

House Bill 1085

By: Representatives Dutton of the 157th, Buckner of the 137th, Quick of the 117th, Kaiser of the 59th, Caldwell of the 131st, and others

A BILL TO BE ENTITLED
AN ACT

1 To amend Article 9 of Chapter 5 of Title 12 of the Official Code of Georgia Annotated, the
2 "Flint River Drought Protection Act," so as to clarify legislative intent; to provide a short
3 title; to revise definitions; to expand programs; to provide for additional powers and
4 requirements of the director; to provide for a waiver of sovereign immunity to allow a cause
5 of action against the state when operation of an issued permit causes a violation of federal
6 law; to provide for new irrigation efficiency requirements; to clarify compliance and
7 enforcement provisions; to provide for related matters; to repeal conflicting laws; and for
8 other purposes.

9 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

10 **SECTION 1.**

11 This Act shall be known and may be cited as the "Farmers' Private Property Protection Act."

12 **SECTION 2.**

13 Article 9 of Chapter 5 of Title 12 of the Official Code of Georgia Annotated, the "Flint River
14 Drought Protection Act," is amended by revising subsection (b) of Code Section 12-5-541,
15 relating to legislative intent, as follows:

16 "(b) The General Assembly finds that the use of water resources for the state for
17 agricultural purposes is of vital importance to Georgia and southwest Georgia in particular;
18 the protection of flows in the Flint River flow and its tributary, Spring Creek, is necessary
19 for a healthy riverine ecosystem and a healthy population of aquatic life; the use of water
20 resources during drought conditions may interfere with public and private rights; the
21 economic well-being of the State of Georgia is dependent on a strong and efficient
22 agricultural industry; the wise use of water, the protection of stream flow flows, and the
23 economic well-being of the state will be furthered by proper water allocation in periods of
24 drought; and a program providing incentives to ensure that certain irrigated lands are

25 temporarily not irrigated during severe droughts will promote the wise use of water
26 resources, the protection of stream flows, and the economic well-being of the state."

27 **SECTION 3.**

28 Said article is further amended by revising Code Section 12-5-542, relating to definitions
29 relative to Flint River drought protection, as follows:

30 "12-5-542.

31 As used in this article, except where otherwise specifically provided, the term:

32 (1) 'Acceptable Flint River basin stream flow' flows' means the quantity of stream flows
33 at one or more specific locations on the Flint River or its tributary, Spring Creek, which
34 provides for aquatic life protection and other needs as established by the director, based
35 on municipal, agricultural, industrial, and environmental needs. Such tributary shall not
36 include field drainage systems, wet weather ditches, or any other water body:

37 (A) In which the channel is located above the ground-water table year round;

38 (B) For which runoff from precipitation is the primary source of water flow; and

39 (C) For which ground water is not a source of water flow.

40 (2) 'Affected area' means that portion of the state lying within the Flint River basin and
41 areas where ground-water use from the Floridan aquifer can affect the stream flow flows
42 in the Flint River or its tributaries.

43 (2.1) 'Irrigation efficiency' means the percentage of the total amount of water withdrawn
44 from a source which is beneficially used to meet crop water requirements or for other
45 agronomic practices in accordance with applicable best management practices.

46 (3) 'Authority' means the Georgia Environmental Finance Authority created by Chapter
47 23 of Title 50.

48 (4) 'Board' means the Board of Natural Resources.

49 (5) 'Director' means the director of the Environmental Protection Division of the
50 Department of Natural Resources.

51 (6) 'Division' means the Environmental Protection Division of the Department of Natural
52 Resources.

53 (7) 'Drought conditions' means any condition which results in a stream flow that is lower
54 than the acceptable Flint River basin stream flow flows.

55 (8) 'Drought protection funds' means the funds held by the authority as provided in Code
56 Section 12-5-545 for the accomplishment of the purposes of this article.

57 (9) 'Flint River basin' means the area of land which drains into the Flint River or its
58 tributaries.

59 (10) 'Floridan aquifer' means those rocks and sediments described in United States
60 Geological Survey Open-File Report 95-321 (1996) that are capable of yielding ground
61 water to wells or discharging water into the Flint River or its tributaries.

62 (11) 'Irrigated land' means farm land which is irrigated by ground water or surface water
63 pursuant to a water withdrawal permit issued by the director pursuant to Code Section
64 12-5-31 or 12-5-96.

