

**MANAGING AGRICULTURAL WATER USE DURING DROUGHT:
AN ANALYSIS OF CONTEMPORARY POLICIES GOVERNING
GEORGIA'S FLINT RIVER BASIN**

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Abstract

The primary purpose of this report is to consider the following two questions that we believe have paramount importance to Georgia's farming sector:

Question 1: Can the Georgia Environmental Protection Division (EPD) modify, revoke, or in any way alter water use permits during periods of drought?

Question 2: Does the tenure of a permit affect the permittee's vulnerability to any such modification or revocation?

Water users seem to assume that the answers to both of these questions are simple. Particularly for those holding grandfathered permits, there is a strong presumption that the EPD cannot alter permits. However, an examination of state law, EPD regulations, and case law yields ambiguous answers to both of these questions. Permittees may not have the clear rights to water that they believe that they have. "Grandfathered," or permits based on applications submitted to the EPD prior to December 1, 1999, may not have the protection from involuntary suspension (during drought) that many permit holders assume to be the case. Moreover, current law that excludes permits based on applications received by the EPD after December 1, 1999 from the Flint River Drought Protection Act, which provides for voluntary and involuntary suspension of permits (with compensation), creates a curious situation where permits based on applications received by the EPD prior to December 1, 1999 (including grandfathered permits) may be involuntarily suspended, but newly issued permits (those based on applications submitted on or after December 1, 1999) are not subject involuntary suspension proceedings.

The study's conclusions take the form of several closely related questions that serve as a guide when considering the state's current policies for agricultural water users. In Section V, we also sketch out some alternative answers to these questions.

Question #1: Should the state continue to allow expansion of irrigated acreage in basins like the Flint River Basin where over-appropriation (during periods of drought) is already a reality?

Question #2: Closely related to the above, do we want a system wherein any riparian can obtain a right to water use, even if this means that existing water users must reduce their established use?

Question #3: Should the state give any sort of preferential treatment to different tenures of permits; i.e., does a farmer who has had a permit for 20+ years have the same standing in any acreage reduction scheme as one who acquired a permit later? Related to

this question, should holders of permits obtained from post-December 1, 1999 be excluded from the Flint River Drought Protection Act irrigation suspension auction and provisions for the involuntary suspension of permits?

Question #4: Similarly, should the law provide more explicit guidance as to how the EPD should attain irrigation reductions when the Drought Protection Act is not invoked but drought conditions exist (i.e., when a drought is not declared by March 1 and severe drought conditions follow or if acreage reductions attained voluntarily by auction under the Act later prove to be inadequate)?

Question #5: Should the state begin the process of quantifying amounts of water use allowed under an issued water use permit?

While considering these important questions, policymakers must also consider the complex world in which these concerns play out. The external policy context tends to further muddy these issues. For example, federal laws add a new layer of complexity and uncertainty. The continuing conflict among Georgia, Alabama, and Florida concerning waters in the Basin could result in federal actions, such as an equitable apportionment action, that could unpredictably affect water resource allocation in the region. The federal Endangered Species Act is also relevant here given the presence of multiple federally listed species including endangered freshwater mussels and Gulf sturgeon in the watershed. Other possible challenges to the rights of Georgia water users could arise based on the Clean Water Act or provisions of state common law, such as the public trust doctrine. A potential inter-state challenge to Georgia's management of the Flint Basin or the larger Appalachian-Chattahoochee-Flint Basin based on federal law adds additional uncertainty to Flint Basin permittees rights to use water. In significant respects, those watching developments in Georgia water law are waiting for the proverbial "other shoe" to drop and potentially turn Georgia's treatment of water rights completely on its head.

This report is offered as a starting point for assessing the current water statutes and regulations that affect agricultural water users in Georgia. This analysis suggests that the current policies are confusing—even contradictory. Moreover, they do not appear to be up to the task of addressing current conditions of scarcity, and they create uncertainty for permit holders over what actual rights they have to water to support their farm operations. Georgia is currently endeavoring to develop a new statewide water policy plan. As it does, discussion of these issues should be central. If the state does not address these issues soon, it will face decisions that are more difficult and choices that are more constrained, and if it waits too long, decisions may be made for it in a court of law.

MANAGING AGRICULTURAL WATER USE DURING DROUGHT: AN ANALYSIS OF CONTEMPORARY POLICIES GOVERNING GEORGIA'S FLINT RIVER BASIN

I. Introduction and study plan

If one were to ask Georgia's agricultural water users about the security of their right to use water, one would find that the conventional wisdom among these users is that their water rights are secure. While some agricultural water users may gripe about the additional hassle that changes to Georgia's water law have caused, it is likely that these users believe that these changes have not impacted the security of their water rights. In fact, a substantial number of these users may even hold the view that because the state has issued them a use permit, the changes to the law have—if anything—increased the security of their water rights.

Those who follow Georgia water law closely, however, would likely be apt to characterize the changes made to Georgia water law over the past two decades quite differently. A close examination of Georgia's water law suggests that the changes to the law have in fact introduced considerable confusion and uncertainty into Georgia water law. This is particularly the case in the thirsty Flint River Basin. The conventional wisdom among those familiar with the law seems to be that even as pressure on Georgia's water resources grows, the changes introduced to Georgia water law have complicated water rights.

This report takes a closer look at some of the changes made to Georgia water law, with a focus on how these changes impact the Flint River Basin. This survey paints a picture of laws that are often ambiguous, confusing, and fraught with uncertainty.

The central question raised by this report is whether the tenure of an agricultural user's permit correlates with the security of the water user's claim to water. Certainly, the perception of many agricultural water users, particularly those with grandfathered permits (discussed below), is that tenure is highly correlated with the security of the water right—with the first round of permitting (for uses initiated prior to July 1, 1988) seen as the most secure and the later rounds of permitting seen as increasingly tenuous.

A casual reading of the Georgia law seems to harmonize with Georgia's agricultural water users' lay understanding of the law. Legislation enacted by the legislature in 1988, 2003, and 2006 appears to create different "classes" of agricultural water use permits. The 1988 act put farmers who acquired their permits based on use prior to July 1, 1988 with applications submitted to the EPD prior to July 1, 1991 (which we refer to as "Tenure 1 permits" or—as they are commonly called—"grandfathered" permits) into a distinct tenure from subsequent permittees.¹ A major distinction between grandfathered permits and subsequent tenures of permits is that the Georgia Environmental Protection Division (EPD) granted the grandfathered permits on the basis of a user's equipment capacity rather than assuring that such use harmonized with Georgia's reasonable use criteria.² (As discussed below, however, the meaningfulness of this distinction is unclear and even problematic.) In the Flint River Basin, all grandfathered users qualify to participate in the drought abatement program created by

¹ It is important to note that, particularly for Georgia's groundwater users, it is not entirely clear what the actual limits of their rights were prior to 1988. In some instances, it appears that Georgia groundwater users had absolute dominion over their groundwater resources—limited only by their ability to get it out of the ground. In other instances, particularly in the case of a strong hydrological connection between groundwater and surface water, it appears that groundwater users were limited by a reasonableness standard. This issue is discussed in further detail in Section I of Appendix A. This may prove quite important in future litigation because it might alter how a reviewing court treats grandfathered permit holders.

² O.C.G.A. § 12-5-31(a)(3) (2006) (surface water); O.C.G.A. § 12-5-105(a) (2006) (groundwater).

the Flint River Drought Protection Act.³ (We address the details of this Act in Section IV.)

We refer to Tenure 2 permits as those permits based on use initiated after July 1, 1988 and on applications submitted to the EPD prior to December 1, 1999. The only difference between Tenure 2 and Tenure 1 permits is that limits to water use under a Tenure 2 permit are based on a “reasonableness” criterion under the 1988 law—a multifactor weighing test left largely to the EPD’s discretion.⁴ In the Flint River Basin, Tenure 2 permittees—like Tenure 1 permittees—are eligible to participate in the drought abatement program created by the Flint River Drought Protection Act.⁵

A moratorium on the issuance of new agricultural water use permits was established as of December 1, 1999; the moratorium was lifted on March 20, 2006. During the moratorium period, the EPD received 1,134 permit applications for water use involving the irrigation of approximately 96, 219 acres.⁶ The EPD has been reviewing and processing the backlog applications since the moratorium was lifted. Several legislative amendments to Georgia’s water laws adopted during the moratorium period affect all permits issued from the backlog permits equally, regardless of the date of the application. Three such amendments are of particular interest for our purposes. First, participation in the Flint River Drought Protection Acts’ acreage reduction is denied to all permit holders where applications were submitted to the EPD after December 1, 1999 (again, this issue is discussed in detail in Section IV). Second, an amendment was adopted that provides that for all permits issued after July 1, 2003, permittees may not

³ O.C.G.A. § 12-5-31(h) (2006) (surface water); O.C.G.A. § 12-5-97(a) (2006) (groundwater).

⁴ O.C.G.A. § 12-5-31(e)-(g) (2006) (surface water); O.C.G.A. § 12-5-96(d) (2006) (groundwater).

⁵ O.C.G.A. § 12-5-31(h) (2006) (surface water); O.C.G.A. § 12-5-97(a) (2006) (groundwater).

⁶ Ga. Dept. of Natural Resources, Environmental Protection Division, “Flint River Regional Water Development and Conservation Plan,” Atlanta, March 20, 2006 at pp. 30 and 41.

use water until a state-approved water meter is installed on pumps allowed by the permit.⁷ This provision does not distinguish between the date when an application was submitted to the EPD and the date when a permit is issued, but it would appear to apply to all backlog permits since all are issued after July 1, 2003.⁸ Additionally, backlog permits for groundwater users have a special obligation to file annual reports documenting their water use to the state.⁹

As something of an aside, there is an additional consideration that distinguishes backlog permits and Tenure 1 and Tenure 2 permits which should be kept in mind in our later discussions of how permits are treated during drought. Tenure 1 and Tenure 2 permits were issued with what would appear to have been little or no consideration given as to the location of the proposed withdrawal. In their consideration of backlog applications, the EPD plans to give considerable attention to the locations of proposed withdrawals, especially in sub-areas that are considered to be “vulnerable” to low flow conditions during drought.¹⁰ Thus, it may well be the case that many backlog applications may be denied, but would have been approved if submitted to the EPD after prior to December 1, 1999.

The third amendment adopted by the legislature creates a distinction between those backlog permits for which applications were submitted to the EPD prior to December 31, 2002 and those for which applications were submitted after that date. For permit holders that submitted applications to the EPD after December 31, 2002, the

⁷ O.C.G.A. § 12-5-31(m.1.)(2)(D) (2006)

⁸ It is not clear how this provision will be enforced. It would be very difficult to determine if a well has been used before a meter is installed. Moreover, the code is mute as to what agency has enforcement responsibility for this provision (the EPD or the Georgia Soil and Water Conservation Commission, which coordinates the well meter program).

⁹ O.C.G.A. § 12-3-105(b) (2006).

¹⁰ Ga. Dept. of Natural Resources, March 20, 2006, Op. Cit., Section I.B.

permit holder must pay the costs for the required water use meter. Thus, we divide backlog permits in to two Tenure classes. Tenure 3 permits are those backlog permits for which applications were received by the EPD prior to December 31, 2002 (and therefore do not pay for their meters). Tenure 4 permits are backlog permits where applications were received by the EPD after December 31, 2003 (and permit holders must pay for their meters).

Finally, Tenure 5 permittees are those who apply for a water use permit after March 20, 2006. In addition to all the restrictions imposed on Tenure 4 permittees, the 2006 amendments introduced a 25-year term governing Tenure 5 permits as well as a permit application fee.¹¹ The EPD may revoke Tenure 5 permits if use does not begin within two years of the user receiving the permit.¹²

We present the major conditions imposed on permits with different “tenures” below in Table I.1. By reviewing Table I.1, it becomes clear that Tenure 1 permittees are given preferential treatment in terms of all permit characteristics. Additionally, the later a permit is received, the more encumbered a permit becomes.

