

December 10, 2008

The Honorable Thomas W. Thrash  
2188 U. S. Court House  
75 Spring Street  
Atlanta, Georgia 30335

Re: Failure to comply with the Safe Drinking Water Act, National Environmental Policy Act, and related Georgia laws and regulations. -- Atlanta's Combined Sewer Overflow Consent Decree (CSO-CD, 1:95-CV-2550-TWT) and Atlanta's First Amended Consent Decree (FACD, 1:98-CV-1956-TWT)

Dear Judge Thrash:

The Objectives of Atlanta's CSO-CD include (1) achieving full compliance with the NPDES Permits for the CSO Control Facilities, the Georgia Water Quality Control Act, and the Clean Water Act relating to all of the Defendant's CSO Control Facilities; and (2) eliminating all unpermitted discharges from the Combined Sewer System, (Section V, page 11). These objectives are not being achieved in accordance with the Safe Drinking Water Act (SDWA) and the National Environmental Policy Act (NEPA).

The enclosed legal opinion establishes that the SDWA and related Georgia laws require authorization for the subsurface emplacement of fluids by obtaining an Underground Injection Control (UIC) permit before construction begins. This requirement is applicable when wastewater is diverted down shafts that fill Atlanta's new West Area Storage Tunnel (WAST). It also applies to shafts that fill other tunnels in Atlanta's wastewater collection system.

I have accumulated a sizable collection of correspondence from 2000-2004 to establish that professionally credentialed citizens shared an opinion that UIC regulations apply to shafts that fill wastewater tunnels and that there are associated risks that must be assessed. This opinion was repeatedly brought to the attention of appropriate officials at the Environmental Protection Agency (EPA) Region 4 and the Georgia Environmental Protection Division (EPD). The opinion was eventually sent to EPA-HQ, the U.S. Department of Justice (USDOJ), Atlanta's Department of Watershed Management (DWM), and DWM's consultants. These citizens received misleading, dismissive, discrediting replies, were led to believe that replies were forthcoming, and/or received no replies at all.

I have also acquired official documents which establish that Atlanta, EPA, and EPD have been complicit in misleading Atlanta's citizens and water/sewer ratepayers (the public) about requirements for UIC permitting and water quality standards, compliance with NEPA, delays in completion of construction activities by the 2007 deadline as required in the CSO-CD, and documentation inconsistencies which jeopardize federal grants and State loans. The citizen plaintiff, Upper Chattahoochee Riverkeeper (UCR), is also aware that much of this is occurring but has joined Atlanta/EPA/EPD by concealing these inconsistencies from the public and the Court.

#### BACKGROUND

Prior to selection of tunneling as part of a remedial measures alternative, Atlanta sponsored numerous public meetings for citizens to learn about options for remediation. The public preferred to achieve compliance with the CSO-CD by selecting an alternative known as "sewer separation" which completely eliminates overflows, uses no chlorine, and is independent of tunnels.

Issues of UIC permitting requirements were raised to EPD and EPA as early as the year 2000. In January 2001, a small group of concerned citizens met with EPA Region 4 to discuss the applicability of UIC requirements for wastewater tunnel systems. This group was advised by Region 4 that questions of UIC authority had been elevated to EPA-HQ's Office of Ground Water and Drinking Water. The citizens were told they would be advised when a national determination was rendered.

In March 2001, Atlanta submitted the Remedial Measures Report (RMR) to EPA/EPD and the results of the earlier public meetings about CSO-CD options are summarized:

"Overall, the recommendation most frequently heard from the participating public was that complete sewer separation is their desired solution. The City also noted citizen concerns about the disruptions associated with separation and questions related to the City's plans to address storm water management issues in a separated system." (RMR Vol. 1, Section 3, Public Involvement, page 2).

The RMR identified Atlanta's Preferred Option for Implementation, "Option C, Phase 1 separation and consolidated storage and treatment is preferred by the City..." for CSO-CD compliance. (RMR, Vol. 1, Section 4, page 22). More simply stated, this means that (after further refinement) approximately 27% of the combined sewers would be separated, a storage/conveyance tunnel would be constructed, and a new CSO treatment plant would be built.

On July 20, 2001, EPA/EPD authorized "Option C" with several comments including:

"Decisions regarding the choice of routes, tunnel boring activities (including groundwater withdrawal and discharge), lining, maintenance, and operation of the tunnels must ensure that these actions do not pose an endangerment to public health through the introduction and emplacement of contaminants into *underground sources of drinking water*." (July 20, 2001, Authorization letter from EPA/EPD to Atlanta, Comment #1 excerpted, *emphasis added*.)

In May 2001 and continuing through December 2004, I was actively involved as a volunteer in a leadership position of the public participation process associated with the CSO-CD. My involvement was through Atlanta's Neighborhood Planning Unit (NPU) process and the Atlanta Planning Advisory Board (APAB) process, both of which are officially recognized by city legislation.

During that period I attended 100+ meetings with citizens from a cross-section of Atlanta at which the CSO-CD was an important topic or the sole topic of discussion. At no time were the UIC permitting requirements raised by Atlanta's staff, consultants, and/or high-level officials who were in attendance. In general, "Option C" was promoted as the only plan that would meet all federal water quality standards as well as be completed on-time and at the lowest cost. Nonetheless, all of Atlanta's NPUs and APAB strongly preferred full sewer separation. A survey performed for Atlanta by Lester and Associates (2002) led respondents to believe that the "Tunnel Plan" would meet all water quality standards. Results establish that 2/3 of Atlanta-in-general preferred "sewer separation" and only slightly less if it meant higher costs. Timely completion was used as the stick to beat the public into accepting the WAST system. I moved out of the metro Atlanta area at the end of 2004.

In a letter dated October 19, 2006, Atlanta notified EPA/EPD that it needed an additional 12 months beyond the negotiated 2007 deadline in order to complete construction of the WAST (tunnel) which is part of a system that also includes dropshafts, a pumping station and a new CSO Treatment plant. The primary excuses for the delay were geologically related and included (1) slower than anticipated excavation rates from the tunnel boring machines and (2) a need to increase the quantity of concrete tunnel lining from the initial estimate of 50% to a new estimate of 75%. After reading this letter I retrieved documents from my personal archives and after reviewing them realized that there were omissions and inconsistencies.

