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**From:** Philip.Perry@lw.com  
**Sent:** Monday, October 12, 2015 5:31 PM  
**To:** cprimis@kirkland.com; Ralph Lancaster  
**Cc:** Mary Clifford; FloridaWaterTeam@foley.com; GeorgiaWaterTeam@kirkland.com; supremectbriefs@usdoj.gov; michael.gray2@usdoj.gov; james.dubois@usdoj.gov; allen.winsor@myfloridalegal.com; John.Cooper@lw.com; Joshua D. Dunlap  
**Subject:** Discovery Dispute  
**Attachments:** 2015.08.26 - Subpoena to Testify to M. Kistenmacher.pdf; Martin Kistenmacher response.pdf

Dear Special Master Lancaster:

Pursuant to Section 11 of the Case Management Plan, Florida counsel writes to report that Florida and Georgia have reached an impasse regarding production of certain email correspondence on a specific topic for a particular individual. Dr. Kistenmacher is a professor/researcher at Georgia Institute of Technology (Georgia Tech), and was involved from 2012-15 in performing analyses of, among other things, the impact of Georgia consumptive uses of water (including for agricultural irrigation) on Apalachicola River flows. Dr. Kistenmacher was part of the Georgia Water Resources Institute (GWRI), a component of the Georgia Tech School of Civil and Environmental Engineering. See <http://www.gwri.gatech.edu/About>. Dr. Kistenmacher, Georgia Tech and GWRI are represented in this matter by the same counsel representing the State of Georgia.

In August of this year, Georgia counsel produced thousands of pages of GWRI's and Dr. Kistenmacher's hydrologic analyses of river flow impacts (both in draft and final form) with related memoranda and materials, and dozens of presentations on those impacts to a group known as ACF Stakeholders. On August 26, 2015, Florida issued a subpoena duces tecum for Dr. Kistenmacher's testimony, and for specific files related to this work. This subpoena duces tecum included the following specification: "To the extent not previously produced in response to the documents subpoenas issued in the above-captioned matter, all documents in your possession custody or control relating to the work you performed for the ACF Stakeholders" as well as certain other specific requests relating Dr. Kistenmacher's/GWRI's analysis of hydrologic impacts of Georgia consumption on the Apalachicola river. The term "documents" was defined to include "correspondence, communications, email."

In its written response to the Kistenmacher subpoena duces tecum, Georgia counsel objected to the production of Dr. Kistenmacher's email communications: "Collecting and producing emails, text, and other electronic messages would impose significant burdens on Dr. Kistenmacher. Furthermore, considering the nature of Florida's claims in this case, emails, texts, and other electronic messages are unlikely to contain a meaningful amount of relevant, material, and non-duplicative information in relation to the effort required to collect, review and produce them."

The Kistenmacher deposition began on September 30. During his testimony, Dr. Kistenmacher identified a specific email folder preserved on his computer which Florida believes will contain relevant discoverable material. The first day of the deposition proceeded, but the deposition was suspended at the conclusion of that day pending resolution of this issue. The parties have met and conferred, but have not reached a resolution of this issue.

\*\* Georgia objects to the foregoing characterization of the issue and has requested that the following specific statements be added to this introduction:

- (1) "Georgia believes this issue is part of a larger disagreement the parties are having about the production of UGA and Georgia Tech emails. Collecting, reviewing, and producing emails from multiple university professors (which Florida has indicated it might well seek) would impose significant and unjustified burdens on the universities;" and
- (2) "Georgia disagrees with this description of the issue in dispute. Georgia believes that Florida has included this introduction to circumvent the Case Management Plan's limit of 75 words per side for arguing discovery disputes. Consistent with the CMP, Georgia has limited its position to 75 words."

Florida's 75 Word Statement:

Kistenmacher's contemporaneous emails should illuminate the context and content of his analytical work, refresh his recollection, distinguish drafts from final materials, explain hydrologic graphs, assist with authentication, and identify which data is being analyzed in presentations. Kistenmacher testified that he preserved these email communications (with attachments) in a readily available folder on his computer. Florida never agreed to forgo relevant university email discovery; indeed, the University of Florida produced thousands of similar emails to Georgia.

Georgia's 75 Word Statement:

In April 2015, UGA and Georgia Tech objected to producing emails because the undue burden of collecting emails from professors and employees outweighed the marginal relevance of doing so. In meet-and-confers with both universities in March or April 2015, Florida's counsel agreed that email production was not required. Now, six months later, Florida has changed positions. It would be unduly burdensome and inequitable to force these universities to now collect and produce email.

Thank you. If convenient for the Special Master, both Florida and Georgia can be available on Thursday or Friday of this week to address these issues.

