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CONSERVATION AND NATURAL RESOURCES

Water Resources: Amend Article 9 of Chapter 5 of Title 12 of the Official Code of Georgia Annotated, the “Flint River Drought Protection Act,” so as to Clarify Legislative Intent; Revise Definitions; Expand Programs; Provide for Additional Powers of the Director; Provide for New Irrigation Efficiency Requirements; Provide for Participation in Augmented Flow Programs; Clarify Compliance and Enforcement Provisions; Provide for Related Matters; Repeal Conflicting Laws, and for Other Purposes

CODE SECTIONS:	O.C.G.A. §§ 12-5-541, -542, -544, -546 (amended); -546.1 (new); -546.2 (new); -549 (amended)
BILL NUMBER:	SB 213
ACT NUMBER:	537
GEORGIA LAWS:	2014 Ga. Laws 302
SUMMARY:	The Act provides the Director of the Environmental Protection Division with flexibility in determining when and how to declare a drought and how to proceed in case of a drought. The Act no longer requires the Director to determine a drought status by a certain date or to conduct irrigation reduction auctions. The Act codifies the Director’s ability to implement augmentation projects and limit the ability of those with withdrawal permits to withdraw the augmented water for irrigation. The Act also creates irrigation efficiency requirements and sets forth a schedule requiring all irrigation systems to achieve eighty percent efficiency by 2020.
EFFECTIVE DATE:	July 1, 2014

History

The Flint River begins in Clayton County and flows through southwest Georgia.¹ The Flint River Basin contains 8,460 square miles of land, primarily used for agriculture,² which is the state's largest industry, producing billions of dollars in revenue annually.³ Farming in the Flint River Basin, specifically, produces over two billion dollars in revenue.⁴ The Flint River Basin is prone to droughts, and frequent use of the water for irrigation has resulted in water shortages in this area.⁵ These droughts have vast economic and ecological impacts.⁶ The Lower Flint River Basin is home to several species of rare mussels, whose continued existence is contingent upon sufficient stream flows.⁷ It has suffered most from the frequent droughts.⁸

In 2000, Georgia passed House Bill 1326 to put in place measures to protect the Flint River by restricting irrigation during periods of drought and providing financial incentives to farmers, who use the greatest amounts of water, to forego irrigating during droughts.⁹ The bill was proposed to regulate southern Georgia's water usage in a way that would most efficiently conserve water in the area. This bill required the Director of the Georgia Environmental Protection

1. Susan Morris, *Flint River*, THE NEW GA. ENCYCLOPEDIA (Sept. 09, 2014), <http://www.georgiaencyclopedia.org/articles/geography-environment/flint-river>.

2. *Id.*

3. *Georgia Agriculture—The State's \$71 Billion Industry*, GEORGIA FARM BUREAU, www.gfb.org/aboutus/georgia_agriculture.html (last visited May 31, 2014).

4. *UGA, IBM Work with Farmers on Water Conservation Project*, SUSTAINABLE UGA (Apr. 29, 2014, 1:12 PM), <http://sustainability.uga.edu/uga-ibm-work-with-farmers-on-water-conservation-project/>.

5. *America's Most Endangered Rivers For 2013: Flint River*, AMERICAN RIVERS, www.americanrivers.org/endangered-rivers/2013-report/flint/ (last visited May 31, 2014); *Georgia Flint River Basin Plan*, GA. ENVTL. PROT. DIV., <http://www1.gadnr.org/frbp/> (last visited May 31, 2014).

6. See Morris, *supra* note 1 (discussing the recurring droughts in the Flint River and the importance of the river's resources to Georgia and surrounding states).

7. See *Flint River*, GEORGIA RIVER NETWORK, www.garivers.org/other-georgia-rivers/flint-river.html (last visited May 31, 2014).

8. AMERICAN RIVERS, *supra* note 5; GA. ENVTL. PROT. DIV., *supra* note 5; O.C.G.A. § 12-5-542 (2003 & Supp. 2014) (identifying the 'affected areas' as "those specific portions of the state lying within the Flint River basin where ground-water use from the Floridan aquifer can affect stream flow or where drainage into Spring Creek, Ichawaynachaway Creek, Kinchafoonee Creek, and Muckalee Creek.").

9. See 2000 Ga. Laws 458 (formerly found at O.C.G.A. § 12-5-541 (2003)).

Division (EPD) to announce by March 1 of each year whether the area was in a drought.¹⁰

Despite these efforts to regulate stream flow, droughts persisted and the river reached record lows in 2012.¹¹ EPD then began exploring new ways to help river flow.¹² The first augmentation project targeted one of the creeks in the lower basin as a measure to protect endangered mussels.¹³ Additionally, EPD ceased issuing permits to those hoping to withdraw water within the Lower Flint River Basin.¹⁴ The Flint River Drought Protection Act was drafted to address the ongoing concerns of low stream flows, including preventing litigation over protected species in the Flint River Basin.¹⁵

In 2013, the General Assembly proposed Senate Bill (SB) 213, but there was not enough time remaining in the session at the time of the proposal to address all the concerns surrounding the bill and to pass the bill.¹⁶ Environmentalists were concerned the bill would deprive certain landowners in the Flint River Basin of rights to water and enable a controversial water transfer system.¹⁷ The bill was sent back to the House Agriculture and Consumer Affairs Committee, but would not be considered again until 2014.¹⁸

10. 2000 Ga. Laws 458, § 1, at 464 (formerly found at O.C.G.A. § 12-5-546 (2003)).

11. Judson H. Turner, *Judson H. Turner: Unfounded Concerns, Rumors Surround Revision of Flint River Drought Protection Act*, ALBANYHERALD.COM (Mar. 10, 2014), <http://www.albanyherald.com/news/2014/mar/10/judson-h-turner-unfounded-concerns-rumors/>.

12. *Id.*

13. *Id.*

14. *Id.*

15. Interview with Michael Pisciotta, Georgia Agribusiness Council (May 23, 2014) [hereinafter Pisciotta Interview]; Turner, *supra* note 11.

16. Pisciotta Interview, *supra* note 15; Maggie Lee, *Flint River Fight Sure to Revive in Months to Come*, THE TELEGRAPH (Mar. 13, 2014), <http://www.macon.com/2014/03/13/2989279/flint-river-fight-sure-to-revive.html>.

17. Ray Henry, *Tussle Over Plan to Supplement Flint River Streams*, TIMES-HERALD (Mar. 31, 2013), <http://www.times-herald.com/local/BC-GA-XGR—Flint-River-Pumping-1st-Ld-Writethru-MOS; Please Call Your State Representative and Ask Them to Vote NO on SB 213>, SIERRA CLUB, <https://secure.sierraclub.org/site/Advocacy?alertId=10670&pg=makeACall> (last visited Aug. 17, 2014); *Flint River Bill a Vehicle for Funneling Tax Dollars to Boondoggle Projects, Uprooting Georgia Water Law, According to Statewide Water Group*, GREENLAW (Mar. 11, 2013), www.green-law.org/info/99949.

18. State of Georgia Final Composite Status Sheet, SB 213, May 1, 2014.

*Bill Tracking**Consideration and Passage by the Senate*

Senators Ross Tolleson (R-20th), Freddie Powell Sims (D-12th), Dean Burke (R-11th), Jack Hill (R-4th), Ronnie Chance (R-16th), and others sponsored SB 213 in the Senate.¹⁹ The Senate first read the bill on February 26, 2013.²⁰ The bill changed the existing law by providing irrigation efficiency requirements for farmers, giving the EPD Director (the Director) flexibility in issuing drought predictions, and permitting studies that could lead to changes in water regulation.²¹ The Senate Natural Resources and the Environment Committee favorably reported a committee substitute on March 1, 2013.²² This substitute revised language pertaining to compliance with the Act.²³ The Senate read the bill for the second time on March 4, 2013.²⁴ The Senate read the bill for the third time on March 7, 2013.²⁵

On the Senate floor, five amendments were proposed, and the Senate adopted four of these amendments.²⁶ The first amendment specifically added the Georgia Water Planning and Policy Center to the list of entities involved with developing studies on new water management regulations.²⁷ The second amendment included a provision prohibiting drilling wells or boreholes for the purpose of injecting surface water into any aquifer.²⁸ Senator Tommie Williams (R-19th) proposed this amendment because, though he was not completely against augmentation, he feared that the bill would allow the injection of surface water into aquifers.²⁹ The second amendment

19. SB 213, as introduced, 2013 Ga. Gen. Assem.

20. State of Georgia Final Composite Status Sheet, SB 213, May 1, 2014.

21. SB 213 (LC 40 0327), 2013 Ga. Gen. Assem.

22. State of Georgia Final Composite Status Sheet, SB 213, May 1, 2014.

23. SB 213 (LC 0358S), § 6, p. 7, ln. 206, 214, 218, 2013 Ga. Gen. Assem. There were only minor changes such as rewording the Code section. *Id.* at ln. 215, 223, 227.

24. State of Georgia Final Composite Status Sheet, SB 213, May 1, 2014.

25. *Id.*

26. Georgia General Assembly, SB 213, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20132014/SB/213>.

27. State of Georgia Final Composite Status Sheet, SB 213, May 1, 2014.

28. *Id.*

29. Video Recording of Senate Proceedings, Mar. 7, 2013 at 3 hr., 11 min. (remarks by Sen. Williams (R-19th)) [hereinafter Senate Video], <http://www.gpb.org/lawmakers/2013/day-30>.

expressly prohibited the injection of surface water into the ground.³⁰ The third amendment, failed on the floor, but the change would have omitted entirely the section of the bill allowing for augmentation projects.³¹ Senator Jason Carter (D-42nd) opposed augmentation for a two reasons.³² First, he was concerned with codifying such an experimental procedure.³³ Second, Senator Carter opposed the idea of the state owning the augmented flow.³⁴ The fourth amendment added two studies to the list of studies that EPD was permitted to conduct to establish new rules and regulations regarding water management, and set flow targets.³⁵ Senator Bill Cowsert (R-46th) sought to broaden the scope of the bill with this amendment,³⁶ which the Senate ultimately adopted.³⁷ The final floor amendment struck from the fourth amendment all language about flow targets.³⁸ The Senate passed the committee substitute with the floor amendments on March 7, 2013 by a vote of 52 to 1.³⁹

Consideration and Passage by the House

Representative Buddy Harden (R-148th) sponsored the bill in the House.⁴⁰ The first reading of the bill took place March 11, 2013.⁴¹ The second reading in the House was on March 12, 2013.⁴² The Agriculture and Consumer Affairs Committee favorably reported a substitute on March 22, 2013.⁴³ This substitute made several changes to the bill passed in the Senate.⁴⁴ The majority of changes merely clarified the intent of the bill to preserve water in specific portions of

30. SB 213 (SFA/2), 2013 Ga. Gen. Assem.

31. Failed Senate Floor Amendment to SB 213, introduced by Sen. Carter (D-42nd), Mar. 7, 2013.

32. Senate Video, *supra* note 29, at 3 hr. 14 min. (remarks by Sen. Carter (D-42nd)).

33. *Id.*

34. *Id.*

35. SB 213 (SFA/4), 2013 Ga. Gen. Assem.

36. Senate Video, *supra* note 29, at 3 hr., 18 min. (remarks by Sen. Cowsert (R-46th)).

37. SB 213 (SFA/4), 2013 Ga. Gen. Assem.

38. SB 213 (SFA/4a), 2013 Ga. Gen. Assem.; *see also* Video Recording of Senate Proceedings, *supra* note 29, at 3 hr., 22 min. (remarks by Sen. Harper (R-7th)).

39. Georgia Senate Voting Record. SB 213 (Mar. 7, 2013).

40. Georgia General Assembly, SB 213, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20132014/SB/213>.

41. State of Georgia Final Composite Status Sheet, SB 213, May 1, 2014.

42. *Id.*

43. *Id.*

44. SB 213 (LC 40 0389S), 2013 Ga. Gen. Assem.

the Flint River and clarified who would be affected by these measures.⁴⁵ This proposed bill itemized particular bodies of water as being exempt from the effects of augmentation.⁴⁶ The substitute also replaced the term “application efficiency” with “irrigation efficiency” and defined the term.⁴⁷ This change clarified the intent of the legislature to measure water use efficiency in irrigation.⁴⁸ Regarding future studies on water management, the committee substitute added the Georgia Water Planning and Policy Center and the Lower Flint-Ochlockonee Regional Water Council to the list of entities with whom EPD must cooperate when conducting water management studies and revising regulations,⁴⁹ removed three variations of studies from the list of water management studies that may be conducted,⁵⁰ and added the Lower Flint-Ochlockonee Regional Water Council to the list of agencies that EPD must cooperate with when providing requirements for methods of showing efficiency.⁵¹ The Georgia Water Planning and Policy Center was included because of its heavy involvement with water management and its understanding of agriculture in the region.⁵² The substitute also removed the previous amendment to prohibit drilling or using wells and boreholes to inject surface water into aquifers.⁵³ On March 26, 2013, due to the unrest in the legislature over the matters addressed in the substitute bills, the House postponed the vote on the bill until March 28, 2013 and sent it back to the committee.⁵⁴

45. *Id.*; Video Recording of House Agriculture and Consumer Affairs Committee, Feb. 5, 2014 at 9 min. 6 sec. (remarks by Rep. Buddy Harden (R-148th)), 47 min. 40 sec. (remarks by Judson Turner, EPD Director) [hereinafter House Video, Feb. 5, 2014], <http://www.house.ga.gov/Committees/en-US/CommitteeArchives87.aspx>.

46. SB 213 (LC40 0389S), § 2, p. 2, ln. 32–36, 2013 Ga. Gen. Assem. (“[F]ield drainage systems, wet weather ditches, or any other water body: (A) In which the channel is located above the ground-water table year round; (B) For which runoff from precipitation is the primary source of water flow; and (C) For which ground water is not a source of water flow.”).

47. SB 213 (LC 40 0389S), § 2, p. 2, ln. 40–42, 2013 Ga. Gen. Assem.

48. *Id.*

49. SB 213 (LC 40 0389S), § 5, p. 4, ln. 107–109, 2013 Ga. Gen. Assem.

50. Compare SB 213 (LC 40 0389S), § 5, p. 4 2013 Ga. Gen. Assem, with SB 213, as passed 2013 Senate, § 5, p. 4, ln. 117–122 2013 Ga. Gen. Assem.

51. SB 213 (LC 40 0389S), § 5, p. 4, ln. 107–109, 2013 Ga. Gen. Assem.

52. Video Recording of House Agriculture and Consumer Affairs Committee, Mar. 22, 2013 at 9 min. 6 sec. (remarks by Rep. Buddy Harden (R-148th)), 47 min. 40 sec. (remarks by Judson Turner, EPD Director) [hereinafter House Video, Mar. 22, 2013], <http://www.house.ga.gov/Committees/en-US/CommitteeArchives87.aspx>.

53. SB 213 (LC 40 0389S), § 7, p. 8, 2013 Ga. Gen. Assem.

54. Georgia General Assembly, SB 213, Bill Tracking, <http://www.legis.ga.gov/legislation/en->

The House Committee on Agriculture and Consumer Affairs favorably reported the bill by substitute on February 5, 2014.⁵⁵ The committee substitute added specific types of data, indexes, and scientific analyses that EPD may consider when deciding whether or not it should predict a severe drought.⁵⁶ Adding this language was a formality, as these practices were already implemented by EPD. The Committee included this language to ease concerns of those who feared EPD had too much liberty in implementing augmentation procedures.⁵⁷ For similar reasons, this substitute also removed language about the effects of EPD studies on shaping water management regulations.⁵⁸ Because of the selective nature of the augmentation procedures, the bill substitute also required the Director to determine which permittees⁵⁹ would not be affected.⁶⁰

The Rules Committee recommitted the bill to the Agriculture and Consumer Affairs Committee on March 3, 2014.⁶¹ The committee favorably reported another substitute on March 10, 2014.⁶² To provide more clarity on which portions of the Flint River the bill intends to address, the substitute listed by name the waters which fall within the previously-defined “affected area”⁶³ and defined augmentation as “the addition of ground water from one or more aquifers underlying the affected areas into a surface water channel within the affected areas for the purpose of maintaining instream flows.”⁶⁴ Defining “augmentation” was a crucial addition to the bill’s

US/Display/20132014/SB/213; House Video, Feb. 5, 2014, *supra* note 45, at 4 min. 54 sec. (remarks by Rep. Buddy Harden (R-148th)).

55. Georgia General Assembly, SB 213, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20132014/SB/213>.

56. SB 213 (LC 40 0525ERS), § 4, p. 3, ln. 81–86, 2014 Ga. Gen. Assem.

57. *See* House Video, Feb. 5, 2014, *supra* note 45, at 22 min., 50 sec., (remarks by Todd Holbrook, President Georgia Wildlife Federation); 24 min., 55 sec. (remarks by Gil Rogers, Senior Attorney, Southern Environmental Law Center).

58. SB 213 (LC 40 0525ERS), § 5, p. 3, ln. 81–86, 2014 Ga. Gen. Assem.

59. O.C.G.A. § 12-5-546.2 (Supp. 2014) (“As used in this Code section, ‘permittee’ means any person holding a valid permit issued pursuant to Code Section 12-5-31 which provides for the withdrawal of surface water from within the affected areas.”).

