



**Alabama Rivers Alliance**  
*Water Is Life*

November 1, 2012

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*Submitted via electronic mail to Bennett Bearden, Chair, Alabama Water Agencies Working Group at BBearden@gsa.state.al.us.*

**RE: Comments from Alabama Rivers Alliance on the Alabama Water Agencies Working Group's issue paper entitled *Water Management Issues in Alabama*.**

Commissioner McMillan, Commissioner Guy, Dr. Tew, Director Lefleur, and Director Atkins,

The Alabama Rivers Alliance is pleased to have the opportunity to submit comments on the Alabama Water Agencies Working Group's (AWAWG) issue paper *Water Management Issues in Alabama*. This paper is a significant step towards achieving a public understanding of the issues associated with water management in Alabama. ARA is a non-profit conservation organization dedicated to the protection of the waters of the state of Alabama. We represent over 800 individual members and 60 watershed groups throughout the state. Our work is clearly described in the *Alabama Water Agenda* which is available at [www.alabamarivers.org](http://www.alabamarivers.org). Development of a comprehensive state water management program is a key focus of our work.

We are very encouraged that Governor Bentley has taken the initiative, through his April 18, 2012, letter to the AWAWG, to address the challenges that Alabama faces to sustainably manage the blessings of our water resources for the people of Alabama. Of the four directives put forth in that letter, the most significant is the explicit requirement to produce a recommendation for a statewide water management plan by December 1, 2013. While we fully understand the implications and challenges associated with this directive, both from scientific and political perspectives, ARA is committed to doing everything that we can to ensure that the AWAWG succeeds in its task to recommend a comprehensive, scientifically sound recommendation for a "statewide water management action plan and timeline that takes into account and equitably manages the various demands on the State's water resources" along with proposals for "any proposed legislation necessary to implement such a plan" on time and on target.

To this end we offer this comment letter. These comments will first discuss our overarching thoughts on the need for a comprehensive water management program that places an appropriate focus on the sustainable protection of the resources and the flows necessary for their sustained ecological vitality as well as their long term productivity, and offer our recommendation of the American Society of Civil Engineer's *Regulated Riparian Model Water Code* as an off-the-shelf solution to many of the issues that the state faces in attempting to develop this program. We will then discuss many of the accomplishments already achieved by the state on the path towards the development of a comprehensive water management program. Following this we will offer some thoughts on specific items and issues addressed in the AWAWG paper. Finally, we will address a couple of issues that were not discussed in this issue paper that we feel warrant consideration by the Working Group.

**Overarching Thoughts and Recommendations**

We concur with the Working Group's assessment that "current state water policies need to be reformed and a comprehensive statewide water management plan created to guide the development, use, and protection of water resources and to protect Alabama from future

uncertainty with respect to water availability.”<sup>1</sup> A scientifically sound, politically balanced water management program is critical in order to avoid the pitfalls associated with Alabama’s current riparian rights regime. This assertion is well documented.<sup>2</sup> The issue was most notably addressed in the Alabama Water Resources Study Commission’s 1990 report to Governor Guy Hunt<sup>3</sup>. In this report, the study commission opined that “there is a great obligation to plan and encourage the use of natural resources to best serve the physical, social, economic, and environmental needs of the people of Alabama.”<sup>4</sup> To this end, the study commission found that “the State has a public trust to protect [Alabama’s ground and surface waters] and direct its use to the betterment of all citizens of Alabama.” The commission found that Alabama was, even at that time, “far behind all other states in water resources planning and management” and that “[a]ctions must be undertaken immediately to develop a framework for managing [Alabama’s] water resources.”<sup>5</sup> Unfortunately, the action that was taken, passage of the Alabama Water Resources Act<sup>6</sup>, has proven wholly inapt to the task and today, some twenty years after the study commission’s report, we find the State in an even more precarious situation. Moreover, two subsequent Attorney General’s opinions, AG2000-226 and AG2012-079, have thrown the entire system into disarray.<sup>7</sup>

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<sup>1</sup> Alabama Water Agencies Working Group, *Water Issues in Alabama: A Report to the Honorable Robert Bentley, Governor of Alabama*, August 1, 2012, p. 1, available at [http://www.adeca.alabama.gov/Divisions/owr/awawg/Documents/2012\\_08\\_31%20WAWG\\_Water\\_Issue\\_Report\\_3\\_1.pdf](http://www.adeca.alabama.gov/Divisions/owr/awawg/Documents/2012_08_31%20WAWG_Water_Issue_Report_3_1.pdf) (accessed November 1, 2012).

<sup>2</sup> See *Water is Life: A Citizen’s Perspective of Water Resources Management in Alabama*, presented by Mitch Reid, Alabama Rivers Alliance, to the Alabama Water Resources Association, September, 7, 2011.

<sup>3</sup> Alabama Water Resources Study Commission, *Water for a Quality of Life*, October 1990.

<sup>4</sup> *Id* at iii

<sup>5</sup> *Id* at 46.