While in many respects a permit’s tenure seems to control the degree to which a permittee is restricted, the report that follows illustrates that the clear lines seemingly drawn by the law may evaporate when scarcity sets in—the very time that water users desire certainty most. This report highlights this looming uncertainty by focusing on two questions of central importance:

¹¹ O.C.G.A. § 12-5-31(a)(3) (2006) (surface water); O.C.G.A. § 12-5-105(a) (2006) (groundwater).

¹² O.C.G.A. § 12-5-31(k)(6.1) (2006) (surface water); O.C.G.A. § 12-5-105(b)(2) (2006) (groundwater).

Question 1: Can the EPD modify, revoke, or in any way alter water use permits during periods of drought?

Question 2: Does the tenure of a permit affect the permittee's vulnerability to any such modification or revocation?

To put these questions in proper perspective, we must necessarily begin with a close examination of three sets of laws/regulations. Thus, we begin in Section II with an overview of relevant sections of existing laws passed by the Georgia legislature (other than the Flint River Drought Protection Act, which we discuss in Section IV). In Section III, we give our attention to EPD policies, especially on those associated with the agency's recently-completed Flint River Basin Regional Water Development and Conservation Plan ("the Flint Plan"). Section IV describes pertinent provisions of the Flint River Drought Protection Act, with particular attention given to the EPD's rules for implementing the irrigation-reduction auction. Concluding remarks are offered in Section V, wherein suggestions are offered as to alternative means by which the state might design an equitable method for reducing agricultural water use during periods of drought.

Table I.1: Permit Characteristics of Different Permit Tenures

(dates refer to date application received by the EPD)

	Tenure 1 Pre-7/1/88	Tenure 2 Post-7/1/88- Pre-12/1/99	Tenure 3 Post-12/1/99 Pre-12/31/02	Tenure 4: Post 12/31/02 Pre-4/20/06	Tenure 5 Post 4/20/06
Standard used for EPD's permitting decision	Pumping capacity of Installed Equipment	Reasonable use	Reasonable use	Reasonable use	Reasonable use
Annual reporting required	No	No	Surface: No GW: Yes	Surface: No GW: Yes	Surface: No GW: Yes
May be required to pay for meter	No	No	No	Yes	Yes
Can initiate use prior to meter installation	Yes	Yes	No	No	No
Pay \$250 application fee	No	No	No	No	Yes
25-year term on permit	No	No	No	No	Yes
Permit revocable for non-use	No	No	No	No	Yes; if initial use doesn't begin within 2 years
Qualifies for program put in place by the Flint River Basin Drought Protection Act	Yes	Yes	No	No	No

II. Georgia's water law and its implications for the "status" of permits

In this section, we focus on laws that govern the EPD's ability to reduce agricultural water use in times of drought or other circumstances that lead to water scarcity. However, in doing so, we do not examine instances where the EPD director exercises his or her powers that flow from his or her declaring a drought and thereby activating the Flint River Drought Protection Act. We will take up the Flint River Drought Protection Act below in Section IV. More specifically, this section attempts to answer the two questions described above, under conditions when the Drought Protection Act is not invoked: First, can the state modify or revoke an agricultural water use permit? Second, if so, does the tenure status of a permit matter in any such action?

As explained in Section I, many of Georgia's agricultural water users may believe that EPD has no such power and that the more senior the tenure of a permit, the more secure the permittee's water rights are. In fact, a review of Georgia's water law produces very few code provisions that contradict this perception. However, as discussed below, at least one code provision regarding surface water permits and a similar provision regarding groundwater permits seem to allow the EPD to modify and revoke water use permits. These code provisions, in fact, provide such a substantial loophole that they cast a great deal of uncertainty onto the security of existing users' water rights.

Before turning to the issue of the EPD's power to modify and revoke permits to make way for new permittees, we note that the legislature has provided the EPD the power to revisit the permits it has granted in order to protect the health and safety of Georgians or otherwise respond in times of crisis or emergency. Specifically, in the context of surface water, for example, the Georgia Code gives the director of the EPD the

power to “revoke, suspend, or modify a permit for any other good cause consistent with the health and safety of the citizens of this state.”¹³ Similarly, the legislature has provided the EPD some power to restrict use during times of emergency.¹⁴ While the purpose of these exceptions is understandable, the lack of clarity about what exactly the EPD should do is still somewhat troubling for those seeking more certainty about water rights—i.e., how specifically the agency should modify or revoke rights once it has found that water use threatens the public health or that an emergency is looming. Specifically, it is unclear how a permittee’s tenure plays into the probability that the EPD will ask any particular user to cut back when the agency uses its authority provided by either of these provisions.

As alluded to above, however, the legislature has created a much more substantial loophole. With respect to surface water, the legislature has provided that the director “may suspend or modify a farm use permit if he should determine through inspection, investigation, or otherwise that the quantity of water allowed under the permit *would prevent other applicants from reasonable use of surface waters for farm use.*”¹⁵ A very similar provision is found in the context of Georgia’s groundwater law.¹⁶ Taken literally, these provisions of the code seem to give the director of the EPD the power to revoke, suspend, or modify *any* existing farm use permit in order to “make room” for new applicants seeking permits to exercise their riparian rights. In isolation, these provisions of the Code seem to make a permittee’s tenure appear *irrelevant*. Perhaps equally

¹³ O.C.G.A. § 12-5-31(k)(8),

¹⁴ O.C.G.A. § 12-5-31(l),

¹⁵ O.C.G.A. § 12-5-31(k)(7) (emphasis added),

¹⁶ See O.C.G.A. § 12-5-105(b)(3).

troubling for Georgia water users seeking security in their water rights is that the Code is mute as to how the EPD should implement this provision.

To appreciate the implications of this provision in the code, consider the following hypothetical example. Suppose that in a watershed we have three farmers with water use permits. Acreage irrigated by each and the date at which the permit was acquired are as follows:

Farmer A (1988)	3,000 acres
Farmer B (1998)	1,000 acres
Farmer C (2006)	2,000 acres

Suppose that use by these three farmers exhausts water supplies in the watershed, especially during drought. Farmer D, a riparian in the watershed, wishes to initiate the irrigation of 3,000 acres. By inspection or other means, the director would surely find that use by farmers A, B, and C prevents this “other applicant” from reasonable use of available surface waters. For such a condition, we must ask two fundamental questions: *First, what did the legislature intend? Second, what other legal safeguards were intended to govern the decisions of the EPD?*

The first question regarding legislative intent in the context of the hypothetical situation boils down to the following questions: How does the EPD evaluate “reasonable use” for new permit applications, such as Farmer D’s? Is the application by Farmer D for 3,000 new acres “reasonable”? And, if not, what constitutes a “reasonable” request? From the perspective of existing water users, understanding what uses are reasonable is important because it would allow them to at least venture a guess as to whether their existing rights to use water are vulnerable to prospective rivals users.

As one might suspect, grasping for hard and fast lines when weighing reasonableness is difficult because it is context-specific. In fact, the Georgia legislature did not even attempt to draw a clear line that can help us make reliable forecasts about how “reasonable” a use is. Rather, in determining what constitutes a “reasonable” request, the Georgia legislature relies on a multi-factor approach that includes a broad range of categories.¹⁷ Examples of these categories illustrate their diversity; they instruct the EPD to consider, among other things: the number of users of the water resource; the physical limits of the resource; the value of proposed use; and, the all-encompassing varying circumstances of each case.¹⁸ This broad and open analysis should make incumbent water users feel at least somewhat vulnerable that somewhere down the road some prospective user will find a way to trump the rights of some existing users, including possibly himself.

We next examine what happens once the EPD deems a request by a new user to be “reasonable.” For example, in the hypothetical example described above, if the EPD allots water to user D, then, among Farmers A, B, and C, who gives up how much and why? Does the EPD apply the same criteria to exiting water users as it does to the new user when it considers making room for other users? Does the permit tenure of existing users matter in this analysis? Do grandfathered users (Tenure 1) receive any protections against the threat of future users? Or, are all users treated in a similar manner?

For example, if the EPD grants farmer D water for 3,000 acres, which makes the water body over allocated, does each farmer (A, B, and C) give up equal shares of 1,000 acres (in which case Farmer B is out of business)? Alternatively, do Farmers A, B, and C

¹⁷ O.C.G.A. § 12-5-31(e)-(g) (2006) (surface water); O.C.G.A. § 12-5-96(d) (2006) (groundwater).

¹⁸ *Ibid.*

give up acreage that is proportional to their existing share (A gives up 50%; B gives up 16.6%; C gives up 33.3%)? Finally, does tenure matter and if so, how much? Do D's needs require that Farmers B and C go out of business, leaving the senior permit holder, Farmer A, unaffected? Or, is there no magic formula and instead the decisions about who gives up what are made with great latitude by the EPD?

Admittedly, we contrived the hypothetical example to allow us to simplify how some alternative scenarios might play out. However, the numerous potential water users found in most of Georgia's water basins only amplifies the importance of questions raised in this hypothetical discussion. The dismal—yet increasingly foreseeable—situation characterized above leaves existing permit holders facing enormous uncertainty as to the long-term security of their rights to use water. This uncertainty exists even if an irrigator holds a grandfathered permit to irrigate lands the way he has for decades.

As unpredictable as the law governing the EPD's ability to modify and revoke existing permits seems, the uncertainty of the law is only compounded when read in relation to other statutory provisions. Arguably, other provisions of the code pertaining to the EPD's charge to issue new permits appear to undercut some of the force of the EPD's ability to modify or revoke existing permits. For example, in evaluating what constitutes a reasonable use, the EPD must also consider factors that point in the direction of protecting existing users. For example, in consideration of new permits for agricultural water users, the EPD must weigh “the extent of any injury or detriment caused or expected to be caused to other water users,”¹⁹ “the prior investments of any persons in lands,”²⁰ and in the case of surface water, the EPD must heed the mandate that

¹⁹ O.C.G.A. § 12-5-31(e)(7) (surface water); O.C.G.A. § 12-5-96(d)(7) (2006) (groundwater).

²⁰ O.C.G.A. § 12-5-31(e)(9) (surface water).

“granting of [a new] permit shall not have unreasonably adverse effects upon other water uses in the area, including potential as well as present use.”²¹

Similarly, another section of the Georgia Code provides that, “the division shall take into consideration the extent to which any withdrawals...are reasonably necessary...to meet the applicant’s needs and shall grant a permit which shall meet those reasonable needs; provided, however, that the granting of such permit *shall not have unreasonably adverse effects upon other water uses in the area...*”²²

However, the code provision that perhaps most challenges the notion that the EPD could modify or revoke existing permits is the following: “In the event two or more competing applicants or users qualify equally [under the Code’s reasonability criteria] ...the director is authorized to grant permits to applicants *or modify the existing permits of users* ...on a prorated or other reasonable basis...; provided, however, *the director shall give preference to an existing use over an initial applicant.*”²³ This section of the Code—viewed in isolation—would seem to lead us to the conclusion that the EPD cannot make room for other prospective users.

So, at least in isolation, these provisions of the Georgia Code create a confusing and seemingly contradictory picture. In fact, the state of the law may seem so blurry that water users may be tempted to throw up their hands at this point. However, as the EPD attempts to administer the law or as a court attempts to interpret it, they do not have the luxury of walking away from the law just because it is confusing.

²¹ *Ibid.*

²² O.C.G.A. § 12-5-31(g) (surface water).

²³ O.C.G.A. § 2-5-31(f) (surface water) (emphasis added).

Rather the legislature has made clear that in interpreting its statutes, we should “look diligently for the intention of the General Assembly.”²⁴ One of the ways this is done, particularly when the law is confusing, is to “attempt to gather the legislative intent from the statute as a whole.”²⁵ The goal in doing so in this context is to make the seemingly contradictory laws “harmonize and to give a sensible and intelligent effect to each part.”²⁶

Our best speculation as to how these seemingly contradictory statutory commands should be parsed is to assure that each of the provisions remains true to the admittedly vague principle of “reasonableness” that Georgia water law embraces.²⁷ Keeping the principle of reasonableness in mind, the legislature seems to be requiring the EPD to make room for new users to the extent that it is reasonable, and part of this analysis requires the EPD to give preference to existing users—all else being equal.