60. SB 213 (LC 40 0525ERS), § 5, p. 6, ln. 175–182, 2014 Ga. Gen. Assem.

61. State of Georgia Final Composite Status Sheet, SB 213, May 1, 2014.

62. *Id.*

63. SB 213 (LC 40 0625ERS), § 2, p. 2, ln. 40–41, 2014 Ga. Gen. Assem.

64. SB 213 (LC 40 0625ERS), § 2, p. 2, ln. 42–44 2014 Ga. Gen. Assem.; Video Recording of House Agriculture and Consumer Affairs Committee, Mar. 10, 2014, 5 min. 25 sec. (remarks by Rep. Buddy Harden (R-148th)) [hereinafter House Video, Mar. 10, 2014], http://media.legis.ga.gov/hav/13_14/2014/committees/ag/ag031014EDITED.wmv.

passage because the ambiguity worried those who feared that allowing for generalized augmentation procedures would enable EPD to participate in controversial water transfers.⁶⁵ The bill was recommitted to the Rules Committee on March 11, 2014.⁶⁶ The third reading took place on March 12, 2014, and the House passed the substitute with a few more minor changes on the same day.⁶⁷ These linguistic changes sought to address the same concerns regarding the Director's discretion over augmented water and the purpose of the augmentation projects.⁶⁸ This change designated the augmentation projects' purpose as protecting "habitat critical for aquatic life."⁶⁹ This language was included to prevent federal intervention in the lower Flint River Basin.⁷⁰ The substitute also revised language concerning the Director's authority to notify permittees of impending augmentation.⁷¹ This substitute reflects that the director not only has the power to notify permittees, but, in fact, has an obligation to send notice.⁷² This notice requirement ensures that those who will inevitably be restricted from water usage during times of augmentation have sufficient time to exhaust their administrative remedies, if necessary.⁷³ On March 13, 2014, the Senate agreed to pass the House substitute bill.⁷⁴ The Senate sent the bill to the Governor on March 26, 2014, and he signed the bill on April 16, 2014.⁷⁵

65. House Video, Mar. 10, 2014, *supra* note 64 at 6 min. 10 sec. (comments by Gil Rogers, Southern Environmental Law Center); Video Recording of Proceedings on the House Floor, Mar. 12, 2014, at 2 hr., 33 min. [hereinafter House Video, Mar. 12, 2014], www.gpb.org/lawmakers/2014/day-37 (remarks by Rep. Regina Quick (R-117th); *GWC Reacts to Flint River Bill*, GREENLAW, www.green-law.org/info/99949 (last visited Aug. 17, 2014).

66. State of Georgia Final Composite Status Sheet, SB 213, May 1, 2014.

67. *Id.*; SB 213 (HCSFA), 2014 Ga. Gen. Assem.

68. House Video, Mar. 12, 2014, *supra* note 65, at 2 hr., 33 min. (remarks by Rep. Regina Quick (R-117th)); House Video, Feb. 5, 2014, *supra* note 45, at 25 min. (remarks by Jud Turner, EPD Director) (discussing concerns about ambiguity with regards to the definition of augmentation).

69. SB 213 (HCSFA), § 1, p. 1, ln. 22–23, 2014 Ga. Gen. Assem.

70. Turner, *supra* note 11 (by stating the purpose as protecting the habitat the state hoped to, "stave off any draconian, judge-made or federally imposed management solutions aimed at protecting endangered species.").

71. SB 213 (HCSFA), § 5, p. 6, ln. 181, 2014 Ga. Gen. Assem.

72. *Id.*

73. See O.C.G.A. § 12-5-546.2 (Supp. 2014).

74. State of Georgia Final Composite Status Sheet, SB 213, May 1, 2014.

75. *Id.*

The Act

The Act amends Article 9 of Chapter 5 of Title 12 of the Official Code of Georgia Annotated, the “Flint River Drought Protection Act” for the purposes of clarifying legislative intent, revising definitions, creating augmented flow programs, and clarifying compliance and enforcement provisions.⁷⁶

Section One amends this article by revising Code section 12-5-541 relating to legislative intent.⁷⁷ The original Code section only provided for protection of “Flint River flow,” and the new Code section protects stream flow in the Flint River and its tributaries.⁷⁸ Additionally, Section One adds language to reflect the legislative intent to allow augmentation programs and protect habitats critical for aquatic life.⁷⁹

Section Two of the Act revises Code Section 12-5-542 relating to definitions of Article 9 of Chapter 5 of Title 12.⁸⁰ Section Two revises the Code section pertaining to acceptable stream flow to encompass stream flows in the Flint River Basin, as opposed to only Flint River stream flow, to include Flint River’s tributaries.⁸¹ The Act also excludes certain water bodies from the augmentation restrictions.⁸² The excluded bodies of water include field drainage systems, wet weather ditches, water bodies with channels located above the ground-water table year round, water bodies precipitation runoff as their primary source of water, and water bodies for which ground water is not a source of water flow.⁸³

Section Two of the Act also revises the definition of “affected areas” by changing the language to say, “those specific portions of the state lying within the Flint River basin where ground-water use from the Floridan Aquifer can affect stream flow” and provides that if any area drains into one of three specific creeks, that area is within

76. 2014 Ga. Laws 302.