<sup>6</sup> Ala. Code § 9-10(B)-1, *et. seq.*

<sup>7</sup> Available at <http://www.ago.state.al.us/Opinions.aspx>. AG2000-226 correctly recognized that non-riparians have no legal access to the waters of the State under the Alabama Water Resources Act. As a result, as many as 67 municipalities around the state have not been granted Certificates of Use by the Office of Water Resources. Rather than offering a solution, AG2012-079 compounded the problem by erroneously suggesting that a water user could establish a water right through proscription citing *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, (1889), along with *Stein v Burden*, 24 Ala. 130 (1854), *Alabama Consol. Coal & Iron Co. v. Turner*, 145 Ala. 639, (1905), *Stouts Mountain Coal & Coke Co. v. Ballard*, 195 Ala. 283, (1915) and others. Constructing a tenuous link to actions against nuisance and then concluding that the prescriptive period for obtaining rights to water in Alabama is ten years, this opinion misinterprets the status of the law in Alabama as well as the nature of the right to use water in the state.

According to *Ulbricht* a riparian landowner may lose the right to challenge another’s use of water after 20 year of acquiescing to such a use, however, neither *Ulbricht* nor any of the other cases consider whether a non-riparian could gain a right to use water vis-à-vis the State through any means that does not involve a license or grant from the State. To suggest that water “rights” can simply be adversely possessed over time advocates bad policy, abandons all requirements of reasonable use under traditional riparian law and state statute, and embarks along a slippery slope leading to the worst aspects of the western horror show that is prior appropriation doctrine. A more compelling interpretation would be that the doctrine of nullum tempus occurrit reipublicae controls with respect to the waters of the state and that there is no time bar for action by the state in accordance with Ala. Code § 6-2-31 and § 6-6-281.

This erroneous opinion provides credence to the Working Groups assertion that there should be a clear statement of the State’s ownership of the waters of the state in the statewide water management program. As a matter of principle and good public policy it should be clearly understood that a water user cannot obtain a right to water except as may be granted or licensed by the state according to the provisions of the State’s water management

Over the past several years there have been increasing calls to action from various stakeholder groups, numerous academic institutions and scholars that focus on various aspects of water resources issues across the State, and even the editorial boards of virtually every major news organization in the state.<sup>8</sup> The clearest expression of the current situation is found in Professor Heather Elliot's 2012 Alabama Law Review article *Alabama's Water Crisis*<sup>9</sup>. Professor Elliott's cornerstone recommendation is that the State adopt the American Society of Engineers' *Regulated Riparian Model Water Code*<sup>10</sup>. We enthusiastically support this recommendation and suggest that the Working Group would discount the *Model Code* only to the peril of the State and its water resources. The *Regulated Riparian Model Water Code* is a sound, vetted solution to the problems inherent in riparian water regimes. Consider that the development of the *Model Code* was a seven year effort that corralled a wide ranging variety of expertise and perspectives and which has subsequently withstood over a decade of intense scrutiny without serious challenge. From the preface of the code: "Those involved in the project agree that overall the end products are carefully balanced to represent a coherent body of law that would markedly improve the law of water allocation as presently found in many States."<sup>11</sup> We implore the Working Group to not undertake to reproduce this effort in an attempt to reinvent-the-wheel or find extra advantage to one subset of stakeholders over others. As with all complex systems, all the pieces of a state's water management program must balance against each other and the model code achieves this balance.

In addition to adopting the *Regulated Riparian Model Water Code*, ARA encourages the Working Group to recommend a scientifically based methodology for assessing and sustaining Alabama's water resources both for their continued ecological vitality as well as ensuring their long term productivity. A base premise of any successful water management plan must be that there is a sustainability threshold that must be scrupulously respected in order to ensure the sustainability of the water system. Often described as instream flows, environmental flows, or conservation flows these boundaries are determined according to the policies of the state, i.e. political determinations as to whether "society chooses to maintain a river in excellent ecological health or to allow some deterioration in its health in order to satisfy human needs for water and energy"<sup>12</sup>, and are identified and evaluated through scientific analysis.

In their seminal book *Rivers for Life: Managing Water for People and Nature*, Postel and Richter conclude that "a scientifically based limit on river flow alterations is the key to optimizing the total array of benefits that society derives from rivers."<sup>13</sup> Alabama's

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plan. Any other interpretation would be akin to allowing the public to stake claims on public rights of way or the state's air.

<sup>8</sup> See *Water is Life, infra* at 2, see also Marcus and Kiebzak, *The Role of Water Doctrines in Enhancing Opportunities for Sustainable Agriculture in Alabama*, Journal of the American Water Resources Association, December, 2008.

<sup>9</sup> Heather Elliot, *Alabama's Water Crisis*, Unv. of Alabama Law Rev, Vol 63, Iss. 2, (February 6, 2012)

<sup>10</sup> American Society of Civil Engineers, *Regulated Riparian Model Water Code*, (2004), available at [http://www.asce.org/Books-and-Journals/Books---Personify/Standards-\(PSD\)/Regulated-Riparian-Model-Water-Code-\(40-03\)/](http://www.asce.org/Books-and-Journals/Books---Personify/Standards-(PSD)/Regulated-Riparian-Model-Water-Code-(40-03)/).

