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Business Alliance for Responsible Development, Inc.

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VIA EMAIL & MAIL

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

RE: Comments Concerning the Alabama Water Agencies Working Group's August 1, 2012 Report on "Water Management Issues in Alabama"

Dear Mr. Atkins:

The Business Alliance for Responsible Development ("BARD") appreciates the opportunity to submit these comments regarding the "Water Management Issues in Alabama" report (hereinafter "Report") drafted by the Alabama Water Agencies Working Group ("AWAWG" or "Group"). This focus and discussion on the protection and continued judicious use of the State's water resources is timely. BARD commends AWAWG for accepting input and comments from stakeholders and the public at large regarding the State's current water resource programs and policies, as well as AWAWG's preliminary outline of the problems with the current programs, and its suggested solutions to those problems.

BARD is a coalition of businesses and trade groups whose footprint extends to all areas of the State. BARD consistently advocates for sustainable economic growth and environmental health and works hard to emphasize that these two initiatives are not diametrically opposed. A number of BARD-members' businesses rely on the State's water resources for transportation and energy production. Thus, BARD has a keen understanding of the unique issues that must be addressed to continue to protect and properly allocate the State's finite water resources as demand for such resources continues to grow both within and beyond our State's borders. A focus on the need for sound state water management policies is a good first step in addressing these important issues. However, development of such policies is a complex process that must be prudently examined and must receive continuous input from all interested stakeholders. BARD stands ready to assist AWAWG and offer its insight throughout this complicated process.

BARD recognizes that AWAWG's Report is simply a first step in this extensive process designed simply "to provide overviews, considerations, and policy options for important water resource issues in Alabama." However, even this preliminary Report—in what it says, and also what it does not say or

address—raises a number of concerns. Importantly, the Report fails to define or adequately explain the water resource problems facing the State. While recognizing that Alabama has had adequate water resources historically, the Report generically asserts that this abundance is threatened by population and industrial growth, development, drought, interstate disputes, and the vagaries of the existing riparian rights system. Yet, the Report does not further define or expand upon these purported threats in any additional detail. To be successful in this process, the precise problems or expected future problems must first be sufficiently defined in order to narrowly tailor subsequent solutions to the problems so that other water resource interests are minimally impacted.

Indeed, throughout the Report, AWAAG states the need for the collection of additional water resources data, including but not limited to water use, water availability and in-stream flows information. BARD believes the collection of this data is a necessary prerequisite to fully understand the pertinent water resource issues. Only after fully defining the water resource problems facing the State, if any, can AWAAG effectively develop a new state water management policy. Given the lack of adequate data, and AWAAG's repeated emphasis on the need for such additional data, BARD believes the Group's immediate focus on the development of a new water management policy is premature. Instead, AWAAG should devote its limited resources to first obtaining all of the necessary data it needs to sufficiently define existing water resource problems. Simply developing policies should not be AWAAG's goal. Instead, providing solutions to the State's water resource problems is the correct goal, and any water resource policies developed by AWAAG should serve only as a means to achieving that ultimate goal.¹

BARD offers these additional comments to the specific "water issue area" discussions included in the Report.

I. Water Resources Management

Any water resource programs or policies developed by AWAAG must be consistent with the Alabama Water Resources Act ("AWRA"), as the Report correctly denotes. Importantly, AWRA expressly provides that it in no way changes or modifies "existing common or statutory law with respect to the rights of existing or future riparian owners concerning the use of the waters of the state." Ala. Code § 9-10B-27. As such, BARD assumes that any comprehensive water resource plan AWAAG eventually proposes will not interfere with existing common law riparian rights held by Alabama property owners. BARD would oppose any alteration to existing rights without substantial justification warranting such a departure from these longstanding common law principles.

Separately, the Report incorrectly asserts that "Alabama's water resources are owned by the State." Water is not considered owned until it is captured, and a state's ability to control or manage water uses under certain conditions does not amount to a capture. Instead, water in its natural state is typically considered part of the associated real property controlled by riparian and littoral rights recognized under common law. BARD recognizes that AWAAG may be able to offer further explanation for this statement, and that perhaps it is not to be interpreted on its face. Thus, BARD

¹ Nor should the State of Alabama be undertaking this initiative simply to keep pace or catch up with surrounding states that have more comprehensive water management programs. The focus should only be on Alabama and determining whether such programs and policies are necessary based on available data and a thorough review of the State's resources and needs.

respectfully requests that AWAAG further explain this statement in subsequent reports, including its understanding of current property rights with respect to waters within the State.