On October 31, 2006 I attended a meeting of City Council's "City Utilities Committee" and provided initial notification that there were internal inconsistencies in accounting spreadsheet entries associated with three companies owned by Ricky Rowe and that two of the companies had performed geological testing and drilling investigations. Newspaper articles document that prior to his passing away in 2004, Rowe had been under investigation by the FBI in the "Mayor Bill Campbell Corruption Scandal" for arranging

political campaign funding in exchange for receiving no-bid contracts to perform work which was later deemed deficient.

The excuses in the October 19th letter along with Rowe's involvement have led me to the discovery that (1) the public has been deceived about the requirement that UIC permits must be obtained before beginning construction of UIC facilities; (2) Atlanta would not likely have been able to comply with SDWA water quality standards for its UIC facilities if permit applications had been submitted; (3) there are inconsistencies regarding Atlanta's ability to achieve timely completion of the unpermitted WAST system; (4) there are gross violations of the NEPA requirement for public participation by misrepresenting assessments of impacts associated with the emplacement of wastewater into an underground source of drinking water (USDW) which is prohibited by the SDWA; and (5) there are violations of policies which require that a significant federal action must comply with many federal laws which are referred to as "Cross-Cutter Authorities" (for example the CSO-CD is a Clean Water Act action which must comply with the Safe Drinking Water Act, the Clean Air Act, etc.). This could jeopardize federal grants and State loan funding.

On June 8, 2007, I requested that Mr. Jimmy Palmer and Mr. Jim Giattina (EPA-4) provide responses to citizen's correspondence from 2000 which were summarized in four letters, all dated 2003, and which raised issues of UIC authority. On October 18, 2007, I received a response from Mr. Giattina which failed to address the numerous issues that had been raised, and instead generally stated that "UIC regulations do not apply to conveyance tunnels". (This is addressed in greater detail in the section "Legal Opinion, below).

As recently as September 25, 2008, in a two-and-half hour meeting with Ms. Marzieh Shahbazaz (EPD, Compliance Officer), I described a connected series of inconsistencies in documents that Atlanta submitted to EPA and EPD beginning in 2001 and continuing through 2007. The inconsistencies were all related to the July 20, 2001 Authorization letter and UIC requirements. Also with me serving as witnesses were Mr. Bill Bozarth, Georgia Common Cause, and Mr. Bill McEwen, P.E. The inconsistencies include required certifications/seals/signatures that had been omitted from the documents, flawed geological studies, the omission of UIC permitting requirements from lists of required permits, flawed engineering decisions, public participation violations of the NEPA, and false statements involved with acquiring federal grants and state loans. Shortly after that meeting, it became apparent that parties to both Consent Decrees were not providing me with substantive answers to my questions and had chosen to remain silent rather than take responsibility for what I described to Ms. Shahbazaz by notifying the Court themselves.

#### SUMMARY

The above information establishes a pattern of dismissing and concealing the importance and requirements of groundwater protection from the public. Opposition to tunnel technology by the public already had a valid basis. For many years, efforts had been made by professionals to ensure that risks to public health and endangerment of aquifers be assessed as required by the SDWA, NEPA, and related Georgia laws. They were all dismissed by those with the responsibility to ensure that assessments occur. The complete abandonment of the SDWA is not a "simple oversight". It is an intentional and concerted effort to prevent the public from fully understanding the impacts of tunneling technology as presented for compliance with the Consent Decrees.

#### CONCEALMENT FROM THE PUBLIC AND THE COURT

By failing to acknowledge and apply SDWA/UIC permitting requirements, Mayor Shirley Franklin, Atlanta; Mr. Jimmy Palmer, EPA Region-4 Administrator, (EPA-4); Dr. Carol Couch, Director of the Georgia Environmental Protection Division (EPD); and Ms. Sally Bethea, Executive Director, Upper Chattahoochee Riverkeeper (hereinafter "the four parties") have acted collectively to omit protection of public health and the environment from consideration under both Consent Decrees. As a result of their actions, assessments of near-term and long-term threats to public health and potential adverse impacts to underground sources of drinking water have been neglected. Without the required permits, the

completion of both Consent Decrees will result in unenforceable violations of SDWA water quality standards. This has all been concealed from the public and the Court.

Atlanta submitted applications to receive federal grants and State loans for the construction of projects which require UIC permits and for which applications were neither going to be made nor required. On September 9, 2004, Dr. Carol Couch (EPD) issued a document which led to authorization for Atlanta to receive State loans, and on August 2, 2005 Mr. Jimmy Palmer (EPA-4) issued a document which led to authorization for Atlanta to receive federal grants. I have been advised by federal investigative agencies that the authorization would likely rise to the level of criminal fraud but for the fact that EPA, EPD, and GEFA accepted the applications and authorized the funding.

Complicit with the four parties are numerous other appointees, employees, consultants, and a few elected leaders, many whom I can identify by individual names and/or as organizations and corporations. I cannot explain "why" the four parties have done this, but I can establish that the public and the Court have been betrayed by those who are sworn, entrusted, and/or morally bound to protect public health and the environment as well as the financial well-being of the public.

#### LEGAL OPINION

Enclosed, please find a legal opinion of applicable Underground Injection Control (UIC) regulations promulgated under the Safe Drinking Water Act (SDWA) and found at 40 CFR Parts 144 and 146 and the Official Compilation of the Rules and Regulations of the State of Georgia, Rule 391-3-6-.13. The opinion has its foundation in an Eleventh Circuit Court of Appeals decision from an UIC case in Alabama (1997). The opinion explains the requirement that UIC permits must be obtained before beginning construction of facilities that emplace fluids into the subsurface. EPA-4 has oversight responsibility for Alabama and Georgia. In spite of this decision, and after considering other alternatives, in July 2001 EPA/EPD authorized Atlanta's RMR plan without requiring that UIC permits be obtained; applications for permits were never made nor required; complete geological information which is critical for the permitting process and protecting underground sources of drinking water was never submitted nor required; and the four parties to the CSO-CD know that UIC permits for the WAST system and other Atlanta tunnel systems do not exist.

