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## Environmental Law

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# Environmental Law

Travis M. Trimble\*

In 2021,<sup>1</sup> the United States District Court for the Southern District of Alabama, in an issue of first impression, concluded that the United States is not a “person” under the contribution provision of the Oil Pollution Act (OPA),<sup>2</sup> and therefore the provision did not waive the sovereign immunity of the United States.<sup>3</sup> For this and other reasons a plaintiff could not recover in contribution from the United States for the plaintiff’s costs of cleaning up an oil spill, even where the plaintiff alleged the spill was the result of the sole negligence of the United States.<sup>4</sup> The United States District Court for the Northern District of Georgia issued a dispositive ruling in the long-running dispute between Alabama and Georgia over the United States Corps of Engineers’ (Corps) allocation of water from Lake Lanier to municipal water supply in the metro Atlanta area.<sup>5</sup> The court granted summary judgment to the Corps and affirmed that the Corps’ decision to allocate water for that purpose, including by direct withdrawals of water from the lake, and the Corps’ accompanying Environmental Impact Statement regarding that decision, was reasonable.<sup>6</sup> Finally, the United States District Court for the Northern District of Georgia ruled that a plaintiff had successfully stated claims against multiple defendants related to the supply, use, and disposal of toxic chemicals used in the manufacture of carpet that resulted in the contamination of surface water in the

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1. For an analysis of last year’s environmental law during the Survey period, see Travis M. Trimble, *Environmental Law, 2020 Eleventh Circuit Survey*, 72 MERCER L. REV. 1135 (2021).

2. 33 U.S.C. §§ 2701–2720 (1990).

3. *Savage Services Corp. v. U.S.*, 522 F. Supp. 3d 1114, 1127 (S.D. Ala. 2021).

4. *Id.*

5. *In re ACF Basin Water Litigation*, No. 1:18-MI-43-TWT, 2021 U.S. Dist. LEXIS 151587 (N.D. Ga. Aug. 11, 2021).

6. *Id.* at \*5.

Coosa River Basin in northwestern Georgia and ultimately the contamination of the drinking water supply of Rome, Georgia.<sup>7</sup>

In *Savage Services Corporation v. United States*,<sup>8</sup> oil barges being pushed by the plaintiff's inland towing vessel on the Tennessee-Tombigbee Waterway were damaged in a lock operated by the United States Corps of Engineers.<sup>9</sup> The damage to the barges, according to the plaintiff, was due to the sole negligence of Corps' employees, resulting in a spill of oil into the lock and causing the plaintiff to incur over four million dollars in damages, including over three million dollars in cleanup costs to remove oil from the lock. The plaintiff was strictly liable for the cleanup costs pursuant to the Oil Pollution Act.<sup>10</sup> The plaintiff sued the United States under the Suits in Admiralty Act (SAA)<sup>11</sup> and the Federal Tort Claims Act (FTCA)<sup>12</sup> for contribution or indemnity.<sup>13</sup>

This set of facts, which the plaintiff alleged created a claim for contribution against the United States for harm under federal admiralty law, also created a crack through which the plaintiff's claims fell, according to the United States District Court for the Southern District of Alabama.<sup>14</sup> It granted the United States' motion to dismiss the plaintiff's claim for contribution as to the oil spill cleanup costs on the ground that the court lacked jurisdiction over the claim due to the United States' sovereign immunity.<sup>15</sup>

At the outset, the court noted that to recover from the United States, the plaintiff had to identify a waiver of sovereign immunity that would allow its claims.<sup>16</sup> Both the SAA<sup>17</sup> and the FTCA<sup>18</sup> contain such waivers. The United States conceded that with respect to the plaintiff's damages not related to the oil spill cleanup, the plaintiff's claims could proceed

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7. Johnson v. 3M, No. 4:20-cv-8-AT, 2021 U.S. Dist. LEXIS 197688 (N.D. Ga. Sept. 20, 2021).

8. *Savage Services Corp.*, 522 F. Supp. 3d at 1114.

9. *Id.* at 1116.

10. *Id.* at 1118.

11. 46 U.S.C. § 30901 (2006).

12. 28 U.S.C. § 1346 (2013).

13. *Savage Services Corp.*, 522 F. Supp. 3d at 1116.

14. *Id.* at 1119–20.

15. *Id.* at 1123.

16. *Id.* at 1117.

17. Waiver of sovereign immunity for claims against the United States, see 46 U.S.C. § 30903(a) (2006); see also *Savage Services Corp.*, 522 F. Supp. 3d at 1117.

18. Waiver of sovereign immunity for claims against the United States, see 28 U.S.C. § 1346 (2013); see also *Savage Services Corp.*, 522 F. Supp. 3d at 1126.

under the SAA.<sup>19</sup> However, with respect to the plaintiff's claim for damages resulting from the oil cleanup, the United States argued that that claim was governed by the OPA,<sup>20</sup> which does not allow a responsible party like the plaintiff to bring a claim for contribution against the United States.<sup>21</sup>

The plaintiff contended that it could pursue a contribution claim for negligence against the United States under OPA's contribution provision, which provides that "a person may bring a civil action for contribution *against any other person* who is liable or potentially liable under this Act *or another law*."<sup>22</sup> The plaintiff argued that because the SAA allowed it to sue the United States to the same extent it could sue a private party, the SAA constituted "another law" under the OPA's contribution provision.<sup>23</sup> Thus, even if the plaintiff's claim was governed by the OPA, the OPA provided a waiver of sovereign immunity for the basis of the plaintiff's lawsuit, the SAA.<sup>24</sup>

However, the court concluded as a matter of first impression that the United States is not a "person" within the meaning of the OPA's contribution provision.<sup>25</sup> The OPA defines person as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body."<sup>26</sup> The plaintiff argued that a person under the OPA includes the United States because the term "State" should be interpreted to mean the United States and because "State" and "United States" are defined interchangeably elsewhere in the OPA.<sup>27</sup>

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19. *Savage Services Corp.*, 522 F. Supp. 3d at 1118.

20. The purpose of the OPA, passed after the Exxon Valdez oil spill, was to "provide quick and efficient cleanup of oil spills, compensate victims of such spills, and internalize the costs of spills within the petroleum industry." *Id.* (citing *In re Settoon Towing, LLC*, 859 F.3d 340, 344 (5th Cir. 2017)).

