

United States Senate

WASHINGTON, DC 20510-0104

January 9, 2014

The Honorable Barbara Boxer
Chairman
Committee on Env't. & Public Works
United States Senate
Dirksen Senate Office Building, Suite 410
Washington DC 20510

The Honorable David Vitter
Ranking Member
Committee on Env't. & Public Works
United States Senate
Dirksen Senate Office Building, Suite 456
Washington DC 20510

Dear Chairman Boxer and Ranking Member Vitter:

I am writing to express appreciation for your efforts on the Water Resources Development Act of 2013 (WRDA) and to provide an update on key findings from the Senate hearing in your committee on July 22, 2013 related to the management of federal reservoirs in the Southeastern United States. In particular, the Senate hearing focused on the actions of the U.S. Army Corps of Engineers (USACE) and other stakeholders in the Apalachicola-Chattahoochee-Flint (ACF) River System (including Lake Lanier) shared among the States of Alabama, Florida, and Georgia; and the Alabama-Coosa-Tallapoosa (ACT) River System (including Lake Allatoona) shared among the States of Alabama and Georgia.

As you will recall, Section 2015 of the Senate WRDA bill provides, among other things, that the "ongoing water resources dispute [in the ACF and ACT basin] raises serious concerns related to the authority of the Secretary of the Army to allocate substantial storage at projects to provide local water supply pursuant to the Water Supply Act of 1958 absent congressional approval." As a consequence of last July's Senate hearing, and the ensuing exchanges of information with the USACE, the Southeastern Power Administration (SEPA), and the States of Alabama, Florida, and Georgia, many important facts were established and/or confirmed that support the concerns recognized in Section 2015 of the Senate WRDA bill.

This letter highlights key findings from these proceedings and urges your continued support in making sure that proper Congressional oversight of these matters continues. In summary, the evidence demonstrates that: (1) Atlanta-area water withdrawals are causing substantial harm to the environment and downstream communities in Alabama and Florida; (2) local water supply is not an authorized purpose of Lake Allatoona and only minimal withdrawals have been authorized by Congress for Lake Lanier; (3) the USACE ignores the limitations of the Water Supply Act of 1958; (4) Atlanta knowingly declined the opportunity to help fund the construction of these reservoirs, yet now looks to these reservoirs as a primary source of its water supply; (5) the USACE has entered, but never enforces, water supply contracts with Atlanta-area interests and even allows Atlanta-area interests to withdraw water from Lake Lanier for just **one-thousandth of a penny per gallon** and to sell the same water to their respective customers for around 250 times that amount; (6) federal hydropower customers in Alabama would pay lower rates for their electricity if Atlanta-area interests paid appropriately for water they actually

withdraw; (7) all stakeholders—the USACE, Congress, and the States—agree that the best way forward is to facilitate resolution of this water resources dispute through mutual negotiation of a water compact among the States of Alabama, Florida, and Georgia; and (8) Georgia has identified reasonable, common-sense steps it can take to reduce its reliance on Lake Lanier and Lake Allatoona.

Key Findings

1. Atlanta-area water withdrawals are causing substantial downstream harm in Alabama and Florida.

The evidence from the Senate hearing shows that Atlanta-area withdrawals are harming downstream communities by degrading water quality, harming fish and wildlife, reducing hydropower generation, reducing water supply for downstream users, constraining economic growth, impeding waterway navigation, challenging agricultural areas, impacting recreational uses, and ultimately, harming the ecological well-being of other parts of the ACT system and the ACF system including Apalachicola Bay. At the hearing, the State of Alabama presented evidence that Atlanta-area withdrawals result in “lower downstream flows” in the ACF and ACT basins, which “inflict substantial environmental and economic damage on Alabama communities and Alabama citizens.” These impacts are especially acute during periods of drought, as is experienced occasionally in our region. Brigadier General Donald E. Jackson, Jr., Commander of the South Atlantic Division of the USACE, testified at our hearing: “I would agree that in periods of drought, there is significant impact up and down the basin to all users.” Regarding Atlanta’s excessive withdrawals for local water supply, General Jackson commented: “Any exceedances would certainly cause additional problems for users downstream.” Moreover, at the August 13, 2013 field hearing of the Senate Committee on Commerce, Science and Transportation, which was chaired by Senators Rubio and Nelson, witnesses testified about the adverse impacts of Atlanta-area water withdrawals on the Apalachicola River, Apalachicola Bay, the local oyster industry, water quality, fisheries, and other concerns. Astoundingly, in spite of the facts to the contrary, the State of Georgia testified at the July hearing that “metro Atlanta’s use has almost no effect at all on the flow into Alabama and Florida.”

2. The USACE conceded that, with respect to Lake Allatoona, water supply is not a congressionally authorized purpose and, with respect to Lake Lanier, only minimal withdrawals have been expressly authorized by Congress.