Philip J. Perry  
Counsel for Florida

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Latham & Watkins LLP

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No. 142, Original

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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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**SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION AND FOR  
PRODUCTION OF DOCUMENTS**

Pursuant to Sections 6.2 and Appendix C of the Case Management Plan, as amended, in the above-captioned matter, the pertinent portion of which is attached hereto, and Rules 30 and 45 of the Federal Rules of Civil Procedure, as incorporated by the Case Management Plan, Martin Kistenmacher (“you”), is hereby **ORDERED** to appear at 9:00 a.m. on September 15, 2015 at the office of Carlton Fields Jordan Burt, One Atlantic Center, 1201 West Peachtree Street N.W., Suite 3000, Atlanta, GA 30309-3455, provided that the time, date, and place are mutually agreed upon by the parties and Dr. Kistenmacher.

The deposition will continue until completed as provided in the Federal Rules of Civil Procedure, as incorporated and modified by the Case Management Plan, which, in accordance with Appx. C of the Case Management Plan, we estimate will take one day of not more than

seven (7) hours of testimony. The deposition will be recorded by stenographic means by a person authorized to administer oaths, and may be videotaped.

You, or your representatives, must also bring with you to the deposition—or provide to counsel for the State of Florida prior to it by mutually agreed upon alternative means—the documents and electronically stored information identified on Attachment A to the extent they have not been previously produced in this matter. Please feel free to contact me at +1.202.637.1022 or [john.cooper@lw.com](mailto:john.cooper@lw.com) to coordinate transmittal or inspection.

The provisions of Rule 45(d) and (e) of the Federal Rules of Civil Procedure are attached hereto, as required by Rule 45(a)(1)(A)(iv) of the Federal Rules of Civil Procedure.

This Subpoena is issued pursuant to Rule 45(a)(3)(B) of the Federal Rules of Civil Procedure by John S. Cooper, counsel for the State of Florida, whose address appears below. **Please review the instructions and definitions carefully, as the chain of custody, method of forensic copying, collection, and production of electronically stored information requires your attention and supervision.**

Dated: August 26, 2015

Respectfully submitted,

/s/ John S. Cooper

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Philip J. Perry  
Abid R. Qureshi  
John S. Cooper  
LATHAM & WATKINS LLP  
555 11th Street, NW  
Suite 1000  
Washington, DC 20004  
Tel.: (202) 637-2200  
[john.cooper@lw.com](mailto:john.cooper@lw.com)

Paul N. Singarella  
LATHAM & WATKINS LLP  
650 Town Center Drive, 20th Floor  
Costa Mesa, CA 92626-1925  
Tel.: +1.714.540.1235  
[paul.singarella@lw.com](mailto:paul.singarella@lw.com)

*Attorneys for the State of Florida*

## ATTACHMENT A

### DEFINITIONS

1. “And” and “or” shall be construed disjunctively or conjunctively as necessary in order to bring within the scope of the request all documents that might otherwise be construed to be outside its scope.
2. “Climate change” means a statistically significant change in the measures of climate lasting for an extended period of time, such as changes in temperature, precipitation, or wind patterns, among others, that occur over several decades or longer.
3. “Document” as used herein refers to all electronically stored information (as defined in the Federal Rules of Civil Procedure, and the commentary thereto) as well as all written or graphic matter, however produced or reproduced, of every kind and description, whether produced internally or received from an outside source, including, without limitation, records, files, papers, books, letters, feasibility studies, objects, tangible things, correspondence, communications, email, telegrams, memoranda, inter-office communications, bulletins, reports, studies, surveys, contracts, licenses, permits, permit applications, agreements, ledgers, books of account, computer printouts and other computer materials, transcripts, analyses, proposals, suggestions, legal pleadings, legal documents, orders, consent orders, vouchers, working papers or drafts, statistical records, notebooks, calendars, appointment books, diaries, agendas, time sheets, logs, bids, job or transaction files, notations, notes, sound records of any type, phonorecords or tape recordings or other data compilations from which information can be obtained, any transcriptions thereof, bulletins, circulars, press releases, notices, instructions, advertisements, work assignments, motion picture films, videotapes, research, or other articles and treatises, including all attachments and enclosures thereto.
4. “Model” means any conceptual description or approximation that describes physical systems using mathematical equations, including without limitation analytical and numerical models, any tool for the analysis of hydrology, hydrogeology, the water cycle, water budgets, climate, water levels, river flows, and ecological response. The term “Model” includes all surface water, groundwater, integrated surface water/groundwater, and hydraulic and hydrologic analysis tools. Models should include all mechanistic, deterministic, and statistical models. Mechanistic models include process models that simulate hydrologic processes using engineering or mechanistic relationships. Statistical models include, but are not limited to trend analyses, regression analyses, probabilistic (e.g., Monte Carlo) analyses, and artificial neural network analyses. The term “Model” also includes the use of hydrologic indicators to help characterize and evaluate hydrology and/or the water cycle.
5. “Relate to,” “relating to” or “related to” means to contain, constitute, refer to, form the basis of, reflect, mention, evidence, concern, pertain to, summarize, analyze, or to be in any way logically or factually associated with the matter discussed.
6. “You” or “your” means Martin Kistenmacher.

7. Unless otherwise defined herein, each word or term shall have the meaning ascribed to it in Webster's Ninth New Collegiate Dictionary.