The legal opinion specifically addresses the reply I received from Mr. Giattina which is mentioned earlier in this correspondence (October 18, 2007). Mr. Giattina's response omits that he had conferred with EPA-HQ to prepare his reply and that it is really a response to all of the meetings and professionally authored correspondence about UIC topics that had begun in 2000 and were summarized in four detailed letters that had been sent to EPA-4, EPA-HQ, and US DOJ in 2003. None of the original four letters had received a reply at that time or later. The 2007 opinion concludes by stating, "...wastewater conveyance tunnels are not required to be permitted under the UIC program." This is inconsistent with UIC regulations. Congress directed EPA to regulate underground injection activities and the enclosed legal opinion will develop this concept in greater detail.

It is important to understand that EPA is the agency with ultimate regulatory authority over EPD and Atlanta. Professional opinions about the applicability of UIC regulations which were first brought to EPA in 2000 had been ignored when EPA authorized the WAST and Nancy Creek tunnel systems. EPA is quick to assert that it does not select technology for compliance with environmental laws and I have video tape from 1993 as an example. However, when EPA authorized Atlanta to build tunnel systems without requiring UIC permits, it issued waivers of SDWA/UIC regulations which it does not have authority to do. EPA-4 has done this before and it is documented in a 1990 Office of Inspector General Report about Combined Sewer Overflows. EPA essentially selected a technology by issuing unauthorized waivers, by repeatedly misinforming the public about the applicability of SDWA/UIC regulations, by repeatedly accepting engineering documents which created the illusion of refining a project for which proper permitting was not being required, and by authorizing federal grants to construct the unpermitted projects.

EPA's unauthorized waivers opened the door for EPD to follow. The Georgia State Legislature directed EPD to regulate underground injection activities, however, when EPD authorized Atlanta's tunnel systems and the State loans to build them, it did so by issuing waivers of Georgia regulations which it is not authorized to do. EPA/EPD's actions do not absolve Atlanta from choosing tunnel systems but the public is now "stuck" with having to pay for projects which were only made possible by regulatory agencies, especially EPA, which issued unauthorized waivers of regulations so that the projects could be built.

The Consent Decrees do not relieve Atlanta from compliance with UIC regulations and the NEPA, however, this happened only because EPA/EPD intentionally abandoned their regulatory roles to ensure that permitting, compliance, and enforcement of the SDWA and NEPA occurs. The location of emplaced fluids relative to underground sources of drinking water is critical for the permitting process. I have copies of the core sample data from both geological studies that were supposed to be submitted for the WAST, but EPA/EPD have neither copy and have refused to use their authority to obtain copies. The five-year document retention period for the second submittal expires at the end of this month, *December 2008*. The copies that I have, each with their own flaws, establish that the WAST is in an underground source of drinking water. Descriptions of the dropshafts for the WAST are included in the "Facts" of the legal opinion, however, my efforts to obtain descriptions of the dropshafts that fill other tunnels in Atlanta's wastewater system have been obstructed. If the Court makes further inquiry about UIC permitting of the WAST system and the associated geological studies, then please also inquire about the geological studies and descriptions of the injection well (dropshaft) facilities that emplace fluids into:

- (a) the Intranchment Creek Storage Tunnel which is utilized for compliance with the CSO-CD;
- (b) the Nancy Creek Storage Tunnel which is utilized for compliance with the FACD,
- (c) the proposed South River Storage Tunnel which will be used for compliance with the FACD, and
- (d) the Three Rivers Tunnel (CSO-CD?); and any other potentially applicable structures.

#### CLOSING THOUGHTS

Documents from my historical archives establish that Atlanta, EPD, and EPA have been complicit in their defiance of environmental laws since the inception of EPA and the passage of the Clean Water Act. Riverkeeper's lawsuit in 1995 led to both Consent Decrees. Now, acting under the protection of the Court, Atlanta is non-compliant with requirements of the SDWA and NEPA but only because EPA/EPD are complicit by issuing unauthorized waivers and Riverkeeper has chosen to be silent rather than informing the Court. GEFA has been advised that inconsistencies are occurring and it has done nothing either. If the CSO-CD were to be declared "finished" today, the only portion of the combined sewers that would be in full compliance with all environmental laws is the 27% where sewers have been separated. The remaining 73% is an illusion of compliance which is dependent on an unpermitted tunnel system and planned expansions to maintain the illusion. Portions of Atlanta which are dependent on tunnel systems for compliance with the FACD are similarly illusory.

If the Court finds that the enclosed legal opinion is persuasive, then I anticipate that the Court will find the remainder of my information to be scandalous and contrary to any concept of justice. Atlanta's citizens and water/sewer ratepayers made it clearly known that full sewer separation was their preferred choice for eliminating combined sewer overflows. For 10 years their own government, two regulatory agencies, and a citizen plaintiff presented a convincing array of deception and concealment that not only prevented their preferred alternative from being implemented but also expands the degree of non-compliance with the SDWA and related Georgia laws.

#### REQUESTS FOR CONSIDERATION FROM THE COURT

The four parties are unrelenting in their deception and for that reason I respectfully request that the Court considers the following:

- (1) Atlanta's citizens and water/sewer ratepayers, through no fault of their own, are the least aware of what is happening and at the same time the most liable for severe adverse public health, environmental,

legal, and financial impacts. Will the Court please ensure that just and equitable remedies are developed.

(2) Issue an order that requires all authorized activities under both Consent Decrees to comply with the the SDWA, NEPA, and related Georgia laws.

(3) Issue an order that requires Georgia Environmental Impact Documents for Consent Decree projects to include an assessment of beneficial and adverse near-term and long-term impacts to "underground sources of drinking water" rather than an assessment of impacts to "aquifer recharge areas". This is consistent with the SDWA and NEPA.

(4) Issue an order that the United States Geological Survey be retained to evaluate geological information produced by Atlanta and to verify any analyses of the data by EPA/EPD in regard to UIC permit requirements and Environmental Impact Documents.