The Report also references the establishment of defined planning areas, such as regional or watershed management authorities. However, such a regional or segmented approach could lead to inconsistent or disparate regulation, as well as duplicative oversight with many existing state agencies such as ADEM and the Office of Water Resources. Such inconsistencies and duplication are not necessary and support the fact that state-wide planning would provide the most uniform and efficient regulation in this initiative.

II. Enhanced Certificates of Use/Permitting

AWAAG's assertion that the certificate of beneficial use program established under AWRA should be enhanced as a means of more comprehensively managing water withdrawals, interbasin transfers, non-riparian uses, and in-stream flow standards may be premature, as well. The Report sets out the purported benefits of enhancing this program but fails to first identify how the existing framework is not adequately addressing these issues. This gap in the Report most likely stems from AWAAG's need for additional water resource data. It is questionable whether any such enhanced program would even be used on a regular basis, as well. Indeed, the State and various impacted parties have managed significant droughts without having to implement the Capacity Stress designation process set out in AWRA.

III. Economic Development

BARD generally agrees with the suggested action items for this subsection, including but not limited to coordinated regional and local planning, public/private partnerships, the potential use of off-stream storage, and the continued promotion and investment in waterborne transportation.

IV. Surface Water and Groundwater Availability

BARD supports an increased emphasis on obtaining scientific assessments of surface and groundwater resources and the need to obtain sufficient funding from various available sources.

V. Drought Planning

BARD supports development of the State's drought planning and response process. As stated above, however, an enhanced Certificates of Use program and/or complex water withdrawal permitting program is not necessary. Instead, immediate planning options should include mandatory water use restrictions and development of mechanisms for improved coordination between state and local government.

VI. Water Conservation and Water Reuse

BARD supports water conservation and reuse initiatives so long as reuse programs carefully account for all potential impacts on flows and landowners' riparian rights.

VII. Interbasin Transfers

Additional data regarding the state's water basins is necessary before AWA WG can reasonably consider regulating interbasin transfers. After developing sufficient data, AWA WG should continually seek stakeholder input prior to taking any regulatory action, if any such action is deemed necessary.

VIII. In-stream Flows

Why are in-stream flow requirements needed at this time? The Report does not provide an adequate basis for such requirements. Moreover, as stated above, sufficient data is needed before any reasonable in-stream flow program could be established. Lastly, AWA WG must again be cognizant to not infringe upon existing riparian rights if and/or when any in-stream flow program is established.

IX. Interstate Coordination Issues

BARD generally supports any efforts AWA WG believes would be productive to improve coordination with neighboring states regarding water resource issues.

X. Water Resources Data

As stated previously, BARD believes a great deal of additional data is needed prior to taking any further action with respect to water resource regulation and BARD commends AWA WG's emphasis on seeking sufficient funding to obtain this data.

XI. Stakeholder and Public Education and Outreach

Public participation in this complex process is essential. AWA WG has included a number of good proposals for ensuring that stakeholders and the public at large are included throughout this process. AWA WG should continue to take the necessary steps to make sure that the public is engaged early and repeatedly consulted throughout this process.

In conclusion, BARD commends the concerted effort of the agencies involved to better understand the State's water resources and to identify important issues that will allow for the continued protection and sensible use of those resources. However, it is apparent that a great deal of additional work and data collection is necessary before any revisions to current water resource programs and policies should be considered. BARD appreciates the opportunity to comment on this preliminary Report and is ready and willing to assist in these continuing efforts, as necessary.

Sincerely,



David Roberson

cc: John McMillan, Alabama Department of Agriculture and Industries (via U.S. Mail)
N. Gunter Guy, Jr., Alabama Department of Conservation and Natural Resources (via U.S. Mail)
Lance LeFleur, Alabama Department of Environmental Management (via U.S. Mail)
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