65 (12) 'Irrigation reduction auction' means the procedure established by subsection (b) of
66 Code Section 12-5-546 pursuant to which permittees submit offers to cease irrigation of
67 a specified number of acres in exchange for a certain sum of money.

68 (13) 'Permittee' means a person holding a valid permit issued before December 1, 2000,
69 pursuant to Code Section 12-5-31 or 12-5-96.

70 (14) 'Stream flow' means the quantity of water passing a given location of the Flint River
71 or its tributary, Spring Creek over a given time period expressed in cubic feet per second."

72 SECTION 4.

73 Said article is further amended in Code Section 12-5-544, relating to powers of the director
74 of the Environmental Protection Division, by revising paragraphs (2) and (4), and by adding
75 a new paragraph to read as follows:

76 "(2) Establish acceptable Flint River basin stream flows at one or more locations;"

77 "(4) Predict or declare when ~~severe~~ drought conditions exist or are expected to exist
78 during a given year ~~based on historical, mathematical, meteorological, or other scientific~~
79 ~~considerations which may be published by the director and which may be developed in~~
80 ~~consultation with the state climatologist, the state geologist, or other appropriate experts;"~~

81 "(9.1) Conduct and participate in studies related to management of the water resources
82 in the Flint River basin; provided, however, that such studies shall not include interbasin
83 transfers;"

84 SECTION 5.

85 Said article is further amended in Code Section 12-5-546, relating to drought predictions and
86 irrigation reduction auction, by revising subsections (a), (b), and (e) as follows:

87 "(a) On or before March 1 of each year, the division ~~will~~ may issue a prediction as to
88 whether severe drought conditions are expected during the year. In any given year,
89 following two consecutive months of moderate or worse drought conditions within the
90 Flint River basin, as measured by a score of -2.0 or lower on the Palmer Drought Severity
91 Index administered by the National Oceanographic and Atmospheric Administration, the
92 division may issue a prediction as to whether severe drought conditions, as measured by
93 the Palmer Drought Severity Index, are expected to occur during the year.

94 (b) If severe drought conditions are predicted or otherwise declared in accordance with
 95 subsection (a) of this Code section, the division ~~will~~ may determine the total number of
 96 acres of irrigated land, serviced by irrigation systems located within one or more of the
 97 affected areas, that must not be irrigated that year in order to maintain the acceptable Flint
 98 River basin stream ~~flow~~ flows. Upon such determination, the division ~~shall~~ may conduct
 99 an irrigation reduction auction whereby a permittee of an irrigation system located within
 100 the affected areas is given an opportunity to enter into an agreement with the division,
 101 agreeing that in exchange for a certain sum of money per acre of irrigated land serviced by
 102 the irrigation system, the permittee will not irrigate those particular acres for the remainder
 103 of that calendar year. The authority shall pay the sum so agreed upon when so directed by
 104 the director from the unexpended balance of the drought protection funds. In conducting
 105 the irrigation reduction auction, the division may establish a maximum dollar amount per
 106 acre to be expended from the drought protection funds for such purposes. All irrigation
 107 restrictions activities shall cease immediately upon a finding by the director that a score
 108 above -2.0 on the Palmer Drought Severity Index has been sustained for two consecutive
 109 months within the Flint River basin."

110 "(e) The expenditure of funds under this article as an incentive to permittees not to irrigate
 111 lands is deemed by the legislature as a valid use of state moneys to promote valid land use
 112 policies that result in the protection of the riverine environment by ensuring that such lands
 113 not be irrigated for specified periods of time. No expenditure of funds under this article
 114 shall be considered full or partial compensation for any losses, financial or otherwise,
 115 experienced due to nonirrigation; a lease or repurchase of any irrigation permit issued by
 116 the director, ~~nor shall it be considered;~~ or an acknowledgment by the State of Georgia of
 117 a property right in any permit issued by the director."

118 SECTION 6.

119 Said article is further amended by adding new Code sections to read as follows:

120 "12-5-546.1.