Given this reading of the law, it appears that in determining whether a new user can supplant an existing user, the legislature seemingly gave the EPD a great deal of discretion to make judgment calls. Indeed, it is customary in Georgia to give great weight to the interpretation adopted by the administrative agency charged with enforcing the statute, when the agency’s interpretation “reflects the meaning of the statute and comports with legislative intent.”²⁸ Because the legislature provided a great number of factors for the EPD to weigh with little instruction of how much weight to give each

²⁴ O.C.G.A. § 1-3-1.

²⁵ *Sikes v. State*, 268 Ga. 19 (1997).

²⁶ *Footstar, Inc. v. Liberty Mut. Ins. Co.*, 281 Ga. 448, 453 (2006), 2006 Ga. Lexis 970 (citing *Vollrath v. Collins*, 272 Ga. 601, 603-604 (2000)).

²⁷ We present this analysis in more detail in Section II in Appendix A.

²⁸ *Schrenko v. DeKalb County School Dist.*, 276 Ga. 786, 791 (2003).

factor, the legislature left the EPD a lot of room to chart the course for Georgia water law.

We admit that this reading is only our best guess. The most sensible reading seems to be that the law conflicts with itself and does not make much sense. However, the EPD and any reviewing court—if possible—have to find a way to harmonize the law passed by the legislature. However, these issues only add to the uncertainty faced by agricultural water use permits held by Georgia farmers.

Thus, in terms of our questions, we find much uncertainty about the extent to which the EPD can and will make room for future users at the expense of present water users. We find ambiguous answers to our questions regarding the status of permits and the relevance of tenure – whether in a drought or not. Some parts of the Code suggest stability of rights and others great uncertainty. Our best guess is that the EPD has the authority to determine how tradeoffs in allocation will be decided so long as it at least considers each of the factors dictated by the legislature. Furthermore, we find nothing that suggests that holders of Tenure 1 permits have any sort of preferred status vis-à-vis later tenured permits in the event that the EPD wishes to reduce agricultural water use during a period of drought or issue new permits (an issue taken up again below in Section IV).

This observation contradicts the belief of many water users that Georgia water law somehow protects grandfathered permits. While permit holders of other tenures bear more burdens in applying for and maintaining their permits, we find nothing in the Code that would seemingly justify the notion that grandfathered permits are protected from

modification as the EPD makes allocation decisions when addressing drought conditions.²⁹

One can argue that the ambiguities and inconsistencies noted above reflect gaps in the state's water laws as they relate to the notion of riparian rights—particularly that of reasonable use. In 1848, the Georgia Supreme Court clearly rejected the “natural flow” theory of riparian rights in favor of the “reasonable use” theory.³⁰ The rationale for the Court's adoption of the reasonable use theory of riparian rights is spelled out in *Price v. High Shoals Mfg. Co.*:³¹

If the general rule that each riparian owner could not in any way interrupt or diminish the flow of the stream were strictly followed, the water would be of but little practical use to any proprietor, and the enforcement of such rule would deny, rather than grant, the use thereof.

The Georgia Supreme Court reaffirmed this position in a 1980 case involving irrigation, *Pyle v. Gilbert*.³² In *Pyle*, the Supreme Court made clear, “each riparian proprietor is entitled to a reasonable use of the water, for domestic, agricultural and manufacturing purposes, provided, that in making such use, he does not work a material injury to other proprietors.” The Georgia Supreme Court however, provided little in the way of specifics as to what constituted a “material injury” or how Georgia should balance the competing demands of Georgia's many water users. Indeed, the *Pyle* Court, in remanding the case to a lower court, simply said that the lower court should be

²⁹ However, it may not matter that this issue is not addressed directly in the Code if a reviewing court were to find that the grandfathered permits (Tenure 1) are qualitatively different than other tenures of permits. This is because a court may, in reviewing the law, determine that grandfathered permits are protected from modifications flowing from allocation decisions. There are plausible interpretations of Georgia law that could justify such a finding. Other interpretations of Georgia law might undermine such a finding as well. The range of legal interpretations is discussed in Appendix A, Section I.

³⁰ *Henrick v. Cook*, 4 Ga. 241 (1848).

³¹ 132 Ga. 246(1909).

³² 245 Ga. 403 (1980).

“...looking always to see if, insofar as injunctive relief is concerned, all the uses of the creek and pond can be accommodated.”

And what if they cannot? A trial court grappling with this issue made the following observation: “Water rights are becoming more and more important with advancing techniques for its withdrawal and use, and there is a need for the courts or the legislature, or both, to further amplify and clarify equitable water rights between parties, particularly as those rights apply to irrigation.”³³ We whole-heartedly agree. We would add that the EPD could be among the parties that could provide water users much needed clarity.

In summary, in answer to the two central questions, we find uncertainty and ambiguity as to whether the state can modify or revoke an agricultural water use permit under existing statutes. Further, it is also unclear how the tenure status of a permit matters in such an action. Water users are left with an indefinite understanding of their real rights to water when they need it most, under drought conditions. We will return to these questions in Section V.

³³ *Pyle*, 245 Ga. at 404 n.3.

III. The EPD's Flint River Basin Regional Water Development and Conservation Plan

In this section, we focus our attention on the EPD's plan for the Flint River Basin.³⁴ At the outset we wish to make clear that all regional water plans are required by law to be consistent with the statewide water plan, which is to be presented by the EPD to the Georgia Water Council on June 28, 2007.³⁵ The implications of this requirement for the ultimate shape of the Flint River Plan are unclear to us inasmuch as the statewide water plan is unavailable to us at the time of this writing.

The Flint River Basin Regional Water Development and Conservation Plan ("the Flint Plan") contains a great deal in the way of hydrological modeling of the Flint River Basin, with particular attention given to two, "vulnerable" sub-basins: Ichawaynochaway³⁶ and Spring Creek³⁷. As a very general statement, the plan calls for new conservation measures and aggressive management of water resources, which could result in significant cut-backs. Specifically, it appears that the EPD plans to reduce irrigated acreage in these basins during periods of drought with reliance on the drought protection auction: Therefore, some parts of the lower [Flint River Basin] (the sub-basins noted above) have already reached their drought-year 'safe yield.' If more withdrawal permits are issued for the lower [Flint River Basin], more aggressive drought-year management strategies will have to be employed, mostly (if not exclusively) in those parts of the Basin closest to their safe yield.³⁸ Moreover:

³⁴ Georgia Department of Natural Resources, Environmental Protection Division, "Flint River Basin Regional Water Development and Conservation Plan," (March 20, 2006).

³⁵ For details, see <http://www.georgiawatercouncil.org/>.

³⁶ USGS Hydrologic Unit Code (HUC) 03130009.

³⁷ USGS Hydrologic Unit Code (HUC) 03130010.

³⁸ Georgia Department of Natural Resources, Environmental Protection Division, "Flint River Basin Regional Water Development and Conservation Plan," at section 2.5 (March 20, 2006).

If irrigation is decreased during a drought year by 20% of current use in Ichawaynochaway Creek and Lower Flint River³⁹ sub-basins, critical low-flow criteria will be met. If irrigation is decreased during a drought year in the Spring Creek sub-basin by 20%, it is assumed this will have a beneficial affect [sic] on water levels and stream ecology even though critical low-flow criteria may not be met.⁴⁰

For our purposes, it is sufficient to note that, not surprisingly, one finds in the EPD's Flint Plan the inconsistencies and uncertainties noted in our review of Georgia laws. The plan contains a discussion in which the EPD purports to follow several statutory requirements, including the following among others:

- “All legitimate requests for farm use permits must be granted in the FRB once the Plan is adopted.”⁴¹
- “EPD may issue permits for less than the amount requested by the permit applicant.”⁴²
- “In issuing new permits, EPD may decrease the permitted withdrawal amounts of all other permitted users including “grandfathered” permits.”⁴³
- “EPD may initiate provisions of the Flint River Drought Protection Act during severe drought years in an effort to maintain critical stream flow.”⁴⁴
- “EPD cannot revoke permits for non-use once initial use has commenced.”⁴⁵

While the EPD's cursory listing of Georgia's statutory requirements does not provide much in the way of concrete details, it does highlight what appear to be guiding principles. Within these principles, we get a glimpse of how the EPD will treat permit holders during times of drought. We see that the EPD fully anticipates that permit

³⁹ In this case, the Plan refers to the Lower Flint sub-basin, USGS HUC 03130008. Elsewhere in this document, lower FRB refers to the lower portion of the entire Flint Basin including sub-basins Ichawaynochaway, Spring Creek, Kinchafoonee-Muckalee, Lower Flint and Middle Flint.

⁴⁰ Georgia Department of Natural Resources, Environmental Protection Division, “Flint River Basin Regional Water Development and Conservation Plan” at section 2.8(4) (March 20, 2006).

⁴¹ Georgia Department of Natural Resources, Environmental Protection Division, “Flint River Basin Regional Water Development and Conservation Plan,” at 52 (March 20, 2006).

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

holders will give way to new applicants if an applicant proposes a use that is more “legitimate” than those holding permits. However, where the line is drawn and what makes one use of water more “legitimate” than another is left unsaid. So, at least in some respects, these guiding principles raise more questions than they answer and compound the uncertainty of rights that exists in the Code.

These principles provide a general—albeit undefined—trajectory of the EPD’s intention to reduce the rights of incumbent users in times of scarcity. Like the statutory provisions, the Flint Plan includes other text that introduces confusion into the mix. Specifically, notwithstanding the EPD’s observation that “more aggressive management strategies” may be required with the increase in water use permits in the Flint River Basin and the assertion that Georgia law allows the EPD to decrease the permitted withdrawal amount of *all* existing permitted users, the plan states that:

“In considering new and existing applications for both ground-water and surface-water withdrawals, EPD will evaluate the effect of the proposed water use on existing users and stream flow, and issue the new permit in such a way that the new permit will not adversely impact stream flow or the water available to existing users.”⁴⁶

Taken literally, this language would require the EPD to refuse permit requests that impact current users. It is hard to square this language with the seemingly contradictory statutory requirement—noted in the plan by the EPD—to make room for new permits by decreasing “permitted withdrawal amounts of all other permitted users including “grandfathered” permits.”⁴⁷ This contradiction makes it very difficult to say what the

⁴⁶ *Ibid.* at 32.

⁴⁷ *Ibid.* at 52.

EPD's plan actually is. It also seems to increase the legal risk that a court will find the Flint Plan legally impermissible. We recognize that if the plan ever were challenged, the EPD would be given much deference. However, this conflict does not particularly help the EPD's case.⁴⁸

Additional provisions in the Flint Plan that water users may find relevant include the following:

- The EPD will no longer issue permits for proposed Floridan aquifer irrigation wells that are within 0.25 miles of another user's well (unless hydrogeologic evaluation indicates that the proposed well will not cause excessive drawdown in the other's well).
- Regardless of their location, all proposed Floridan aquifer wells will be evaluated for their effect on nearby streams and springs. Proposed irrigation wells that would draw from the Floridan aquifer within 0.5 miles of an in-channel spring or stream exhibiting a demonstrable connection with the Floridan aquifer will not be permitted if evaluation indicates that, for the stream reach closest to the proposed well, the well would lower the Floridan aquifer water level to below the average stream state or decrease the discharge of the spring.
- In addition to restrictions on end-guns and other conservation requirements, newly issued surface water withdrawal permits in Spring Creek and Ichawaynochaway sub-basins are required to have low-flow protection plans, requiring a complete cessation of irrigation when discharge at the withdrawal location falls below 25% of the average annual discharge as calculated at the point based on the period of record for the nearest downstream continuous flow gauge, plus a prorated portion of the permitted amount of downstream users. While the Plan states that affected individuals will be notified by the EPD via e-mail or phone call when these conditions exist, the Plan also requires that the permit conditions be followed regardless of whether the permittee has been contacted by the EPD or not.⁴⁹

Seemingly as a part of the EPD's mandate to establish a "...reasonable system of classification," the Plan establishes three categories of small (HUC-12) watersheds; such

⁴⁸ For discussion about the deference paid to agencies administering the Legislature's commands, see Appendix A, Section II. In Appendix A, Section II we also discuss plausible outcomes of a court attempting to interpret these seemingly conflicting provisions of the Flint River Basin Regional Water Development and Conservation Plan.

