

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION**

STATE OF ALABAMA,)	
)	
Plaintiff,)	
)	
v.)	1:90-CV-1331-KOB
)	
UNITED STATES ARMY CORPS OF ENGINEERS, et al.,)	
)	
Defendants.)	

ORDER

This matter comes before the court on the Federal Defendants’ Motion to Dismiss (doc. 744); the Georgia Parties’ Motion to Dismiss Counts One Through Nine of Alabama’s Sixth Amended Complaint (doc. 745); and the Georgia Parties’ Motion to Dismiss Certain Claims in Complaints Filed by Alabama Power Company, the Water Works and Sanitary Sewer Board of the City of Montgomery, Alabama, and the Board of Water and Sewer Commissioners of the City of Mobile (doc. 746). The Federal Defendants and the Georgia Parties move under Fed. R. Civ. P. 12(b)(1) for the dismissal of Counts One through Nine of Alabama’s Sixth Amended and Supplemented Complaint (doc. 598) as not based on final agency action, a requirement for this court to have subject matter jurisdiction over these counts. The Federal Defendants, in their motion to dismiss, also seek dismissal of Alabama Power’s Fourth Amended and Supplemental Complaint in Intervention (doc. 600), the Water Works and Sanitary Sewer Board of Montgomery’s Second Amended Complaint in Intervention (doc. 599), and the Board of Water and Sewer Commissioners of Mobile’s Complaint

in Intervention (doc. 602), to the extent these complaint are based on conduct that is not final agency action. The Georgia Parties separately move to dismiss the complaints of the intervenor-plaintiffs, except to the extent they assert challenges to final agency action that are not time-barred. The parties fully briefed these motions, and the court conducted a hearing on these motions on June 29, 2012. As stated at the hearing, the court GRANTS all motions to dismiss for the reasons stated on the record.

At the hearing, the court, with the benefit of the parties' excellent briefs and commendable oral advocacy, applied the standard to determine final agency action pronounced in *Bennett v. Spears*, 520 U.S. 154 (1997), and discussed in the Eleventh Circuit's opinion in *In re MDL-1824 Tri-State Water Rights Litigation*, 644 F.3d 1160 (11th Cir. 2011), to the facts of this case. For the reasons stated on the record, the court could not find final agency action for the Corps's conduct alleged in Counts One through Nine in Alabama's Sixth Amended Complaint in light of *Bennett* and the *MDL* case, and found that the motions to dismiss were due to be GRANTED. The court, thus, DISMISSES Counts One through Nine from Alabama's Sixth Amended Complaint WITH PREJUDICE. Because Alabama Power's Fourth Amended and Supplemental Complaint alleged the same conduct by the Federal Defendants as Alabama did in its Sixth Amended Complaint, the court also DISMISSES WITH PREJUDICE the counts asserted in Alabama Power's complaint to the extent they rely on the Corps's conduct the court found not to be final agency action. The court also DISMISSES WITH PREJUDICE Montgomery's and Mobile's complaints to the extent they rely on the Corps's conduct the court found not to be final agency action.

Count Ten of Alabama's complaint, alleging a claim based on the Corps's issuance of a Clean Water Act § 404 permit for the Hickory Log Creek Reservoir, which the defendants conceded

was final agency action, still remains pending, as does Alabama Power's complaint to the extent its claims are based on the § 404 permit for the Hickory Log Creek Reservoir.

For the reasons stated on the record, the court also found that the Georgia Parties' motion to dismiss certain claims in Montgomery's and Mobile's complaint as time-barred was due to be GRANTED. In addition to the conduct alleged by Alabama and Alabama Power in their complaints, Montgomery and Mobile challenged other actions by the Corps, including the issuance of § 404 permits and the execution of contracts with cities in Georgia that the Georgia Parties admit satisfy the final agency action requirement. However, the Georgia parties argued that these additional final agency actions alleged in Montgomery's and Mobile's complaint, with the exception of the issuance of a § 404 permit for the Hickory Log Creek Reservoir, were due to be dismissed as time-barred. The court agrees for the reasons stated on the record, and DISMISSES WITH PREJUDICE Montgomery's and Mobile's complaints to the extent they rely on any conduct besides the Corps's issuance of a § 404 permit for the Hickory Log Creek Reservoir.

DONE and ORDERED this 3rd day of July, 2012.


KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE