

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1991

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SENATE BILL 129*

Short Title: Water Transfer Permits.

(Public)

Sponsors: Senators Block; Tally, Cochrane, and Ward.

Referred to: Environment and Natural Resources.

February 20, 1991

A BILL TO BE ENTITLED

AN ACT TO REQUIRE REGISTRATION OF ALL WATER TRANSFERS AND TO
REQUIRE A PERMIT FOR THE TRANSFER OF ONE MILLION GALLONS OR
MORE OF WATER PER DAY FROM ONE RIVER BASIN TO ANOTHER.

The General Assembly of North Carolina enacts:

Section 1. Article 21 of Chapter 143 is amended by adding a new Part to
read:

“PART 2A. REGULATION OF WATER TRANSFERS.

”§ 143-215.22A. Definitions.

The following definitions apply to this Part.

- (1) ‘Losing river basin’ means a river basin which sustains a decrease in water as the result of a transfer of water to a different river basin and there is no significant return of the water to the river basin of origin.
- (2) ‘River’ means any body of water bearing the designation ‘river’ on the latest edition of the appropriate U.S. Geological Survey 7.5 minute quadrangle map.
- (3) ‘River basin’ means the area drained by a river and its tributaries or through a specified point on a river, as determined by the Commission.
- (4) ‘Surface water’ means any water located on the land surface which is not derived by pumping from groundwater.
- (5) ‘Transfer’ means the withdrawal, diversion, or pumping of surface water from one river basin and the use or discharge of all or any part of the water in a basin different from the origin.

”§ 143-215.22B. Permit required for water transfers; prohibited water transfers.

1 (a) Except as provided in G.S. 143-215.22G, no person may transfer 1,000,000
2 gallons or more of water a day on any day from the basin of one river to another unless
3 the person shall first obtain a permit from the Commission.

4 (b) No permit may be granted for a water transfer that violates State water
5 classifications or water quality standards or that adversely affects the public health and
6 welfare.

7 **"§ 143-215.22C. Permit application.**

8 (a) An application for a water transfer permit shall be in writing and shall
9 include:

10 (1) Information regarding the existing uses of water by the applicant,
11 including the following:

12 a. A listing of each use or purchase greater than 100,000 gallons
13 per day, on any day;

14 b. The amount or percent of consumption for each use or purchase
15 listed under (a)(1)a.;

16 c. A listing of conservation programs or practices currently used
17 for each use or purchase listed under (a)(1)a.;

18 d. The peak capacity of each major component used in the present
19 transfer facility for each use or purchase listed under (a)(1)a.

20 (2) Information regarding any proposed transfer of water, including the
21 following:

22 a. A listing of the projected uses or purchases greater than 100,000
23 gallons per day, on any day;

24 b. The estimated amount or percent of consumption for each use
25 or purchase listed under (a)(2)a.;

26 c. A listing of conservation programs or practices proposed for
27 each use or purchase listed under (a)(2)a.;

28 d. Engineering and economic justification for the capacity of each
29 major component of the proposed transfer facility; and

30 e. An engineering and economic assessment of the feasibility of
31 using alternate water sources.

32 (3) The location of all collection, withdrawal, and transportation facilities;
33 and

34 (4) Any other information deemed necessary by the Commission for
35 review of the proposed water transfer.

36 (b) An application for a water transfer permit shall be filed with the Commission
37 at least 180 days in advance of the date on which it is desired to begin the transfer. The
38 Commission may conduct any inquiry or investigation that it considers necessary before
39 acting on an application and may require an applicant to submit plans, specifications,
40 and other information the Commission considers necessary to evaluate the application.