21. *Id.* Under the OPA, "any person owning, operating, or demise chartering [a] vessel" is a responsible party. 33 U.S.C. § 2701 (32) (2018). A responsible party "from which oil is discharged . . . into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages . . . that result from such incident." 33 U.S.C. § 2702(a) (1990).

22. *Savage Services Corp.*, 522 F. Supp. 3d at 1119 (citing 33 U.S.C. § 2709 (1990) (emphasis in original)).

23. *Id.*

24. *Id.*

25. *Id.* at 1120–21.

26. *Id.* at 1119–20 (citing 33 U.S.C. § 2701(27) (2018)).

27. *Id.* at 1120. "United States' and 'State' mean the several States of the United States . . ." 33 U.S.C. § 2701 (36) (2018).

The court disagreed.<sup>28</sup> First, the court agreed with the United States' argument that had Congress intended the term "State" to include the United States in the OPA, the statute would not use the terms separately "in numerous places," as it does, to refer to the United States as a separate entity from a State.<sup>29</sup> Second, the court explained that with respect to oil spills, the OPA had repealed a contribution provision of the Federal Water Pollution Control Act,<sup>30</sup> which also had allowed vessel owners or operators to recover oil spill remediation costs when those costs were incurred as a result of the sole negligence of the United States (among other things).<sup>31</sup> Thus, Congress intended to remove the possibility that responsible parties under the OPA could recover remediation costs in contribution from the United States.<sup>32</sup> Third, courts have recognized a "well-settled presumption that the term 'person' in a statute does not include the sovereign in common usage, absent an affirmative showing of congressional intent to the contrary."<sup>33</sup>

The court also rejected the plaintiff's argument that if the OPA's contribution provision were not construed to include the United States as a person from whom contribution could be had, it would conflict with the SAA, which explicitly did include the United States in its contribution provision.<sup>34</sup> While the court acknowledged that the two statutes were in conflict on this point, the court concluded that the conflict could not be resolved in the plaintiff's favor for two reasons.<sup>35</sup> First, the OPA is more recent, having been enacted in 1990 where the SAA was enacted in 1920.<sup>36</sup> The court explained that "Congress's intent to effect an implied repeal . . . when a later statute conflicts with or is repugnant to an earlier statute; or when a newer statute covers the whole subject of the earlier one, and clearly is intended as a substitute."<sup>37</sup> The court concluded that with respect to oil spills, both of those circumstances were present in the conflict between the OPA and the SAA.<sup>38</sup> Second, the OPA is a "specific, detailed statute" with respect

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28. *Savage Services Corp.*, 522 F. Supp. 3d at 1120.

29. *Id.*

30. 33 U.S.C. § 1321(i) (2018).

31. *Savage Services Corp.*, 522 F. Supp. 3d at 1120–21.

32. *Id.* at 1120.

33. *Id.* at 1121.

34. *Id.* at 1122.

35. *Id.*

36. *Id.*

37. *Id.* (quoting *Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Eng'rs*, 619 F.3d 1289, 1299 (11th Cir. 2010)).

38. *Id.*

to oil spills, where the SAA is more general, implying the OPA's "mandatory and exclusive nature" in dealing with oil spills.<sup>39</sup> For these reasons, the court resolved the conflict between the two statutes in favor of its reading that the OPA did not include the United States as a person for contribution purposes.<sup>40</sup>

Further, the court rejected the plaintiff's argument that the OPA's "savings" provision allowed the plaintiff to pursue its contribution claim under the SAA.<sup>41</sup> The OPA provides that "[e]xcept as otherwise provided in this Act, this Act does not affect-(1) admiralty and maritime law; or (2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction . . ." <sup>42</sup> The court concluded that the language "except as otherwise provided by this Act" applied to the plaintiff's claim, returning it to the court's earlier interpretation that the OPA did not allow for a contribution claim against the United States.<sup>43</sup>

Finally, the court concluded that the plaintiff could not bring its claim under the FTCA because the FTCA does not apply to claims falling under admiralty law.<sup>44</sup>

Thus, under the court's application of law to this narrow set of circumstances, that is, an oil spill into navigable waters, a plaintiff who is strictly liable for cleaning up the oil under the OPA cannot recover its costs from the United States, even assuming the United States is solely at fault for the spill.

In the case of *In re ACF Basin Water Litigation*,<sup>45</sup> the Georgia court resolved a long-running dispute between the states of Alabama and Georgia over Georgia's use of water from Lake Lanier to satisfy the water supply needs of Atlanta.<sup>46</sup> The court concluded that the Corps' adoption of an updated Master Manual in 2017, which allowed for Georgia water supply providers to withdraw water directly from Lake Lanier in order to meet the water supply needs of Atlanta and surrounding areas through 2030, was not arbitrary or capricious.<sup>47</sup> It also concluded that the Corps' Environmental Impact Statement that

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39. *Id.* at 1122–23.

40. *Id.* at 1123.

41. *Id.*

42. *Id.* (citing 33 U.S.C. § 2751(e) (1990)).

43. *Id.* at 1124–25.

44. *Id.* at 1127.

45. No. 1:18-MI-43-TWT, 2021 U.S. Dist. LEXIS 151587 (N.D. Ga. Aug. 11, 2021).

46. *Id.* at \*6–8.

