



US Army Corps of Engineers

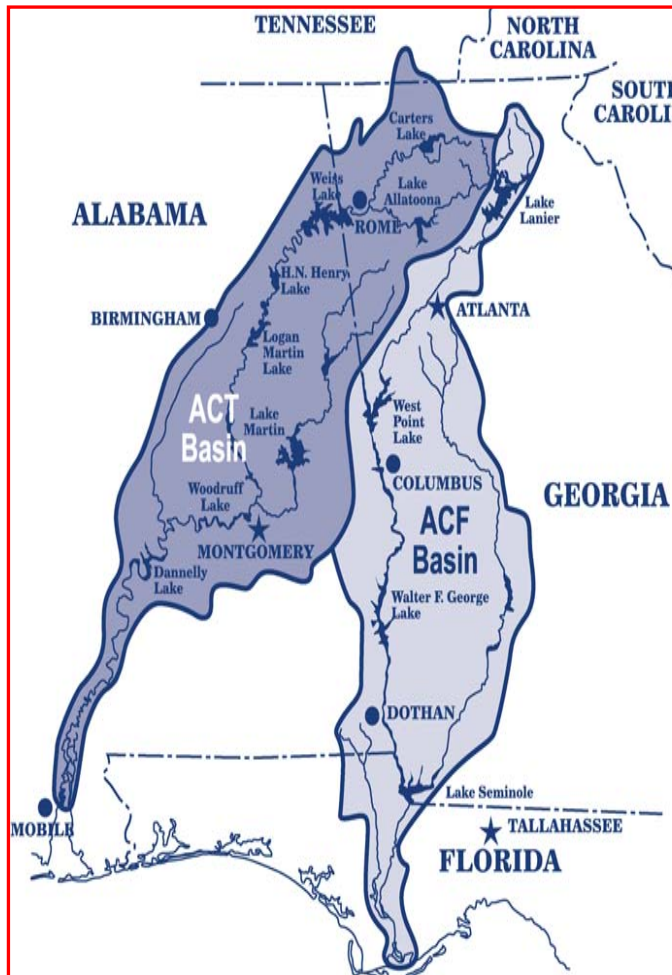


*January 2009 Chief Counsel
Legal Opinion:
Authority to Reallocate Storage
under the Water Supply Act*

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Overview



- Background
 - Lake Lanier & Water Supply
 - ACT-ACF Litigation
 - D.C. Circuit Decision in SEFPC v. Geren, 514 F.3d 1316 (2008)
- Chief Counsel's Legal Opinion (9 Jan 2009)
 - WSA authority to make operational changes
 - Water supply at Lake Lanier
- Implications
 - ACF Litigation--Phase I
 - Operational Change vs. Effect on Project Purposes
 - Project Authorization and WSA



Background: Lake Lanier

- Project authorization (1946):
 - Purposes: Flood control, hydropower, navigation
 - Incidental benefits to water supply and water quality through off-peak releases
- 1950s: Relocation agreements for existing water supply withdrawals
- 1959: Initial Buford Dam operating manual published
 - “Normally” operated as peaking plant, with off-peak weekend generation to ensure minimum downstream flows



Water Supply at Lake Lanier

- 1970s:
 - Contracts for water supply withdrawals from Lake Lanier;
 - Interim plans to accommodate increased downstream withdrawals
- 1980s:
 - Contract to accommodate downstream water supply withdrawals (> 327 mgd) (IOAA)
 - 1989 Draft Post-Authorization Change Report recommended reallocation of 207,000 ac-ft for water supply
- 1990-present:
 - Litigation halted reallocation proposal; withdrawal contracts expired; status quo preserved through MOA and Compacts
 - 2007-08: Sec Army directs updates to ACT/ACF manuals



SEFPC v. Geren, 514 F.3d 1316 *(D.C. Cir. 2008)*

- Power customers alleged that Corps' accommodation of water supply at Lake Lanier, without adequate compensation to hydropower, exceeded Corps' authority
 - Alleged water supply operations have serious effect on hydropower
 - Serious effects could be mitigated by appropriate compensation
- District Court approved settlement
- Florida & Alabama intervened and appealed to D.C. Circuit
- D.C. Circuit reversed District Court's approval of settlement agreement as exceeding Secretary's discretionary authority under WSA § 301(d)



Water Supply Act, § 301(d)

- Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage as provided in subsection (b) of this section **which would seriously affect the purposes** for which the project was authorized, surveyed, planned, or constructed, **or which would involve major structural or operational changes** shall be made only upon the approval of Congress as now provided by law.



