Target Practice:
Georgia's Water Withdrawal Permitting

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Georgia Environmental Conference

August 22, 2013

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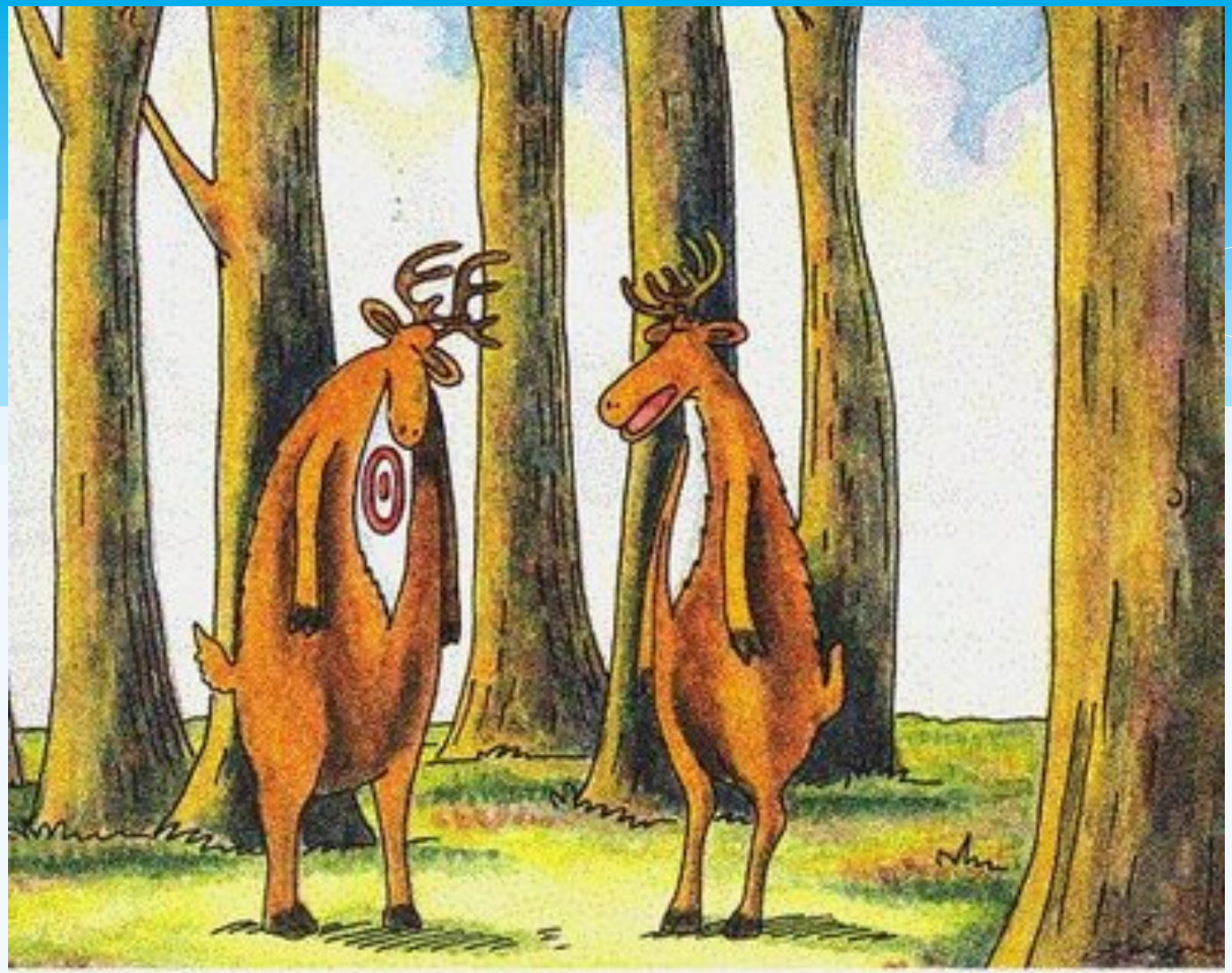

"Bummer of a birthmark, Hal."