47. *Id.* at \*55.

accompanied the 2017 Master Manual was not arbitrary or capricious.<sup>48</sup> As a result, the court granted summary judgment to the Army Corps of Engineers and the Georgia water supply defendants and denied summary judgment to Alabama and other parties who challenged the 2017 Manual.<sup>49</sup>

The lawsuits resolved in this case began in 2017.<sup>50</sup> The state of Alabama, and the National Wildlife Federation (NWF) and other environmental plaintiffs (Environmental Plaintiffs), in separate lawsuits challenged the Corps' 2017 updated ACF River Basin Water Control Manual, which allocated additional water from Lake Lanier to water supply for Atlanta and the surrounding region and the Environmental Impact Statement (EIS) that accompanied it.<sup>51</sup> Relevant to the present case,<sup>52</sup> Alabama's suit claimed the Manual and EIS violated the Administrative Procedure Act (APA),<sup>53</sup> the Water Supply Act of 1958,<sup>54</sup> and the National Environmental Policy Act (NEPA).<sup>55</sup> The Environmental Plaintiffs' suit challenged the Manual and EIS under the APA, the Water Resources Development Act of 2007,<sup>56</sup> NEPA,<sup>57</sup> and the Fish and Wildlife Coordination Act.<sup>58</sup>

The State of Georgia, Atlanta Regional Commission, the City of Atlanta, Cobb County-Marietta Water Authority, DeKalb County, Forsyth County, Fulton County, the City of Gainesville, and Gwinnett County (Georgia Water Providers) intervened as defendants in both cases.<sup>59</sup>

The Corps operates five reservoirs along the Chattahoochee River, which rises in north Georgia, flows through Atlanta, and forms a large part of the border between Alabama and Georgia before flowing through north Florida and emptying into Lake Seminole at the Florida-Georgia

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48. *Id.* at \*34–35, \*62–63.

49. *Id.* at \*63.

50. *Id.* at \*6–8.

51. *Id.*

52. On May 22, 2020, the court granted summary judgment to the Georgia Water Provider defendants on the portions of Alabama's and the Environmental Plaintiffs' claims brought under the Clean Water Act. *Id.* at \*25.

53. 5 U.S.C. §§ 701–706 (1966).

54. 43 U.S.C. § 390b (1958).

55. 42 U.S.C. § 4321 (1969).

56. Pub. L. No. 110-114, 121 Stat. 1041.

57. 42 U.S.C. § 4321 (1969).

58. 16 U.S.C. §§ 661-667e; *In re ACF Basin Water Litig.*, 2021 U.S. Dist. LEXIS 151587, at \*7.

59. *Id.*

border.<sup>60</sup> Water from Lake Seminole becomes the Apalachicola River, which flows through north Florida into the Gulf of Mexico. This water management system is known as the Apalachicola-Chattahoochee-Flint (ACF) River Basin. The largest reservoir is Lake Lanier, created by the Buford Dam (the Buford Project).<sup>61</sup>

By two statutes: the Rivers and Harbors Acts of 1945<sup>62</sup> and 1946,<sup>63</sup> the Corps was given the authority to build and operate the Buford Project.<sup>64</sup> Reservoirs in the ACF River Basin generally were authorized by Congress for purposes including navigation, hydroelectric power, national defense, recreation, and industrial and municipal water supply.<sup>65</sup> The 1946 Act authorized the construction of the Buford Project for downstream water supply and flood control, although the Buford Project was also to be managed for the other purposes as well, including power generation.<sup>66</sup> The laws required the Corps to issue manuals governing its operations of the ACF basin projects to meet the needs of the projects authorized by Congress.<sup>67</sup>

In the following years, the Corps increased the amount of Lake Lanier's water allocated to municipal water supply uses due to growth in the Atlanta area.<sup>68</sup> This water was withdrawn by users downstream from the Buford Dam. In 1989, the Corps decided to reallocate a specific amount of water storage in Lake Lanier for municipal water supply downstream, with water to be withdrawn directly from Lake Lanier. The Corps claimed the authority to do so under the Water Supply Act of 1958.<sup>69</sup> Alabama filed suit against the Corps to stop the reallocation, and Georgia and Florida intervened,<sup>70</sup> thus beginning the long-running tri-state water wars. This lawsuit was stayed by a "live-and-let-live" agreement whereby the Corps withdrew its plan for permanent reallocation and direct withdrawal of water from Lake Lanier but kept the ability to continue to allow reasonable increases in the amount of water allocated to municipal water supply downstream of Lake Lanier on an ad hoc basis.<sup>71</sup>

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60. *Id.*

61. *Id.* at \*8.

62. 33 U.S.C. § 544b (1945).

63. Pub. L. No. 98-606, 98 Stat. 3169.

64. *In re ACF Basin Water Litig.*, 2021 U.S. Dist. LEXIS 151587, at \*10.

65. *Id.* at \*11.

66. *Id.* at \*11–12.

67. *Id.* at \*10–12.

68. *Id.* at \*12–14.

69. *Id.* at \*16 (citing 43 U.S.C. § 390b (2016)).

70. *Id.*

71. *Id.* at \*17.



In 2000, Georgia asked the Corps to modify its operation of the Buford Project to meet Georgia users' projected water supply needs until 2030, including withdrawal of 408 million gallons per day from the Chattahoochee River and 297 million gallons per day directly from Lake Lanier.<sup>72</sup> The Corps denied the request on the ground that it did not have the authority under the Rivers and Harbors Act of 1946 and the Water Supply Act to make such a reallocation of water without congressional approval.<sup>73</sup> Georgia filed suit challenging that denial, and other suits followed. These lawsuits were eventually consolidated into a multi-district litigation, in which the United States District Court for the Middle District of Florida ruled that the Corps had exceeded its authority by its "*de facto*" reallocation of water storage to accommodate water supply uses.<sup>74</sup> The Eleventh Circuit reversed, holding that the district court lacked jurisdiction under the Administrative Procedure Act in the case because the Corps had not taken a "final agency action" required for a legal challenge.<sup>75</sup> The Eleventh Circuit also ordered the Corps' denial of Georgia's request in 2000 for permanent reallocation of water remanded to the Corps, because the court concluded the Corps did have the authority under the Rivers and Harbors Act to allocate water for municipal water supply uses.<sup>76</sup>

In 2012, the Corps concluded that it did have the authority to grant Georgia's request for water reallocation but would have to prepare an Environmental Impact Statement addressing the change.<sup>77</sup> The Corps completed a draft of its updated Master Manual reflecting the reallocation, and the accompanying EIS, in 2015. Although the EIS identified potential adverse environmental effects, including "substantially adverse" effects on fish and aquatic resources in the Chattahoochee River, the Corps concluded that it could provide over 250,000 acre-feet of water storage for direct withdrawal from Lake Lanier without seriously affecting other purposes of the Buford Project. The Corps adopted the updated Master Manual reflecting the new water allocation on March 30, 2017, and the plaintiffs' lawsuits followed.<sup>78</sup>

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72. *Id.* at \*18.

73. *Id.*

74. *In re Tri-State Water Rights Litigation*, 639 F. Supp. 2d 1308 (M.D. Fla. 2009).

