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CONSERVATION AND NATURAL RESOURCES

Water Resources: Amend Provisions Concerning Failure to Submit Plan to Eliminate Combined Sewer Overflows

CODE SECTION: O.C.G.A. § 12-5-29.1 (amended)
BILL NUMBER: SB 19
ACT NUMBER: 597
SUMMARY: The Act removes a provision from existing law that automatically prohibited a municipality that failed to submit a schedule for eliminating its combined sewer overflows by a specified deadline from making any connections to the combined sewer system. Failure to meet the deadline can still result in penalties under the Georgia Water Pollution Control Act, including the sewer moratorium, but the penalty will be at the discretion of the Environmental Protection Division (EPD).
EFFECTIVE DATE: July 1, 1993

History

A combined sewer system is defined as “a sewage system so designed or constructed as to allow surface-water runoff to enter the conduit carrying sewage, industrial waste, or other waste,”¹ or, in other words, a system which carries both storm water and municipal sewage. Such systems were built in the days before sewage treatment requirements, when a sewer system simply routed wastewater to a stream or river to be carried away.² In a combined sewer, heavy rains can cause a sudden influx of storm water into the system, in turn, causing overflows from manholes or openended pipes.³ Even though most of the volume is rainwater, the overflow contains some sewage which may be contaminated with disease-causing bacteria, toxic chemicals, or both.⁴

1. O.C.G.A. § 12-5-29.1(a)(1) (Supp. 1992).

2. See Environmental Protection Agency National Combined Sewer Overflow Control Strategy, 54 Fed. Reg. 37,371 (Sept. 8, 1989) [hereinafter EPA CSO Control Strategy]. “Combined sewer overflows (CSOs) are flows from a combined sewer in excess of . . . capacity that are discharged into a receiving water without going to a . . . treatment works.” *Id.*

3. See, e.g., Charles Seabrook, *Raw Sewage Flowing Through Parks a Danger to Public Health*, *EPA Says*, ATLANTA J., Aug. 24, 1988, at A1. When it rains, raw sewage can overflow from seven CSOs into tributaries to the Chattahoochee River. *Id.* The rainfall need not be heavy. *Id.*

4. See EPA CSO Control Strategy, *supra* note 2, at 37,371. “CSOs have been

In 1989, the Environmental Protection Agency (EPA), acting on its authority under the Clean Water Act,⁵ issued a strategy for both the elimination of CSOs and a mechanism for permitting them until they were eliminated.⁶ States, including Georgia, that had the authority to issue discharge permits for other wastewater discharges were required to develop strategies to implement the policy.⁷

Georgia, which has several cities with combined sewer overflows,⁸ amended the state Georgia Water Quality Control Act (WQCA)⁹ in 1990 to include laws requiring the elimination and interim permitting of CSOs. Code section 12-5-29.1 required any owner or operator of a CSO as of July 1, 1990, to submit to the Environmental Protection Division (EPD), by December 31, 1990, a plan to eliminate the CSO by December 31, 1993.¹⁰ Any owner or operator who failed to eliminate the CSO by the deadline would incur civil and criminal penalties contained in the WQCA (Code sections 12-5-52 and 12-5-53) and, in addition, would be prohibited from adding any additional sewer inlets to such sewer system.¹¹ The General Assembly also added Code section 12-5-30.2 in 1990, which required that every CSO, by March 31, 1991, obtain a permit to regulate it until its sewage elimination.¹² Procedures for the permits were similar to those for other water quality permits issued pursuant to the WQCA.¹³

The 1990 CSO legislation essentially conformed to the EPA policy except for the mandatory sewer ban contained in Code section 12-5-29.1(d). The federal laws and regulations on CSOs contain no provision for a mandatory sewer ban, nor does any other part of the WQCA.¹⁴

shown to have severe adverse impacts on water quality, aquatic biota, and human health under certain conditions." *Id.*

5. 33 U.S.C. §§ 1251-1387 (1988). The specific sections of the Clean Water Act which apply to CSOs are § 301(a) (codified at 33 U.S.C. § 1311(a) (1988)) (discharge of any pollutant unlawful unless in compliance with the Act) and § 402 (codified at 33 U.S.C. § 1342 (1988)) (authority to issue permits for discharge of pollutants).

6. EPA CSO Control Strategy, *supra* note 2, at 37,371.

7. *Id.*

8. Georgia has six cities with one or more CSOs: Albany, Atlanta, Augusta, Cedartown, Columbus and Rome. EPD, Combined Sewer Overflow Permitting Strategy 2 (Dec. 3, 1990).

