservoirs as opposed to free-flowing rivers).

⁴¹ The 1992, 1993, and 1997 Bassmaster Classics took place on Logan Martin Lake, while the 1996, 2002, 2007, and 2010 Classics took place on Lay Lake. *B.A.S.S. Historical Timeline*, BASSMASTER, <https://www.bassmaster.com/news/bass-historical-timeline> (last visited Mar. 3, 2016).

⁴² *Alabama Bass Trail Lakes*, ALA. BASS TRAIL, <http://www.alabamabasstrail.org/abt-lakes/>. The Tennessee River is the only other river to have more than one lake on the Trail, with three. Lake Mitchell is the only Coosa River lake to not make the Trail. Fishing tournaments on the Coosa River Lakes provide a significant economic boost to the local economy, with estimates of a \$250,000 impact on the local economy from hosting a major, at-least three day fishing

vacation on the river. The river provides drinking water for several municipalities, as well as irrigation and water supply for agriculture and industry.⁴³

A growing worry on the lakes in Alabama is how the Coosa will fare in the Tri-State Water Wars, with the leaders of Alabama ostensibly making little progress to protect the river. In many instances, discussed in sections below, citizens are taking their own steps to help protect the ecological integrity of the Coosa and other rivers embroiled in the Water Wars. However, a combination of Alabama's inadequate riparian law, weak public trust doctrine, and concentrated riparian ownership by hydropower interests complicates the issue of managing these waters, ultimately hampering Alabama's ability to protect the State's interest in, and the biological integrity of, the Coosa River in the Tri-State Water Wars.

The second part of this article will discuss the various arenas in which citizen stakeholders are taking action in the management of Alabama's waters. The third part examines the issue of legal ownership of the Coosa River. Finally, the conclusion summarizes how private ownership of the Coosa complicates efforts to manage the state's waters.

II. BOOTS ON THE GROUND

Citizens have grown increasingly concerned with the impact Atlanta's growing thirst could have on two fronts: first, the environmental impact on water quality, and second, the detrimental depletion of and impact upon drinking water supply and recreational uses downstream in Alabama. On many levels and in many venues, citizens and non-governmental organizations have taken the initiative to act to protect the environmental, recreational, and aesthetic qualities of their rivers.

First, Alabamians are actively engaging in the state's water management planning. Second, they are working within the existing

tournament. Lisa Savage, *Fishing Tournaments Have Big Impact on Area*, GADSDEN TIMES (Mar. 5, 2016, 08:02 PM), <http://www.gadsdentimes.com/article/20160305/NEWS/160309985?p=1&tc=pg>.

⁴³ Drinking water from the Coosa River is provided to the Greater Gadsden Area (via Gadsden Water Works on Neely Henry Lake), Odenville, Springville, Pell City (via Coosa Valley Water Supply District on Logan Martin Lake), Shelby County (via Shelby County Water Services at two locations on Lay Lake), and Clanton (via Clanton Water Department on Lake Mitchell). Three power plants include the Hammond Steam Plant, Gadsden Steam Plant, and Ernest C. Gaston Steam Plant. Goodyear Tire and Resolute Forest Products have industrial operations on the river. Agriculture close to the river is mostly limited to small privately owned farms, but also some sod farming.

regulatory framework to adopt new standards to protect rivers from excessive water withdrawals. Third, groups are using litigation under existing environmental laws to protect aquatic species that could be harmed by excessive water withdrawals or new reservoir development. Lastly, stakeholder groups are working to develop their own management plans.

A. Water Management Planning in Alabama

Alabama's greatest weakness in its attempt to litigate its way through the Water Wars is the State's complete lack of a statewide water management plan. Every single state in the Southeast has a water management plan, except for Alabama.⁴⁴ A statewide comprehensive water management plan demonstrates to a court that a state has taken adequate steps to study its water resources and needs, and that it has devoted significant energy to properly managing that water.⁴⁵ Not having such a plan indicates a lack of concern or responsibility for statewide water resources. Alabama's water management plan has been a long time coming, and collaborative efforts have slowed to a crawl as research and funding have become bogged down in politics.⁴⁶

Even with former Alabama Governor Guy Hunt's creation of the Alabama Water Resources Study Commission in 1990,⁴⁷ or current Governor Robert Bentley's more recent Alabama Water Agencies Working Group ("AWAWG"),⁴⁸ no meaningful, effective outcomes have actually been achieved. Governor Bentley ordered his agencies to work together on water management and policy issues beginning in late 2011.⁴⁹ His agency task force submitted a document chock full of policy options and recommendations to the Governor on December 1, 2013.⁵⁰ To the chagrin of public activists and organizations who had worked so diligently on the issue in the previous two years, the final report sat on Governor Bentley's desk for over four months before it was released to

⁴⁴ *Water Policy*, ALA. RIVERS ALLIANCE, <http://www.alabamarivers.org/current-work/water-management-planning> (last visited Dec. 2, 2015).

⁴⁵ Mitch Reid, Op-Ed, *Alabama Needs a Comprehensive Water Management Plan Now, Not Later*, ALABAMA.COM (Aug. 19, 2013, 08:15 AM), http://www.al.com/opinion/index.ssf/2013/08/alabama_needs_a_comprehensive.html.

⁴⁶ *Id.*

⁴⁷ ALA. WATER AGENCIES WORKING GROUP, MAPPING THE FUTURE OF ALABAMA WATER RESOURCES MANAGEMENT: POLICY OPTIONS AND RECOMMENDATIONS 119 (2013).

⁴⁸ *Id.* at 1 (noting that the agencies included in the working group are the Alabama Department of Agriculture and Industries, the Alabama Department of Conservation and Natural Resources, the Alabama Department of Economic and Community Affairs (Office of Water Resources), the Alabama Department of Environmental Management, and the Geological Survey of Alabama).

⁴⁹ *Id.*

⁵⁰ *Id.*

the public on April 17, 2014.⁵¹ Since that time, nothing further has been accomplished on the issue as the State wallows in a seemingly self-inflicted budget crisis.