75. *In re ACF Basin Water Litig.*, 2021 U.S. Dist. LEXIS 151587, at \*20 (citing *In re MDL-1824-Tri-State Water Rights Litigation*, 644 F.3d 1160 (11th Cir. 2011)).

76. *Id.* at \*20–21 (citing *In re MDL-1824-Tri-State Water Rights Litigation*, 644 F.3d at 1160).

77. *Id.* at \*22–23.

78. *Id.* at \*23–25.

In May 2020, the court granted summary judgment to the defendants as to the portions of Alabama's and NWF's lawsuits based on the Clean Water Act (CWA)<sup>79</sup> and judgment.<sup>80</sup> The parties all filed motions and cross-motions for summary judgment as to the remaining claims.<sup>81</sup> At issue in the present case was Alabama's challenges to the Master Manual based on four grounds.<sup>82</sup>

First, Alabama claimed the Manual violated the Water Supply Act of 1958 by allocating what amounted to 23.7% of the Buford Project's conservation pool to the Georgia Water Providers' direct withdrawals.<sup>83</sup> Alabama contended that this reallocation was in violation of the Water Supply Act's requirement that any modification of a reservoir project that would "seriously affect" the project's purposes or would involve "major structural or operational changes" must be approved by Congress.<sup>84</sup>

The court ruled against Alabama on this claim.<sup>85</sup> The court explained that the terms in the statute on which Alabama based this claim were not defined in the statute and were themselves ambiguous, and therefore "the agency's interpretation [of the terms' meaning] is entitled to 'controlling weight' as long as that interpretation is reasonable."<sup>86</sup> The Corps had determined that the terms "major" and "seriously" "refer to changes and impacts that fundamentally depart from congressional intent for a project[.]" and could not be measured only by the size of a reallocation of water by itself.<sup>87</sup> The court explained that the Corps had demonstrated that it could allocate additional water to the water supply via direct withdrawals from Lake Lanier without requiring a major structural or operational change to the Buford Project and without seriously affecting any authorized purpose of the Project or of the ACF system.<sup>88</sup> The court concluded that the Corps demonstrated that its decision was reasonable, and thus the Corps was entitled to deference.<sup>89</sup>

Second, Alabama contended that the Corps violated the Rivers and Harbors Acts of 1945 and 1946 by unlawfully abandoning purposes

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79. 33 U.S.C. § 1361(1987).

80. *In re ACF Basin Water Litig.*, 2021 U.S. Dist. LEXIS 151587, at \*25.

81. *Id.* at \*25–26.

82. *Id.* at \*29.

83. *Id.* at \*29–30.

84. *Id.* at \*31–32 (citing 43 U.S.C. § 390b(e) (2016)).

85. *Id.* at \*34–35.

86. *Id.* at \*32–33 (citing Nat'l Ass'n of State Utility Consumer Advocates v. F.C.C., 457 F.3d 1238, 1253 (11th Cir. 2006)).

87. *Id.* at \*36.

88. *Id.* at \*37–39, \*43–45.

89. *Id.* at \*45.

authorized for the Project by Congress and by improperly prioritizing water supply over other authorized purposes of the Buford Project, including power generation, navigation, and flood control.<sup>90</sup> Here, too, the court concluded that the Corps' determination that it had the authority to allocate more water from Lake Lanier to the needs of the municipal water supply was reasonable, as was the Corps' conclusion that it could do so without significantly impacting other authorized purposes of the Project or other ACF basin projects.<sup>91</sup> The court noted that "[t]he Corps has significant discretion to balance the often competing purposes at its multi-purpose reservoirs."<sup>92</sup>

Third, Alabama contended that the Corps' EIS violated NEPA by comparing the impacts of the reallocation of water to conditions that had been present in 1989, when the Corps' issued its first draft of the updated Manual, prior to NEPA's passage.<sup>93</sup> Alabama contended that the Corps should have measured the impact of the reallocation of water by comparing to the environment as it existed in 1958, when the previous manual was adopted.<sup>94</sup> The court concluded that the Corps had properly described the "no action" alternative under NEPA as the environmental conditions existing at the time the reallocation of water was proposed (for example, the environmental conditions that would continue to exist if the proposed federal actions were not taken).<sup>95</sup> These conditions in turn were the proper baseline against which to measure impacts of the water reallocation.<sup>96</sup> The court explained that "[i]n Alabama's proposal, the Corps would have to describe an environment that has not existed for decades and analyze the management practice not as they actually exist but as a hypothetical set of conditions. Like many other districts, the [c]ourt holds that the interpretation of the 'no action' alternative as the current level of activity used as a benchmark is correct."<sup>97</sup>

Fourth, Alabama contended that the Corps violated the APA by failing to explain why the Corps did not follow its established policy of ensuring that its project operations did not degrade water quality.<sup>98</sup> Alabama argued that the APA's mandate that agencies make

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90. *Id.* at \*45–46.

91. *Id.* at \*46.

92. *Id.* at \*47.

93. *Id.* at \*48.

94. *Id.*

95. *Id.* at \*48–49.

96. *See id.* at \*49.

97. *Id.* at \*50.

98. *Id.* at \*50–51.

reasonable decisions required the Corps to acknowledge the change in policy and offer a reasonable explanation for the change.<sup>99</sup> The court noted, however, that Alabama admitted that the Corps explained in the EIS and the Record of Decision that “it was adopting the preferred alternative despite the potential impact to water quality because the ‘substantial benefits to water supply . . . outweigh the potentially adverse water quality impacts associated with increased water supply uses.’”<sup>100</sup> Thus, the court concluded, “even if the Corps’ action was a departure from its guidance, the Corps adequately explained the reasons for its substantive action” and “[t]he [c]ourt defers to ‘an agency’s ultimate findings as well as drafting decisions like how much discussion to include on each topic . . . .’”<sup>101</sup>

The court also granted summary judgment to the Corps and the Water Provider defendants on the NWF’s claim that the Corps’ EIS violated NEPA.<sup>102</sup> The NWF argued that the EIS violated NEPA in several ways: (1) by narrowing the fish and wildlife conservation purpose to limit consideration of alternatives to the reallocation of Lake Lanier’s water in the amount the Corps approved;<sup>103</sup> (2) by using the Corps’ management practices of the ACF basin in 1989, which the NWF contended were already environmentally damaging, as the “no action” baseline against which to measure the impacts of the proposed reallocation;<sup>104</sup> (3) by failing to consider additional alternatives;<sup>105</sup> and (4) by failing to analyze the “direct, indirect, and cumulative impacts” of the reallocation.<sup>106</sup>

The court rejected each of these grounds.<sup>107</sup> As to the first, the court explained that NEPA only required the Corps to include a purpose and need statement for the EIS.<sup>108</sup> The contents “is left to the agency’s expertise and discretion, and courts defer to the agency if the statement is reasonable.”<sup>109</sup> Further, the court noted that the purposes of the Corps’ ACF basin operations are defined by Congress, and while the

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99. *Id.* at \*51.