(5) Issue an order that this letter and enclosed legal opinion be placed in a conspicuous location on Atlanta's Document Repository website, that related documents from others be added in an orderly and timely manner, that Atlanta send media releases and notices to APAB and NPUs when additions are made, and that I, too, be notified. The public is entitled to this information and shares responsibility for subsequent outcomes.

(6) Issue an order that Atlanta's City Auditor provide a report to the Court which assesses the financial impacts of extending the 2007 CSO-CD deadline so that the Court can consider rescinding the deadline extension. My layman's analysis indicates that the extension rewards the four parties by relieving them of their culpability for an entire additional year of construction expenses and penalizes Atlanta's water/sewer ratepayers who must now bear the full additional financial burden of the project. This is in addition to ratepayer losses of ~\$1500/day that the tunnel builders agreed to pay for each day that they are late in completing the project (City Resolution 04-R-0378). Also order that the report includes information about likely misappropriation of water/sewer funds for ineligible projects (WAST extensions and City Ordinance 07-O-1530) as well as an analysis of financial information about GEFA loans which appears in the February 2008 Moody's Ratings report of Atlanta's water/wastewater system.

(7) At a later date, allow me to raise a Consent Decree compliance issue related to Document Repository website postings and availability of public documents.

The problems with implementing both Consent Decrees can only be resolved after acknowledging that problems exist. I apologize in advance if any of my allegations are the result of misunderstandings. My efforts to obtain clarification have been obstructed by the four parties' choice to misinform or remain silent rather than speaking the truth and this has adversely altered the capacity of many to make informed decisions.

Most Appreciatively,



Robert Schreiber



I declare that all statements herein are related to Civil Action File Numbers: 1:95-CV-2520-TWT and 1:98-CV-1956-TWT which are official matters of public interest; are made in good faith with an honest belief in their truth; and without fraudulent or malicious intent. [August 3, 2007]. I invite corrections and differing opinions.

## NOTE

The following legal opinion was prepared for Judge Thrash, however, you can quickly get a “feel” for the content by reading just a few short sections.

Scroll down to page 4 of the opinion and you will find “**II. QUESTIONS PRESENTED:**” which has four questions. Then, review “**III. SHORT ANSWERS:**” The answers are a good place to begin to understand the immediate situation.

If Judge Thrash orders compliance with the Underground Injection Control (UIC) regulations then there are several alternatives that will emerge. A legal requirement for public participation that was originally denied will likely be brought back in place. Then the questions become, “What does the public want?” and “How will those with authority respond?”

The problem of “unpermitted UIC wells” is a national problem and citizens in other cities are not yet aware of it. The solutions that Atlanta/Georgia select might become a national model.

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Exhibits Omitted

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November 24, 2008

**VIA FEDERAL EXPRESS**

Robert Schreiber  
XXXXXXXXXX  
XXXXXXXXXX

**Re: Opinion Letter addressing the City of Atlanta's emplacement of fluids in the West Area CSO Storage Tunnel and other tunnels in the Metro Atlanta Area through certain dropshaft structures.**

Mr. Schreiber:

We have been asked to review the law to determine whether the emplacement of fluids through drop shafts which fill the West Area CSO Storage Tunnel (as well as other dropshafts for other tunnels in Atlanta) require underground injection control permits. It is our opinion that both federal law and the laws of the State of Georgia require dropshaft structures to be permitted pursuant to the underground injection control program of the Safe Drinking Water Act and the Official Compilation of the Rules and Regulations of the State of Georgia, Rule 391-3-6-.13.

This firm understands this Opinion Letter may be used within the context of certain litigation initiated and reported at *Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta*, 986 F. Supp. 1406 (N.D. Ga.1997). Subsequently a Consolidated Consent Decree was entered between the "Citizen Plaintiffs" Upper Chattahoochee Riverkeeper Fund, Inc., Upper Chattahoochee Riverkeeper, Inc., and W. Robert Hancock, Jr.; the "Government Plaintiffs" United States of America acting on behalf of the Administrator of the Environmental Protection Agency (EPA) and the State of Georgia acting on behalf of and at the request of the Department of Natural Resources, Environmental Protection Division (EPD); and the Defendant, City of Atlanta. A Consolidated Consent Decree was filed by Judge Thrash in Civil Action No. 1:95-CV-2550-TWT whereby defendant addresses the CSO related claims brought by the citizen plaintiffs. Subsequently, on December 20, 1999, a First Amended Consent Decree was entered between the government plaintiffs and the defendant to address the remaining claims. The decree was assigned Civil Action No. 1:98-CV-1956-TWT. Bridges and Wright, L.L.C. has not been involved in the above litigation or the implementation of the above referenced consent decrees.

In reviewing this matter we have relied heavily on the work and analysis of David Ludder, Esq., Law Office of David Ludder, A Professional Limited Liability Company, 9150 McDougal Court, Tallahassee, Florida, 32312, 850-386-5671. Mr. Ludder was the lead attorney for the plaintiffs/petitioners in each of the 11<sup>th</sup> Circuit cases *Legal Envtl. Assistance Found., Inc.*

*v. Bd. of County Commr's of Brevard County, Florida*, 10 F.3d 1579 (11th Cir. 1994) (per curiam), *Legal Env'tl. Assistance Found., Inc. v. U.S. Env'tl. Prot. Agency*, 118 F.3d 1467 (11th Cir. 1997) (LEAF I) (a courtesy copy of which has been attached hereto as Exhibit A), and *Legal Env'tl. Assistance Found., Inc. v. U.S. Env'tl. Prot. Agency*, 276 F.3d 1253, 1261 (11th Cir. 2001) (LEAF II). Each of these cases involved the interpretation of the laws relating to underground injection wells. Mr. Ludder is a practicing member of both the Florida and Alabama state bars.

In the capacity described above, we have considered such matters of law and of fact, including the examination of originals or copies, certified or otherwise identified to our satisfaction, of such records and documents of the appropriate regulatory authorities including the United States Environmental Protection Agency and the Georgia Department of Natural Resources, Environmental Protection Division, and such other documents as we have deemed appropriate as a basis for the opinions hereinafter set forth.

The opinions set forth herein are limited to the laws of the State of Georgia and applicable federal laws.

