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Dear Alabama Water Agencies Working Group:

The Southern Environmental Law Center ("SELC") is pleased to provide the following comments to the Alabama Water Agencies Working Group ("AWAWG") concerning Alabama's first comprehensive statewide management plan. SELC is a regional conservation organization whose mission is to protect natural resources and promote healthy communities around the Southeastern United States. SELC has been advocating for a statewide comprehensive water management plan for over 5 years in Alabama. We are thankful that Governor Bentley has taken this first step in filling what AWAWG has called a "vacuum" in Alabama water policy.[1] We greatly appreciate being included as formal stakeholders in this important process.

These comments center around the AWAWG document "Water Management Issues in Alabama". The governor asked the working group to "recommend a statewide water management plan by December 1, 2013" and to include any "proposed legislation necessary" to implement the plan.[2] On the whole, it is imperative that any final policy or legislative recommendations from AWAWG are based in sound science. In addition, while the current working document represents a first step, it must go further to include policy recommendations as opposed to merely lists of options, and it must specify responsibility for implementing these recommendations.

We strongly recommend that Alabama embrace the *Regulated Riparian Model Water Code* ("Code"), produced by the American Society of Civil Engineers, as a basis for a comprehensive water plan and accompanying policy recommendations.[3] The Code provides for a complete, comprehensive, and well-integrated statutory scheme for creating a robust regulated riparian system of water law. The very purpose of the Code is

[1] Alabama Water Agencies Working Group, *Water Management Issues in Alabama; A Report to the Honorable Robert Bentley, Governor of Alabama*. August 1, 2012 p. 11, available at http://www.adeca.alabama.gov/Divisions/owr/awawg/Documents/2012_08_31%20WAWG_Water_Issue_Report_31.pdf (accessed October 25, 2012).

[2] Letter from Robert Bentley, Governor of Alabama, to Alabama Water Agencies Working Group, available at http://www.adeca.alabama.gov/Divisions/owr/awawg/Documents/Gov%20Bentley%204-18-12%20water%20working%20group.pdf (accessed October 25, 2012).

[3] American Society of Civil Engineers, *Regulated Riparian Model Water Code,* 2004.

to serve as the basis for legislation concerning the allocation of water rights among competing interests and the resolution of other qualitative conflicts over water. The Code represents thousands of hours of work by national experts in law, engineering and water resources policy, with feedback from representatives of all interests in water use and management. Alabama should use this Code as the foundation for the formulation of state water policy.

Specific comments applicable to different sections of the AWAWG draft document are provided below.

I. Water Resources Management

As a starting point, AWAWG should clearly note that water is a public resource in Alabama. The surface water and groundwater are managed by the state in the public interest, and the state holds these resources in trust for the public.[4] Water in Alabama is not private property, nor is it governed by prior appropriation concepts or other property-centered doctrines. In fact, some states across the country have moved toward water planning by the judicial imposition of the public trust duties, (i.e. courts decide that because the state holds the resources in trust for the public, the state has a responsibility to manage the resource).[5]

We also agree that Alabama's lack of a statewide water management plan "poses a threat" for the United States Supreme Court to decide that other states have a superior claim to Alabama's water.[6] Under the doctrine of equitable apportionment, which the Supreme Court has relied on, when neighboring states lay claims to a state's water, that state must generate "hard evidence" (i.e. a water plan) to support the need for the use of that water before they are apportioned it. Dan Tarlock, the author of the article *The Law of Equitable Apportionment Revisited, Updated and Restated* writes, "In … equitable apportionment cases, the Court has shown some willingness to use the doctrine to force the states to assert their interstate rights through planning and conservation programs."[7] In Colorado v. New Mexico, the U.S. Supreme Court imposed long-range planning obligations on both states and found that New Mexico, which had spent some money on economic studies to support its existing uses, had better discharged the duty.[8] "Long-range planning and analysis will, we believe, reduce the uncertainties with which equitable apportionment judgments are made. If New Mexico can develop evidence to prove that its existing economy is efficiently using water, we see no reason why Colorado cannot take similar steps to prove that its future economy could do better."[9] Similarly, a

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[4] PPL Mont., LLC v. Montana, 132 S. Ct. 1215, 1234-1235 (2012); Idaho v. Coeur D'Alene Tribe, 521 U.S. 261, 283 (1997).

[5] *See* United Plainsmen Ass'n v. North Dakota, 247 N.W.2d 457 (N.D. 1976); National Audubon Soc'y v. Superior Court of Alpine County, 33 Cal. 3d 419 (1983).