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Presentation Overview

* Groundwater Permitting Moratorium from Floridian Aquifer (or, The Target is Gone)
* Implementation of Regional Water Plans into Water Withdrawal Permits (or, The Target Keeps Moving)

Groundwater Permitting Moratorium from Floridian Aquifer

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Water Withdrawal Permits

Two Separate (but Similar) Systems

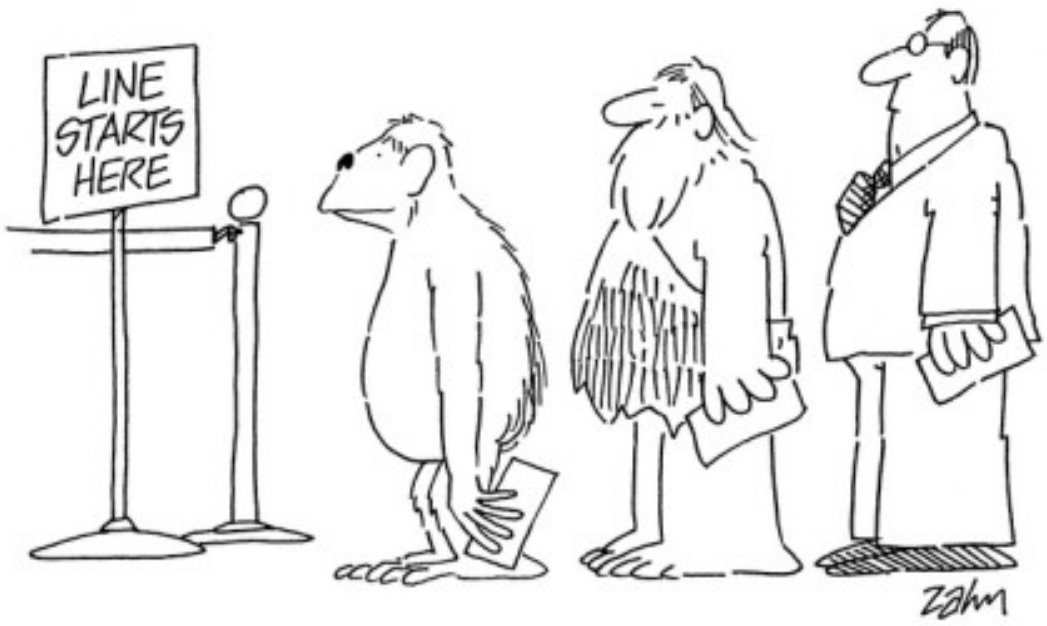
* Surface Water (e.g., rivers and streams)
* Groundwater (aquifers)

Threshold Amount: Greater than 100,000 gallons per day

Background on Moratorium

* The Problem: saltwater intrusion into wells in Hilton Head Island, South Carolina
* The Cause: according to South Carolina, the problem is over pumping of groundwater in Savannah
* The Solution: the states are working on it; moratorium on groundwater withdrawals from the Floridian aquifer
* Fun Fact: in July 2012, the Director of South Carolina's DHEC threatened to take Georgia to court over the saltwater intrusion

