

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

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HOUSE BILL 886\*  
Committee Substitute Favorable 6/14/95

Short Title: State Auth./Fed. Clean Water Act.

(Public)

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Sponsors:

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Referred to:

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April 12, 1995

A BILL TO BE ENTITLED

AN ACT TO DIRECT THE APPROPRIATE STATE DEPARTMENTS HOW TO EXERCISE THE STATE'S AUTHORITY UNDER THE CLEAN WATER ACT AND TO ESTABLISH THE WETLANDS MITIGATION BANK AND WETLANDS RESTORATION FUND.

The General Assembly of North Carolina enacts:

Section 1. G.S. 143B-282(a)(1) reads as rewritten:

"(a) There is hereby created the Environmental Management Commission of the Department of Environment, Health, and Natural Resources with the power and duty to promulgate rules to be followed in the protection, preservation, and enhancement of the water and air resources of the State.

(1) Within the limitations of G.S. 143-215.9 concerning industrial health and safety, the Environmental Management Commission shall have the following powers and duties:

a. To grant a permit or temporary permit, to modify or revoke a permit, and to refuse to grant permits pursuant to G.S. 143-215.1 and G.S. 143-215.108 with regard to controlling sources of air and water pollution;

- 1           b.     To issue a special order pursuant to G.S. 143-215.2(b) and G.S.  
2           143-215.110 to any person whom the Commission finds  
3           responsible for causing or contributing to any pollution of water  
4           within such watershed or pollution of the air within the area for  
5           which standards have been established;
- 6           c.     To conduct and direct that investigations be conducted pursuant  
7           to G.S. 143-215.3 and G.S. 143-215.108(b)(5);
- 8           d.     To conduct public hearings, institute actions in superior court,  
9           and agree upon or enter into settlements, all pursuant to G.S.  
10          143-215.3;
- 11          e.     To direct the investigation of any killing of fish and wildlife  
12          pursuant to G.S. 143-215.3;
- 13          f.     To consult with any person proposing to construct, install, or  
14          acquire an air or water pollution source pursuant to G.S. 143-  
15          215.3 and G.S. 143-215.111;
- 16          g.     To encourage local government units to handle air pollution  
17          problems and to provide technical and consultative assistance  
18          pursuant to G.S. 143-215.3 and G.S. 143-215.112;
- 19          h.     To review and have general oversight and supervision over local  
20          air pollution control programs pursuant to G.S. 143-215.3 and  
21          G.S. 143-215.112;
- 22          i.     To declare an emergency when it finds a generalized dangerous  
23          condition of water or air pollution pursuant to G.S. 143-215.3;
- 24          j.     To render advice and assistance to local government regarding  
25          floodways pursuant to G.S. 143-215.56;
- 26          k.     To declare and delineate and modify capacity use areas pursuant  
27          to G.S. 143-215.13;
- 28          l.     To grant permits for water use within capacity use areas pursuant  
29          to G.S. 143-215.15;
- 30          m.     To direct that investigations be conducted when necessary to  
31          carry out duties regarding capacity use areas pursuant to G.S.  
32          143-215.19;
- 33          n.     To approve, disapprove and approve subject to conditions all  
34          applications for dam construction pursuant to G.S. 143-215.28; to  
35          require construction progress reports pursuant to G.S. 143-  
36          215.29;
- 37          o.     To halt dam construction pursuant to G.S. 143-215.29;
- 38          p.     To grant final approval of dam construction work pursuant to  
39          G.S. 143-215.30;
- 40          q.     To have jurisdiction and supervision over the maintenance and  
41          operation of dams pursuant to G.S. 143-215.31;
- 42          r.     To direct the inspection of dams pursuant to G.S. 143-215.32;

- 1 s. To modify or revoke any final action previously taken by the  
2 Commission pursuant to G.S. 143-214.1 and G.S. 143-215.107;  
3 ~~and~~  
4 t. To have jurisdiction and supervision over oil pollution pursuant  
5 to Article 21A of ~~Chapter 143.~~ Chapter 143; and  
6 u. To administer the State's authority under 33 U.S.C. § 1341 of the  
7 federal Clean Water Act pursuant to G.S. 143-215.3(c1)-(c3) and  
8 G.S. 143-215.8 and to adopt rules implementing those sections."

9 Sec. 2. G.S. 143-215.3 is amended by adding the following subsections to  
10 read:

11 "(c1) General Exercise of Powers Granted Under Section 401 of the Clean Water  
12 Act. – Except as provided in subsection (c3) of this section, in determining whether to  
13 certify a federally issued permit or activity pursuant to 33 U.S.C. § 1341, the Commission  
14 shall consider only those provisions listed in 33 U.S.C. § 1341(a). The Commission shall  
15 not duplicate the site specific application of any guidelines employed by the United  
16 States Army Corps of Engineers in evaluating permit applications under 33 U.S.C. §  
17 1344 and applicable federal regulations.