### **DOCUMENTS TO BE PRODUCED**

1. To the extent not previously produced in response to the document subpoenas issued in the above-captioned matter, all documents in your possession, custody, or control relating to the work you performed for the ACF Stakeholders, Inc. This work includes, but is not limited to, work you have performed for the ACF Stakeholders' *Sustainable Water Management Plan* (May 13, 2015), *Current Conditions Model Runs* (Apr. 12, 2013), and *Unimpaired Flow Assessment for the Apalachicola Chattahoochee-Flint River Basin, Technical Report*, Georgia Water Resources Institute, 211p. (2012).
2. To the extent not previously produced in response to the document subpoenas issued in the above-captioned matter, all models, model inputs, outputs, underlying datasets, and sensitivity analyses, in your possession, custody, or control, relating to your work on the ACF Stakeholders' *Sustainable Water Management Plan*, including, but not limited to:
  - a. The inputs and outputs from the ACF Decision Support System (ACF-DSS) model developed, adapted, or relied on by the Georgia Water Resources Institute for the ACF Stakeholders' *Sustainable Water Management Plan*;
  - b. The inputs and outputs from the RES-SIM model developed, adapted, or relied on by the Georgia Water Resources Institute for the *Sustainable Water Management Plan*;
  - c. An executable version of the hydrodynamic bay model developed, adapted, or relied on by the Georgia Water Resources Institute for the *Sustainable Water Management Plan*, as well as the inputs and outputs associated with the model (if multiple versions were used, then each such version); and
  - d. An executable version of the basin flow model developed, adapted, or relied on by the Georgia Water Resources Institute for the *Sustainable Water Management Plan*, as well as the inputs and outputs associated with the model (if multiple versions were used, then each such version).
3. To the extent not previously produced in response to the document subpoenas issued in the above-captioned matter, all documents, models, model inputs, outputs, and underlying datasets, in your possession, custody, or control, relating to your work on *Environmental Flow and Ecological Impacts of Alternative Regulation Scenarios for the ACF River Basin*, 2011 Georgia Water Resources Conference, April 2011, Athens, Georgia.
4. To the extent not previously produced in response to the document subpoenas issued in the above-captioned matter, executable versions, in your possession, custody, or control, of any other hydrodynamic, statistical, or technical models developed, adapted, or relied on by the Georgia Water Resources Institute to analyze, directly or indirectly, the impact of



consumptive uses in Georgia on groundwater and surface water flows in the Apalachicola-Chattahoochee-Flint River Basin, as well as the inputs and outputs corresponding with such models.

5. To the extent not previously produced in response to the document subpoenas issued in the above-captioned matter, all documents in your possession, custody, or control relating to the ACF Decision Support System (ACF-DSS) model, which are not already covered under paragraph 2(a) above.
6. To the extent not previously produced in response to the document subpoenas issued in the above-captioned matter, all documents in your possession, custody, or control relating to climate change analysis and assessments in the Apalachicola-Chattahoochee-Flint River Basin.
7. Your current *curriculum vitae*, including a list of publications relating to the Apalachicola-Chattahoochee-Flint River Basin.
8. All documents in your possession, custody, or control related to communications relating to the above topics, paragraphs 1 through 7 inclusive.
9. All documents used or reviewed by you, or supplied to you, to prepare for this deposition.

**No. 142, Original**

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**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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**OFFICE OF THE SPECIAL MASTER**

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**CASE MANAGEMENT ORDER NO. 7**

**April 8, 2015**

## CASE MANAGEMENT ORDER NO. 7

For purposes of the proceedings before the Special Master, IT IS HEREBY ORDERED THAT:

**1. Amendment of Case Management Plan Section 6.1.**

In response to the parties' requests for an extension of time for production of documents and completion of written discovery, and in light of the scope and volume of discovery in this proceeding as well as the parties' discovery efforts, Section 6.1 of the Case Management Plan ("CMP") as subsequently modified is hereby further modified as follows. The parties should expect that further enlargement of the written discovery period will be strongly disfavored.

**6.1 Written Discovery**

All written discovery may be initiated beginning on January 12, 2015, and shall be completed by no later than November 10, 2015.

**6.1.1 Interrogatories**

Each party may serve not more than fifty (50) interrogatories, including discrete subparts, on the other party. Without prior written approval of the Special Master, no additional interrogatories may be served. Each party served with interrogatories shall have thirty (30) days from the date of service to serve objections and forty-five (45) days from the date of service to serve answers.

**6.1.2 Requests For Production Of Documents/Inspections To Parties**

Each party may serve requests for production of documents/inspections on the other party. A party upon which requests for production of documents/inspections are served shall have twenty (20) days from the date of service to serve objections other than objections based on privilege, work product

or confidentiality, thirty (30) days from the date of service within which to make remaining objections and to begin producing documents, and two hundred forty (240) days from the date of service within which to complete full production subject to unresolved objections. If either party anticipates that full production will unavoidably require more than two hundred forty (240) days from service, that party shall notify the Special Master within ten (10) days of service of the requests, and a telephone conference will be convened to discuss the issue.