[6] Water Management Issues at 11.

[7] 56 U. Colo. L. Rev. 409 1984-1985. p. 384. *citing* Idaho ex. Rel. Evans v. Oregon, 103 S. Ct. 2817, 2823 (1983).

[8] 104 S. Ct. 2433 (1984).

[9] Id.

Montana water report advises users that "[a] state water plan is important in ... proving, by clear and convincing evidence, that its diversion should be allowed to continue."[10]

We appreciate AWAWG's acknowledgement that "management of water resources needs to be holistic across an entire watershed or drainage basin due to the interrelationship of the natural and human processes and activities that can impact each other".[11] Any final policy recommendations from AWAWG must include a method of managing water from a watershed perspective. Otherwise, water management will remain unenforceable and highly contentious. In Georgia, for example, water is managed largely through political boundaries instead of natural watershed and aquifer boundaries. The plans for managing the water in these political boundaries often overlap and/or conflict with plans in other political boundaries, since the boundaries are not separated by watersheds. Alabama's statewide plan should include the creation of separate watershed plans that consider river and aquifer resources in each watershed. A system of regional watershed management/districts authorities should be established to properly manage water, following both specific guidelines to each region as well as overarching state-level policies. Political boundaries will of course be a factor when establishing these districts, but the districts should first and foremost be organized according to watershed.

II. Enhanced Certificates of Use/Planning

This section does not include a recommendation to create a more formal permitting system; instead, it merely recommends "review [of] the benefits, costs, and issues associated with establishing a more formal system for managing water withdrawals in the state."[12] Some form of permitting will ultimately be necessary to have a secure and predictable water supply. We recommend use of the Model Code to provide the details of how to permit water usage and withdrawals, and a direct recommendation to this effect by the AWAWG.

III. Economic Development

SELC supports sustainable economic development throughout Alabama, and appreciates that AWAWG included the word "sustainable" in one of its policy options.[13] SELC hopes that sustainability is a reoccurring theme throughout the economic policy options since its inclusion indicates to all stakeholders that Alabama recognizes the importance of the future use of water resources.

Despite not knowing the current availability or usage of the state's waters, AWAWG is already "encouraging...the use of water development concepts such as off-stream storage" and stating that a policy should "identify potential reservoir sites".[14] Such infrastructure projects should be a last resort after a community has made the most of less

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[10] Tarlock, n. 115 *citing Report of the Select Committee On Water Marketing: 49th Legislature State of Montana* (Jan. 1985).
[11] Water Management Issues at 10.
[12] Id. at 4.
[13] Id. at 16.
[14] Id at 15.

costly alternatives, such as efficiency and conservation measures. These "off-stream" reservoirs, although they are the preferred type of reservoirs are still reservoirs that damage tributaries that contribute to the overall water availability for a community, as well as harm the environment.[15] Additionally, they are often the most costly option in adding water capacity compared to alternatives.[16] AWAWG should be encouraging Alabama to develop its water resources in a sustainable and cost-effective manner.

Any agency tasked with reviewing future proposals for reservoirs should study the proposal in a transparent manner that allows for public input and rigorously evaluates the direct, indirect, and cumulative impacts on the environment and local economies. Because cumulative impacts of reservoirs can be extremely significant to the overall health of a particular stream, river, or watershed, the agency should examine other past, present, and forecasted projects in a watershed when evaluating a proposal.[17] When assessing need, demand forecasts should be based on populations that do not already have supply allocated from other sources. If the need for the reservoir is demonstrated, then the full yield of the reservoir should be for water supply. In addition, these reservoirs should not be built for the commoditization of surface and ground water resources. Building reservoirs is not a strategy to be taken lightly and certainly not one to recommend before mandating conservation and efficiency measures or before knowing all of the specific water variables of a certain area.

IV. Surface Water and Groundwater Availability

SELC supports full funding for scientific assessments of Alabama's water resources and their current stress levels in the course of developing a comprehensive statewide plan. The Geological Survey of Alabama ("GSA") and the Department of Conservation and Natural Resources ("DCNR") should be intricately involved in conducting these assessments given their scientific and technical expertise regarding surface and groundwater systems and natural communities. Ongoing assessments and monitoring should not be used to unduly delay the formulation and implementation of a water plan, and these studies should continue after the plan is in place so that the plan can be adaptive to the best available science. SELC supports the inclusion of groundwater in a comprehensive plan, as well as the recommendation to enact groundwater regulations that will preserve and protect aquifer recharge areas, as well as recommendations to determine proper well spacing, maximum well production rates and maximum aquifer water withdrawals.

