

**In The  
Supreme Court of the United States**

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STATE OF FLORIDA,

*Plaintiff,*

v.

STATE OF GEORGIA,

*Defendant.*

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Before the Special Master

Hon. Ralph I. Lancaster

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**STATUS REPORT OF THE STATE OF GEORGIA  
NOVEMBER 6, 2015**

This report constitutes the tenth monthly status report filed by the State of Georgia pursuant to Section 4 of the Case Management Plan.

**I. GENERAL STATUS**

Georgia is on track to complete its production of documents and data consistent with the deadlines set by the Case Management Plan. Georgia also continues to review the tremendous amount of documents and data produced by Florida, a substantial amount of which was produced in the final weeks of the document-discovery period. As Georgia previously reported to the Special Master, the back-loaded nature of Florida's production has prejudiced Georgia's ability to prepare for depositions. In fact, Georgia requested information about further Florida productions in advance of the November 2 teleconference with the Special Master, but it was only after the teleconference that Florida disclosed that it would still need to produce an

additional 100,000 individual files prior to the November 10 deadline. Georgia has received the first installment of this production, totaling more than 250,000 pages, and is still awaiting an additional 25,000 (or more) files that will total an unspecified number of pages. That brings Florida's total for document production over the last two months alone to more than 2.25 million pages and more than 3.5 million pages if documents from the University of Florida are included. Notwithstanding the timing and burden of these productions, Georgia is scheduling and proceeding with depositions as expeditiously as possible, while also ensuring that it has time to review relevant documents in advance of depositions.

One further issue that is cause for concern is Florida's refusal to provide discovery regarding its alleged injuries in this case. That discovery is pivotal because Florida is required to prove harm before the Court considers the other issues involved in equitable apportionment. Florida nonetheless has long resisted providing factual support for its claimed harms in response to a specific interrogatory on the topic served on February 26, 2015. Now Florida is refusing to provide a 30(b)(6) witness on these issues, stating that it will instead provide information on alleged injuries only through interrogatory responses. But nothing in law, logic, or the rules of discovery limits Georgia to only using interrogatories to probe Florida's alleged injury; Florida can and must provide deponents to testify on that subject. Georgia will await the interrogatory responses that Florida seeks to use to block any 30(b)(6) testimony so it can fully evaluate Florida's position, but Georgia will likely need to raise this issue with the Special Master if Florida continues to refuse to provide 30(b)(6) testimony on this critically important topic. The precise nature and extent of Florida's alleged injuries is a threshold issue for its equitable apportionment claims, and by withholding critical information regarding those alleged injuries

Florida is prejudicing Georgia's ability to defend itself. Further details about Georgia's discovery efforts to date are set forth below in Section III.

## **II. UNRESOLVED DISPUTES AND OTHER CONCERNS**

### **A. 30(b)(6) Witness on Injury**

As described above, Florida has refused to designate a 30(b)(6) witness to provide testimony regarding its alleged injuries. Injury is a threshold issue in this case. Before the Court considers equitable apportionment, Florida is required to prove that it is suffering some "real or substantial injury or damage" as a result of Georgia's upstream water use. *Connecticut v. Massachusetts*, 282 U.S. 660, 672 (1931); *Colorado v. New Mexico*, 459 U.S. 76, 87 nn. 12 & 13 (1982). Yet Florida has refused to provide a witness who can testify about what specific injuries Florida is claiming in this case and instead has insisted that Georgia's discovery be limited to Florida's written interrogatory responses. Those responses, which to date have been wholly insufficient, would not provide a basis for denying a 30(b)(6) deposition in any event. Georgia will await receipt of Florida's interrogatory responses next week, but Georgia cannot foresee any situation where interrogatory responses would be a valid substitute for a 30(b)(6) deposition on alleged injury. If Florida does not reverse its position, Georgia anticipates that it will need to seek relief from the Special Master.

### **B. Document and Data Production Concerns**

As Georgia informed the Special Master during the November 2, 2015 conference, Georgia is currently reviewing and assessing Florida's recent and voluminous productions. Most recently, on November 3, 2015, Florida produced an additional 250,000 pages of documents. As Georgia continues to evaluate these productions for gaps or omissions, it will raise any issues or concerns promptly with Florida.

