



**Coalition of Alabama
Waterway Associations**

300A Water Street, #307
Montgomery, AL 36104

November 1, 2012

Via E-mail and Regular Mail

J. Brian Atkins, P.E., Division Director
Alabama Office of Water Resources
Alabama Department of Economic and
Community Affairs
401 Adams Avenue, Suite 434
Montgomery, Alabama 36103-5690

Re: Report of the Alabama Water Agencies Working Group Regarding Water Management Issues in Alabama

Dear Mr. Atkins:

On August 1, 2012, the Alabama Water Agencies Working Group (Working Group) issued a report entitled "Water Management Issues in Alabama" (hereinafter "Report"). In response, the Coalition of Alabama Waterway Associations (CAWA) is pleased to provide the following comments. We appreciate this opportunity to share our views.

About CAWA

CAWA is dedicated to promoting the full utilization of Alabama's waterways. We seek to maintain and increase the use of Alabama's five commercially navigable river systems and the Alabama State Port Authority's facilities at the Port of Mobile. Our state's inland waterways provide an efficient and environmentally friendly means of supporting domestic commerce and international trade. The communities along Alabama's rivers rely on the waterways to provide a sustainable, low-impact transportation infrastructure, recreational opportunities, municipal water supply, and industrial water withdrawals and discharges. Accordingly, CAWA and its members have a strong interest in the quality and quantity of water resources as well as economic development.

CAWA's members include the Coosa-Alabama River Improvement Association; the Tennessee River Valley Association; the Tennessee-Tombigbee Waterway Development Council; the Tri Rivers Waterway Development Association (serving the Apalachicola-Chattahoochee-Flint (ACF) River Basin); and the Warrior-Tombigbee Waterway Association. The Alabama State Port Authority is an associate member of CAWA.

Alabama's waterways are important engines for jobs and economic growth.

CAWA urges the Working Group to remain mindful of the significant role of the waterways in Alabama's economy. We particularly appreciate the Report's reference to jobs and the economy generally and navigation specifically (Economic Development, pp. 14-16).

Each year, Alabama waterways facilitate the shipment of over 140 million tons of import, export, and domestic freight. A recent Troy University study estimates that shipping and navigation on Alabama waterways contributes 27,698 direct jobs and \$6.13 billion direct economic output to Alabama's economy on an annual basis.¹ Using our inland waterways for transportation provides a significant source of competition to road and rail rates, reduces congestion and maintenance, and reduces air emissions compared to other modes. Because water-based transportation is such an integral component to the state's economy, any consideration of changes to water policy must include consideration of transportation issues.

- Recommendation: We urge the Working Group to account for and protect the availability of our waterways for commercial navigation, in order to preserve and grow the jobs and benefits that go along with it.

Alabama waterways also provide broader economic stimulus. The Troy study estimates that certain other industries that rely on Alabama's inland waterways – including recreation, power generation, and water supply – contribute an additional 25,000 direct jobs and \$9.77 billion in direct economic output to the state economy each year. That is in addition to the substantial economic impacts associated specifically with the Port of Mobile. Direct and indirect jobs from waterway-related businesses touch 40 of the State's 67 counties, comprise approximately 11% of Alabama's total workforce, and generate \$485 million in *state* tax revenue. Alabama has registered over one million boaters, including 266,819 registrations in 2011 alone. Additionally, hydropower is a clean, low-cost, and renewable source of energy which accounts for approximately 10% of power generation capacity in Alabama while infusing critical peak generation response capabilities into the state's power grid. Steam facilities – providing half of Alabama's electric generation capacity – also depend heavily on the waterways. Finally, Alabama waterways contribute an additional \$7 billion annually to the state's economy with respect to water supply.

¹ Troy University's Center for International Business and Economic Development, Accounting for Economic Value of Alabama's Inland Waterways (March 2012).

- Recommendation: The Working Group should identify and quantify the many ways our waterways contribute to economic growth and state and local tax revenues. Any proposals to change existing law or policy should reflect consideration of these important issues and explain possible effects.