Of the water management issues Bentley's agency task force reported, water ownership was among the more esoteric. AWAAG noted Alabama's claim to ownership of waters flowing through the state is questionable.⁵² Nothing in the Alabama Constitution, legislation, or case law makes clear that Alabama owns the surface waters that flow through the state.⁵³ Instead, only riparian landowners have legal ownership of this water.⁵⁴

Stakeholders in water management planning issues were given the opportunity to weigh in on the work of AWAAG before the final report was delivered to the Governor.⁵⁵ Many pointed to the critical issue of water law. Professors William Andreen and Heather Elliott of the University of Alabama School of Law opined that "Alabama's current legal regime is wholly inadequate."⁵⁶ Both professors, and several other stakeholders, recommended that Alabama adopt the *Regulated Riparian Model Water Code*, developed by the American Society of Civil Engineers,⁵⁷ in order to better manage the state's water resources.⁵⁸

Matthew Bowden, Vice President of Environmental Affairs for Alabama Power Company, wrote that

the AWAAG report contains a statement implying that Alabama's water resources are owned by the State. While there is little debate the state owns certain submerged lands and that certain water bodies are classified as 'public waters' from the

⁵¹ Press Release, Office of Alabama Governor Robert Bentley, Governor Bentley Releases Alabama Water Resources Management Policy Report (Apr. 17, 2014), <http://governor.alabama.gov/newsroom/2014/04/governor-bentley-releases-alabama-water-resources-management-policy-report/>.

⁵² ALA. WATER AGENCIES WORKING GROUP, *supra* note 47, at 92.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Stakeholder Comments*, ALA. WATER AGENCIES WORKING GROUP, <http://adeca.alabama.gov/Divisions/owr/awawg/Pages/comments.aspx> (last visited Feb. 25, 2016).

⁵⁶ Email from Bill Andreen & Heather Elliott, Professors of Law, University of Alabama School of Law, to Dr. Bennett Bearden, Chair, Alabama Water Agencies Working Group (Oct. 31, 2012), <http://adeca.alabama.gov/Divisions/owr/awawg/Comments/University%20of%20Alabama%20School%20of%20Law,%20William%20Andreen,%20Heather%20Elliott.pdf>.

⁵⁷ *Id.*; see also AM. SOC'Y OF CIVIL ENG'RS, *REGULATED RIPARIAN MODEL WATER CODE* (2004).

⁵⁸ See Andreen & Elliott, *supra* note 56; see also Comment of Mitchell Reid, Alabama Rivers Alliance (Nov. 1, 2012); Comment of Black Warrior Riverkeeper (Nov. 1, 2012); Comment of Beth K. Stewart & Randall C. Haddock, Cahaba River Society (Nov. 1, 2012); Comment of Myra Crawford, Cahaba Riverkeeper (Nov. 1, 2012); Comment of Rita Grub. These comments are compiled at *Stakeholder Comments*, ALA. DEPT. OF ECON. & CMTY AFFAIRS, <http://adeca.alabama.gov/Divisions/owr/awawg/Pages/comments.aspx> (last visited Mar. 3, 2016).

standpoint of public access, we are not aware of any legal support for the proposition that the state ‘owns’ surface water as a general rule.⁵⁹

The comment hinted at what is likely Alabama Power Company’s greatest concern with the ongoing water management planning, and the one that is most likely to derail its progress.

During the same comment period, Alabama Attorney General Luther Strange stated that he is “ready to take appropriate legal action to protect the State’s legal interest in its water resources.”⁶⁰ In consideration of its contribution to Alabama’s economy and natural environment, it would be surprising if the Coosa River was not near the top of the list of waterways in the public trust that the Attorney General would want to protect. It would be even more shocking to imagine the Attorney General going toe-to-toe with the state’s largest power provider to fight for ownership of the Coosa.⁶¹ The points Bowden and AAWWG raise show that Alabama would most certainly lose an argument claiming ownership of surface waters in private impoundments.⁶²

After the flurry of activity in developing the report and compiling stakeholder comments, little has been accomplished, which benefits Alabama Power directly by maintaining the status quo. For two years, the policy options and recommendations have sat on Governor Bentley’s desk. No legislation has been introduced on the matter. Despite benefitting from a Republican supermajority in the House and Senate,⁶³ the Republican Governor had to call two special sessions during the 2015 legislative session just to pass a state budget.⁶⁴ Water management planning could not have been further from reaching the floor.

Furthermore, many of the AAWWG member agencies received drastic budget cuts. For example, the Alabama Department of

⁵⁹ Letter from Matthew W. Bowden, *supra* note 35, at 2.

⁶⁰ Letter from Jess Nix, Deputy Attorney General, State of Alabama, to J. Brian Atkins, Division Director, Alabama Office of Water Resources (Nov. 1, 2012), <http://adeca.alabama.gov/Divisions/owr/awawg/Comments/AL%20Attorney%20General's%20Office,%20Jess%20Nix.pdf>.

⁶¹ *Alabama State Energy Profile*, U.S. ENERGY INFO. ADMIN., (Mar. 17, 2015), <https://www.eia.gov/state/print.cfm?sid=AL>.

⁶² Letter from Matthew W. Bowden, *supra* note 35; *see also* ALA. WATER AGENCIES WORKING GROUP, *supra* note 47, at 1.

⁶³ Cameron Smith, *GOP Supermajority, Governor Should Hold Their Noses and Pass Budget*, ALABAMA.COM (May 20, 2015, 07:30 AM), http://www.al.com/opinion/index.ssf/2015/05/if_a_republican_supermajority.html.

⁶⁴ Mike Cason, *Gov. Robert Bentley Signs State Budget*, ALABAMA.COM (Sept. 17, 2015, 12:21 PM), http://www.al.com/news/index.ssf/2015/09/gov_robert_bentley_signs_state.html.

Environmental Management's ("ADEM") budget was drastically reduced to just \$280,000, which was earmarked entirely for livestock management programs.⁶⁵ ADEM is also required to send \$1,200,000 back to the State's General Fund.⁶⁶ These cuts happened despite the Environmental Protection Agency ("EPA") threatening that further cuts to the State's budget could be grounds for EPA to revoke Alabama's authority to issue water pollution permits.⁶⁷ In response to 2016 budget cuts, ADEM was forced to approve a twenty percent increase in permit fees just to maintain funding equivalent with the 2014 levels EPA had scrutinized.⁶⁸

ADEM also conducts a significant portion of the water quality monitoring that is necessary for developing a water management plan based on sound science.⁶⁹ Many of the industry critics of water management planning called for more data before any changes to riparian law are considered.⁷⁰ Crippling ADEM's ability to collect data by defunding their program is yet another recondite, silent victory for the status quo.

The budget that was ultimately passed did not address long-term issues that affect the way the state government is funded. This means that budget "showdowns" will continue to happen year after year, leaving little to no time, or funds, for other important legislative work, like amending current riparian law and developing a comprehensive water management plan.⁷¹

⁶⁵ Dennis Pillion, *Alabama's Environmental Management Funding Slashed in 2016 Budget; Fee Increases Loom*, ALABAMA.COM (Sept. 18, 2015, 09:59 AM), http://www.al.com/news/index.ssf/2015/09/alabamas_environmental_managem.html.

