

# ACF Legal Update

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# Introduction

- Multidistrict ACF Litigation
- Delaware River Litigation
- Other ACF Activities
- Southeastern Species Listing Petition

# Multidistrict ACF Litigation

## ■ Parties

- “Georgia Parties” (State of Georgia, Atlanta Regional Commission, Fulton County, DeKalb County, Cobb County-Marietta Water Authority, City of Gainesville, Gwinnett County, Lake Lanier Association)
- States of Alabama and Florida
- Alabama Power Company
- Southeastern Federal Power Customers
- Columbus, Georgia
- Apalachicola, Florida
- Corps of Engineers, Fish & Wildlife Service (FWS)



# Multidistrict ACF Litigation

## ■ Issues

### – Alabama and Florida - primary claims:

- “Phase 1” issues: Corps’ operation of Lake Lanier inconsistent with authorized purposes.

- “Phase 2” issues:

  - Endangered Species Act (ESA)

  - Challenges to the Corps’ Interim Operations Plan (IOP) and FWS’ biological opinion (BiOp) for threatened & endangered species in the Apalachicola River.

### – Georgia Parties - primary claim:

- Corps’ denial of water supply request in 2000



# Multidistrict ACF Litigation

- July 17, 2009: Judge Magnuson ruled in favor of AL and FL on the “Phase 1” issues
  - The Corps’ operation of Lake Lanier for local water supply deemed unlawful
    - Major operational change that seriously affects Congressionally authorized purposes:
      - Hydropower, flood control, and navigation
    - In three years, absent a settlement, operations return to mid-1970s baseline (600 cfs off-peak flow; only Gainesville and Buford to withdraw for water supply)

# Multidistrict ACF Litigation

## ■ Status of the ACF Case

- Phase I opinion has been appealed to the Eleventh Circuit Court of Appeals
  - Briefing underway
- Phase II issues continue before Judge Magnuson
  - Briefing complete
  - Oral argument June 8, 2010



# Delaware River Litigation

- In a recent federal court case, the Corps argued that it had the authority under Clean Water Act § 404(t) to dredge the Delaware River over state's objections.
  - TRWDA argued this position in the “404(t) Petition” filed with the Corps in 2006, in reference to the Apalachicola River.
- Also: The Corps can make its own “consistency” determination under the Coastal Zone Management Act.



# Delaware River Litigation

- The federal district court for the District of Delaware agreed and ruled in favor of the Corps.
  - “Ultimately, however, the federal supremacy principles apparent in each of these regimes require that state law yield in certain statutorily defined circumstances.”
  - *Delaware Dept. of Nat. Resources v. U.S. Army Corps of Engineers, No. 09-821-SLR (D. Del. Jan. 29, 2010).*

# Delaware River Litigation

- Decision not yet final. . .

- Ruling addressed a motion for a preliminary injunction for part of the dredging but did not address the Corps' entire plan of work.

- Meanwhile, the district court for the District of New Jersey recently denied a motion to transfer an overlapping case to the District of Delaware.

- So two different federal courts are considering substantially the same issues and possibly coming up with different answers.

- *Sound familiar?*



# Other ACF Activities

- ACF water:
  - Congressional activity (?)
  - Three-state negotiations (?)
  - Stakeholder discussions
- Longleaf Energy Station
- Georgia water legislation



# Listing Petition

- Center for Biological Diversity
  - Extremely litigious group based in Tucson, AZ
  - Offices in AK, AZ, CA, DC, IL, MN, NV, NM, OR, VT; previous efforts concentrated elsewhere
- Petition filed with FWS on April 20, 2010, to list 404 species as threatened or endangered

	AL	FL	GA
#Now listed	116	112	69
#CBD	136	130	111



# Listing Petition

## ■ Petition process:

- The ESA authorizes citizen listing petitions.
- Under ESA Section 4(b)(3)(A), FWS responds to a petition to list a species as threatened or endangered within 90 days to “the maximum extent practicable.”
  - Response is a finding as to whether the petition “may be warranted” based on “substantial scientific or commercial information”
- More detailed findings on the petition are required 12 months later.



# Listing Petition

- Listing criteria

- Five factors:

- Present or threatened destruction, modification, or curtailment of habitat or range
    - Overutilization (commerce, recreation, etc.)
    - Disease or predation
    - Inadequacy of existing regulation
    - Other natural or manmade factors

- Solely on basis of “best available scientific and commercial information”





**Thank you!**

***Questions?***

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