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## CONSERVATION AND NATURAL RESOURCES

*Water Resources: Enact Flint River Drought Protection Act; Create Drought Protection Program; Require the Board of Natural Resources To Establish a Drought Protection Program; Require Cooperation with the Georgia Environmental Facilities Authority*

**CODE SECTIONS:** O.C.G.A. §§ 12-5-134 (amended),  
12-5-540 to -550 (new), 50-23-5 (amended)

**BILL NUMBER:** HB 1362

**ACT NUMBER:** 650

**GEORGIA LAWS:** 2000 Ga. Laws 458

**SUMMARY:** The Act, known as the "Flint River Drought Protection Act," adds several sections to the Code to identify the importance of Georgia's water resources, define certain terms, and authorize the Board of Natural Resources and the Director of the Environmental Protection Division (EPD) of the Department of Natural Resources to create and enforce a drought protection program and administer funds. The Board is also required to implement such measures as are necessary to prevent future droughts in the Flint River basin, including the use of irrigation auctions as a water conservation technique. The Act provides compensation for nonirrigated acres either under a voluntary irrigation reduction plan or under an involuntary reduction order issued by the Director of the EPD. The Act gives the EPD authority to conduct reasonably necessary investigations and inspections of irrigated land. The Act provides enforcement measures and penalties. It encourages the

Georgia Environmental Facilities Authority to work with the Director of the EPD to assist in the implementation and funding management of the drought protection program. Finally, the Act changes certain irrigation well water standards and permitting requirements. April 19, 2000<sup>1</sup>

EFFECTIVE DATE:

### *History*

The Flint River is a 349-mile long river that runs from Atlanta into South Georgia.<sup>2</sup> There, it joins the Chattahoochee River to form the Apalachicola River, which flows across the Florida panhandle and into the Gulf of Mexico.<sup>3</sup>

Georgia's Flint River basin is predominantly an agricultural region of the state,<sup>4</sup> and agriculture is the largest industry in Georgia.<sup>5</sup> The eighteen counties in Georgia that produce 43.5 % of the state's total agricultural income depend on the waters of the Flint River for irrigation.<sup>6</sup> The importance of agriculture to the state, combined with the growing concerns about the effects of severe drought on Georgia and its neighboring states, led many agricultural, business, and environmental groups to come together to balance the state's agricultural needs with the water rights of neighboring states in times of drought.<sup>7</sup>

The underlying driving force behind HB 1362 was, in large part, the litigation between Georgia, Florida, and Alabama over water rights in the region.<sup>8</sup> The litigation actually motivated the Georgia Environmental Protection Division (EPD) to examine

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1. See 2000 Ga. Laws 458, §§ 4-5, at 468. The Act took effect upon approval by the Governor. *See id.*

2. See Charles Seabrook, *The Flint River System: Water Worries Tri-State Flap Could Mean Irrigation Limits for Farmers*, ATLANTA J. & CONST., Apr. 10, 2000, at D1.

3. *See id.*

4. See Audio Recording of House Proceedings, Feb. 16, 2000 (remarks by Rep. Richard Royal) <<http://www.ganet.org/services/leg/audio/2000archive.html>> [hereinafter House Audio].

5. *See id.*; see also Telephone Interview with Rep. Richard Royal, House District No. 164 (June 7, 2000) [hereinafter Royal Interview].

6. See House Audio, *supra* note 4.

7. *See id.*

8. *See id.*

the Flint River water flow.<sup>9</sup> In its initial studies, the EPD discovered that high use of irrigation during times of severe drought had the potential of dramatically reducing the flow of the Flint River.<sup>10</sup> This finding led the EPD to discuss the problem with the U.S. Army Corps of Engineers.<sup>11</sup> In addition to the interstate water rights concerns, the Corps of Engineers was also concerned about the environmental implications of reduced water flow in the Flint.<sup>12</sup> Prompted by the discussions between the EPD and the Corps of Engineers, members of the Georgia House of Representatives met with the Georgia Farm Bureau, state agribusiness leaders, individual farmers in the region, and environmental groups to develop a solution to the water flow problem.<sup>13</sup> That solution took the form of HB 1362, a mechanism to take acreage out of irrigation production during times of severe drought.<sup>14</sup>

