

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

COBB COUNTY-MARIETTA WATER
AUTHORITY,

Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS
et al.,

Defendants.

CIVIL ACTION NO. _____

COMPLAINT

The Cobb County-Marietta Water Authority (“CCMWA” or “Cobb-Marietta”) files this Complaint against the United States Army Corps of Engineers (“Corps”) and its officers in this action:

INTRODUCTION

1. This case is about water rights granted to Plaintiff Cobb-Marietta by the State of Georgia at Allatoona Lake, a reservoir operated by the United States Army Corps of Engineers. In 1963, Cobb-Marietta entered into a contract with the United States granting it the right to utilize a portion of Allatoona Lake to store water for its wholesale customers, which include Cobb County and Paulding

County, Georgia. The contract grants Cobb-Marietta a permanent right to store up to 13,140 acre-feet of water in Allatoona Lake at any one time.

2. Cobb-Marietta and its customers have invested hundreds of millions of dollars in projects to generate man-made inflows to Allatoona Lake—known as “made inflows”—to increase the amount of water Cobb-Marietta can store in the reservoir. These include both (1) “return flows”—that is, “recycled” water that is withdrawn from the reservoir, treated to a very high level in advanced water reclamation facilities after it is used, and then returned to back to Allatoona Lake for reuse; and (2) water released from storage in a water supply reservoir owned by Cobb-Marietta located upstream of Allatoona Lake, which then flows downstream through the natural river channel and can be withdrawn through Cobb-Marietta’s existing water supply intake in Allatoona Lake.

3. By permit, the State of Georgia has granted Cobb-Marietta exclusive rights to store and utilize made inflows to Allatoona Lake from three specific sources. Having paid for the right to utilize space in Allatoona Lake to store water, Cobb-Marietta has a right to use that space to store any water the State has allocated to it. The Corps, however, has rejected the State’s allocation of made inflows to Cobb-Marietta, choosing instead to adopt its own, federal water

allocation rule, which it has implemented through a “Storage Accounting System” described further below.

4. The Corps does not object to Cobb-Marietta’s discharging made inflows into the reservoir. Nor does it dispute Cobb-Marietta’s right to withdraw and use this water under Georgia law. Nevertheless, the Corps asserts, in essence, that these made inflows become the property of the federal government, subject to allocation by the Corps, simply because they entered the federal facility. The federal water allocation rule adopted by the Corps would allow the Corps to allocate to itself almost 95% of the made inflows the State of Georgia has allocated to Cobb-Marietta. This deprives Cobb-Marietta of the right to store more than 40 million gallons of water per day.

5. The Corps’ decision to allocate water rights in a manner contrary to Georgia law violates basic principles of federalism governing federal water projects and the allocation of water rights. As sovereign entities in our federal system, States have “inherent authority ... to regulate the use of water” within their borders. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1066 (2015). The Supreme Court has called this “power to control ... public uses of water” within their borders “an essential attribute of sovereignty,” *United States v. Alaska*, 521 U.S. 1, 5 (1997), and it is “well-established ... that States do not easily cede their sovereign powers,

including their control over waters within their own territories,” *Tarrant Reg’l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132 (2013). Thus, unless specifically preempted by federal law, the authority to allocate water rights is reserved to the States under the Tenth Amendment to the United States Constitution.

6. No federal law preempts the State of Georgia’s sovereign right and authority to allocate made inflows to Cobb-Marietta. The federal statute that authorized the Corps to construct and operate Allatoona Lake did not have this effect. And, although any allocation by the State of Georgia that conflicted with the federal authorization for Allatoona Lake would be preempted, Georgia’s allocation of made inflows to Cobb-Marietta does not conflict with any federal purpose. Indeed, the Corps has already determined that Cobb-Marietta can withdraw all of the made inflows the State of Georgia has allocated to it without affecting any congressionally authorized purpose of the project. The Corps’ decision to countermand the State of Georgia’s allocation of made inflows to Cobb-Marietta thus exceeds the Corps’ authority and is unlawful.

7. In addition to usurping the State of Georgia’s authority to allocate water rights, the Corps’ Storage Accounting System also directly conflicts with the Corps’ own Water Control Plan for Allatoona Lake, which governs the operation of the reservoir. As a result, the Storage Accounting System arbitrarily deprives

Cobb-Marietta of water to which it is entitled even under the Corps' own stated water allocation principles.

8. The first principle that is violated is the Corps' rule that all storage accounts must be full when the conservation pool at Allatoona Lake is full. The Storage Accounting System violates this principle—and basic common sense—by declaring Cobb-Marietta's storage account to be empty (indeed, 25% overdrawn) at a time when the Water Control Plan for Allatoona Lake declares the conservation pool to be full. As a result, the Water Control Plan calls for water to be evacuated from Allatoona Lake as rapidly as possible—not to serve any purpose downstream, but to keep flood storage within the reservoir empty—at a time when the Storage Accounting System shows that Cobb-Marietta not only needs the water, but has ample room to store it.

9. The second principle that is violated is the Corps' rule that water entering the reservoir should be allocated to water supply users based on the percentage of conservation storage under contract. The Storage Accounting System, however, arbitrarily ignores seasonal variations in the conservation pool, which shrinks in the winter, changing Cobb-Marietta's share of conservation storage. Because Cobb-Marietta's 13,140 acre-feet constitutes a larger percentage of the conservation pool in the winter than in the summer, it should receive a larger

percentage of inflow during that period. The Corps' unexplained decision to ignore the Water Control Plan and the seasonal variations in the conservation pool results in almost half the water to which Cobb-Marietta is entitled under the Corps' own system being allocated to other users.

10. Correcting the Corps' Storage Accounting System is critical to Cobb-Marietta's ability to meet the needs of the communities it serves. If Cobb-Marietta is not able to utilize the space it has purchased in Allatoona Lake to store water the State has allocated to it, Cobb-Marietta will be required to construct expensive and needless infrastructure—with wholly unnecessary environmental impacts—to access the very same water. For instance, Cobb-Marietta would be forced to build stand-alone reservoirs to store its return flows, and a new pumping station and 20-mile pipeline to convey water from Hickory Log Creek Reservoir to its existing treatment plant at Allatoona Lake, simply to access water that can—and should—be stored in Cobb-Marietta's existing storage space in Allatoona Lake. These projects would not change the amount of water removed from the basin, as they would be necessary only to ensure that Cobb-Marietta could retain control of the water the State has allocated to it. The only difference would be the costs to the public, environment, and society caused by the need to construct unnecessary reservoirs and pipelines due to the Corps' Storage Accounting System.

11. For these and other reasons set forth below, the Corps' Storage Accounting System at Allatoona Lake is arbitrary and capricious, contrary to law, and exceeds the Corps' legal authority. Cobb-Marietta accordingly requests an Order from this Court vacating, declaring unlawful, and setting aside the Army's Storage Accounting System at Allatoona Lake and remanding the matter to the Corps for development of a Storage Accounting System consistent with the judgment of this Court.

PARTIES

12. Plaintiff Cobb-Marietta is a political subdivision of the State of Georgia established by the Georgia General Assembly in 1951. Cobb-Marietta is a water utility that provides water to wholesale customers. Through its wholesale customers, Cobb-Marietta is the second largest provider of drinking water in Georgia, serving approximately 900,000 residents of metropolitan Atlanta, as well as numerous businesses and industries in the region, including important military installations, defense contractors, hospitals, universities, and schools. As described herein, Cobb-Marietta depends on water allocated to it by the State of Georgia and impounded in Cobb-Marietta's reservoir storage in Allatoona Lake to meet critical water supply needs within its service area.