121 (a) The Department of Agriculture and the State Soil and Water Conservation Commission
 122 shall coordinate with the division in examining current practices, programs, policies, rules,
 123 and regulations to identify opportunities to enhance programming and incentives that will:

124 (1) Support implementation of the agricultural water efficiency measures in water
 125 conservation or management plans prepared in accordance with Code Sections 12-5-31,
 126 12-5-96, and 12-5-522;

127 (2) Support implementation of pilot projects demonstrating the efficacy of emerging
 128 innovative irrigation technologies where appropriate and affordable;

129 (3) Identify ways the State Soil and Water Conservation Commission's program for
130 measuring agricultural uses of water as authorized under Code Section 12-5-105 can
131 further enhance efforts to improve agricultural water use efficiency; and

132 (4) Encourage a scheduled program for the voluntary retirement of unused surface-water
133 and ground-water farm use permits in accordance with Code Sections 12-5-31 and
134 12-5-105.

135 (b) The director may modify all active surface-water and ground-water withdrawal permits
136 for farm use in the affected area to require all irrigation systems applying water withdrawn
137 pursuant to such permits to achieve irrigation efficiencies of 80 percent or greater by the
138 year 2020. The schedule for achieving the irrigation efficiencies provided in this
139 subsection shall be as follows:

140 (1) Irrigation systems applying water withdrawn pursuant to all active permits issued
141 after 2005 shall achieve a minimum irrigation efficiency of 80 percent by January 1,
142 2016;

143 (2) Irrigation systems applying water withdrawn pursuant to all active permits issued
144 from 1991 through 2005 shall achieve a minimum irrigation efficiency of 80 percent by
145 January 1, 2018; and

146 (3) Irrigation systems applying water withdrawn pursuant to all active permits issued
147 before 1991 shall achieve a minimum irrigation efficiency of 80 percent by January 1,
148 2020.

149 (c) Notwithstanding subsection (b) of this Code section, the director may modify specified
150 active surface-water and ground-water withdrawal permits for farm use in the affected area
151 to require all mobile irrigation systems and solid-set irrigation sprinklers operating under
152 such permits to achieve irrigation efficiencies of 60 percent or greater by the year 2020.
153 The schedule for achieving such efficiencies shall be as follows:

154 (1) Irrigation systems applying water withdrawn pursuant to all active permits issued
155 after 2005 shall achieve a minimum irrigation efficiency of 60 percent by January 1,
156 2016;

157 (2) Irrigation systems applying water withdrawn pursuant to all active permits issued
158 from 1991 through 2005 shall achieve a minimum irrigation efficiency of 60 percent by
159 January 1, 2018; and

160 (3) Irrigation systems applying water withdrawn pursuant to all active permits issued
161 before 1991 shall achieve a minimum irrigation efficiency of 60 percent by January 1,
162 2020.

163 (d) Notwithstanding the irrigation efficiency rates required in subsection (c) of this Code
164 section or any other provision of this Code section to the contrary, the minimum irrigation

165 efficiency rate for mobile irrigation systems and solid-set irrigation sprinklers applying
166 water withdrawn pursuant to new permits shall be 60 percent.

167 (e) When issuing any permit application for a new surface-water or ground-water
168 withdrawal for farm use in the affected area, the division shall require that the irrigation
169 system applying water withdrawn pursuant to any such permit has an irrigation efficiency
170 of at least 80 percent.

171 (f) The division shall, in cooperation with other state and federal agencies, universities, the
172 Georgia Water Planning and Policy Center, the Lower Flint-Ochlockonee Regional Water
173 Council, and other appropriate entities, provide to the board for consideration for adoption
174 in its rules requirements pertaining to methods an applicant may utilize to demonstrate that
175 the required irrigation efficiency has been achieved. Requirements shall consider current
176 technologies, best management practices, and the effects of soil type and topography,
177 among other factors deemed necessary.

178 (g) The division shall coordinate with any federal or state agencies offering incentive
179 programs that support the purposes of this article, to identify opportunities to refine and
180 target relevant programs as practicable and to assist permittees with achieving irrigation
181 efficiency requirements.

182 12-5-546.2.

183 (a) As used in this Code section, the term 'the federal act' means the Endangered Species
184 Act of 1973 (Public Law 93-205), 16 U.S.C. Section 1531, et seq., as amended.