HB 1362 was viewed by many as a good faith effort by Georgia to reduce the amount of water consumption by farmers during times of drought, thus preserving the river flow into Florida.<sup>15</sup> If Florida and Georgia enter into an agreement that guarantees Florida a minimum water flow amount from the Flint, HB 1362 will have the additional purpose of ensuring compliance with that legal obligation.<sup>16</sup>

In addition to the legal impact of the bill, HB 1362 was also seen as an environmental protection measure to preserve the ecology of the Flint River.<sup>17</sup> The Flint River is home to many endangered species.<sup>18</sup> If the river's ecology cannot be protected by the state, the federal Environmental Protection Agency (EPA) may institute even more severe water restrictions on the region.<sup>19</sup> The Corps of Engineers and the EPA could force

9. See Royal Interview, *supra* note 5.

10. See *id.*

11. See *id.*

12. See *id.*

13. See *id.*; see also Telephone Interview with Rep. Bob Hanner, House District No. 159 (July 7, 2000) [hereinafter Hanner Interview].

14. See Royal Interview, *supra* note 5.

15. See House Audio, *supra* note 4.

16. See *Bill Pays Farmers Who Don't Irrigate During Droughts*, AP NEWSWIRE, Apr. 19, 2000, available in WESTLAW, GANEWS.

17. See House Audio, *supra* note 4.

18. See *id.*

19. See *id.* (remarks by Rep. Bob Hanner).

farmers to cease irrigating their lands completely.<sup>20</sup> In order to preserve the water flow of the Flint, it is estimated that farmers will need to cease irrigation on approximately 100,000 acres of land during severe drought periods.<sup>21</sup>

### *HB 1362*

Representatives Richard Royal, Bob Hanner, Tom McCall, Henry Reaves, Thomas Murphy, and Newt Hudson of the 164th, 159th, 90th, 178th, 18th and 156th Districts, respectively, sponsored HB 1362.<sup>22</sup> HB 1362 was introduced on February 7, 2000.<sup>23</sup> The House assigned the bill to its Committee on Natural Resources & Environment, which favorably reported the bill, as substituted, on February 10, 2000.<sup>24</sup> The Committee substitute changed a provision of the bill to authorize the Georgia Environmental Facilities Authority to contract with the Director of the EPD to implement and execute a drought protection program for the Flint River basin.<sup>25</sup>

On the House floor, Representative Bobby Franklin of the 39th District offered a floor amendment that would have changed how the General Assembly would review the rules and regulations promulgated by the Board of Natural Resources.<sup>26</sup>

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20. See Royal Interview, *supra* note 5.

21. See House Audio, *supra* note 4.

22. See HB 1362, as introduced, 2000 Ga. Gen. Assem.

23. See State of Georgia Final Composite Status Sheet, Mar. 22, 2000.

24. See *id.*

25. Compare HB 1362, as introduced, 2000 Ga. Gen. Assem., with HB 1362 (HCS), 2000 Ga. Gen. Assem. The original version of the bill specified that the Georgia Environmental Facilities Authority should contract with the Board of Natural Resources, rather than the Director of the EPD. See HB 1362, as introduced, 2000 Ga. Gen. Assem. This change was made, upon recommendation of the Governor's Office, for purely logistical reasons so that all of the state agencies could work most effectively with each other. See Hanner Interview, *supra* note 13.

26. See Failed House Floor Amendment to HB 1362, introduced by Rep. Bobby Franklin, Feb. 16, 2000. Even without the amendment, the General Assembly will still have oversight of the promulgation of agency rules and regulations. See Hanner Interview, *supra* note 13. If the General Assembly disagrees with a regulation, it can strike it down by law during the next legislative session. See *id.* The General Assembly must ensure that the EPD and Board of Natural Resources comply with the Administrative Procedures Act. See *id.*

This floor amendment failed (27-136), and the House passed the bill, as substituted, on February 16, 2000.<sup>27</sup>

