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# CONSERVATION AND NATURAL RESOURCES Water Resources: Impose Civil Penalties Upon Public Water Systems for Certain Violations; Provide for Limitation of Liability Under the Georgia Hazardous Site Reuse and Redevelopment Act; Change Criteria for Exemption of Certain Properly from Liability

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## CONSERVATION AND NATURAL RESOURCES

*Water Resources: Impose Civil Penalties Upon Public Water Systems for Certain Violations; Provide for Limitation of Liability Under the Georgia Hazardous Site Reuse and Redevelopment Act; Change Criteria for Exemption of Certain Property from Liability*

CODE SECTIONS: O.C.G.A. §§ 12-5-192, 12-8-200 to -207  
(amended)

BILL NUMBER: SB 486

ACT NUMBER: 1006

GEORGIA LAWS: 1998 Ga. Laws 1667

SUMMARY: The Act imposes civil penalties on public water systems that violate certain provisions of the Act or negligently or intentionally fail or refuse to comply with final orders issued by the Director of the Environmental Protection Division of Georgia's Department of Natural Resources (the Director). Further, the Act defines certain terms and provides for powers and duties of the Director. The Act also changes the liability exemption criteria of certain property and sets forth limitations of liability under the Georgia Hazardous Site Reuse and Redevelopment Act. Finally, the Act provides exceptions to such exemptions.

EFFECTIVE DATE: July 1, 1998

### *History*

Prior to the Act, Code section 12-5-192 allowed civil penalties for the negligent or willful violation of "any provision . . . or any permit condition or limitation established pursuant to this part."<sup>1</sup> However, prior law did not specify who was liable for the civil penalties beyond the general category of "any person."<sup>2</sup> Code section 12-5-192(a)(1) provided that the civil penalty for a violation or "negligent[] fail[ure]" to comply with prior law was "not to exceed \$1,000.00 for such

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1. 1977 Ga. Laws 351, § 19, at 365-66 (formerly found at O.C.G.A. § 12-5-192(a) (1996)).

2. *Id.*

violation and an additional civil penalty not to exceed \$500.00 for each day during which the violation continue[d].”<sup>3</sup> Similarly, Code section 12-5-192(a)(2) provided that “any person *willfully* violating [the prior law] . . . shall be liable for a civil penalty not to exceed \$5,000.00 for each day during which the violation continue[d].”<sup>4</sup> Prior law did not specify whether the civil penalty was calculated by the day or by the violation *and* the day.<sup>5</sup> Thus, previous Code sections left unclear whether someone with one violation should be assessed a similar or smaller fine than someone with several violations.

In 1996, the Georgia General Assembly enacted the “Georgia Hazardous Site Reuse and Redevelopment Act” (Georgia Hazardous Site Act), which added to Chapter 8 of Title 12 new Article 9 and new Code sections 12-8-200 to -207.<sup>6</sup> That legislation did not limit the liability of lenders who foreclosed on contaminated sites, nor did it set forth clear criteria for exempting certain property from liability.<sup>7</sup> Similarly, assuming an exemption for certain property existed, that legislation did not provide any exceptions to the exemption.<sup>8</sup> The 1996 law did limit the criminal and civil liability of prospective buyers, even though the State could impose such liability upon the owner of contaminated property pursuant to Article III, Part 2 of Chapter 8 of the Code.<sup>9</sup> Additionally, the 1996 law empowered the Board of Natural Resources to establish certain rules and regulations necessary to implement and enforce the legislation.<sup>10</sup>

The 1996 Georgia Hazardous Site Act provided certain criteria that both the property and prospective purchasers must have met in order to qualify for a limitation of liability.<sup>11</sup> Code section 12-8-204(a) required that the property must have been “in a state of disuse”<sup>12</sup> or

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3. *Id.*

4. *Id.* (emphasis added).

5. *See id.*

6. *See* 1996 Ga. Laws 993, § 4, at 999-1006 (formerly found at O.C.G.A. §§ 12-8-200 to -207 (1996)). The new article and Code sections originated as a floor substitute to HB 1227 and were incorporated into the 1996 bill without changes. *See id.*; HB 1227 (HFS), 1996 Ga. Gen. Assem.

7. *See* 1996 Ga. Laws 993, § 4, at 999-1006 (formerly found at O.C.G.A. §§ 12-8-200 to -207 (1996)).

8. *See id.*

9. *See id.*

10. *See id.* (formerly found at O.C.G.A. §§ 12-8-202 to -203 (1996)).

