



## **Birmingham Water Works Board Land – Need for a Conservation Easement**

### **SUMMARY:**

The undeveloped open space land surrounding the Little Cahaba River, the Cahaba River, and Lake Purdy acts as an essential natural buffer that filters stormwater runoff. We are deeply concerned that this land is not adequately protected. As a result, the quality and cost of our drinking water is at risk.

***We ask the Board to fully protect this land into the future for the good of your water system ratepayers.*** A 2001 settlement agreement required the Board to place a conservation easement on its land to protect the land from harmful development. However, what was finally recorded in 2017, the Conservation Easement Agreement, is not a conservation easement and is legally defective. ***Full protection of this land would be achieved by amending and curing the “Conservation Easement Agreement” in four ways, as follows.***

1. **Create a true conservation easement under state law**, with a third-party easement holder that can support long term conservation of the land.

Under the Conservation Easement Agreement, the “easement” is not held by a third-party, but by the Birmingham Water Works Board only.

Over the history of the Board, there have been many proposals to sell parts of these lands for development, as recently as 2019. And in fact, some of this land has been sold. A true conservation easement is required to ensure long-term protection of the drinking water source for the ratepayers.

2. **Make them permanent, for as long as the Cahaba River is a drinking water source, rather than temporary as they are now.**

The 2001 settlement requires the easement to be “permanent,” but the adopted restrictions sunset in 2051 and can be changed at any time with the approval of only the Attorney General and the Board, which could happen without public knowledge.

3. **Clarify that the land can only be used and developed as necessary for purposes defined in the conservation easement.**

The 2001 settlement allowed development, including roads, to be built only for the purposes of carrying out the easement, but the Conservation Easement Agreement allows for development that fulfills the purpose of the Water Board. A conservation easement’s purpose would be defined in the easement, based on the Settlement Agreement requirements, but the Board’s purpose can be different things at different times.

4. **Ensure that ALL the land specified in the settlement agreement is protected.**

The 2001 settlement specified which land was to be protected, but the Conservation Easement Agreement allows certain land to be carved out as long as the stormwater naturally drains or is engineered to drain outside the Water Works Board's watershed.

All the land specified in the settlement needs to be protected. This land is not just essential to filtering stormwater, but also for groundwater recharge of the drinking water.

Without these revisions, the Board is in violation of the 2001 legal settlement and is not ensuring permanent protection of Lake Purdy and the Cahaba River watershed lands. We urge the Board to formally record a valid conservation easement that that permanently protects the land around the Cahaba River in order to better protect our drinking water.

#### **MORE INFORMATION AND BACKGROUND:**

- The undeveloped lands surrounding Lake Purdy, the Little Cahaba River below Lake Purdy, and the main Cahaba River around the drinking water pool serve as a major source of drinking water for the Birmingham metro area.
- The forested, undeveloped land surrounding these waters acts as an important natural buffer that filters stormwater runoff, recharges groundwater, and keeps the drinking water supply clean and abundant.
- In 1998, the City of Birmingham and Birmingham Water Works Board attempted to sell off all of the Board's assets, including these thousands of acres of undeveloped land, in order to retire some the City's debts and fund capital projects for the schools.
- As a result of overwhelming public outcry, the assets—including the acres of land in question—were returned to the Board.
- However, the Attorney General was concerned about the loss of public value of the assets, and filed a complaint against the Board on behalf of ratepayers.
- In 2001, the Board and Attorney General entered into a settlement agreement requiring that a conservation easement be established to ensure that the land surrounding the Cahaba River watershed be "permanently" protected from harmful development.
- The 2001 settlement agreement also preserved citizens' rights to enforce it.

#### **Settlement Agreement Violations:**

- Finally, after 16 years, the Board attempted to record a "conservation easement" in October 2017 in a "Conservation Easement Agreement."
- However, the Board did not create a conservation easement. The recorded "easement" is held by the Birmingham Water Works Board—which has, at times sold or considered selling some of the land for development—rather than a third-party trustee.
- According to Alabama law, if the main land holding and the conservation easement are held by the same party, the two interests merge. This merger invalidates the easement.

- In addition, the Conservation Easement Agreement violates the settlement agreement in the following ways:
  - The agreement can be amended at any time for whatever reason, as long as the Attorney General signs off. This could be done without knowledge of any other party or the ratepayers.
  - Instead of permanently protecting the land, this agreement only lasts for the next thirty years, expiring in 2051. The legal meaning of “permanent” is crystal clear. These restrictions are not permanent.
  - The agreement allows for the construction of roads and development in the area as long as the activities meet the BWWB’s purpose, instead of meeting the conservation easement’s purpose.

### **Threats to Birmingham’s Water Quality and Cost:**

- The Birmingham Water Works Board is responsible for providing clean drinking water for the Birmingham metro area; therefore, it is critically important to preserve this land in order to protect water quality for these important Alabama waters and the supply and cost of drinking water for the ratepayers.
- Along with local communities and elected officials, the Cahaba River Society and Cahaba Riverkeeper have serious concerns about the land around the Little Cahaba River, the Cahaba River, and Lake Purdy—it is not currently protected and as a result, the quality and cost of our drinking water is at risk.
- As some of the last undeveloped land in a rapidly urbanizing area, the natural areas in the Cahaba River watershed have been and continue to be under intense development pressure.
- By failing to protect Lake Purdy and the Cahaba River watershed, the Birmingham Water Works Board is failing to protect Birmingham communities and ratepayers.
- Protecting the land not only protects our water, it is also cost-effective for the Birmingham Water Board ratepayers.
  - For example, New York City recently bought more land surrounding the city’s primary drinking water source in order to protect it.
  - As a result of previous land preservation, 90% of the city’s drinking water does not require treatment at a filtration plant, saving the city over \$8 billion by avoiding the need to build an additional plant.
  - On a smaller scale, the Birmingham Water Board could reap cost savings while serving the public interest in terms of providing clean drinking water.
- For the benefit of the customers it serves, we urge the Board to formally record a conservation easement that permanently protects the land around the Cahaba River in order to effectively and permanently protect our drinking water.