

**GENERAL ASSEMBLY OF NORTH CAROLINA**

**SESSION 1995**

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**SENATE BILL 824**

Agriculture/Environment/Natural Resources Committee Substitute Adopted 6/1/95

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

(Public)

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Sponsors:

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Referred to: Appropriations

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April 25, 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.  
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):

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

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

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

32 (c3) Exercise of Authority Granted Under Federal Law With Regard to Wetlands. –  
33 The Commission shall exercise its authority with regard to the water quality certification  
34 for wetlands except coastal wetlands defined in G.S. 113-229(n)(3) as follows:

35 (1) The Commission shall grant the water quality certification for any  
36 project that will impact less than one acre of any wetlands.

37 (2) The Commission shall grant the water quality certification for any  
38 project that will impact between one and three acres of wetlands based  
39 on the following classifications:

- 40 a. A Class I wetland requires minimization of impacts for the  
41 protection of water quality and requires that the applicant agree  
42 to provide compensatory mitigation for any loss of wetlands  
43 resulting from the proposed project on a five-to-one ratio, acres

1 mitigated to acres lost. In conducting the minimization analysis  
2 required under this sub-subdivision, the Commission may  
3 consider: (i) the spatial and dimensional requirements of the  
4 project; (ii) the location of any existing structural or natural  
5 features that may dictate the placement or configuration of the  
6 proposed project; (iii) the purpose of the project and how the  
7 purpose relates to placement, configuration, or density; and (iv)  
8 the ability of wetlands to continue to support the existing uses  
9 after project completion.

10 b. A Class II wetland requires that the applicant agree to provide  
11 compensatory mitigation for any loss of wetlands resulting from  
12 the proposed project on a three-to-one ratio, acres mitigated to  
13 acres lost.

14 c. A Class III wetland may require compensatory mitigation for any  
15 loss of wetlands resulting from the proposed project on a one-to-  
16 one ratio, acres mitigated to acres lost, if the Commission finds  
17 that the loss of wetlands will result in a violation of water quality  
18 standards.

19 (3) The Commission shall grant the water quality certification for any  
20 project that impacts more than three acres of wetlands if it determines  
21 that the project will comply with the provisions listed in 33 U.S.C. §  
22 1341(a).

23 (4) The Commission shall grant water quality certification for any project  
24 that involves dredge or fill activities conducted in any wetlands that: (i)  
25 are inadvertently created through any construction, mining, or other  
26 commercial activities, and (ii) are subject to the provisions of 33 U.S.C.  
27 § 1344."

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

30 "**§ 143-214.8. Wetlands Mitigation Bank.**

31 (a) Policy, Purpose, and Intent. – The Department shall develop a wetlands  
32 restoration, enhancement, and protection program to promote consistency among projects  
33 that utilize the assets of the wetlands Mitigation Banking Program under subsection (b) of  
34 this section by governmental agencies or other persons. The program shall be a statewide  
35 program for the acquisition, restoration, enhancement, and creation of wetland and  
36 riparian resources that contribute to the protection and improvement of water quality,  
37 flood prevention, fisheries, wildlife habitat, and recreational opportunities. The purpose  
38 of the program is to restore wetlands functions and values across the State to replace  
39 critical functions lost through wetlands conversion and through current and future  
40 permitted impacts. The implementation of this program shall include a statewide plan for  
41 wetlands restoration to be developed by the Department within the context of the  
42 basinwide planning initiatives, with the goal of protecting and enhancing water quality,  
43 flood prevention, fisheries, wildlife habitat, and recreational opportunities within each of

1 the 17 major river basins in the State. Further, it is the intent that this program be  
2 implemented to streamline the wetlands permitting process, minimize delays in permit  
3 decisions, decrease the burden of permit applicants of planning and performing  
4 compensatory mitigation for wetlands losses, and increase the ecological effectiveness of  
5 compensatory mitigations.

6 (b) Mitigation Banking Program. – There is established within the Department a  
7 Wetlands Mitigation Bank. The wetlands mitigation bank is part of the Wetlands  
8 Restoration, Enhancement, and Protection Program. It is the intent of this section that all  
9 wetlands mitigation shall be coordinated by the Department consistent with the statewide  
10 plan for wetlands restoration and rules developed by the Environmental Management  
11 Commission unless specifically exempted by the Secretary of the Department. The  
12 purpose of the mitigation bank is to provide a repository for monetary contributions and  
13 donations or dedications of interests in real property to promote projects for the  
14 restoration, enhancement, preservation, or creation of wetlands. The emphasis of  
15 mitigation is on replacing functions within the same river basin unless it has been  
16 demonstrated that restoration of other areas could be more environmentally beneficial.  
17 Persons subject to permits or authorizations issued by the United States Army Corps of  
18 Engineers under 33 U.S.C. § 1344, may contribute to the Wetlands Mitigation Bank, on a  
19 voluntary basis, to comply with conditions to, or terms of, the permits or authorizations,  
20 provided that participation in the Wetlands Mitigation Bank will meet the requirements of  
21 mitigation by the United States Army Corps of Engineers.

22 (c) Wetlands Restoration Fund. – The Wetlands Restoration Fund is established as  
23 a nonreverting fund within the Department. The Fund shall be treated as a special trust  
24 fund and shall be credited with interest by the State Treasurer pursuant to G.S. 147-69.2  
25 and G.S. 147-69.3. The Department shall, at the discretion of the applicant, accept  
26 monetary payment into the Wetlands Restoration Fund in accordance with any  
27 authorizations established by the United States Army Corps of Engineers under 33 U.S.C.  
28 § 1344, provided that participation in the Wetlands Mitigation Bank will meet the  
29 requirements of mitigation by the United States Army Corps of Engineers. The monetary  
30 payment shall be based on the per acre cost of restoring or creating a wetlands capable of  
31 performing the same or similar functions. Receipts collected under this section shall be  
32 credited to the Fund and shall be used for wetlands and riparian area acquisition,  
33 restoration, and mitigation. No funds shall be expended from this Fund for any purpose  
34 other than those directly contributing to the acquisition, enhancement, restoration, or  
35 creation of wetlands."

36 Sec. 4. There is appropriated from the Highway Fund to the Wetlands  
37 Restoration Fund in the Department of Environment, Health, and Natural Resources, the  
38 sum of one million dollars (\$1,000,000) for the 1995-96 fiscal year for the mitigation  
39 bank created under Section 3 of this act.

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

1 the sum of two million dollars (\$2,000,000) in recurring funds for the 1996-97 fiscal  
2 year.

3           Sec. 6. There is appropriated from the General Fund to the Department of  
4 Environment, Health, and Natural Resources, the sum of five hundred thousand dollars  
5 (\$500,000) in recurring funds for the 1995-96 fiscal year and the sum of five hundred  
6 thousand dollars (\$500,000) in recurring funds for the 1996-97 fiscal year for  
7 administrative and other expenses to implement the Wetlands Restoration, Enhancement,  
8 and Protection Program.

9           Sec. 7. This act becomes effective October 1, 1995, provided that the  
10 Commission shall initiate rule making proceedings to implement this act upon  
11 ratification. The Commission shall adopt rules to implement this act no later than  
12 December 31, 1996. Section 2 of this act applies to any wetlands inadvertently created  
13 on or after the effective date of this act.