Corps Regulations

- EM 1165-2-105:
 - No serious effect or major operational change if project “provides essentially equivalent services...as originally contemplated by Congress” (1961)
 - Modifications “insignificant” if do not exceed 50,000 ac-ft or 15% of total storage allocated to authorized purposes (usable storage) (1977)
- ER 1105-2-100, para. E-57(d) (22 Apr 2000):
 - Provided § 301(d) standards not exceeded, Chief of Engineers may approve reallocations of up to 50,000 ac-ft or 15% of usable storage;
 - Sec Army may approve larger reallocations, if Congressional approval not required



D.C. Circuit in SEFPC v. Geren

- Facts in record:
 - 145,460 ac-ft of storage utilized for water supply
 - Up to 240,858 ac-ft to be reallocated (95,000 ac-ft increase)
 - 1,049,400 ac-ft of conservation storage
- Court's conclusion:
 - Proposed reallocation of 240,858 ac-ft (22% of “total storage”) constituted “major operational change”
 - “In other circumstances it is conceivable that the difference between a minor and major operational change might be an ambiguous matter of degree”
- Did *not* address authority for “previous reallocations”



Impact of SEFPC v. Geren

- SeFPC settlement agreement invalidated
- Corps cannot reallocate 240,858 ac-ft at Lake Lanier without Congressional approval
- Raises questions regarding extent of WSA authority to reallocate storage space for water supply at Lake Lanier, and analysis under WSA generally



Chief Counsel Legal Opinion - 1/09

- Addresses two questions:
 - What legal & factual issues should Corps consider in determining whether proposed reallocation involves major operational change
 - Whether Secretary of the Army has authority to accommodate present water supply needs of Atlanta region
- Scope of analysis:
 - Interpretation of Water Supply Act
 - Congressional understanding reflected in Lake Lanier authorization
 - Evolution of project operations over time, as related to water supply
 - Defines existing water supply needs
 - Estimates operational changes and effects of a reallocation of storage to formally accommodate existing water supply needs
- Counsel worked closely with SAM, IWR technical experts



Chief Counsel Opinion: Major Operational Change

- Authority to reallocate storage under the WSA, generally:
 - “Major operational change” is a change that fundamentally departs from the concept of operations envisioned at project authorization
 - To evaluate a proposed modification to include storage, must consider the original project authorization and establish a baseline from which the proposed modification can be measured
 - No precise threshold, and percentage of storage is not, by itself, dispositive
- Reflects intent of Congress, as expressed in plain language of statute and legislative history
- Consistent with SeFPC ruling
 - Specific holding of that case: Reallocation of 240,858 ac-ft would constitute a major operational change at Lake Lanier



Chief Counsel Opinion- Water Supply at Lake Lanier

- Corps can adjust operations under the project authorization to accommodate certain water supply needs
 - At Lake Lanier, Congress envisioned that Atlanta's water supply needs would be met as an incidental benefit
 - Corps has adjusted project operations to accommodate downstream withdrawals of up to 327 mgd
- Additional water supply needs require a reallocation of storage under WSA
 - Withdrawals directly from Lake Lanier (excluding amounts provided under relocation agreements during project construction)
 - Downstream withdrawals of greater than 327 mgd (est)



Chief Counsel Opinion-Conclusions

- Corps may accommodate present water supply needs under the Lake Lanier project authorization and WSA
 - Present needs estimated at 407 mgd; 337 mgd accommodated under project authorization, relocation agmts
 - Reallocation of approximately 122,924 ac-ft estimated to accommodate additional withdrawals
 - Operations would not fundamentally depart from operational scheme originally contemplated (some off-peak generation)
 - Effect on project purposes would not be serious
 - Hydropower generation reduced 1% overall
 - Effects on navigation insignificant
 - No effect on flood control



Implications

- In re Tri-State Water Rights Litigation--ACF Phase I:
 - M.D. Fla. (Magnuson, J.) to rule on motions addressing WSA authority to operate to accommodate present water supply use
- Rule of SeFPC?
- Evaluating Reallocation Proposals:
 - Must identify and assess operational change as well as effects on project purposes
 - Baseline for analysis = Congressional understanding when authorizing project authorization
 - Close cooperation between legal and technical experts