Prioritization of the enforcement of good water quality policies for both groundwater and surface water must be a cornerstone of the water plan, since water

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[15] Seerley, Dana, et. al, *Balancing Instream and Offstream Uses: Instream Flows, Surface Storage and Aquifer Management; A Report to the Environmental Protection Division*. U. GA CARL VINSON INST OF GOV'T, 2006. p.6-7; 73 http://www.cviog.uga.edu/environmental/policy-reports/balanceinstream.pdf (accessed October 29, 2012).

[16] American Rivers. *Money Pit; The High Cost and High Risk of Water Supply Reservoirs in the Southeast*. July 2012. http://www.americanrivers.org/assets/pdfs/reports-and-publications/money-pit-report.pdf (accessed October 25, 2012).

[17] Seerley at 7.

quality is interlinked with water quantity. Because of the importance of including water quality in the plan, SELC supports the suggestion to expand the Alabama Department of Environmental Management ("ADEM"), DCNR, and GSA assessments of water quality and biological resources.

V. Drought Planning

While drought planning in Alabama is very important, it should not serve as a surrogate for comprehensive statewide water management. Drought plans are not designed to govern water allocations and management under normal rainfall conditions. Any drought plan must be consistent with the policies adopted as part of the more comprehensive state water plan.[18] Furthermore, adoption of drought planning legislation ahead of more comprehensive state water plan legislation should not serve as a signal to decision makers that Alabama has fully discharged its responsibilities regarding water management.

VI. Water Conservation and Reuse

Water conservation and efficiency are almost always the most cost-effective water supply alternatives.[19] While they cannot always be the sole supplier of water to an area, they reduce or eliminate altogether the need for more costly infrastructure projects such as reservoirs. SELC supports AWAWG's statement that water conservation "plays a significant role in preserving water quality and reducing water loss."[20] We also recommend, however, that the policy options prioritize conservation and efficiency measures and include enforceable conservation and efficiency goals, benchmarks, and timetables. Since there is "no state system or standard for measuring water efficiency among public water systems," AWAWG should not just generally "promote water conservation and efficiency for public utilities" but should specifically recommend funding studies of water conservation and efficiency methods for public utilities, as well as mandating the implementation of these measures.[21] All types of water uses should implement conservation and efficiency practices – municipal, industrial, and agricultural. We also strongly recommend that water conservation in thermoelectric power generation be specifically addressed in this plan, since this practice involves tremendous water use and consumption. Regarding water withdrawal permits, the permitting agency should have the ability to reject applications from permittees that have not demonstrated adequate water conservation.

While SELC supports water reuse as a viable practice, water reuse should not encourage adding capacity, such as withdrawing more water from rivers and streams. For example, residents may change behavior to water their lawns more with reuse water,

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[18] Water Management Issues at 21.

[19] American Rivers, *Hidden Reservoir; Why Water Efficiency is the Best Solution for the Southeast*, October 2008. http://www.americanrivers.org/assets/pdfs/reports-and-publications/SE_Water_Efficiency_Oct_2008_opt3534.pdf (accessed October 25, 2012);

[20] Water Management Issues at 22.

[21] Id. at 23.

which could result in an aggregate increase in water use, much of it consumptive use. Regulation can be written in such a way to prevent this result.

In addition, SELC recommends the inclusion of riparian buffer protection in a comprehensive water plan. Riparian buffers are naturally vegetated areas adjacent to waterways, including streams, ponds, estuaries and wetlands. Protecting riparian buffers is a relatively inexpensive way of reducing the impacts of drought and flooding. [22] They should be kept intact or restored whenever possible. As a general rule, protecting existing water sources is less expensive than restoring water to communities.

VII. Interbasin Transfers (IBTs)

SELC supports AWAWG's statements that "IBTs can be problematic in that they contribute to unsustainable growth (e.g. Atlanta)" and "IBTs can create permanent and significant detrimental impacts to water quantity and water quality."[23] Given these acknowledged impacts, coupled with the fact that Alabama has already enacted eight local legislative acts banning IBTs in the Tennessee River watershed, new or expanded IBTs should not be permitted in this state absent extenuating circumstances.[24] Communities need to be called upon to live within their means and not use faraway basins to support unsustainable growth; IBTs inherently are not sustainable water uses. Where IBTs are permitted, regulations must ensure that downstream communities and users are not robbed of their water supply to serve distant areas in other basins. AWAWG should recommend expanding IBTs only when the environmental and economic impacts to both the donor and receiving basins have been rigorously analyzed, and when less costly water supply alternatives, including conservation and efficiency measures, have been implemented. In addition, IBTs should only be allowed when the permitting agency decides that the benefits of the transfer outweigh the negative impacts; the agency should allow for opportunities for public involvement and comment on this decision.