100. *Id.* at \*52.

101. *Id.* (quoting *Black Warrior Riverkeeper Inc. v. U.S. Army Corps of Eng’rs*, 833 F.3d 1274, 1285 (11th Cir. 2016)).

102. *Id.* \*54, \*62.

103. *Id.* at \*54–55.

104. *Id.* at \*56–57.

105. *Id.* at \*57–58.

106. *Id.* at \*59–60.

107. *Id.* at \*60–62.

108. *Id.* at \*54–55.

109. *Id.* at \*55 (quoting *Citizens for Smart Growth v. Peters*, 716 F. Supp. 2d 1215, 1223 (S.D. Fla. 2010)).

Corps did include fish and wildlife as a purpose and need of the Buford Project in the EIS, it was not required to treat that purpose as co-equal, or indeed give it any particular weight in comparison, with other purposes of the Project.<sup>110</sup>

As to the second ground, the court rejected it for a similar reason that it rejected Alabama's challenge to the "no action" baseline the Corps used for the EIS.<sup>111</sup> The court stated that "[o]nce again, the Corps' judgment and selection of a baseline that represented no change from current management is deserving of deference, consistent with NEPA, and neither arbitrary nor capricious."<sup>112</sup>

On the third ground, the court concluded that the ten alternatives examined by the Corps in the EIS "enabled reasoned choices considering the objectives the Corps had identified" and thus its choices of alternatives to the reallocation of water at the level it authorized was not arbitrary or capricious.<sup>113</sup>

Finally, the court disagreed with the NWF's contention that the Corps had failed to analyze the direct, indirect, and cumulative impacts of the reallocation.<sup>114</sup> The court found, to the contrary, that the Corps had "exhaustively detailed" the direct, indirect, and cumulative impacts and followed NEPA's requirements in all necessary respects in making its decision.<sup>115</sup> Also, while the NWF argued that the Corps left it to the State of Georgia to figure out how to mitigate adverse impacts of the additional water withdrawals, the court noted that federal agencies "can recognize that other entities are in the best position to take appropriate action[.]" and that "[t]he agency need not delay adopting its preferred alternatives while those other entities choose 'what mitigating measures they consider necessary.'"<sup>116</sup>

The court summed up its decision by stating that "[i]n the absence of an agreement among Georgia, Florida[,] and Alabama, there is no better alternative [,] [d]ecades of deferral and delay due to litigation should end."<sup>117</sup>

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110. *Id.* at \*55–56.

111. *Id.* at \*56.

112. *Id.* at \*57.

113. *Id.* at \*59.

114. *Id.*

115. *Id.* at \*60.

116. *Id.* at \*60–61 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989)).

117. *Id.* at \*63.

In *Johnson v. 3M*,<sup>118</sup> the plaintiff and potential members of a class of plaintiffs were purchasers of water from the Rome Water and Sewer Division in Rome, Georgia.<sup>119</sup> The plaintiff sued numerous defendants related to the carpet manufacturing industry in Dalton, Georgia, including suppliers of chemicals to carpet manufacturers, carpet manufacturers, the City of Dalton d/b/a/ Dalton Utilities, and the Dalton Whitfield County Solid Waste Authority,<sup>120</sup> claiming that these defendants caused or contributed to the discharge of chemicals used in carpet manufacturing known as Per-and polyfluoroalkyl substances (PFAS) into waterways in the Upper Coosa River Basin, including the Oostanaula River, from which the City of Rome withdraws its drinking water.<sup>121</sup>

PFAS is a group of chemicals used in carpet manufacturing.<sup>122</sup> PFAS is stable and repels oil and is used to make carpet both water and stain resistant. As a result of these properties, PFAS does not break down in the environment. It is also toxic and is linked to adverse health effects including cancer and developmental defects in fetuses. PFAS is water soluble, and thus drinking water is a significant source of exposure to PFAS for humans.<sup>123</sup>

Defendants named in plaintiff's lawsuit comprised four groups: the Supplier Defendants, who manufacture and supply PFAS to carpet manufacturers; the Manufacturer Defendants, who manufacture carpet in and around Dalton, Georgia; the Dalton Whitfield Solid Waste Authority (DWSWA), which operates two landfills that accepted solid waste from the Manufacturer Defendants and which discharged leachate from the landfills to the Dalton water treatment facility (publicly owned treatment works, or POTW), and Dalton Utilities, an entity of the City of Dalton.<sup>124</sup>

Dalton Utilities operates the Dalton POTW and a Land Application System (LAS) of liquid waste disposal where wastewater is treated and then sprayed onto land rather than returned to a waterway.<sup>125</sup> Under its permit, Dalton Utilities must operate the LAS as a "no discharge" system, meaning that no discharges of pollutants to surface water. Dalton Utilities also has a National Pollutant Discharge Elimination

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118. No. 4:20-cv-8-AT, 2021 U.S. Dist. LEXIS 197688 (N.D. Ga. Sept. 20, 2021).

119. *Id.* at \*15–16.

120. For a list of all parties, see *id.* at \*1–7.

121. *Johnson*, 2021 U.S. Dist. LEXIS 197688, at \*16–18.

122. *Id.* at \*14.

123. *Id.* at \*15.

124. *Id.* at \*16–18.

125. *Id.* at \*17.