Get in Line



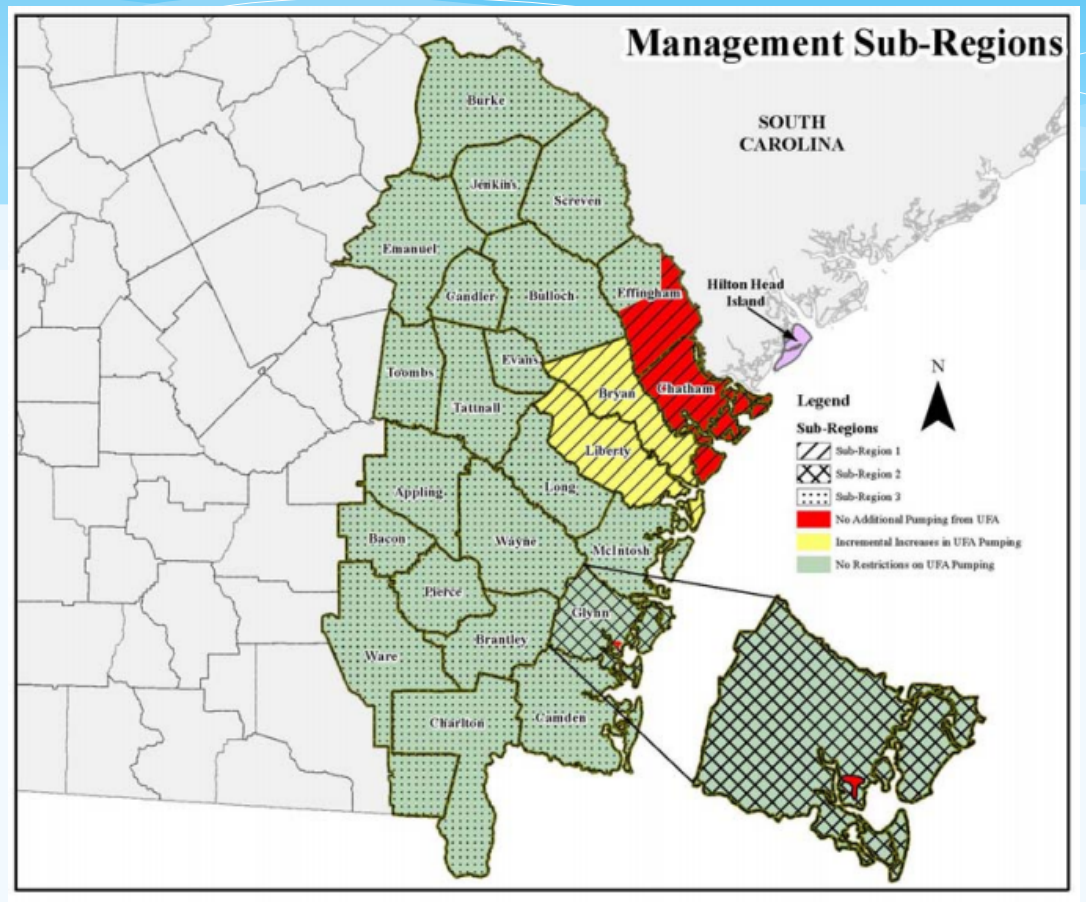
A Very Slow Line

EPD's Moratorium

On May 20, 2013, EPD put a moratorium in place prohibiting new groundwater withdrawals for certain coastal counties from the Floridian aquifer.

* "The aquifer is a source of fresh water for the coastal region, but increased withdrawals have been linked to saltwater seeping into the groundwater in the area around Hilton Head Island ***South Carolina***."
* "EPD ***will not consider any applications*** for withdrawal of water from the Floridian aquifer in the Red and Yellow zones."
* "The EPD restrictions on the Floridian aquifer will require potential users to consider other sources of water, such as surface water, desalination of sea water and other aquifers."
    - May 20, 2013, EPD Press Release, "Georgia EPD to Prohibit New Groundwater Permits in Portion of Coastal Region" ("EPD Press Release")

Moratorium Area: Red and Yellow Zones



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How Can EPD Do That?

Potential Sources for Moratorium Authority:

* Constitution
* Statute
* Regulations
* Case Law

Constitution

"[T]he General Assembly shall have the ***power to provide by law*** for: (1) Restrictions upon land use in order to protect and preserve the natural resources, environment, and vital areas ***of this state.***" Section VI, Paragraph II.

* Has the General Assembly provided for a water withdrawal moratorium by law?
  - Not really and certainly not clearly.
* Was the moratorium issued to protect the environment "of this state?"
  - No. EPD's press release says that it was based on saltwater intrusion in South Carolina.

Statute
Non-Consumptive Use

"When sufficient evidence is provided by the applicant that the water withdrawn or used from the ground is not consumptively used, ***a permit therefore shall be issued by [EPD]*** without a hearing and without [conditions otherwise provided for]." O.C.G.A. § 12-5-96(b).

* The statute creates a non-discretionary duty on behalf of EPD to issue a permit once a proper application is filed demonstrating non-consumptive use.
* Unlike the statute, the moratorium does not distinguish between consumptive and non-consumptive use.
* If, based on the moratorium, EPD "fails to consider" a non-consumptive use permit application that would otherwise be issued, is EPD in violation of this statute?