At part of our Senate hearing in July, the USACE acknowledged that Congress has never established water supply as one of the authorized uses of Lake Allatoona. This admission is important because, absent specific authorization from Congress for this reservoir to be tapped for local water supply, the USACE’s only authority for allowing withdrawals for local water supply purposes is the Water Supply Act of 1958 (WSA). Unlike a grant of specific water supply authorization for a federal reservoir, the general authority provided by the WSA is limited, as described below (see Finding No. 3). Indeed, the USACE conceded that the WSA is the sole basis of its authority to allocate water supply at Lake Allatoona. With respect to Lake Lanier, the USACE acknowledged on the record that, besides the relatively small withdrawals authorized by

statute for Gwinnett County, direct withdrawals from Lake Lanier were not among the original congressionally authorized purposes for that reservoir.

3. The USACE ignores the limits on its WSA authority at Lake Lanier and Lake Allatoona.

The Water Supply Act of 1958 “declared it to be the policy of Congress to recognize the primary responsibility of the States and local interests in developing water supplies for domestic, municipal, industrial and other purposes.” Actions by the USACE at Lake Lanier and Lake Allatoona have turned this declaration of U.S. policy on its head. Instead of implementing the WSA in a manner that respects the primary role of the States and local interests to provide local water supply, the USACE has essentially ignored this fundamental principle by treating Atlanta’s water supply problems as an issue that the federal government should solve.

Importantly, while the WSA authorized the USACE and Bureau of Reclamation to allocate a portion of federal reservoirs for municipal and industrial water supply under appropriate circumstances, Congress imposed an important limitation—i.e., only Congress can authorize water supply allocations that “seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes.” As the evidence from our hearing shows, the WSA limitations are being ignored by the USACE at Lake Allatoona and Lake Lanier.

It is undeniable that Atlanta-area interests are placing enormous and growing demands on the shared, multi-state water resources in the ACF and ACT systems. The evidence introduced at the July hearing in our committee demonstrated that, while Lake Lanier and Lake Allatoona were constructed in the 1950s when Atlanta’s metro population was just 725,000 people, the Atlanta area population now exceeds 5.5 million people. Less than 1% of these reservoirs were used for local water supply purposes in the 1960s. Today, as much as 20% or more is used for water supply purposes, and Atlanta-area interests are seeking additional usages. Almost all of the direct withdrawals are occurring without any congressional authorization whatsoever. Despite the clear limits placed on its authority under the WSA, the USACE stated in its written responses after the hearing that the USACE is aware of only one instance in which it has “formally concluded that a particular request for water supply storage pursuant to the Water Supply Act required congressional approval...” This suggests that the USACE does not take seriously the limits of its authority under the WSA.

4. The historic facts surrounding construction of these federal reservoirs demonstrate that the current situation is fundamentally flawed and unfair.

Over 60 years ago, the City of Atlanta expressly declined the opportunity to help pay for Lake Lanier and Lake Allatoona. For instance, in a 1948 letter to Rep. James Davis of the Fifth Congressional District of Georgia, Mayor Hartsfield of Atlanta explained: “The City of Atlanta has many sources of potential water supply in north Georgia... Certainly in view of other possible sources of Atlanta’s future water we should not be asked to contribute [funds] to a dam which the Army [Corps of] Engineers have said is vitally necessary for navigation and flood control on the balance of the river.” Likewise, evidence at our July hearing showed that, in a

1952 hearing before the House Committee on Appropriations, then-Rep. Gerald Ford asked a prescient question: “Is it not conceivable in the future ... that the city of Atlanta will make demands on the Corps [] for certain water at certain times because of the needs of [Atlanta], when at the same time it will be for the best interests of the over-all picture—power, navigation, and flood control—to retain water in the reservoir [Lake Lanier]?” At the 1952 hearing, Colonel Potter of the USACE responded: “[We] would have to come back, I believe, to Congress to alter the authorization of that project, were it a major diversion of the water... [W]e take a very dim view of changing a project to the subsequent needs without Congress having a hand in it.” The USACE appears to have abandoned that approach completely.

5. The USACE has failed to enforce water supply contracts with Atlanta-area interests.

Evidence at our Senate hearing, and from correspondence with the USACE and SEPA following the hearing, shows that the USACE does not charge Atlanta-area interests a fair amount for actual water withdrawals and, further, that the USACE has failed to enforce these water supply contracts. For example, at Lake Lanier, Gwinnett County (Georgia) continues to pay for water under the terms of a contract that expired in 1990 and has not been renewed. In fact, data uncovered as a result of the Senate hearing in July showed that the USACE charges Gwinnett County just \$18.80 per million gallons of water withdrawn from Lake Lanier—an infinitesimally small one-thousandth of a penny per gallon. Separately, our staff looked into the amount that Gwinnett County charges its residential customers for water, and we found that Gwinnett County sells that same water to its own customers at a price of more than 250 times the amount charged by the USACE.¹ In other words, Georgia interests like Gwinnett County are able to withdraw water from federal reservoirs like Lake Lanier at virtually no cost at all and then, with the USACE turning a blind eye, those communities are selling that same water to their customers for around 250 times that amount or more. This situation is unlawful and fundamentally unfair to the federal taxpayer, and given the impacts of these withdrawals, it is also fundamentally unfair and harmful to other Americans living downstream of Atlanta.