The Senate assigned HB 1362 to its Natural Resources Committee, which favorably reported the bill on March 3, 2000.<sup>28</sup> The Senate passed the bill, without any additional changes,<sup>29</sup> on March 13, 2000.<sup>30</sup> Governor Roy Barnes signed HB 1362 into law on April 19, 2000.<sup>31</sup>

### *The Act*

Section 1 of the Act, entitled the “Flint River Drought Protection Act,” amends Chapter 5 of Title 12 of the Georgia Code by adding several Code sections relating to water resource preservation in Georgia’s Flint River basin.<sup>32</sup>

The Act adds Code section 12-5-541, which states that the policy of the Act is to protect Georgia’s public health, safety, and welfare by preserving the state’s water in times of drought.<sup>33</sup> Section 12-5-542 defines certain terms to be used throughout the Act.<sup>34</sup>

The Act adds Code section 12-5-543, which authorizes the Board of Natural Resources to establish and implement a drought abatement program for the Flint River basin.<sup>35</sup> The Board may adopt any rules that are necessary to implement the policy goals of the state.<sup>36</sup> This Code section prescribes suggested rules for the Board to implement, including an irrigation abatement program, water withdrawal permits, and an irrigation auction.<sup>37</sup> Finally, this Code section provides that any

27. See Georgia House of Representatives Voting Record, HB 1362 (Feb. 16, 2000); House Audio, *supra* note 4 (vote on amendments).

28. See State of Georgia Final Composite Status Sheet, Mar. 22, 2000.

29. Compare HB 1362 (HCS), 2000 Ga. Gen. Assem., with HB 1362, as passed, 2000 Ga. Gen. Assem.

30. See Georgia Senate Voting Record, HB 1362 (Mar. 13, 2000).

31. See 2000 Ga. Laws 458, § 5, at 488.

32. See *id.* § 1, at 459-67; see also O.C.G.A. § 12-5-140 (Supp. 2000).

33. See O.C.G.A. § 12-5-541 (Supp. 2000).

34. See *id.* § 12-5-542.

35. See *id.* § 12-5-543(a).

36. See *id.* § 12-5-543(b).

37. See *id.* To benefit from the drought abatement program and payments, a permittee must demonstrate actual prior irrigation usage and must have applied for a surface-water or ground-water withdrawal permit before December 1, 1999, and received that permit prior to December 1, 2000. See *id.*

rules promulgated by the Board will be submitted to the Georgia General Assembly and will automatically become effective unless they are specifically disapproved by the General Assembly.<sup>38</sup>

The Act also gives additional power to the Director of the EPD by adding Code section 12-5-544.<sup>39</sup> The Director is given the authority to implement and enforce the provisions of the Act, including the establishment of acceptable Flint River stream flow levels, identification of affected regions, prediction of drought conditions, investigation and inspection of irrigated land, collection of fines and payments, and cooperation with the affected state and local agencies.<sup>40</sup> The Act adds Code section 12-5-545, which identifies the power of the Georgia Environmental Facilities Authority to administer drought protection funds.<sup>41</sup> The Act provides that the drought protection funds must be earmarked as drought protection funds and not allocated to the general fund.<sup>42</sup>

The Act adds Code section 12-5-546 to require the EPD to issue a prediction every March as to whether a drought is expected that year.<sup>43</sup> If a drought is predicted, the Act requires that the Division conduct an irrigation reduction auction where, in exchange for monetary compensation, irrigation system permittees in the Flint River basin will agree to abate irrigation of their land for the remainder of the year.<sup>44</sup> Under Code section 12-5-547, if the auction is unsuccessful in significantly reducing the basin's drought problem, the Director has the authority to implement forced irrigation abatement.<sup>45</sup> Again, the Act provides for compensation to those persons who are forced to cease irrigation of their land.<sup>46</sup>

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38. *See id.* § 12-5-543(c). This provision was the subject of Representative Franklin's failed floor amendment. *See* House Audio, *supra* note 4 (remarks by Rep. Bobby Franklin).

39. *See* O.C.G.A. § 12-5-544 (Supp. 2000).

40. *See id.*

41. *See id.* § 12-5-545.

42. *See id.*

43. *See id.* § 12-5-546(a).