### **6.1.3 Requests For Documents/Inspections To Non-Parties**

Each party may serve on non-parties requests for production of documents/requests for inspection as provided in Fed. R. Civ. P. Rules 34(c) and 45. Such requests should be specific and designed to avoid imposing unnecessary burdens on non-parties. Non-parties shall have thirty (30) days from the date of service to serve objections and to begin producing documents, and one hundred twenty (120) days from the date of service within which to complete full production. If either a party or the non-party anticipates that full production will require more than one hundred twenty (120) days from service, that party or non-party shall notify the Special Master within ten (10) days of service of the subpoena and a telephone conference may be convened to discuss the issue. Any subpoena shall so inform the non-party of these deadlines.

### **6.1.4 Requests To Admit**

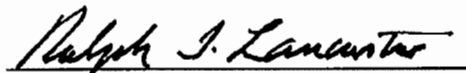
A party may serve requests for admission on the other party. Each party served with requests for admission shall have thirty (30) days from the date of

service to serve objections and forty-five (45) days from the date of service to respond.

2. **Briefing on Joinder of Alabama Under Fed. R. Civ. P. 19**

The parties shall submit briefs addressing the following questions: (1) whether the State of Alabama is a required party that must be joined under Rule 19(a); (2) whether the State of Alabama can be joined under Rule 19(a); and (3) whether the State of Alabama is an indispensable party under Rule 19(b). The parties shall file briefs on these questions on or before May 1, 2015. The parties shall file any responsive briefs on or before May 15, 2015. The United States and the State of Alabama may also submit *amicus curiae* briefs pursuant to the same schedule.

Dated: April 8, 2015



Ralph I. Lancaster  
Special Master

Pierce Atwood LLP  
Merrill's Wharf  
254 Commercial Street  
Portland, ME 04101  
Tel: (207) 791-1100  
Fax: (207) 791-1350  
Email: [rlancaster@pierceatwood.com](mailto:rlancaster@pierceatwood.com)

**No. 142, Original**

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**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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**OFFICE OF THE SPECIAL MASTER**

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**CASE MANAGEMENT ORDER NO. 10**

**May 11, 2015**

## CASE MANAGEMENT ORDER NO. 10

For purposes of the proceedings before the Special Master, IT IS HEREBY ORDERED THAT:

In response to the parties' requests for an extension of time for depositions and expert discovery, and in light of the prior extension to the parties' deadline for written discovery, the schedule set forth in the Case Management Plan ("CMP") dated December 3, 2014, as subsequently modified, is hereby further modified as follows. The parties should expect that further enlargement of any deadlines will be strongly disfavored.

1. **Amendment of Case Management Plan Section 6.2.**

Section 6.2 of the CMP, as subsequently modified, is amended to read:

**6.2 Deposition Discovery**

Unless they agree to proceed sooner, the parties may schedule depositions to begin on or after June 1, 2015. Depositions will be conducted in accordance with the guidelines attached hereto as Appendix C.

Depositions other than those taken of expert witnesses in their capacity as such shall be completed by January 15, 2016. Depositions of expert witnesses in their capacity as such shall be completed by April 1, 2016.

2. **Amendment of Case Management Plan Section 7.**

Section 7 of the CMP, as subsequently modified, is amended to read:

**7. Expert Witnesses**

Fed. R. Civ. P. 26(a)(2) shall control the disclosure of expert testimony in this action. While drafts of expert reports or disclosures need not be produced, any worksheets that reflect or explain calculations upon which the expert's report depends

**No. 142, Original**

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**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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**OFFICE OF THE SPECIAL MASTER**

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**CASE MANAGEMENT PLAN**

**December 3, 2014**



**APPENDIX C**  
***Florida v. Georgia*, No. 142, Original**  
**Deposition Guidelines**  
**December 3, 2014**

**1. Cooperation**

Counsel will cooperate with each other and exercise civility in all aspects of this litigation.

**2. Waiver Stipulations**

Unless contrary to an order of the Special Master, the parties (and when appropriate, a non-party witness) may stipulate, in a suitable writing, to alter, amend, or modify any practice relating to noticing, conducting, or filing a deposition. Stipulations for any discovery beyond discovery cutoffs or deadlines set by the Special Master are not valid without approval of the Special Master.

**3. Scheduling**

Except in extraordinary circumstances, noticing counsel shall consult in advance with counsel for the deponent, if any, and with opposing counsel, so as to schedule depositions at mutually convenient times and places.

**4. Attendance**

**4.1 Who May Be Present**

Unless otherwise ordered under Fed. R. Civ. P. 26(c), depositions may be attended by counsel of record, members and employees of their firms, attorneys specially engaged by a party for purposes of the deposition, the parties or the representative of a party, including counsel from the offices of the respective attorneys general, counsel for the deponent, and expert consultants or witnesses. During examination of a deponent about any

confidential document or its confidential contents, persons to whom disclosure is not authorized under section 10 of this CMP shall be excluded.

#### **4.2 Cross-Noticing**

A party may cross-notice a deposition. The cross-notice shall be served at least seven (7) days prior to the date noticed for the deposition unless otherwise provided for by an applicable rule or Case Management Order.