13. Defendant the U.S. Army Corps of Engineers is a branch of the United States Army under the direction and supervision of the Secretary of the United States Army and is an agency of the United States within the meaning of 5 U.S.C. § 701. The Corps is subject to the requirements of the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*

14. Defendant Robert M. Speer is the Acting Secretary of the United States Army. Defendant Jo-Ellen Darcy (“Assistant Secretary Darcy”) is the Assistant Secretary of the United States Army for Civil Works. Defendant Lieutenant General Todd Semonite is the Commander and Chief of Engineers of the United States Army Corps of Engineers. Defendant Brigadier General C. David Turner is the Division Commander for the South Atlantic Division of the United States Army Corps of Engineers. Colonel James A. DeLapp is the District Commander for the Mobile District of the United States Army Corps of Engineers. Each of these Defendants is named in their official capacity.

15. Secretary Speer, Assistant Secretary Darcy, General Semonite, General Turner, and Colonel DeLapp, or their predecessors, acting in their official capacities, individually or collectively, are responsible for and approved the acts and omissions of the Corps alleged herein and are responsible for compliance by the Corps with any decree of this Court.

JURISDICTION

16. This Court has jurisdiction over this action pursuant to federal law, including 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory judgment), and 2202 (injunctive relief); 42 U.S.C. §§ 4321 *et seq.* (National Environmental Policy Act), and 5 U.S.C. §§ 701 *et seq.* (the Administrative Procedure Act).

VENUE

17. Allatoona Lake, the reservoir at issue in this litigation, is physically located in the Atlanta Division of the Northern District of Georgia, and a substantial part of the events and omissions giving rise to the claims asserted in this Complaint occurred in this District and in this Division. Defendant General Turner resides within this District and Division. Cobb-Marietta has its primary place of business and principal office within this District and Division.

18. Venue rests properly in this Court pursuant to 28 U.S.C. § 1391(e)(1) and Local Rule 3.1 of the United States District Court for the Northern District of Georgia.

BACKGROUND

Allatoona Lake

19. Allatoona Lake is a reservoir on the Etowah River near Cartersville, Georgia, approximately thirty-two miles northwest of Atlanta. The Corps was

authorized to construct Allatoona Lake by the Flood Control Act of 1941, which authorized the construction of numerous water resources projects across the United States.

20. The Corps operates Allatoona Lake pursuant to authorities provided by the Flood Control Act of 1941, the Water Supply Act of 1958, and other statutes. These statutes authorize storage in Allatoona Lake to be used for multiple purposes, including water supply, flood control, hydropower generation, recreation, and navigation.

21. The Corps is required to develop water control plans and manuals for each reservoir under its control. *See, e.g.*, 33 U.S.C. § 709; 33 C.F.R. § 222.5. Water control plans specify how the reservoir will be operated for its various authorized purposes. *Id.*

22. The Corps operates Allatoona Lake in accordance with a water control plan adopted on May 4, 2015 (the “Water Control Plan”). The Water Control Plan is included as Appendix A to the Master Water Control Manual, Alabama-Coosa-Tallapoosa (ACT) River Basin, Alabama and Georgia.¹

¹ U.S. Army Corps of Engineers, Alabama-Coosa-Tallapoosa River Basin Water Control Manual, Appendix A, Allatoona Dam and Lake, Etowah River, Georgia (Revised Dec. 2014), *available at* <http://www.sam.usace.army.mil/>

23. As explained in the Water Control Plan, Allatoona Lake contains approximately 670,047 acre-feet of reservoir storage divided by elevation into three distinct “pools,” as follows:

a. The “flood pool” is used to store flood waters. It is the uppermost pool, and the ideal condition is for it to be empty. During floods, the flood pool is used to store water until it can be passed downstream safely.

b. The “conservation pool” is the middle section of the reservoir. It is used to store water for authorized project purposes such as water supply, hydropower generation, navigation, and recreation. Under ideal conditions, the conservation pool would always be full. At Allatoona Lake, the Corps’ “[w]ater management regulation decisions strive to maintain the pool elevation at the top of conservation elevation or at the highest elevation possible while meeting project purposes.” Water Control Plan at ES-24.

c. The “inactive pool” is the bottom portion of the reservoir. This pool is used to collect sediment and to create head for hydropower. Because water is never released from it, it is always completely full.

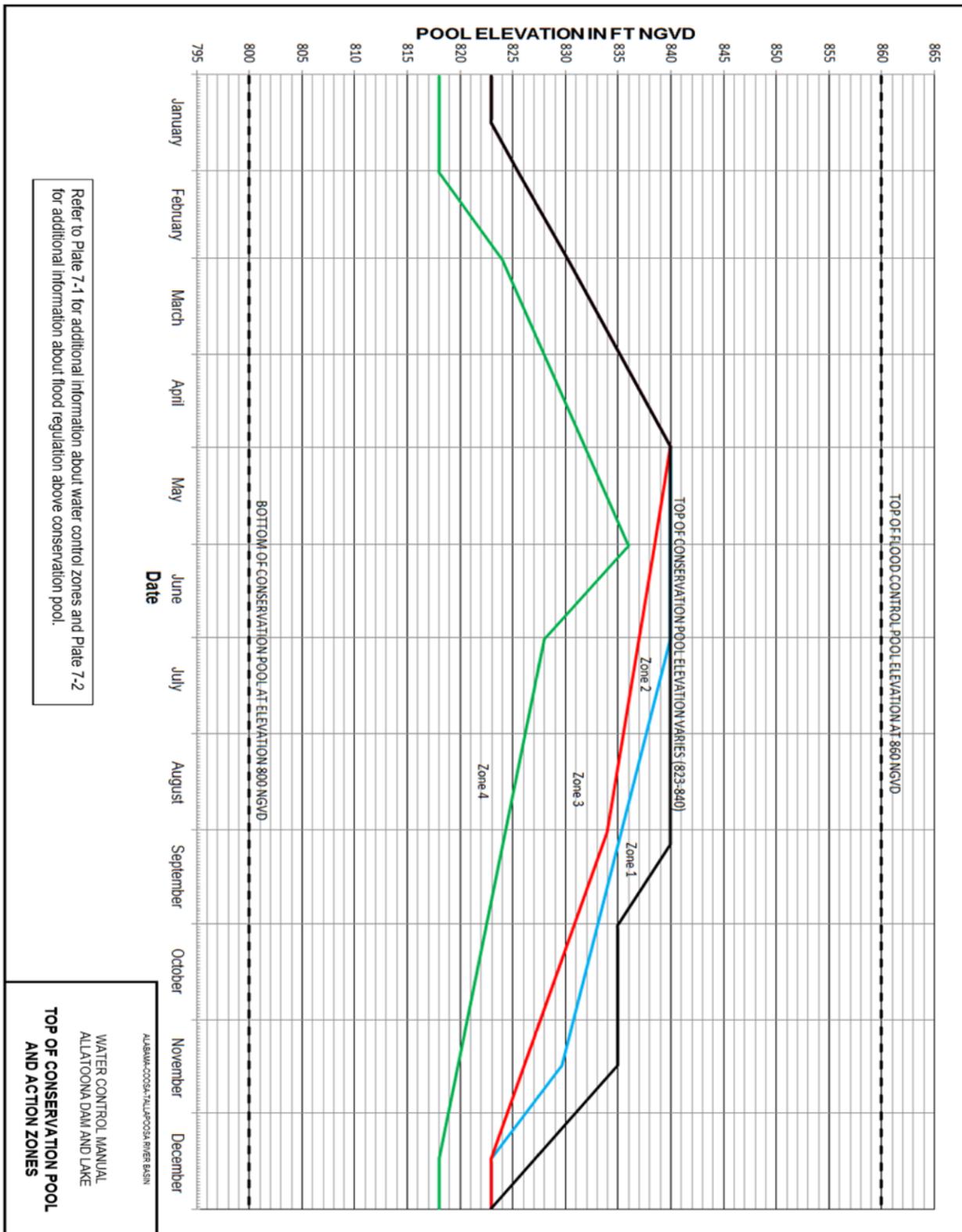
Portals/46/docs/planning_environmental/act/docs/ACT_EIS_Volume/2_App%20A-Allatoona%20WCM-Oct14.pdf [hereinafter, “Water Control Plan”].