<sup>11</sup> *Model Code* at vii

<sup>12</sup> Postel and Richter, *Rivers for Life: Managing Water for People and Nature*, Island Press, 2003. p. 80

<sup>13</sup> Postel and Richter, at 81

comprehensive water management program must establish the policies of the state which describe these boundaries; identify the necessarily narrow subset of conditions in which it will be acceptable to violate these boundaries (e.g. water emergencies); provide for the actions that must be taken to ensure that long term harm to the system is avoided or minimized; and include provisions for scientifically analyzing, establishing, and monitoring these boundaries over time. The water management program must be sufficiently adaptable to allow for adjusting these boundaries in accordance with better data or changing conditions.

Any flow provision in the program must account for the seasonal variability of flows and the disparate geomorphological regions of the state. Ideally, water allocations will be considered in light of an individual assessment of the stream from which the proposed withdrawal will occur. Because we recognize that, at least initially, time and resources preclude evaluating all of the State's individual streams prior to allocation determinations, we recommend that the water plan require that flow determinations be determined based on the best available data and scientific methodology available. We recommend using the *Ecological Limits of Hydrologic Alteration (ELOHA)* framework for assessing and managing environmental flows across large regions.<sup>14</sup> The Alabama Department of Conservation and Natural Resources has undertaken the first steps towards protecting flows with its *Instream Flow Policy Statement* which was discussed at ARA's symposium on environmental flows held on August 2, 2012<sup>15</sup> and at the Alabama Water Resources Association Symposium held on September 5, 2012.<sup>16</sup>

### **Accomplishments Thus Far.**

While much of the heavy lifting remains on the horizon, we commend the leadership of the state and the AWAAG for the significant progress made thus far in the process. We appreciate the efforts by the Working Group to reach out to, educate, and receive feedback from a large and varied number of stakeholders. Of particular note are the tireless efforts of Bennett Bearden who has crisscrossed the state many times over in his efforts to meet stakeholders and understand their issues. We are likewise grateful for the willing participation of the Working Group in stakeholder led meetings including the Environmental Flows Symposium held by ARA in Birmingham and the irrigation summit held at the Department of Agriculture and Industries facility in Montgomery. We appreciate that the Working Group has responded to stakeholder comments and created a website where all stakeholders can learn more information about the AWAAG and its work as well as keep abreast of upcoming events and deadlines by accessing the available timeline. We encourage the Working Group to maintain this resource and to post copies of all written comments and transcripts of verbal public comments received to this website to ensure absolute transparency in this process. Finally, we appreciate the publication of this issue paper and the AWAAG's reception to public input. At the end of this process, the inclusion of public input into the process will be the program's bulwark against criticism and efforts to derail the plan in favor of maintaining the status quo.

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<sup>14</sup> Available at <http://conserveonline.org/workspaces/eloha>

<sup>15</sup> See <http://www.alabamarivers.org/current-work/water-management-planning/comprehensive-water-resource-regulation-and-permitting/water-policy-adcnrs-perspective>

<sup>16</sup> See <http://auei.auburn.edu/conference/symp.php>

## Specific Comments on the Issue Paper

In addition to these overarching comments, ARA submits the following comments which address specific items in the AWAAG paper.

### *Introduction/ Current status*

As stated above, we agree with the AWAAG's assessment that changes to the current water management regime are absolutely necessary to preserve and sustain our water resources. We also concur that one of the main challenges is the lack of a unified focus, with respect to their statutory mandates, of the various state agencies that have responsibilities in water resources areas. Fixing this disjointed system must be a primary focus of the Working Group's recommendations. At the very least, the AWAAG's recommendations should include proposals for restructuring the current system to put in place the necessary overlap of responsibilities in order to ensure that all components of water management adequately covered, including the protection of natural systems and water quality. The clearest example of this issue is the current gulf that exists between the state's water quality and water quantity programs under ADEM and OWR. Ideally, quality and quantity would be housed under the same agency, however, if this is not currently feasible, the program must include stringent checks and balances to ensure that water quality safeguards are accounted for in every quantity decision, and vice versa. This will require the AWAAG to give the current system a hard look, putting aside positional differences. We recognize that this is a challenging proposition as the necessary analysis will certainly entail pitting one agency's responsibilities against the others' and there will be the tendency to fight for existing powers and associated funding. With that in mind, it is our recommendation that the State engage consultation from outside state government to facilitate this process. There are many qualified firms with the expertise and experience necessary to undertake this task. We will be happy to provide additional recommendations and assistance as the program moves forward.