18 (c2) Classification of Wetlands. – Classifications of wetlands set forth in  
19 subdivisions (1) through (3) of this subsection shall apply to all wetlands except coastal  
20 wetlands defined in G.S. 113-229(n)(3) or wetlands within Areas of Environmental  
21 Concern established by the Coastal Resources Commission pursuant to G.S. 113A-113.

22 (1) 'Class I wetland' means any wetland located within 150 feet of the mean  
23 high waterline or normal water level of any perennial or intermittent  
24 water body as designated on the most recently published version of the  
25 United States Geological Survey 1:24,000 (7.5 minute) scale  
26 topographic map.

27 (2) 'Class II wetland' means any wetland located greater than 150 feet but  
28 less than 1,000 feet of the mean high waterline or normal water level of  
29 any perennial or intermittent water body as designated on the most  
30 recently published version of the United States Geological Survey  
31 1:24,000 (7.5 minute) scale topographic map.

32 (3) 'Class III wetland' means any wetland not classified as a Class I or II  
33 wetland.

34 (c3) Exercise of Authority Granted Under Federal Law With Regard to Wetlands. –  
35 The Commission shall exercise its authority with regard to the water quality certification  
36 for wetlands except coastal wetlands defined in G.S. 113-229(n)(3) or wetlands within  
37 Areas of Environmental Concern established by the Coastal Resources Commission  
38 pursuant to G.S. 113A-113 as follows:

39 (1) The Commission shall grant the water quality certification for any  
40 project that will impact less than one acre of any wetlands. The  
41 Commission shall be notified of any project that impacts between one-  
42 third and one acre of wetlands in accordance with procedures developed  
43 by the Commission.

- 1           (2)   The Commission shall grant the water quality certification for any  
2           project that will impact between one and three acres of wetlands if it  
3           determines that the project will comply with the provisions listed in 33  
4           U.S.C. § 1341(a) and if the requirements in this subdivision have been  
5           met:
- 6           a.     A Class I wetland requires minimization of impacts to wetlands  
7           for the protection of water quality and requires that the applicant  
8           agree to provide compensatory mitigation for any loss of  
9           wetlands resulting from the proposed project. In conducting the  
10           minimization analysis required under this sub-subdivision, the  
11           Commission may consider: (i) the spatial and dimensional  
12           requirements of the project; (ii) the location of any existing  
13           structural or natural features that may dictate the placement or  
14           configuration of the proposed project; (iii) the purpose of the  
15           project and how the purpose relates to placement, configuration,  
16           or density; and (iv) the ability of wetlands to continue to support  
17           the existing uses after project completion. Mitigation shall be  
18           conducted based on the following ratios:
- 19                 1.     Five-to-one ratio, acres mitigated to acres lost for any  
20                 wetlands located within 150 feet of the mean high  
21                 waterline or normal water level of a perennial water body.
- 22                 2.     Three-to-one ratio, acres mitigated to acres lost for any  
23                 wetlands located within 150 feet of the mean high  
24                 waterline or normal water level of an intermittent water  
25                 body.
- 26           b.     A Class II wetland requires that the applicant agree to provide  
27           compensatory mitigation for any loss of wetlands resulting from  
28           the proposed project based on the following ratios:
- 29                 1.     Three-to-one ratio, acres mitigated to acres lost for any  
30                 wetlands located greater than 150 feet and less than 1,000  
31                 feet from the mean high waterline or normal water level of  
32                 a perennial water body.
- 33                 2.     Two-to-one ratio, acres mitigated to acres lost for any  
34                 wetlands located greater than 150 feet and less than 1,000  
35                 feet from the mean high waterline or normal water level of  
36                 an intermittent water body.
- 37           c.     A Class III wetland may require compensatory mitigation for any  
38           loss of wetlands resulting from the proposed project on a one-to-  
39           one ratio, acres mitigated to acres lost, if the Commission finds  
40           that the loss of wetlands will result in a violation of any water  
41           quality standards.
- 42           (3)   The Commission shall grant the water quality certification for any  
43           project that impacts more than three acres of wetlands if it determines

1           that the project will comply with the provisions listed in 33 U.S.C. §  
2           1341(a).

- 3           (4)   The Commission shall grant water quality certification for any project  
4           that involves dredge or fill activities conducted in any wetlands that: (i)  
5           are inadvertently created on or after January 1, 1990, through any  
6           construction, mining, or other commercial activities, and (ii) are subject  
7           to the provisions of 33 U.S.C. § 1344. The applicant shall provide  
8           information to the Commission documenting the date and nature of the  
9           activity that resulted in the inadvertent creation of wetlands."

