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# CONSERVATION AND NATURAL RESOURCES Water Resources: Amend Chapter 5 of Title 12 of the Official Code of Georgia Annotated, Relating to Water Resources, so as to Provide That Local Governments May Impose Additional Restrictions on Outdoor Water Use for Good Cause Shown; Provide for Local Emergency Restrictions on Outdoor Water Use; Provide for Exemption from Certain Penalties; Provide that Political Subdivisions May Be Exempted from Outdoor Water Restrictions for Good Cause Shown; Provide for Automatic Repeal; Prohibit Placing Certain Restrictions on Use of Surface

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# Water for Swimming Pools; Prohibit Placing Certain Restrictions on Use of Ground Water for Swimming Pools; Provide an Effective Date; Repeal Conflicting Laws; and for Other Purposes

Georgia State University Law Review

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## CONSERVATION AND NATURAL RESOURCES

***Water Resources: Amend Chapter 5 of Title 12 of the Official Code of Georgia Annotated, Relating to Water Resources, so as to Provide That Local Governments May Impose Additional Restrictions on Outdoor Water Use for Good Cause Shown; Provide for Local Emergency Restrictions on Outdoor Water Use; Provide for Exemption from Certain Penalties; Provide That Political Subdivisions May Be Exempted from Outdoor Watering Restrictions for Good Cause Shown; Provide for Automatic Repeal; Prohibit Placing Certain Restrictions on Use of Surface Water for Swimming Pools; Prohibit Placing Certain Restrictions on Use of Ground Water for Swimming Pools; Provide an Effective Date; Repeal Conflicting Laws; and for Other Purposes***

CODE SECTION:	O.C.G.A. § 12-5-7 (new); O.C.G.A. § 12-5-31 (amended); O.C.G.A. § 12-5-102 (amended)
BILL NUMBER:	HB 1281
ACT NUMBER:	Act 761
GEORGIA LAWS:	2008 Ga. Laws 814
SUMMARY:	The Act requires local governments to obtain approval from the Environmental Protection Division of the Georgia Department of Natural Resources before imposing water restrictions that are more stringent than those imposed by the state, authorizes the Environmental Protection Division to exempt local governments from nonstatutory restrictions imposed by the state, and prohibits, with limitations, restrictions against the filling of swimming pools. The Act seeks to standardize water restrictions across the state and protect the green industry and swimming pool industry from unnecessarily stringent

restrictions imposed by local governments.

EFFECTIVE DATE: May 14, 2008

### *History*

In 2007, Georgia experienced droughts and water shortages of “historic proportions.”<sup>1</sup> Average rainfall patterns in Georgia usually cause the water levels in major water reservoirs such as Lake Lanier and Lake Allatoona to drop in the late summer months, and then recover when winter rains arrive, but the winter of 2007 did not bring the necessary rains.<sup>2</sup> At one point, “[s]tate officials warned that Lake Lanier, a 38,000-acre north Georgia reservoir that supplies Atlanta residents with water, could be depleted by mid-January 2008.”<sup>3</sup> Experts expected the drought and its resulting water shortages to extend into 2008.<sup>4</sup> However, the severity of the drought varied widely across the state.<sup>5</sup> Coastal counties, for example, experienced “mild” drought conditions, while southwest and north Georgia suffered “exceptional” drought conditions, and west-central and south-central Georgia as well as the south-central and south-eastern piedmont experienced extreme to severe drought conditions.<sup>6</sup>

In September of 2007, the State of Georgia declared a Level IV drought response for sixty-one counties in north Georgia “from Muscogee County on the Alabama line northeastward to Spalding County, and eastward to Lincoln County on the South Carolina line,”

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1. Press Release, Georgia Department of Natural Resources, Citing Historic Drought, Georgia Environmental Protection Division Bans Most Outdoor Water Use in North Georgia (Sept. 28, 2007) (on file with author) [hereinafter Press Release, Department of Natural Resources] (statement of EPD Director Carol A. Couch); see also Charles Davidson, *Will the Southeast's Water Woes Become Water Wars?*, 9 ECONSOUTH 28 (2007), available at [http://www.frbatlanta.org/invoke.cfm?objectid=21A0C794-5056-9F12-12AADD74A26AB96A&method=display\\_body](http://www.frbatlanta.org/invoke.cfm?objectid=21A0C794-5056-9F12-12AADD74A26AB96A&method=display_body).

2. Press Release, Department of Natural Resources, *supra* note 1.

3. Environment News Service, *Winter Forecast Shows Little Drought Relief for Southeast*, (Dec. 20, 2007), <http://www.ens-newswire.com/ens/dec2007/2007-12-20-094.asp>.

4. *Id.*

5. David E. Stooksbury, *Drought Conditions in Georgia Worsen Dramatically*, THE U. OF GA. C. OF AGRIC. & ENVTL. SCIENCES, Aug. 23, 2007, available at <http://apps.caes.uga.edu/news/storypage.cfm?storyid=3201>.

6. *Id.* (noting that the only four counties not suffering drought conditions—Laurens, Montgomery, Treutlen and Wheeler—enjoyed significant rainfall from the remnants of tropical storm Barry).

including all of metropolitan Atlanta, Rome, Athens, and Columbus.<sup>7</sup> A Level IV drought response, which triggers the most stringent restrictions provided under Georgia's drought contingency plan, prohibits most outdoor watering use, including filling swimming pools and watering landscaping.<sup>8</sup> Although the state offered some exemptions for commercial uses, the local governments and water utilities were permitted to impose more stringent watering restrictions.<sup>9</sup> Those more stringent watering restrictions, imposed to alleviate problems caused by the drought, had some unintended consequences.<sup>10</sup> The effects of the water shortages and strict water restrictions on businesses were considered by the Metro Atlanta Chamber of Commerce to be "the biggest and most imminent economic threat to our region."<sup>11</sup>

Some industries, such as the green industry and the swimming pool industry, were impacted by the water restrictions in extreme ways.<sup>12</sup> The green industry encompasses most forms of horticulture, including urban agriculture and landscaping, but not farming.<sup>13</sup> Urban agriculture is the cultivation and distribution of food in populated areas.<sup>14</sup> When the state announced the Level IV drought, the green industry in Georgia was an \$8 billion industry, employing over 79,000 people; however, after the new local restrictions were put in place, over 35,000 jobs were lost in the green industry, and sales dropped by over \$3 billion.<sup>15</sup> Likewise, the strict local drought

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7. Press Release, Department of Natural Resources, *supra* note 1.

8. *Id.*; see also GA. DEP'T OF NATURAL RES., GEORGIA DROUGHT MANAGEMENT PLAN 13 (2003) [http://www.gaepd.org/Files\\_PDF/gaenviron/drought/drought\\_mgmtplan\\_2003.pdf](http://www.gaepd.org/Files_PDF/gaenviron/drought/drought_mgmtplan_2003.pdf) [hereinafter Georgia Drought Management Plan]; Water Crunch: When Water and People Collide, <http://watercrunch.blogspot.com/2007/09/unprecedented-total-outdoor-watering.html> (last visited Aug. 12, 2008).