Statute
Consumptive Use

When a permit for consumptive use has been applied for, "[EPD] ***shall*** have the power: (1) To grant such permit . . .; (2) To grant any temporary permit; . . . (3) To modify or revoke any permit; . . . (4) To deny such permit." O.C.G.A. § 12-5-96(c).

* Nowhere in that specifically enumerated list is the power to "not consider any application." *See* EPD Press Release.
* Similarly, nowhere in the list is the power to issue a moratorium.

Statute
Coordination With Regional Water Plans

The groundwater withdrawal permitting statute requires coordination with the Regional Water Plans (RWPs). "Such plans shall serve to promote the ***conservation and reuse of water within the state***, guard against a ***shortage of water within the state*** and each region, and promote the efficient use of the water resource and shall be consistent with the ***general welfare and public interest of the state***. . . ." O.C.G.A. § 12-5-96(e).

* To the extent EPD looks to this section for authority to issue a permitting moratorium, the authority is not there.
* There is no explicit mention of permitting moratoria.
* There is no implicit authority to issue a moratorium to protect another state.

Statute
Recourse

"[A]ny person who is aggrieved or adversely affected by ***any order or action*** of [EPD] pursuant to this Code section shall, upon petition ***within 30 days after the issuance of such order or the taking of such action***, have a right to hearing before an administrative law judge appointed by the Board of Natural Resources." O.C.G.A. § 12-5-96(h)(1).

* If a person submits a permit application and EPD takes no action on it, is that an "order or action"?
* If not, what recourse does an applicant have if EPD simply ignores its application?
* Is the issuance of the moratorium an "order or action"? If so, and if you want to apply for a permit at some point in the future, would you have had to have filed a petition challenging the moratorium by June 19, 2013 (30 days from the May 20, 2013 EPD Press Release)?

Regulations
Purpose

The purpose of this regulation is to "outline the procedures of [EPD] in the granting, denial, revocation, modification and granting with conditions of permits to withdraw groundwater." Ga. Comp. R. & Regs. r. 391-3-2-.01.

* Right from the start, it appears that the regulations are not going to address EPD's moratorium authority. Instead, the regulations address granting, denying, revoking and modifying permits – the same four actions provided for in the statute.

Regulations
Conference with EPD or Awkward Silence

If a person decides to apply for a groundwater withdrawal permit, EPD suggests that, prior to constructing a new well, "the intended user should have a conference with representatives of [EPD] to determine the acceptability of the proposed well. . . . Such conference ***shall be granted*** within thirty (30) days after request therefor." Ga. Comp. R. & Regs. r. 391-3-2-.04(4).

* Under the moratorium, what would happen if an intended user requested such a conference?
* If the conference is granted, what will be discussed?

Regulations
Salt Water Encroachment

"To protect or abate against salt water encroachment or deterioration of the water quality of the ground water, [EPD] shall take into consideration the best information [available] and ***shall require the user to take such action*** as it deems necessary for control of brackish or salt water intrusion into fresh water aquifers. The ***control measures*** may include, but not be limited to, the following: . . . (d) ***curtailment*** of groundwater withdrawal of proposed water users in the area; . . . (l) such ***other control or abatement techniques*** as are technically feasible and proven to be successful in other areas and nationally." Ga. Comp. R. & Regs. r. 391-3-2-.10.

* This seems like a logical place to include the authority for a moratorium, but it is not here. Instead, this section is focused on "control measures" for a user to take assuming a permit will be granted.
* This may be the closest we have come to implicit moratorium authority:
  - Can "curtailment" of groundwater withdrawals mean "elimination" of groundwater withdrawals?
  - Is a moratorium an "other control or abatement technique?"
* But, how can there be a "user" under a moratorium?

Georgia Case Law
Recycle & Recover, Inc. (R&R)

Facts

* In 1992, EPD issued a permit to R&R to operate a landfill.
* In 1993, R&R filed an application for a permit modification to horizontally expand its landfill.
* In 1994, while R&R's permit application was pending, the General Assembly passed a law which imposed, under certain circumstances, a three year moratorium on the issuance of landfill permit modifications for horizontal or vertical expansion.