## **I. MATERIAL FACTS:**

“The City of Atlanta, Department of Watershed Management is undertaking an aggressive program to control combined sewer overflows (CSOs) to comply with state and federal regulations through the development of a long-term CSO Control Plan (CSO Plan).” City of Atlanta CSO Remedial Measures Plan, Final Consolidated Storage Tunnel Design Development Report (March 2004) *included in* Environmental Review and Planning Document for Georgia Environmental Facilities Authority (April 30, 2004 revised) (hereinafter “DDR-GEFA”) at page 8.

The Plan calls for the construction and operation of “storage and conveyance tunnels to capture and convey CSOs to CSO treatment facilities.” *Id.*<sup>1</sup>

“Structures proposed at each [storage tunnel] inflow location include a . . . dropshaft.” *Id.* at 18.<sup>2</sup> *See* City of Atlanta CSO Remedial Measures Plan - CSO Pre-Design Report (May 2002) at Figure 6-2 (hereinafter “PDR”) (A copy of which is attached hereto as Exhibit B).

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1 The proposed West Area CSO Storage Tunnel (West Area Tunnel) would be configured with a main tunnel and one branch tunnel. The Main Branch would extend from the abandoned Chattahoochee Steam Plant, adjacent to R.M. Clayton WRC and Chattahoochee Water Treatment Plant (WTP), to the North Avenue CSO Facility. The Clear Creek Branch would extend from the Clear Creek CSO Facility to the vicinity of Marietta Street/Marietta Boulevard, referred to as “Rockdale.” The proposed minimum finished diameter of the two tunnel branches is 24 feet. The total length of the proposed West Area Tunnel is approximately 45,900 LF. \* \* \* The North Avenue and Tanyard CSO Facilities would require connecting tunnels to convey flow to the main tunnel branches. The West Area Tunnel depth ranges from approximately 150 feet to 305 feet below ground surface. DDR-GEFA at page 18. Construction of the West Area Tunnel has been substantially completed but is not yet operational.

2 “Flow intake locations are proposed at the existing Clear Creek, Tanyard, and North Avenue CSO Facilities.” DDR-GEFA at page 18.

Dropshafts are constructed by the raised bore drilling method. DDR-GEFA at page 23.

Dropshaft diameters range from 9 to 16 feet. Id.

“The dropshafts would feature a vortex design, allowing a controlled fall of more than 100 feet . . .” PDR Section 1 at page 4.

A total of three dropshafts are proposed. DDR-GEFA at page 23.

The storage tunnels (artificial caverns) are to be excavated in the subsurface rock formations. Id.

Fifty-percent (or less) of the West Area Tunnel will be lined with concrete. Id.

## **II. QUESTIONS PRESENTED:**

1. Are the owners/operators of the dropshafts engaged in “underground injection” activities?
2. Are the construction and operation of the dropshafts required to be authorized by an underground injection permit?
3. Are the construction and operation of the dropshafts presently authorized by an underground injection permit?
4. Is recognition that the dropshafts are used for “underground injection” important?

## **III. SHORT ANSWERS:**

1. Yes, the owners/operators of the dropshafts are engaged in “underground injection” activities. SDWA, 42 U.S.C. § 300h(d)(1) (definition of “underground injection”); Ga. Comp. R. & Regs. r. 391-3-6-.13(2)(ss) (definition of “well injection”); 40 C.F.R. § 144.3 (definition of “underground injection” and “well injection”); Ga. Comp. R. & Regs. r. 391-3-6-.13(2)(qq) (definition of “well”); 40 C.F.R. § 144.3 (same).
2. Yes, underground injection is required to be authorized by a permit. SDWA, 42 U.S.C. § 300h(b)(1)(A). The dropshafts are classified as Class V wells under Ga. Comp. R. & Regs. r. 391-3-6-.13(3)(e) & (11)(d). *See also* 40 C.F.R. § 144.6(e). No person shall construct or operate a Class V injection well without first having applied for and obtained a permit from the Director. Ga. Comp. R. & Regs. r. 391-3-6-.13(11), 391-3-6-.13(12). *See also* 40 C.F.R. §§ 144.11, 144.24.
3. No, the construction and operation of the dropshafts are not presently authorized by an underground injection permit. Because the owner/operator of the dropshafts has not applied for and obtained a permit, the owner/operator is prohibited from

injecting fluids into the sewer tunnels. Ga. Comp. R. & Regs. r. 391-3-6-.13(11)(a). *See also* 40 C.F.R. § 144.24(c).

4. Yes, recognition that the dropshafts are being used for “underground injection” is important because such recognition allows regulators to impose siting, construction and operational requirements to ensure that underground sources of drinking water are not endangered. Ga. Comp. R. & Regs. r. 391-3-6-.13(5)(a), (11)(f), (11)(h), (12)(b), (12)(c), (12)(e), (13). *See also* 40 C.F.R. § 144.12(a), (c) & (d).

#### **IV. DISCUSSION:**

In 1974, Congress enacted the Safe Drinking Water Act (“SDWA”), Pub. L. No. 93-523, 88 Stat. 1660 (codified as amended at 42 U.S.C. §§ 300f et seq. (1988)), which empowers the Environmental Protection Agency (“EPA”) to regulate the underground injection of wastewater. The SDWA established a regulatory program to be administered by the EPA or a state if the EPA approves the state underground injection control (“UIC”) program. Congress established several minimum requirements for state UIC programs, including the requirement that underground injection be prohibited unless authorized by permit.

*Legal Envtl. Assistance Found., Inc. v. Bd. of County Commr’s of Brevard County, Florida*, 10 F.3d 1579, 1580 (11th Cir. 1994) (per curiam).

The minimum requirements for state UIC programs are contained in 40 C.F.R. pt. 145. Among these requirements, the state must prohibit, in accordance with 40 C.F.R. § 144.11, any “underground injection” unless authorized by permit or rule. 40 C.F.R. § 145.11(a)(5). The statutory definition of “underground injection” is “the subsurface emplacement of fluids by well injection.” 42 U.S.C. § 300h(d)(1). The state also must classify injection wells in conformance with the classification system promulgated by EPA in 40 C.F.R. § 144.6. 40 C.F.R. § 145.11(a)(2).