9. Press Release, Department of Natural Resources, *supra* note 1.

10. See discussion *infra* The Act.

11. Davidson, *supra* note 1.

12. See discussion *infra* The Act.

13. See Interview with Rep. Terry England (R-108th) (Apr. 3, 2008) [hereinafter England Interview]; Interview with Rep. Sean Jerguson (R-22nd) (Apr. 3, 2008) [hereinafter Jerguson Interview].

14. See Jerguson Interview, *supra* note 13.

15. See, e.g., Posting of Mary Swint to GoDeKalb.com, *House Passes Bill to Help Green and Swimming Pool Industries*, [http://www.broadcastatlanta.com/index.php?option=com\\_content&task=view&id=7964&Itemid=2781](http://www.broadcastatlanta.com/index.php?option=com_content&task=view&id=7964&Itemid=2781) (Mar. 4, 2008); Video Recording of House Natural Resources & Environment Subcommittee Hearing, Feb. 27, 2008 at 30 min., 23 sec. (remarks by Rep. Terry England (R-108th)), [http://www.legis.ga.gov/legis/2007\\_08/house/Committees/natResources/natArchives.htm](http://www.legis.ga.gov/legis/2007_08/house/Committees/natResources/natArchives.htm) [hereinafter House Committee Video]; Stacy Shelton, *House OKs Bill Limiting Water Restrictions*,

restrictions threatened the \$150 million swimming pool industry, encompassing 6,500 public pools and 92,000 residential pools in the sixty-one county Level IV drought area.<sup>16</sup> Restrictions on water use prohibited, *inter alia*, new or prospective purchasers of swimming pools from filling them.<sup>17</sup> Water in the pool exerts outward pressure on the pool wall, counteracting the inward pressure applied by the surrounding ground.<sup>18</sup> Thus, constructing a new in-ground pool without filling it with water introduces the very real possibility of structural damage or even collapse.<sup>19</sup> In addition, existing pool owners, after lowering the level of their pools slightly during the winter months before covering them (not even close to completely emptying them), were prohibited from refilling them in the spring, or “topping them off.”<sup>20</sup> Without refilling the pools in the summer to a level above the “skimmer” (which circulates, cleans, and chlorinates the water), the swimming pool becomes a stagnant pool of unsanitized water—and a breeding ground for mosquitoes and other insects.<sup>21</sup> As the summer months approached, this industry would have felt a crippling blow without help.<sup>22</sup>

Governor Sonny Perdue stepped in with an eye toward alleviating the drought on a state-wide level. In October of 2007, Governor Perdue called for ten-percent water use reductions on water permit holders.<sup>23</sup> That same month, he took the “drastic step[]” of filing a motion in Florida Federal Court to require the Army Corps of Engineers (responsible for regulating water flow out of Lake Lanier) to reduce water releases, declared a state of emergency in eighty-five

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ATLANTA J.-CONST., Mar. 4, 2008, available at [http://www.ajc.com/metro/content/metro/stories/2008/03/04/water\\_0305.html](http://www.ajc.com/metro/content/metro/stories/2008/03/04/water_0305.html); Press Release, Urban Agricultural Council, Urban Agricultural Council Thankful for HB 1281 as Governor Signs Legislation into Law (May 15, 2008), available at <http://www.georgiapoliticaldigest.com/cgi/sm/exec/view.cgi?archive=9&num=19133> [hereinafter Urban Agricultural Council Press Release].

16. Posting of Mary Swint, *supra* note 15.

17. Jerguson Interview, *supra* note 13.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Posting of Mary Swint, *supra* note 15.

23. Press Release, Office of the Governor, Governor Perdue Orders Utilities, Permit Holders to Reduce Water Use by 10 Percent (Oct. 23, 2007), available at [http://gov.georgia.gov/00/press/detail/0,2668,78006749\\_96092834\\_96284545,00.html](http://gov.georgia.gov/00/press/detail/0,2668,78006749_96092834_96284545,00.html).

counties, and pleaded with President George W. Bush to exempt Georgia from the Endangered Species Act during the drought.<sup>24</sup> He even held a prayer vigil on the steps of the Capitol building on November 11, 2007, leading citizens in a prayer for water.<sup>25</sup>

But, in view of the economic concerns raised by the increasing water restrictions, Governor Perdue announced on February 6, 2008, that the State would ease its watering restrictions, saying that “[t]aking this action strikes a balance between sound management of our water resources and support of Georgia’s industries that depend on water use,” specifically focusing on the landscaping industry.<sup>26</sup> However, following Governor Perdue’s easing of the water restrictions, the Georgia General Assembly took action to further correct the woes of the green industry and the swimming pool industry.

House Bill 1281 was introduced in the wake of Governor Perdue’s partial removal of restrictions against outdoor watering and the filling of swimming pools.<sup>27</sup> This bill was introduced to standardize water use restrictions across the state and to protect the green industry and the swimming pool industry, even in the midst of water restrictions to curtail the drought.<sup>28</sup>

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24. Sam Eifling, *Thirst and Long*, ESPN OUTDOORS, Oct. 25, 2007, available at <http://sports.espn.go.com/espn/print?id=3079306&type=story>.

25. James Salzer et al., *Perdue Asks Crowd to “Pray Up a Storm,” Drought is Message from God to Conserve Better, Governor Says*, ATLANTA J-CONST., Nov. 13, 2007, available at [http://www.ajc.com/metro/content/metro/stories/2007/11/13/rainprayer\\_1114.html](http://www.ajc.com/metro/content/metro/stories/2007/11/13/rainprayer_1114.html) (quoting Governor Perdue’s prayers, “We have not been good stewards of our land. We have not been good stewards of our water. Lord, have mercy on your people, have mercy on us and grant us rain. Oh God, let rain fall on this land of Georgia.”).

26. Press Release, Office of the Governor, Governor Perdue Announces More Flexibility in Outdoor Watering Restrictions: State Will Provide Exemptions to Level Four Drought Response; Exemptions Balanced with Renewed Conservation Effects (Feb. 6, 2008), available at [http://gov.georgia.gov/00/press\\_print/0,2669,78006749\\_78013037\\_105175463,00.html](http://gov.georgia.gov/00/press_print/0,2669,78006749_78013037_105175463,00.html).

27. HB 1281 was read for the first time on February 21, 2008 in the House of Representatives. See State of Georgia Final Composite Status Sheet, HB 1281, Apr. 4, 2008.