### **5. Conduct**

#### **5.1 Examination**

Ordinarily, each party should designate one attorney to conduct the principal examination of the deponent. Examination by other attorneys should be limited to situations where designated counsel must leave before the deposition is completed or is otherwise incapacitated.

#### **5.2 Objections and Directions Not to Answer**

Counsel shall comply with Fed. R. Civ. P. 30(c)(2). When a claim of privilege is made, the witness should nevertheless answer questions relevant to the existence, extent or waiver of the privilege, including the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement, unless such information is itself privileged.

### **5.3 Time Limitations**

Depositions must be concluded within a reasonable time limit. At the time of notification, the noticing party will estimate the reasonable amount of time needed for the deposition. In the event any other party considers the proposed amount of time to be unreasonable, the dispute, if unresolved, may be referred to the Special Master pursuant to section 11 of this CMP. Except with prior agreement of counsel or written approval of the Special Master, no deposition may last longer than three (3) eight (8) hour days, provided that no such agreement of counsel may extend any discovery deadline.

### **5.4 Continuation of Deposition**

If a deposition is not finished by the end of the business day, it will continue on the following business day and each business day thereafter, subject to the availability of the witness and time limitations otherwise set by agreement or order of the Special Master. The parties may agree to continue or suspend a deposition until a mutually agreed upon later date, provided that the later date is within any discovery deadline set by the Special Master.

## **6. Documents**

### **6.1 Production of Documents**

All documents should be requested and produced pursuant to sections 6.1.2 and 6.1.3 of this CMP. If a non-party witness is believed to have documents not previously produced, a subpoena to produce documents

should be served at least twenty (20) days before the scheduled deposition. Arrangements should be made to permit inspection of the documents by both parties before the deposition begins. Any documents produced in such a manner should be Bates numbered pursuant to section 8 of the CMP.

## **6.2 Copies**

Extra copies of documents about which counsel expects to question the deponent shall be provided to opposing counsel and the deponent at the time of the deposition. Deponents should be shown a document before being examined about it except when counsel are attempting to impeach deponent or test deponent's recollection.

## **7. Videotaped Depositions**

By request in its notice of a deposition, a party may record the deposition as permitted under Fed. R. Civ. P. 30(b)(3) through (5).

### **7.1 Video Operator**

The operator(s) of the videotape recording equipment shall be subject to the provisions of Fed. R. Civ. P. 28(c). At the commencement of the deposition, the operator(s) shall swear or affirm to record the proceedings fairly and accurately.

### **7.2 Attendance**

Each witness and each examining attorney shall be identified on camera at the commencement of the deposition. All others present at the deposition shall be identified off-camera. Thereafter, generally speaking, only the

deponent (and demonstrative materials used during the deposition) shall be videotaped.

### **7.3 Standards**

The deposition will be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at a trial. Unless physically incapacitated, the deponent shall be seated at a table or in a witness box other than when reviewing or presenting demonstrative materials for which a change in position is needed. The deposition should be conducted in a neutral setting, against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angles, lens setting, and field of view should be changed only as necessary to record accurately the natural body movements of the deponent or to portray exhibits and other materials used during the deposition. Sound levels should be altered only as necessary to record satisfactorily the voices of counsel and the deponent. No eating or smoking by deponents or counsel should occur during the deposition.

### **7.4 Interruptions**

The videotape shall run continuously throughout the active conduct of the deposition. Videotape recording shall be suspended during agreed "off the record" discussions.

### **7.5 Index**

The videotape operator shall use a counter on the recording equipment and, after completion of the deposition shall prepare a log, cross-

referenced to counter numbers. The log shall identify on the tape where: examination by different counsel begins and ends; objections are made and examination resumes; record certifications are requested; exhibits are identified; any interruption of continuous tape recording occurs; and the reason for the interruption, whether for recesses, "off the record" discussion, mechanical failure, or otherwise.

#### **7.6 Filing**

The operator shall send the original videotape in its original condition to the deposing State party in a sealed envelope. No part of a videotaped deposition shall be released or made available to any member of the public or to any unauthorized person, whether marked "Confidential" or not.

#### **7.7 Objections**

Requests for ruling on the admissibility of evidence obtained during a videotaped deposition shall be accompanied by appropriate pages of the written transcript. Each issue shall be separately submitted. If needed for a ruling, a copy of the videotape and equipment for viewing the tape (if necessary) shall also be made available to the Special Master.

### **8. Telephonic Depositions**

By stating in the deposition notice that it wants to conduct the deposition by telephone, a party shall be deemed to have moved for an order under Fed. R. Civ. P. 30(b)(4). Notice of a telephonic deposition shall be served at least twenty (20) days before the deposition. Unless an objection is filed and served at least ten (10) days before the deposition, the motion shall be deemed to have been granted. Other parties may

examine the deponent telephonically or in person. All persons present with the deponent shall be identified in the deposition and shall not by word, or otherwise, coach or suggest answers to the deponent.