We believe the data in our possession understate the economic impact of the state's water resources. With that caveat, CAWA and its members will be pleased to share available information with the Working Group and assist in efforts to identify any data gaps.

The Working Group's top priority should be information-gathering.

In recent years, there have been many public discussions of possible changes to Alabama law and policy on water-related issues. Those discussions have taken place at hearings of committees of the Legislature, at conferences and other public forums, and among the leadership and staff of state agencies. However, most discussions have been in the realm of opinions, rhetoric, and anecdotes.

Alabama has abundant water resources that serve a great many different interests – economic, social, ecological, industrial, agricultural, and recreational, to name some of the most obvious. A policy change may affect stakeholders who value and rely on each of those interests. Before making changes of that nature, it is critical to develop a thorough and sound understanding of the current state of our water resources. Only after we understand the status quo can we identify what changes, if any, are desirable. Without a robust data set, it is virtually assured that any policies will be less efficient than otherwise, with a greater risk of unintended, negative consequences.

The Report includes a dozen “water issue area summaries” reflecting various issues and concerns. Only one of those summaries – listed tenth out of the twelve provided in Appendix to the Report – focuses specifically on Water Resources Data (pp. 30-31). The discussion of that issue observes accurately that there are serious limits to the set of available data. Further, efforts to enhance and expand the data are subject to resource constraints and other impediments.

This is a critical issue that has to be addressed before the Working Group can effectively evaluate most of the other issues. For example, regarding Surface Water and Groundwater Availability (pp. 17-19) and Instream Flows (pp. 26-27): What is the state of knowledge regarding the quantity of existing water sources and flows? What are the various purposes served by water supplies and flows, and how much water is needed for those purposes? We question whether there is sufficient information on those issues and other related areas to evaluate in any meaningful way the need for new laws for

Water Resources Management (pp. 10-11) or new water use restrictions and regulations (Enhanced Certificates of Use/Permitting (pp. 12-13)).

- Recommendation: Focus on improving available information first. Better information is necessary before the Working Group can do a reasonably effective job of determining what changes in existing policy are necessary or desirable.

The Working Group should use the information it gathers to define the policy objective before developing the policy.

The Report advocates “creating a statewide water management plan” (p. 2), but the goal of such a plan is not clear. A change in law or policy may be needed when the status quo is undesirable in some respect, and there is an achievable governmental response that is preferable to inaction. However, we are not aware of a clear articulation of the problem, other than a desire to create a policy for the sake of creating a policy. Without a policy *objective* in mind, it is impossible to evaluate whether any given proposal is effective.

The Report acknowledges on page 3:

Historically Alabama has had ***adequate water resources*** with brief but intense periods of water shortfalls. While a drought crisis creates a temporary groundswell of public concern, ***once rains return there is little pressure to implement major changes*** to our current water management system. (emphasis added)

It would be reasonable to interpret that statement as indicating that there is no general crisis, and existing laws and policies are adequate most of the time. The circumstances portrayed by this statement do not support a broad effort to enact a comprehensive water management plan or to impose new water controls through expanded certificate and permitting requirements.

The opening paragraph of the Report *tells* us there is a risk of a water crisis due to factors such as economic growth and Alabama’s current system of water laws (p. 1). However, the Report does not *show* us by providing the data that would be necessary to support predictions of doom and gloom. Again, the Working Group needs to focus on gathering and interpreting the data and then explaining the situation. Only after reasonable progress to that effect is it possible to set policy goals; and only after the goals are clear is it possible to evaluate whether a proposal is effective to achieve the goals.

- Recommendation: Use data to identify and quantify current and future problems. If there are unacceptable problems, identify specific goals. Refrain from advocacy for new policies until after the policy goals are clear.