11. *See id.* (formerly found at O.C.G.A. §§ 12-8-204 to -205 (1996)).

12. *Id.* (formerly found at O.C.G.A. § 12-8-204(a)(4)(A) (1996)).

“abandoned”<sup>13</sup> by the owner.<sup>14</sup> The prospective purchaser must not have contributed to a release of regulated substances on the property and could not be related or affiliated in any way to the previous owner or any other “person who . . . contributed to a release of hazardous materials on the [property].”<sup>15</sup> “This limitation [was] intended to ensure that landowners [who were] responsible for a release at a subject property did not transfer that property simply to circumvent liability.”<sup>16</sup>

Upon qualifying for the exemption, the prospective purchaser was required to submit a corrective action plan describing the purchaser’s agenda to bring the property into compliance.<sup>17</sup> Further, the prospective purchaser had to prepare a community impact statement, which described the environmental, societal, or economic benefits to the community and the State from the intended productive use of the property.<sup>18</sup> Thereafter, the Director of the Environmental Protection Division (EPD) had to approve both the corrective action plan and the community impact statement, and such approval must have been completed within the time specified in the plan.<sup>19</sup> “Legislators hope[d] that this limitation of liability [would] be another incentive for persons to buy and rehabilitate land that [was] abandoned or unrepaired.”<sup>20</sup>

### *SB 486*

#### *Introduction*

SB 486 was introduced to the Senate on January 27, 1998.<sup>21</sup> The Senate referred SB 486 to the Senate Natural Resources Committee.<sup>22</sup> The Committee made several minor changes to the bill<sup>23</sup> and

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13. *Id.* (formerly found at O.C.G.A. § 12-8-204(a)(4)(B) (1996)).

14. *See id.* (formerly found at O.C.G.A. § 12-8-204(a) (1996)).

15. *Id.* (formerly found at O.C.G.A. § 12-8-205(a)(1), (2) (1996)).

16. *Review of Selected 1996 Georgia Legislation*, 13 GA. ST. U. L. REV. 54, 59 (1996) [hereinafter *Selected 1996 Legislation*].

17. *See* 1996 Ga. Laws 993, § 4, at 1003-04 (formerly found at O.C.G.A. § 12-8-206 (1996)).

18. *See id.* at 1003.

19. *See id.* at 1003-04.

20. *Selected 1996 Legislation*, *supra* note 16, at 59.

21. *See* State of Georgia Final Composite Status Sheet, Mar. 19, 1998.

22. *See id.*

23. *Compare* SB 486, as introduced, 1998 Ga. Gen. Assem., *with* SB 486 (SCA), 1998 Ga. Gen. Assem.

presented the substitute to the Senate on January 30, 1998.<sup>24</sup> The Senate passed this version on February 3, 1998,<sup>25</sup> and then transferred the bill to the House.<sup>26</sup> The House referred the bill to the House Natural Resources and Environment Committee on February 4, 1998,<sup>27</sup> which subsequently passed the bill on February 11, 1998.<sup>28</sup> At that point, the bill contained only one section, which provided for the imposition of civil penalties upon public water systems serving 10,000 or more persons *and* public water systems serving fewer than 10,000 persons for the failure or refusal to comply with final orders issued by the Director of the EPD.<sup>29</sup>

### *House Floor Substitute*

On March 12, 1998, a substitute to SB 486 was offered on the House floor.<sup>30</sup> Representative Denny Dobbs of the 92nd District introduced the substitute on behalf of the Georgia Department of Natural Resources.<sup>31</sup> The substitute appended section 2, which was an amended version of the Georgia Hazardous Site Act, to existing section 1.<sup>32</sup> The House passed the substitute bill on March 12, 1998, and thereafter transferred it to the Senate for concurrence.<sup>33</sup> On March 18, 1998, the Senate concurred with the House amendments, and Governor Zell Miller signed the bill on April 23, 1998.<sup>34</sup>

The House and Senate unanimously passed SB 486.<sup>35</sup> One observer suggested that such support was due in part to the fact that Representative Dobbs, who played a large role in authoring the substituted version of SB 486, has a lot of credibility with members of

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24. See State of Georgia Final Composite Status Sheet, Mar. 19, 1998.