**9. Use**

Under the conditions prescribed in Fed. R. Civ. P. 32(a)(1) to (4), as otherwise permitted by the Federal Rules of Evidence, or as agreed to by the parties with approval of the Special Master, depositions may be used against either party.

**10. Supplemental Depositions**

To the extent a deponent acquires new information, or forms new opinions, or finds new grounds to support previous opinions, any party may move for a supplemental deposition. Such motion shall be made for good cause shown within ten (10) days of a party's learning of the new information, opinion or grounds from supplemental discovery responses provided under section 15 of this CMP or any other source. If permitted, the supplemental deposition shall be treated as the resumption of the deposition previously taken, but shall not exceed one (1) eight (8) hour day in length. Supplemental depositions shall not be repetitive of prior examination and repetition of substantially the same examination as previously conducted may result in imposition of monetary and other sanctions.

**11. Rulings**

Rulings on objections made during a deposition will be resolved according to the procedure set forth in section 12 of the CMP.

(B) inspection of premises at the premises to be inspected.

(d) PROTECTING A PERSON SUBJECT TO A SUBPOENA; ENFORCEMENT.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney’s fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party’s officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert’s opinion or information that does not describe specific occurrences



in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(1) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) DUTIES IN RESPONDING TO A SUBPOENA.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being

notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) **TRANSFERRING A SUBPOENA-RELATED MOTION.** When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.

(g) **CONTEMPT.** The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 16, 2013, eff. Dec. 1, 2013.)

#### **Rule 46. Objecting to a Ruling or Order**

A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007.)

#### **Rule 47. Selecting Jurors**

(a) **EXAMINING JURORS.** The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

(b) **PEREMPTORY CHALLENGES.** The court must allow the number of peremptory challenges provided by 28 U.S.C. §1870.

(c) **EXCUSING A JUROR.** During trial or deliberation, the court may excuse a juror for good cause.

No. 142, Original

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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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**RESPONSES AND OBJECTIONS TO FLORIDA'S SUBPOENA TO TESTIFY AT A  
DEPOSITION IN A CIVIL ACTION AND FOR PRODUCTION OF DOCUMENTS**

Pursuant to Section 6.2 and Appendix C of the Case Management Plan,<sup>1</sup> and Rules 30 and 45 of the Federal Rules of Civil Procedure, as incorporated by the Case Management Plan Dr. Martin Kistenmacher ("Dr. Kistenmacher"), by and through his attorneys, hereby submits his responses and objections to the Subpoena to Testify at a Deposition in a Civil Action and for Production of Documents ("the Subpoena") issued by the State of Florida ("Florida").

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<sup>1</sup> Case Management Plan, Dkt. No. 6 (Dec. 3, 2014) was adopted by the Special Master in Case Management Order No. 1, Dkt. 5 (Dec. 3, 2014) and modified by Case Management Order No. 2, Dkt. 12 (Dec. 19, 2014), Case Management Order No. 3, Dkt. 23 (Jan. 30, 2015), Case Management Order No. 4, Dkt. 40 (Feb. 10, 2015), Case Management Order No. 5, Dkt. 52 (Feb. 23, 2015), Case Management Order No. 6, Dkt. 57 (March 3, 2015), Case Management Order No. 7, Dkt. 99 (Apr. 8, 2015), Case Management Order No. 8, Dkt. 101 (Apr. 13, 2015), Case Management Order No. 9, Dkt. 106 (Apr. 23, 2015), and Case Management Order No. 10, Dkt. 119 (May 11, 2015).

## GENERAL OBJECTIONS

1. **Definition No. 2 – “Climate Change.”** Dr. Kistenmacher objects to the definition of “Climate Change” as vague, ambiguous, and overly broad. As drafted, this definition purports to require the production of any and all information associated with changes in climate lasting for an indefinite period of time in the Southeastern United States.

2. **Emails, Texts or Other Electronic Messages.** Dr. Kistenmacher objects to each document request to the extent it seeks emails, texts, or other electronic messages. Collecting and producing emails, text, and other electronic messages would impose significant burdens on Dr. Kistenmacher. Furthermore, considering the nature of Florida’s claims in this case, emails, texts, and other electronic messages are unlikely to contain a meaningful amount of relevant, material, and non-duplicative information in relation to the effort required to collect, review and produce them. If any emails, texts or other electronic messages are collected and produced by Dr. Kistenmacher in the course of collecting and producing other available materials that are responsive to the Requests, that shall not operate as a waiver of this objection.

3. **Expert Opinion Testimony.** Dr. Kistenmacher objects to the Subpoena to the extent Florida impermissibly seeks to compel Dr. Kistenmacher, who has not been retained or identified by a party in the litigation as an expert whose opinions may be presented at trial, to provide his expert opinion on any topic. Fed. R. Civ. P. 45(d)(3)(B)(ii). Dr. Kistenmacher’s collection and production of any materials responsive to these Requests shall not operate as a waiver of this objection.