24. According to the Water Control Plan, the conservation pool “guide curve” for the reservoir “defines the seasonal top of conservation storage” at Allatoona Lake. Water Control Plan at 7-2. It is the dividing line between the conservation pool and the flood pool. As explained by the Water Control Plan, “[t]he top of conservation pool elevation is the reservoir’s normal maximum operating level for conservation storage purposes. If the elevation is higher than the conservation limit, the reservoir level is in the flood pool.” *Id.* at 7-1.

25. As explained in the Water Control Plan, the dividing line between the conservation pool and the flood pool varies seasonally to reflect seasonal priorities. Because it is more important to conserve water than to control floods in the dry summer and fall, more storage is devoted to conservation at those times. This is done by raising the target lake level, thus increasing the volume of water that can be held in storage. Conversely, the lake is kept at a lower elevation in the fall and winter to make room to store flood waters. Thus, the volume of conservation storage is reduced, as more storage in the reservoir is devoted to storing flood water. *Id.* at 7-1 to 7-2 & Appx. A, Plate 3-1.

26. As shown in Plate 3-1 from the Water Control Plan below, the bottom of the conservation pool is always elevation 800 feet.² The top of the conservation pool, however, varies from elevation 823 feet in the winter to elevation 840 feet in the summer.

² All elevations in the Water Control Plan are in feet above mean sea level (MSL) referenced to the project's historical vertical datum, National Geodetic Vertical Datum of 1929 (NGVD29). Water Control Plan at iii.



27. Because the top of the conservation pool varies seasonally above a fixed bottom elevation, the volume of conservation storage (*i.e.*, the maximum volume of water that can be held in storage) also varies. Conservation storage in Allatoona Lake ranges from 284,580 acre-feet in the summer to 119,878 acre-feet in the winter. *See* Water Control Plan at xv.

Cobb-Marietta's Storage Contract

28. Cobb-Marietta entered into a Water Supply Act contract with the United States in 1963 to store water in Allatoona Lake for use as public water supply. The contract (No. DA-01-076-CIVENG-64-116 (Negotiated)) has been amended by three supplemental agreements and remains in effect today (as amended, the "Contract").

29. The Contract entitles Cobb-Marietta to store up to 13,140 acre-feet of water in Allatoona Lake at any one time. The Contract neither limits the amount of water that Cobb-Marietta may withdraw from the storage space it has purchased, nor guarantees that any particular amount of water will be available for withdrawal. Rather, the Contract grants Cobb-Marietta the right to store water in Allatoona Lake and "to make such diversions [from the project] as granted to the Authority by the State of Georgia to the extent such storage space will yield." Contract, Art. I.

30. Shortly after the 1963 contract was executed, Congress enacted a law to clarify that storage rights acquired in this manner are permanent, remaining available to the user “so long as the space designated for that purpose may be physically available.” 43 U.S.C. § 390e. In 2016, the Corps executed a supplement to the 1963 contract confirming Cobb-Marietta’s permanent right to use the storage covered by the Contract.

31. Cobb-Marietta’s 13,140 acre-feet of storage represents approximately 4.61% of the conservation storage in Allatoona Lake at elevation 840 feet. Cobb-Marietta’s share of the conservation pool increases to 10.96% during the winter when the top of the conservation pool is lowered to elevation 823 feet.

**Cobb-Marietta’s Efforts to Increase the Yield of Its
Storage in Allatoona Lake**

32. The amount of water that can be withdrawn from storage in a reservoir is the “yield” of the storage. It is usually expressed as the average annual rate of withdrawal in million gallons per day (“mgd”). Yield is determined by factors that include storage capacity (the maximum volume that can be stored for later use); the timing and quantity of inflows; and the timing and quantity of withdrawals.

33. The “firm yield” of storage is the maximum yield available under all conditions. It is calculated by using historical hydrologic records to determine the

maximum withdrawal that could have been sustained from beginning to end of the worst drought on record. When the Corps executes a storage contract, it usually (but not always) offers a volume of storage that is expected to provide a “firm yield” sufficient to meet projected demand.

34. When the 1963 Contract was executed, the Corps projected that, given historic inflow patterns, Cobb-Marietta would need to be able to put 13,140 acre-feet of water in storage during the wet season to achieve a year-round firm yield of 34.5 mgd. The Contract accordingly authorizes Cobb-Marietta to store up to 13,140 acre-feet of water in the reservoir.

35. The Water Supply Act of 1958, which authorized the 1963 Contract, prohibits the Corps from executing any water supply storage contract that “would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed.” 43 U.S.C. § 390b(e). Prior to executing the Cobb-Marietta Contract, the Corps determined that it would not “seriously interfere” with any other authorized purpose.

36. In November 1981, Cobb-Marietta submitted a request to the Corps to increase the volume of water that it could store in Allatoona Lake. Though never withdrawn and repeatedly renewed by Cobb-Marietta, that request is still pending. Cobb-Marietta and the State of Georgia have filed a separate lawsuit to compel the

Corps to act on this request, which has been unlawfully withheld and/or unreasonably delayed. *See Georgia v. U.S. Army Corps of Engineers*, Civil Action No. 1:15-cv-3593 (N.D. Ga. *filed* Nov. 7, 2014).

37. Because the Corps has failed to act on Cobb-Marietta's request for additional storage, Cobb-Marietta has taken other steps to meet the needs of its customers. These include measures to manage demand, as well as measures to increase the water supply available to it without increasing the total volume that can be stored in Allatoona Lake.

38. To control demand, Cobb-Marietta has been working with its customers for decades to implement water conservation and efficiency measures. This aggressive conservation program has been recognized nationally for its effectiveness. Although these efforts have been highly successful, conservation alone is not sufficient to allow Cobb-Marietta to meet its existing or future water supply needs through the natural yield of Cobb-Marietta's storage in Allatoona Lake.

39. To increase available supplies, Cobb-Marietta has worked with its largest wholesale customer (Cobb County) to "recycle" water by capturing it after use, treating it to a very high level of purity, and then pumping and discharging it back into Allatoona Lake. Cobb County now operates two state-of-the-art water

reclamation facilities to generate these man-made “return flows.” During 2016, these return flows added an average of 16.2 mgd of inflows into the reservoir that would not otherwise occur. Consistent with permits issued by Georgia EPD, this amount is projected to increase to 25.6 mgd in the future.

40. Additionally, in 2000, Cobb-Marietta entered into a partnership with the City of Canton to construct a new water supply storage reservoir to supplement the storage available to it in Allatoona Lake. This \$100 million project, called Hickory Log Creek Reservoir, is located on a tributary of the Etowah River several miles upstream of Allatoona Lake. The Hickory Log Creek Reservoir was permitted by the Corps in 2004 and completed in 2008.

41. The sole function of Hickory Log Creek Reservoir is to store water. It does not include any treatment or distribution facilities. Because it is located on a tributary of the Etowah River above Allatoona Lake, stored water can be released from Hickory Log Creek Reservoir and transferred to Allatoona Lake as needed, using gravity and the natural channel of the Etowah River.

42. At the time the Corps issued the permit to construct Hickory Log Creek Reservoir, the Corps determined that water impounded in Hickory Log Creek Reservoir could be withdrawn and used by Cobb-Marietta without

interfering with the Corps' ability to meet the other authorized purposes of Allatoona Lake.

43. The Corps does not dispute Cobb-Marietta's right to withdraw any water released from Hickory Log Creek Reservoir if it is withdrawn outside the physical boundary of Allatoona Lake. The Corps has stated, however, that once that same water flows into Allatoona Lake, it is subject to allocation by the Corps according to the Corps' own water allocation rules.

44. As described above, water discharged into Allatoona Lake in the form of "return flows" from water reclamation facilities and releases from storage in Hickory Log Creek Reservoir are collectively referred to as "made inflows." These made inflows increase the potential yield of Cobb-Marietta's existing storage in Allatoona Lake by more than 40 mgd.