*Legal Envtl. Assistance Found., Inc. v. U.S. Envtl. Prot. Agency*, 118 F.3d 1467, 1470 (11th Cir. 1997).

A state must submit to EPA a proposed UIC program that meets these minimum requirements, and receive EPA approval, in order to obtain primary regulatory and enforcement responsibility for underground injection activities within that state. *Id.* § 300h-1. The state retains primary responsibility until EPA determines, by rule, that the state UIC program no longer meets the minimum requirements established under the SDWA. *Id.* § 300h-1(b)(3).

*Id.* at 1469-1470.

The Georgia UIC program was approved by EPA on April 19, 1984. 49 Fed. Reg. 15553 (1984). See 40 C.F.R. § 147.550 (2007). Included in Georgia's approved UIC program is Ga. Comp. R. & Regs. r. 391-3-6-.13. (a copy of which is attached hereto as Exhibit "C"). 40 C.F.R. § 147.550(a)(8) (2007).

**1. The owners/operators of the dropshafts are engaged in "underground injection" activities.**

In the Safe Drinking Water Act (SDWA), "Congress directed EPA to regulate 'underground injection' activities, not 'injection wells.'" *Legal Envtl. Assistance Found., Inc. v. U.S. Envtl. Prot. Agency*, 118 F.3d at 1475. The Court discussed the meaning of the term "underground injection" in the SDWA.

To achieve the statutory purpose of "prevent[ing] underground injection which endangers drinking water sources," 42 U.S.C. § 300h(b)(1), Congress chose the regulatory strategy of requiring that state programs approved under the UIC regulations "shall prohibit ... *any* underground injection in such State which is not authorized by a permit issued by the State (except that the regulations may permit a State to authorize underground injection by rule)." *Id.* § 300h(b)(1)(A) (emphasis added). Thus, it is clear that Congress dictated that *all* underground injection be regulated under the UIC programs. An applicant may receive a permit to conduct underground injection activity if the applicant "satisf[ies] the State that the underground injection will not endanger drinking water sources." *Id.* § 300h(b)(1)(B). Whether a particular activity . . . must be regulated under the UIC programs therefore turns solely on whether such activity falls within the statutory definition of "underground injection." This statutory definition is as follows: "The term 'underground injection' means the subsurface emplacement of fluids by well injection. Such term does not include the underground injection of natural gas for purposes of storage." 42 U.S.C. § 300h(d)(1).

*Id.* at 1474.

The Court specifically noted that the House Report accompanying the bill that eventually became the SDWA states:

The definition of "underground injection" is intended to be broad enough to cover any contaminant which may be put below ground level and which flows or moves, whether the contaminant is in semi-solid, liquid, sludge, or any other form or state.

This definition is not limited to the injection of wastes or to injection for disposal purposes; . . .

*Id.* at 1475 (citing H.R. Rep. No. 93-1185, at 31 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6483).

Finally, the Court concluded that “‘underground injection’ means the subsurface emplacement of fluids by forcing them into cavities and passages in the ground through a well.” *Id.* at 1474. The Court further said that even the temporary subsurface emplacement of fluids through a well is “underground injection.” *Id.* at 1474 n.10. In addition, the Court said that the emplacement of fluids in the subsurface need not be the primary purpose or principle function of the well. *Id.* at 1475.

EPA defines “underground injection” as “well injection.” 40 C.F.R. § 144.3. Georgia and EPA define “well injection” as “the subsurface emplacement of fluids through a well.” Ga. Comp. R. & Regs. r. 391-3-6-.13(2)(ss); 40 C.F.R. § 144.3. Thus, the subsurface emplacement of fluids, either temporarily or permanently, by well injection, regardless of the well’s primary purpose or principle function, is “underground injection.”

“Well” means an open bored, drilled or driven shaft, whose depth is greater than the largest surface dimension; or an open dug hole whose depth is greater than the largest surface dimension; or, an improved sinkhole; or a subsurface fluid distribution system. Ditches and drains, open or filled, are not wells.

Ga. Comp. R. & Regs. r. 391-3-6-.13(2)(qq). *See also* 40 C.F.R. § 144.3.

The dropshafts are shafts that are open on the surface. They are created by the raised bore drilling method. The surface dimension of the dropshafts is between 9 and 16 feet in diameter. The depth of the dropshafts are 100 feet or more. Accordingly, the dropshafts are “wells” as defined in Ga. Comp. R. & Regs. r. 391-3-6-.13(2)(qq). *See also* 40 C.F.R. § 144.3.

Untreated wastewater will be injected through the dropshafts into the subsurface excavated tunnels. Thus, fluids will be emplaced in the subsurface, either temporarily or permanently, by well injection. Accordingly, the owners/operators of the dropshafts are engaged in “underground injection” activities.<sup>3</sup>

**2. The construction and operation of the dropshafts are required to be authorized by an underground injection well permit.**

To achieve the statutory purpose of “prevent[ing] underground injection which endangers drinking water sources,” 42 U.S.C. § 300h(b)(1), Congress chose the regulatory strategy of requiring that state programs approved under the UIC

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<sup>3</sup> The dropshafts are also “injection wells.” Ga. Comp. R. & Regs. r. 391-3-6-.13(2)(bb) (“a well into which fluids are being, or intended to be, injected”). *See also* 40 C.F.R. § 144.3 (“a ‘well’ into which ‘fluids’ are being injected”).

regulations “shall prohibit . . . *any* underground injection in such State which is not authorized by a permit issued by the State (except that the regulations may permit a State to authorize underground injection by rule.” Id. Section(s) 300h(b)(1)(A) (emphasis added). Thus, it is clear that Congress dictated that *all* underground injection be regulated under the UIC programs. An applicant may receive a permit to conduct underground injection activity if the applicant “satisf[ies] the State that the underground injection will not endanger drinking water sources.” Id. Section(s) 300h(b)(1)(B).

*Legal Envtl. Assistance Found., Inc. v. U.S. Envtl. Prot. Agency*, 118 F.3d at 1474.