4. **Reasonable Search.** In searching for responsive documents, Dr. Kistenmacher will conduct a reasonable search of his records kept in the ordinary course of business, in the places where information and documents responsive to these Requests for Production are most likely to be found. To the extent these Requests ask for more, Dr. Kistenmacher objects on the grounds

that the Requests are overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

5. *Ongoing Nature of Proceedings.* Given the ongoing nature of this proceeding, and the possibility that additional documents, data, and information will be identified during the discovery period, Dr. Kistenmacher expressly reserves the right to supplement his objections to the Requests for Production Florida has propounded on him.

6. *Outside Geographic Scope.* Dr. Kistenmacher objects to all Requests for Production that are not explicitly limited to the geographic territory at issue in this litigation—namely, the Apalachicola-Chattahoochee-Flint Basin (“ACF Basin”). Dr. Kistenmacher construes all Requests as applying only to the ACF Basin. If any documents collected and produced by Dr. Kistenmacher in the course of collecting and producing other materials that are responsive to the Requests relate to a territory beyond the geographic limits of the ACF Basin, that shall not operate as a waiver of this objection.

7. *Outside Temporal Scope.* Dr. Kistenmacher objects to all Requests for Production to the extent they encompass a time period outside that which is relevant to this litigation. As Florida does not provide a date range in its Definitions or its Requests, Dr. Kistenmacher will construe each Request as encompassing the period from January 1, 1975, to the present. If any documents collected and produced by Dr. Kistenmacher in the course of collecting and producing other materials that are responsive to the Requests encompass a time period before January 1, 1975, that shall not operate as a waiver of this objection.

8. *Privileges.* Dr. Kistenmacher objects to each Request for Production to the extent it seeks documents protected from disclosure by the attorney-client privilege, the work product doctrine, or any other available legal privileges or protections against discovery. Nothing

contained in these Responses and no information produced by Dr. Kistenmacher is intended to be, or shall be construed as, a waiver of any privilege or immunity from production.<sup>2</sup>

9. *Publicly Available Materials.* Dr. Kistenmacher objects to each Request for Production to the extent it seeks documents or other materials that are publicly available. Dr. Kistenmacher does have in his possession documents, books, reports, reference and other materials that are publicly available and that could be considered responsive to Florida's Requests for Production. However, because those materials are equally accessible to Florida through other means, and because collecting and producing those materials would impose significant burdens, Dr. Kistenmacher will not undertake to collect and produce publicly available materials. If publicly available materials are collected and produced by Dr. Kistenmacher in the course of collecting and producing non-publicly available materials that are responsive to the Requests, that shall not operate as a waiver of this objection.

10. *Possession or Control.* Dr. Kistenmacher objects to any Request that purports to require him to produce documents not within his possession, custody, or control, such as those maintained by private companies or local governments. Dr. Kistenmacher will produce documents as described in each Response to the extent the documents sought are within his possession, custody, or control.

11. *Reasonable Interpretation.* Dr. Kistenmacher has responded to the Requests for Production as he reasonably interprets and understands them. If Florida subsequently asserts an interpretation of any Request for Production that differs from Dr. Kistenmacher's understanding, Dr. Kistenmacher reserves the right to supplement his objections and/or responses herein.

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<sup>2</sup> The handling of privileged and confidential materials is now governed by Case Management Order No. 6, Dkt. 57 (Mar. 3, 2015).

## RESPONSES

Incorporating each of the above General Objections and Conditions (“General Objections”) as if fully set forth with respect to each Response, and further subject to any Specific Objections made in connection with each of the below-numbered Responses, Dr. Kistenmacher responds to Florida’s Requests for Production as follows:

### REQUEST FOR PRODUCTION NO. 1:

To the extent not previously produced in response to the document subpoenas issued in the above-captioned matter, all documents in your possession, custody, or control relating to the work you performed for the ACF Stakeholders, Inc. This work includes, but is not limited to, work you have performed for the ACF Stakeholders’ *Sustainable Water Management Plan* (May 13, 2015), *Current Conditions Model Runs* (Apr. 12, 2013), and *Unimpaired Flow Assessment for the Apalachicola Chattahoochee-Flint River Basin, Technical Report*, Georgia Water Resources Institute, 211p. (2012).

### RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

Dr. Kistenmacher objects to the term “work you performed” because determining what documents in his possession, or control only relate to work he performed would be overly burdensome.

Subject to and without waiving his General and Specific Objections, Dr. Kistenmacher either already has or will produce relevant documents in his possession responsive to this Request, to the extent such documents exist and have not previously been produced, without regard to whether they relate to work that he personally performed.

### REQUEST FOR PRODUCTION NO. 2:

To the extent not previously produced in response to the document subpoenas issued in the above-captioned matter, all models, model inputs, outputs, underlying datasets, and sensitivity analyses, in your possession, custody, or control, relating to your work on the ACF Stakeholders’ *Sustainable Water Management Plan*, including, but not limited to:

- a) The inputs and outputs from the ACF Decision Support System (ACF-DSS) model developed, adapted, or relied on by the Georgia Water Resources Institute for the ACF Stakeholders' *Sustainable Water Management Plan*;
- b) The inputs and outputs from the RES-SIM model developed, adapted, or relied on by the Georgia Water Resources Institute for the *Sustainable Water Management Plan*;
- c) An executable version of the hydrodynamic bay model developed, adapted, or relied on by the Georgia Water Resources Institute for the *Sustainable Water Management Plan*, as well as the inputs and outputs associated with the model (if multiple versions were used, then each such version); and
- d) An executable version of the basin flow model developed, adapted, or relied on by the Georgia Water Resources Institute for the *Sustainable Water Management Plan*, as well as the inputs and outputs associated with the model (if multiple versions were used, then each such version).