41 **"§ 143-215.22D. Application notice and comment.**

42 (a) Within 30 working days following the submission of a completed application,
43 the Commission shall:

44 (1) Publish notice of the application in the North Carolina Register;

1 (2) Provide notice of the application by registered or certified mail, return
2 receipt requested to each of the following within the proposed losing
3 river basin:

- 4 a. A person holding a water transfer permit issued under this Part;
5 b. A person holding a discharge permit issued under G.S. 143-
6 215.1;
7 c. A person holding a National Pollutant Discharge Elimination
8 System permit issued under the Federal Water Pollution Control
9 Act, as amended;
10 d. A person who has registered a water transfer as provided by this
11 Part;
12 e. The board of county commissioners of each county that is
13 located entirely or partially within the losing river basin and the
14 governing body of any municipality that takes water from the
15 losing river basin.

16 (b) Any notice that an application for a water transfer has been received shall
17 include a conspicuous statement in bold type that the river level in the proposed losing
18 river basin will be decreased if the requested water transfer permit is granted. The
19 notice shall also include a nontechnical description of the applicant's request. The
20 notice shall further indicate the procedure to be followed by anyone wishing to submit
21 comments on the proposed water transfer and shall direct local governments that
22 objections from a local government must be filed with the Commission within 30 days
23 of the receipt of the notice by the local government.

24 (c) At least one public hearing for each application for a water transfer permit
25 shall be conducted by the Commission at a location in the losing river basin below the
26 point of transfer. If an objection to the application for the water transfer permit is filed
27 by a local government pursuant to this section, the Commission shall conduct at least
28 two public hearings at a location in the losing river basin below the point of transfer.

29 At least 30 days' notice of the public hearing shall be given to all persons to whom
30 notice of the application was sent and to any other person requesting notice. The
31 Commission shall also publish notice of the public hearing once a week for four
32 consecutive weeks prior to the date of the public hearing in a newspaper of general
33 circulation in each river basin area to be affected and in a newspaper of general
34 circulation that originates in the losing river basin.

35 **§ 143-215.22E. Permit application review.**

36 (a) The Commission shall insure the protection of the present and permitted
37 assimilative needs of the losing river basin. For each application, the Commission shall
38 use data from stream modeling and instream sampling to determine whether the
39 proposed water transfer is prohibited under G.S. 143-215.22B(b) and shall state its
40 findings of fact and determination in writing.

41 (b) In reviewing an application, the Commission shall consider information
42 developed through studies, analyses, or inquiries undertaken by the Commission and
43 information and comments submitted to the Commission by the applicant, public
44 agencies, affected persons, and the public.

1 (c) In determining whether a transfer may be permitted the Commission shall
2 specifically consider each of the following items and state in writing its findings of fact
3 with regard to each item. No permit may be granted for a water transfer unless the
4 Commission concludes by a preponderance of the evidence based upon the preceding
5 findings of fact that the benefits of the proposed project outweigh the potential
6 detriments of the project and that any such detriment has been mitigated as much as
7 possible. The criteria to be used by the Commission in evaluating an application are as
8 follows:

- 9 (1) Protect present and projected stream uses of the losing river basin
10 generally and of the losing river specifically including, but not limited
11 to, present agricultural, municipal, industrial and instream uses, and
12 assimilative needs.
- 13 (2) Protect water quality of the losing river basin.
- 14 (3) Protect reasonably foreseeable future water needs of the losing river
15 basin.
- 16 (4) Protect the reasonably foreseeable future water needs of the applicant
17 for the water to be transferred, including methods of water use,
18 conservation, and efficiency of use.
- 19 (5) Find a beneficial impact on the State and its local subdivisions of any
20 proposed transfer, and the capability of the applicant to implement
21 effectively its responsibilities under the requested permit.
- 22 (6) Find that the nature of the permittee's use of the water is reasonable
23 and beneficial in light of the probable detriment of the proposed water
24 transfer.
- 25 (7) Find that the proposed project shall promote and increase the storage
26 and conservation of water.
- 27 (8) Find that the feasibility of alternative sources of supply and their
28 comparative costs are less preferable than the proposed water transfer.
- 29 (9) Consider the impact on interstate water use.
- 30 (10) Find that the requirements of other state or federal agencies with
31 authority relating to water resources are not violated by the proposed
32 transfer.
- 33 (11) Protect the availability of water in the losing river basin to respond to
34 emergencies, including drought.
- 35 (12) Consider whether the project shall have any beneficial or detrimental
36 impact on navigation, hydropower generation, fish and wildlife habitat,
37 aesthetics, or recreation.
- 38 (13) Consider such other facts and circumstances as are reasonably
39 necessary to carry out the purposes of this part.