**The State of Georgia's Allocation of Made Inflows
to Cobb-Marietta**

45. As sovereign entities, States have broad authority to control and regulate the use of water resources within their boundaries. As the Supreme Court has explained, they have "inherent authority [as] sovereign States to regulate the use of water." *Kansas v. Nebraska*, 135 S. Ct. 1042, 1066 (2015). This "power to control ... public uses of water ... is an essential attribute of sovereignty." *United States v. Alaska*, 521 U.S. 1, 5 (1997). These sovereign rights are absolute, "subject

only to the rights since surrendered by the constitution to the general government.”
Martin v. Waddell’s Lessee, 41 U.S. 367, 410 (1842). Thus, unless specifically preempted by federal law, the authority to allocate water rights is reserved to the States under the Tenth Amendment to the United States Constitution.

46. Under Georgia law, water rights to surface waters of the State are governed by the Georgia Water Quality Control Act. The Act declares that the “people of the State of Georgia are dependent upon the rivers, streams, lakes, and subsurface waters of the state for public and private water supply,” and that it is “the policy of the State of Georgia that the water resources of the state shall be utilized prudently for the maximum benefit of the people, in order to restore and maintain a reasonable degree of purity in the waters of the state and an adequate supply of such waters.” O.C.G.A. § 12-5-21(a). “To achieve this end,” the Act provides that the State “shall assume responsibility for the quality and quantity of [its] water resources,” and shall establish a program of water regulation “adequate for present needs and designed to care for the future needs of the state.” *Id.*

47. The Georgia Water Quality Control Act gives the Georgia Environmental Protection Division of the Department of Natural Resources (“Georgia EPD”) the authority to regulate water use and grant water rights in the

State of Georgia. This includes “the authority to regulate the withdrawal, diversion, or impoundment of the surface waters of the state.” O.C.G.A. § 12-5-21(b).

48. Pursuant to this authority, Georgia EPD regulates the use of water in the State of Georgia under a permit system that requires users to obtain a “permit to withdraw, divert or impound surface waters of the State.” Ga. Comp. R. & Regs. 391-3-6-07(1); *see also* O.C.G.A. § 12-5-31(a). Under Georgia law, the right to “impound” (or “store”) surface waters is a separate and independent water right that may be granted by permit from Georgia EPD. *See generally* O.C.G.A. § 12-5-31(a); Ga. Comp. R. & Regs. 391-3-6-07(3).

49. Georgia EPD’s authority under Georgia law to regulate the use and impoundment of surface water includes the power to allocate made inflows to particular water users by granting users “the right to withdraw State waters ... as well as the right to impound made inflow.” Ga. Comp. R. & Regs. 391-3-6-07(16)(a). Specifically, Georgia Department of Natural Resources Rule 391-3-6-07 provides:

When a user has contracted for the right to utilize storage space within a reservoir that is owned or operated by an agency of the federal government, the Director [of the Environmental Protection Division] shall retain authority to allocate any State water rights subject to regulation under O.C.G.A § 12-5-31, including the right to withdraw State waters from the project as well as the right to impound made inflow to the reservoir. When the Director allocates to a specific user made inflows to a reservoir, pursuant to the permitting authority and

procedure provided by O.C.G.A. § 12-5-31, that user will have the right to impound such flows in the storage space for which it has contracted, to the extent storage space is available.

Id.

50. The State of Georgia has exercised this authority by allocating certain made inflows into Allatoona Lake to Cobb-Marietta. This allocation is currently set forth in Georgia EPD Permit No. 008-1491-05 (Modified Nov. 7, 2014) (the “Permit”). A true and correct copy of the Permit is attached to this Complaint as Exhibit A.

51. The Permit grants Cobb-Marietta the exclusive right to store return flows to Allatoona Lake and water delivered to Allatoona Lake from Hickory Log Creek Reservoir, so long as the total volume of water placed in storage does not exceed the contract limit of 13,140 acre-feet. Once the storage limit is reached, any made inflows discharged into Allatoona Lake can be stored and used by other users.

52. No federal law has preempted the State of Georgia’s authority to allocate made inflows to Cobb-Marietta. Further, the Corps has confirmed that the “Corps has no existing policy guidance that would preclude or govern accounting for that increased yield in the manner that CCMWA proposes.” Letter from Steven L. Stockton, P.E., Director of Civil Works, to Glenn Page, P.E., Cobb County-

Marietta Water Authority (Mar. 6, 2012). Yet, as described below, the Corps has refused to acknowledge or honor the State of Georgia's allocation. Instead, the Corps has arrogated to itself the power to allocate water rights among users at Allatoona Lake, and unlawfully granted to itself and other users more than 95% of the made inflows the State of Georgia has allocated to Cobb-Marietta.

The Corps' Unlawful Storage Accounting System

53. In 2007, the Corps began developing a "Storage Accounting System" to determine how much water is held in storage for Cobb-Marietta and other users at any point in time. This system includes a specific method for allocating water to the entities that have contracted for the right to store water in Allatoona Lake.

54. The first step in the Storage Accounting System is to create virtual "storage accounts" for each user—Cobb-Marietta, the City of Cartersville, and the Corps itself. The storage capacity allocated to each water supply user—that is, the maximum volume of water that can be held in that users' storage account—is determined by contract. Because Cobb-Marietta contracted with United States for the right to store up to 13,140 acre-feet of water in Allatoona Lake, that volume has been allocated to Cobb-Marietta—and its virtual storage account is sized accordingly.

55. The Corps uses the Storage Accounting System to determine how much water is held in storage for each user at any point in time. To accomplish this, the Corps adopted water allocation rules (a) to distribute water entering Allatoona Lake to the appropriate accounts; and (b) to debit the appropriate account(s) for any shared losses or individual withdrawals. The water allocation principles embodied in the Storage Accounting System are as follows:

a. All water entering Allatoona Lake is subject to allocation by the Corps. This is true regardless of the source of the water (natural or man-made) and regardless of any water rights granted by the State of Georgia.

b. Water entering Allatoona Lake is allocated to users based on the storage capacity under contract. This water is distributed based on the size of the users' storage contract in relation to the size of the conservation pool at the maximum summertime elevation of 840 feet. Because Cobb-Marietta owns the right to store 13,140 acre-feet of water in the Allatoona Lake, and this constitutes 4.61% of the conservation pool at full summer pool, the Corps allocates 4.61% of the water entering Allatoona Lake to Cobb-Marietta. Notwithstanding that Cobb-Marietta's percentage of the conservation pool varies seasonally (because its storage capacity remains fixed while the volume of the conservation pool varies), the Corps allocates the same percentage of inflow to Cobb-Marietta at all times.

c. When any user's account reaches its maximum storage volume (13,140 acre-feet for Cobb-Marietta), any water that would otherwise have been deposited into that user's account is redistributed to other accounts *pro rata* using the percentages described above until all users' accounts are full.

d. Storage accounts refill when the reservoir reaches elevation 840 feet, which is the top of the conservation pool during the summer but not at other times of the year. At all other times, when the top of the conservation pool is lower than elevation 840, but the conservation pool is full and water is being held in flood storage, water supply storage accounts located in the conservation pool can be less than full or even empty.

e. Water supply withdrawals are debited to the entity that withdrew the water; and releases through the dam are debited to Hydropower.

f. Shared project losses (*e.g.*, evaporation and leakage) are debited to each user in the same manner as inflow (*i.e.*, using the same percentages).