**RESPONSE TO REQUEST FOR PRODUCTION NO. 2:**

Dr. Kistenmacher objects to the term "work you performed" because determining what documents in his possession, or control only relate to work he performed would be overly burdensome.

Subject to and without waiving his General and Specific Objections, Dr. Kistenmacher either already has or will produce relevant documents in his possession responsive to this Request, to the extent such documents exist and have not previously been produced, without regard to whether it relates to work that he personally performed.

**REQUEST FOR PRODUCTION NO. 3:**

To the extent not previously produced in response to the document subpoenas issued in the above-captioned matter, all documents, models, model inputs, outputs, and underlying datasets, in your possession, custody, or control, relating to your work on *Environmental Flow and Ecological Impacts of Alternative Regulation Scenarios for the ACF River Basin*, 2011 Georgia Water Resources Conference, April 2011, Athens, Georgia.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 3:**

Dr. Kistenmacher objects to the term "relating to your work" because determining what documents in his possession, or control only relate to work he performed would be overly burdensome.



Subject to and without waiving his General and Specific Objections, Dr. Kistenmacher either already has or will produce relevant documents in his possession responsive to this Request, to the extent such documents exist and have not previously been produced, without regard to whether it relates to work that he personally performed.

**REQUEST FOR PRODUCTION NO. 4:**

To the extent not previously produced in response to the document subpoenas issued in the above-captioned matter, executable versions, in your possession, custody, or control, of any other hydrodynamic, statistical, or technical models developed, adapted, or relied on by the Georgia Water Resources Institute to analyze, directly or indirectly, the impact of consumptive uses in Georgia on groundwater and surface water flows in the Apalachicola-Chattahoochee-Flint River Basin, as well as the inputs and outputs corresponding with such models.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 4:**

Dr. Kistenmacher objects to the phrase “relied on by the Georgia Water Resources Institute” as overbroad to the extent it requests materials outside of his custody, possession, or control.

Subject to and without waiving his General and Specific Objections, Dr. Kistenmacher either already has or will produce relevant documents in his possession responsive to this Request, to the extent such documents exist.

**REQUEST FOR PRODUCTION NO. 5:**

To the extent not previously produced in response to the document subpoenas issued in the above-captioned matter, all documents in your possession, custody, or control relating to the ACF Decision Support System (ACF-DSS) model, which are not already covered under paragraph 2(a) above.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 5:**

Subject to and without waiving him General and Specific Objections, Dr. Kistenmacher either already has or will produce relevant documents in his possession responsive to this Request, to the extent such documents exist.

**REQUEST FOR PRODUCTION NO. 6:**

To the extent not previously produced in response to the document subpoenas issued in the above-captioned matter, all documents in your possession, custody, or control relating to climate change analysis and assessments in the Apalachicola-Chattahoochee-Flint River Basin.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 6:**

Subject to and without waiving his General and Specific Objections, Dr. Kistenmacher either already has or will produce relevant documents in his possession responsive to this Request, to the extent such documents exist.

**REQUEST FOR PRODUCTION NO. 7:**

Your current *curriculum vitae*, including a list of publications relating to the Apalachicola-Chattahoochee-Flint River Basin.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 7:**

Dr. Kistenmacher objects to the request to create “a list of publications relating to the Apalachicola-Chattahoochee-Flint River Basin” as unduly burdensome. Subject to and without waiving his General and Specific Objections, Dr. Kistenmacher will produce his current *curriculum vitae* which will include publications related to the Apalachicola-Chattahoochee-Flint River Basin.

**REQUEST FOR PRODUCTION NO. 8:**

All documents in your possession, custody, or control related to communications relating to the above topics, paragraphs 1 through 7 inclusive.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 8:**

Dr. Kistenmacher objects to Request No. 8 on the grounds that it is overly broad, unduly burdensome and duplicative.

**REQUEST FOR PRODUCTION NO. 9:**

All documents reviewed, considered, relied on, used by, and/or supplied to you to prepare for this deposition.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 9:**

Dr. Kistenmacher objects to Request No. 9 to the extent it calls for the production of documents beyond the scope of production required by the Federal Rules of Civil Procedure. Dr. Kistenmacher further objects to this request to the extent it seeks materials protected by the attorney-client privilege, work product immunity, or any other privilege from disclosure.

Dated: September 23, 2015

/s/ Russell D. Willard  
Russell D. Willard  
Senior Assistant Attorney General  
Office of the Attorney General  
40 Capitol Square, SW  
Atlanta, GA 30334  
Tel.: (404) 656-7298  
Fax: (404) 657-9932  
rwillard@law.ga.gov