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## Georgia v. United States Army Corps of Eng'rs, 302 F.3d 1242 (11th Cir. 2002)

Lisa M. Thompson

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The court found three sources of the discharged water: (1) rainfall; (2) groundwater withdrawn into the canals from the areas being drained; and (3) seepage from the lake. Additionally, it found that each of these sources fell within the CWA exemptions as either “agricultural storm water discharge or “return flows from irrigation agriculture.” Closter Farms was thus not required to obtain a permit for any waters discharged into Lake Okeechobee that originated on its lands.

Finally, the court found insufficient evidence in the record to conclude that Closter Farms discharged non-agricultural pollutants into Lake Okeechobee. The only testimony that supported such a conclusion was from an environmental manager with the Florida Department of Environmental Protection. Without identifying any studies or research, the manager tentatively concluded that runoff from the waste treatment plant, the county road and the county park likely contributed pollutants. The court found such evidence insufficient to conclude these sources discharged any pollutants, affirming the district court’s ruling.

*Brian L. Martin*

**Georgia v. United States Army Corps of Eng’rs, 302 F.3d 1242 (11th Cir. 2002)** (holding that parties can intervene as a matter of right when the parties have a legally protected interest in water quantity, such as, the right to an equitable apportionment of water flowing through the interstate stream and the right to hydropower production).

The State of Georgia (“Georgia”) sued the U.S. Army Corps of Engineers (“Corps”) in the United States District Court for the Northern District of Georgia to compel increased releases of water from a reservoir managed by the Corps. The district court denied a motion to intervene submitted by State of Florida (“Florida”) and Southeastern Federal Power Customers, Inc. (“SeFPC”). The Court of Appeals for the Eleventh Circuit reversed and held that both Florida and SeFPC could intervene as a matter of right.

The Chattahoochee River originates in Georgia and becomes the Apalachicola River at the Florida Border. The Flint River joins with the Chattahoochee and the Apalachicola Rivers to form the Apalachicola-Chattahoochee-Flint Basin (“ACF Basin”). Florida, Georgia and Alabama share the water supply of these interconnected rivers, and in 1997 enacted the Apalachicola-Chattahoochee-Flint (“ACF”) Compact. The ACF Compact required the states to negotiate water allocation, however, no agreement was ever reached. In the 1940s, Congress authorized the Corps to build and manage the Buford dam across the Chattahoochee River. The resultant lake, Lake Lanier, is within the ACF Basin and thus subject to the ACF Compact. In 2000,

Georgia made a request to the Corps for increased water releases from Buford Dam and increased withdrawals from Lake Lanier to accommodate the municipal and industrial needs of Atlanta. After the Corps failed to respond for nine months, Georgia filed suit against the Corps. Subsequently, Florida and SeFPC filed a motion to intervene. The district court denied both motions to intervene. The appellate court reviewed *de novo*.

The issue before the appellate court was whether the Federal Rules of Civil Procedure provided for intervention as a matter of right for Florida and/or SeFPC. Before a party can intervene as a matter of right, it must: (1) make a timely motion to intervene; (2) show that it has an interest in the subject matter of the suit; (3) show that its ability to protect that interest may be impaired by the disposition of the suit; and (4) show that the existing parties in the suit cannot adequately protect that interest.

Florida made a timely motion to intervene and thereby satisfied the first requirement. Turning to the second requirement, the court concluded that Florida possessed the required interest in the subject matter of the litigation. Even though the remedy sought by Georgia would occur within Georgia's borders, it would have a practical effect on the quantity and quality of the Apalachicola River, water to which Florida had a right under the ACF Compact. Additionally, the court concluded that irrespective of the ACF Compact, Florida had a protectable interest because a state has a right to an equitable apportionment of water flowing through an interstate stream located within its borders.

In reference to the third requirement, the court concluded that Florida's interest would be impaired by disposition of the suit because Florida did not have access to the two alternative means suggested by Georgia—the ACF Compact negotiations and filing an original action in the United States Supreme Court. Florida did not have a clear and compulsory right to be heard by the Supreme Court, nor did Florida have a remedy under the ACF Compact since a water allocation agreement had not been finalized. Under the last requirement, the proposed intervener must show that the existing parties could not adequately represent their interest, but this burden is minimal. The court of appeals concluded the Corps could not represent Florida's interest because the Corps had no independent stake in the quantity of water reaching the Apalachicola River.

The appellate court also allowed SeFPC, the hydropower purchaser, to intervene as a matter of right because it also met the four criteria for intervention. First, SeFPC had a legally protectable interest in the production of hydropower at the dam because the amount and power of water that SeFPC received from Buford Dam would be diminished if Georgia's request was granted. Secondly, a ruling in this case would have a *stare decisis* effect on SeFPC's separate suit (filed several months prior to the subject case) against the Corps; therefore, the court concluded that SeFPC's interests would be impaired by the

denial of intervention. Thirdly, the Corps could not adequately represent the purchaser's economic interests, and lastly, the motion to intervene was timely.

*Lisa M. Thompson*

## UNITED STATES DISTRICT COURTS

**Cal. Sportfishing Prot. Alliance v. Diablo Grande, Inc., 209 F. Supp. 2d 1059 (E.D. Cal. 2002)** (holding that plaintiff satisfied standing and subject matter jurisdiction requirements of the Clean Water Act, and classifying general construction activity as a point source).

California Sportfishing Protection Alliance ("CSPA") was a California nonprofit public benefit corporation with an estimated membership of 10,000. Diablo Grande, Inc. ("Diablo") was a limited partnership building a golf resort on 29,500 acres of land west of Patterson, California. CSPA filed suit against Diablo for violating the conditions of their General Permit for Storm Water Discharges Associated with Construction Activity ("General Permit") in the United States District Court for the Eastern District of California. CSPA claimed this violation introduced pollutants to Salado Creek. CSPA sought an injunction ordering Diablo to: (1) operate its construction in compliance with their state permit; (2) provide CSPA with proof of its compliance with the Clean Water Act ("CWA") for a one year period; (3) contribute payments to a court-approved environmental remediation fund; (4) pay civil penalties on a per day of violation basis; and (5) pay CSPA's attorneys' fees. Both sides filed motions for summary judgment pertaining to: standing; subject matter jurisdiction; the definition of "navigable water of the United States"; and defining what material facts were required of a party asserting a violation of the CWA.

CSPA asserted the following three arguments: (1) its members had standing to sue in their own right; (2) the interests at issue were germane to the organization's purpose; and (3) neither the claim nor the relief requested required individual member participation. CSPA brought its complaint on behalf of associate members. Since Diablo could not show that at least one of CSPA's members would not have standing in this suit, the court found that CSPA had standing to sue. It also held that CSPA's state purpose did not need include a certain activity in order for that activity to be germane to CSPA's purpose. It followed that enforcement of the CWA was sufficiently germane to CSPA's purpose to justify standing. Diablo alternately argued that CSPA lacked standing because there was no evidence of any fish in Salado Creek. However, CSPA offered evidence establishing the presence of both bluegill and bullhead fish in the creek and