9. O.C.G.A. §§ 12-5-20 to -53 (1992).

10. 1990 Ga. Laws 1216 (formerly found at O.C.G.A. § 12-5-29.1 (1990)).

11. 1990 Ga. Laws 1217-18 (formerly found at O.C.G.A. § 12-5-29.1(d) (1990)).

12. 1990 Ga. Laws 1201 (formerly found at O.C.G.A. § 12-5-30.2 (1990)).

13. *See* O.C.G.A. § 12-5-30 (1992).

14. Interview with David Word, Assistant Director, Georgia Environmental Protection Division (EPD), in Atlanta (Mar. 11, 1993) [hereinafter Word Interview]. It has been speculated that the tough language was included because of anti-Atlanta sentiment in the legislature. *Id.* At the time the original CSO legislation was passed, it was widely thought that only Atlanta would be affected by it. *Id.*

The General Assembly amended both Code sections in 1991. Code section 12-5-30.2 was amended to extend the deadline for obtaining a permit one year, to March 31, 1992.¹⁵ Code section 12-5-29.1 was amended to extend the deadline for elimination of CSOs by two years, to December 31, 1995.¹⁶ However, this extension only applied to those cities which had not submitted a plan for eliminating the CSOs to the EPD by August 1, 1990.¹⁷ Interim deadlines were included for those cities with the December 31, 1995 deadline.¹⁸ The mandatory sewer ban provision was not changed.¹⁹

A number of cities faced problems, both logistical and financial, in complying with the statutory requirements.²⁰ One of the affected cities, Columbus, expressed concern to the EPD about the cost of compliance.²¹ After Columbus was issued its CSO permit,²² it reiterated its concerns, contending among other things that the schedule was too tight and the financial burden was excessive.²³ The city acknowledged that these matters were beyond the control of the EPD, and that since the deadlines were statutory the city would attempt to change them legislatively.²⁴ The EPD acknowledged Columbus' dilemma, but agreed that the deadlines were beyond EPD authority.²⁵

The city began discussions with its representatives in the General Assembly to find a way to reduce its burden.²⁶ As a result, SB 19 was introduced in the 1993 General Assembly.²⁷

15. 1991 Ga. Laws 1389 (codified at O.C.G.A. § 12-5-30.2 (1992)). The deadline may have been extended once legislators realized that Atlanta was not the only municipality that would be affected. Word Interview, *supra* note 14.

16. 1991 Ga. Laws 1388 (codified at O.C.G.A. § 12-5-29.1 (1992)).

17. *Id.* The only city that had submitted its plan by Aug. 1, 1990 was Atlanta. See *supra* notes 14-15.

18. 1991 Ga. Laws 1388 (codified at O.C.G.A. § 12-5-29.1 (1992)).

19. *Id.* at 1389.

20. See, e.g., Douglas A. Blackmon, *Atlanta Water to Cost 10% More by April: Council Approves Series of Hikes to Finance Pollution-Control Effort*, ATLANTA J. & CONST., Mar. 19, 1993, at D1.

21. Ben Wright, *Columbus to Query State Sewer Permit Requirements*, COLUMBUS LEDGER-INQUIRER, Dec. 10, 1991, at B3.

22. Letter from Harold Reheis, Director, EPD, to Billy Turner, President, Columbus Water Works (Mar. 31, 1992) (available in Georgia State University College of Law Library).

23. Letter from Billy Turner, President, Columbus Water Works, to Harold Reheis, Director, EPD (Apr. 30, 1992) (available in Georgia State University College of Law Library).

24. *Id.*

25. Letter from Harold Reheis, Director, EPD, to Billy Turner, President, Columbus Water Works (June 15, 1992) (available in Georgia State University College of Law Library).

26. Word Interview, *supra* note 14.

27. Telephone Interview with Sen. Pete Robinson, Senate District No. 16 (Apr. 15,

SB19

SB 19, as introduced, would have amended two sections of the WQCA.²⁸ Language would have been added to Code section 12-5-29.1 to provide that any violator of the compliance schedule contained in that section would “not be subject to the liability and penalty provided in Code section 12-5-53 because of such failure.”²⁹ The same sentence was also amended to delete the phrase, “in addition, shall be prohibited from adding any additional sewer connections to such combined sewer system.”³⁰ As introduced, section 2 of SB 19 would have amended Code section 12-5-53, the criminal penalty provision, to effectuate the exception from criminal penalties provided in section 1 of the bill.³¹

