

# Environmental Issues Update

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# Introduction

- Three mussels
- Listing petition coming
- ACT and ACF litigation
- Stricter environmental requirements for barge transportation

# Three mussels

- Three mussels:
  - Georgia pigtoe (GP)
  - Interrupted rocksnail (IR)
  - Rough hornsnail (RH)
- June 29, 2009: FWS proposed to list as endangered and designate critical habitat (74 *Fed. Reg.* 31,114).



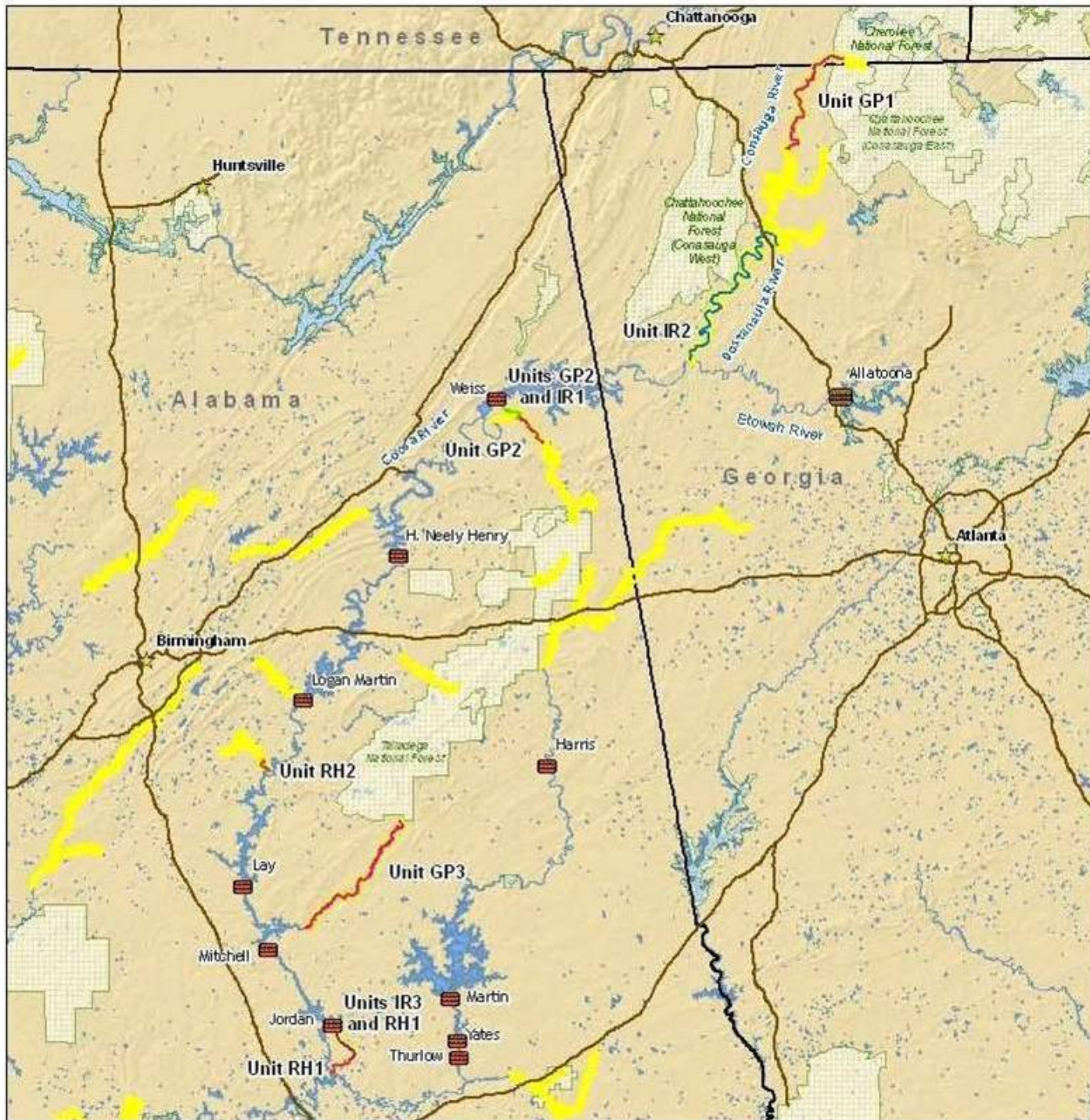
# Three mussels

- February 10, 2010: FWS issued a draft economic impact analysis reopened the public comment period (*75 Fed. Reg. 6,613*).
  - An economic impact analysis is a legal requirement for critical habitat designation (*ESA § 4(b)(2)*).
  - Public hearing in Montgomery on March 2, 2010.
    - Auburn Montgomery Taylor Center, 7440 East Drive, conference room 223, 7:00 PM.
  - Comment period closes on March 12, 2010.