28. See HB 1281, as introduced, 2008 Ga. Gen. Assem.; see also Video Recording of House Proceedings, Mar. 4, 2008 at 2 hr., 46 min., 40 sec. (remarks by Rep. Terry England (R-108th)), [http://www.georgia.gov/00/article/0,2086,4802\\_6107103\\_103744292,00.html](http://www.georgia.gov/00/article/0,2086,4802_6107103_103744292,00.html) [hereinafter House Floor Video] (explaining that “standardization” was a driving motive); England Interview, *supra* note 13.

*Bill Tracking of HB 1281**Consideration and Passage by the House*

Representatives Terry England (R-108th), Tom McCall (R-30th), Jay Roberts (R-154th), Bob Hanner (D-148th), Earl Ehrhart (R-36th), and Sean Jerguson (R-22nd), respectively, sponsored HB 1281.<sup>29</sup> The House of Representatives read the bill for the first time on February 21, 2008, and for the second time the following day.<sup>30</sup> Speaker of the House Glenn Richardson<sup>31</sup> (R-19th) assigned it to the House Committee on Natural Resources and Environment.<sup>32</sup>

The bill, as originally introduced, prohibited political subdivisions of the state from imposing outdoor water use restrictions “during periods of drought” that are more restrictive than those imposed by the state, unless the political subdivision is granted an exemption by the Environmental Protection Division (a state agency) “for good cause.”<sup>33</sup> In addition, Representative Sean Jerguson (R-22nd) worked with Rep. Terry England (R-108th) to include a provision to protect the swimming pool industry.<sup>34</sup> The bill also prohibited the director of the Environmental Protection Division from restricting the use of ground water “for public, private, or community swimming pools solely due to drought or water shortage,” except during an “excessive drought or other emergency period of water shortage.”<sup>35</sup> The swimming pool provision was originally included in a different bill, SB 368, authored by Sen. Chip Rogers (R-21st),<sup>36</sup> which did not survive Cross-Over Day.<sup>37</sup>

The House Committee on Natural Resources and the Environment amended HB 1281, changing the exceptions in Sections 2 and 3 that would have allowed for the filling of swimming pools “during an

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29. See HB 1281, as introduced, 2008 Ga. Gen. Assem.

30. State of Georgia Final Composite Status Sheet, HB 1281, Apr. 4, 2008.

31. Representative Glenn Richardson (R-19th) is a Georgia State University College of Law Alumnus.

32. State of Georgia Final Composite Status Sheet, HB 1281, Apr. 4, 2008.

33. HB 1281, as introduced, 2008 Ga. Gen. Assem.

34. House Committee Video, *supra* note 15, at 10 min., 06 sec. (remarks by Rep. Tom McCall (R-30th)).

35. *Id.*

36. SB 368, as introduced, 2008 Ga. Gen. Assem.

37. Jerguson Interview, *supra* note 13.



excessive drought or other emergency period,” to allow pools to be filled simply “during an emergency period.”<sup>38</sup> This change was made to prevent localities from restricting water usage when there was merely a Level I drought declared in an area.<sup>39</sup> Additionally, the Committee added a requirement that the Environmental Protection Division of the Georgia Department of Natural Resources respond to local government petitions within three working days.<sup>40</sup> The Committee unanimously passed those amendments.<sup>41</sup> The House Committee on Natural Resources and Environment favorably reported the House Committee Substitute on February 27, 2008.<sup>42</sup> House Bill 1281 was read for the third time on March 4, 2008.<sup>43</sup> On that same day, the House of Representatives passed HB 1281 by a vote of 124 to 38.<sup>44</sup> On April 2, 2008, after the Senate passed the bill by substitute and with amendments by a vote of 39 to 13, the House passed the bill as amended by the Senate by a vote of 145 in favor and 15 in opposition.<sup>45</sup>

### *Consideration and Passage by the Senate*

On March 5, 2008, the Senate first read HB 1281 and Senate President Pro Tempore Eric Johnson (R-1st) assigned it to the Senate Committee on Agriculture and Consumer Affairs.<sup>46</sup> In committee, Representative England proposed further changes to the bill to alleviate the concerns of local governments.<sup>47</sup> First, the committee’s substitute bill changed the language of subsection (a) to read as an

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38. House Committee Video, *supra* note 15, at 0 hr., 10 min., 6 sec. (remarks by Rep. Tom McCall (R-30th)).

39. Jerguson Interview, *supra* note 13; *see also* Georgia Drought Management Plan, *supra* note 8 (defining Drought Levels I, II, III, and IV).

40. HB 1281 (HCS), 2008 Ga. Gen. Assem. (added paragraph (c)); House Committee Video, *supra* note 15, at 0 hr., 10 min., 6 sec. (remarks by Rep. Tom McCall (R-30th)).

41. House Committee Video, *supra* note 15, at 38 hr., 38 min., 13 sec. (remarks by Rep. Lynn Smith (R-70th)).

42. State of Georgia Final Composite Status Sheet, HB 1281, Apr. 4, 2008.

43. *Id.*

44. Georgia House of Representatives Voting Record, HB 1281 (Mar. 4, 2008).

45. Georgia House of Representatives Voting Record, HB 1281 (Apr. 2, 2008).

46. State of Georgia Final Composite Status Sheet, HB 1281, Apr. 4, 2008.

47. *See* Student Observation of the Senate Committee on Agriculture and Consumer Affairs (Mar. 20, 2008) (remarks by Rep. Terry England (R-108th)) (on file with the Georgia State University Law Review) [hereinafter Senate Committee Meeting].

affirmative grant of authority to local governments, rather than a restriction of the ability to exercise that authority.<sup>48</sup> Second, the committee added paragraph (2) of subsection (a) to allow political subdivisions, with limitations, to impose more stringent restrictions in the case of emergencies that threaten “public health, safety, or welfare.”<sup>49</sup> As a counter-measure, the proposed committee substitute authorized the director of the Environmental Protection Division to “suspend the emergency powers” if they are abused in a way that is intended to “circumvent” the state’s water restrictions.<sup>50</sup> Third, the substitute clarified that under subsection (b) local governments may apply for exemptions only from state water use restrictions that are “nonstatutory.”<sup>51</sup> According to Representative England those changes would “clarify some language” and address the concerns of some local governments pertaining to the ten percent reduction in water use requirement imposed by Governor Perdue.<sup>52</sup> Counties that had already reduced their water consumption as much as possible feared they would be incapable of meeting the ten percent reduction.<sup>53</sup>

Chairman John Bulloch (R-11th) allowed four members of the public to speak in opposition to and three in favor of the bill at the committee meeting.<sup>54</sup> Testimony from the opposition, including Don Cope, President and CEO of Dalton Utilities, emphasized that local regions have widely differing needs relating to water use and that local governments must already follow Environmental Protection Division guidelines.<sup>55</sup> Glenn Page, from the Cobb County-Marietta Water Authority, argued that the effects of droughts are felt locally, rather than state-wide, and that the three day application period would curtail the local governments’ much-needed ability to respond quickly.<sup>56</sup> Representing the Douglas County Water and Sewer Authority, Peter Frost, Executive Director, focused on the effect of an

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48. See HB 1281 (SCS), 2008 Ga. Gen. Assem.