77. O.C.G.A. § 12-5-541 (Supp. 2014).

78. O.C.G.A. § 12-5-541(b)(2012); O.C.G.A. § 12-5-541 (Supp. 2014).

79. O.C.G.A. § 12-5-541(b) (Supp. 2014).

80. O.C.G.A. § 12-5-542 (Supp. 2014).

81. O.C.G.A. § 12-5-542(1) (Supp. 2014).

82. *Id.*

83. *Id.*

the affected area.⁸⁴ These creeks are Spring Creek, Ichawaynochaway Creek, Kinchafoonee Creek, and Muckalee Creek.⁸⁵ Moreover, this Section adds the term “irrigation efficiency”⁸⁶ and defines it as “the percentage of the total amount of water withdrawn from a source which is beneficially used to meet crop water requirements or for other agronomic practices in accordance with applicable best management practices.”⁸⁷

Section Three of the Act amends Code section 12-5-544 relating to powers of EPD under Article 9 of Chapter 5 of Title 12.⁸⁸ This Section changes the language regarding acceptable stream flows from “Flint River stream flows” to “Flint River basin stream flows”⁸⁹ The Section also provides the Director with the power to “[c]onduct and participate in studies related to management of the water resources in the Flint River basin.”⁹⁰

Section Four amends Code section 12-5-546 relating to drought predictions and irrigation reduction auctions.⁹¹ Section Four gives EPD flexibility in declaring droughts by making drought declarations permissive.⁹² It provides, however, that if EPD does predict a drought, it must make that prediction by March 1, and the Act includes a list of types of data, indexes, and scientific analyses that EPD may consult when evaluating possible drought predictions.⁹³ This Section also adds that no payment of funds will be considered “full or partial compensation for any losses, financial or otherwise, experienced due to nonirrigation.”⁹⁴

Section Five amends Article 9 of Chapter 5 of Title 12 by creating code sections 12-5-546.1 and 12-5-546.2.⁹⁵ Code section 546.1 addresses irrigation efficiency and requires the Department of Agriculture and the State Soil and Water Conservation Commission

84. O.C.G.A. § 12-5-542(2) (Supp. 2014).

85. *Id.*

86. The standards for irrigation efficiency are later set forth in O.C.G.A. § 12-5-546.1.

87. O.C.G.A. § 12-5-542(11.1) (Supp. 2014).

88. O.C.G.A. § 12-5-544 (Supp. 2014).

89. O.C.G.A. § 12-5-544(2) (Supp. 2014).

90. O.C.G.A. § 12-5-544(9.1) (Supp. 2014).

91. O.C.G.A. § 12-5-546 (Supp. 2014).

92. O.C.G.A. § 12-5-546(a) (Supp. 2014).

93. *Id.*

94. O.C.G.A. § 12-5-546(e) (Supp. 2014).

95. O.C.G.A. § 12-5-546.1 (Supp. 2014).

to coordinate with EPD to examine “practices, programs, policies, rules, and regulations” to identify ways to meet certain goals.⁹⁶ These goals include supporting the implementation of efficiency measures, supporting projects on innovative irrigation technologies, identifying ways that the State Soil and Water Conservation Commission’s water use measurement programs can enhance efficiency, and encouraging a program for voluntarily retiring unused water use permits.⁹⁷

Code section 12-5-546.1(b) also allows the Director to modify all active surface-water and ground-water withdrawal permits in the affected areas to require that the irrigation systems used achieve certain irrigation efficiencies⁹⁸ by 2020.⁹⁹ Irrigation systems operating pursuant to permits issued after 2005 are required to be eighty percent efficient by 2016.¹⁰⁰ Systems operating pursuant to permits issued from 1991 through 2005 must achieve eighty percent efficiency by 2018.¹⁰¹ Systems operating pursuant to permits issued before 1991 must achieve eighty percent efficiency by 2020.¹⁰² Code section 12-5-546.1(c) then provides that the Director may require mobile irrigation systems operating pursuant to water withdrawal permits achieve sixty percent efficiency by 2020.¹⁰³ Similar to the requirements in Code section 12-5-546.1(b), Code section 12-5-546.1(c) requires mobile systems in the affected area operating pursuant to permits issued after 2005 achieve sixty percent efficiency by 2016, systems operating pursuant to permits issued from 1991 through 2005 by 2018, and systems operating pursuant to permits issued before 1991 by 2020.¹⁰⁴

Additionally, all solid-set irrigation sprinklers and mobile irrigation systems operating pursuant to new permits must be sixty percent efficient.¹⁰⁵ All systems operating under newly issued permits in the affected areas must be eighty percent efficient.¹⁰⁶ Code

96. O.C.G.A. § 12-5-546.1(a) (Supp. 2014).

97. *Id.*

98. *See supra* p. 16 for a definition of irrigation efficiency.