⁶⁶ *Id.*

⁶⁷ LANCE LEFLEUR, ALA. DEP'T OF ENVTL. MGMT., DIRECTOR'S REPORT TO AEMC OCTOBER 16, 2015, at 5 (2015).

⁶⁸ LANCE LEFLEUR, ALA. DEP'T OF ENVTL. MGMT., DIRECTOR'S REPORT TO AEMC DECEMBER 18, 2015, at 1 (2015).

⁶⁹ ALA. DEP'T OF ENVTL. MGMT., ALABAMA'S WATER QUALITY ASSESSMENT AND LISTING METHODOLOGY 13 (2014).

⁷⁰ Comments calling for more data included Comment of Matthew Bowden, Alabama Power Company (Nov. 1, 2012); Comment of Roy McAuley, Alabama Pulp and Paper Council (Nov. 1, 2012); Comment of Jerry Newby, Alabama Farmers Federation, (Oct. 24, 2012); Comment of David Roberson, Business Alliance for Responsible Development (Nov. 1, 2012); Comment of William Canary, Business Council of Alabama (Oct. 31, 2012); Comment of Dennis Lathem, Coalbed Methane Association of Alabama (Nov. 15, 2012); Comment of Larry Merrihew, Chairman, Coalition of Alabama Waterway Associations (Nov. 1, 2012); Comment of George Clark, Manufacture Alabama (Nov. 1, 2012); Comment of Keith Stephens, PowerSouth Energy Cooperative (Nov. 1, 2012). These comments are compiled at *Stakeholder Comments*, ALA. DEPT. OF ECON. & CMTY AFFAIRS, <http://adeca.alabama.gov/Divisions/owr/awawg/Pages/comments.aspx> (last visited Mar. 3, 2016).

⁷¹ Kyle Whitmire, *Alabama Legislature's 2015 Winners and Losers*, ALABAMA.COM (Sept. 17, 2015, 1:52 PM), http://www.al.com/opinion/index.ssf/2015/09/alabama_legislatures_2015_winn.html.

Alabama will struggle to make any progress towards water management planning with reduced funding and staffing for the AWAAG agencies that make up the Governor's task force. With Alabama's involvement in litigation and negotiation similarly dissipating, many citizens are beginning to question if state leaders will ever make meaningful progress to protect their rivers.

Alabama must prioritize water management planning to have any chance for a successful outcome in the Water Wars. Otherwise, it will continue to come to the table empty handed while Florida and Georgia give Alabama the royal flush.

B. Setting the Standard

Water quality standards provide a comprehensive method for environmental agencies to protect waterbodies from degradation.⁷² However, the standards are only as effective as the science they are based on. Water quality standards are *supposed* to be adopted by state agencies using the latest available scientific knowledge to define the baseline water quality characteristics of a healthy stream, setting limits on criteria like minimum levels of dissolved oxygen or maximum levels of temperature.⁷³ The unfortunate political reality is that sometimes water quality standards include blanket exceptions to certain industries, or the standards are based on faulty or out-of-date scientific data.⁷⁴ The environmental community has had little success in overturning standards they view as contrary to the Clean Water Act ("CWA").

One effort by citizen groups is to encourage ADEM to adopt water quality standards that would protect a river's flow. Currently, Alabama does not have a water quality standard for flow.⁷⁵ This means riparian landowners may reasonably alter the flow of a stream passing through their property.⁷⁶ Downstream landowners have no riparian rights

⁷² 40 C.F.R. § 131.2 (2015).

⁷³ *How are Standards Developed?*, EPA, <http://www2.epa.gov/standards-water-body-health/how-are-standards-developed> (last visited Jan. 12, 2016) (emphasis added).

⁷⁴ For example, Alabama's water quality standards grant a blanket variance for existing hydropower facilities to only have to meet a 4.0 mg/L dissolved oxygen standard instead of 5.0 mg/L, which is generally considered the scientifically-defensible standard. See Specific Water Quality Criteria, ALA. DEP'T OF ENVTL. MGMT. ADMIN. CODE REV. § 335-6-10-.09 (2014). Conservationists have criticized that this variance is illegal because there is no scientific evidence that suggests 4.0 mg/L is an acceptable level at existing hydro facilities compared to natural streams or at future hydro facilities.

⁷⁵ See Alabama Water Quality Standards, ALA. DEP'T OF ENVTL. MGMT. ADMIN. CODE REV. § 335-6-10 (2014).

⁷⁶ This is so because Alabama currently operates under a "reasonable use" doctrine and there is no water quality standard for flow to define what "reasonable use" is. A court must decide what

guaranteed by law that protect against otherwise “reasonable” human-caused changes in flow of their creek.⁷⁷ If an upstream neighbor completely sucks a creek dry, the downstream neighbor can sue him for an injunction of an “unreasonable use,” but this requires a reactive, lengthy, and often costly court battle.⁷⁸

In 2010, EPA encouraged Alabama “to consider explicit expression of flow as a water quality standard.”⁷⁹ Additionally, since at least 1998, ADEM has been aware that altered flows can detrimentally impact water quality. In 1998, ADEM named three water bodies, including the Coosa and Tallapoosa Rivers, as impaired due to flow alteration.⁸⁰ Despite this declaration, ADEM has refused to develop a water quality standard for flow. Again, a water quality standard for flow could have significant impact on existing reservoir operations which may be the primary political reason why no progress has been made on flow standards. This is unfortunate because a flow standard could assist Alabama in the Tri-State Water Wars if Georgia, as an upstream neighbor, diverts significant amounts of water from the Coosa, Tallapoosa, or Chattahoochee rivers.

Several other states have enacted water quality standards that account for flow, which Alabama can use as models for implementing its own flow standards. For example, Tennessee adopted a narrative water quality standard, requiring that “[s]tream or other waterbody flows shall support the fish and aquatic criteria.”⁸¹ Vermont, on the other hand, has a numeric standard, mandating that “[c]hanges from the natural flow regime shall not cause the natural flow regime to be diminished, in aggregate, by more than 5% of 7Q10 at any time.”⁸² The term 7Q10 refers to the lowest seven-day average flow that occurs on average every ten years, or in other words a very low flow volume.⁸³ Five percent of this low flow, then, is a very small volume indeed.

is and is not reasonable. See Heather Elliott, *Alabama's Water Crisis*, 63 ALA. L. REV. 383, 390–91 (2012).

⁷⁷ *Id.* at 391–92.

⁷⁸ *Id.*

⁷⁹ Letter from Joan Benante, EPA Region 4, to James McIndoe, Ala. Dep't of Env'tl. Mgmt. 5 (Aug. 20, 2010) (on file with author).