### **C. Models**

Over the last month, Florida and Georgia have met-and-conferred about two models produced to Florida.

The first model was produced by a Georgia Tech custodian and relates to salinity in Apalachicola Bay. In the interest of cooperation, Georgia undertook to collect this model (which was housed overseas) and produced it to Florida on October 9, 2015. Georgia devoted substantial resources to copying the model, which was over 1 Terabyte, and to producing it in native form with all associated input and output files. Georgia produced the model in a manner that should have allowed Florida's experts to run the model independently. Notwithstanding these efforts, Florida has indicated that it has been having difficulty running the model. Georgia is working with its experts to assist Florida with the technical issues it claims to have.

In addition, Florida has raised technical issues with another Georgia Tech model, relating to decision support systems in the bay. Georgia has conferred with Florida and with third-party custodians in an effort to facilitate resolution of the technical issues with the model.

### **D. Dispute Regarding Professor Emails**

The parties initially met and conferred regarding concerns with emails from professors at Georgia universities in March and April 2015. Pursuant to these discussions, Florida counsel agreed that email production from University custodians would not be required. The Georgia universities relied on that representation and produced hundreds of thousands of pages of documents responsive to Florida's subpoenas, but—pursuant to the terms of its agreement with Florida—did not produce emails. Following the deposition of Dr. Martin Kistenmacher, a professor at Georgia Tech, Florida requested that Dr. Kistenmacher produce a single email folder identified by him during his deposition. On October 12, 2015, in light of the specific facts surrounding Dr. Kistenmacher's single email folder, the Special Master granted that request, and

ordered that this single email folder be produced. Georgia is currently finalizing production of this email folder and anticipates producing those materials early next week.

Notwithstanding the limited nature of the Special Master's order, Florida now insists that other, more voluminous email collections be produced from other professors, despite the parties' original agreement that Georgia universities would not be required to collect, review, and produce professor emails. As Georgia foreshadowed during the hearing on the Kistenmacher emails, Florida is indeed expanding its allegedly "limited" request in an attempt to impose much more substantial burdens on Georgia. Florida counsel agreed many months ago that email productions from these professors would not be required but has now reversed itself, at a time when Georgia's resources are already heavily burdened by Florida's own back-loaded and voluminous productions. Specifically, without a substantially narrowed request from Florida, reviewing and producing emails from just one of Florida's requested professor custodians could require reviewing thousands of email files. Though Georgia stands by its position that Florida explicitly waived the right to seek such emails, Georgia has continued to meet and confer with Florida to see if there is a potential compromise that would avoid the burden of reviewing an unduly voluminous and burdensome amount of email so late in the discovery process in the case.

**E. Unanswered Requests Regarding Water Use Permit Audits and Oyster Assessment Reports**

On October 7, 2015, Georgia requested that Florida confirm whether it had produced all Water Use Permit Audits and Oyster Assessment Reports, both of which are indisputably responsive to Georgia's document requests. With regard to Oyster Assessment Reports, Florida only provided additional documents and information regarding those reports today, November 6, 2015. Georgia is currently reviewing those additional documents and confirming with Florida

that no additional Oyster Assessment Reports exist that have not been produced. Georgia has received no additional information or documents regarding Water Use Permit Audits.

**F. Further Supplementation of Written Discovery Regarding Florida's Harms Requested**

In the course of providing its own supplemental written discovery responses and requesting updated responses from Florida, Georgia has asked since the June meeting that Florida clarify the scope and extent of its alleged harm by specifically identifying all species or industries that it believes have been harmed by Georgia's conduct so that Georgia can focus its discovery, depositions, and expert analysis on Florida's actual alleged harms. Florida's revised interrogatory response dated October 2, 2015, did not address Georgia's request. Florida has yet to identify the specific species allegedly harmed by Georgia's conduct, or the extent of Florida's alleged harm (whether ecological or economic). It is imperative that Florida respond to Georgia's request, as understanding the scope of the alleged harm is critical as discovery moves forward.

**III. STATUS OF GEORGIA'S DISCOVERY EFFORTS**

**A. Written Discovery Between Parties**

Georgia and Florida each served a third set of interrogatories, as well as their first sets of requests for admission, on September 25, 2015.