56. The Corps provided a draft Storage Accounting System reflecting these water allocation principles to Cobb-Marietta on November 2, 2007, giving Cobb-Marietta 10 days to provide comments on the Corps' draft storage accounting methods. Letter from Col. Byron Jorns, District Commander, U.S. Army Corps of Engineers, Mobile District, to Cobb-Marietta (Nov. 2, 2007). The

Corps stated that its “preliminary calculations indicate that CCMWA has substantially exceeded the storage allocation provided in [its] water supply storage contract.” The Corps stated, however, that it was providing the spreadsheet containing the draft Storage Accounting System “in the interest of insuring the accuracy of [the Corps’] calculations” and so that Cobb-Marietta could “review [the Corps’] calculations.” *Id.* The Corps assured Cobb-Marietta that it would “carefully consider any additional information [Cobb-Marietta] provide[ed].” *Id.*

57. Cobb-Marietta provided detailed comments on the draft identifying the following three major flaws in the Corps’ draft Storage Accounting System:

Allocation of Water Rights

58. First, the Corps’ draft Storage Accounting System was based on water allocation principles that contradicted and countermanded specific water allocations made by the State of Georgia. Specifically, the system failed to credit Cobb-Marietta’s storage account with made inflows granted to it by the State of Georgia.

59. The Corps is authorized to allocate storage space in its reservoirs, as it has done by executing the Contract with Cobb-Marietta at Allatoona Lake. The Corps has repeatedly recognized, however, that it lacks authority to allocate water or water rights, as that is a function of the State of Georgia.

60. Having already purchased the right to store up to 13,140 acre-feet of water in Allatoona Lake, Cobb-Marietta has a right under State law to utilize that space to store up to 13,140 acre-feet of any water allocated to it by the State of Georgia. Because the State of Georgia has allocated made inflows to Cobb-Marietta, Cobb-Marietta is entitled to use its storage in Allatoona Lake to store 100% of this water in accordance with the permits and authorizations granted by Georgia EPD.

61. The draft Storage Accounting System exceeded the Corps' legal authority, and was thus contrary to law, because it allocated water to other users in contravention of water rights granted to Cobb-Marietta by the State of Georgia.

Full is Full

62. Second, the Corps' draft Storage Accounting System violated the fundamental principle that all conservation storage accounts must be full whenever the reservoir is full. Water supply storage contracts (like Cobb-Marietta's) reserve to the user the right to utilize a portion of the conservation pool. Because water supply storage is located in the conservation pool, it is physically impossible for any water supply storage account to be less than full when the conservation pool is full.

63. The Corps has previously recognized this common-sense principle at Allatoona Lake, stating: “If the reservoir conservation pool is full, all storage accounts or pools must be full.” Memorandum from Gen. Schroedel Regarding Water Storage Contract and Usage Calculations for Cobb County Marietta Water Authority (CCMWA) (Sept. 28, 2007). Nevertheless, the Corps’ draft Storage Accounting System showed Cobb-Marietta’s storage account to be empty at times when conservation storage was completely full.

64. The source of the anomaly was in the draft Storage Accounting System’s definition of “full.” As discussed above, the top of the conservation pool at Allatoona Lake is defined by the “top of conservation pool guide curve,” which defines the boundary between the conservation pool and the flood storage pool located above it. As the Water Control Plan for Allatoona Lake explains, the “conservation pool” at Allatoona Lake is full whenever the reservoir level is at or above the “top of conservation pool guide curve,” which varies from elevation 823 feet in the winter to elevation 840 feet in the summer. The Corps’ draft Storage Accounting System, however, directly contradicted the Corps’ own operating rules by declaring conservation storage to be full only when the lake is at or above elevation 840—including in the winter months when the top-of-conservation-pool guide curve was reduced to elevation 823 feet.

Fixed Inflow Allocation

65. The third error in the Corps' draft Storage Accounting System was that it deprived Cobb-Marietta of a substantial portion of the water to which it is entitled under the water allocation rule the Corps purports to follow.

66. The water allocation rule adopted by the Corps holds that inflow should be allocated *pro rata* based on the percentage of conservation storage held by each user. The draft Storage Accounting System violated this rule by allocating water based, not on the percentage of the conservation pool, but on the percentage of the maximum summer pool. The result was to deprive Cobb-Marietta of a substantial portion of the inflows to which it is entitled under the Corps' own stated principles.

67. As explained above, the volume of the conservation pool at Allatoona Lake varies seasonally. Cobb-Marietta owns 13,140 acre-feet of storage. In the summer, when the top of the conservation pool is elevation 840 feet, this is 4.61% of conservation storage; but in the winter, when the top of conservation pool is at elevation 823 feet, Cobb-Marietta's share of conservation storage rises to 10.96%. Thus, to be consistent with the Corps' own rule, to the extent it applies, the percentage of inflow allocated to Cobb-Marietta should vary depending on the volume of conservation storage.

The Corps' Response

68. The Corps never responded to Cobb-Marietta's 2007 comments on the draft Storage Accounting System.

69. In May 2012, after five years of complete silence, the Corps wrote to Cobb-Marietta about its storage account. While assuring Cobb-Marietta that its storage account was full at the time, the Corps advised of the potential for drought conditions to worsen in the Southeast and stated that it would "advise you and your staff of the storage account status on a monthly basis." The Corps stated it "expects" Cobb-Marietta to "comply with the provisions of the storage contract and storage allocation" and requested that Cobb-Marietta provide its "best estimate" of its "ability to meet that obligation and your confirmation that CCMWA intends to do so."

70. Cobb-Marietta responded to the Corps' letter in June 2012, explaining that the Corps had refused to act on its requests for additional storage in Allatoona Lake; that Cobb-Marietta was legally entitled to credit for made inflows allocated to it by the State of Georgia; and that the Corps had never responded to Cobb-Marietta's 2007 comments on its draft Storage Accounting System.

71. In September 2012, the Corps responded to Cobb-Marietta's letter. The Corps did not provide any substantive response to Cobb-Marietta's comments

on the draft Storage Accounting System. Nor did the Corps explain why its storage accounting methods were valid. Nevertheless, the Corps stated that it would “continue the accounting methodology currently employed in administering the Contract at Lake Allatoona, as well as its practice of notifying CCMWA when the Mobile District estimates that CCMWA’s storage balance is low.” Letter from Col. Roemhildt, District Commander, U.S. Army Corps of Engineers, Mobile District, to Cobb-Marietta (Sept. 11, 2012). The Corps stated that it “expect[ed] that account holders will take appropriate action upon receiving such notice to ensure that they do not make withdrawals that exceed the amount of water that is available for withdrawal from their storage accounts.” *Id.* at 1.

72. Thereafter, during the winter of 2012 through January 2013, the Corps sent Cobb-Marietta a series of letters and emails regarding its storage account in Allatoona Lake. These letters and emails stated that, according to the Corps’ Storage Accounting System, the balance in Cobb-Marietta’s storage account was low or even negative. Contrary to the Corps’ claims, however, at no time during 2012 or 2013 was Cobb-Marietta’s storage in Allatoona Lake empty when correct storage accounting methods are applied.

73. On April 29, 2013, Assistant Secretary Darcy wrote to Georgia’s Governor Nathan Deal. In her letter, Secretary Darcy responded to a request from

the State of Georgia that, among other things, the Corps credit made inflows at Allatoona Lake to Cobb-Marietta. Secretary Darcy stated that action on the State's requests would "require additional evaluation, including public notice and comment periods, analysis, and other documentation that may be required under federal laws such as the Administrative Procedure Act and the National Environmental Policy Act." Thus, Secretary Darcy stated that the Corps was "unable at this time to make a final decision on any of the [State of Georgia's] requests."

74. Secretary Darcy further stated that the Corps was then in the process of "updating its water control plans and manuals for the Alabama, Coosa, and Tallapoosa (ACT) Basin." Secretary Darcy advised the State of Georgia that this process would "provide information that is relevant to the requests you have made," but would "not foreclose resolution or dictate the outcomes of those matters. Accordingly, the Corps is not in a position to take final action on any of those issues prior to the completion of the updated ACT water control manuals."

75. Cobb-Marietta understood Secretary Darcy's letter to mean that, in contrast to the statements in the Corps' September 2012 letter to Cobb-Marietta, the Corps had not taken final agency action to establish and adopt a Storage Accounting System for Allatoona Lake.