10           Sec. 3. Article 21 of Chapter 143 of the General Statutes is amended by  
11           adding a new section to read:

12           "**§ 143-214.8. Wetlands Mitigation Bank.**

13           (a)   Policy, Purpose, and Intent. – The Department shall develop a Wetlands  
14           restoration, enhancement, and protection program to promote consistency among projects  
15           that utilize the assets of the Wetlands Mitigation Banking Program under subsection (b)  
16           of this section by governmental agencies or other persons. The program shall be a  
17           statewide program for the acquisition, restoration, enhancement, and creation of wetland  
18           and riparian resources that contribute to the protection and improvement of water quality,  
19           flood prevention, fisheries, wildlife habitat, and recreational opportunities. The purpose  
20           of the program is to restore wetlands functions and values across the State to replace  
21           critical functions lost through wetlands conversion and through current and future  
22           permitted impacts. The implementation of this program shall include a statewide plan for  
23           wetlands restoration to be developed by the Department within the context of the  
24           basinwide planning initiatives, with the goal of protecting and enhancing water quality,  
25           flood prevention, fisheries, wildlife habitat, and recreational opportunities within each of  
26           the 17 major river basins in the State. Further, it is the intent that this program be  
27           implemented to streamline the wetlands permitting process, minimize delays in permit  
28           decisions, decrease the burden of permit applicants of planning and performing  
29           compensatory mitigation for wetlands losses, and increase the ecological effectiveness of  
30           compensatory mitigations.

31           (b)   Wetlands Mitigation Banking Program. – There is established within the  
32           Department a Wetlands Mitigation Bank. The Wetlands Mitigation Bank is part of the  
33           Wetlands Restoration, Enhancement, and Protection Program. It is the intent of this  
34           section that all wetlands mitigation shall be coordinated by the Department consistent  
35           with the statewide plan for wetlands restoration and rules developed by the  
36           Environmental Management Commission unless specifically exempted by the Secretary  
37           of the Department. The purpose of the Wetlands Mitigation Bank is to provide a  
38           repository for monetary contributions and donations or dedications of interests in real  
39           property to promote projects for the restoration, enhancement, preservation, or creation of  
40           wetlands. The emphasis of mitigation is on replacing functions within the same river  
41           basin unless it has been demonstrated that restoration of other areas could be more  
42           environmentally beneficial. Persons subject to permits or authorizations issued by the  
43           United States Army Corps of Engineers under 33 U.S.C. § 1344, may contribute to the

1 Wetlands Mitigation Bank, on a voluntary basis, to comply with conditions to, or terms  
2 of, the permits or authorizations, provided that participation in the Wetlands Mitigation  
3 Bank will meet the requirements of mitigation by the United States Army Corps of  
4 Engineers.

5 (c) Wetlands Restoration Fund. – The Wetlands Restoration Fund is established as  
6 a nonreverting fund within the Department. The Fund shall be treated as a special trust  
7 fund and shall be credited with interest by the State Treasurer pursuant to G.S. 147-69.2  
8 and G.S. 147-69.3. The Department shall, at the discretion of the applicant, accept  
9 monetary payment into the Wetlands Restoration Fund in accordance with any  
10 authorizations established by the United States Army Corps of Engineers under 33 U.S.C.  
11 § 1344, provided that participation in the Wetlands Mitigation Bank will meet the  
12 requirements of mitigation by the United States Army Corps of Engineers. The monetary  
13 payment shall be based on the per acre cost of restoring or creating a wetlands capable of  
14 performing the same or similar functions. Receipts collected under this section shall be  
15 credited to the Fund and shall be used for wetlands and riparian area acquisition,  
16 restoration, and mitigation. No funds shall be expended from this Fund for any purpose  
17 other than those directly contributing to the acquisition, enhancement, restoration, or  
18 creation of wetlands."

19 Sec. 4. There is appropriated from the Highway Fund to the Wetlands  
20 Restoration Fund in the Department of Environment, Health, and Natural Resources, the  
21 sum of one million dollars (\$1,000,000) for the 1995-96 fiscal year for the Wetlands  
22 Mitigation Bank created under Section 3 of this act.

23 Sec. 5. There is appropriated from the General Fund to the Wetlands  
24 Restoration Fund in the Department of Environment, Health, and Natural Resources, the  
25 sum of two million dollars (\$2,000,000) in recurring funds for the 1995-96 fiscal year and  
26 the sum of two million dollars (\$2,000,000) in recurring funds for the 1996-97 fiscal  
27 year.

28 Sec. 6. There is appropriated from the General Fund to the Department of  
29 Environment, Health, and Natural Resources, the sum of five hundred thousand dollars  
30 (\$500,000) in recurring funds for the 1995-96 fiscal year and the sum of five hundred  
31 thousand dollars (\$500,000) in recurring funds for the 1996-97 fiscal year for  
32 administrative and other expenses to implement the Wetlands Restoration, Enhancement,  
33 and Protection Program.

34 Sec. 7. The Department shall prepare a biennial report beginning October 1,  
35 1996, to the Environmental Review Commission on the Wetlands Restoration,  
36 Enhancement, and Protection Program and the Wetlands Mitigation Bank. The report  
37 shall document the wetlands losses and gains and compensatory mitigation under this act.

38 Sec. 8. The Coastal Resources Commission shall study the effect of impacts to  
39 wetlands adjacent to saltwater marshes and, if necessary, shall adopt rules to provide  
40 adequate protection to those adjacent wetlands.

41 Sec. 9. This act becomes effective October 1, 1995, provided that the  
42 Commission shall initiate rule-making proceedings to implement this act upon

- 1 ratification. The Commission shall adopt rules to implement this act no later than
- 2 December 31, 1996.