Georgia filed its objections to Florida's requests for admission and third set of interrogatories on October 26, 2015. Georgia's substantive responses are forthcoming. To the extent necessary, Georgia will supplement its responses to Florida's interrogatories as discovery continues.

**B. Georgia Has Met and Conferred with Other Third Parties Regarding Collection and Production of Documents**

Georgia has continued to meet and confer with third parties other than the United States in an effort to obtain responsive documents without imposing unnecessary burdens, and to schedule third-party depositions as needed. To date, Georgia has provided Florida with documents it received from 33 nonparties—nearly 1.7 million pages—in response to its subpoenas. Georgia will make its final production to Florida of documents received from third-parties in accordance with the deadline set by the Case Management Plan. A chart of the nonparty documents Georgia has received and produced to date is attached as Exhibit A.

**C. Georgia's Production of Documents and Data to Florida**

Throughout the discovery period, Georgia has produced documents and data on a rolling basis in anticipation of meeting the deadline set in the Case Management Plan. To date, Georgia has produced approximately 2.1 million pages of documents and 26 native models (approximately 240 GB of modeling files). Georgia has also produced a total of 6 native databases or database reports pertaining to Permits, Safe Dams, Agricultural Metering, Monthly Operating Reports, Agricultural Permitting, and Geological Appraisal. Georgia will make its final production of documents on or before November 10, 2015, in accordance with the Case Management Plan.

Georgia continues to dedicate substantial resources to the full-time review of documents it has collected from its own custodians, as well as documents produced by Florida, by third parties, and by the United States. Thirty-four additional attorneys were hired this month to expedite review of Florida's recent voluminous productions. In total, more than seventy full-time attorneys are now dedicated to document review for Georgia.

**D. Georgia Continues to Review and Analyze Documents and Data Produced by the United States**

The States have conferred with all federal agencies that received *Touhy* requests and subpoenas. All agencies have now produced at least some documents and data. For example:

- On May 13, 2015, the U.S. Army Corps of Engineers produced 7 native models to the States, including models pertaining to the operation of Woodruff Dam.
- On May 29, 2015, the U.S. Fish and Wildlife Service produced almost 250,000 files to the States, including electronically stored information and models.
- On May 29, 2015, the U.S. Geological Survey produced almost 30,000 files to the States, including electronically stored information and models.
- On June 25, 2015, the U.S. Department of Agriculture – National Resources Conservation Service produced two native spreadsheets of aggregate data in response to the States’ joint request.
- On July 1, 2015, the U.S. Department of Agriculture – National Agricultural Statistics Service produced five spreadsheets of aggregate data pertaining to past Censuses of Agriculture.
- On July 9, 2015, the U.S. Geological Survey produced 75 files to the States in response to the States’ joint request.
- On July 10, 2015, the U.S. Army Corps of Engineers produced 195 files to the States, including electronically stored information.
- On July 10, 2015, the U.S. Department of Commerce produced 2,789 files, including electronically stored information.
- On July 31, 2015, the U.S. Department of Agriculture – National Agricultural Statistics Service produced native spreadsheets of data in response to the States’ joint request.
- On August 5, 2015, the U.S. Fish and Wildlife Service produced 965 files responsive to the States’ joint request.
- On August 21, 2015, the U.S. Army Corps of Engineers produced 136 email files responsive to the States’ joint request.
- On August 13, 2015, the U.S. Department of Agriculture – National Resources Conservation Service produced 69 files in response to the States’ joint request.

- On August 24, 2015, the U.S. Department of Commerce – National Oceanic and Atmospheric Association (NOAA) produced 1,744 files responsive to the States’ joint request.
- On September 30, 2015, the U.S. Army Corps of Engineers produced a DVD of modeling files and electronically stored information related to the HEC-ResSim model and report used by the Corps for its draft Water Control Manual (“WCM”) released the same day.

It is Georgia’s understanding that all federal agencies have substantially completed their productions. As mentioned in last month’s report, the U.S. Army Corps of Engineers produced materials relating to the WCM and Environmental Impact Statement (“EIS”). While the Corps has maintained that this represents its final production in response to the States’ joint requests, there may still be additional materials in the Corps’ possession relating to the WCM and EIS to be produced in response to these joint requests.