System (NPDES) General Stormwater Permit which prohibits discharges of wastewater and contaminated stormwater from the LAS. Dalton Utilities in turn enacted its own rules for users of the LAS, which prohibit a user from discharging any wastewater to the LAS which would cause the “pass through” of pollutants from the LAS to surface water.<sup>126</sup>

Approximately 90% of the wastewater that is disposed of by the LAS originates from industrial users, primarily carpet manufacturers.<sup>127</sup> The Manufacturers’ wastewater discharge contains PFAS. A characteristic of PFAS is that they “resist degradation during treatment processing at the POTW and [thus] accumulate in the LAS.”<sup>128</sup>

The EPA has established a drinking-water limit of seventy parts per trillion for certain PFAS chemicals.<sup>129</sup> Studies done in 2006 found PFAS levels well above this level in surface water downstream of the LAS, and a 2009 study found “dangerously high levels” of PFAS in Rome’s drinking water.<sup>130</sup> In 2016, the City of Rome determined that its existing water treatment system was incapable of removing PFAS from the city’s drinking water. Rome installed a temporary filtration process, and to pay for it and a planned permanent upgraded filtration system capable of dealing with PFAS, Rome has implemented a surcharge on the price of water that will increase at least 2.5% per year.<sup>131</sup>

The plaintiff filed suit in 2019, claiming personal injury, property damage, and economic harm resulting from the PFAS contamination of Rome’s drinking water.<sup>132</sup> Causes of action included claims under the Clean Water Act against Dalton Utilities and the DWSWA, and for willful misconduct and negligence against all defendants except Dalton Utilities, negligence per se against all defendants except Dalton Utilities and the Supplier Defendants, and public nuisance against all defendants.<sup>133</sup>

Of particular relevance to the defendants’ motions to dismiss, the plaintiff alleged that all defendants “have known for years that PFAS cannot be removed from the industrial wastewater and that the

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126. *Id.* at \*17–19.

127. *Id.* at \*18.

128. *Id.* at \*19.

129. *Id.* at \*15.

130. *Id.* at \*20–21.

131. *Id.* at \*22.

132. *Id.* at \*22–24.

133. *Id.* at \*24–25.

conventional treatment processes and land application do not remove these chemicals prior to discharge” to surface waters around the LAS.<sup>134</sup>

The court’s present order dealt with motions to dismiss for failure to state a claim brought by defendants as to several of the plaintiff’s claims.<sup>135</sup> The court ruled that plaintiff’s amended complaint stated claims against defendants, except as follows: the court ruled that the plaintiff failed to state a claim for nuisance against Dalton Utilities, failed to state a claim for negligence against the Supplier Defendants, and failed to state a claim for negligence per se against two of the Supplier Defendants.<sup>136</sup> Rather than summarize all of the court’s rulings in its lengthy opinion, this Article summarizes aspects of some of those rulings that practitioners might find particularly interesting.

I. PLAINTIFF’S COMPLAINT IS NOT AN IMPROPER COLLATERAL ATTACK ON THE GEORGIA ENVIRONMENTAL PROTECTION DIVISION’S PERMITTING DECISIONS.

Dalton Utilities moved to dismiss the complaint’s CWA citizen-suit claim against it on the ground that its LAS is permitted by the Georgia Environmental Protection Division (EPD) as a nonpoint source and that Dalton Utilities had not violated its LAS permit.<sup>137</sup> Dalton Utilities argued that the CWA’s National Pollution Elimination Discharge System Permit (NPDES) program only requires permits for point sources, and that EPD’s regulations implied that if EPD issued an LAS permit, EPD had necessarily determined that the LAS was not a point source that required an NPDES permit. The plaintiff’s CWA claim alleging that Dalton Utilities’ LAS discharged pollutants without an NPDES permit thus failed because Dalton Utilities was in compliance with its LAS permit and was not required to have an NPDES permit.<sup>138</sup>

The court rejected this argument.<sup>139</sup> Among other things, the court concluded that the LAS was a point source.<sup>140</sup> The court followed other courts that had concluded that spray heads used for the land application of wastewater fit the regulatory definition of a point source, and that the wastewater that thereafter migrated from the LAS into

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134. *Id.* at \*19–20.

135. *Id.* at \*26–27.

136. *Id.* at \*8–9.

137. *Id.* at \*49.

138. *Id.* at \*49–51.

139. *Id.* at \*50.

140. *Id.* at \*58.



surface water constituted a discharge from a point source.<sup>141</sup> It pointed out that even if an LAS is a nonpoint source when it operates properly, “When the system fails . . . with resulting discharge . . . the escape of liquid from the confined system is from a point source.”<sup>142</sup>

The court also concluded that Dalton Utilities could not claim protection under the CWA’s permit shield provision,<sup>143</sup> which provides that if the holder of an NPDES permit discharges pollutants in accordance with its permit, the permit shields the holder from CWA liability.<sup>144</sup> The court explained that Dalton Utilities did not hold an NPDES permit and that the permit shield protection did not extend to an LAS permit.<sup>145</sup> The court noted that “[p]laintiff’s Complaint adequately alleges that the LAS system does not operate according to its design as a ‘no discharge system,’ but instead Dalton Utilities’ operation of the LAS system results in discharges of PFAS[.]” to surface waters, which would require an NPDES permit that Dalton Utilities did not have.<sup>146</sup>

With respect to other grounds for dismissal of the plaintiff’s CWA claim against Dalton Utilities, the court also ruled that it would not abstain from asserting jurisdiction under the *Burford* abstention doctrine,<sup>147</sup> that the plaintiff’s complaint stated a claim under the CWA for spills of sewage from the LAS,<sup>148</sup> and that the plaintiff’s claim was not barred by the statute of limitations.<sup>149</sup>

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141. *Id.* at \*55–58 (citing *Flint Riverkeeper Inc. v. Southern Mills, Inc.*, 276 F. Supp. 3d 1359, 1367–68 (M.D. Ga. 2017)); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 370 (10th Cir. 1979); *Reynolds v. Rick’s Mushroom Service, Inc.*, 246 F. Supp. 2d 449, 457 (E.D. Pa. 2003).

142. *Johnson*, 2021 U.S. Dist. LEXIS 197688, at \*57 (citing *Earth Sciences, Inc.*, 599 F.2d at 374).

143. 33 U.S.C. § 1342(k) (2019).