VIII. Instream Flows

SELC agrees that an instream flow policy must serve as the "cornerstone" of any water management plan. Without establishing an instream flow doctrine at the outset, stakeholders' future access to water is much less predictable. AWAWG has confirmed that "water scientists and aquatic biologists agree that natural stream flow and all of its variations through seasonal flood events…are significant controlling variables in nature recharging groundwater aquifers, creating and maintaining aquatic habitat, supporting fish and wildlife populations, and maintaining acceptable water-quality conditions... "[25]

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[22] Peterson, Julie; Stone, Amanda; and Houle, James. *Protecting Water Resources and Managing Stormwater; A Bird's Eye for New Hampshire Communities* "In rural areas with substantial forests and fields, prudent land conservation and the protection of existing riparian buffers are likely to be the most cost effective approaches to water resource protection." http://www.unh.edu/unhsc/sites/unh.edu.unhsc/files/pubs_specs_info/stormwater_guide.pdf (accessed October 25, 2012).

[23] Water Management Issues at 24.

[24] Id. at 25.

[25] Id. at 27.

SELC supports providing resources for investigations into the instream flow needs of Alabama's aquatic ecosystems. These investigations should be conducted in a timely manner.

In addition, AWAWG acknowledges that "static minimum instream flows…versus variable instream flows, do not reflect the natural inter-and intra-annual flow variability to which most aquatic and riparian ecosystems are adapted. Disruption or modification of the natural flow patterns puts these ecosystems at risk."[26] Variable instream flow must be protected to the extent necessary to protect both the hydrological and biological integrity of the waterway.[27] An average mean annual flow of 30% is a static level; although this has been proposed by DCNR as a placeholder, a monthly mean annual flow should be implemented in order to protect all water uses and species, including many endangered species. In addition, a 7Q10 policy is not sufficient. A University of Georgia report states, "[t]hrough the 1990s strong scientific evidence was developed that annual 7Q10 was not a sufficient amount of water to maintain a healthy aquatic system."[28]

Water quantity and water quality are intrinsically interlinked. SELC recommends that a site-specific instream flow standard be based in part on its ability to protect water quality standards. Likewise, NPDES permits should include limits based on the instream flow in a receiving water. For example, Georgia's regulation reads, "No permit will be issued by the Director which authorizes the depletion of the instream flow established for the withdrawal, diversion or impoundment of surface water, except for periods of Emergency Water Shortage".[29] Jim Giattina, the director of the water management division of the U.S. Environmental Protection Agency, Region 4, writes that "Existing water quality standards implicitly protect flow through narratives for protection of aquatic life, protection of designated uses, biological integrity, habitat protection and through antidegradation policies….Region 4 is encouraging all of our states and tribes to consider explicit expression of flow as a water quality standard, either through a narrative standard (i.e. such as that used by Tennessee '…flow shall support the aquatic criteria…') or through a numeric standard (i.e. such as used by Vermont…)."[30] The instream flow standard for a waterway is extremely important to the ability to comply with water quality standards.

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[26] Id.

[27] Seerley at 31 *citing* Instream Flow Council, *Instream Flows for Riverine Stewardship,* 2002; Postel, Sandra, and Brian Richter, *Rivers for Life: Managing Water for People and Nature*, Island Press, 2003.

[28] Seerley at 14.

[29] Ga. Comp. R. & Regs. 391-3-6.07(4)(b)(9)(iii)(I) (2011).

[30] Letter from James Giattina , EPA, Region 4, Director of Water Division to Linda MacGregor, Chief of Watershed Protection Branch of Georgia's Environmental Protection Division. March 15, 2012.

Conclusion

Thank you for undertaking this very important and needed task of embarking on the creation of a water management plan. Alabama's economic growth, as well as the protection of its water resources, depends on such a plan. We look forward to working with you in the future in the creation and implementation of this plan. Please contact us with any questions.

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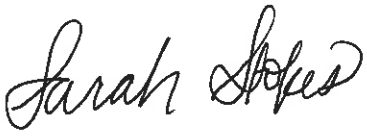

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