185 (b) When the director has reason to believe that the issuance of additional permits or the
186 modification or continued use of existing permits for surface water withdrawals within the
187 Flint River basin would result in a violation of the federal act, the director shall coordinate
188 with the United States Fish and Wildlife Service to determine whether such a violation
189 would in fact occur. If, after consultation with the United States Fish and Wildlife Service,
190 the director determines that the issuance of additional withdrawal permits or the
191 modification or continued use of existing withdrawal permits within the Flint River basin
192 would likely result in a violation of the federal act, the director shall apply for an incidental
193 take permit as set forth in the federal act. In the event that no incidental take permit is
194 granted, the director shall modify withdrawal permits in accordance with subsection (c) of
195 this Code section.

196 (c) Subject to subsection (b) of this Code section, the director shall modify any water
197 withdrawal permit issued pursuant to Code Section 12-5-31 for use within the Flint River
198 basin to the extent such action is necessary to comply with the federal act. Any permit
199 holder against whom such action is taken shall comply therewith immediately, but shall be
200 afforded a hearing concerning such action within five days of the director's receipt of a

201 petition filed by the permittee. Such hearing shall otherwise be conducted in accordance
 202 with subsection (c) of Code Section 12-2-2.

203 (d)(1) An action for damages may be maintained against the division by any person held
 204 to be in violation of the federal act when such person was acting in reliance on, and in
 205 strict accordance with, a surface-water withdrawal permit issued by the division for use
 206 within the Flint River basin, so long as such liability was the sole result of the permitted
 207 withdrawal which was otherwise lawful. The sovereign immunity of the state shall be
 208 waived with respect to such an action.

209 (2) Damages recoverable under this subsection shall be limited to those civil penalties,
 210 finances, or attorney's fees incurred as a direct result of such violation of the federal act.

211 (3) As a condition of the waiver of sovereign immunity authorized by this Code section,
 212 all actions filed against the division shall be brought in the state or superior court of the
 213 county within which the applicable withdrawal permit is used."

214 **SECTION 7.**

215 Said article is further amended by revising Code Section 12-5-549, relating to compliance
 216 and violations, as follows:

217 "12-5-549.

218 (a) Except as may otherwise be provided in ~~Code Section 12-5-547~~ this article, whenever
 219 the director has reason to believe that a violation of any provision of this article or any rule
 220 or regulation adopted pursuant to this article has occurred, he or she shall attempt to obtain
 221 compliance therewith by conference, conciliation, or persuasion, if the making of such an
 222 attempt is appropriate under the circumstances. If he or she fails to obtain compliance in
 223 this manner, the director may order the violator to take whatever corrective action the
 224 director deems necessary in order to obtain such compliance within a period of time to be
 225 prescribed in such order.

226 (b) Except as may otherwise be provided in ~~Code Section 12-5-547~~ this article, any order
 227 issued by the director under this article shall become final unless the person or persons
 228 named therein file with the director a written request for a hearing within 30 days after such
 229 order or permit is served on such person or persons.

230 (c) Except as may otherwise be provided in ~~Code Section 12-5-547~~ this article, hearings
 231 on contested matters and judicial review of final orders and other enforcement actions
 232 under this article shall be provided and conducted in accordance with subsection (c) of
 233 Code Section 12-2-2.

234 (d) The director may file in the superior court of the county wherein the person under order
 235 resides, or if the person is a corporation, in the county wherein the corporation maintains
 236 its principal place of business, or in the county wherein the violation occurred or in which

237 jurisdiction is appropriate, a certified copy of a final order of the director unappealed from
238 or a final order of the director affirmed upon appeal, whereupon the court shall render
239 judgment in accordance therewith and notify the parties. Such judgment shall have the
240 same effect, and all proceedings in relation thereto shall thereafter be the same, as though
241 the judgment had been rendered in an action duly heard and determined by such court.

242 (e) For purposes of this Code section, a violation of an agreement entered into in
243 accordance with Code Section 12-5-546 or an order issued by the director in accordance
244 with Code Section 12-5-547 shall be prima facie established upon a showing that:

245 (1) During the effective period of the agreement or order, the irrigation system was
246 observed in person or via remote sensing or otherwise established by representatives of
247 the division or others to have been operating and disbursing water; or

248 (2) During the effective period of the agreement or order, a seal, lock, or other device
249 placed by the division on the system to prevent operation of the system has been broken
250 or otherwise tampered with."

251 **SECTION 8.**

252 All laws and parts of laws in conflict with this Act are repealed.