

**Concept Paper for
Establishing a Comprehensive
Water Use Permitting Program
October 12, 2001**

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Respectfully Submitted by Mobile Bay Watch, Inc./Mobile BayKeeper

This paper is produced at the request of the Governor's Alabama Commission on Environmental Initiatives' Committee on Water Withdrawal Permitting and makes the case for establishing a comprehensive water use permitting program in Alabama. Special thanks are extended to the Office of Water Resources, the Office of the Attorney General, Alabama Rivers Alliance, ALFA, Alabama Forestry Association, and many others for their guidance, information, leadership and assistance in developing this white paper.

Overview:

The Water Resources Act of 1993 does not grant the authority to any agency of the State of Alabama to develop, implement and enforce a water use permitting program. Therefore, in order to establish such a program, the State of Alabama must pass new legislation to either amend or repeal and replace the current Resources Act.

A comprehensive water use permitting program could be placed in the Alabama Office of Water Resources (OWR) or within the Alabama Department of Environmental Management (ADEM). This white paper makes the case for the former. It is recognized that regulatory environmental functions are already relatively fragmented in the State of Alabama and this proposal, if implemented as recommended, would perpetuate some level of continued fragmentation. Consideration should therefore, be given to a comprehensive, long-term strategy to combine environmental regulatory agencies to increase governmental efficiency and effectiveness. The plan that appears to require the least effort and provide the best protection for our water resources, however, is a plan that creates a permitting system complete with enforcement within the OWR.

Current Water Use Law, Regulation and Policy

Prior to the Alabama Water Resources Act of 1993 (Code of Alabama, 1975 §9-10B-1 through §9-10B-30), Alabama had no mechanism to track water use at the state level. The Alabama Water Resources Act established the OWR within the Alabama Department of Economic and Community Affairs (ADECA) and established the Alabama Water Resources Commission to advise the OWR, hear appeals, and to adopt, amend and repeal rules to implement the law. The law charges the OWR with a broad range of responsibilities including: "to develop long-term strategic plans for the use of the waters of the state; to implement quantitative water resource programs and projects for the coordination, conservation, development, management, use and understanding of the waters of the state; [and] to participate on behalf of the state in discussions between or among the state, any federal officer, department, or agency, or any other state, or any person concerning the waters of the state." The law requires water users withdrawing more than 100,000 gallons per day from any water of the state (defined broadly to include surface and

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groundwater) to file for a “certificate of beneficial use” (CBU), quantify usage, and report on that usage annually to the OWR.

The law grants only limited authority to the OWR to allocate limited water resources where water deficits or scarcity exists relative to water demands. In the case of a concern about water depletion, the OWR can engage in a “Critical Use Study” (CUS) under Section 21 of the law. The CUS may be accompanied by recommendations regarding the appropriate actions that should be taken in order to manage an area’s limited water resources. The OWR, once it has completed a CUS, submits the study to the Water Resources Commission with its recommendations. The Commission may then initiate rulemaking to declare a basin as “capacity-stressed.” The Commission is required then to “further initiate rulemaking authorizing only the implementation of those actions recommended by the OWR or such other action as the Commission determines to be reasonably necessary to protect the interests of the people of the state with respect to the waters of the state.” (9-10B-21)

Where the Commission acts to declare an area of the state as capacity stressed, Section 22 of the law requires the Commission to then initiate rulemaking to adopt rules governing the restriction of water consumption where it determines that “the implementation of a use restriction alternative is necessary because the aggregate existing or reasonably foreseeable uses of the waters of the state in such an area exceeds or will exceed the availability of such waters and is required to protect the availability of the waters of the state within such area....”

The law becomes particularly cumbersome at Section 23, where the responsibility and authority for implementing any regulations developed by the Water Resources Commission is vested in the Alabama Department of Environmental Management acting through its Environmental Management Commission. In summary, no regulatory action can be taken to restore or protect a waterway until after a Critical Use Study is complete and two Commissions have adopted rules and regulations creating a regulatory program.

Advantages and Disadvantages of the Current Law, Regulation and Policy

The current law creates only a limited process for quantifying existing water use and a very cumbersome process for implementing water use restrictions where such restrictions are necessary. Most importantly, the law does not establish an instream flow policy. Therefore, there is no mechanism to protect a waterway from being “pumped dry” in Alabama. Even where water usage does not completely de-water a stream, over-consumption of water in Alabama can and does deplete instream flows to the point that instream pollution concentrations can be excessive. As a result, over consumption of water can cause or contribute to water quality standards violations in a number of Alabama waters.

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An advantage of the law is that it defines a process for regulating water consumption where necessary, through the C.U.S. The C.U.S. process also begins to get streams monitored and/or studied in a more complete fashion than any other process presently on record.

Comprehensive Permitting

For a truly comprehensive permitting program, the State of Alabama should consider writing legislation, that at a minimum will achieve the following:

1. Establish a grandfather-type timeline for CBU holders to get their permits and for those systems that use 50,000-99,999 gallons per day to obtain their CBUs.
2. Replace the CBU with a permit for water systems that withdraw more than one million gallons per day from any source or withdraws water from any surface water source with a 7Q10 flow of equal to or less than 50 cfs.
3. Retain the CBU system for small withdrawals (50,000 gallons per day up to 999,999 gallons per day) from surface waters with adequate flow to support such usage.
4. Articulate the criteria to be used by the state to impose limitations on water use permits.
5. Create in-stream flow guidelines to be used for purposes of guiding the water use permitting program and apply these guidelines in permitting decisions.
6. Establish enforcement and funding mechanisms.

Second, the Governor should work closely with the OWR to hire staff or consultants in order to establish the capacity to implement the mandates of an amended Water Resources Act.

Attached you will find an amended version of the Water Resources Act to become a Water Withdrawal permitting system. This version does not tackle each point listed above, but instead, focuses on the changes necessary to replace the CBU system to a permitting system.

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Conclusion

This paper outlines a water use permitting system which would have the following benefits:

1. It would eliminate part of the current law that requires the sharing of water quantity policy by two agencies. Putting all water quantity permitting and enforcement in one agency would make water quantity regulation in Alabama more efficient and effective.
2. It would place no more than the minimum necessary regulatory burden on water users in order to efficiently manage the water of the state. In most cases and during most times of the year, the burden of securing a permit would be no higher than the burden of securing a Certificate of Beneficial Use and water usage. In many cases, water usage would not need to be restricted by permit.
3. It would decrease unmonitored water use from 100,000 per day to 50,000 per day water usage, but not make it difficult for those using less than 1 mgd to withdraw.
4. The project allows for present holders of CBU's who use more than 1 mgd to simply replace their CBU with a permit.
5. Those users who've never received CBU's and withdraw between 50,000 and 99,999 will have two years to get their permit.
6. It would improve Alabama's standing in any interstate water allocation negotiations or litigation in the future.
7. It would create guidelines for balancing water usage to allow for out of stream uses while protecting instream flows.