The original promulgation of UIC regulations in 1979 established a classification system for underground injection wells. Under this classification system, all underground injection wells subject to the SDWA fit within the five well classes in EPA’s well-classification scheme. See 40 C.F.R. §§ 144.6 & 146.5; *see also LEAF I*, 118 F.3d at 1470. Classes differ from each other according to the purpose and function of the well and the substance to be injected into it. We summarized the five categories in *LEAF I*:

Class I wells are wells used to dispose of hazardous, industrial, or municipal wastes beneath underground sources of drinking water. 40 C.F.R. § 144.6(a). Class II wells are “[w]ells which inject fluids: (1) [w]hich are brought to the surface in connection with . . . conventional oil or natural gas production . . .; (2) [f]or enhanced recovery of oil or natural gas; and (3) [f]or storage of hydrocarbons.” Id. § 144.6(b). Class III wells are wells which inject for extraction of minerals. Class IV wells are wells used to dispose of hazardous or radioactive wastes into or above underground sources of drinking water. Id. § 144.6(c) and (d). Class V wells are “[i]njection wells not included in Classes I, II, III, or IV.” Id. § 144.6(e).

*Legal Envtl. Assistance Found., Inc. v. U.S. Envtl. Prot. Agency*, 276 F.3d 1253, 1261 (11th Cir. 2001).

Like 40 C.F.R. § 144.6, Ga. Comp. R. & Regs. r. 391-3-6-.13(3) classifies injection wells as Class I, II, III, IV and V. The dropshafts are not covered by the definitions of Class I, II, III, and IV. Accordingly, they are Class V wells. Ga. Comp. R. & Regs. r. 391-3-6-.13(3)(e), 391-3-6-.13(11)(d). Class V wells are typically wells that inject into or above an underground source of drinking water. The “injection zone” (*i.e.*, the “geological ‘formation,’ group of formations, or part of a formation receiving fluids through a ‘well’”) is located in or above an “underground source of drinking water” (*i.e.*, “all aquifers or portions of aquifers which are not exempted aquifers;” an aquifer is “a geological formation, group of formations, or part of a formation that

is capable of yielding water to a well or spring”). Ga. Comp. R. & Regs. r. 391-3-6-.13(2)(b), 391-3-6-.13(2)(cc), 391-3-6-.13(2)(oo). Thus, the dropshafts are Class V wells.

No person shall construct or operate a Class V injection well without first having applied for and obtained a permit from the Director. Ga. Comp. R. & Regs. r. 391-3-6-.13(11), 391-3-6-.13(12). *See also* 40 C.F.R. §§ 144.11, 144.24. Requirements applicable to Class V wells include Ga. Comp. R. & Regs. r. 391-3-6-.13(5) (prohibition of fluid movement into underground sources of drinking water), Ga. Comp. R. & Regs. r. 391-3-6-.13(11) (permit application requirements), Ga. Comp. R. & Regs. r. 391-3-6-.13(12) (siting, construction and operation requirements), Ga. Comp. R. & Regs. r. 391-3-6-.13(13) (mechanical integrity requirements), and Ga. Comp. R. & Regs. r. 391-3-6-.13(15) (emergency actions).

An official of the U.S. Environmental Protection Agency has opined that the emplacement of untreated wastewater in the sewer tunnels is not “underground injection.” He said:

The UIC program regulates the subsurface emplacement of fluids by well injection. Regulations promulgated under Part C of the Safe Drinking Water Act (SDWA) prevent underground injection from endangering underground sources of drinking water. Tunnels that convey sewage to a Publicly Owned Treatment Works (POTW) for treatment do not fall within the scope of the definitions set forth in the regulations promulgated under Part C of the SDWA. This is because the tunnels are not *intended* to emplace fluids below the surface of the ground through a well; rather, they are distribution systems intended to convey wastewater to POTWs from intake sites that collect both sewer flow and flow from a treatment plant during high usage times. Therefore, wastewater conveyance tunnels are not required to be permitted under the UIC program.

Letter from James D. Giatinna, Director, Water Management Division, U.S. EPA Region 4, to Robert Schreiber (Oct. 18, 2007) (emphasis added). ( A copy of said letter is attached hereto as Exhibit “D”). Similarly, an official of the Georgia Department of Natural Resources, Environmental Protection Division, opined that the emplacement of untreated wastewater in the sewer tunnels is not “underground injection.” He said:

The receiving shaft and the underground sewage conveyance tunnel, as described in your Memorandum of October, 14, 2004, do not require an underground injection control (UIC) permit. We understand that sections of the construction that are subject to leakage will be lined, and that neither the *purpose* nor the *function* of the shaft tunnel is to “inject” fluids into the subsurface soil or rock. Further, subject to the final shaft and tunnel dimensions, depths and other factors, the facilities, may not meet the definition of an underground injection well. UIC permits are issued for wells that inject fluids into the subsurface, usually under pressure, and may contaminant [sic] the underground aquifer. The facilities

described more closely resemble underground sewer lines, which are not regulated by the UIC program.

Memorandum from William G. Smith to Glen Behrend (Oct. 25, 2004) (emphasis added). (A copy of said memorandum attached hereto as Exhibit “E”).

The definition of “underground injection” in the SDWA is “the subsurface emplacement of fluids by well injection.” 42 U.S.C. § 300h(d)(1)(A). Only two activities are excluded from this definition: “(i) the underground injection of natural gas for purposes of storage; and (ii) the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.” 42 U.S.C. §300h(d)(1)(B). The subsurface emplacement of untreated wastewater by well injection is not excluded.

“Whether a particular activity . . . must be regulated under the UIC programs . . . turns solely on whether such activity falls within the statutory definition of ‘underground injection.’” *Legal Envtl. Assistance Found., Inc. v. U.S. Envtl. Prot. Agency*, 118 F.3d at 1474.

Nothing in the statutory definition suggests that EPA has the authority to exclude from the reach of the regulations an activity . . . which unquestionably falls within the plain meaning of the definition, on the basis that the well that is used to achieve that activity is also used— even primarily used—for another activity . . . that does not constitute underground injection. EPA’s argument that a methane gas production well is not an “injection well” because it is used primarily for gas extraction is spurious. Congress directed EPA to regulate “underground injection” activities, not “injection wells.” In view of clear statutory language requiring the regulation of all such activities, they must be regulated, regardless of the other uses of the well in which these activities occur.