The bill was assigned to the Senate Natural Resources Committee, and, in turn, to the Water Resources Subcommittee.³² There was immediate opposition from the EPD.³³ The EPD agreed to eliminate the mandatory sewer ban language.³⁴ However, the EPD opposed excepting violations of the CSO portion of the Act from criminal penalties.³⁵ Since Georgia was delegated authority from the EPA to administer its water quality permit program, Georgia’s laws must be consistent with federal laws.³⁶ Removal of the criminal penalty provision from the CSO or any other portion of Georgia water quality law would be a major inconsistency with the federal requirements.³⁷

1993] [hereinafter Robinson Interview]. Sen. Robinson cosponsored SB 19 and was influential in the passage of the previous legislation concerning CSOs. *Id.*

28. O.C.G.A. §§ 12-5-20 to -53 (1992).

29. SB 19, as introduced, 1993 Ga. Gen. Assem. O.C.G.A. § 12-5-53 is the section of the Act which provides for criminal penalties, including up to \$50,000 per day per violation and imprisonment for up to two years for certain violations. O.C.G.A. § 12-5-53 (Supp. 1993). According to Sen. Robinson, it was not considered “proper” to impose criminal penalties on a city because of CSOs. Robinson Interview, *supra* note 27.

30. SB 19, as introduced, 1993 Ga. Gen. Assem. This clause was the mandatory sewer moratorium language, unique to this Code section, that was at issue. *See supra* note 18 and accompanying text.

31. SB 19, as introduced, 1993 Ga. Gen. Assem.

32. Word Interview, *supra* note 14.

33. *Id.*

34. Letter from Harold Reheis, Director, EPD, to Frank Martin, Mayor, Columbus, Georgia (Jan. 14, 1993) [hereinafter Reheis-Martin Letter]. “Removing that requirement will make this portion of the [WQCA] consistent with the rest of the [WQCA], and consistent with other Georgia environmental laws.” *Id.*

35. *Id.* “The removal of criminal penalty provisions is a problem.” *Id.* (emphasis in original).

36. *Id.*; *see also* 40 C.F.R. § 123.27 (1992) (requirements for state National Pollutant Discharge Elimination System permit programs).

37. 40 C.F.R. § 123.27(a)(3)(ii) (1992). “(a) Any State agency administering a [NPDES] program shall have available the following remedies . . . : (3) . . . to seek criminal penalties, including fines, as follows: (ii) Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or

The EPD did not want to lose its delegation of the federal program.³⁸ Also, the exception was contrary to EPD policy of having the option of imposing criminal sanctions in response to violations.³⁹ As a result of the EPD's concerns, the Senate Natural Resources Committee removed the language excepting CSOs from criminal penalties under the Act.⁴⁰ The amended bill passed the Senate without incident, and was ultimately passed by the House despite some delay while in the Natural Resources Committee.⁴¹

The main effect of SB 19 is to bring the combined sewer overflow provisions of the WQCA in line with other provisions of the WQCA. A mandatory sewer moratorium was inconsistent with the EPD's policy of exercising discretion in enforcement action.⁴² The EPD contends that a permittee should not be penalized with a sewer ban if the permittee should miss the statutory deadline through no fault of its own.⁴³ Such a ban would almost certainly inhibit development. Under pre-SB 19 law, the EPD would have had no choice but to impose a sewer moratorium on a system which failed to meet its deadline, no matter what the reason.⁴⁴ With SB 19, the harsh mandate to both the EPD and the regulated community was removed.⁴⁵

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limitations" *Id.*

38. Reheis-Martin Letter, *supra* note 34.

39. Word Interview, *supra* note 14.

40. *See* SB 19 (SCS), 1993 Ga. Gen. Assem.

41. SB 19, 1993 Ga. Gen. Assem. Reportedly the bill was held up because of concerns by representatives of communities downstream from Atlanta on the Chattahoochee River. Word Interview, *supra* note 14. Release from Committee may have been based on the guarantee that the bill would be signed into law only if Atlanta agreed to a negotiated settlement with EPD which would resolve violations by Atlanta of the deadline provisions for two of its CSOs. *Id.*

42. Reheis-Martin Letter, *supra* note 34.

43. Word Interview, *supra* note 14.

44. *Id.*

45. The benefit to the City of Columbus, the driving force behind SB 19, may be negligible; the City will probably meet its deadlines under O.C.G.A. § 12-5-29.1. Robinson Interview, *supra* note 27. The major beneficiary of SB 19 will probably be Atlanta, since its deadline precedes the rest of Georgia's CSOs by two years. *Id.* On the actual probability that a criminal penalty would be imposed, Sen. Robinson commented, "I know they [EPD] are not going to put anybody in Reidsville [for failure to meet deadlines]." *Id.*