#### **E. Deposition Discovery Between Parties**

Georgia and Florida continue to discuss the number, timing, and coordination of depositions of both State personnel and third parties. Florida has served 38 deposition notices or subpoenas: four on August 26, six on August 28, five on September 14, eight on September 18, four on September 21, seven on October 8, three on October 23, and a 30(b)(6) notice on Georgia on November 3. Florida has previously indicated that it intends to take a minimum of 45 depositions in this case.

Georgia has served 42 notices or subpoenas: thirteen on September 15, including a 30(b)(6) notice, three on September 24, eighteen on October 7, two on October 12, and six on October 21.

To date, Florida has taken eight depositions. Georgia has cooperated to schedule these depositions and to produce additional relevant documents for both Georgia custodians and third parties in advance of the depositions. Although Florida has complained about the timing of these

productions, that complaint is unfair because Florida only identified these additional document requests in recent subpoenas duces tecum, long after initial requests for documents were served (and in many cases, long after initial document productions were completed). Florida's characterization is also unfounded because Georgia has typically produced documents further in advance of the depositions than Florida suggests. Moreover, Florida counsel has arrived at depositions unaware that documents for the witness had been produced, when in fact those documents had been produced between one and two weeks before the deposition.

Georgia has not yet taken any depositions, in spite of its efforts and commitment to doing so. As Georgia informed the Special Master during the November 2, 2015 conference, Georgia was forced to postpone its first two depositions last week because Florida refused to produce the related agency documents sufficiently in advance of those depositions. Then, within days of the scheduled depositions, Florida made voluminous productions of key materials from, among other sources, the Northwest Florida Water Management District and the Florida Department of Environmental Protection. This has been a pattern. Although these late productions prejudiced Georgia's ability to prepare for those depositions, Georgia nonetheless offered to move forward with one of the depositions as scheduled, so long as Florida would keep the deposition open for a second day later in discovery pending review of the recent document productions. Because Florida would not agree to do so, that deposition had to be postponed. Florida and the University of Florida have also moved previously confirmed depositions that Georgia was prepared to take; Georgia understands this may happen on both sides as we coordinate multiple schedules but the fact is that Georgia has not been able to take any depositions, while Georgia has provided the opportunity for Florida to complete eight depositions. Georgia will, presumably, begin taking depositions this week, with a University of Florida oyster expert and a former official of

Florida's Department of Environmental Protection. Further depositions are scheduled in coming weeks through November and December.

#### **IV. ANTICIPATED DISCOVERY**

Georgia anticipates conducting the following discovery in the next month:

- Serving its responses to Florida's interrogatories and requests for admission;
- Producing to Florida its final production of documents and data in response to the parties' requests for production by November 10, 2015, recognizing its ongoing obligation to supplement that production as necessary;
- Producing to Florida documents in response to subpoenas duces tecum that Florida has served in connection with its deposition notices later in discovery, the scope of which are subject to objections and meet and confer between the parties;
- Producing to Florida additional third-party documents produced to Georgia in response to its subpoenas;
- Conferring with Florida about the deposition schedule and the identification of deponents to conduct deposition discovery in an orderly and efficient manner;
- Conferring with third parties about scheduling depositions;
- Taking and defending depositions.

#### **V. SETTLEMENT**

Following the meeting of the Governors and their staffs in June 2015, Georgia has reached out to Florida to try and advance a process for discussing a potential settlement of this case. Unfortunately, those efforts have not advanced and there has been no material progress on settlement since June. At this point, Georgia believes that the best way to advance the process is to engage a mediator acceptable to both sides who can create a framework for formal in-person discussions and periodic exchanges of information specifically directed to settlement. Georgia is willing to discuss mediator selection with Florida and is also open to suggestions from the Special Master on how best to proceed.