40 **"§ 143-215.22F. Commission's power as to permits; permit action; emergency**
41 **permits.**

42 (a) The Commission may grant, deny, or issue with conditions a water transfer
43 permit. The Commission may attach to a permit any conditions necessary to achieve
44 the purposes of this Part, including the following:

- 1 (1) The amount of water approved for transfer may be varied seasonally;
- 2 (2) The transfer of water shall be required to cease or decrease when the
3 instantaneous streamflow of the river basin of origin is equal to or less
4 than a specified amount determined by permit application review
5 conducted pursuant to G.S. 143-215.22F;
- 6 (3) Special provisions may be included to promote an adequate water
7 supply for the State or to mitigate any future adverse conditions
8 resulting from the transfer;
- 9 (4) The installation, maintenance and use of streamflow monitoring
10 equipment may be required;
- 11 (5) The establishment and reporting of transfer activities by the permittee
12 may be required.

13 (b) In order to protect the water uses of the losing river basin, the Commission, in
14 determining the amount of water to be approved, may conduct or have conducted
15 instream sampling and stream modeling to predict the volumes of water which may be
16 transferred.

17 Transferable amounts may vary to accommodate seasonal water conditions in the
18 losing river basin. No transfer of water may be permitted at any time which shall cause
19 the remaining flow in the losing river basin to be less than the statistical low flow that
20 occurs for seven consecutive days, once every 10 years as established prior to the water
21 transfer.

22 (c) The permit shall specify the location of all collection, withdrawal,
23 transmission, and discharge facilities to be used or constructed to effect the water
24 transfer and shall specify the amount which can be withdrawn. The permit shall require
25 that the water transfer shall cease or decrease when the actual flow of the losing basin is
26 less than a specified minimum required to protect against adverse effects to the basin.
27 The permit shall further require that the permittee comply with other requirements as
28 may be advisable to promote an adequate water supply for the State and to mitigate any
29 adverse conditions or effects which the Commission finds exist but are not sufficient to
30 require denial of the permit.

31 (d) Upon the issuance by the Governor of a declaration or proclamation of an
32 emergency relating to water resources, the Chairman of the Commission may waive the
33 usual permitting requirements and grant a temporary emergency water transfer permit.
34 The emergency water transfer permit shall be limited to meet the needs created by the
35 emergency and shall be issued for a period no longer than 140 days or the duration of
36 the Governor's declaration or proclamation, or public health emergency, whichever
37 period is shorter.

38 **"§ 143-215.22G. Registration of all water transfers; pre-existing water transfers.**

39 (a) Any water transfer from one river basin to another for which a permit is not
40 required under this Part shall be registered with the Commission.

41 (b) Water transfers designated in Section 2 of Chapter 954 of the 1989 Session
42 Laws may continue, even though not permitted under this Part subject to the following
43 conditions:

1 (1) The transfer is registered with the Commission within six months of
2 the effective date of this Part.

3 (2) Any increase in water transferred over the amount authorized in
4 subdivision (1) of this section must be reviewed and permitted in
5 accordance with G.S. 143-215.22B.

6 (c) A person registering a water transfer under this section shall provide the
7 Commission with the following information:

8 (1) The amount of water used;

9 (2) Identification of the point of withdrawal of the water to be transferred,
10 the point where the actual transfer of water occurs, and the point of
11 discharge for the water transfer;

12 (3) A description of how the water is used.

13 **"§ 143-215.22H. Civil penalties; injunctions.**

14 (a) A civil penalty of not more than ten thousand dollars (\$10,000) may be
15 assessed by the Commission against any person who:

16 (1) Is required but fails to apply for or to secure a permit required by G.S.
17 143-215.22B or who violates or fails to act in accordance with the
18 terms, conditions, or requirements of such permit.