As noted, one of the key deficiencies arising out of the current structure is that the "level of detail and statewide coverage of information regarding water resource availability is incomplete."<sup>17</sup> This is a major frustration considering that the central recommendation of the 1990 Water Resources Study Commission's report was to create an agency with the responsibility to collect data, maintain databases of this information, and to conduct studies to understand our water resources and their availability.<sup>18</sup> For over 20 years the lack of data has been a common excuse used by opponents of water management to resist action. If we wait 20 more years to collect the data the only thing we will know for certain is that we will need more data. Today science and policy have reached the point where the lack of conclusive data is no longer a sufficient justification for delaying action. To be clear, good, scientifically sound data is vitally important to the success of the resulting water program and the AWAAG's recommendation should certainly include provisions for moving forward with data collection as well as proposals for securing the funding necessary to collect this data. Likewise, the program should be sufficiently adaptable to respond to new and changing data as it becomes available.

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<sup>17</sup> *Issue Paper* at 3

<sup>18</sup> Study Commission at 2, 14-19

However, Alabama has reached a critical point where action is necessary and the need for more or better data should no longer be an anchor holding the state back.

One obvious aspect of the Working Group's issue paper is that it reads more like a compilation of issues and ideas than a unified assessment or proposal. This critique has led to the assumption that the paper is more of a "scoping document" intended to lead to a later more comprehensive product. However, information conveyed by members of the Working Group during informal stakeholder meetings suggests that this paper is presented as the outline or rough draft of the final product. If this is, in fact, a draft of the final recommendation, we would recommend that special focus be given to ensuring that the paper melds into the Working Group's unified vision for a comprehensive statewide water management program.

### *Water Resource Management*

"The waters of the State are a natural resource owned by the State in trust for the public and subject to the State's sovereign power to plan, regulate, and control..."<sup>19</sup> This is a basic premise underlying the authority granted to the Office of Water Resources in the Alabama Water Resources Act<sup>20</sup> as well as the grants of authority given to Watershed Management Authorities<sup>21</sup>, Water Authorities<sup>22</sup>, and Water Utilities<sup>23</sup> of the state. As the commentary to Section 1R-1-01 of the Model Code suggests, this interpretation "underscores the reality that water as an ambient resource cannot be fully subordinated to private rights; *water is always a matter of public concern* and is subject to regulation in the public interest."<sup>24</sup> Further, a prohibition against withdrawing water from a water source without a certificate of use issued by the State is well within the State's police power to regulate water withdrawal and use in order to protect the public health, safety, and welfare.<sup>25</sup> While a "clear statement of State ownership of [the] waters of the State" would undoubtedly provide clarity to the citizens' of the State, it is wholly unnecessary for the State to move forward with water resources management and planning. The State has no more responsibility to express its ownership of the waters of the state than it does to declare its ownership of the air we breathe or to notify citizens that they will be unsuccessful in an attempt to take over a city park through adverse possession. However we are in favor of the Working Group restating the assertions of Senate Joint Resolution 16 that "the waters of the state... are a natural resource of the state and subject to the state's sovereign power to plan and manage the withdrawal and use of those waters."<sup>26</sup>

The issue paper's first policy option under this section is to "direct the Alabama Water Agencies Working Group to recommend components of a statewide water management plan..."<sup>27</sup> Considering the April 18<sup>th</sup> letter from Governor Bentley to the AWAAG, this has

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<sup>19</sup> *Model Code* §1R-1-01

<sup>20</sup> Ala. Code § 9-10B-2

<sup>21</sup> Ala. Code § 9-10-1, et seq

<sup>22</sup> Ala. Code § 11-88-1, et seq

<sup>23</sup> Ala. Code § 11-89-1, et seq

<sup>24</sup> *Model Code* at 1

<sup>25</sup> *Model Code* at ix

<sup>26</sup> Ala. SJR 16, (2012)

<sup>27</sup> *Issue Paper* at 12

already been addressed. Our analysis suggests that the Governor's letter is sufficient authority for the AWAAG to meet the letter's directive to "recommend a statewide water management action plan and timeline that takes into account and equitably manages the various demands on the State's water resources" along with recommendations for any necessary legislation to implement such a plan by December 1, 2013. If the AWAAG feels that it needs additional authority or that such authority should come from the legislature then those concerns should be brought up immediately for action during the 2013 legislative session.

The issue section's implied conclusion, that the current water management regime needs an overhaul, is sound. From the introduction to the American Society of Civil Engineers' *Regulated Riparian Model Water Code*:

"In any state following traditional riparian rights, a new legal regime for water management will require changes in the way in which water is allocated to particular uses, the manner in which the state deals with water shortages or other water emergencies, and the ability of water users to transfer water to new uses, perhaps at new locations and with a different timing of the use. All of this must be accomplished with due respect for existing rights to use water without allowing those existing uses to stifle the necessary steps to respond to the changing circumstances confronting water users and managers within the state."

This statement is in full agreement with the issues raised in Governor Bentley's April 18, 2012 letter and the Working Group's findings.