49. *Id.*

50. *Id.*

51. *Id.*

52. Senate Committee Meeting, *supra* note 47.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

appeal of a decision by the Environmental Protection Division.<sup>57</sup> He feared that if and when a citizen appeals a restriction imposed by the county, the county would be enjoined from implementing that restriction pending resolution of the appeal.<sup>58</sup> This, he explained, could severely diminish the county's water supply.<sup>59</sup> Charles Laughinghouse, Commissioner of Forsyth County (R-1st), voiced his concern that Forsyth County would be unable to meet Governor Perdue's ten percent restriction requirement without imposing water use restrictions that are more stringent than those imposed by the state.<sup>60</sup>

Supporters of the bill emphasized the adverse effects on employment caused by locally-imposed water restrictions and the administrative inefficiencies of creating and complying with the myriad of local rules.<sup>61</sup> With each county and municipality potentially imposing its own rules, Mary Kay Woodworth, representing the Urban Ag Council of Georgia, stated that there could be approximately 600 different sets of water use rules in Georgia.<sup>62</sup> Echoing Ms. Woodworth's concerns, the remaining two speakers in opposition related personal experiences of significant losses in the nursery industry.<sup>63</sup> The Senate Committee on Agriculture and Consumer Affairs favorably reported the Senate Committee Substitute on March 27, 2008.<sup>64</sup>

On April 1, 2008, the bill was read for a third time in the Senate.<sup>65</sup> Three amendments were proposed on the Senate floor.<sup>66</sup> The first amendment, offered by Senator John Bulloch (R-11th) was adopted by the Senate.<sup>67</sup> First, it extended the time within which the

57. *Id.*

58. Senate Committee Meeting, *supra* note 47.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. State of Georgia Final Composite Status Sheet, HB 1281, Apr. 4, 2008.

65. State of Georgia Final Composite Status Sheet, HB 1281, Apr. 4, 2008.

66. Video Recording of Senate Proceedings, Apr. 1, 2008 at 2 hrs, 59 min., 4 sec. (remarks by Senator John Bulloch (R-11th)), [http://www.georgia.gov/00/article/0,2086,4802\\_6107103\\_103744254,00.html](http://www.georgia.gov/00/article/0,2086,4802_6107103_103744254,00.html) [hereinafter Senate Floor Video].

67. *Id.* at 3 hrs, 2 min., 30 sec. (remarks by Senator John Bulloch (R-11th)) (introducing the amendment); *Id.* at 3 hrs, 47 min., 12 sec. (remarks by Lt. Gov. Casey Cagle (R)) (indicating that the

Environmental Protection Division must respond to an application by a local government from three days to five days.<sup>68</sup> This change was proposed to alleviate the concerns of the Environmental Protection Division that it would be unable to adequately respond to requests in only three days.<sup>69</sup> Second, the amendment also added a two-year sunset provision, repealing Section 1 on July 1, 2010.<sup>70</sup> This provision was proposed because new rules and regulations governing drought management must be adopted by June 30, 2009, replacing any and all previous drought management plans.<sup>71</sup> Last, this amendment proposed to completely replace Sections 2 and 3 relating to the filling of swimming pools with language that excludes the filling of swimming pools from the definition of “outdoor water use” if failing to fill the pool would create “unsafe, unsanitary, or unhealthy conditions affecting the public health or welfare.”<sup>72</sup>

The second amendment, proposed by Sen. Bulloch (R-11th), was also approved.<sup>73</sup> This amendment added a provision exempting local governments from fines and penalties in the event that they fail to meet “reduced water consumption or other permit requirements” due to their “inability . . . to impose more stringent restrictions on outdoor water use.”<sup>74</sup> However, the local governments must request an exemption by the Environmental Protection Division within ten days from discovering their failure to meet the requirement.<sup>75</sup> This provision was proposed to alleviate the concerns of local governments that they would be unable to meet water use reduction requirements, such as those imposed by Governor Perdue, because of HB 1281.<sup>76</sup>

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amendment was passed); State of Georgia Final Composite Status Sheet, HB 1281, Apr. 4, 2008 (indicating that the amendment was passed).

68. HB 1281 (SFA) AM 25 1104), 2008 Ga. Gen. Assem.

69. See England Interview, *supra* note 13.

70. HB 1281 (SFA) (AM 25 1104), 2008 Ga. Gen. Assem.

71. HB 1281 (SFA) (AM 25 1104), 2008 Ga. Gen. Assem.. See also England Interview, *supra* note 13.

72. HB 1281 (SFA) (AM 25 1104), 2008 Ga. Gen. Assem.

73. Senate Floor Video, *supra* note 66, at 3 hr., 5 min., 22 sec. (remarks by Senator John Bulloch (R-11th)); *Id.* at 3 hr., 47 min., 12 sec. (remarks by Lt. Gov. Casey Cagle (R)) (indicating the amendment passed); State of Georgia Final Composite Status Sheet, HB 1281, Apr. 4, 2008.

74. HB 1281 (SFA) (AM 25 1109), 2008 Ga. Gen. Assem.

75. *Id.*

76. Senate Floor Video, *supra* note 66, at 3 hr., 12 min., 14 sec. (remarks by Sen. John Bulloch (R-11th)).

The third amendment, introduced by Sen. Mitch Seabaugh (R-28th), did not pass.<sup>77</sup> This amendment would have expressly prevented a variance granted by the Environmental Protection Division from being stayed by the filing of a petition by a third party challenging the Environmental Protection Division's decision.<sup>78</sup> On April 1, 2008, the Senate approved the bill, with amendments, by a vote of 39 in favor and 13 in opposition and returned the bill to the House (where it was then ratified).<sup>79</sup> Governor Sonny Perdue signed the bill into law on May 14, 2008.<sup>80</sup>

### *The Act*

The Act amends Chapter 5 of Title 12 to standardize water restrictions across Georgia and to prohibit, with exceptions, restrictions against the filling of swimming pools.<sup>81</sup>

Section 1 of the Act adds a new Code section, 12-5-7, which standardizes water restrictions by setting forth an application process through which local governments may seek to impose water restrictions that are more or less stringent than those imposed by the state.<sup>82</sup> Subsection (a) governs the imposition of water restrictions that are more stringent than those imposed by the state.<sup>83</sup> Subsection (b) governs the imposition of water restrictions that are less stringent than those imposed by the state.<sup>84</sup>

Under subsection (a), during periods of a drought, local governments may apply to the Environmental Protection Division to

77. *Id.* at 3 hr., 36 min., 19 sec. (remarks by Sen. Seabaugh (R-28th)); *Id.* at 3 hr., 47 min., 12 sec. (remarks by Lt. Gov. Casey Cagle (R)) (indicating that the amendment did not pass).