*Id.* at 1475.

“[Underground injection] is not limited to . . . injection for disposal purposes; . . .” H.R. Rep. No. 93-1185, at 31 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6483. Indeed, the court in *Legal Environmental Assistance Foundation, Inc. v. U.S. Environmental Protection Agency*, expressly rejected the State of Alabama’s contention that “underground injection” requires the *permanent* emplacement of fluids in the subsurface. The Court said:

EPA does regulate under the UIC programs several activities that result in the temporary emplacement of fluids in the ground, most notably “[w]ells which inject fluids ... [f]or storage of hydrocarbons,” and “[w]ells which inject for extraction of minerals.” See 40 C.F.R. §§ 144.6(b)(3) (Class II wells) & (c) (Class III wells). In fact, the very purpose of these wells is to temporarily emplace fluids into the ground. Class II wells are used to store hydrocarbons in the ground and then retrieve these hydrocarbons when needed. Class III wells are used to

mine minerals by injecting certain fluids into mineral-bearing formations for the purpose of dissolving these minerals and then extracting the now mineral-rich fluids out of the ground.

118 F.3d. at 1474 n. 10. *See also* The Class V Underground Injection Control Study, Volume 21 - Aquifer Recharge and Aquifer Storage and Recovery Wells (EPA/816-R-99-014u, Sept. 1999 (describing aquifer storage and recovery wells as Class V wells “used to achieve two objectives: (1) storing water in the ground; and [later] (2) recovering the stored water . . . for a beneficial use.”).

Thus, merely because the intended purpose of the injection of untreated wastewater is not permanent emplacement in the subsurface, but rather to convey the wastewater to treatment facilities, does not alter the fact that the untreated wastewater is emplaced in the subsurface by well injection.<sup>4</sup> Accordingly, it is “underground injection.” “[I]t is clear that Congress dictated that all underground injection be regulated under the UIC programs.” *Legal Envtl. Assistance Found., Inc. v. U.S. Envtl. Prot. Agency*, 118 F.3d at 1475.

**3. The construction and operation of the dropshafts are not presently authorized by an underground injection well permit.**

The construction and operation of the dropshafts are not presently authorized by an underground injection control permit. Because the owner/operator of the dropshafts has not applied for and obtained a permit, the owner/operator is prohibited from using the dropshafts to inject untreated wastewater into the sewer tunnels. Ga. Comp. R. & Regs. r. 391-3-6-.13(11)(a). *See also* 40 C.F.R. § 144.24(c).

**4. The recognition that the dropshafts are used for “underground injection” is important.**

Absent recognition that the dropshafts are used for “underground injection,” none of the requirements for protection of underground sources of drinking water applicable to Class V wells will be applied. Ga. Comp. R. & Regs. r. 391-3-6-.13(5) (prohibition of fluid movement into underground sources of drinking water), Ga. Comp. R. & Regs. r. 391-3-6-.13(11) (permit

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4 The fact that a sewer tunnel may be lined does not alter the fact that the untreated wastewater will be emplaced *in the subsurface*. “The definition of ‘underground injection’ is intended to be broad enough to cover any contaminant which may be put *below ground level* and which flows or moves, whether the contaminant is in semi-solid, liquid, sludge, or any other form or state.” H.R. Rep. No. 93-1185, at 31 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6483 (emphasis added). *See also* 40 C.F.R. § 144.80(e) (“Typically, Class V wells are shallow wells used to place a variety of fluids directly *below the land surface*.”). Furthermore, the tunnels are “passages in the ground” into which fluids are emplaced. *See Legal Envtl. Assistance Found., Inc. v. U.S. Envtl. Prot. Agency*, 118 F.3d at 1474. Moreover, only 50% of the West Area Storage Tunnel will be lined.

application requirements), Ga. Comp. R. & Regs. r. 391-3-6-.13(12) (siting, construction and operation requirements), Ga. Comp. R. & Regs. r. 391-3-6-.13(13) (mechanical integrity), and Ga. Comp. R. & Regs. r. 391-3-6-.13(15) (emergency actions). For example, there will be no demonstration by the applicant that the underground injection will not result in movement of fluid into underground sources of drinking water that may threaten health, Ga. Comp. R. & Regs. r. 391-3-6-.13(5)(a); no assessment by the State of the potential adverse effect of the underground injection upon underground sources of drinking water, Ga. Comp. R. & Regs. r. 391-3-6-.13(11)(f)3., 391-3-6-.13(h); no construction, operation, monitoring and reporting requirements for the protection of underground sources of drinking water will be imposed, Ga. Comp. R. & Regs. r. 391-3-6-.13(11)(f)3., 391-3-6-.13(11)(g)1.; no opportunity for the State to order the owner/operator to take such actions as may be necessary to prevent movement of fluid into underground sources of drinking water that may threaten health, Ga. Comp. R. & Regs. r. 391-3-6-.13(11)(h); no assurance that the well will be properly sited so that the injection fluid does not contaminate an underground source of drinking water, Ga. Comp. R. & Regs. r. 391-3-6-.13(12)(b); no assurance that the injected fluid, upon reaching any underground source of drinking water, will not contain any chemical constituents that exceed any Maximum Contaminant Levels (MCL), Ga. Comp. R. & Regs. r. 391-3-6-.13(12)(c); no assurance that the well will not be located within the inner management zone of any well head protection area, Ga. Comp. R. & Regs. r. 391-3-6-.13(12)(d); no special construction requirements will be specified by the Director or in the permit to prevent contamination of an underground source of drinking water, Ga. Comp. R. & Regs. r. 391-3-6-.13(12)(e)4.; and no permit conditions for monitoring, testing and reporting to assure contamination of underground drinking water sources is not occurring, Ga. Comp. R. & Regs. r. 391-3-6-.13(12)(g).

### CONCLUSION

Underground injection control programs in the Safe Drinking Water Act and the Georgia rules and regulations are meant to protect underground sources of drinking water from endangerment. To date, these programs' essential components, including the critical component of increased public review and scrutiny, have been impermissibly circumvented in the case of the Atlanta sewer tunnels.

Respectfully submitted this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

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