We highly recommend that the Working Group recommend adoption of the American Society of Civil Engineers' *Regulated Riparian Model Water Code*<sup>28</sup> as the cornerstone of Alabama's comprehensive water management program. The *Model Code* provides a ready-made, vetted framework for the State's program. It should either be adopted in its entirety, which would entail rescinding the current Alabama Water Resources Act and other conflicting laws, or the Water Resources Act should be significantly reworked in order to include the provisions of the *Model Code*. An example of what this would look like has been provided to the Office of Water Resources. This method allows for the continuation of the current structure while adapting it to address the many challenges presented under the current program. In addition to strengthening the process by which the State plans for and manages the use of the State's waters, adoption of the *Model Code* will provide for clear administrative authorities, responsibilities, and procedures; enforcement and dispute resolution; methods for establishing, and the scope of, a grant of a right to use the waters of the State; solutions for responding to water shortages and water emergencies; and policies and procedures for ensuring that the waters of the state are used efficiently and conserved for increased use and future needs. To be clear, the *Model Code* is not the state's water management plan; under the *Model Code* the designated state agency must develop and adopt a Comprehensive Water Allocation Plan within a specified period of time after passage of the *Code*. Rather, the *Model Code* provides the essential framework necessary for a successful and sustainable program.

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<sup>28</sup> Supra at note 10

The issue paper suggests that the AWAAG should recommend components of a plan that “considers and incorporates, as appropriate, the recommendation for statewide water resources management from the October 1990 study of Alabama’s water resources *Water for a Quality of Life*”<sup>29</sup>. We are hesitant to support, without qualification, the recommendations of the Alabama Water Resources Study Commission because it did not go far enough in addressing the need for a comprehensive program. For instance, the Study Commission’s recommendation for establishing a water resource agency was largely fulfilled when the Alabama Water Resources Act created the Office of Water Resources. However, the powers that the Commission recommended were ultimately inadequate to allow OWR to meaningfully address the challenges of water resource management in Alabama. We support using the recommendations of the Study Commission as the starting point for developing a truly comprehensive state water management program.

Likewise, we support the inclusion of the Water Resources Commission in the process so long as that participation is in keeping with its role as an advisory body to OWR. However, as currently defined, the Water Resources Commission is not authorized to conduct rule making or provide oversight of water management decisions. The Water Resources Commission also has significant shortcomings with regards to representation of all interest and the public’s ability to influence membership on the Commission is severely limited. For these reasons, the Water Resources Commission should not be viewed as an approving body for any of the AWAAG’s recommendations.

#### *Permitting/Enhanced Certificates of Use*

The current certificate of use program is ineffective and is not designed to meet the needs of the state. There is little oversight of the program, no enforcement, and no protection afforded to participants in the event that their water use is challenged. The absurd situation that many of the State’s suppliers are facing with their Certificates of Use having been withheld because they are, quite properly, providing water to non-riparian customers within their service areas is a prime example of the shortcomings of the current program. As the Alabama Water Resources Act recognizes, water for human consumption is the highest priority of use in the state and the certificate of use program must be adjusted to conform to this reality. Additionally the current system provides no mechanism for ensuring that waters are not over-allocated or that instream uses, including flows necessary to sustain the viability of the system, are protected. Finally, the current system does not provide for enforcement of the state program nor does it allow the State to make adjustments to withdrawals during periods of shortage or changing needs.

The Working Group should develop recommendations for a certificate of use system that allocates water resources fairly among all water users; ensures that the viability of the resource is protected for future use and the health of the environment, ensures that instream uses are protected including recreational and commercial uses, provides for meeting water quality standards under the Clean Water Act and ADEM’s regulations, and restricts uses among all users in an equitable and predictable manner during periods of water shortages or water emergencies. We recommend that the Working Group consider chapter VI of the *Model Code* in developing

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<sup>29</sup> *Issue Paper* at 12

revisions to the certificate of use program. In addition to requiring a Certificate of Use for all appropriate withdrawals, the program should include a mechanism for collecting fees sufficient to provide funding to sustain the state program and a contain a transparent and accessible dispute resolution program that allows for access by both water users and members of the public. Finally, this revised certificate of use program should clearly identify the right to use the waters of the state and the associated responsibilities of the certificate holder and provide appropriate protections to the certificate holder against challenges to the permitted water use so long as the use is in keeping with the provisions of the State's water management program.

### *Economic Development*

We are concerned with the often myopic focus on reservoir development in most discussions of economic development. We encourage the Working Group to consider the benefits to the economy from ecosystem services when considering economic development opportunities. Many of these benefits are lost or greatly reduced when our streams are impounded<sup>30</sup>. Additionally, water allocation decisions must be made with a view to the long term viability of the system. Therefore it is critical that the State management program view allocation requests through a lens tinted towards maximizing efficient use of the water and conservation of the resource.

### *Surface and Groundwater Availability*

We suggest that a basic principle of the state water management program should be that there is no meaningful distinction between allocations of surface water and ground water. The *Alabama Water Resources Act* defines the Waters of the State as

A quantity of any spring, brook, creek, stream, river, pond, swamp, lake, reservoir, impoundment, sound, tidal estuary, bay, waterway, aquifer, or any other body or accumulation of water, surface water, or ground water, public or private, natural or artificial, that

- a. is contained within the borders of this state;
- b. flows through or to this state or any portion thereof; or
- c. borders upon this state or any portion thereof, including those portions of the Gulf of Mexico over which this state has jurisdiction.<sup>31</sup>

The *Model Code* provides a cleaner definition with “any lake, pond, river, stream, creek, run, spring, other water flowing or lying on or underneath the surface, or contained within an aquifer, or found within the atmosphere regardless of the quantity of water or duration”<sup>32</sup>; although these two definitions are fundamentally congruent.