Dated: November 6, 2015

/s/ Craig S. Primis  
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**EXHIBIT A**

**DOCUMENTS RECEIVED FROM THIRD PARTIES IN RESPONSE TO GEORGIA'S  
SUBPOENAS AND PRODUCED TO FLORIDA**

<b>Third Party</b>	<b>Bates Range</b>	<b>Date Produced</b>
Alligator Point Water Resources District	APWRD_00001 to APWRD_01177	July 1, 2015
Apalachicola Bay Oyster Dealers Association	ABODA_0001 to ABODA_0081	Apr. 30, 2015
Apalachicola Chamber of Commerce	ACOC_0001 to ACOC_0195	Apr. 30, 2015
Apalachicola Riverkeeper	AR_0001 to AR_0036	Apr. 30, 2015
	AR_0000037 to AR_0116946	July 27, 2015
	AR_0116947 to AR_0221940	Sept. 28, 2015
Bay County	BAY_CO.(FL)_00001 to BAY_CO.(FL)_00009	July 1, 2015
Calhoun County	CALHOUN_CO_0001 to CALHOUN_CO_0049	Apr. 30, 2015
City of Apalachicola	City_of_Apalachicola(FL)_0001 to City_of_Apalachicola(FL)_0617	Apr. 30, 2015
City of Blountstown	BLOUNTSTOWN(FL)_00001 to BLOUNTSTOWN(FL)_01557	May 29, 2015
City of Bristol	City_of_Bristol(FL)_0000001 to City_of_Bristol(FL)_0000998	July 27, 2015
City of Carrabelle	City_of_Carrabelle(FL)_0001 to City_of_Carrabelle(FL)_0020	Apr. 30, 2015
	City_of_Carrabelle(FL)_0021 to City_of_Carrabelle(FL)_1595	July 1, 2015
City of Chattahoochee	City_of_Chattahoochee(FL)_00001 to City_of_Chattahoochee(FL)_00136	May 29, 2015
City of Cottondale	COTTONDALE(FL)_00001 to COTTONDALE(FL)_00227	May 29, 2015
City of Marianna	City_of_Marianna(FL)_00001 to City_of_Marianna(FL)_00217	July 1, 2015
City of Port St. Joe	Port_St_Joe_0000001 to Port_St_Joe_0000486	July 27, 2015
City of Wewahitchka	Wewahitchka(FL)_0000001 to Wewahitchka(FL)_0003099	July 27, 2015
Florida State University	FL_State_Univ_00001 to FL_State_Univ_00050	May 29, 2015
	FL_State_Univ_00051 to FL_State_Univ_01377	Sept. 28, 2015
Florida Sea Grant	FL_SEA-GRANT_00001 to FL_SEA-GRANT_37355	Apr. 30, 2015
	FL_SEA-GRANT_37356 to FL_SEA-GRANT_56648	May 29, 2015
	FL_SEA-GRANT_56649 to FL_SEA-GRANT_56762	Sept. 28, 2015
Franklin County	FRANKLIN_CO_0001 to FRANKLIN_CO_5512	Apr. 30, 2015
Franklin Co. Seafood Workers Association	FCSWA_00001 to FCSWA_00005	May 29, 2015
	FCSWA_00006 to FCSWA_00017	July 1, 2015

<b>Third Party</b>	<b>Bates Range</b>	<b>Date Produced</b>
Gadsden County	Gadsden_Co_0001 to Gadsden_Co_0015	Apr. 30, 2015
Jackson County	JACKSON_CO_0001 to JACKSON_CO_0062	Apr. 30, 2015
Jacob City	JACOB_CITY(FL)_00001 to JACOB_CITY(FL)_00309	July 1, 2015
Liberty County	Liberty_Co_0001 to Liberty_Co_0804	Apr. 30, 2015
Lighthouse Utility Co.	Lighthouse_Util_Co.(FL)_00001 to Lighthouse_Util_Co.(FL)_00581	July 1, 2015
Town of Alford	Town_of_Alford(FL)_00001 to Town_of_Alford(FL)_00480	May 29, 2015
Town of Altha	TOWN_OF_ALTHA(FL)_00001 to TOWN_OF_ALTHA(FL)_00163	July 1, 2015
Town of Greenwood	Town_of_Greenwood(FL)_0000001 to Town_of_Greenwood(FL)_0000019	July 27, 2015
Town of Malone	Town_of_Malone(FL)_00001 to Town_of_Malone(FL)_00181	May 29, 2015
	Town_of_Malone(FL)_00182 to Town_of_Malone(FL)_00284	July 27, 2015
Town of Sneads	SNEADS_0001 to SNEADS_0802	Apr. 30, 2015
St. James Island Utility Company Water Treatment Plant	SJIUC_0001 to SJIUC_0153	Apr. 30, 2015
University of Florida	UFL_0001 to UFL_0858	Apr 30, 2015
	UFL_00859 to UFL_01592	May 29, 2015
	UFL_00001593 to UFL_00846570	Sept. 22, 2015
	UFL_00846571 to UFL_01432034	Sept. 28, 2015
Washington County	Washington_Co.(FL)_00001 to Washington_Co.(FL)_00113	May 29, 2015
Water Management Services, Inc.	Water_Mgmt_Servs(FL)_0000001 to Water_Mgmt_Servs(FL)_0001071	July 27, 2015
	Water_Mgmt_Servs(FL)_0001072 to Water_Mgmt_Servs(FL)_0002133	Sept. 28, 2015