76. Following the Corps' issuance of the Final Environmental Impact Statement for the ACT Water Control Plan, Cobb-Marietta and others expressed concern about storage accounting provisions discussed in an appendix. In response, the Army Corps of Engineers issued an "addendum" on May 4, 2015, referring to "issues ... raised in public comments and in lawsuits filed by the State of Georgia, the Atlanta Regional Commission, and the Cobb County-Marietta Water Authority (CCMWA), for which no final agency action has been taken in connection with the [Record of Decision] ROD." Although the Addendum stated that no final action on the issues raised by Cobb-Marietta was being taken "in connection with the ROD," the Corps acknowledged that it had developed and implemented a Storage Accounting System at Allatoona Lake, stating that, according to the Corps' calculations, Cobb-Marietta's storage would be inadequate to meet current and future water supply needs under "the storage accounting methodology that is currently employed at Allatoona Lake."

**The Corps' Renewed Application of Its Unlawful
Storage Accounting to Cobb-Marietta**

77. On October 19, 2016, the Corps wrote to Cobb-Marietta regarding the status of its storage account in Allatoona Lake. Attaching the Corps' correspondence from 2012, the Corps stated: "Per the attached letter dated

September 21, 2012, I am following up to provide you with a status of your storage usage at Lake Allatoona.”

78. In connection with this communication, the Corps provided Cobb-Marietta with a new Storage Accounting System for Allatoona Lake. This Storage Accounting System fails to correct any of the three errors in the Corps’ storage accounting methods that Cobb-Marietta identified in 2007.

79. *First*, like the Corps’ 2007 draft, the Storage Accounting System exceeds the Corps’ legal authority by unlawfully allocating water and granting water rights in direct contravention of water rights granted to Cobb-Marietta by the State of Georgia. As described above, the State of Georgia has granted Cobb-Marietta the exclusive right to impound and withdraw certain made inflows to Allatoona Lake. The Corps’ Storage Accounting System, however, overrides the State of Georgia’s decision and allocates the same made inflows to other users. This is unlawful.

80. *Second*, like the Corps’ 2007 draft, the Storage Accounting System directly conflicts with the Corps’ Water Control Plan for Allatoona Lake by assuming that the conservation pool is full only when the reservoir reaches its maximum summertime elevation of 840 feet, despite the fact that the Water Control Plan expressly states that the conservation pool is full whenever the

reservoir crosses above the “top of conservation pool guide curve,” which defines the upper boundary of the conservation pool.

81. As a direct consequence of this error, the Corps’ Storage Accounting System arbitrarily and capriciously calculates that Cobb-Marietta’s storage in Allatoona Lake is completely empty, even when the conservation pool in Allatoona Lake is completely full. Indeed, the Corps’ Storage Accounting System currently shows Cobb-Marietta’s storage account as being less than empty (almost 25% overdrawn) at a time when Allatoona Lake is more than 3 feet above the top of the conservation pool, the conservation pool at Allatoona Lake is completely full, and the reservoir is in flood operations.

82. This is physically impossible. As described above, Cobb-Marietta’s storage in Allatoona Lake is located in the conservation pool. Because the conservation pool is completely full of water, Cobb-Marietta’s portion of the conservation pool must also be full. The Corps’ Storage Accounting System thus violates basic common sense, as well as the Corps’ own principles of storage accounting, which expressly recognize that all storage accounts must be full whenever conservation storage in the reservoir is full.

83. The Corps’ decision to adopt a Storage Accounting System that directly conflicts with its own Water Control Plan causes the Corps to operate

Allatoona Lake in wholly irrational ways. When the conservation pool is full, as defined by the guide curve, the Water Control Plan for Allatoona Lake calls for water to be evacuated from the reservoir as quickly as possible without causing flood risks downstream. The manual calls for the water to be evacuated from the reservoir, not because it is needed downstream, but to make room to store additional flood waters. It would make no sense, however, to evacuate water from a reservoir to store additional flood waters if the conservation pool—the portion of the reservoir designed to hold and store water for future use—were not completely full. Even as this complaint is being written, water is being evacuated from Allatoona Lake as rapidly as possible at a time (1) when it is not needed for any specific purpose downstream; (2) but it is needed by Cobb-Marietta; and (3) by the Corps' own accounting, Cobb-Marietta has room in its storage account to store it.

84. The effect of adopting a Storage Accounting System that considers the reservoir to be half-empty when the Water Control Plan says it is full is to prevent water supply storage accounts from ever refilling during the rainy season. This is the time when storage accounts should refill, however, as this is the time when water is most abundant. Indeed, it is the ease of refilling the reservoir—and the risk associated with overfilling the reservoir during flood events—that necessitates lowering the conservation pool to create more flood storage. To adopt a rule

making it impossible to refill at precisely the time when it would be easiest and most important to refill is arbitrary and capricious in the extreme.

85. This feature of the Storage Accounting System also allows the Corps to encroach on Cobb-Marietta's storage space. If Cobb-Marietta's virtual storage account is empty at a time when its physical storage space is full, it follows that the Corps is using the storage space that Cobb-Marietta bought and paid for to hold water for other users, or itself, without Cobb-Marietta's consent.

86. *Third*, like the Corps' 2007 draft, the Storage Accounting System directly conflicts with the Corps' own Water Control Plan for Allatoona Lake by ignoring seasonal variations in volume of the conservation pool—and wrongly assuming that the volume of the conservation pool is constant—despite the fact that the Water Control Plan states unambiguously that it is not.

87. As a result of this error, the Corps' Storage Accounting System arbitrarily allocates a fixed 4.61% of inflows to Cobb-Marietta, which is based on Cobb-Marietta's share of conservation storage at the maximum summertime elevation of 840 feet. It does this even though Cobb-Marietta's proportional share of the conservation pool is not constant, but rather increases to as much as 10.96% during the winter when the top of the conservation pool is lowered to elevation 823 feet.

88. These errors in the Corps' Storage Accounting System cause the Corps to significantly overstate Cobb-Marietta's use of storage in Allatoona Lake and to erroneously conclude that Cobb-Marietta has exceeded its storage allocation.

89. Between October 19, 2016 and the present, the Corps sent numerous communications to Cobb-Marietta incorrectly asserting that Cobb-Marietta's storage in the reservoir is low or even completely empty, with balances falling as low as negative 23.79%. Contrary to the Corps' assertions, however, at no point since the Corps renewed its Storage Accounting System has Cobb-Marietta's storage in Allatoona Lake been empty. For example:

a. On October 19, 2016, the Corps wrote to Cobb-Marietta regarding the status of its storage account in Allatoona Lake. The Corps stated: "Our analysis of storage usage indicates that as of October 17, 2016, CCMWA had 32% of storage remaining." However, on October 17, 2016, Allatoona Lake was at elevation 835.31 feet and above the guide curve for the project. The reservoir was therefore in the flood pool, with 3,310 acre-feet of water in flood storage, and conservation storage in the project was completely full. Accordingly, contrary to the Corps' claims, Cobb-Marietta's share of the conservation pool must also have been full as of that date.

b. On November 3, 2016, the Corps wrote to Cobb-Marietta regarding the status of its storage account in Allatoona Lake. The Corps stated: “Our analysis of storage usage indicates that as of October 31, 2016, CCMWA had 18.48% of storage remaining.” However, on October 31, 2016, Allatoona Lake was at elevation 834.44 feet, just 0.36 feet from the guide curve for the project and the top of the conservation pool. Contrary to the Corps’ claims, Cobb-Marietta had at least 12,655 acre-feet of water in its storage space in Allatoona Lake on October 31, 2016, meaning that Cobb-Marietta’s storage was 96.31% full as of that date.