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<sup>30</sup> See <http://www.freshwater-science.org/about-sfs/benefits-of-freshwater-systems.aspx>

<sup>31</sup> Ala Code. § 9-10B-3(19)

<sup>32</sup> *Model Code* § 2R-2-33.

In keeping with these definitions, all water use regulations should be combined under one comprehensive program. As such the allocating agency's first question becomes whether there is a requirement for a Certificate of Use before the water may be withdrawn not whether the source is surface or groundwater. In certain circumstances, the State may decide that a Certificate is not required, i.e. use of atmospheric water or small withdrawals for human consumption. However, for every withdrawal requiring a Certificate of Use, the issuing agency must determine the impact of the allocation on both the surface water and groundwater and make its determination accordingly. We understand that there is quite a lot of data that needs to be collected to fully understand the productivity of our water resources. We agree with the call for funding and support for maintaining and expanding monitoring networks. We also support programs designed to protect sensitive source waters such as groundwater recharge areas and stream buffers.

### *Drought Planning*

The Drought Planning issue section appears to only recommend a drought reporting plan and we would encourage the Working Group to develop a more comprehensive water shortage response program. Our recommendation is that, as with many other aspects of water management, drought planning be included as part of a larger comprehensive water management program. We agree with the Working Group's recommendation that that the drought management plan be consistent with the statewide program but we would take this a step further and adopt the *Model Code's* provisions for responding to a wide variety of potential water shortages, of which droughts are a subset. The State water management program should include an enhanced certificate of use program so that it provides a reliable and fair system of allocating the waters of the state and a predictable method of response to water shortage.<sup>33</sup> A condition of each Certificate of Use should be a monitoring and use reporting requirement along with a clear statement that all Certificates are subject to modification in accordance with the state water program, which includes predetermined drought response strategies. The State program should include descriptions of water shortages and water emergencies such as those found in the *Model Code* along with clear descriptions of how the state will determine and react to these conditions.<sup>34</sup> Finally, the State's water management program must include the necessary enforcement mechanisms to allow the allocating agency to enforce the provisions of the program before water shortage becomes an issue in order to protect the rights to use water granted by the Certificates of Use.

### *Water Conservation and Reuse*

The Alabama Water Resources Act finds that the waters of the state "should be conserved and managed to enable the people of this state to realize the full beneficial use thereof and to maintain such water resources for use in the future"<sup>35</sup>. In keeping with this finding, the Working

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<sup>33</sup> See *Model Code*, Chapter VII, §7R-3-01, et seq

<sup>34</sup> *Model Code* §§ 2-2-29, 31, 3R-2-03, 4R-2-03, and 9R-1-01, et seq.

<sup>35</sup> Ala.Code § 9-10B-2(3)

Group should recommend a program which has, at its core, the conservation of the waters of the State. We recommend adopting the following from the *Model Code*:

Pursuant to this Code, the State undertakes, by certificates of use and other steps authorized by this Code, to allocate the waters of the State among users in a manner that fosters efficient and productive use of the total water supply of the State in a sustainable manner in the satisfaction of economic, environmental, and other social goals, whether public or private with a view to preventing water from becoming a limiting factor in the general improvement of social welfare.<sup>36</sup> ...The State shall conserve the water of the State through suitable policies and by encouraging private efforts to conserve water and avoid waste.<sup>37</sup>

We support the Working Group's recommendations for the development of water reuse standards and regulations and for promoting efficiency and conservation to public utilities. In developing these policies for conservation and efficiency, we recommend that the Working Group consider two publications by American Rivers, Inc. which focus on the benefits available through efficiency and conservation. *Money Pit: The High Cost And High Risk Of Water Supply Reservoirs In The Southeast*<sup>38</sup> challenges many of the commonly held assumptions associated with building reservoirs for water supply. *Hidden Reservoir: Why Water Efficiency Is The Best Solution For The Southeast*<sup>39</sup> provides an indepth look at the benefits available through investing in efficiency.

Additionally, we recommend that the state water management program explicitly promote conservation by expanding the Alabama Water Resources Act's mandate for education programs<sup>40</sup> to provide technical assistance through the allocation agency to aid in the development of water conservation measures and to give preferences to water developed through conservation measures.<sup>41</sup> The allocating agency should maintain a list of voluntary conservation measures and provide conservation credits for users who, either through permit conditions or voluntarily, reduce water until other users have achieved comparable restrictions in the exercise of their rights to use water.<sup>42</sup>

### *Interbasin Transfers*

All interbasin transfers, both existing and future, should be evaluated for reasonableness under the State's water management program. We recommend that a request for a withdrawal of water for use outside the basin of origin receive careful consideration under a state policy that affords primary protection to the reasonable needs of the basin of origin. This regulation of interbasin transfers should give particular weight to any foreseeable adverse impacts that would impair the sustainability of the waters of the basin of origin. We recommend that the state adopt

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<sup>36</sup> *Model Code* § 1R-1-02,

<sup>37</sup> *Model Code* § 1R-1-10

<sup>38</sup> Available at <http://www.americanrivers.org/newsroom/resources/money-pit.html>

<sup>39</sup> Available at <http://www.americanrivers.org/newsroom/resources/hidden-reservoir.html>

<sup>40</sup> Ala. Code § 9-10b-5(15).