⁴⁹ It seems to us that this provision will be *very* difficult to implement and/or enforce.

watersheds are relevant to the EPD's permitting actions and management plans. "Where necessary, and/or where data are available, permitting and management decisions will take into account site-specific conditions and local stream impacts down to a HUC-12 watershed scale."⁵⁰ These HUC-12 based areas are classified as follows:

Capacity Use Areas: includes watersheds in the Spring Creek Sub-Basin in which hydrologic models indicate decreased baseflow of more than 5 cfs in any month of a drought year, more than 10 cfs in Ichawaynochaway Creek Sub-Basin, and more than 30 cfs in the Lower Flint Sub-Basin

Restricted Use Areas: includes watersheds in Spring Creek where hydrologic models indicate decreased baseflow of 1-5 cfs in any month of a drought year, 1-10 cfs in Ichawaynochaway Creek Sub-Basin, and 3-30 cfs in the Lower Flint River Sub-Basin.

Conservation Use Areas: includes watersheds in which hydrologic models indicate decreased baseflow of less than 1 cfs in any month of a drought year in Spring Creek and Ichawaynochaway Creek Sub-Basins and less than 3 cfs in the Lower Flint River Sub-Basin.

The area classifications are designed to assist in targeting management actions within the watershed, including the suspension of water withdrawals. The relevance of these provisions is discussed in the next section of the Report.

In summary, the EPD's plan for the Flint River Basin echoes and adds to the statutory provisions concerning water management. Moreover, it compounds the uncertainty about the security of water rights and how future water management actions will affect existing and future water users, especially in the Flint River Basin.

⁵⁰ Georgia Department of Natural Resources, Environmental Protection Division, "Flint River Basin Regional Water Development and Conservation Plan," at 30 (March 20, 2006).

IV. The Flint River Drought Protection Act

The legislature enacted the Flint River Drought Protection Act during the 2000 legislative session and revised it during the 2006 legislative session. The basic purpose of the Act was to provide the EPD with a mechanism for reducing acreage under irrigation in the Flint River Basin during periods of severe drought. The Flint River Drought Protection Act has several key features. First, in order to activate the statutory provisions of the Act, by the first of March, the Director of the EPD must declare a “severe drought” for the upcoming summer.⁵¹ In making this finding, the Director of the EPD can rely such as historical, mathematical, meteorological indicators. Second, if the Director declares a drought, the Director must also determine the acreage that must be taken out of irrigation to protect the Flint River.⁵² Third, the Director then oversees an “auction-like” process designed to reduce use of the Flint River according to the EPD’s determination and wherein farmers may voluntarily agree to not irrigate for the balance of that year for a given amount of money (per acre).⁵³ Fourth, if the Director is unable to acquire the target acreage in the auction, permitted irrigation is involuntarily suspended for the year on a last-in-first-out basis; i.e., permits with the most recent issuance date would be suspended, working down through later issuance dates until the target acreage reduction is achieved.⁵⁴

Funding for the Act—which is critical both for the auction and for the involuntary suspensions as set forth by the Act—is “guaranteed” only through the following statement of legislative intent:

⁵¹ O.C.G.A. § 12-5-546(a).

⁵² O.C.G.A. § 12-5-546(b).

⁵³ *Ibid.*

⁵⁴ O.C.G.A. § 12-5-547.

The General Assembly intends for the total maximum balance of the unexpended drought protection funds during any fiscal year not to exceed \$30 million. In the event the total balance of unexpended drought protection funds at the end of a fiscal year is less than \$5 million, it is the intent of the General Assembly that the total balance of unexpended drought protection funds be replenished to at least \$10 million *at the earliest possible time*.⁵⁵

We simply note, in this regard, that with the high potential costs of implementing the auction and a Georgia population that is increasingly urban, it is simply not clear what fund replenishment “at the earliest possible time” might mean to the growing number of legislators representing these urban areas.

The EPD issued a number of rules that added some details to the basic structure of the Flint River Drought Protection Act.⁵⁶ Perhaps the most fundamental addition to the Flint River Drought Protection Act were the rules that determine eligibility for participation in the auction⁵⁷ and the rules that exclude permittees who applied for permits after December 1, 1999 from potential involuntary suspension.⁵⁸ This exclusion has dramatic potential implications for Tenure 1 farmers. Only those farmers with pre-December 1, 1999 application dates are subject to the auction proceedings and, more importantly, involuntary suspension of their irrigation permits. This exclusion appears to detract from the intent of the Flint River Drought Protection Act, which seemingly provided protection to farmers with more senior tenures of permits. Instead, Tenure 1 permittees are protected from involuntary reductions in irrigated acreage only to the extent that they can be accommodated by focusing involuntary reductions on permittees with application dates post-7/1/1988 and pre-12/1/1999.

⁵⁵ O.C.G.A. §12-5-541 (emphasis added).

⁵⁶ Rules of the Georgia Department of Natural Resources Environmental Protection Division. Chapter 319-3-28, Flint River Drought Protection.

⁵⁷ Rule 391-3-28.05(b).

⁵⁸ Rule 319-3-28.09 (read in light of “Permittee” as defined in 319-3-29.02).

Newly issued permits in the Flint River Basin seemingly enjoy a preferred status in that they will not be involuntarily suspended or revoked due to over-allocation or drought under the Flint River Drought Protection Act.⁵⁹ Approximately 41,000 acres were voluntarily suspended in the 2002 auction. Since that time and the recent lifting of the permit moratorium (December 1999 – March 2006), new withdrawal permits have been and are being issued. Processing the backlog of over 1,100 permit applications that accumulated during the moratorium could result in new permits for up to 100,000 irrigated acres.⁶⁰ Moreover, new permit applications can now be considered. The backlog permits and new permits will not be subject to the Drought Protection Act. As new withdrawals are permitted, the protection that the last-in, first-out provision of the Drought Protection Act provides to Tenure 1 permittees is becoming severely limited.⁶¹

The EPD has also issued a number of rules that flesh out how it might target particular areas in the Flint River Basin in order to meet its water management objectives. These rules allow it to target “affected areas” for auction, specifically providing that it can focus on specific watersheds and ground water permits “within 3 miles adjacent to the Flint River or its tributaries where ... withdrawals may directly decrease stream flow.”⁶² This focused approach, while perhaps smart from a policy standpoint, only

⁵⁹ Georgia Code Section 12-5-543[b][1][A] provides that only permits with application dates prior to December 1, 1999 can participate in the Drought Protection auction. Note, however, that outside of the Drought Protection Act, new permits (Tenure 5) for surface water use in the Spring Creek and Ichawaynochaway Creek sub-basins are interruptible without compensation [Flint River Basin Regional Water Development and Conservation Plan, p. 35], and it would seem that restrictions on new groundwater permits for taking water from the Floridan aquifer will be much more restrictive than in the past. [Flint River Basin Regional Water Development and Conservation Plan, p. 23]

⁶⁰ Georgia Environmental Protection Division, Flint River Basin Regional Water Development and Conservation Plan, March 20, 2006, p. 41, Table 1.1.

⁶¹ Due to the dramatic change this exclusion of new permittees created for implementation of the Flint River Basin Drought Protection Act, it might not hold up if challenged in court. This issue is addressed in additional detail in Appendix A, Section III.

⁶² Rule 391-3-28.05(a).

increases the possibility that more senior tenured permittees will be affected by future EPD involuntary suspensions.

The EPD has stated that it is the agency's intention to reduce withdrawals during a drought by 20% in the "vulnerable sub-basins" discussed above in Section III (the Ichawaynochaway and Spring Creek Sub-Basins). To appreciate how the EPD's approach may impact water users, we have compiled some data for illustrative purposes in Tables IV.1 through IV.5.⁶³ In Table IV.1, Ichawaynochaway has 394 surface water permits with 62,429 permitted acres; it has 468 groundwater permits with 63,691 acres. The EPD's Flint Plan and subsequent rule changes⁶⁴ give particular emphasis to concern with water use within a 3-mile "buffer" along Ichawaynochaway Creek. Surface and groundwater acreage included in this 3-mile buffer and acreage in the three area classifications (Capacity Use, Restricted Use, and Conservation Use, further described in Section III) are also given in the table. Spring Creek (Table IV.2) has 96 surface water permits with 12,897 permitted acres, and 1,077 groundwater permits with 137,055 permitted acres.

It is unclear whether the EPD's stated policy of reducing withdrawals in these two sub-basins by 20% during periods of drought refers to total permitted acreage or only to acreage within the 3-mile buffer zone. If the 20% reduction were based on total acreage, the EPD would need to retire 25,224 acres in Ichawaynochaway and 29,990 acres in Spring Creek for a total of 55,214 acres. If the 20% reduction was targeted to lands within the 3-mile buffer, the EPD would need to retire 17,656 acres in Ichawaynochaway

⁶³ Data shown were compiled using ESRI ArcGIS based on the agricultural water withdrawal permit data base as of December 2006. The data were made available to the authors by the Georgia EPD. Given the dynamic nature of the data base involved, we would anticipate some minor changes in the numbers since our analyses were performed.

⁶⁴ See Rule 391-391-3-28-.05(a)(2)(i).

and 27,727 acres in Spring Creek for a total of 45,383 acres. Even under this lower target—45,383 acres –it is interesting to note that during the 2002 auction, only 8,277 of Ichawaynochaway’s permitted 49,430 surface water acreage and 3,013 of Spring Creek’s 11,210 permitted surface water acreage in the 3-mile buffer zone were voluntarily suspended. Thus, the acquisition of more than 45,000 acres in these sub-basins is likely to require prices well in excess of the \$150.00/acre offer price used in the 2002 auction.

**Table IV.1
Water Use Permits: Ichawaynochaway Sub-Basin**

	Total number of permits	Permitted acreage
Surface water	394	62,429
Surface water, within 3-mile buffer	285	49,430
Capacity	15	1,265
Restricted	11	6,209
Conservation	259	41,956
Ground water	468	63,691
Ground water, within 3-mile buffer	296	38,849
Capacity	70	7229
Restricted	7	590
Conservation	219	31,030

**Table IV.2
Water Use Permits: Spring Creek Sub-Basin**

	Total number of permits	Permitted acreage
Surface water	96	12,897
Surface water, within 3-mile buffer	85	11,210
Capacity	8	703
Restricted	9	1,030
Conservation	68	9,477
Ground water	1,077	137,055
Ground water, within 3-mile buffer	1,000	127,427
Capacity	261	31,340
Restricted	291	36,105
Conservation	448	50,082

In any case, if the area classifications (e.g., capacity use, restricted use, conservation use) are not relevant, the EPD could then obtain its targeted acreage entirely from surface permits.⁶⁵ However, if suspension decisions are based on the classifications, the implications for Tenure 1 permittees are substantial. Consider, for example, the Ichawaynochaway Creek Sub-Basin.⁶⁶ Virtually all surface water permits in the Capacity and Restricted Use areas and more than 85% of surface water permits in the Conservation Use areas are “grandfathered” (Tenure 1) permits.⁶⁷ Obtaining targeted acreage solely from surface water would necessarily require that large acreages of Tenure 1 permits be voluntarily or involuntarily suspended. With the addition of groundwater permits, as shown in Tables IV.3-IV.5, the bulk of permits in the classifications most likely to be suspended (“Capacity” and “Restricted” Uses) are still in the hands of Tenure 1 farmers. We find similar conditions in the Spring Creek Sub-Basin.

⁶⁵ It seems reasonable to assume that the EPD would look first to surface permits given that their retirement would have a larger and more certain effect on surface water supplies than the suspension of groundwater permits.

⁶⁶ Note that Tables IV.3 through IV.5 assume that EPD would seek to attain a 20% reduction in permitted withdrawals only within the 3-mile buffer.