99. O.C.G.A. § 12-5-546.1(b) (Supp. 2014).

100. O.C.G.A. § 12-5-546.1(b)(1) (Supp. 2014).

101. O.C.G.A. § 12-5-546.1(b)(2) (Supp. 2014).

102. O.C.G.A. § 12-5-546.1(b)(3) (Supp. 2014).

103. O.C.G.A. § 12-5-546.1(c) (Supp. 2014).

104. O.C.G.A. § 12-5-546.1(c)(1)–(3) (Supp. 2014).

105. O.C.G.A. § 12-5-546.1(d) (Supp. 2014).

106. O.C.G.A. § 12-5-546.1(e) (Supp. 2014).

Section 12-5-546.1 also requires that EPD propose requirements for methods that a permit applicant may utilize to show that the applicant has met the irrigation efficiency requirements and requires EPD coordinate with federal and state agencies that offer incentive programs supporting the article and assist permittees in achieving efficiency requirements.¹⁰⁷

Code section 12-5-546.2 first defines permittee as “any person holding a valid permit issued pursuant to Code Section 12-5-31 which provides for the withdrawal of surface water from within the affected areas.”¹⁰⁸ Code section 12-5-546.2 then requires that the Director notify specific downstream permittees of augmentation projects and provides that these projects will only be used for the purpose of “maintaining the minimum stream flows sufficient to protect habitat critical for vulnerable aquatic life within the affected areas.”¹⁰⁹ This Code section provides that the Director “may notify specified downstream permittees that, during specified periods . . .” the permittee must allow the augmented flow to pass the permittee’s withdrawal point.¹¹⁰ The Director must also determine which permittees are not subject to the requirements.¹¹¹ Notice provided by the Director must be based on available science and inform that permittee of the augmentation project and that the project is providing water flows “for the sole purpose of maintaining the minimum stream flows sufficient to protect habitat critical for vulnerable aquatic life within the affected areas.”¹¹² The Director must also notify the permittees of the opportunity for a hearing.¹¹³ Permittees who are notified about the projects are required to adhere to the notice, but the permittees are provided with a hearing before an administrative law judge within five business days from the time the Director receives the permittee’s petition for a hearing.¹¹⁴ Code

107. O.C.G.A. § 12-5-546.1(f)–(g) (Supp. 2014).

108. O.C.G.A. § 12-5-546.2(a) (Supp. 2014).

109. O.C.G.A. § 12-5-546.2(b) (Supp. 2014).

110. *Id.*

111. *Id.*

112. O.C.G.A. § 12-5-546.2(c) (Supp. 2014).

113. O.C.G.A. § 12-5-546.2(d) (Supp. 2014).

114. *Id.*

section 12-5-546.2 also provides the Director with factors to consider when preparing notification.¹¹⁵

Section Six amends Article 9 of Chapter 5 of Title 12 relating to compliance and violations by revising Code section 12-5-549.¹¹⁶ Section Six replaces language in Code section 12-5-549(a), Code section 12-5-549(b), and Code Section 12-5-549(c) referencing Code section 12-5-547 with “this article.”¹¹⁷ Now, under this Code section except as otherwise provided in “this article,” when the Director suspects a violation of the article has occurred, the Director will take steps to obtain compliance with the article; if the Director fails, he may order corrective action.¹¹⁸ Any order the Director issues will be final unless the affected person files a request for a hearing within thirty days after the order, except as otherwise provided in “this article.”¹¹⁹ Hearings on any contested matter and judicial review of any final order will be conducted in accordance with Code section 12-2-2, except as otherwise provided “in this article.”¹²⁰

Analysis

Tailoring River Augmentation in South Georgia

SB 213 changes the existing Flint River Drought Protection Act to give the Director greater discretion in implementing conservation procedures during times of severe drought, but the new Act does not significantly change the existing procedures.¹²¹ During the formation of the bill, opponents voiced concerns that allowing EPD to implement augmentation procedures would lead to the creation of an aquifer storage and recovery (ASR) system.¹²² Flint Riverkeeper Gordon Rogers warned that the bill could allow the state to implement a costly ASR system used to pump water into the Flint