25. See *id.*; Georgia Senate Voting Record, SB 486 (Feb. 3, 1998).

26. See State of Georgia Final Composite Status Sheet, Mar. 19, 1998.

27. See *id.*

28. See *id.*

29. See SB 486, as introduced, 1998 Ga. Gen. Assem.

30. See State of Georgia Final Composite Status Sheet, Mar. 19, 1998.

31. See Telephone Interview with Sen. Hugh M. Gillis, Sr., Senate District No. 20 (July 21, 1998).

32. See SB 486 (HFS), 1998 Ga. Gen. Assem.

33. See State of Georgia Final Composite Status Sheet, Mar. 19, 1998; Georgia House of Representatives Voting Record, SB 486 (Mar. 12, 1998).

34. See State of Georgia Final Composite Status Sheet, Mar. 19, 1998; 1998 Ga. Laws 1667, at 1675.

35. See Telephone Interview with Sen. Waymond C. (Sonny) Huggins, Senate District No. 53 (July 27, 1998) [hereinafter Huggins Interview].

the House and the Senate.<sup>36</sup> Further, Representative Dobbs ensured that there was nothing controversial about the bill.<sup>37</sup> According to Senator Sonny Huggins of the 53rd District, nobody voted against SB 486 because the bill was needed to protect the environment.<sup>38</sup>

### *The Act*

The Act has two sections. Section 1 imposes civil penalties upon public water systems serving 10,000 or more individuals (large public water systems) and upon public water systems serving fewer than 10,000 persons (small public water systems) for certain violations and for the negligent or intentional failure or refusal of a water system to comply with final orders issued by the Director of the EPD.<sup>39</sup> Further, it provides that the civil penalties will be assessed for *each* violation per day, as opposed to a per day penalty that does not account for the number of violations.<sup>40</sup>

Section 2 of the Act amends the Georgia Hazardous Site Act.<sup>41</sup> This section provides for certain exemptions for lenders and expands the universe of sites to which the Georgia Hazardous Site Act applies.<sup>42</sup> Before the Act's passage, the Georgia Hazardous Site Act only applied to abandoned sites.<sup>43</sup> However, under the Act, abandonment is no longer required.<sup>44</sup> Further, the Act no longer requires that a prospective purchaser prepare a redevelopment plan.<sup>45</sup>

### *Civil Penalties*

The Act completely strikes Code section 12-5-192, relating to procedures for imposing penalties, hearings, and review, and inserts

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36. See Telephone Interview with David Word, Assistant Director of Georgia Environmental Protection Division (June 24, 1998) [hereinafter Word Interview].

37. See *id.*

38. See Huggins Interview, *supra* note 35.

39. See O.C.G.A. § 12-5-192 (Supp. 1998).

40. See *id.*

41. See *id.* §§ 12-8-200 to -207.

42. See Word Interview, *supra* note 36.

43. See *id.*; see also 1996 Ga. Laws 993, § 4, at 999-1006 (formerly found at O.C.G.A. §§ 12-8-200 to -207 (1996)).

44. See Word Interview, *supra* note 36. Compare 1996 Ga. Laws 993, § 4, at 1001-02 (formerly found at O.C.G.A. § 12-8-204(4) (1996)), with O.C.G.A. § 12-8-204(4) (Supp. 1998).

45. See Word Interview, *supra* note 36.

new Code section 12-5-192.<sup>46</sup> The amended Code section provides for the assessment of civil penalties for *both* public water systems serving fewer than 10,000 individuals *and* public water systems serving 10,000 or more individuals.<sup>47</sup> The Act also provides the amount of fines for the first day and each subsequent day of a violation.<sup>48</sup> Rather than just assessing civil penalties for each day's violation, the Act now specifies that each violation will incur additional daily civil penalties.<sup>49</sup>

The penalty is assessed against public water systems that "negligently or intentionally fail[] or refus[e] to comply with any final order of the director" and differ depending on the size of the system.<sup>50</sup> A "public water system serving 10,000 or more individuals [would] be liable for a civil penalty not to exceed \$1,000.00 per day per violation."<sup>51</sup> However, "for [a] public water system serving fewer than 10,000 individuals," the fine shall not "exceed \$1,000.00 for the first day of each violation and . . . \$500.00 per violation for each additional day."<sup>52</sup>

#### *Georgia Hazardous Site Reuse and Redevelopment Act*

The Act covers property listed on the " 'Hazardous [S]ite [I]nventory,' "<sup>53</sup> which refers to "the hazardous site inventory published by the [EPD] pursuant to Code section 12-8-97."<sup>54</sup> The Act further defines "qualifying property" as property that meets the criteria of Code section 12-8-204, which requires that a prospective purchaser intending to purchase the property bring the property into compliance with risk reduction standards.<sup>55</sup> The Act deletes as a qualification subsection (a)(4) of Code section 12-8-204, which required that the Director of the EPD determine whether the property was in a state of disuse or had been abandoned.<sup>56</sup> Thus, it is now possible for property that is currently being utilized to qualify under the Georgia

46. Compare 1977 Ga. Laws 351, § 19, at 365-66 (formerly found at O.C.G.A. § 12-5-192 (1996)), with O.C.G.A. § 12-5-192 (Supp. 1998).