⁶⁷ It is important to note that grandfathered permits include those for which applications were submitted to the Georgia Environmental Protection Division prior to July 1, 1991; they were based on water use that had taken place prior to July 1, 1988. Tables IV.3 – IV.5 list the issuance date of permits, but not the application date; application date data were not available. The EPD had a backlog of applications of grandfathered permits which it took several years to process. For the purposes of this analysis, we estimate that most permits issued in 1995 or before are grandfathered permits, but it is possible that some grandfathered permits were issued even later than 1995.

Table IV.3
Ichawaynochaway Sub-Basin
Tenure of Auction-eligible permits for lands with “Capacity Use” Classification

Year permit issued	Permits Within 3-mile Buffer							
	Surface water				Ground water			
	number of permits	acreage	cumulative acreage	% total	number of permits	acreage	cumulative acreage	% total
1988					1	103	103	1
1989	5	284	284	22	2	162	265	4
1990	4	338	622	49	12	1,237	1,502	21
1991	1	99	721	57	12	1,313	2,815	39
1992	5	544	1205	100	24	2,692	5,507	76
1993			1205	100			5,507	76
1994			1205	100			5,507	76
1995			1205	100	1	154	5,661	78
1996			1205	100			5,661	78
1997			1205	100	1	50	5,711	79
1998			1205	100			5,711	79
1999			1205	100	1	114	5,825	81
2000			1205	100	13	1,184	7,009	97
2001			1205	100	2	165	7,174	99
2002			1205	100	1	55	7,229	100
2003			1205	100			7,229	100

Table IV.4
Ichawaynochaway Sub-Basin
Tenure of Auction-eligible permits for lands with “Restricted Use” Classification

Year permit issued	Permits Within 3-mile Buffer							
	Surface water				Ground water			
	number of permits	acreage	cumulative acreage	% total	number of permits	acreage	cumulative acreage	% total
1988								
1989	6	4,719	4719	76				
1990			4719	76	1	57	57	10
1991	2	1,306	6025	97	6	533	590	100
1992	1	103	6128	99			590	100
1993			6128	99			590	100
1994			6128	99			590	100
1995			6128	99			590	100
1996			6128	99			590	100
1997			6128	99			590	100
1998			6128	99			590	100
1999			6128	99			590	100
2000	2	81	6209	100			590	100
2001			6209	100			590	100
2002			6209	100			590	100
2003								

Table IV.5
Ichawaynochaway Sub-Basin
Tenure of Auction-eligible permits for lands with “Conservation Use” Classification

Year permit issued	Permits Within 3-mile Buffer							
	Surface water				Ground water			
	number of permits	acreage	cumulative acreage	% total	number of permits	acreage	cumulative acreage	% total
1988	11	2,293	2293	5	13	2,554	2,554	8
1989	82	14,292	16585	40	35	6,115	8,669	28
1990	45	6,374	22959	55	33	5,437	14,106	45
1991	75	11,403	34362	82	58	7,259	21,365	69
1992	7	905	35267	84	17	2,145	23,510	76
1993	2	473	35740	85			23,510	76
1994	2	668	36408	87	1	101	23,701	76
1995	3	483	36891	88	1	187	23,888	77
1996	1	44	36935	88	1	182	24,070	78
1997	1	150	37085	88	2	188	24,258	78
1998	2	230	37315	89	3	400	24,718	80
1999			37315	89	2	215	24,993	80
2000	22	3,832	41147	98	43	5,176	30,109	97
2001	2	412	41559	99	5	526	30,635	99
2002	3	346	41905	100	4	389	31,024	100
2003	1	51	41956	100	1	6	31,030	100

Given our understanding of the Flint Plan, we conclude that the bulk of permits to be retired – voluntarily through the auction or involuntarily – will be from Tenure 1 farmers.

We note that Georgia law is mute on the question as to what will happen in the event that a drought is not declared on March 1, but in fact occurs after that date. There are no provisions for a post-March 1 declaration that would trigger an acreage reduction auction. In this case, if the EPD finds that acreage reduction is required to protect the river, involuntary means would appear to be their only recourse. Then, the open questions are: Whose acreage would be suspended? What procedures would be adopted by the EPD in implementing any required suspensions in the absence of the Drought Protection Act process? It may be that if a drought is not declared, the EPD would revert

to rules discussed in Section III. If so, as discussed in Section III, water users are left with substantial uncertainty.

Finally, we simply note that any number of the provisions of the Drought Protection Act, such as the provisions related to a farmer’s property right in a permit, *may* be subject to challenge in the courts. The basis for such challenges could be a provision of the Georgia Constitution that does not permit amendment of laws of general application by “special” laws. Article VI, ¶ IV of the Constitution states:

Paragraph IV. *Limitations on special legislation,*

(a) Laws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law, except that the General Assembly may by general law authorize local governments by local ordinance or resolution to exercise police powers which do not conflict with general laws.

It is possible that—if challenged—a reviewing court would find that at least portions of the Flint River Drought Protection Act are “special” laws as relevant for this article in the Constitution.⁶⁸

⁶⁸ This is discussed in Appendix A, Section IV.

V. Concluding remarks

At the outset of this work we posed what we believe to be questions of paramount importance to Georgia's farming sector:

Question 1: Can the EPD modify, revoke, or in any way alter water use permits during periods of drought?

Question 2: Does the tenure of a permit affect the permittee's vulnerability to any such modification or revocation?

The answers we find to these questions in state law, EPD regulations, and case law are ambiguous. Permittees may not have the clear rights to water that they believe that they have. Their rights are riddled by legal uncertainties. Georgia water law appears to be caught in a dilemma: while it tries to comport with the principles of riparian laws, conditions of scarcity (during drought) make such a commitment untenable. Existing laws appear to leave the EPD in a "damned if they do; damned if they don't" position. The EPD faces a certain amount of litigation risk no matter how it attempts to leverage the laws of the state with respect to water use management. Moreover, as conditions of scarcity become more frequent, the risk of litigation is certainly going to increase.

We wish to make clear that we do not advocate the adoption of a prior appropriation system for the state of Georgia. In fact, we do not advocate any particular solution to the uncertainties found in Georgia's water law. However, we do support the clarification of the law to reduce uncertainty about future access to water for permit holders. We note that the riparian doctrine, *as traditionally applied*, is not well suited for guiding water use under conditions where water is scarce. Modifications are needed to clarify the rights and responsibilities of permittees during periods of drought or pronounced demand. The state needs to rationalize its water laws in order to eliminate

inconsistencies in its current laws and to make clear the legislature's intent as to how water resources are to be managed. In our view, too much is left to chance and to the outcome of what seems virtually certain and protracted litigation under the current law.

Along these lines, we suggest that the state may wish to consider the need to quantify the amount of water that a permittee is entitled to withdraw. To date, agricultural withdrawal permits in Georgia have not specified this amount. This action was taken in other riparian states (e.g., Oregon and Texas)⁶⁹ when these states began to grapple with conditions of scarcity, similar to those we are now experiencing in Georgia. In these states, riparians were given a fixed amount of time to provide documentation of their water use over the previous four-to-five years, and these data were used to quantify their riparian rights. Existing permits issued by the EPD specify the acreage that can be irrigated under the permit; this new requirement would simply add an additional datum to the permit. Quantified rights under a water use permit offers several advantages, including supporting the EPD in reducing water use during a drought on an (arguably) "fair" basis. For example, all users could be required to reduce water use by 10% of their permitted amount. These limits would be enforceable once the state's program to install meters on all agricultural wells is complete (projected to be 2009).

Given the discussions in this and earlier sections, our "conclusions" will take the form of several closely related questions that we believe can help to facilitate discussion among policymakers and stakeholders in the state. Responses to these questions could help to guide the development of substantive improvements in the state's water laws.

⁶⁹ See Ronald G. Cummings, Nancy A. Norton, and Virgil A. Norton, *Enhancing In-Stream Flows in the Flint River Basin: Does Georgia Have Sufficient Policy Tools?*, Water Policy Working Paper #2001-002, Georgia Water Planning and Policy Center (Albany: September 2001).

Question #1: Should the state continue to allow expansion of irrigated acreage in basins like the Flint River Basin where over-appropriation (during periods of drought) is already a reality?

If the answer is yes, then the state would be well advised to initiate plans for how they might respond to the likelihood of litigation claiming the state's abrogation of its obligations to downstream states.

If the answer is no, then the state would benefit by providing the EPD with explicit guidance as to restraints on the issuance of new permits.

Question #2: Closely related to the above, do we want a system wherein any riparian can obtain a right to water use, even if this means that existing water users must reduce their established use?

If the answer is yes, then the law needs to provide more explicit guidance on how existing permits can be modified to accommodate new users. Should each permit holder, regardless of permitted acreage, cede the same amount of water which will, in total, offset the water use of the new permit application? Is the reduction pro-rated on a per-permitted-acre basis? Does the tenure of a permit affect the amount of reduction required; i.e., does the holder of a permit issued in the 1980s give up the same or a lesser amount that the holder of a permit issued in the 1990s? Is there a limit on the riparian claim of a new applicant; i.e., can a new applicant assert a riparian claim for water required to irrigate thousands of acres? Will compensation be given to existing permit holders pushed aside for new users?

If the answer is no, then existing provisions that require that the EPD issue new permits for irrigation and sections of the law cited above that require modification of existing permits to accommodate new applicants should be changed.

Question #3: Should the state give any sort of preferential treatment to different tenures of permits; i.e., does a farmer who has had a permit for 20+ years have the same standing in any acreage reduction scheme as one who acquired a permit later? Related to this question, should holders of permits obtained from post-December 1, 1999 be excluded from the Flint River Drought Protection Act irrigation suspension auction and provisions for the involuntary suspension of permits?

If the answer to the first question is yes, then explicit language to this effect in Georgia's water laws would resolve ambiguity created by conflicting requirements to accommodate new users and to protect existing permit holders.

If the answer is no, then explicit language to this effect would remove a great deal of uncertainty from Georgia's water laws.

Question #4: Similarly, should the law provide more explicit guidance as to how the EPD should attain irrigation reductions when the Drought Protection Act is not invoked but drought conditions exist (i.e., when a drought is not declared by March 1 and severe drought conditions follow or if acreage reductions attained voluntarily by auction under the Act later prove to be inadequate)?

If the answer to this question is yes, then the law should provide specific guidelines for the identification of farmers whose permits may be suspended. It must make clear whether the tenure of a permit "counts" in this regard.

If the answer is no, then, it would still be helpful if at least the rules used by the EPD were made more explicit. Prior to adoption, any rule changes should be fully debated by affected stakeholders.

Question #5: Should the state begin the process of quantifying amounts of water use allowed under an issued water use permit?

If the answer is yes, then policymakers should give consideration to the process that they wish the EPD to follow in quantifying permitted water use.

If the answer is no, then, obviously, no action is required.

While considering these important questions, policymakers must also consider the external context for these concerns. In this case, the external context tends to further muddy the waters. First, federal laws add a new layer of complexity and uncertainty. The continuing conflict among Georgia, Alabama, and Florida concerning waters in the Basin could result in federal actions, such as an equitable apportionment action, that could unpredictably affect water resource allocation in the region. The federal Endangered Species Act is also relevant here given the presence of multiple federally listed species including endangered freshwater mussels and Gulf sturgeon in the watershed. Other possible challenges to the rights of Georgia water users could arise based on the Clean Water Act or provisions of state common law, such as the public trust doctrine. In significant respects, those watching developments in Georgia water law are waiting for the proverbial “other shoe” to drop and potentially turn Georgia’s treatment of water rights completely on its head. A potential inter-state challenge to Georgia’s management of the Flint Basin or the larger Appalachicola-Chattahoochee-Flint Basin

based on federal law adds additional uncertainty to Flint Basin permittees rights to use water.