144. *Johnson*, 2021 U.S. Dist. LEXIS 197688, at \*60.

145. *Id.* at \*61–62.

146. *Id.* at \*63.

147. *Id.* at \*66. The Supreme Court of the United States explained that federal courts could elect to abstain from issuing rulings or holdings that could interfere with State regulatory schemes or enforcement actions. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *see generally Johnson*, 2021 U.S. Dist. LEXIS 197688, at \*65–66.

148. *Id.* at \*67.

149. *Id.* at \*73.

II. PLAINTIFF STATED A CLAIM AGAINST THE DWSWA UNDER THE CWA FOR CAUSING OR CONTRIBUTING TO THE DISCHARGE OF PFAS FROM THE DALTON UTILITIES' LAS

The plaintiff's complaint alleged that the DWSWA discharged its landfill leachate containing PFAS to the Dalton POTW, where the chemicals could not be removed from the leachate, and from where the PFAS "pass[ed] through" to the LAS, where they were sprayed onto land as part of the land application of wastewater.<sup>150</sup> From the LAS, the PFAS then migrated into surface water that became the drinking water supply for Rome.<sup>151</sup> The plaintiff alleged that the DWSWA caused violations of Dalton Utilities' sewer use rules, its NPDES general stormwater permit, prohibiting discharges of stormwater mixed with industrial wastewater or contaminated stormwater, and section 307(d) of the CWA,<sup>152</sup> which prohibits the discharge of pollutants that pass through and are discharged from a POTW into surface waters.<sup>153</sup>

The DWSWA contended that it did not cause a violation of Dalton Utilities' NPDES stormwater permit.<sup>154</sup> First, the DWSWA argued that because a claim based on the "pass through" of pollutants requires a plaintiff to provide a discharge in violation of a permit, and the plaintiff's claim against Dalton Utilities was based on a discharge without a permit, the DWSWA could not have caused a violation of a permit.<sup>155</sup> The court concluded that the complaint did allege that the DWSWA discharged PFAS into the Dalton POTW, which then exited the LAS into surface waters in violation of Dalton Utilities' permits.<sup>156</sup> Because the court was required to accept those allegations as true for the purposes of deciding a motion to dismiss for failure to state a claim, the court would not dismiss the CWA claim on that basis.<sup>157</sup>

The DWSWA also argued that the permit violation on which the plaintiff based his CWA claim was the discharge itself of stormwater mixed with industrial wastewater but not the discharge of any particular pollutant in the wastewater.<sup>158</sup> Since the DWSWA did not cause the discharge itself, it argued that it did not cause a violation of the CWA. The court concluded, however, that "[p]laintiff has alleged

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150. *Id.* at \*76–77.

151. *Id.* at \*75.

152. 33 U.S.C. 1317 (1987).

153. *Johnson*, 2021 U.S. Dist. LEXIS 197688, \*75–76.

154. *Id.* at \*81.

155. *Id.* at \*81–82.

156. *Id.* at \*82.

157. *Id.*

158. *Id.*

that violations of [Dalton Utilities'] General Stormwater permit are caused by the presence of the PFAS from the DSWA's discharges to the POTW and the LAS."<sup>159</sup> Again, the DSWA's argument appears to be based on the presumption that it could presume that the LAS would function as it was intended, which would result in no discharge to surface waters. Thus, the PFAS in its wastewater was not in and of itself a violation of any permit term or regulation when its wastewater was ultimately applied on land.<sup>160</sup> The court pointed out, though, that one actor such as the DSWA could be a cause of another's violation of a permit due to the "pass through" of pollutants without having to be the sole cause of the violation.<sup>161</sup> The court pointed to reasoning from the Eighth Circuit that an industrial user's discharge need only be "'a cause' of the POTW's NPDES permit violation, even though another factor, such as the POTW's operation difficulties . . . are independent causes of such violation . . . ."<sup>162</sup>

### III. DALTON UTILITIES AND THE DSWA ARE NOT ENTITLED TO SOVEREIGN IMMUNITY

The governmental entities (Dalton Utilities and the DSWA) contended that they were entitled to sovereign immunity as to the plaintiffs state-law nuisance claim.<sup>163</sup> Dalton Utilities based its contention on a 2014 Supreme Court of Georgia decision<sup>164</sup> where the court appeared to hold that the so-called "nuisance exception" to sovereign immunity was limited to claims for eminent domain or inverse condemnation where the government would be expected to pay compensation for property.<sup>165</sup> The plaintiff countered with authority prior to 2014 that allowed plaintiffs to bring nuisance claims against local governments.<sup>166</sup>

The court noted that a decision by the Supreme Court of Georgia in *Gatto v. City of Statesboro*<sup>167</sup> was issued following the hearing on the

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159. *Id.* at \*87.

160. *Id.* at \*83.

161. *Id.* at \*86–87.

162. *Id.* at \*87 (quoting *Arkansas Poultry Fed'n v. U.S.E.P.A.*, 852 F.2d 324, 238 (8th Cir. 1988)).

163. *Id.* at \*113–14.

164. *Dept. of Nat. Resources v. Ctr. for a Sustainable Coast*, 294 Ga. 593, 755 S.E.2d 184 (2014).

165. *Johnson*, 2021 U.S. Dist. LEXIS 197688, at \*113 (citing *Dept. of Nat. Resources*, 294 Ga. at 600, 755 S.E.2d at 190).

166. *Id.* at \*114–15.