Additionally, evidence obtained from the hearing showed that Cobb County Marietta Water Authority (CCMWA) has exceeded the limits of its contractual authority to use Lake Allatoona for water supply during every year between 2006 and 2012 except for one year. In fact, it was shown irrefutably that CCMWA’s exceedance of its contract limits is major – CCMWA has taken as much as 361% of its authorized amount, and the USACE does not charge CCMWA for withdrawals that exceed their contact limits.

¹ Our review shows that a residential customer in Gwinnett County pays a rate of \$4.69 per 1,000 gallons for the first 7,999 gallons (which equates to a rate of \$4,690.00 per million gallons), \$7.03 per 1,000 gallons (\$7,030 per million gallons) for the next 4,000 gallons, and \$9.38 per 1,000 gallons (\$9,380 per million gallons) for everything above 12,000 gallons. Commercial users pay Gwinnett County \$4.69 per 1,000 gallons (\$4,690 per million gallons), except the rate for irrigation and builder accounts is \$9.38 per 1,000 gallons (\$9,380 per million gallons).

Even though the USACE has the ability to work with the Department of Justice to enforce the terms of these water contracts, the USACE has not done so. The amount the USACE charges CCMWA when withdrawing water from Lake Allatoona “does not vary based on [] the withdrawals that CCMWA actually makes.” CCMWA is only charged for the amount of water allocated by its 1963 contract, but not for the additional withdrawals that far exceed the contract amount.

6. The USACE’s failure to properly charge Atlanta-area interests for water supply withdrawals has unfairly caused federal hydropower customers in Alabama to pay more for electricity.

At the July hearing in our committee, the Georgia witness claimed that granting Georgia’s water supply demands at Lake Lanier would reduce annual power generation by 17,155 MWh in the ACF basin—an amount that Georgia argued was just a “1.7% decrease in hydropower generation basin-wide.” Following the hearing in our committee, I wrote the Administrator of the Southeastern Power Administration (SEPA) to learn more about Georgia’s assertions.

Importantly, SEPA responded with a letter refuting Georgia’s claim, explaining: “Water withdrawals [in Georgia] have a significant impact to [SEPA’s] authorized purpose. They reduce our generating capacity and energy production, which in turn impacts our ability to repay allocated costs.” Importantly, SEPA estimates that granting Georgia’s request would require a “reallocation of approximately 133,000 acre-feet from [Lake Lanier].” SEPA explains that this reallocation “impacts both the energy production and dependable capacity” at a project and also affects “the availability of power at downstream projects.” Further, SEPA explains: “Reallocations of storage for water withdrawals typically lower the value of hydropower resources, as they tend to result in reduced quantities of peaking generation available for preference customers.” Georgia’s testimony ignored these facts.

SEPA noted that communities in Alabama and other downstream areas will bear the brunt of the losses associated with Atlanta’s increased water withdrawals at Lake Lanier. Specifically, SEPA explains: “The municipalities and cooperatives which benefit from project generation are heavily dependent on their government allocation of capacity and energy to meet their peak loads. Many of them have been preference customers for 50 years. They have designed their electrical systems considering the government generation as an important part of their systems’ peaking resource.” Stated simply, these Atlanta-area withdrawals “ultimately impact the [SEPA] customers.”

In a separate November 8, 2013 letter, SEPA acknowledges that, from 1950-2012, hydropower customers paid (through their electric rates collected by SEPA) \$118.8 million for the “costs associated with the Allatoona Project.” Further, SEPA explains: “If the Corps were to bill and receive additional water supply revenue from water supply users exceeding their contract withdrawal amount, additional water supply revenues would decrease preference customer rates.” In other words, it can be stated unequivocally that Alabama electric customers are paying more for electricity than they would pay if the USACE charged Atlanta-area interests (CCMWA, specifically) for the water they are *actually* withdrawing from Lake Allatoona.

The evidence clearly shows that Alabama citizens are paying for Georgia citizens to have more water than they are entitled from a shared federal resource. We have also obtained important information from SEPA showing that the excess Atlanta-area withdrawals ultimately impact Alabama municipalities, cooperatives, and other customers which depend upon reliable flows for hydropower generation. Not only is less water available to generate clean, cheap hydropower as a result of this excess water supply consumption, but SEPA's hydropower customers are required to pay the costs of the water that CCMWA is taking. In other words, Alabama electric customers are paying for Atlanta's excess water consumption. While troubling, hydropower is just one of many examples of the adverse, unfair impacts born by downstream interests as a result of the USACE's current policies at Lake Lanier and Lake Allatoona.