c. On November 21, 2016, the Corps wrote to Cobb-Marietta regarding the status of its storage account in Allatoona Lake. The Corps stated: “Our analysis of storage usage indicates that as of [November] 15, 2016, CCMWA had 8.08 % of storage remaining.” However, on November 15, 2016, the reservoir was at elevation 833.27 feet, less than 1.5 feet below the guide curve for the project and the top of the conservation pool. Contrary to the Corps’ claims, Cobb-Marietta had at least 11,964 acre-feet of water in its storage space in Allatoona Lake on November 15, 2016, meaning that Cobb-Marietta’s storage was 91.05% full as of that date.

d. On December 15, 2016, the Corps wrote to Cobb-Marietta regarding the status of its storage account in Allatoona Lake. The Corps stated:

“Our analysis of storage usage indicates that as of December 4, 2016, CCMWA had -5.49 % of storage remaining.” However, on December 4, 2016, Allatoona Lake was at elevation 831.48 feet and above the guide curve for the project. The reservoir was therefore in the flood pool, with 15,045 acre-feet of water in flood storage, and conservation storage in the project was completely full. Accordingly, contrary to the Corps’ claims, Cobb-Marietta’s share of the conservation pool must also have been full as of that date.

e. On December 15, 2016, the Corps wrote to Cobb-Marietta regarding the status of its storage account in Allatoona Lake. The Corps stated: “Our analysis of storage usage indicates that as of December 11, 2016, CCMWA had -9.33 % of storage remaining.” However, on December 11, 2016, Allatoona Lake was at elevation 829.80 feet and above the guide curve for the project. The reservoir was therefore in the flood pool, with 15,297 acre-feet of water in flood storage, and conservation storage in the project was completely full. Accordingly, contrary to the Corps’ claims, Cobb-Marietta’s share of the conservation pool must also have been full as of that date.

f. On December 21, 2016, the Corps wrote to Cobb-Marietta regarding the status of its storage account in Allatoona Lake. The Corps stated: “Our analysis of storage usage indicates that as of December 18, 2016, CCMWA

had -13.48 % of storage remaining.” However, on December 18, 2016, Allatoona Lake was at elevation 827.16 feet and above the guide curve for the project. The reservoir was therefore in the flood pool, with 7,126 acre-feet of water in flood storage, and conservation storage in the project was completely full. Accordingly, contrary to the Corps’ claims, Cobb-Marietta’s share of the conservation pool must also have been full as of that date.

g. On January 10, 2017, the Corps provided the status of “CCMWA’s storage account ... remaining for calendar year 2016 through December 18th, December 25th, and December 31st.” The Corps stated: “Our analysis of storage usage indicates that as of December 18, 2016, CCMWA had -14.91% of storage remaining, -20.18% of storage remaining as of December 25, 2016, and -23.79% of storage remaining as of December 31, 2016. However, on each of the dates referenced in the Corps’ communication, Allatoona Lake was above the guide curve for the project. The reservoir was therefore in the flood pool, with as much as 7,126 acre-feet of water in flood storage, and conservation storage in the project was completely full. Accordingly, contrary to the Corps’ claims, Cobb-Marietta’s share of the conservation pool must also have been full on each of the dates referenced.

h. On January 10, 2017, the Corps also wrote to Cobb-Marietta regarding the status of its storage account in Allatoona Lake for the first week of 2017. The Corps stated: “Our analysis of storage usage indicates that as of January 6, 2017, CCMWA had -21.64% of storage remaining.” However, on January 6, 2017, Allatoona Lake was at elevation 824.86 feet and above the guide curve for the project. The reservoir was therefore in the flood pool, with 7,336 acre-feet of water in flood storage, and conservation storage in the project was completely full. Accordingly, contrary to the Corps’ claims, Cobb-Marietta’s share of the conservation pool must also have been full as of that date.

i. Most recently, on January 31, 2017, the Corps wrote to Cobb-Marietta, stating: “Our analysis of storage usage indicates that as of January 29, 2017, CCMWA had -24.00% of storage remaining.” However, on January 29, 2017, Allatoona Lake was at elevation 828.05 feet and above the guide curve for the project. The reservoir was therefore in the flood pool, with 22,579 acre-feet of water in flood storage, and conservation storage in the project was completely full. Accordingly, contrary to the Corps’ claims, Cobb-Marietta’s share of the conservation pool must also have been full as of that date.

90. After receiving the communications from the Corps described above, Cobb-Marietta wrote to the Corps on October 19, 2016, November 17, 2016, and

again on January 31, 2017, regarding its flawed Storage Accounting System.

Copies of Cobb-Marietta's correspondence are attached as Exhibits B, C, and D, respectively.

91. As of the date of this Complaint, the Corps has not responded to Cobb-Marietta's letters or ever provided a justification for its Storage Accounting System at Allatoona Lake.

**The Corps' Failure to Comply with the National
Environmental Policy Act**

92. The National Environmental Policy Act ("NEPA") requires federal agencies to develop an environmental impact statement ("EIS") before undertaking any major federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

93. If the Corps finds that an EIS is not required because a proposed action will not significantly affect the quality of the human environment, the Corps "shall prepare an environmental assessment" ("Environmental Assessment") and properly make a finding of "no significant impact," explaining the agency's decision. 40 C.F.R. § 1501.3(a); 40 C.F.R. § 1508.9(a)(1); 33 C.F.R. § 230.10. Any finding of no significant impact must explain the basis for the Corps' conclusion that an action will not have a significant impact on the human environment. 40 C.F.R. § 1508.13.

94. The Corps has never analyzed the effects of adopting the Storage Accounting System as required by the National Environmental Policy Act. It has not followed any of the procedures required by that statute, including preparing either an Environmental Assessment or an Environmental Impact Statement.

95. The Corps did prepare an Environmental Impact Statement in conjunction with its recent update of the Master Manual for the Alabama-Coosa-Tallapoosa River Basin, but that document expressly disclaimed consideration of alternative Storage Accounting Systems.

96. While not considering alternatives to the Storage Accounting System, the Environmental Impact Statement and Record of Decision for the ACT Water Control Manual do recognize that the Storage Accounting System will have significant social and environmental impacts. Indeed, these documents recognize that the Storage Accounting System the Corps has adopted will result in Cobb-Marietta experiencing “frequent shortages of large amounts,”³ with significant shortages occurring in about one out of every two years.⁴

³ See Final Environmental Impact Statement, Update of the Master Water Control Manual for the Alabama-Coosa-Tallapoosa River Basin, Vol. IV, Appx. C at 15 (Oct. 2014) (“Final ACT EIS”).

⁴ See *id.* at 17.

97. These shortages would not occur if the Corps honored the State's allocation of made inflow to Cobb-Marietta and incorporated this allocation into the Storage Accounting System. For that reason, Cobb-Marietta and the State of Georgia requested that the Corps study reasonable alternatives to the Storage Accounting System that correct the flaws described in this Complaint.

98. The Corps, however, refused to study or consider these or any other alternatives to its Storage Accounting System when it updated the Master Water Control Manual for the ACT Basin, claiming that changes to its Storage Accounting System were "not consistent" with the purpose and need for the updated manual. Similarly, in litigation concerning that decision, the Corps has asserted that it has no obligation to study either changes to its Storage Accounting System or the impacts of water supply shortages resulting from its Storage Accounting System.

99. The Corps cannot avoid evaluating the impacts of the Storage Accounting System it has adopted. In light of the Corps' refusal to conduct any analysis of its Storage Accounting System in connection with its update to the Master Water Control Manual for the ACT Basin, NEPA mandates that the Corps conduct an independent analysis of the impacts resulting from its Storage

Accounting System at Allatoona Lake. The Corps' attempt to avoid the analysis required under NEPA is unlawful.

**The Corps' Storage Accounting Rule
Has Directly Harmed Cobb-Marietta**

100. Cobb-Marietta depends upon its storage in Allatoona Lake to meet the water supply needs of more than 900,000 people. This requires that the Corps allocate natural inflows into Allatoona Lake in a manner that is both fair and logical, and that Cobb-Marietta be able to utilize its existing storage in Allatoona Lake to store made inflows allocated to it by the State of Georgia.