78. See Failed Senate Floor Amendment to HB 1281 (AM 25 1110), introduced by Sen. Mitch Seabaugh (R-28th), Apr. 1, 2008; Senate Floor Video, *supra* note 66, at 3 hr., 36 min., 19 sec. (remarks by Sen. Mitch Seabaugh (R-28th)).

79. See Georgia Senate Voting Record, HB 1281 (Apr. 1, 2008); Georgia Senate Voting Record, HB 1281 (Apr. 2, 2008); see also State of Georgia Final Composite Status Sheet, HB 1281, Apr. 4, 2008.

80. Georgia General Assembly, HB 1281, Bill Tracking, [http://www.legis.state.ga.us/legis/2007\\_08/sum/hb1281.htm](http://www.legis.state.ga.us/legis/2007_08/sum/hb1281.htm); Urban Agricultural Council Press Release, *supra* note 15.

81. See O.C.G.A. §§ 12-5-7, 12-5-31(l)(4.2), 12-5-102(e) (Supp. 2008). After the legislature enacted HB 1281, creating O.C.G.A. § 12-5-31(l)(4.1), the Code Commission redesignated par. (l)(4.1) as par. (l)(4.2). See O.C.G.A. § 12-5-31, Code Commission Notes (Supp. 2008).

82. See O.C.G.A. § 12-5-7 (Supp. 2008).

83. See *id.*

84. See *id.*

impose more stringent outdoor water use restrictions.<sup>85</sup> The local government has the burden to show “good cause” for the restriction, defined as “necessary and appropriate to avoid or relieve a local water shortage.”<sup>86</sup> However, in the event of an “emergency [that] immediately threatens the public health, safety, or welfare,” local governments may impose more stringent water restrictions without applying to the Environmental Protection Division, but only for seven days without a variance.<sup>87</sup> Representative Terry England (R-108th) explained that this type of “emergency” would be an unforeseeable event at the local level requiring immediate action.<sup>88</sup> For example, the approval process may be circumvented if a major water main breaks or if someone opens all the fire hydrants during the night, causing the locality to lose a significant amount of its water reserves.<sup>89</sup> To remain effective after the seven-day period, the director of the Environmental Protection Division must grant a variance—a longer-term approval of the action taken by the local government.<sup>90</sup> Last, the Act grants the Environmental Protection Division the authority to suspend those “emergency powers” if it determines that local governments are using them as a pretext for circumvention of the application process.<sup>91</sup>

Subsection (b) allows local governments to apply to the Environmental Protection Division for an exemption from “nonstatutory” water restrictions such as the ten percent water use reduction requirement imposed by Governor Perdue.<sup>92</sup> The applicant has the burden to show “good cause” for the exemption.<sup>93</sup> Subsection (c) requires the director of the Environmental Protection Division to render a decision on an application within five business days.<sup>94</sup>

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85. O.C.G.A. § 12-5-7(a) (Supp. 2008).

86. *Id.*

87. *Id.*

88. England Interview, *supra* note 13.

89. *Id.*

90. *Id.*

91. *Id.*

92. See O.C.G.A. § 12-5-7(b) (Supp. 2008); Senate Committee Meeting, *supra* note 47 (noting in response to a question that the ten percent reduction requirement is “nonstatutory” because it was imposed by Governor Perdue rather than the Legislature).

93. O.C.G.A. § 12-5-7(b) (Supp. 2008).

94. O.C.G.A. § 12-5-7(c) (Supp. 2008).

Subsection (d) imposes a sunset provision repealing the Act on July 1, 2010.<sup>95</sup> The Act also adds Code section 12-5-8, which requires new drought management rules and regulations to be adopted by the drought response committee by June 30, 2010, and further provides that those rules and regulations will supersede any and all drought management plans previously adopted by the board.<sup>96</sup>

Sections 2 and 3 of the Act affect the use of surface water and ground water to fill “any swimming pool.”<sup>97</sup> Section 2 of the Act amends subsection (l) of Code section 12-5-31 to exclude the filling of swimming pools from the definition of “outdoor water use” *if* the failure to fill the pool “would create unsafe, unsanitary, or unhealthy conditions affecting the public health or welfare.”<sup>98</sup> Section 3 of the Act adds subsection (e) to Code section 12-5-102, applying the same exception for swimming pools in the context of emergency orders issued to protect the public health or welfare.<sup>99</sup>

### *Analysis*

The Act manifests an attempt to standardize the process of imposing water use restrictions across the state to protect the green industry and swimming pool industry from arbitrary decisions by local governments.<sup>100</sup> It is a “balancing act” between local control and structured decision-making in the context of water use restrictions during periods of drought.<sup>101</sup> By forcing local governments to seek approval from the Environmental Protection Division—a state agency—the sponsors of this Act intended to prevent local governments from imposing unnecessarily stringent

95. O.C.G.A. § 12-5-7(d) (Supp. 2008).

96. O.C.G.A. § 12-5-8 (Supp. 2008).

97. *See* O.C.G.A. §§ 12-5-31(l)(4.2), 12-5-102(e) (Supp. 2008).

98. O.C.G.A. § 12-5-31(l)(4.2) (Supp. 2008).

99. O.C.G.A. § 12-5-31(e) (Supp. 2008).

100. House Floor Video, *supra* note 28, at 2 hr., 46 min., 40 sec. (remarks by Rep. Terry England (R-108th)) (explaining that “standardization” was a driving motive); Senate Committee Meeting, *supra* note 47 (remarks by Chairman John Bulloch (R-11th)) (stating that one purpose of HB 1281 was to protect these industries).

101. House Committee Video, *supra* note 15, at 30 min., 23 sec. (remarks by Rep. Terry England (R-108th)); *State Legislation Benefits Agribusiness in the 2008 Session*, AGOUTLOOK (Georgia Agribusiness Council, Inc., Commerce, G.A.), May 2008, [www.ga-agribusiness.org/index.aspx?ascxid=pagedetail&pid=22862&cid=835](http://www.ga-agribusiness.org/index.aspx?ascxid=pagedetail&pid=22862&cid=835) (last visited Feb. 1, 2009).

water use restrictions for improper reasons or based on unreliable information.<sup>102</sup> The Act contemplates the implementation of a long term plan for the Environmental Protection Division to oversee and coordinate water use.<sup>103</sup> Looking to the future, opponents of the Act have raised several concerns.<sup>104</sup>

### *Relative Effectiveness of State and Local Regulation*

Local governments fear that limiting their authority to impose water restrictions that are more stringent than those imposed by the state will detract from the effectiveness with which the water supply is regulated.<sup>105</sup> They dissent from the centralization in governance of what is essentially a local issue.<sup>106</sup> In essence, they argue that the local governments are more knowledgeable of their local situations and water capacities and are more accountable to their local constituents.<sup>107</sup> As articulated by Glenn Page, the state does not have its hand “on the pulse of the local communities.”<sup>108</sup> This argument is not new.<sup>109</sup> The drafters of the Constitution contemplated a government structure where local issues are addressed locally

102. House Floor Video, *supra* note 28, at 2 hr., 52 min., 36 sec. (remarks by Rep. Terry England (R-108th)); England Interview, *supra* note 13.