Second, Georgia is currently developing a new statewide water plan to guide its management of water resources across the state. The draft is currently being developed by the Georgia Environmental Protection Division with a concurrent stakeholder involvement process. The draft plan will be presented to the Georgia Water Council in the summer of 2007, and the state legislature will consider the plan in its 2008 session. The current draft of the plan suggests a number of new policies for water resource management in the state. Perhaps the most significant with respect to the issues in this document is the proposal to manage watersheds based on “consumptive use budgets”, which aim to allocate available water to various users, in-stream flows, downstream needs, and assimilative capacity with clear numerical targets. Additionally, the current draft of the plan proposes the use of regional entities to coordinate water management planning at the sub-state level. A shift to regional management of watersheds could significantly change water policy in this state, but it also might not. Until the details of implementation are known, the impact is uncertain. Thus, the new statewide plan could change the direction of current state water policy, and therefore, while the plan and its implementation details are still incomplete, water users face additional uncertainty over how future water management and allocation policies will affect them.

Georgia water policy is at a crossroads. This report is offered as a starting point for assessing the current water statutes and regulations that affect agricultural water users in Georgia. This analysis suggests that the current policies are confusing—even contradictory. Moreover, they do not appear to be up to the task of addressing current

conditions of scarcity, and they create uncertainty for permit holders over what actual rights they have to water to support their farm operations. Georgia is currently endeavoring to develop a new statewide water policy plan. As it does, discussion of these issues should be central. If the state does not address these issues soon, it will face decisions that are more difficult and choices that are more constrained, and if it waits too long, decisions may be made for it in a court of law.

Appendix A

This memorandum supplements and explains some of the legal assumptions provided in the report, *Managing Agricultural Water Use During Drought: An Analysis of Contemporary Policies Governing Georgia's Flint River Basin* (the "report").⁷⁰ The organization of the memo follows the organization of the report. This memorandum provides a more detailed discussion of some of the key legal conclusions made in the report.

I. Absolute Dominion and Reasonable Use as Applied to Groundwater Use

Legal Questions Presented: Prior to the 1988 legislative changes to water law governing Georgia's farmers, was the law of Georgia that governed these users characterized by absolute dominion or absolute use? If it was characterized by absolute dominion, do grandfathered permits retain residual rights of the common law absolute dominion system?

Analysis Summary: The character of water law prior to the 1988 legislative changes is unclear because there are differing strains of case law that suggest both doctrines. This creates substantial uncertainty as to the actual nature of the rights that attach to grandfathered permits and how much of the common law system still attaches to these permits.

A. Analysis

What was the nature of groundwater law prior to the legislature's codification of policy for agricultural groundwater use in 1988? Some would argue that the 1988

⁷⁰ This memorandum was originally developed as an analysis to support the development of the report. The final version of the report incorporates most of these comments. However, the memorandum provides a more extensive discussion of several important issues addressed in the report. For that reason, it was included as an appendix.

revisions of the Georgia code “introduced” the concept of reasonableness to Georgia groundwater law.⁷¹ They would argue that prior to the statutory law governing groundwater, Georgia relied on the rule of “absolute dominion” to allocate groundwater resources. While *in practice* absolute dominion seems to characterize the common practice governing groundwater use prior to 1988, common practice may not actually have reflected Georgia law. Perhaps this issue never arose because water was perceived as abundant and, therefore reductions in use were not necessary. Moreover, given the abundance of water, all uses were probably viewed as reasonable.⁷²

For some readers, it may seem inconsequential whether reasonable use or absolute dominion characterized groundwater law prior to the changes to Georgia law in 1988. However, in the future, particularly in the context of potential litigation brought by grandfathered groundwater users, this question may have substantial import. Simply put, understanding what the law was prior to 1988 may help us to understand the rights that currently govern holders of grandfathered groundwater permits. If prior to 1988, absolute dominion governed groundwater use, then it may be that grandfathered users should not be subject to reasonable use requirements—at least without just compensation. Rather, it could be argued that these users still retain a right characterized by absolute dominion—at least to the extent these users conformed to law and installed technology to harvest water prior to 1988.

Unfortunately, case law does not give us a very clear picture as to the precise nature of the rights of Georgia’s groundwater users under Georgia’s common law prior to

⁷¹ Prior to 1988, *surface* water use was governed by the riparian doctrine, modified by reasonable use. *Pyle v. Gilbert*, 245 Ga. 403, 406 (1980); *Price v. High Shoals Mfg. Co.*, 132 Ga. 246, 248-249 (1909).

⁷² Joseph W. Dellapenna, The Law of Water Allocation in the Southeastern States at the Opening of the Twenty-First Century, 25 U. Ark. Little Rock L. Rev. 9, 67 (2002).

1988. On one hand, several cases in Georgia, which predate the 1988 revisions to Georgia law, applied reasonable use to disputes surrounding underground streams and to interference of underground springs.⁷³ So, where there is strong hydrological connection between groundwater and surface water, it seems that long before Georgia changed the code in 1988, Georgia’s groundwater—at least to some extent—was subject to the rule of reasonable use and not absolute dominion. On the other hand, when hydrological connections were not at issue, it seems that absolute dominion governed aquifers.⁷⁴ One case, *Stoner v. Patten*,⁷⁵ provides stark language that absolute dominion is the rule that governs. *Stoner* rests on the finding that a property owner actually owns land and all that is in it from the surface down to the “bowels of the Earth.”⁷⁶

The conflicting lines of reasoning in case law leave a significant gray area in Georgia’s historic groundwater law. Specifically, what happens when several property owners sit over an aquifer and one user’s pumping of groundwater impacts the groundwater found below the others? If the user’s permit predates 1988, do we rely on absolute dominion or reasonable use? Additionally, given advances in technology, hydrological connections are much simpler to identify today than they have been in the

⁷³ See *Atlanta v. Hudgins*, 193 Ga. 618, 631-32 (1942) (stating that reasonable use governs disputes surrounding uses of underground streams); *Stoner v. Patten*, 132 Ga. 178, 179-180 (1909) (same); *Robertson v. Arnold*, 186 S.E. 806 (Ga. 1936) (stopping a spring violates riparian rights); *St. Amand v. Lehman*, 120 Ga. 253 (1904) (finding it permissible to seek an injunction against action of another landowner that intentionally was meant to damage an underground spring). See also John L. Fortuna, “Water Rights, Public Resources, and Private Commodities: Examining the Current and Future Law of Governing the Allocation of Georgia Water”, 38 Ga. L. Rev. 1009, 1037-38 (2004) (discussing some of these cases); Joseph W. Dellapenna, “The Law of Water Allocation in the Southeastern States at the Opening of the Twenty-First Century”, 25 U. Ark. Little Rock L. Rev. 9, 67 (2002) (same).

⁷⁴ See John L. Fortuna, “Water Rights, Public Resources, and Private Commodities: Examining the Current and Future Law of Governing the Allocation of Georgia Water”, 38 Ga. L. Rev. 1009, 1013 (2004); J. Marshall Lawson, “Transboundary Groundwater Pollution: The Impact of Evolving Groundwater Use Laws On Salt Water Intrusion of the Floridian Aquifer Along the South Carolina-Georgia Border”, 9 S.C. Evtl. L.J. 85, 92 (2000).

⁷⁵ 132 Ga. 178, 179-180 (1909).

⁷⁶ *Ibid.* at 180.

past. Therefore, should Georgia law gravitate to reasonable use or is reasonable use limited to the special cases of underground rivers and springs? Unfortunately, our review of Georgia law does not provide clear answers to these questions. At least one commentator shares our frustration with the lack of case law in this area, particularly in more recent cases.⁷⁷

Given this significant gray area, it might be useful to speculate about how a court might see this issue if, foreseeably, future litigation attempts to clarify what rights adhere to grandfathered permits. A court could find that grandfathered permits retain rights that resemble absolute dominion because in prior case law, the courts have been silent on the issue, and the absolute dominion doctrine spelled out in Stoner still is and always has been the law in Georgia. One might argue that the best evidence supporting this argument is that the legislature has recognized this from the inception of the farm use permit program; in allocating permits to grandfathered users, the state looked to the size of a farmer's pump and not to reasonable use. On the other hand, Georgia has also looked to equipment capacity rather than reasonable use for surface water permits, too, which have been and are clearly still governed by reasonable use.⁷⁸

Another way a court might approach this issue is to examine the limitations placed on other property rights to land in other contexts. This approach makes sense given Stoner wherein the right to groundwater arises from property rights to land. However, not surprisingly, a land owner does not have an absolute right over his land: most significantly, landowners' rights are limited when their use impacts other land

⁷⁷ See John L. Fortuna, "Water Rights, Public Resources, and Private Commodities: Examining the Current and Future Law of Governing the Allocation of Georgia Water", 38 Ga. L. Rev. 1009, 1037-38 (2004) (discussing older cases and explaining that no "modern court" has addressed the question of dominion).

⁷⁸ See *Pyle v. Gilbert*, 265 S.E.2d 584, 588 (Ga. 1980); *Hendrick v. Cook*, 4 Ga. 241, 254 (1848).

owners. In fact, Georgia courts have limited land owners with a standard that is quite familiar in the context of Georgia water law: *reasonable use*.⁷⁹ So by extension, at least where use impacts land owners, there is a colorable argument that reasonable use has always governed groundwater law in Georgia.

Yet, another way to view the law is that Georgia courts have historically refused to regulate groundwater because technology has not allowed courts to do much more than speculate about how far the resource extended underground. In fact, several opinions in the context of underground streams expressed some skepticism that litigants could prove the course of underground streams.⁸⁰ Perhaps a modern court would find—given the vast expansion of our understanding of groundwater over the past few decades—that reasonableness would be applied to any shared water resource—surface or ground—but that the burden of proof that the resource was shared among litigants sat with the party attempting to alter the status quo.

There is enough fodder for courts to find that either absolute dominion or reasonable use governs the bulk of groundwater use in Georgia, and the outcome of litigation on this point could have substantial consequences. Specifically, if reasonable use attaches to grandfathered permits, then in times of scarcity, those deprived of water use—assuming the reasonable use criteria dictates cutting back—may not be compensated. On the other hand, if absolute dominion is the nature of the water rights of grandfathered users, then cutting back would seemingly constitute a takings that requires just compensation.

⁷⁹ See e.g., *North Ga. Petroleum Co. v. Lewis*, 128 Ga. App. 653 (1974).

⁸⁰ *Stoner v. Patten*, 132 Ga. 178, 180 (1909).

Does absolute dominion still apply to grandfathered groundwater permits? At this time, this is an open question. It is at least plausible that those holding grandfathered permits for agricultural groundwater use still have the right to absolute dominion of groundwater, limited by their pump capacity as described by their grandfathered permits. Therefore, it is at least plausible that a reviewing court could find that grandfathered permit holders are not subject to reasonable use restrictions, at least without some form of just compensation. However, it is also plausible that a court would find that reasonable use has always governed groundwater use and grandfathered permittees are subject to reasonable restrictions to their permitted use. Thus, the status of grandfathered groundwater users is not clearly resolved by reviewing the case law.

II. Apparent Conflicts in Agricultural Water Permit Laws and Regulations

Legal Questions Presented: Some aspects of Georgia water law seems to suggest that incumbent users have to make way for new users pursuing more “reasonable” uses than those pursued by incumbent, while other aspects seem to seek to protect the rights of existing users. How will the courts and the EPD read these seeming conflicting laws?

Analysis Summary: Because courts and the EPD will attempt to avoid reading the law as contradictory, the most plausible reading of the law is that the seemingly conflicting elements of the law are modified by the Georgia Code’s criteria for determining reasonableness. Other readings are plausible, but inferring reasonableness in the legal provisions seems to make the most sense given the overall focus on reasonableness in the Georgia water law.