101. If Cobb-Marietta is unable to utilize its existing storage space in this manner, Cobb-Marietta will not be able to meet the current or future water needs of its service area without constructing very significant new water supply infrastructure, projected to cost hundreds of millions of dollars. This construction, along with the economic, social and environmental impacts it will necessarily involve, would be unnecessary if a lawful and correct Storage Accounting System is implemented at Allatoona Lake.

102. Furthermore, the Corps has repeatedly relied upon its unlawful Storage Accounting System at Allatoona Lake to conclude that Cobb-Marietta is "violating" its existing 1963 Contract. For example:

a. The Corps has unambiguously stated that it “expects” Cobb-Marietta to conform its conduct to the Corps’ Storage Accounting System, and to limit its withdrawals from Allatoona Lake to the amount of water available in Cobb-Marietta’s storage according to the Corps’ calculations.

b. The Corps has asserted that Cobb-Marietta has violated its Contract in sworn testimony before the United States Congress. This testimony occurred in oversight hearings held by the Senate Environment and Public Works Committee expressly for the purpose of examining, and developing potential legislation regarding, the Corps’ management of Allatoona Lake and its failure to “enforce” Cobb-Marietta’s Contract.

c. The Corps has stated that Cobb-Marietta has “violated” its Contract in litigation pending in the federal courts. In that litigation, the Corps relied upon its unlawful Storage Accounting System and purported Contract “violations” to argue that the Corps was not required to study potential water shortages in Cobb-Marietta’s service area resulting from its Storage Accounting System because it was entitled to assume that Cobb-Marietta would not use an “amount of storage beyond what [it is] legally allowed to store.”

103. The Corps’ application of its unlawful Storage Accounting System, and its determinations that Cobb-Marietta has violated its 1963 Contract, have

caused significant uncertainty regarding the reliability of Cobb-Marietta's water supply and its ability to meet the water supply needs of its wholesale customers. As a result, Cobb-Marietta's second-largest wholesale customer (Paulding County) has commenced construction of its own water supply reservoir located downstream of Allatoona Lake, with an anticipated cost of \$215 million to rate payers in Paulding County. Construction of this reservoir is expected to be completed by 2019, after which time Paulding County's purchases from Cobb-Marietta will be cut by 98%, and Cobb-Marietta's revenues from those purchases will be reduced by a similar amount.

**Count I: Judicial Review of the Corps'
Adoption of the Storage Accounting System**

104. Cobb-Marietta incorporates by reference the allegations set forth in paragraphs 1 through 103 of this Complaint.

105. The Corps has adopted and implemented a "Storage Accounting System" to determine how much water is held in storage for Cobb-Marietta and other users at Allatoona Lake.

106. The Corps finalized, adopted and implemented the Storage Accounting System within six years of the date of the filing of this Complaint.

107. The Corps' decision to adopt the Storage Accounting System that is currently being used at Allatoona Lake constitutes final agency action subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 706.

108. The Corps' Storage Accounting System is arbitrary and capricious, an abuse of discretion, and contrary to law, for reasons that include the following:

a. Notwithstanding that the State of Georgia has allocated to Cobb-Marietta the exclusive right to store and utilize certain "made inflows" that are discharged into Allatoona Lake, the Storage Accounting System fails to "credit" these made inflows to Cobb-Marietta's storage account. The result is both to deprive Cobb-Marietta of water (made inflows) and water rights (the right to store made inflows) granted to Cobb-Marietta by the State of Georgia and to redistribute those made inflows to other users (namely the Corps itself) who paid nothing to produce them.

b. By countermanding the State's allocation of water rights to Cobb-Marietta, the Storage Accounting System illegally encroaches on the State's jurisdiction and authority to allocate water rights within the State of Georgia.

c. The Storage Accounting System arbitrarily and capriciously allows for Cobb-Marietta's storage account to be empty at times (such as now) when the conservation pool is full.

d. The Storage Accounting System arbitrarily and capriciously ignores seasonal variations in the volume of the conservation pool, thus depriving Cobb-Marietta of more than 50% of the inflow to which it is entitled based on a *pro rata* allocation of natural inflow.

109. Cobb-Marietta has suffered a legal wrong and has been adversely affected and aggrieved by the Corps' adoption of its unlawful Storage Accounting System at Allatoona Lake.

110. The Corps' Storage Accounting System at Allatoona Lake should be held unlawful and set aside because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Claim II: Violation of Structural Federalism Provisions of Tenth Amendment

111. Cobb-Marietta incorporates by reference the allegations set forth in paragraphs 1 through 110 of this Complaint.

112. The States have authority to allocate water rights within their borders unless the State's authority has been preempted by federal law.

113. Pursuant to Georgia law, the State of Georgia has allocated made inflows to Allatoona Lake to Cobb-Marietta. This allocation is currently set forth in Georgia EPD Permit No. 008-1491-05 (Modified Nov. 7, 2014).

114. The State of Georgia's general authority to allocate water rights at Allatoona Lake is not preempted by any federal law.

115. The State of Georgia's specific allocation decision in Permit No. 008-1491-05 is not preempted by any federal law.

116. The Corps has refused to acknowledge or recognize the State of Georgia's decision to allocate made inflows to Cobb-Marietta. The Corps has ignored and overridden the State of Georgia's grant of water rights, and instead allocated the same water to other users, including the Corps itself.

117. The Corps' decision to override the State of Georgia's water allocation authority at Allatoona Lake unlawfully usurps authority retained by the State of Georgia under the Tenth Amendment to the United States Constitution.

118. The Corps' Storage Accounting System should be declared unlawful, and the Corps should be enjoined from applying it to Cobb-Marietta, because it unlawfully usurps the power to allocate water rights within the State of Georgia that has been reserved to the State under the Tenth Amendment to the United States Constitution.

Claim III: Violation of NEPA

119. Cobb-Marietta incorporates by reference the allegations set forth in paragraphs 1 through 118 of this Complaint.

120. The Corps has adopted and implemented the “Storage Accounting System” to determine how much water is held in storage for Cobb-Marietta and other users at Allatoona Lake.

121. The Corps finalized, adopted and implemented the Storage Accounting System within six years of the date of the filing of this Complaint.

122. The decision to adopt the Storage Accounting System constitutes final agency action subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 706.

123. The National Environmental Policy Act requires that Corps either prepare an Environmental Impact Statement, or make a properly supported finding of no significant impact, prior to adopting and implementing the Storage Accounting System. 42 U.S.C. § 4332; 40 C.F.R. § 1501.3(a); 40 C.F.R. § 1508.9(a)(1); 40 C.F.R. § 1508.13.

124. The Corps has not prepared an Environmental Impact Statement analyzing the effects of its decision to adopt and implement the Storage Accounting System.

125. The Corps has not prepared an Environmental Assessment upon which the Corps could find that implementing the Storage Accounting System would have no significant impacts.

126. Cobb-Marietta has suffered legal wrong and has been adversely affected and aggrieved by the Corps' failure to prepare a lawful Environmental Impact Statement and/or lawful Environmental Assessment and finding of no significant impact.

127. The Storage Accounting System should be held unlawful and set aside because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and violates the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, and implementing regulations.

WHEREFORE, the Cobb County-Marietta Water Authority prays that this Court:

- a. Issue an Order vacating and setting aside the Corps' Storage Accounting System at Allatoona Lake;
- b. Issue an Order declaring the Storage Accounting System to be unlawful, and enjoining the Corps from implementing a Storage Accounting System at Allatoona Lake that grants water rights to users of the reservoir in contradiction to the State of Georgia's allocation of water rights;
- c. Award Cobb-Marietta its attorneys' fees and costs; and

d. Award such other and further relief as the Court may deem just and proper to protect the interests of Cobb-Marietta.

Respectfully submitted this 1st day of February, 2017.

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