103. England Interview, *supra* note 13.

104. See discussion *infra* Relative Effectiveness of State and Local Regulation.

105. Representatives Butch Parrish (R-156th) and Al Williams (D-165th), for example, voted against the measure “because it gives the state too much control over decisions that are better made at the community level by locally elected officials.” Rep. Butch Parrish, *A Missed Opportunity for True Tax Relief*, BLADE PLUS, Mar. 17, 2008, <http://www.thebladeplus.com/news/2008/0317/news/008.html> (on file with author); Rep. Al Williams, *Assault on Local Control Doomed Tax Plan*, COASTAL COURIER, Mar. 10, 2008, <http://www.coastalcourier.com/news/archive/6045> (on file with author). Representative Stephanie Benfield (D-85th) was absent, but would have voted against the measure because “local governments are better able to evaluate their water resources and needs than the state.” Posting of Rep. Stephanie Benfield to GoDeKalb.com, [http://godekalb.com/index.php?option=com\\_content&task=view&id=8080&Itemid=2781](http://godekalb.com/index.php?option=com_content&task=view&id=8080&Itemid=2781) (Mar. 18, 2008) (on file with author). Todd Edwards, a lobbyist for the Association County Commissioners of Georgia, “can’t believe the state has more knowledge of [local] water systems and [local] capacities than . . . local governments do.” Shelton, *supra* note 15. See also Interview with Sen. Nan Orrock (D-36th) (May 23, 2008) [hereinafter Orrock Interview] (stating that “local governments need flexibility on the ground to make adjustments”); Interview with Glenn Page, Director of the Cobb County Marietta Water Authority (May 23, 2008) [hereinafter Page Interview] (stating that the Act is unnecessary and that it “oversteps the local rule”).

106. See sources cited *supra* note 105.

107. *Id.*

108. Page Interview, *supra* note 105.

109. See *infra* text accompanying note 110.



because local government officials are more knowledgeable of local issues and are more accountable to their local constituents.<sup>110</sup> The Act is a transfer of some control from counties and municipalities to the state.<sup>111</sup>

In the context of water regulation, however, the sponsors of HB 1281 flatly rejected the principle that local governments are better equipped to govern this local issue.<sup>112</sup> They believe local governments were arbitrarily imposing unnecessarily stringent restrictions merely to reduce their workload.<sup>113</sup> Representative Terry England (R-108th) explained that some local governments imposed complete and total outdoor watering bans simply because “they were tired of fielding phone calls or requests from consumers and citizens about what the watering restrictions were.”<sup>114</sup> According to Representative Tom McCall (R-30th), the Act forces those local governments “to do a little bit of work” instead of ignoring phone calls to avoid dealing with citizens “telling on [neighbors] for watering grass.”<sup>115</sup> Members of the green industry complain that local governments frequently implemented restrictions targeting their industry without seeking their input.<sup>116</sup> Moreover, they claim that local governments do not make their restrictions readily available to the public, making compliance nearly impossible.<sup>117</sup>

Opponents of the bill point out the factual inaccuracies of the supporter’s claims.<sup>118</sup> For example, in support of the bill,

110. See, e.g., THE FEDERALIST NO. 10 (James Madison).

111. See generally O.C.G.A. §§ 12-5-7, 12-5-31(1)(4.2), 12-5-102(e) (Supp. 2008).

112. See *infra* text accompanying notes 113–115, 125–130.

113. See e.g., House Floor Video, *supra* note 28, at 2 hr., 58 min., 20 sec. (remarks by Rep. Terry England (R-108th)).

114. *Id.*; Posting of Rep. Terry England to <http://www.barrowjournal.com/index.php?/archives/63-England-responds-to-critics-of-watering-bill.html> (Mar. 14, 2008, 10:33:00 EST); see also England Interview, *supra* note 13.

115. House Committee Video, *supra* note 15, at 0 hr., 36 min., 45 sec. (remarks by Rep. Tom McCall (R-30th)).

116. See Email from Sherry Loudermilk, Executive Director of Georgia Green Industry Association, to Terri Ceravolo, Sweet Apple Graphics, *URGENT—Contact Your Senator About HB 1281*, <http://www.graphicsgreen.com/URGENT%20-%20Contact%20your%20Senator%20about%20HB%201281.htm> (Mar. 10, 2008) (on file with author) [hereinafter Loudermilk Email] (encouraging constituents to mail a personalized form letter to their representatives in support of HB 1281).

117. *Id.*

118. See generally Stacy Shelton, *Tree Tale Takes Root: Drought Bill Affected by an Exaggeration?*, ATLANTA J.-CONST., Mar. 22, 2008, available at

Representative McCall illustrated the lack of effectiveness of local government to the House of Representatives with a story of a Forsyth County bank.<sup>119</sup> According to Representative McCall, the county ordered the bank to plant some trees on its property.<sup>120</sup> After a few of the trees died from the drought, the county ordered the bank to replace the trees, but simultaneously prohibited the bank from watering them.<sup>121</sup> Not included in the story, however, was the county's rescission of its order to replant the trees.<sup>122</sup> Senator Nan Orrock believes that the inaccuracies of the stories expounded by the bill's supporters further highlight the failure to "prove that there were abuses going on at the local level."<sup>123</sup> Opponents of the bill also discredit the premise that water facilities arbitrarily restrict water use, given that it is "unlikely that they will overact when they are in the business of selling water."<sup>124</sup>

Regardless of whether local governments have in fact engaged in such arbitrary decision-making, sponsors of the Act believe that the state is better-equipped to make more educated and accurate decisions.<sup>125</sup> Representative England explains that water management will now be conducted based on a "scientific model," rather than "Joe running down to the creek and seeing if it is dry."<sup>126</sup> "Sustainable yields" may be calculated for every water basin, river, and aquifer with data that will be collected under the state-wide water management plan.<sup>127</sup> Historical data will be collected to enable the Environmental Protection Division to estimate incoming water during periods of average, below average, and above average rainfall.<sup>128</sup> However, the scientific model will not be fully operational until certain assessments are made pursuant to the state's comprehensive

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<http://www.ajc.com/print/content/printedition/2008/03/22/treetale0322.html> (reporting the exaggeration of a story told to the House of Representatives in support of the bill).