44. *See id.* § 12-5-546(b); *see also id.* § 12-5-546(c)-(e).

45. *See id.* § 12-5-547.

46. *See id.*

The Director is authorized to investigate and inspect irrigated lands under Code section 12-5-548.<sup>47</sup> Furthermore, the Act prohibits landowners from interfering with lawful inspections by authorized personnel.<sup>48</sup> When the Director has reason to believe that a landowner or permittee has violated the Act or the DNR's rules, Code section 12-5-549 gives the Director authority to take certain steps to ensure compliance.<sup>49</sup> First, the Director can confer with the landowner, and if that approach is unsuccessful, he or she may issue an order of compliance.<sup>50</sup> Within thirty days of receipt of the order, the individual may request a hearing.<sup>51</sup> The Director has the power to have the order enforced in the superior court of the county in which the violation occurred.<sup>52</sup> Finally, this Code section establishes a *prima facie* case for an irrigation restriction violation.<sup>53</sup>

Code section 12-5-550 establishes a repayment penalty for irrigation violators.<sup>54</sup> The Director is required to give written notice to the violator.<sup>55</sup> If the violator refuses to pay or fails to challenge the notice, then the violation is deemed admitted and the Director will issue a final, unappealable order.<sup>56</sup>

Section 2 of the Act amends Code section 12-5-134 by adding a provision requiring permits for large wells (capable of producing 100,000 gallons or more of water each day).<sup>57</sup> Such wells can only be constructed after the EPD issues the landowner a letter of concurrence or a permit.<sup>58</sup> Finally, section 3 of the Act amends Code section 50-23-5 by adding subsection 31.<sup>59</sup> This subsection requires the Georgia

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47. *See id.* § 12-5-548(a).

48. *See id.* § 12-5-548(b).

49. *See id.* § 12-5-549(a).

50. *See id.*

51. *See id.* § 12-5-549(b).

52. *See id.* § 12-5-549(d).

53. *See id.* § 12-5-549(e).

54. *See id.* § 12-5-550(a). If a person irrigates in violation of his irrigation reduction agreement or a compliance order issued against him, he must pay a penalty of three times the dollar amount of payments he received from drought protection funds. *See id.*

55. *See id.* § 12-5-550(b).

56. *See id.* § 12-5-550(c)-(d).

57. *Compare* 1985 Ga. Laws 1192, § 1, at 1209 (formerly found at O.C.G.A. § 12-5-134(3) (1996)), *with* O.C.G.A. § 12-5-134(3) (Supp. 2000).

58. *Compare* 1985 Ga. Laws 1192, § 1, at 1209 (formerly found at O.C.G.A. § 12-5-134(3) (1996)), *with* O.C.G.A. § 12-5-134(3) (Supp. 2000).

59. *Compare* 1994 Ga. Laws 1108, § 6, at 1110-27 (formerly found at O.C.G.A. § 50-23-5



Environmental Facilities Authority to work with the Director of the EPD to implement the drought protection program.<sup>60</sup>

*Opposition to HB 1362*

HB 1362 met some opposition in both houses of the Georgia General Assembly. Representative Jeff Brown of the 130th District expressed concern that the bill was premature because the bill attempted to solve the water usage problem before the results of a \$750,000 study of the Flint River were finalized.<sup>61</sup> In addition, the bill might be premature because the tri-state compact between Georgia, Florida, and Alabama was not yet resolved.<sup>62</sup> Despite these objections, HB 1362 passed both houses by a strong majority vote.<sup>63</sup>

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(1998)), with O.C.G.A. § 50-23-5(31) (Supp. 2000).

60. See O.C.G.A. § 50-23-5(31) (Supp. 2000).

61. See House Audio, *supra* note 4 (remarks by Rep. Jeff Brown). *But see* Royal Interview, *supra* note 5 (asserting that farmers would not be able to survive if they were forced to wait for the completion of the five year study).

62. See House Audio, *supra* note 4 (remarks by Rep. Jeff Brown).

63. See Georgia House of Representatives Voting Record, HB 1362 (Feb. 16, 2000); Georgia Senate Voting Record, HB 1362 (Mar. 13, 2000).