7. All stakeholders—the USACE, Congress, and the States—are united in the position that the best way to resolve this ongoing, interstate problem is through mutual negotiation among the three States.

Importantly, Section 2015 of the Senate-approved WRDA bill urged the Governors of Alabama, Georgia, and Florida to “reach agreement on an interstate water compact as soon as possible...” Likewise, Section 140 of the House-approved WRRDA bill recognizes that “Interstate water disputes are most properly addressed through interstate water agreements or compacts that take into consideration the concerns of all affected States,” and that “Congress and the Secretary should urge States to reach agreement on interstate water agreements and compacts.” In a letter dated May 15, 2013, you both wrote Assistant Secretary Jo-Ellen Darcy:

As committee leadership with jurisdiction over these matters, we believe in the principle that water resources conflicts of this nature should be resolved through negotiated interstate water compacts whenever possible. State-level agreements are better able to take into consideration the concerns of all affected States and stakeholders, including impacts to other authorized uses of the projects (such as hydropower or navigation), water supply for communities and major cities in the region, fisheries management issues, water quality, freshwater flows to communities, rivers, lakes, estuaries, and bays located downstream of projects, agricultural uses, economic development, and other appropriate concerns...

Accordingly, we strongly urge your personal and direct involvement in fostering efforts to enable the States of Alabama, Georgia, and Florida to reach an amicable and reasonable water compact as soon as possible. We believe that it is essential that the Army Corps not take actions that favor the position of any of the three States, but rather the Army Corps should serve as a neutral facilitator of a negotiated solution.

At the July 22nd hearing, Assistant Secretary Jo-Ellen Darcy stated that the “longstanding view of the Army” is that “a compact between the three impacted States would be the best resolution for this issue.” In a separate letter dated July 26, 2013, you both wrote again to Assistant Secretary Jo-Ellen Darcy stating that the ACF and ACT water disputes should be “resolved amicably through compacts ...” Similarly, in a letter dated July 15, 2013, Governor Robert Bentley of Alabama wrote you that “a negotiated solution among the three States is the best way to solve the longstanding dispute concerning the ACT and ACF Basins.”

8. Reasonable, common-sense solutions to Atlanta’s water needs are available.

At the July hearing, evidence was introduced showing that, with modest investments in water supply infrastructure, Atlanta could find ways to meet its growing water needs while substantially minimizing downstream impacts. For example, a December 2009 report by the Atlanta Water Contingency Task Force found: “By 2020, a broader set of more cost effective options exists, as reservoirs and transfers could be implemented... This solution includes... more cost effective reservoir expansions (Tusahaw Creek, Dog River), and a new reservoir (Richland Creek). The 2020 contingency solution would require a lower upfront capital requirement of ~\$1.7B...” Atlanta has not yet implemented these options.

Conclusion

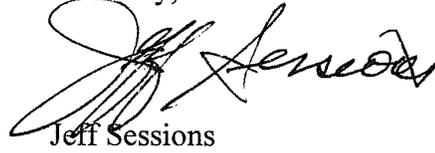
These findings are troubling, but I am appreciative that, through the diligent efforts of our committee in 2013, the findings outlined in this letter have been brought to light. As the witness for the State of Alabama explained at our hearing: “Upstream communities should not be allowed to disrupt settled usages and expectations of downstream communities through unauthorized and improper usage of Federal reservoirs built with Federal taxpayer dollars.” Sadly, that is the exact situation we have today in the ACF and ACT systems.

Yet there were also some positive commitments made by the USACE at the July 22nd hearing that merit attention. For instance, the USACE committed that the updated ACT master manual will reflect the withdrawals allowed under the applicable water supply contracts, which are well below actual, current withdrawal levels. I believe the USACE should enforce the contract limits and that those limits should be reflected in the updated manuals. As another example, the USACE reaffirmed its commitment to existing policies regarding return flows.

Again, thank you for your work in the 113th Congress on the critical water resources issues facing our country. All of the materials related to the Senate hearing in July have been submitted to the USACE for inclusion in the administrative record for the ACF and ACT master manual update processes. By letter dated November 13, 2013, General Jackson informed me that all of these documents have been included in the relevant administrative records.

Given your leadership roles on the Senate committee of jurisdiction, your continued interest and oversight into these issues is greatly appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Sessions", written in a cursive style.

Jeff Sessions

cc: The Honorable Richard Shelby
The Honorable Bill Nelson
The Honorable Marco Rubio
The Honorable Johnny Isakson
The Honorable Saxby Chambliss