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
To 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; to provide a short title; to revise definitions; to expand programs; to provide for additional powers and requirements of the director; to provide for a waiver of sovereign immunity to allow a cause of action against the state when operation of an issued permit causes a violation of federal law; to provide for new irrigation efficiency requirements; to clarify compliance and enforcement provisions; to provide for related matters; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.
This Act shall be known and may be cited as the "Farmers' Private Property Protection Act."

SECTION 2.
Article 9 of Chapter 5 of Title 12 of the Official Code of Georgia Annotated, the "Flint River Drought Protection Act," is amended by revising subsection (b) of Code Section 12-5-541, relating to legislative intent, as follows:
"
(b) The General Assembly finds that the use of water resources for the state for agricultural purposes is of vital importance to Georgia and southwest Georgia in particular; the protection of flows in the Flint River and its tributary, Spring Creek, is necessary for a healthy riverine ecosystem and a healthy population of aquatic life; the use of water resources during drought conditions may interfere with public and private rights; the economic well-being of the State of Georgia is dependent on a strong and efficient agricultural industry; the wise use of water, the protection of stream flows, and the economic well-being of the state will be furthered by proper water allocation in periods of drought; and a program providing incentives to ensure that certain irrigated lands are

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

SECTION 3.

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

"12-5-542.

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

(1) 'Acceptable Flint River basin stream flow flows' means the quantity of stream flows at one or more specific locations on the Flint River or its tributary, Spring Creek, which provides for aquatic life protection and other needs as established by the director, based on municipal, agricultural, industrial, and environmental needs. Such tributary shall not include field 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.

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

(2.1) 'Irrigation efficiency' means 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.

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

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

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

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

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

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

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

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

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

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

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

SECTION 4.

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

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

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

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

SECTION 5.

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

"(a) On or before March 1 of each year, the division may issue a prediction as to whether severe drought conditions are expected during the year. In any given year, following two consecutive months of moderate or worse drought conditions within the Flint River basin, as measured by a score of -2.0 or lower on the Palmer Drought Severity Index administered by the National Oceanographic and Atmospheric Administration, the division may issue a prediction as to whether severe drought conditions, as measured by the Palmer Drought Severity Index, are expected to occur during the year."
(b) If severe drought conditions are predicted or otherwise declared in accordance with subsection (a) of this Code section, the division may determine the total number of acres of irrigated land, serviced by irrigation systems located within one or more of the affected areas, that must not be irrigated that year in order to maintain the acceptable Flint River basin stream flow. Upon such determination, the division may conduct an irrigation reduction auction whereby a permittee of an irrigation system located within the affected areas is given an opportunity to enter into an agreement with the division, agreeing that in exchange for a certain sum of money per acre of irrigated land serviced by the irrigation system, the permittee will not irrigate those particular acres for the remainder of that calendar year. The authority shall pay the sum so agreed upon when so directed by the director from the unexpended balance of the drought protection funds. In conducting the irrigation reduction auction, the division may establish a maximum dollar amount per acre to be expended from the drought protection funds for such purposes. All irrigation restrictions activities shall cease immediately upon a finding by the director that a score above -2.0 on the Palmer Drought Severity Index has been sustained for two consecutive months within the Flint River basin.

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

SECTION 6.

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

"12-5-546.1.
(a) The Department of Agriculture and the State Soil and Water Conservation Commission shall coordinate with the division in examining current practices, programs, policies, rules, and regulations to identify opportunities to enhance programming and incentives that will:

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

(2) Support implementation of pilot projects demonstrating the efficacy of emerging innovative irrigation technologies where appropriate and affordable;"
(3) Identify ways the State Soil and Water Conservation Commission's program for measuring agricultural uses of water as authorized under Code Section 12-5-105 can further enhance efforts to improve agricultural water use efficiency; and

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

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

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

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

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

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

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

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

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

(d) Notwithstanding the irrigation efficiency rates required in subsection (c) of this Code section or any other provision of this Code section to the contrary, the minimum irrigation
efficiency rate for mobile irrigation systems and solid-set irrigation sprinklers applying
water withdrawn pursuant to new permits shall be 60 percent.

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

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

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

12-5-546.2.

(a) As used in this Code section, the term 'the federal act' means the Endangered Species

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

(c) Subject to subsection (b) of this Code section, the director shall modify any water
withdrawal permit issued pursuant to Code Section 12-5-31 for use within the Flint River
basin to the extent such action is necessary to comply with the federal act. Any permit
holder against whom such action is taken shall comply therewith immediately, but shall be
afforded a hearing concerning such action within five days of the director's receipt of a
petition filed by the permittee. Such hearing shall otherwise be conducted in accordance with subsection (c) of Code Section 12-2-2.

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

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

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

SECTION 7.

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

“12-5-549.

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

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

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

(d) The director may file in the superior court of the county wherein the person under order resides, or if the person is a corporation, in the county wherein the corporation maintains its principal place of business, or in the county wherein the violation occurred or in which
jurisdiction is appropriate, a certified copy of a final order of the director unappealed from or a final order of the director affirmed upon appeal, whereupon the court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though the judgment had been rendered in an action duly heard and determined by such court.

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

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

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

SECTION 8.

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