# Three mussels

- Location of critical habitat:
  - North Georgia (GP, IR)
  - Coosa River below Weiss & Terrapin Creek (GP, IR)
  - Yellowleaf Creek in Shelby County (RH)
  - Hatchet Creek in Clay and Coosa Counties (GP)
  - Lower Coosa from Jordan to Tallapoosa River (IR, RH)
- Location of existing populations:
  - GP: Conasauga River (GA / TN)
  - IR: Oostanaula River (GA), Coosa River - Wetumpka Shoals
  - RH: Coosa River - Wetumpka Shoals, Yellowleaf Creek



### Legend

- Georgia pigtoe (GP) only
- Interrupted rocksnail (IR) only
- Rough hornsnail (RH) only
- IR and RH Overlap
- GP and IR Overlap
- 11 Mobile River Basin mussels

# Three mussels

- Interrupted rocksnail:
  - FWS declared to be a “candidate” for listing in 1991; believed extinct until a small population identified in 1997
  - Present at Wetumpka Shoals due to “reintroduction” by ADCNR in 2003, 2004 & 2005
    - Using a “captive colony” originally established at the Tennessee Aquarium Research Institute; later transferred to the Alabama Aquatic Biodiversity Center at the Marion State Fish Hatchery



# Three mussels

- Law of reintroductions (IR)
  - Listed species are subject to “take” prohibition and scientific permit requirement. (*ESA* §§ 9(a), 10(a))
  - “Experimental populations” are subject to FWS’ prior determinations:
    1. that release will further “conservation”; and
    2. whether or not population is “essential to the continued existence” of the species. (*ESA* § 10(j)(2)(A)&(B))
  - If an experimental population is not “essential”:
    - Treated as proposed for purposes of Section 7 consultations (unless in federal wildlife refuge or park)
    - No critical habitat (*ESA* § 10(j)(2)(C))



# Three mussels

- Quality of data supporting listing & critical habitat:
  - Decision must be based on best scientific and commercial data (*ESA* § 4(b)(1) & (2))
- Critical habitat:
  - Occupied habitat must include physical or biological features that are “essential” to conservation and which “may require special management considerations or protection” (*ESA* § 3(5)(A)(i))
  - Unoccupied habitat may be designated as critical only if FWS finds “such areas are essential for the conservation of the species” (*ESA* § 3(5)(A)(ii))
  - “Primary constituent elements” (stream bed, flow, water quality, fish hosts) (see *50 C.F.R. § 424.12*)



# Listing petition coming

- Citizens may file a petition for FWS to list species as threatened or endangered.
- 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 coming

- According to the Center for Biological Diversity:
  - “In the spring, the Center will be filing a 2,500-page petition to add 550 southeastern aquatic species to the endangered species list.”
  - “More than 70 percent of mussels, 48 percent of crayfish, and 28 percent of fishes are considered endangered, threatened, or of special concern by the American Fisheries Society.”
  - “The Center’s petition will call attention to the severity and scale of the problem of biodiversity loss in Southeast rivers and streams and will eventually provide protection to hundreds of species across the Southeast.”
- Of 1,900 currently listed species, 1,323 occur in the United States and 116 in Alabama.



# ACT and ACF Litigation

## ■ ACT Case: Parties

- Judge Karon Bowdre, federal district court for the Northern District of Alabama
- Plaintiffs: State of Alabama, Alabama Power Co., Montgomery and Mobile water boards
- Defendants: Corps of Engineers, State of Georgia, Atlanta Regional Commission, Cobb County-Marietta Water Authority
- Issue: Corps' operation of Allatoona and Carters for Atlanta area water supply

## ■ Status: Stayed; no action scheduled



# ACT and ACF Litigation

## ■ ACF Case: 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 and Fish & Wildlife Service



# ACT and ACF Litigation

## ■ ACF Case: Issues

### —Alabama and Florida - primary claims:

- “Phase 1” issues: Corps’ operation of Lake Lanier inconsistent with authorized purposes.
- “Phase 2” issues: Challenges to the Corps’ Interim Operations Plan (IOP) and FWS’ biological opinion (BiOp) for threatened & endangered species in the Apalachicola River.

### —Georgia - primary claim:

- Corps’ denial of water supply request in 2000.



# ACT and ACF Litigation

## ■ ACF Case: Status

— 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)



# ACT and ACF Litigation

## ■ ACF Case: Status

- “Phase 1” opinion has been appealed to the Eleventh Circuit
- Judge Magnuson continues to hear “Phase 2” issues
- State & stakeholder discussions continue



# ACT and ACF Litigation

- Maintenance dredging is not squarely addressed in ACF case.
- But 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.
  - **This is what Tri Rivers Waterway Development Association argued in its “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.
- The federal court 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).*

# Stricter requirements . . .

- Barge transportation is seeing cost increases due to tighter environmental regulations, including:
  - Water: Vessel general permit under CWA / National Pollutant Discharge Elimination System (NPDES)
  - Air: Marine diesel engines
  - Climate: Fossil fuel / carbon regulation
  - Natural resources: T&E species, invasive species



***Thank you!***

***Questions?***

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