⁸⁰ ALA. DEP'T OF ENVTL. MGMT., ALABAMA'S 1998 §303(D) LIST OF IMPAIRED WATERS (1998). Ultimately this listing was an error by ADEM because they cannot list a stream as impaired if the pollutant (in this case flow) does not have a water quality standard. The listings were revoked in later editions of the 303(d) List of Impaired Waters.

⁸¹ See TENN. CODE ANN. § 0400-40-03-03 (2015).

⁸² See WATERSHED MGMT. DIV., VT. DEP'T OF ENVTL. CONSERVATION, VERMONT WATER QUALITY STANDARDS ENVIRONMENTAL PROTECTION RULE CHAPTER 29(a), § 3-01(C)(1)(a) (2014).

⁸³ *Id.*

For the Coosa River at Mayo's Bar near the Georgia-Alabama state line, which has a 7Q10 flow of 1200 cubic feet per second,⁸⁴ a five percent deviation would amount to just under 32.3 million gallons of water per day.⁸⁵ By comparison, the Cobb County-Marietta Water Authority, the second largest supplier of drinking water in Georgia,⁸⁶ withdrew an average of 47.2 million gallons of water per day from Lake Allatoona in 2006⁸⁷ and is permitted to produce 72 million gallons of water per day at that facility.⁸⁸

States are required to recognize downstream water quality standards in decision-making processes like issuing water withdrawal or pollution permits, or when setting their own water quality standards. The CWA requires that "the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters."⁸⁹ EPA interprets this to include situations, like the ACT Basin and on the Coosa River, where multiple states are involved.⁹⁰

As such, Georgia must recognize and consider Alabama's water quality standards and use of the Coosa, Tallapoosa, and Chattahoochee Rivers in setting Georgia's water quality criteria, designating uses, and potentially when making permitting decisions. Alabama's lack of flow criteria is one more reason why Georgia does not have to recognize the streamflow needs of Alabama. Adding a flow standard would provide an additional safeguard and litigation stronghold indicating that Alabama is taking its water stewardship responsibilities seriously. Moreover, it could be used as a tool for Alabama to challenge Georgia's consumptive water uses and apply pressure towards a negotiated settlement. Not having a water quality standard for flow signals to courts that Alabama does not view water quantity or streamflow as a threat to its needs.

⁸⁴ ENVTL. PROT. DIV., GA. DEP'T OF NATURAL RES., TOTAL MAXIMUM DAILY LOAD EVALUATION FOR THE COOSA RIVER IN THE COOSA RIVER BASIN FOR DISSOLVED OXYGEN 30 (2004).

⁸⁵ A 1200 cubic feet per second annual average 7Q10 converts 645.8 million gallons per day, five percent of which is only 32.3 mgd.

⁸⁶ *About Us*, COBB COUNTY-MARIETTA WATER AUTH., <http://ccmwa.org/About-Us> (last visited Dec. 10, 2015).

⁸⁷ U.S. ARMY CORPS OF ENG'RS, RECORD OF DECISION, ALABAMA-COOSA-TALLAPOOSA RIVER BASIN MASTER WATER CONTROL MANUAL REVIEW AND UPDATE, ADDENDUM A (2015).

⁸⁸ COBB COUNTY-MARIETTA WATER AUTH., 2014 ANNUAL REPORT (2014).

⁸⁹ 40 C.F.R. § 131.10(b) (2015).

⁹⁰ OFFICE OF WATER, EPA, EPA No. 820-F-14-001, PROTECTION OF DOWNSTREAM WATERS IN WATER QUALITY STANDARDS: FREQUENTLY ASKED QUESTIONS 1-6 (2014).

If Alabama had a numeric or even narrative water quality standard that protected water quantity in the Coosa River, then Georgia, and the federal government (through the Corps), would be forced to recognize it.⁹¹ The key is that the standard must be defensible with the latest scientific knowledge to withstand scrutiny in court.⁹² But it will be politically difficult for ADEM to develop flow criteria that will satisfy the Alabama Power Company, which is the largest private riparian landowner in the state. Consequently, the Alabama Power Company exerts significant influence on developing this criteria. Although the Alabama Power Company has a vested interest in the volume of flows entering the state, any regulation of flows could have far reaching impacts for their operation of hydropower dams across several rivers.

Alabama must put science before politics and adopt water quality standards that adequately protect its rivers from the potential ecological and economic impacts of an unsuccessful battle in the Water Wars. A water quality standard for flow is long overdue and imperative in Alabama to protect the interests of its rivers and end-users.

C. Threatening the Endangered Species Act

One conservation group has taken legal action against a federal agency that, as a byproduct, could prove hugely successful in protecting Coosa tributaries in North Georgia from impoundment. The Center for Biological Diversity, based in Tucson, Arizona with sixteen offices across the United States,⁹³ filed a scientific petition in 2010 with the U.S. Fish & Wildlife Service (“FWS”) to list 404 aquatic, riparian, and wetland species in the Southeast under the Endangered Species Act (“ESA”).⁹⁴ In 2011, the Center filed a notice of intent to sue FWS for failure to make progress on listing these species.⁹⁵ A 2011 settlement

⁹¹ As stated previously, 40 C.F.R. 131.10(b) requires that “the State shall take into consideration the water quality standards of downstream waters.”

⁹² 40 C.F.R. 131.11 requires that criteria be scientifically defensible, or based on guidance from EPA.

⁹³ *Contact Us*, CENTER FOR BIOLOGICAL DIVERSITY, <http://www.biologicaldiversity.org/about/contact/index.html> (last visited Dec. 3, 2015).

⁹⁴ CENTER FOR BIOLOGICAL DIVERSITY, PETITION TO LIST 404 AQUATIC, RIPARIAN AND WETLAND SPECIES FROM THE SOUTHEASTERN UNITED STATES AS THREATENED OR ENDANGERED UNDER THE ENDANGERED SPECIES ACT 2 (2010).

⁹⁵ Letter from D. Noah Greenwald, Endangered Species Program Director, Center for Biological Diversity, to Ken Salazar, Secretary of the Interior, U.S. Department of the Interior (Apr. 20, 2011) (on file with author). This letter served as a sixty-day notice of intent to sue for failing to make findings on a listing petition under the Endangered Species Act, 16 U.S.C. § 1540(g)(2)(C) (2012).

compelled the agency to move forward in the protection process for 374 of these species.⁹⁶

Most of these species are small, like darters, shiners, mussels, snails, or crayfish.⁹⁷ To many of these species, impoundment of their habitat is the single largest threat to their survival.⁹⁸ If many of these species receive protection, it is possible that proposed impoundments on rivers in North Georgia would not be able to receive a permit because the project could disturb species protected under the ESA.