A. Analysis

The report discusses in detail conflicts in the laws that govern agricultural water permitting. The report notes that the law appears to protect existing (grandfathered) permit holders in some places, while giving very little weight to the interests of senior permit holders in other places. The report points to several aspects of the code that seem to suggest that the EPD must consider permit tenure or at least infer that the rights of senior users trump the rights of new applicants.⁸¹ On the other side of the ledger, a number of code provisions suggest that the EPD need not protect existing users. In this regard, the report references Section 12-5-31(k)(8), which gives the EPD to adjust permits for public health and safety; Section 12-5-31(l), which empowers the EPD to make adjustments during times of drought; and, Section 12-5-31(k)(7)—which gives the EPD the power to adjust for reasonable uses. The report reinforces this point referencing that part of 12-5-31(a)(3) that states that the EPD “shall” issue permits to ensure the applicant’s right to a reasonable use of water. The report observes that the alternating deference and indifference to permit tenure in the law creates a confusing and contradictory legal situation. We explore this conflict by first considering statutory interpretation in the abstract and then moving to the particular statutes at issue in the report.

1. General Approach to Statutory Interpretation in Georgia

Georgia’s courts and the legislature have created general rules of statutory construction. The General Assembly has taken the unusual step of passing a statute that

⁸¹ In the groundwater context, it appears that there is no equivalent of 12-5-31(l) or 12-5-31(k)(8). However, we note that Section 12-5-105(b)(3) is similar to 12-5-31(k)(7). This section, which allows for adjustments based on reasonableness, seems to encompass any concern that might arise due to threats to the public health or drought. This provision currently receives the bulk of attention in the Report.

sets out protocol for courts attempting to determine the meaning of Georgia statutory law.

The legislature requires the following of courts:

(a) In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy. Grammatical errors shall not vitiate a law. A transposition of words and clauses may be resorted to when a sentence or clause is without meaning as it stands.

(b) In all interpretations of statutes, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter, which shall have the signification attached to them by experts in such trade or with reference to such subject matter.⁸²

As reflected particularly in the first requirement, the legislature desires courts to attempt to ferret out the assembly's meaning whenever possible. However, how do courts do this?

It probably is not surprising that courts vary in their approaches in practice. However, generally, Georgia courts look to a number of fairly simple principles in parsing out the General Assembly's meaning:

First, the "golden rule" of statutory construction is that courts "follow the literal language of the statute unless it produces contradiction, absurdity or such an inconvenience as to insure that the legislature meant something else."⁸³

Second, "[f]or purposes of statutory interpretation, a specific statute will prevail over a general statute, absent any indication of a contrary legislative intent."⁸⁴

Third, sometimes parsing the words on the page is not enough. "[I]n construing language in any one part of a statute, a court should consider the entire scheme of the

⁸² O.C.G.A. § 1-3-1.

⁸³ *Telecom*USA v. Collins*, 260 Ga. 362, 363 (1990).

⁸⁴ *Vines v. State*, 269 Ga. 438 (1998).

statute and attempt to gather the legislative intent from the statute as a whole.”⁸⁵

Similarly, “[i]t is a well-established principle that a statute must be viewed so as to make all its parts harmonize and to give a sensible and intelligent effect to each part.”⁸⁶

Fourth, despite the best efforts of courts to discern the legislature’s meaning, sometimes a court will come up empty handed. Ambiguity may prevail for a number of reasons, including legislative silence, imprecision, or irreconcilable contradiction. When this does happen,

courts should give great weight to the interpretation adopted by the administrative agency charged with enforcing the statute. Although [a court] is “not bound to blindly follow” an agency’s interpretation, [courts] defer to an agency’s interpretation when it reflects the meaning of the statute and comports with legislative intent.⁸⁷

We will now turn to how these code sections relate to the statute in question in this section of the memorandum.

2. Interpretation of Relevant Code Provisions

It is hard to deny that that the individual code sections in question are confusing: sections of the code seem to mandate violations of other parts of the code. Because taking the code sections at their face value leaves us perplexed about how to proceed, we would argue that Georgia’s golden rule” of statutory construction fails in this case.

⁸⁵ *Sikes v. State*, 268 Ga. 19 (1997).

⁸⁶ *Footstar, Inc. v. Liberty Mut. Ins. Co.*, 281 Ga. 448, 453 (2006), 2006 Ga. Lexis 970 (citing *Vollrath v. Collins*, 272 Ga. 601, 603-604 (2000))

⁸⁷ *Schrenko v. DeKalb County School Dist.*, 276 Ga. 786, 791 (2003). This ruling essentially parrots a famous administrative law case decided by the United States Supreme Court called *Chevron v. NRDC*, 467 U.S. 837 (1984). According to *Chevron*, a court should discern the meaning of a statute by asking two questions. First, a court has to ask if the legislative body has spoken clearly to the question at issue. If so, that is the end of the matter. If not, courts should then ask, was the administrative agency that attempted to interpret the statute do so reasonably? If so, courts defer to agencies. If not, courts overturn agency interpretations.

What, if anything, can we learn from looking at the sections of concern in the code in light of the broader scheme of Georgia water law? This type of inquiry can open the door to a number of plausible interpretations. Therefore, this part of the opinion memorandum is only well informed speculation.

We begin by looking at what we believe is the most fundamental principle governing Georgia water law: reasonable use. What if anything might we learn from the disputed statutes by looking at them through the lens of reasonable use? While the code sections seemingly conflict, does focusing on reasonableness and reading it into these statutes resolve any of the conflict?

Turning, first to Sections 12-5-31(e)(7) and (e)(9), it is interesting to note that Section (e) begins by explaining that the factors mentioned in Section (e) are to guide the Board of Natural Resources in constructing a “reasonable system of classification for application in situations involving competing uses, existing or proposed, for a supply of available surface waters.” In other words, Section (e) is meant to provide some parameters that Georgia can use to help weigh various and sometimes conflicting interests that the state has in allocating water. Through the lens of reasonable use, we might say that Section (e) is attempting to define touchstones of reasonableness. The EPD does not have to accomplish these factors, or any other factor laid out in subsection (e), but rather the EPD has to give each factor due weight. Section (e)(9) specifically limits itself to situations that do not have “*unreasonably* adverse effects.” It is also noteworthy that Section (e) begins with a disclaimer that the EPD must consider each of the listed factors, but its consideration need not be limited to these. Moreover Section (e)(10) instructs that the EPD consider “the varying circumstances of each case.”

Section 12-5-31(f) gives the EPD the ability to modify existing permits, and it also instructs the EPD to give preference to existing users. In the event that the EPD modifies existing permits, subsection (f) specifically instructs that it should do so on a “reasonable” basis. However, the requirement that the EPD “give preference to an existing use over an initial application” is somewhat difficult to resolve and square with the other provisions of the code. Still, focusing on reasonableness still helps. If we read subsection (f) to mean that in the event that the EPD has weighed all of the Section (e) factors and determined that an existing user and a new applicant both have equal rights to use water, the tie should go to the existing user. The frequency of ties, however, in large part depends on the extent to which the EPD attempts to tease out differences under Section (e). If the EPD considers “the varying circumstances of each case,” in theory, perhaps no ties would result.

Now, turning to 12-5-31(g), inferring reasonableness in the statute is not much of a stretch here because subsection (g) actually limits itself by using adjectives like “reasonably necessary,” “reasonable,” and “unreasonably adverse.” In this light, the qualification that the EPD must not grant new users permits that “have unreasonably adverse effects upon other water uses in the area” is not so controversial: it is not an absolute bar on creating adverse effects or harming other water users; rather, it is only a bar to do so when it would prove unreasonable. It is not that a new use cannot impact other water users, rather that the EPD should not permit a new use that would unreasonably impact such uses.

Similarly, if we look at those aspects of the code that seem to give to the EPD the ability to adjust permits without regard to existing permit holders—to be specific 12-5-

31(k)(7) (reasonable use), 12-5-31(k)(8) (public health and safety), 12-5-31(l) (during drought)—each of these powers would be constrained by the concept of reasonableness. Of course as discussed above, reasonableness includes many factors. Furthermore, it seems that according to 12-5-31(f)—all else being equal—the EPD should give preference to existing users. However, as discussed above, if the EPD works at it, things need not be equal much of the time.

Lastly, the report suggests that Section 12-5-31(a)(3) requires that a permit “shall” be issued in some instances and questions the extent to which this section contradicts subsections (e), (f), and (g). The cited section only seems to require the EPD to honor an applicant’s right to a *reasonable* use; specifically, in the event the EPD finds that a permit applicant’s use is reasonable, the permit “shall be issued to ensure the applicant’s right to a *reasonable* use of such surface waters.” Rather than ignoring the requirements of Subsections (e), (f), and (g), in large part the EPD will need to rely on those aspects of the code to determine what is “reasonable” in the first instance.

On this basis, the concept of reasonableness appears to help to reconcile the seemingly conflicting code provisions that require both protection of issued permits and accommodation of new users.⁸⁸ While perhaps other readings of the law are plausible, it seems that a reviewing court would likely cling to reasonableness because it sits at the foundation of Georgia’s modified riparian doctrine. While this does not completely

⁸⁸ Several layers of complexity may cloud over this straightforward conclusion. First, the actual footing of tenured users —according to 12-5-31(g)—depends in substantial part on the extent to which EPD relies on the reasonable use criteria and deems one user’s use more reasonable than another. The more that EPD clumps users together, the more tenure matters because the tie goes to the existing user. Second, this conclusion may not have as much force in the context of grandfathered groundwater users. If a permittee’s rights are not governed by reasonable use, which as Part I discusses is at least arguable for holders of grandfathered groundwater use permits, then at least to those users, this analysis becomes a bit trickier.

resolve uncertainty as to a potential reviewing court might view this issue, it seems the most plausible reading of these seemingly conflicting code provisions.

We re-emphasize that inferring reasonableness in these sections of the code seems to resolve some of the apparent conflict in the code. However, while this is the most likely way a court would attempt to revise the tension between these seemingly contradictory statutes, it is only one plausible reading; other readings are possible. If a court were to infer reasonableness into the statute in order to make it harmonize, substantial uncertainty would still remain for Georgia's agricultural water users. If a court were to follow this route, the EPD would be given a tremendous amount of discretion to set the course of Georgia's water law because the agency would be left to determine the meaning of reasonableness. Thus, even if a court were to attempt to clarify the law by focusing on reasonableness, it would probably not provide more certainty or security for incumbent users of water.

III. Confusion Related to the EPD's Rules and Flint River Basin Plan

Legal Questions Presented: Is it permissible for the EPD to exclude permit holders that received their permits after December 1, 2000 from the Flint River Drought Protection Act? How would a reviewing court treat the provisions of the EPD's Flint River Regional Water Development and Conservation Plan that both call for the EPD to make room for new water users while also not adversely affecting existing users?

Analysis Summary: The exclusion of more recent permit holders from the Flint River Drought Protection Act will be likely difficult to justify legally. However, even

though the conflicting language in the Flint Plan seems impossible to square, a reviewing court would be likely to salvage the plan by attempting to harmonize the apparent conflicts.

A. Analysis

The report posits that the EPD has introduced a number of problematic elements into Georgia water law through its rules and the Flint River Regional Water Development and Conservation Plan. Because the concerns related to the rules and the basin plan essentially share the same legal test, we will address them together.

Before detailing the relevant legal analysis, we will review the problems identified in the report. The first of these arises from the EPD's rules relating to the Flint River Drought Protection Act. Specifically, the report notes that confusion that arises from a rule that seems to exempt permittees from the prospect of an involuntary taking, so long as these permittees applied for permits after 1999 and received them after 2000. Specifically, the rule that describes non-voluntary reductions reads as follows:

If the Director determines that the total number of non-irrigated acres needed during a given year cannot be sufficiently obtained through the irrigation reduction auction held in accordance with Chapter 391-3-28-.08, the Director is authorized to issue an order, in accordance with rules adopted by the board, *requiring certain Permittees* not to irrigate a specified number of acres of irrigated land until the end of the calendar year. When issuing such orders, the Director shall begin with the *Permittees* whose surface water withdrawal permits were issued most recently and then work chronologically backward with each order issued. A *Permittee* who is issued such an order shall be compensated for such restriction if such *Permittee* applied to the Division for a surface-water withdrawal permit prior to December 1, 1999, received a surface-water withdrawal permit from the Division prior to December 1, 2000, and is able to demonstrate actual previous irrigation on the same

acres of land which the owner has been ordered not to irrigate....⁸⁹

Even though the law limits compensation to those who applied for a permit by December 1, 1999 and received them prior to December 1, 2000, it also limits it to “Permittees.” Each time the rule references “Permittees” it capitalizes the word, suggesting that it is defined elsewhere with the rules. Indeed, the rules define “Permittee” in the context of the rules promulgated to administer the Flint River Drought Protection Act as follows:

“Permittee” means a person holding a valid agricultural withdrawal permit issued before December 1, 2000, pursuant to Code Section 12-5-31 or 12-5-96.⁹⁰

This creates an odd circumstance when the EPD declares a drought and activates the Flint River Drought Protection Act:

- Those who applied for permits prior to December 1, 1999 and who received them prior to December 1, 2000 will be eligible for compensation
- Those who received their permits on or after December 1, 2000 are not “Permittees” as defined by the rules and are therefore not subject to non-voluntary reductions under the Flint River Drought Protection Act.⁹¹

A permit moratorium was in place for new farm uses in the Flint River Basin (surface water) and the Floridan aquifer Subarea 4 from December 1, 1999 until March 2006.