47. See O.C.G.A. § 12-5-192 (Supp. 1998).

48. See *id.*

49. See *id.*

50. *Id.* § 12-5-192(a)(1)-(2).

51. *Id.* § 12-5-192(a)(1).

52. *Id.* § 12-5-192(a)(2).

53. *Id.* § 12-8-201(4).

54. *Id.* § 12-8-201(3).

55. See *id.* § 12-8-201(7).

56. Compare 1996 Ga. Laws 993, § 4, at 1000-02 (formerly found at O.C.G.A. § 12-8-204 (1996)), with O.C.G.A. § 12-8-204 (Supp. 1998).

Hazardous Site Act.<sup>57</sup> Further, the Act eliminates paragraph 5 of Code section 12-8-204(a), which required a prospective purchaser to prepare a community impact statement and obtain approval of the statement from the Director of the EPD.<sup>58</sup>

However, perhaps the most important provision of the Act is the provision which limits liability of lenders who hold indicia of ownership or who foreclose on contaminated sites.<sup>59</sup> Under Code section 12-8-206(d),

[a] person who holds indicia of ownership executed by the prospective purchaser primarily to protect said person's security interest in the qualifying property or who acts in good faith solely in a fiduciary capacity and who did not actively participate in the management, disposal, or release of hazardous wastes, hazardous constituents, or hazardous substances on or from the qualifying property shall not be liable to the state or any third party for costs incurred in the remediation of, equitable relief relating to, or damages resultant from the preexisting release at the [hazardous site inventory] site of which the qualifying property is part.<sup>60</sup>

This Code section provides the limitation of lender liability that did not previously exist under the Georgia Hazardous Site Act.<sup>61</sup> Further, Code section 12-8-206(e) allows a lender to take title via foreclosure on a qualifying property and still avoid liability if certain requirements are met.<sup>62</sup>

Because the 1996 law did not provide for a limitation of lender liability, "[l]enders and secured creditors fear[ed] that by foreclosing on contaminated property or by taking precautions to secure contaminated collateral, they [would] become fully liable for the contamination [as the owner] of the property."<sup>63</sup> Further, as of November 24, 1997, not one "brownfield"<sup>64</sup> had been redeveloped since

57. See Word Interview, *supra* note 36.

58. Compare O.C.G.A. § 12-8-204(a)(4)(A)-(C) (Supp. 1998), with 1996 Ga. Laws 993, § 4, at 1002 (formerly found at O.C.G.A. § 12-8-204(a)(4)-(5) (1996)).

59. See O.C.G.A. § 12-8-206(d)-(e) (Supp. 1998).

60. *Id.* § 12-8-206(d).

61. Compare *id.* with 1996 Ga. Laws 993, § 4, at 999-1006 (formerly found at O.C.G.A. §§ 12-8-200 to -207 (1996)).

62. See *id.* § 12-8-206(e).

63. Douglas A. Henderson, *Lender Liability for Environmental Contamination: Recent Guidance from EPA and the Department of Justice*, 113 BANKING L.J. 918 (1996) (discussing lender liability background).

64. Andrea Lee Rimer, *Environmental Liability and the Brownfields Phenomenon*:



the passage of the 1996 Georgia Hazardous Site Act.<sup>65</sup> Thus, in a continuing effort to encourage potential buyers to purchase and rehabilitate affected property, the Act limits lender liability.<sup>66</sup>

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*An Analysis of Federal Options for Redevelopment*, 10 TUL. ENVTL. L.J. 63, 68 (1986). "The EPA defines brownfields as 'abandoned, idle or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.'" *Id.*

65. See John McCosh, *Inside Line Your Weekly Intelligence Report on Business Development Making a List, Checking It Twice*, ATLANTA J. & CONST., Nov. 24, 1997, at E1.

66. See O.C.G.A. § 12-8-206(d) (Supp. 1998); *Selected 1996 Legislation*, *supra* note 16, at 58.