19 (2) Violates a rule of the Commission implementing this Part.

20 (b) If any action or failure to act for which a penalty may be assessed under this
21 subsection is continuous, the Commission may assess a penalty not to exceed ten
22 thousand dollars (\$10,000) per day for so long as the violation continues, unless
23 otherwise stipulated.

24 (c) In determining the amount of the penalty the Commission shall consider the
25 degree and extent of harm caused by the violation and the cost of rectifying the damage.

26 (d) The Commission may assess the penalties provided for in this section. Any
27 person assessed shall be notified of the assessment by registered or certified mail, and
28 the notice shall specify the reasons for the assessment. If the person assessed fails to pay
29 the amount of the assessment to the Department within 30 days after receipt of notice,
30 or such longer period, not to exceed 180 days, as the Commission may specify, the
31 Commission may institute a civil action in the superior court of the county in which the
32 violation occurred or, in the discretion of the Commission, in the superior court of the
33 county in which the person assessed resides or has his or its principal place of business,
34 to recover the amount of the assessment.

35 (e) Upon violation of any of the provisions of the Part, or the rules of the
36 Commission, the Secretary may institute a civil action in the superior court in the name
37 of the State for injunctive relief. Neither the institution of the actions nor any of the
38 proceedings relating to them shall relieve any party to the proceedings from the penalty
39 prescribed by the Part for any violation of the provisions of the Part.

40 **"§ 143-215.22I. Criminal penalties.**

41 (a) Any person violating any provision of this Part is guilty of a misdemeanor
42 and, upon conviction, must be fined not less than one thousand dollars (\$1,000) nor
43 more than ten thousand dollars (\$10,000) for each violation. In addition, if any person

1 is adjudged to have committed a violation of this Part willfully, the court may determine
2 that each day during which the violation continued constitutes a separate offense.

3 **"§ 143-215.22J. Adoption of rules.**

4 (a) The Commission may adopt rules to carry out the intent of this Part.

5 **"§ 143-215.22K. Actions for loss of water rights.**

6 Any riparian landowner or person legally exercising rights to use water, suffering
7 material injury for the loss of water rights as a consequence of a water transfer
8 permitted under this Part may maintain an action for relief against the water transferor
9 in (i) the county where the land of the riparian owner lies, or (ii) in the county in
10 which the water transfer originates to recover all provable damages for loss of riparian
11 rights including increases in operating costs, lost production, or other damages directly
12 caused him by the water transfer. Nothing in this Part changes or modifies existing
13 common or statutory law with respect to the relative rights of riparian owners or others
14 concerning the use of or disposal of water in the streams of North Carolina. Failure to
15 file an objection as provided under Chapter 150B to the issuance of a permit to transfer
16 water shall not be deemed a failure to exhaust administrative remedies and shall not
17 affect the right to bring a civil action concerning riparian rights or the legal right to use
18 water. The burden of proof is on the person alleging damages."

19 Sec. 2. G.S. 153A-285 reads as rewritten:

20 **"§ 153A-285. Prerequisites to acquisition of water, water rights, etc.**

21 The word 'authority' as used in G.S. 162A-7(b) through (f) includes counties and
22 cities acting jointly or through joint agencies to provide water services or sewer services
23 or both. No county or city acting jointly and no joint agency may ~~divert water from one~~
24 ~~stream or river to another nor~~ institute any proceeding in the nature of eminent domain to
25 acquire water, water rights, or lands having water rights attached thereto until the
26 ~~diversion or~~ acquisition is authorized by a certificate from the Environmental
27 Management Commission pursuant to G.S. 162A-7. Any proceeding to secure a
28 certificate from the Environmental Management Commission shall be governed by the
29 provisions of G.S. 162A-7(b) through 162A-7(f)."

30 Sec. 3. G.S. 153A-287 is repealed.

31 Sec. 4. This act becomes effective July 1, 1991.