**EXHIBIT B**

**GEORGIA'S PRODUCTIONS**

<b>Production Number</b>	<b>Bates Range</b>	<b>Production Type</b>	<b>Date Produced</b>
First	GA00000001 to GA00000008	7 Models (4.4 GB), 1 Database	Feb. 6, 2015
Second	GA00000009 to GA00013500	Electronically Stored Information	Feb. 10, 2015
Third	GA00013501 to GA00041516	Electronically Stored Information, 2 Databases	Mar. 6, 2015
Fourth	GA00041517	1 Database	Mar. 27, 2015
Fifth	GA00041518 to GA00041989	Electronically Stored Information	Apr. 2, 2015
Sixth	GA00041990 to GA00208007	9 Models (78 GB), Electronically Stored Information and Paper Records	Apr. 3, 2015
Seventh	GA00208008 to GA00208010	3 Models (4.3 GB)	Apr. 30, 2015
Eighth	GA00208011 to GA00338078	Electronically Stored Information and Paper Records	May 1, 2015
Ninth	GA00338079	1 Model (2.5 GB)	May 29, 2015
Tenth	GA00338080 to GA00596884	Electronically Stored Information and Paper Records	June 4, 2015
Eleventh	GA00596885 to GA00596886	1 Database & 1 Database Report	June 15, 2015
Twelfth	GA00596887 to GA00646491	Electronically Stored Information and Paper Records	June 22, 2015
Thirteenth	GA00646492 to GA00865658	Electronically Stored Information and Paper Records	July 7, 2015
Fourteenth	GA00865659 to GA00865664	6 Models (149 GB)	August 5, 2015
Fifteenth	GA00865665 to GA01382872	Electronically Stored Information and Paper Records	August 5, 2015
Sixteenth	GA01382873 to GA01827401	Electronically Stored Information and Paper Records	Aug. 26, 2015
Seventeenth	GA01827402 to GA02052890	Electronically Stored Information and Paper Records	Sept. 9, 2015
Eighteenth	GA02052891 to GA02126195	Electronically Stored Information and Paper Records	Oct. 1, 2015

**CERTIFICATE OF SERVICE**

This is to certify that the OCTOBER 2, 2015 STATUS REPORT OF THE STATE OF GEORGIA has been served on this 2nd day of October 2015, in the manner specified below:

<p><b><u>For State of Florida</u></b></p> <p><u>By U.S. Mail and Email</u></p> <p>Allen Winsor          Solicitor General          Counsel of Record          Office of Florida Attorney General          The Capital, PL-01          Tallahassee, FL 32399          T: 850-414-3300  <a href="mailto:allen.winsor@myfloridalegal.com">allen.winsor@myfloridalegal.com</a></p>	<p><b><u>For United States of America</u></b></p> <p><u>By U.S. Mail and Email</u></p> <p>Donald J. Verrilli          Solicitor General          Counsel of Record          Department of Justice          950 Pennsylvania Avenue, N.W.          Washington, DC 20530          T: 202-514-7717  <a href="mailto:supremectbriefs@usdoj.gov">supremectbriefs@usdoj.gov</a></p>
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