We have heard repeatedly that Alabama should have a policy that is more like that of other states, such as Georgia. The Working Group should clarify its view as to whether and to what extent Alabama should be limited or otherwise influenced by the actions of Georgia and other states. We urge the Working Group to clarify the significance of other states' laws and policy. We believe the development and utilization of better data on Alabama's water resources is more significant than the nature or status of Georgia's water laws or regulations.

We also have observed numerous statements to the effect that a new water policy would be helpful in interstate water litigation. The Report suggests as much in its reference to "the legal unpredictability of interstate water disputes" (p. 1). However, the recently concluded litigation as to the ACF River Basin rested exclusively on issues of federal law, namely, the authority of the U.S. Army Corps of Engineers with respect to the operation of federal reservoirs in that system. Likewise, litigation on the Alabama-Coosa-Tallapoosa (ACT) system concerns federal law exclusively. We are aware of no reasonable basis or theory under which the status of Alabama's water resources laws would have any influence on the legal issues in those cases.

Some have suggested changes in water laws would improve the development of information that would be useful in the event Alabama were to sue another state directly. Such a lawsuit must be filed in the U.S. Supreme Court, which has "original jurisdiction" over interstate disputes. Obviously, that course of action would be lengthy, expensive, and confrontational, even more than the ACF and ACT cases. We are aware of no serious discussion of Alabama filing such a lawsuit; therefore, we hope that unlikely and undesirable eventuality is not the basis for current water policy proposals.

- Recommendation: If the Working Group's goals have to do with factors such as the laws of other states or the possibility of future litigation, the Working Group should articulate its assumptions in a clear and transparent fashion, so as to allow a public evaluation and response.

Interbasin Transfers and Interstate Water Resources

CAWA appreciates the Working Group's discussion of interbasin transfers and interstate water resources. All of our member associations work with stakeholders in other states. We also are aware of important instances in the state where a significant stakeholder, such as a municipal water agency, may have water-related needs and operations that touch more than one basin. We recognize the difficulty and complexity

inherent in interbasin and interstate issues. CAWA and its members stand ready to work with you, other Working Group members, and stakeholders to continue to evaluate interbasin transfers and interstate water issues.

Ownership of Water

The Report includes an incorrect statement of law with respect to water, and the implications of the incorrect statement are broad and far-reaching. Specifically, on page 10, the Report states, "It is not widely understood that Alabama's water resources are owned by the State." However, the Alabama government does not "own" all water within state boundaries. The state possesses authority to regulate various aspects of water usage, but that is not the same as ownership. On the same page, the Report cites various sections of the Alabama Code, but those sections do not purport to confer a proprietary interest to the state.

Also on the same page, the Report provides that "a clear statement of State ownership of waters of the State would enhance the State's ability to protect this resource." Without concurring in that statement, it appears to acknowledge tacitly that the state does not actually own all "waters of the State." Otherwise, a new policy would not be necessary for the enhancement of state authority.

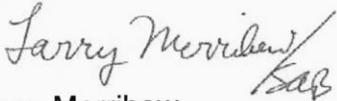
We are hopeful the reference to state ownership was unintended. However, if that is not the case, the Working Group should provide a clear and thorough statement of its view, including a detailed legal memorandum.

- Recommendation: Withdraw or revise language implying state ownership of all water within the state. In the alternative, if the statement was intentional, please provide a clear statement of position supported by detailed legal analysis to allow for public review.

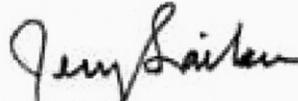
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Thank you again for this opportunity to share our views. Please feel free to contact any and all of us if we may provide additional information or assistance.

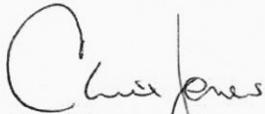
Sincerely,



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COALITION OF ALABAMA WATERWAYS
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WARRIOR-TOMBIGBEE WATERWAY
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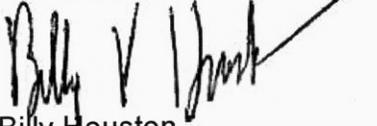
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cc: Bennett Bearden, Esq., General Counsel
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