167. 312 Ga. 164, 860 S.E.2d 713 (2021).

motions in the present case.<sup>168</sup> Based on *Gatto*, the district court in *Johnson* (the present case) concluded that “as it stands now, [Georgia] law allows for a nuisance claim against a municipality for injury to property (or the use and enjoyment thereof) or personal injury.”<sup>169</sup> The court then cited Georgia law for the rule that

To be held liable for maintenance of a nuisance, the municipality must be chargeable with performing a continuous or regularly repetitious act . . . which causes . . . hurt, inconvenience[,] or injury; [and] the municipality must have knowledge or be chargeable with notice of the dangerous condition . . . .<sup>170</sup>

Based on this rule, the court concluded that the plaintiff stated a claim for nuisance against Dalton Utilities for the “continuous or regularly repetitious act’ of discharging PFAS into the Conasauga River for years, with full knowledge and awareness of its consequences, and failing to act to remedy this dangerous condition.”<sup>171</sup>

The court also concluded that the DWSWA could not establish at the motion to dismiss phase that it was entitled to sovereign immunity.<sup>172</sup> The court noted that whether an entity like the DWSWA, which is a quasi-governmental authority created pursuant to O.C.G.A. § 12-8-50,<sup>173</sup> is entitled to sovereign immunity is an issue of first impression under Georgia law.<sup>174</sup> The DWSWA argued that because it is a creation of the City of Dalton and Whitfield County, both of which have sovereign immunity, it should similarly be entitled to sovereign immunity. However, the court noted that the law was not clear that an authority should be treated similarly to a local government.<sup>175</sup> Further, no law exists in Georgia to show whether an authority like the DWSWA is a “department or agency of the state” such that it would have sovereign immunity under the Georgia Constitution.<sup>176</sup> Beyond determining whether the DWSWA is entitled to sovereign immunity in the first place, the court noted that the plaintiff had raised a number of “legitimate” arguments that the DWSWA had waived that immunity,

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168. *Johnson*, 2021 U.S. Dist. LEXIS 197688, at \*118–19.

169. *Id.*

170. *Id.* at \*119 (quoting *Mayor of Savannah v. Palmerio*, 242 Ga. 419, 426, 249 S.E.2d 224, 229 (1978)).

171. *Id.* at \*120.

172. *Id.* at \*122.

173. O.C.G.A. § 12-8-50 (1990).

174. *Johnson*, 2021 U.S. Dist. LEXIS 197688, at \*126.

175. *Id.* at \*130–31.

176. *Id.* at \*127 (discussing GA. CONST. art. I, § 2, para. 9(e)).

which in some cases would require additional factual support through discovery and thus should not be addressed in a 12(b)(6) motion.<sup>177</sup>

IV. THE SUPPLIER DEFENDANTS DID NOT OWE A DUTY TO THE PLAINTIFF  
TO PREVENT CONTAMINATION BY PFAS OF ROME'S DRINKING WATER

Although the court concluded that the other defendants did owe a duty for the purposes of the plaintiff's negligence claim to the plaintiff with respect to the contamination, the court concluded that the Supplier Defendants did not.<sup>178</sup> The court explained that the PFAS suppliers "are not alleged to have polluted the water themselves[,] [r]ather, they are alleged to have supplied the chemicals[,] that were used by the Manufacturing Defendants and disposed of in a manner that polluted the water."<sup>179</sup> The plaintiff could not "point to any authority from Georgia establishing a duty on the part of a chemical supplier to protect an unknown third-party, rather than its consumer, from harm resulting from the negligent use or disposal of the chemical."<sup>180</sup>

V. THE PLAINTIFF STATED A CLAIM FOR PUBLIC NUISANCE AGAINST ALL  
DEFENDANTS

"The essential element of nuisance is control over the cause of the harm."<sup>181</sup> In addition, "some Georgia courts have emphasized that, in the case of a continuing nuisance, to be liable, the defendant must at least have a 'legal right' to terminate the cause of the injury."<sup>182</sup> Finally, "[w]here the element of control is met, knowledge of a dangerous situation and a failure to remedy that situation within a reasonable time can result in a legal nuisance."<sup>183</sup>

The plaintiff alleged that the Manufacturing Defendants and the DWFWS knowingly discharged PFAS to the Dalton POTW.<sup>184</sup> Further, the plaintiff alleged that these defendants "have the legal right and ability to abate the nuisance but have failed" to do so.<sup>185</sup> For example,

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177. *Id.* at \*128–29.

178. *Id.* at \*144–46.

179. *Id.* at \*146.

180. *Id.* at \*147.

181. *Id.* at \*172 (quoting *Grinold v. Farist*, 284 Ga. App. 120, 122, 643 S.E.2d 253, 255 (2007)).

182. *Id.* at \*174 (citing *Kenner v. Addis*, 61 Ga. App. 40, 43, 5 S.E.2d 695, 698 (1939)).

183. *Id.* at \*176 (citing *Horton v. City of Macon*, 144 Ga. App. 380, 382, 241 S.E.2d 311, 314 (1977)).

184. *Id.* at \*177–78.

185. *Id.* at \*180.

the court explained that the defendants could have found alternative ways to dispose of their wastewater, built a specialized water treatment plant for the carpet industry, or ceased to use PFAS in the process.<sup>186</sup> Thus, “[a]t this stage, Plaintiff’s allegations sufficiently allege the control and causation required to state a claim for nuisance.”<sup>187</sup>

The court also concluded that the plaintiff stated a claim for nuisance against the Supplier Defendants.<sup>188</sup> The plaintiff alleged that these defendants sold and supplied PFAS chemicals “while knowing of the downstream contamination” and also knowing “that the PFAS cannot be removed from Dalton Utilities’ POTW or removed prior to discharge into” surface waters.<sup>189</sup> As to a product supplier’s connection to liability for a nuisance created or maintained by a user of the product, the court pointed to Georgia precedent where the Court of Appeals of Georgia held that where “gas is supplied with actual knowledge on the part of the one supplying it of the defective and dangerous condition of the customer’s appliances [for example, underground storage tanks that had leaked], he is liable for injuries caused by . . . the gas.”<sup>190</sup> The court also accepted that the plaintiff alleged the Supplier Defendants could have abated the nuisance, analogizing to a claim where a Georgia trial court ruled that the State of Georgia stated a claim for public nuisance against suppliers of opioid drugs because the suppliers controlled the drugs before they were distributed and “had the power to shut off the supply . . . to lessen or prevent the harm that was occurring.”<sup>191</sup>

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186. *Id.*

187. *Id.* at \*180–81.

188. *Id.* at \*189–90.

189. *Id.* at \*191–192.

190. *Id.* at \*192 (citing *Citizens & Southern Trust Co. v. Phillips Petroleum Co.*, 192 Ga. App. 499, 500–01, 385 S.E.2d 426, 428–29 (1989)).

191. *Id.* at \*193–94 (citing *State of Georgia v. Teva Pharmaceutical Indus. Ltd.*, 19-A-00060-4 (Gwinnett Cnty. Sup. Ct. Oct. 9, 2019)).