119. See House Floor Video, *supra* note 28, at 3 hr., 4 min., 10 sec. (remarks by Rep. McCall (R-30th)).

120. *Id.*

121. *Id.*

122. See Shelton, *supra* note 118.

123. Orrock Interview, *supra* note 105.

124. *Id.*

125. See House Floor Video, *supra* note 28, at 2 hr., 54 min., 44 sec. (remarks by Rep. Terry England (108th)).

126. *Id.* at 2 hr., 52 min., 36 sec. (remarks by Rep. Terry England (108th)).

127. *Id.* at 2 hr., 54 min., 44 sec. (remarks by Rep. Terry England (108th)).

128. *Id.*

water management plan.<sup>129</sup> Representative England assured that the quality of the process improves with time; that is, the more information that is accumulated, the more accurate the Environmental Protection Department's decisions will become.<sup>130</sup> Opponents, however, including Mr. Page, believe that the Environmental Protection Division is underfunded, understaffed, and unprepared to meet its expectations.<sup>131</sup>

Last, although the Act expressly allows for local governments to petition for more stringent restrictions, opponents fear that local governments will refrain from doing so to avoid adverse political consequences.<sup>132</sup> Cobb County, for example, will decline to petition for more stringent restrictions, at least in the short-term.<sup>133</sup>

### *Relative Efficiency of State and Local Regulation*

One motivating factor for introducing this bill involved promoting efficient regulation of water consumption.<sup>134</sup> People disagree as to which governing body—the state government or local governments—is better equipped to regulate water consumption, which can better ease compliance burdens on industry, and which is better equipped to handle emergency situations arising from water shortages.

The Act was grounded, in part, on the idea that the state government, especially with the infrastructure of the Environmental Protection Division of the Georgia Department of Natural Resources, could most efficiently regulate water consumption.<sup>135</sup> The Act reduces the number of sources of rules from 600 (potentially) to one, undoubtedly reducing the complexity of *compliance*.<sup>136</sup> The concern

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129. House Floor Video, *supra* note 28, at 3 hr., 0 min., 0 sec. (remarks by Rep. Terry England (R-108th)).

130. *Id.*

131. Page Interview, *supra* note 105.

132. *Id.*

133. *Id.*

134. England Interview, *supra* note 13.

135. See *supra* text accompanying notes 113–115, 125–130.

136. See Senate Committee Meeting, *supra* note 47 (remarks by Mary Kay Woodworth, representing the Urban Ag Council of Georgia); see also O.C.G.A. §12-5-7 (Supp. 2008); Loudermilk Email, *supra* note 116 (“Imagine being the owner of a landscape company who works in 10 different counties that includes over 35 municipalities. With 61 separate water providers in metro-Atlanta alone, it is virtually

remains, however, that the process of regulating water use will be less efficient if handled at the state level.<sup>137</sup> As articulated by Senator Orrock, this Act adds one more unnecessary level of bureaucracy.<sup>138</sup> Further, if only one source of rules exists, it must be able to address the concerns of 600 local governments, which are all unique. Representative Terry England, author of the Act, agrees that “blanket restrictions” would be ineffective.<sup>139</sup>

In addition, the Act may diminish the ability of local governments to efficiently respond during emergencies.<sup>140</sup> However, this concern was largely alleviated by the addition of subsection (a)(2), which allows local governments to impose more stringent restrictions without applying to the Environmental Protection Division in cases of “emergenc[ies] [that] immediately threaten[] public health, safety, or welfare.”<sup>141</sup> Although “welfare” is a broad term, the Act restricts local governments from abusing those emergency powers by “suspend[ing] the [local governments’] emergency powers” in the event that they are being abused.<sup>142</sup> Further, even in normal (non-dire) situations, the Environmental Protection Division is required by the Act to render a decision to the local government within three business days; thus, a local government’s course of action may be delayed by a maximum of only three days.<sup>143</sup> Taken together, the Act should not significantly diminish the ability to quickly respond to a local situation, whether or not the situation constitutes an “emergency.”

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impossible to keep up with changes in the rules—particularly since most localities do not have the information readily available for industry access . . .”).

137. See sources cited *supra* note 105; see also Shelton, *supra* note 15.

138. Orrock Interview, *supra* note 105.

139. House Floor Video, *supra* note 28, at 2 hr., 51 min., 25 sec. (remarks by Rep. Terry England (R-108th)).

140. See Senate Committee Meeting, *supra* note 47 (remarks by Sen. Nan Orrock (D-36th)) (noting that local agencies should not feel “hogtied to a seven day approval process when [they’re] trying to protect [their] local citizens/situations.”).

141. See HB 1281 (SCS), 2008 Ga. Gen. Assem.

142. O.C.G.A. § 12-5-7(a)(2) (Supp. 2008).

143. *Id.*

*Effect on Water Supply*

House Bill 1281 was introduced in the wake of Governor Perdue's partial removal of restrictions against outdoor watering and the filling of swimming pools.<sup>144</sup> However, at the time the bill was introduced, Lake Lanier—Atlanta's primary source of water—remained over eighteen feet below capacity, and several local governments, including the City of Atlanta, declined to follow suit by removing their restrictions.<sup>145</sup> This Act forces those local governments to follow the lead of Governor Perdue and remove their restrictions as well unless they show to the satisfaction of the Environmental Protection Division that such restrictions are "necessary and appropriate to avoid or relieve a local water shortage."<sup>146</sup>

Whenever a local government desires to impose more stringent restrictions and cannot win the approval of the Environmental Protection Division, a loss of water supply necessarily results.<sup>147</sup> To be sure, the Act's explicit purpose was to eliminate "arbitrary" water restrictions imposed by local governments, reflecting the legislative determination that the elimination of "arbitrary" water restrictions is more important than the resultant loss of water supply.<sup>148</sup> However, uncertainty remains as to whether local governments actually restrict the use of water "arbitrarily."<sup>149</sup> Further, reasonable differences may arise regarding, for example, the definition of "local water supply" and "shortage."<sup>150</sup> Thus, whenever the Environmental Protection Division denies an application to impose more stringent water

144. See discussion *supra* History.

145. U.S. Army Corps of Engineers, Midnight Pools at Buford, <http://water.sam.usace.army.mil/gage/acf/probl.txt> (last visited Aug. 13, 2008) (reporting historical water levels); Shelton, *supra* note 15.

146. See Senate Committee Meeting, *supra* note 47 (remarks by Sen. Greg Goggans (R-7th)) (explaining that a restriction imposed unilaterally by the Governor is a "nonstatutory" restriction).

147. See Page Interview, *supra* note 105 (emphasizing that during this drought, the primary objective of the Cobb County-Marietta Water Authority is to "preserve water supply"; rejected applications for more stringent water restrictions would necessarily frustrate that objective).