Imperiled species can be listed by FWS as “endangered” or “threatened” according to a process established by the ESA.⁹⁹ FWS and the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service have the authority to list a species; alternatively an individual or organization can petition FWS to list a species.¹⁰⁰ A lengthy review process follows with deadlines at each step before a final determination is reached.¹⁰¹ Commonly, FWS is unable to meet these deadlines, which creates a litigation opportunity, as in the case with the Center for Biological Diversity suit.

A report from the Center for Biological Diversity listed eighty-five species that were not on the endangered species list when they went extinct between the passage of the ESA and 2004.¹⁰² The report noted that “twenty-nine of these species became extinct before a listing process was initiated, forty-two became extinct during a delay in the listing process, and eleven listed species became extinct after a delay in the listing decision.”¹⁰³ Thus, the Center’s strategy to threaten litigation against FWS for failure to act was warranted in order to protect other species from a similar fate.

The presence of an endangered species in a stream can prevent the construction of a dam on that stream. In 1978, the U.S. Supreme Court affirmed an injunction to stop construction of the Tellico Dam in Tennessee due to the presence of the endangered snail darter (*Percina*

⁹⁶ Stipulated Settlement Agreement, In re Endangered Species Act Section 4 Deadline Litigation, No. 10-377 (D.D.C. July 12, 2011).

⁹⁷ *Id.* at 3–5.

⁹⁸ U.S. FISH & WILDLIFE SERV., *supra* note 11, at 9 (“Impounded waters have eliminated many native species from extensive portions of the Basin’s larger rivers, and virtually all of the Basin’s snail and mussel extinctions are a direct or indirect result of dam construction and river impoundment.”).

⁹⁹ *Endangered Species Act: Overview*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/endangered/laws-policies/> (last visited Feb. 29, 2016).

¹⁰⁰ 16 U.S.C. §§ 1531–1544.

¹⁰¹ 16 U.S.C. § 1533.

¹⁰² KIERAN SUTLING ET AL., CENTER FOR BIOLOGICAL DIVERSITY, EXTINCTION AND THE ENDANGERED SPECIES ACT 2 (2004).

¹⁰³ *Id.*

tanasi) in *Tennessee Valley Authority v. Hill*.¹⁰⁴ In his majority opinion, Chief Justice Burger wrote that the language of the Act “admits of no exception” to its strict rules barring the federal government from permitting or funding activities which would harm an endangered species.¹⁰⁵ It was this strict construction of the ESA that ultimately unnerved some Congressmen who became determined to destroy the ESA.

In an attempt to weaken the Act, Congress created the Endangered Species Committee by amending the ESA in 1978.¹⁰⁶ Composed of various federal Cabinet-level administrators, the Committee retains oversight over the endangered species listing process, earning it the endearing nickname of the “God Squad” because of its perceived power to determine the fate of a species.¹⁰⁷ In its first meeting in 1979, the Committee considered, but unanimously denied, an exemption for the snail darter.¹⁰⁸

Determined to have the dam project completed, Congress pushed through a construction allowance for the Tellico Dam in an amendment to the Energy and Water Development Appropriation Act.¹⁰⁹ The exemption was pushed through by Tennessee Republican Senator Howard Baker who famously said on the Senate floor that “the awful beast is back. The Tennessee snail darter, the bane of my existence, the nemesis of my golden years, the bold perverter of the Endangered Species Act is back.”¹¹⁰ Baker, in the same speech, argued that “[i]f the snail darter can be found in the Little Tennessee River, there is a snail darter or some equally obscure creature in every river and under every rock in America. Opponents of public works projects will have a virtually limitless arsenal of weapons with which to do battle.”¹¹¹

The Tellico Dam was completed not long after the narrow passage of the 1979 rider amendment and the snail darter populations in the area died out as a result.¹¹² However, other small populations were found in

¹⁰⁴ 437 U.S. 153, 172 (1978).

¹⁰⁵ *Id.* at 173.

¹⁰⁶ Jared des Rosiers, *Exemption Process Under the Endangered Species Act: How the God Squad Works and Why*, 66 NOTRE DAME L. REV. 825, 833 n.55 (1991).

¹⁰⁷ *Id.*

¹⁰⁸ Endangered Species Comm., Decision on Tellico Dam and Reservoir Application for Exemption (Feb. 7, 1979).

¹⁰⁹ Energy and Water Development Appropriations Act of 1980, Pub. L. No. 96-367, 94 Stat. 1331 (1980).

¹¹⁰ 125 CONG. REC. 1291 (statement of Sen. Baker).

¹¹¹ *Id.* at 1292.

¹¹² DAVID GILLILAN & THOMAS BROWN, *INSTREAM FLOW PROTECTION: SEEKING A BALANCE IN WESTERN WATER USE* 366 n.41 (1997).

nearby streams, and, after successful stocking in other rivers,¹¹³ the snail darter was eventually downlisted from “endangered” to “threatened,” where it remains today.¹¹⁴

The snail darter case illustrates two important points for reservoir construction in the Tri-State Water Wars. First, citizen activists can use the presence of protected species to great effect, even halting reservoir construction in ecologically sensitive areas. Second, more often than not, politics trumps science and common-sense conservation. A simple amendment to a bill can override the fundamental rights of an entire species to persist, as did the 1979 amendment. Congressional politicians were never right in the case of the snail darter. They did, however, prevail by using pork barrel legislation, overcoming the Supreme Court and the God Squad.

In some cases, even delaying a project can amount to a victory for conservationists. Often, costs for projects, especially reservoirs, skyrocket with time spent on consultants, lawyers, and environmental studies.¹¹⁵ When expenses bloom and doubt is cast on the future of the project, projects can fail for economic reasons rather than purely environmental ones.¹¹⁶ The slow movement of every aspect of the ESA combined with the vast presence of protected and petitioned species in the ACT and ACF basins will halt or slow many reservoir projects. In fact, they already have.

In 2010, the Center for Biological Diversity petitioned FWS to protect the northern long-eared bat (*Myotis septentrionalis*).¹¹⁷ Populations of the bat have declined by ninety-nine percent, largely due to white-nose syndrome, a deadly disease affecting six species of bats.¹¹⁸ On April 2, 2015, FWS finally granted the bat protection as a “threatened” species under the ESA.¹¹⁹ The species’ range reaches into Hall County, Georgia outside Atlanta, where the Glades Reservoir has been proposed on a tributary of the Chattahoochee. The listing of the

¹¹³ *Id.*

¹¹⁴ *Species Profile for Snail Darter*, U.S. FISH & WILDLIFE SERV., http://ecos.fws.gov/tess_public/profile/speciesProfile.action?spcode=E010 (last visited Mar. 3, 2016).