<sup>41</sup> See *Model Code* §§ 9R-1-01, et seq.

<sup>42</sup> See *Model Code* §4R-2-02 and § 7R-3-06

the considerations provided in the *Model Code* for determining whether an interbasin transfer is reasonable.<sup>43</sup>

### *Instream Flow*

We recommend that the State adopt as part of the comprehensive statewide water management program the following provision:

The State shall develop, using the best available science and data, a conservation flow or level for each water source or class of scientifically similar water sources that is the larger of the amount necessary for the chemical, physical, or biological integrity of the water source, taking into account normal seasonal variations in flow and need. The State shall preserve conservation flows and levels in all water sources by reserving such waters from allocation and by authorizing additional protections of the waters of the state. Every person exercising a right to use water pursuant to this Code is required to protect the prescribed conservation flows or levels when exercising such rights. The State shall develop, using the best available science and data, a subsistence flow level for each water source or class of scientifically similar water sources, that are emergency minimum flows or levels that are not subject to allocation except to prevent grave threats to human life or health under circumstances in which water is not available from other sources for coping with those needs.<sup>44</sup>

As we have previously discussed, we recommend using the *ELOHA* model for classifying and assessing the waters of the state. The state water management program should incorporate policies and procedures for protecting conservation flows in water allocation decisions and reactions to water shortages. The program should clearly state that a threat to impair the conservation flow in a stream shall be justification for declaring a water shortage or water emergency as appropriate.<sup>45</sup>

### *Interstate Coordination Issues*

Under the United States Supreme Court's equitable apportionment doctrine, the Court will consider the "harms and benefits to the competing States."<sup>46</sup> The development of a statewide, comprehensive water management program which accounts for all uses of water as well as waters reserved for conservation flows and other instream flow uses is the State's best protection against water grabs from our neighboring states

### *Water Resources Data*

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<sup>43</sup> See *Model Code* § 6R-3-06.

<sup>44</sup> See *Model Code* §§ 1R-1-11, 2R-2-02, 03,16, 3R-2-01, et seq.

<sup>45</sup> See *Model Code* § 3R-2-03-1, et seq.

<sup>46</sup> *Colorado v. New Mexico II*, 459 U.S. 176, 192-93 (1982).

We appreciate the challenges faced by the Working Group to collect and maintain the data necessary to operate a statewide water management program. As the program moves forward, it is critical that assessment and data collection requirements receive funding and that the water management program is structured in such a way that ensures that funding for assessments and data collection is a component of fees collected for the issuance of Certificates of Use and other sources of funding. Considerations must be made to ensure that funding is allocated to all agencies contributing to the water management program including funding for assessments conducted by GSA and DCNR and water quality work at ADEM.

### *Stakeholder Education and Outreach*

We are wary of segregating public participation into categories, particularly when the Working Group identifies one group as “Key Stakeholders”. The waters of the state are a public resource to be protected and managed for the good of the people of Alabama. In keeping with this principle the development of the water management program should be as open and transparent as possible. We understand that there are stakeholders that are more intimately involved in water issues than others and that there are some that are quite heavily invested in the resources of the State. For this reason, we agree that it is appropriate that the Working Group reach out to these individuals and groups to collect their input. However, the ultimate goal of the Working Group must be to develop recommendations that serve the best interests of the State and all of her citizens.

Our primary issue with the Working Group’s approach to stakeholder participation is the phrasing of the policy option to “[a]fford *key stakeholders* an opportunity to participate in the process of developing a comprehensive policy...”<sup>47</sup>. The implication is that only a select group of stakeholders will have a voice in this process. Our recommendation is to remove any distinction in the public participation process and to be clear that anyone who is interested may participate. Past experience in developing state policy and working on water issues such as hydropower relicensing suggest that the makeup of the core participants will not change all that much but the public’s perception of the process will be much more favorable. A more open process has the potential added benefit of finding an essential stakeholder or group that may not have been previously engaged in the process.

Ultimately, we believe it will be necessary to bring all interested parties together to discuss and negotiate the details of a comprehensive water management program. We encourage the Working Group to thoughtfully consider at what point this is appropriate and how best to achieve success in a process such as this. Our experience tells us that a well-designed set of stakeholder meetings with professionally facilitated discussions can go a long way in overcoming challenges that might interfere with the success of the plan down the road.