115. O.C.G.A. § 12-5-546.2(e) (Supp. 2014).

116. O.C.G.A. § 12-5-549 (Supp. 2014).

117. *Id.*

118. *Id.*

119. O.C.G.A. § 12-5-549(b) (Supp. 2014).

120. O.C.G.A. § 12-5-549(c) (Supp. 2014).

121. Interview with Rep. Buddy Harden (R-148) (April 2, 2014).

122. Interview with Rep. Buddy Harden (R-148) (Aug. 15, 2014) [hereinafter Rep. Harden Interview, Aug. 15, 2014].

downstream of Atlanta, unfairly distributing water to some, while denying permittees the use of this surface water.¹²³ The Flint River Drought Protection Act was carefully drafted to not lead to these “unintended consequences.”¹²⁴ The Act includes a definition of augmentation as well as language assuring that nothing in the bill provides for interbasin transfers.¹²⁵ The purpose of the bill is to provide water to the Lower Flint River Basin where droughts have left tributaries dangerously low.¹²⁶ By adding language to demonstrate the purpose of the augmentation procedures was to protect endangered habitats and not to promote interbasin transfers,¹²⁷ the legislators addressed many of the opposition’s concerns.¹²⁸ The Act will increase conservation efforts, but has no effect on EPD’s ability to create an ASR system.¹²⁹

Georgia’s Control in Water Regulation

By enacting SB 213, legislators also hope to avoid federal regulation of Georgia’s water and federal lawsuits relating to water regulation.¹³⁰ Other states have faced federal lawsuits related to state water regulation,¹³¹ and Georgia lawmakers carefully drafted SB 213 in hopes of avoiding the issues faced by other states.¹³²

The Act expressly provides that one purpose of the law is to protect aquatic habitats,¹³³ and one of the purposes of this provision is to prevent federal intervention.¹³⁴ Because the Flint River Basin is

123. Gordon Rogers, *Bill Would Fundamentally Change Georgia Water Law*, ATLANTA BUSINESS CHRONICLE (Jan. 10, 2014), www.bizjournals.com/atlanta/print-edition/2014/01/10/bill-would-fundamentally-change.html?page=all; House Video, February 5, 2014, *supra* note 45, at 27 min. (remarks by Gordon Rogers).

124. House Video, Mar. 12, 2014, *supra* note 65, at 2 hr., 33 min. (remarks by Rep. Regina Quick (R-117th)).

125. House Video, Mar. 10, 2014, *supra* note 64, at 10 min., 30 sec.; O.C.G.A. § 12-5-546.2(f) (Supp. 2014).

126. O.C.G.A. § 12-5-541(b) (Supp. 2014).

127. O.C.G.A. § 12-5-541(b) (Supp. 2014); O.C.G.A. § 12-5-546.2(f).

128. House Video, Mar. 12, 2014, *supra* note 65, at 2 hr., 33 min. (remarks by Rep. Regina Quick (R-117th)).

129. Rep. Harden Interview, Aug. 15, 2014, *supra* note 122.

130. *Id.*

131. *Id.*

132. *Id.*

133. O.C.G.A. § 12-5-541 (Supp. 2014).

134. Rep. Harden Interview, Aug. 15, 2014, *supra* note 122.

home to endangered species that benefit from federal protection,¹³⁵ Georgia could be the subject of lawsuits brought by environmental groups trying to hold the State responsible for the demise of the species.¹³⁶ Though it is not certain that the Act will prevent federal regulation, the express provision regarding the protection of habitats necessary for aquatic life may help to stave off a federal lawsuit.¹³⁷ First, it assures federal agencies that the Georgia legislature is taking all necessary steps to adequately manage its water.¹³⁸ Second, the law presumably will prevent the loss of protected mussels and the need for action under the Endangered Species Act.¹³⁹

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135. See 50 C.F.R. § 17.11 (2013).

136. Cf. *Aransas Project v. Shaw*, 930 F. Supp. 2d 716, 725, 788–89 (S.D. Tex. 2013) *rev'd* *Aransas Project v. Shaw*, 756 F.3d 801 (5th Cir. 2104). In *Shaw*, the Southern District of Texas found a state agency liable for the “take” of cranes protected under the Endangered Species Act for failure to properly manage water in their habitat.

137. O.C.G.A. § 12-5-541 (Supp. 2014).

138. See *Aransas Project v. Shaw*, 756 F.3d 801, at 811–13 (5th Cir. 2014) (noting that comprehensive state regulation of natural resources may weigh in favor of abstention); Rep. Harden Interview, Aug. 15, 2014, *supra* note 122.

139. Cf. *Aransas*, 930 F. Supp. 2d at 789 (allowing the suit under the ESA because of the deaths of whooping cranes).