148. See Senate Committee Meeting, *supra* note 47 (remarks by Sen. John Bulloch (R-11th)); see also *supra* notes 112–115, 125–130 and accompanying text.

149. See, e.g., Page Interview, *supra* note 105 (strongly challenging the assertion that Cobb County "arbitrarily" makes decisions to the detriment of its citizens); Orrock Interview, *supra* note 105 (Senator Orrock asserting that proponents of the bill failed to prove that the local governments were making inefficient or ineffective decisions).

150. See Senate Committee Meeting, *supra* note 47 (remarks by Sen. Nan Orrock (D-36th)) (emphasizing the ambiguity of the term "local").

restrictions by a local government, which is not acting arbitrarily or otherwise inappropriately, an unintended loss of water supply results.<sup>151</sup>

Nevertheless, acknowledging the risks and imperfections associated with ambiguity, the total water loss that would result from reasonable differences between the Environmental Protection Division and local governments is expected to be minimal, and legislators tipped the scales in favor of protection of local industries.<sup>152</sup> Even opponents of the Act acknowledge that it will have “a minimal impact” on the availability of water, and that the Act is “more responsible” and “much better” than the original bill, particularly because it provides an emergency ‘out’ provision (allowing local governments to impose restrictions without state approval during emergencies) and requires the Environmental Protection Division to accept or deny an application to impose restrictions when there is not an emergency.<sup>153</sup>

### *Industry Protection: Swimming Pools*

The swimming pool provision is intended to protect the swimming pool industry, as a health and safety measure (protecting against West Nile virus and other mosquito related problems), and to prevent swimming pool construction dangers arising from unfilled swimming pools.<sup>154</sup>

Protecting the swimming pool industry, a \$150 million industry in Georgia, became a more important issue as the summer months approached.<sup>155</sup> In the 61-county Level IV drought response area, there are 6,500 public pools & 92,000 private residential pools.<sup>156</sup> Swimming pools account for about 0.5% of the water consumed in

151. See U.S. Army Corps of Engineers, *supra* note 147.

152. See Senate Committee Meeting, *supra* note 47 (remarks by Rep. Terry England (R-108th)) (responding to a question regarding the definition of “local” water shortages that something can be done to save local industries, and that “[n]othing we do [in the legislature] is perfect”).

153. Page Interview, *supra* note 105.

154. House Floor Video, *supra* note 28, at 2 hr., 49 min., 13 sec. (remarks by Rep. Terry England (R-108th)); Jerguson Interview, *supra* note 13.

155. House Floor Video, *supra* note 28, at 2 hr., 56 min., 37 sec. (remarks by Rep. Terry England (R-108th)); Jerguson Interview, *supra* note 13.

156. Posting of Mary Swint, *supra* note 15.

the 61-county region.<sup>157</sup> Neither this provision nor any of the aforementioned statistics were debated heavily in either house.<sup>158</sup>

One issue arising in both houses relates to the interplay between this provision (which would require local governments to allow swimming pools to be filled completely), and the mandates by Governor Perdue, which require each county to reduce its water usage by ten percent.<sup>159</sup> Whether a local government would still be forced to, or will still be able to, meet the mandated ten-percent reduction while allowing swimming pools to be filled raised many questions.<sup>160</sup> Representative England said, “[T]here are some inherent flaws there, but I don’t think they’re intended.”<sup>161</sup> Representative England suggested that the Environmental Protection Division can consider that a particular county may need to restrict the filling of pools to meet the ten-percent requirement; or, the Environmental Protection Division may exempt the county from meeting the ten-percent requirement, and that inherently, this would be a judgment call appropriate for the Environmental Protection Division to make on a case-by-case basis.<sup>162</sup>

This provision was heavily amended by the Senate on April 1, 2008.<sup>163</sup> Instead of explicitly prohibiting restrictions against the filling of swimming pools (except in emergency situations), the Act merely excludes the filling of swimming pools from the definition of “outdoor watering use,” but only if the failure to keep the pools full would “create unsafe, unsanitary, or unhealthy conditions affecting the public health or welfare.”<sup>164</sup> The new wording was similar to that originally proposed in SB 368.<sup>165</sup> Representative Jergusson considered

157. House Committee Video, *supra* note 15, at 30 min., 23 sec. (remarks by Rep. Terry England (R-108th)).

158. *See, e.g., id.*; Senate Committee Meeting, *supra* note 47 (remarks by Rep. Terry England (R-108th)); House Floor Video, *supra* note 28, at 2 hr., 45 min., 10 sec. (remarks by Rep. Terry England (R-108th)).

159. *See* House Committee Video, *supra* note 15, at 30 min., 23 sec. (remarks by Rep. Terry England (R-108th)); Senate Committee Meeting, *supra* note 47 (remarks by Rep. Terry England (R-108th)); House Floor Video, *supra* note 28, at 2 hr., 56 min., 37 sec. (remarks by Rep. Terry England (R-108th)).

160. House Committee Video, *supra* note 15, at 30 min., 23 sec. (remarks by Rep. Terry England (R-108th)).

161. *Id.*

162. *Id.*

163. *Compare* HB 1281 (AP), 2008 Ga. Gen. Assem. with HB 1281 (SCS), 2008 Ga. Gen. Assem.

164. O.C.G.A. §§ 12-5-31(l)(4.2), 12-5-102(f) (Supp. 2008).

165. Jergusson Interview, *supra* note 13.

this wording a victory.<sup>166</sup> The new wording requires that, if structural issues would be caused by leaving the pool unfilled, or if a mosquito problem would be found by leaving the pool unfilled, then the pool can be filled or topped off.<sup>167</sup> Representative Jerguson explained that this will always be the case; that is, unfilled pools will always create health and safety problems.<sup>168</sup> He elaborated that the Act, by failing to specify *who* decides what circumstances qualify as a health and safety problem, allows the owner of the pool to decide.<sup>169</sup> However, litigation would presumably result if the owner's conclusion is challenged by the Environmental Protection Division or any other third party.

As intended, the Act would protect the filling of pools from locally-imposed "arbitrary" or blanket restrictions that ban all "outdoor water use."<sup>170</sup> However, the Act does not prevent local governments or the Environmental Protection Division from explicitly restricting the filling of swimming pools so long as they label it something other than "outdoor water use."<sup>171</sup> Of course, the other sections of the Act would prevent local governments from imposing any restrictions without the approval of the Environmental Protection Division.<sup>172</sup> While the language does not prohibit such a maneuver, Representative Jerguson indicated that such a move by a local government or the Environmental Protection Division would be clearly contrary to the intent of the wording in this section.<sup>173</sup>

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166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. Jerguson Interview, *supra* note 13.

171. O.C.G.A. §§ 12-5-31(l)(4.2), 12-5-102(f) (Supp. 2008).

172. Jerguson Interview, *supra* note 13.

173. *Id.*