¹¹⁵ Atif Ansar et al., *Should We Build More Large Dams? The Actual Costs of Hydropower Megaproject Development*, 69 ENERGY POL’Y 43, 45–49 (2014).

¹¹⁶ *Id.*

¹¹⁷ CENTER FOR BIOLOGICAL DIVERSITY, PETITION TO LIST THE EASTERN-SMALL FOOTED BAT MYOTIS LEIBII AND NORTHERN LONG-EARED BAT MYOTIS SEPTENTRIONALIS AS THREATENED OR ENDANGERED UNDER THE ENDANGERED SPECIES ACT 1 (2010).

¹¹⁸ *Saving the Northern Long-Eared Bat*, CENTER FOR BIOLOGICAL DIVERSITY, http://www.biologicaldiversity.org/species/mammals/northern_long-eared_bat/index.html (last visited Dec. 3, 2015).

¹¹⁹ *Northern Long-Eared Bat*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/midwest/endangered/mammals/nleb/> (last visited Dec. 3, 2015).

northern long-eared bat caused delays in the release of the draft environmental impact statement for the Glades Reservoir which had been scheduled for March 2015 release¹²⁰ but was held back until October 2015.¹²¹

When the Army Corps of Engineers released the draft environmental impact statement, it noted its concerns about the bat.¹²² Of the 1000 acres within the proposed Glades Reservoir footprint, approximately one-third contained potential habitat for the threatened northern long-eared bat and the already-listed endangered Indiana bat (*Myotis sodalis*).¹²³ Thus, the Center for Biological Diversity's petition has ultimately delayed an environmentally destructive project and may continue to do so for many years. Yet the political situation with the Glades Reservoir is similar to that in the snail darter case, as Georgia legislators vocally oppose the FWS's decisions.¹²⁴

There remain two big questions for the Glades Reservoir project. First, will the project be permitted by the federal government, given the endangered species concerns presented in the draft environmental impact statement? Second, if the bats do block federal permitting of the reservoir, do Georgia's politicians have enough power to push an exemption through Congress? Unfortunately, they may not need to on their own.

The current session of Congress is working to limit the scope of the ESA's applicability to hydropower in the North American Energy Security and Infrastructure Act of 2015.¹²⁵ President Obama threatened to veto the bill if it makes it to his desk because it would "creat[e] a new exemption from licensing that would undercut bedrock environmental statutes, including the Clean Water Act, the National Environmental Policy Act, and the Endangered Species Act."¹²⁶ While this bill may be vetoed if it passes through Congress, it signals the current Congressional appetite to derail environmental laws that have been fundamental in restoring the natural environment since the 1970s. Worse yet, it illuminates the enormous political power of "Big Hydro."

¹²⁰ Joshua Silavent, *Bat Protections Could Impact Glades Reservoir Decision*, GAINESVILLE TIMES (Apr. 2, 2015), <http://www.gainesvilletimes.com/archives/108836/>.

¹²¹ Notice of Availability of the Draft Environmental Impact Statement for the Proposed Glades Reservoir Water Supply Project, 80 Fed. Reg. 66,888 (Oct. 30, 2015).

¹²² U.S. ARMY CORPS OF ENG'RS, GLADES RESERVOIR DRAFT ENVIRONMENTAL IMPACT STATEMENT, ENVIRONMENTAL CONSEQUENCES 4-140 (2015).

¹²³ *Id.*

¹²⁴ Silavent, *supra* note 120.

¹²⁵ H.R. 8, 114th Cong. § 1207 (as passed by the House, Dec. 3, 2015).

¹²⁶ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 8 - NORTH AMERICAN ENERGY SECURITY AND INFRASTRUCTURE ACT OF 2015, at 1 (2015).

D. Claiming a Stake

Some citizens have taken the most productive approach to addressing the Water Wars: working together to develop equitable water management solutions. The prime example is the Apalachicola-Chattahoochee-Flint Stakeholders, a group of fifty-six stakeholders representing fourteen different interest groups, ranging from hydropower to the seafood industry.¹²⁷ These stakeholders recognize that decades of litigation and negotiation between state leaders is not resolving the Tri-State Water Wars. Their mission is “to change the operation and management of the ACF Basin to achieve equitable and viable solutions among stakeholders that balance economic, ecological, and social values and ensure that the entire ACF Basin is a sustainable resource for current and future generations.”¹²⁸

In May 2015, the ACF Stakeholders released a Sustainable Water Management Plan.¹²⁹ The group compiled data and conducted modeling, while working to address the concerns of each of the different stakeholder groups.¹³⁰ The Plan makes specific recommendations to the Corps on the best way to manage the ACF Basin equitably for all users.¹³¹ In other words, it is a water management plan developed by a broad group of stakeholders who themselves are the water users. Truly, this is the way water use issues should be handled: with buy-in and input from all key stakeholders, not solely by those who monopolize water resources.

The Sustainable Water Management Plan makes recommendations based on five themes: (1) to achieve sustainable use and reuse; (2) to improve water storage and control operations; (3) to target dry and drought years; (4) to advance scientific and technical knowledge for future decisions; and (5) to strengthen basin coordination.¹³² The Plan calls for adaptive management—adapting water management strategies based on changes in rainfall and changes in how the water is used.¹³³ The Plan also specifically calls for releasing environmental “pulsing flows” of 9000 cubic feet per second for one week in May and one week

¹²⁷ *ACFS Members*, APALACHICOLA-CHATTAHOOCHEE-FLINT STAKEHOLDERS, <http://acfstakeholders.org/stakeholders/acfs-members/> (last visited Dec. 3, 2015).

¹²⁸ APALACHICOLA-CHATTAHOOCHEE-FLINT STAKEHOLDERS, SUSTAINABLE WATER MANAGEMENT PLAN EXECUTIVE SUMMARY 1 (2015).

¹²⁹ *Id.*

¹³⁰ *Id.* at 2.

¹³¹ *Id.* at 4.

¹³² *Id.* at 3.

¹³³ *Id.*

in July each year and to raise the winter level of West Point Lake an additional four-and-a-half feet.¹³⁴

Immediately after the release of the plan, the offices of the Governors of Georgia and Florida were quiet, mainly because of the ongoing Water Wars litigation.¹³⁵ The ACF Stakeholders submitted the plan to the Corps to be considered during the development of the new water control manual for the ACF Basin. The public was given the opportunity to comment on the water control manual and its associated draft environmental impact statement until February 15, 2016.¹³⁶

The extent to which the Corps embraces the ACF Stakeholders plan is yet to be seen. Because the Corps is a government agency, some amount of politicking is sure to be a factor and ultimately legislators with enough power may disrupt the plan. Nonetheless the work of the ACF Stakeholders serves as a model that should be followed to develop a management plan for the ACF Basin. A similar effort should be developed in the ACT Basin. Furthermore, politicians and agency officials should heed the advice of these stakeholders—their constituents—and adopt plans and policies that provide equitable solutions to water management for all users.