When the moratorium was lifted, the EPD began issuing permits again. The EPD is still

⁸⁹ Georgia Rules 391-3-28-.09(a) (emphasis added).

⁹⁰ Georgia Rules 391-3-28-.02(t).

⁹¹ A third class water users exists at least in theory—those who applied for a permit on or after December 1, 1999 but received them prior to December 1, 2000. However, due to the permit moratorium, this seems to be a null set. If they did exist, under the law, it appears that they could have their permits involuntary modified or suspended during times of drought but will receive no compensation under the Flint River Drought Protection Act.

working through the backlog of permit applications that accumulated during the moratorium.

Secondly, the report highlights how the EPD's plan for the Flint River Basin includes two provisions that contradict each other. On one hand, the plan states,

In considering new and existing applications for both ground-water and surface-water withdrawals, the EPD will evaluate the effect of the proposed water use on existing users and stream flow, and issue the new permit in such a way that the new permit will not adversely impact stream flow or the water available to existing users.⁹²

On the other hand, the plan also provides that

In issuing new permits, the EPD may decrease the permitted withdrawal amounts of all other permitted users including "grandfathered" permits.⁹³

Taking both of these provisions of the EPD's plan literally, the language seems to both allow and disallow making room for new applicants by reducing use of current permit holders.

A. Arbitrary and Capricious Standard

In promulgating rules or in creating plans, an implementing agency cannot do so in a way that is arbitrary and capricious.⁹⁴ What makes a rule or plan arbitrary and capricious? It is not an exact science, but a number of factors that might lead a court to find that an agency's actions are arbitrary and capricious.

As a broad overview, Georgia's Administrative Act, Section 50-13-19 (h) of the Georgia Code, provides that a court may reverse or modify the agency's decision only if "the administrative findings, inferences, conclusions, or decisions violate the constitution or a statute, exceed the agency's statutory authority, are based on unlawful procedure, are

⁹² *Ibid.* at 32.

⁹³ *Ibid.* at 52.

⁹⁴ *Georgia Real Estate Com. v. Accelerated Courses in Real Estate, Inc.*, 234 Ga. 30, 36 (1975).

affected by other errors of law, are clearly erroneous, or are arbitrary, capricious, or an abuse of discretion.” Even though “arbitrary” and “capricious” are included in this list, the term arbitrary and capricious is essentially shorthand for any of those factors listed.

While we will not describe each of these factors in detail, we will highlight a few of the more relevant factors. First, it is arbitrary and capricious for an agency to promulgate rules or create binding plans that are inconsistent with statute or the Georgia Constitution.⁹⁵

Second, another typical challenge in the context of rulemakings or agency plans brought under the rubric of “arbitrary and capricious” are those that assert that an agency decisions failed to justify its decision sufficiently—meaning that given the information before it, the agency at least had a rational basis for its decision.⁹⁶

Third, a decision is arbitrary if it relies on factors other than those the General Assembly intended or fails to consider important aspect of the problem.⁹⁷

Fourth, courts will find an agency’s action arbitrary and capricious when an agency violates its own rules.

B. Analysis

The arbitrary and capricious standard is a substantial barrier to overcome: courts generally do not second guess agency decisions. So, we begin with the presumption that a court will find arbitrary and capricious behavior only if it believes that the agency is in substantial need of correction.

⁹⁵ *Ibid* at 34.

⁹⁶ *Walker v. DOT*, 279 Ga. App. 287, 295 (2006).

⁹⁷ *Motor Vehicle Mfrs. Ass'n. of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)

First, with respect to the Flint River Drought Protection Act, the decision to exclude any permit issued after December 1, 2000 from potential involuntary modification or suspension during times of declared drought seems—honestly—bizarre. Involuntary modification and suspension under the Flint River Drought Protection Act proceeds on a last in, first out basis. Excluding those who receive permits after December 1, 2000 makes those with more senior permits more vulnerable. To the extent that the EPD has issued permits for applications received after December 1, 2000 (a permit moratorium was in place from December 2000 to March 2006), exempting these new permits from involuntary modification and suspension seems to violate the spirit, text, and purpose of the last-in, first-out structure of the Flint River Drought Protection Act, and therefore, it is likely illegal and arbitrary and capricious.⁹⁸

Second, we will examine the apparent contradictory provisions found in the Flint River Basin Regional Water Development and Conservation Plan. A number of challenges may be brought on the basis of these provisions. Some of these challenges seem more likely to prevail than others, but the range of potential challenges seem to include the following: that the plan failed to consider all the relevant factors the Legislature intended for it, that it gave too much weight to certain factors, that the agency failed to have a rational basis for its decisions, and that it violated its own rules.

If implementation of the plan fails to accommodate the provision of the code that requires the EPD to make room for new reasonable uses, an arbitrary and capricious argument might be made, particularly in those instances where the plan calls for a

⁹⁸ The use of the word “received” was intentional here. Under Georgia law, those permits received by December 1, 2000 will be treated as if issued prior to December 1, 2000 whether EPD actually did this or not: “if the director fails to act on a permit application by December 1, 2000, the time for receipt of a permit shall be extended until such time as the director makes a decision on the application.” O.C.G.A. § 12-5-543(a).

nonnegotiable bar of new permits. However, it is not clear that a court would hang the plan on these two provisions; it might rather look at the broader context of the plan to evaluate how the agency will address this code section in the aggregate.

It could be argued that even though the plan states that it will not impact existing users by issuing new permits, other aspects of the plan call for current users to make—in some cases dramatic—reductions in their water use. Additionally, the plan calls for conservation efficiency gains and plans to accomplish these reductions. A court could find that the meaning of this central and controversial portion of the plan is ambiguous.

What does it mean that the “EPD will evaluate the effect of the proposed water use on existing users and stream flow, and issue the new permit in such a way that the new permit will not adversely impact stream flow or the water available to existing users”? If taken literally, no new uses could be permitted because they would certainly diminish—if even in ways that were not readily apparent—flow and water available to existing users. However, it is also possible to read the plan as saying, if somewhat sloppily, that no new user will *unreasonably* use water to detract from flow or the claims of existing users. A reviewing court could swing in either direction. While we predict that a reviewing court would not let the plan fall on this controversial sentence, it could. This ambiguity increases the uncertainty for permit holders.

IV. Flint River and Bar Against Special Laws

Legal Question Presented: Does the Flint River Drought Protection Act violate the bar in Georgia’s Constitution against special laws?

Analysis Summary: It may; a number of potential challenges are possible.

A. Analysis

Without much specificity, the report alleges that the Flint River Basin Drought Protection Act may conflict with the Georgia Constitution's bar against special laws. Typically a claim pertaining to special laws is brought against local governments to preempt them from passing laws that conflict with Georgia state law. However, it equally applies to laws passed by the Georgia General Assembly.

As mentioned in the report, the Georgia Constitution provides

Laws of a general nature shall have uniform operation throughout the state and no local or special law shall be enacted in any case for which provision has been made by an existing general law, except that the General Assembly may by general law authorize local governments by local ordinance or resolution to exercise police powers which do not conflict with general laws.⁹⁹

A challenge based on the bar against special laws must show more than that the legislature has made distinctions. It must consider how the legislature has acted in that area of law in the past: "the legislature may enact special laws affecting special classes, but it cannot do so if it has previously legislated in that area by general law nor may it do so if the classification of those affected is unreasonable."¹⁰⁰

As a general matter, it seems that some claims under this constitutional provision are more viable than others. To an extent, water basin plans might be justified on the basis that each water basin faces unique challenges. However, there could be a basis for a special law challenge to the Flint River Drought Protection Act where it departs from reasonable use in favor of "last in, first out," which looks much like a prior appropriation system in the basin. Other potential claims may lurk below the surface of the Flint River

⁹⁹ Ga. Const. of 1983, art. III, sec. VI, par. IV (a).

¹⁰⁰ *Lasseter v. Ga. Public Service Comm.*, 253 Ga. 227, 229-30 (1984).

Drought Protection Act. A reviewing court would probably be reticent to strike down one act of the legislature (i.e., the Flint River Drought Protection Act) because of the existence of another (i.e., Georgia's general water statutes), but a colorable claim exists that could arise in litigation in the future.

V. Conclusion

To summarize our analysis of the legal issues in this memorandum:

- The status of grandfathered groundwater permit holders is not clearly resolved in the law. A court could find that absolute dominion applies and, therefore, just compensation would be due if their permits were restricted. However, it seems just as plausible that a court could find that reasonable use applies, and if so, mandated cutbacks for grandfathered permit holders would not require compensation. This uncertainty arises from the case law, which offers several lines of reasoning that a court could potentially cling to in determining what law applies to grandfathered permit holders.
- The report argues substantial conflicts exist in the sections of the code that apply to agricultural water use permitting. The most significant issues raised are whether permit tenure matters and how the EPD should accommodate (or not) new applicants. While the most straightforward reading of the Georgia code would suggest an irreconcilable conflict, a court would be likely to attempt to salvage the statute by seeking to harmonize these sections of the code. In doing so, it is likely that a court would read the code provisions as guideposts, rather than legislative commands. In large part, this approach would leave the EPD to

determine whether the accommodation of new users is reasonable. On the other hand, it is plausible, though unlikely, that a court could find another way to reconcile these code sections.

- Under the rules adopted to implement the EPD's Flint River Regional Water Development and Conservation Plan, applicants who receive permits on or after December 1, 2000 are not subject to non-voluntary reductions under the Flint River Drought Protection Act. Exempting post-December 1, 2000 permits from involuntary modification and suspension seems to violate the spirit, text, and purpose of the last-in, first-out structure of the Flint River Drought Protection Act, and it appears to be arbitrary and capricious. While predicting the law is difficult to do with certainty, the EPD's interpretation of the law in this case does not seem to be permissible.
- The Flint River Regional Water Development and Conservation Plan has conflicting provisions that seem to both allow and disallow "making room" for new applicants by reducing use of current permit holders. This ambiguity could make the Plan vulnerable to legal challenge.
- The Flint River Drought Protection Act could be subject to challenge based upon the Georgia Constitution's bar against "special laws", especially because it appears to apply a new standard for allocation in one river basin: first-in, last-out in place of reasonable use, which is used in the rest of the state. Challenges of legislative enactments based the constitutional bar against "special laws" are not usually successful, but there is a fair chance that the Flint River Drought Protection Act could be vulnerable such a challenge. If so, permit holders are

subject to additional uncertainty about the vulnerability of the rights they believe their permits grant them.

Overall, this area of Georgia law, as written by the legislature and the EPD, contains some ambiguous provisions. From a legal standpoint, the primary issue is how a potential reviewing court would read Georgia law. While ambiguity may exist in several instances, in most cases, a reviewing court would probably try to reconcile apparent conflicts in the law and give substantial deference to the practices of the implementing agency: the EPD. However, some parts of the law might be vulnerable to legal challenge. On the whole, this legal analysis in many ways raises more questions than it answers for Georgia's agricultural water users. Permit holders face substantial uncertainty in the security of their permits and on-going access to water.