There are many examples of successful collaborative stakeholder efforts to solve complex water issues. We highly recommend the ACF Stakeholders, Inc., organization as one model of a stakeholder organization that is both broad as to participation and focused in management. ACFS’s governing board systems is an ingenious system for bringing stakeholders

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<sup>47</sup> *Issue Paper* at 35

together both as issue groups and geographical regions which allows for selected individuals to speak on behalf of a larger constituent body. The Working Group may be able to adapt this system to its use in an effort to provide greater opportunities for participation while keeping the number of voices to which it must respond to a manageable number.

We very much appreciate the efforts of the Working Group to post information online and its willingness to receive comments from the public at large. We encourage the Working Group to continue along this path and post copies of all written comments received, or transcripts of any verbal public comments, to the website and to schedule a series of public forums around the state to educate the citizens and solicit input.

### **Issues not Addressed in the Working Group's Paper**

The following issues were not addressed in the issue paper or did not receive the attention from the Working Group that we feel is warranted.

#### *Coordination of Water Quality and Water Quantity Management*

Protecting water quality is a fundamental responsibility of the State under both State and Federal Law including extensive provisions under the Clean Water Act<sup>48</sup> and the Safe Drinking Water Act<sup>49</sup>. Under current law, ADEM has primary responsibility for water quality.<sup>50</sup> The Working Group should include in its recommendations to the Governor recommendations for coordinating or even integrating water allocation with the regulation of water quality. If the responsibility for allocating water is to be vested in an agency different than ADEM then the state water management program must spell out the necessary procedures that the water allocating agency is to follow to coordinate its allocation decisions with the achievement and maintenance of water quality standards applicable under State and Federal Law. We recommend the procedures provided in the *Model Code* including the recommendation to combine Certificates for Use with water quality permits.<sup>51</sup> Additionally, we urge ADEM to develop water quality criteria for flows sufficient to protect designated uses in accordance with the Department's mandates under the Clean Water Act<sup>52</sup> and the Alabama Water Pollution Control Act<sup>53</sup> in order to account for the necessary flow components of water quality protections under ADEM regulations chapters 335-6-10 and 335-6-11.

#### *Enforcement and Dispute Resolution*

“Inevitably, there will be disputes between the State Agency and those parties subject to its regulatory authority, as well as disputes between holders of [Certificates of Use].<sup>54</sup> The

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<sup>48</sup> *Clean Water Act*, 33 U.S.C. §1251 et seq. (1972)

<sup>49</sup> *Safe Drinking Water Act*, 42 U.S.C. §300f et seq. (1974)

<sup>50</sup> Ala Code 22-22-1, et seq.

<sup>51</sup> *Model Code* § 6R-4-01, et seq. Recommendations for combining permits is found at § 6R-4-04, et seq.

<sup>52</sup> CWA § 303(c)(2)(A), see 40 C.F.R 131(6)(c)

<sup>53</sup> Ala. Code 22-22-1, et seq. Please see *Comments from the Alabama Rivers Alliance Regarding the 2012 Triennial Review of State Water Quality Standards*, July 19, 2012.

<sup>54</sup> *Model Code*, commentary to Chapter V: Enforcement and Dispute Resolution, 71.

Working Group's recommendations should include recommended provisions for contesting decisions of the allocating agency with regard to issuance or denial of a Certificate of Use as well as provisions for commenting on and contesting the adoption of regulations under the statewide water management program.<sup>55</sup> Additionally, we urge the Working Group to make recommendations pertaining to criminal and civil enforcement of the program as well as the prerequisite reporting requirements and inspection authorities.<sup>56</sup>

### **Building Blocks and Next Steps**

Governor Bentley and the Alabama Water Agencies Working Group have taken major steps towards bring a sustainable water management program to Alabama. At the conclusion of this comment process, the Working Group should have a clear understanding of the important issues surrounding this effort. We encourage the Working Group to be as open as possible with regards to the comments received. The process is at a critical point where stakeholder buy-in is essential and stakeholders must all understand where everyone else is coming from in order to reach a common understanding or to be able to negotiate around sensitive issues. We concur with the Working Group's determination that assessments must continue, however, we disagree that these assessments must be "completed" prior to moving on to follow on phases. The assessment process will be on going.

We recommend that the Working Group determine a time for a review of the information collected thus far and then proceed along two parallel paths of continuing to collect data and developing the Working Group's recommendations for a comprehensive water management program. Communication to stakeholders should be ongoing throughout, although it may be helpful to identify critical benchmarks over the next year when there will be planned stakeholder meetings and opportunities for additional public comment.

We look forward to the opportunity to discuss the Working Group's thoughts on our comments and any future drafts of the Working Group's recommendation for a water management program and any associated proposed legislation. We will remain an active participant in the process and, as always, offer any support that we can provide to ensure that the Working Group successfully meets the deadlines imposed in Governor Bentley's letter. If there are any comments or questions regarding this letter please do not hesitate to contact us at 205.322.6395 or mreid@alabamarivers.org.

With sincerest appreciation for your collective work,

Sincerely,



Mitchell Reid  
Program Director

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<sup>55</sup> See *Model Code* § 5-1-01, et seq.

<sup>56</sup> See *Model Code* §§ 5R-4-01, et seq; 5R-5-01, et seq; and §7R-1-01(f).

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