III. WHO OWNS THE WATER?

Recent events have prompted Alabamians to ask the question, “who owns the Coosa River?” In March 2014, three dead cows floated down Big Canoe Creek into the Coosa’s Neely Henry Lake.¹³⁷ A local television news channel took it upon itself to speak with nine different government agencies, and the Alabama Department of Agriculture told the reporter that the owner of the creek was responsible for removing the dead cows.¹³⁸ A back and forth debate ensued for nearly three weeks as to who owned the creek: was it the county, the State, or the Alabama Power Company?¹³⁹ In a compromise, Alabama Power crews removed the cows while the St. Clair County commission paid the costs to bury

¹³⁴ *Id.* at 4.

¹³⁵ Jeff Gill, *ACF Stakeholders’ Plan Draws Muted Reaction from States in ‘Water Wars’ – Group’s Leader Hopes Officials will ‘Embrace’ Management Strategy*, GAINESVILLE TIMES (Dec. 3, 2015), <http://www.gainesvilletimes.com/archives/110071/>.

¹³⁶ Public Notice, U.S. Army Corps of Eng’rs, Extension of Comment Period, Draft Environmental Impact Statement, Glades Reservoir Water Supply Project (Nov. 12, 2015).

¹³⁷ Melanie Posey, *Cow Carcasses Seen Floating in Coosa River Creek*, WBRC FOX 6 NEWS (Apr. 4, 2014), <http://www.wbrc.com/story/25168656/cow-carcasses-seen-floating-in-coosa-river-creek>.

¹³⁸ *Id.*

¹³⁹ Sarah Snyder, *Dead Cows Rotting in Lake near Coosa River in St. Clair County*, ABC 33/40 (Apr. 4, 2014), <http://abc3340.com/archive/dead-cows-rotting-in-lake-neely-henry>.

them.¹⁴⁰ The debate demonstrated very clearly that water rights and ownership issues in Alabama are incredibly complex and without ready answers.

All of the work being done by citizen groups, elected officials, and government agencies in Alabama's quest for better water management and security is complicated by one inescapable truth: Alabama's claim that it "owns" the water in its own rivers is unsettled. So it seems, much of the water in Alabama's rivers, especially the Coosa and Tallapoosa, is privately owned. Private ownership of the water that the State is fighting to protect necessarily complicates all levels of action. Moreover, because one private corporation holds enormous political sway in Alabama and maintains control of most of the state's waterways, it holds ostensible veto power over any major changes to Alabama's water rights regime.¹⁴¹

Surface waters flowing within a state, like the Coosa, have been considered a part of the public trust since the time of the Roman Emperor Justinian,¹⁴² who came into power 1387 years before the completion of Lay Dam.¹⁴³ And though the Coosa flows through a nation where the public trust doctrine is part of the common law system,¹⁴⁴ Alabama's own public trust doctrine is relatively undeveloped.¹⁴⁵

The Alabama Constitution asserts that "all navigable waters shall remain forever public highways, free to the citizens of the state and the United States," but does not clearly state that the State owns these waters.¹⁴⁶ Although the state Constitution does guarantee public access to privately owned navigable waters, such as the Coosa River, it does not assert ownership over the water itself.

In 1993, the public trust doctrine was further embedded into Alabama law under lethargic declaration that "[a]ll waters of the State . . . are among the basic resources of the State of Alabama."¹⁴⁷ Most recently, in 2012, Governor Robert Bentley signed a Resolution stating "[t]hat

¹⁴⁰ WBRC Staff, *2 of 3 Cow Carcasses Removed from Coosa River*, WBRC FOX 6 NEWS (Apr. 7, 2014), <http://www.wsmv.com/story/25186949/2-of-3-cow-carcasses-removed-from-coosa-river>.

¹⁴¹ *Id.*

¹⁴² THOMAS CECH, *PRINCIPLES OF WATER RESOURCES: HISTORY, DEVELOPMENT, MANAGEMENT, AND POLICY* 251 (2009).

¹⁴³ Lay Dam was completed in 1914, well after the coronation of Justinian I in 527.

¹⁴⁴ *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), firmly established the public trust doctrine.

¹⁴⁵ Robin K. Craig, *Public Trust and Public Necessity Defenses to Takings Liability For Sea Level Rise Responses on the Gulf Coast*, 26 J. LAND USE 395, 404 (2011).

¹⁴⁶ ALA. CONST. 1901 § 24.

¹⁴⁷ ALA. CODE § 9-10B-2 (2015).

waters of the state . . . are a natural resource of the state and subject to the state's sovereign power."¹⁴⁸ The problem with these proclamations is that they do not define "waters of the state," nor do they clarify whether Alabama maintains ownership of them.

As recently as 2010, the Alabama Supreme Court noted that "[i]t has long been settled law in this state that the State of Alabama has title to submerged lands in navigable waters."¹⁴⁹ While Alabama does claim that impounded lakes such as those on the Coosa are "public waters," the only rights guaranteed to the citizens of Alabama on those public waters are navigation and fishing.¹⁵⁰ The right to make water withdrawals is regulated under Alabama's riparian law.

Unlike Alabama's public trust doctrine, Alabama's riparian law has undergone changes over time. Alabama case law in the mid-1800s adopted the "natural flow doctrine" of riparian law, which means a riparian landowner can use water flowing over this property as they see fit, without concern for harm that might occur to a riparian landowner downstream.¹⁵¹ But from the late 1800s forward, Alabama moved towards the "reasonable use doctrine," under which riparian landowners cannot cause unreasonable injury to other riparian owners.¹⁵²

Non-riparian landowners, those who do not live along a stream or river, ostensibly have no rights under statute or case law to use water from the state's rivers. In the absence of permits authorizing non-riparian water usage, the entire premise of a municipal water supply system is illegal in Alabama, because citizens do not have the legal right to use water from a riparian property they do not own. Such a system is clearly undesirable and not in the public's best interest, particularly given the overwhelming private ownership of the state's surface water rights. Yet, it is this very private ownership of these riparian lands that complicates efforts to create an alternative water rights regime.

Real world examples also demonstrate that the Coosa River does not belong to Alabamians in a traditional sense. Tellingly, if the river did belong to the citizens of Alabama, their municipal water authorities would certainly not be paying a publicly traded company to withdraw water for municipal water supply.¹⁵³ But, municipal authorities are paying for water from the Coosa. The Coosa Valley Water Supply

¹⁴⁸ S.J. Res. 16, Reg. Sess. (Ala. 2012).