Georgia Case Law

In Re: Recycle and Recover, Inc., DNR-EPD-SW-AH 5-94, 1994 Ga. ENV LEXIS 39

* Fearing that EPD would use the three year moratorium to deny its permit modification application, R&R sought an administrative declaratory ruling that either (1) the 1994 three year moratorium did not apply to its permit modification application or (2) if it did apply, such application is unconstitutional.
* The ALJ ultimately determined that the 1994 three year moratorium did apply, however, in the course of the opinion, the ALJ said of R&R's pending permit application, "R&R is ***entitled to a determination on its application***. If the purported suspension is based upon a belief that [the new three year moratorium law] precludes granting the application, ***R&R is entitled to either a denial of its application*** on that basis or the ***continued review of its application followed by a final determination*** on all aspects of the application. [EPD] is not required to address all aspects of an application [it] believes [it] must deny but ***[EPD] must act in some final way*** in order that the applicant may obtain administrative review if desired."
  * How does this reasoning affect EPD's permitting moratorium authority?
  * What does this reasoning mean when EPD has stated that it will not consider permit applications?

Georgia Case Law

Recycle & Recover, Inc. v. Ga. DNR, 266 Ga. 253 (1996)

* This case eventually made its way to the Georgia Supreme Court and the Court held that R&R was entitled to review of its permit modification application under the law in place at the time it applied. Put another way, the three year moratorium did not apply to its application.
* Quoting previous cases, the Supreme Court held that "a property owner 'can avail himself of the privilege [to alter his property pursuant to a statute] while it remains in the [statute.]' . . . Thus, if a property owner becomes an actual applicant seeking to alter the use of his land, ***he has a vested right to consideration of his application under the statutory law then in existence***."
  - Following this reasoning, and since the moratorium has not changed the statutory law, is the Supreme Court suggesting that a moratorium is improper?
  - During a moratorium, can there be an "actual applicant?"

Summary of EPD's Authority to Issue Moratorium

* Clear under the constitution? No.
* Clear under the statute? No.
* Clear under the regulations? No.
* Clear under the case law? No.

Implementation of Regional Water Plans into Water Withdrawal Permits

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Even When You Can Obtain a Permit, What Conditions Will it Hold?

* Historical statutory and regulatory requirements and conditions.
* Now, there is the potential for additional conditions based on RWPs.
* How are the RWPs considered in the water withdrawal permitting process?
  - Statutory authority
  - Regulatory authority
  - State Water Plan

Legal Authority

State Water Plan

* Section 14 of the State Water Plan states that "upon adoption, [EPD] shall use the water development and conservation plans to ***guide*** decisions regarding permitting."

O.C.G.A. 12-5-522(e)

* "[EPD] ***shall make*** all water withdrawal permitting decisions ***in accordance with*** this chapter, the [State Water Plan], and any applicable [RWP]."

Ga. Comp. R. & Regs. r. 391-3-32-.01(7)(a), 391-3-6-.25(4)(a)

* "As provided in O.C.G.A. §§ 12-5-31, 12-5-96, and 12-5-522, the Director ***shall ensure*** that the issuance of any permit for the use of water is ***based upon*** the [State Water Plan] and all applicable [RWPs]."

Ga. Comp. R. & Regs. r. 391-3-32-.01(7)(a)

* "The purpose of Section 391-3-6-.25 is to provide minimum ***uniform*** statewide regulations for the issuance of any permit for the use of water based on [RWPs]. As authorized by O.C.G.A. §§ 12-5-31 and 12-5-96, in a manner consistent with O.C.G.A. § 12-5-520, et seq., and as provided in the [State Water Plan], [RWPs] shall promote the sustainable use of Georgia's waters through the selection of an ***array*** of management practices, to support the State's economy, to protect public health and natural systems, and to enhance the quality of life for all citizens."

Lack of Implementation Clarity

* Are RWPs a guide for informing permitting decisions and conditions or, instead, are they a required consideration?
* If required, what does that look like? How does it take into account aspirational goals, non-quantifiable requirements, and long term planning?
* How can permit applicants find certainty and clarity?
  - The general nature of RWPs is iterative and adaptive planning.
  - Throughout the RWPs, there are calls for additional monitoring, data collection and modeling needs.
* What recourse will be available to a permit applicant who receives a permit based on questionable data or modeling contained in an RWP?

Questions?

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