¹⁴⁹ *Natures Way Marine, LLC v. Dunhill Entities, LP*, 63 So. 3d 615, 617 (Ala. 2010) (citing *Reid v. Ala. State Docks Dep't*, 373 So. 2d 1071 (Ala. 1979)).

¹⁵⁰ See ALA. CODE § 9-11-80(a) (2009) (defining public waters).

¹⁵¹ ALA. WATER AGENCIES WORKING GROUP, *supra* note 47, at 92.

¹⁵² *Id.*

¹⁵³ Alabama Power Company is traded as ALP-O on the New York Stock Exchange.

District,¹⁵⁴ for example, pays an annual fee of \$165,000 to Alabama Power Company to withdraw water from the Coosa River at Logan Martin Lake.¹⁵⁵ Similarly, if Alabamians owned the Coosa River, they would not have to pay a fee to Alabama Power to build a dock on their lakefront property. But, they do pay that fee.¹⁵⁶

As discussed earlier, an Alabamian only has riparian rights to the water if he or she is a riparian landowner.¹⁵⁷ If the water is not on top of land that one owns, then the citizen does not have any rights to withdraw that water. On each of the six reservoirs on the Coosa River, Alabama Power has fee simple ownership of the land within the reservoir up to the full lake level, aside from the pre-dammed river bed before the damming of the Coosa, which belongs to the State.¹⁵⁸ On most reservoirs, this fee simple ownership extends above the normal full pool level by as little as one foot to as many as twelve feet in elevation.¹⁵⁹ Alabama Power also has the additional legal right to inundate some lands that they do not own at higher elevations with flood easements.¹⁶⁰

Although a person may say that they have “a little place on the lake” on the Coosa, the legal reality does not bear that out. Alabamians sit on their porch and watch the sun set over their pier, imagining that all the land between their home and the waterfront is theirs. Legally speaking, all the land does not belong to them. On Lake Mitchell, for example, the lake elevation hovers around a constant 312 feet above sea level, but Alabama Power Company has a fee simple ownership of lands up to 317 feet above sea level.¹⁶¹ In other words, the low-lying perimeter of the waterfront, with limited exceptions, belongs to Alabama Power. Consequently, the average lake homeowner on the Coosa has no legal riparian right to the water in front of them. They need permission from

¹⁵⁴ The water supply district includes a water treatment plant created by the cities of Pell City, Odenville, and Springville. Goodwyn, Mills & Cawood, *Coosa Valley Water Supply District Benefits Extend Beyond Clean, Affordable Water*, ALABAMA.COM (Aug. 20, 2013, 02:35 AM), http://blog.al.com/press-releases/2013/08/coosa_valley_water_supply_dist.html.

¹⁵⁵ David Atchison, *Pell City to Pay More for Water*, THE DAILY HOME (Jan. 22, 2013), http://www.annistonstar.com/the_daily_home/dh_news/pell-city-to-pay-more-for-water/article_0a155a66-9dae-5f39-8140-56d80ac65_ec5.html.

¹⁵⁶ ALA. POWER CO., COOSA RIVER PROJECT SHORELINE MANAGEMENT PLAN § 4.3.5 (2005) (FERC allows Alabama Power to collect reasonable fees for the cost of administering lakeshore permitting).

¹⁵⁷ See *supra* notes 149–152 and accompanying text.

¹⁵⁸ ALA. POWER CO., SHORELINE MANAGEMENT PRACTICES 3 (2005).

¹⁵⁹ *Id.* at 4–5.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 5.

Alabama Power to withdraw water from the lake,¹⁶² to build a pier, to construct a boathouse, or to make a seawall.¹⁶³

Recall that each of the Coosa River's impoundments abuts one another. As such, Alabama Power's fee simple ownership of riparian rights along the Coosa River is, save for some exceptions, nearly unbroken from the Georgia-Alabama border all the way to the city of Wetumpka. The water rights situation is similar on the Tallapoosa River.¹⁶⁴ Thus, much of the riparian rights of Alabama's ACT Basin do not even belong to the State. Instead, these rights belong to a for-profit, publicly traded company.

IV. CONCLUSION

The actions that the State of Alabama and its citizens need to take to protect their rivers are largely being stymied. The State must resolve this complex web of uncertainty over river ownership and riparian control to better manage its water resources and secure Alabama-positive outcomes in the Tri-State Water Wars.

In her article *Alabama's Water Crisis*, Professor Heather Elliott argues for the State to adopt new water law statutes based on the American Society of Civil Engineers' *Regulated Riparian Model Water Code*, and that "[a]dopting such a statute will prepare the state for future water shortages, as well as putting it on a better footing for future negotiations with neighboring states."¹⁶⁵ The State Legislature should move quickly in adopting a comprehensive water management statute based on this *Model Water Code*, informed by the recommendations of Governor Bentley's water agency task force. Pursuing further litigation without taking this step will be futile because a court will likely determine that Alabama has not taken responsibility to steward its own water resources.

Additionally, all local, state, and federal government agencies involved in the Tri-State Water Wars need to foster and support stakeholder initiatives such as the Apalachicola-Chattahoochee-Flint Stakeholders group. Bringing all stakeholders together to negotiate a comprehensive management strategy is ultimately the fastest and most successful way to ensure that all needs, including those of environmental conservationists, are met. The government should facilitate, and participate in, major stakeholder initiatives and heed the

¹⁶² *Id.* at 6. A permit is required for withdrawals in excess of one million gallons per day, and residential use by lake homeowners is allowed via a permit.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 3–6.

¹⁶⁵ Elliott, *supra* note 76, at 401.

recommendations of these interested parties when amending state-level water management policies.

Litigation alone does not favor Alabama, nor really any state. Litigation only extends the long and costly debate without truly putting into place a comprehensive and adaptive policy that satisfies the needs of all users. A collaborative, comprehensive water management strategy that is developed largely by stakeholders across state boundaries is necessary to implement a management system that will fairly benefit all users and be able to adapt to future changes in population, water use, and climate.

Until Alabama's riparian laws are modernized and stakeholders are given recognizable seats at the decision-making table, most citizen efforts will be stymied. Interestingly, litigation has proved to be the most efficient method for citizen groups to be heard. Citizen-led litigation has had a measurable impact on protecting the environment in the Water Wars, where litigation among states has not. For example, consider the ESA litigation brought by the non-governmental Center for Biological Diversity. In the end, more comprehensive efforts, such as those argued for in this article, are needed to protect the remarkable river systems in the tri-state area for the enjoyment of future generations.