

Regulatory Impact Analysis

Rule Topic: Interbasin Surface Water Transfers

Rule Citation: 15A NCAC 02E .0401 through .0409 – Regulation of Surface Water Transfers

DEQ Division: Division of Water Resources (DWR)

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Impact Summary:

State government:	Minimal potential benefit
NCDOT:	No
Local government:	Minimal potential benefit
Federal government:	No
Private entities:	No
Environment:	No
Substantial Impact:	No

1. Necessity for Rule Change

The Division of Water Resources (DWR) reviewed the Regulation of Surface Water Transfers rules in accordance with G.S.150B-21.3A which requires state agencies to review existing rules every 10 years, determine which rules are still necessary, and either re-adopt or repeal each rule as appropriate. The subject rules were categorized as “Necessary with substantive public interest.” The proposed readoption with amendment of Rules 02E .0401 and .0402 and adoption of Rules .0403 through .0409 will satisfy G.S. 150B-21.3A. The rule changes are also, in part, a result of legal proceedings during which it was strongly suggested that DWR clarify (through rulemaking) some of the administrative procedures associated with implementing Interbasin Transfer (IBT) statute G.S. §143-215.22L. These clarifications are reflected in the proposed rules.

2. Background

Regulation of Surface Water Transfer

North Carolina’s history of regulating interbasin transfers of surface waters dates back to the 1950’s. In 1991, the North Carolina General Assembly passed G.S. 143-215.22G which defined interbasin transfer as the withdrawal, diversion, or pumping of surface water from one river basin that is then discharged in a different river basin. The purpose of the IBT statute is to ensure it is good public policy to move water from one basin into another. G.S. 143-215.22G also established 18 major river basins and 38 subbasins. These major river basins and subbasins are designated on the map entitled “Major River Basins and Sub-basins in North Carolina,” which was filed with the Office of the Secretary of State on April 16, 1991.

In 1993, G.S. 143-215.22I was passed as part of an “Act to Regulate Interbasin Transfers” (Session Law 1993-348). This law regulated large surface water transfers between river basins by requiring a certificate from the North Carolina Environmental Management Commission (EMC). In 2007, G.S. 143-215.22I was repealed and replaced with the more expansive G.S. 143-215.22L as part of an “Act to Direct the Environmental Review Commission to Study Issues Related to the Transfer of Water from One River Basin to Another River Basin and the Allocations of Surface Water Resources and to Amend the Laws Governing the Transfer of Water from One River Basin to Another River Basin.”

G.S. 143-215.22L outlines the process for obtaining an IBT certificate. In general, an IBT certificate is required when an interbasin transfer meets or exceeds two million gallons per day (2 MGD). Facilities that existed or were under construction prior to July 1, 1993, unless the facility exceeds the full transfer capacity of that facility, regardless of the transfer amount, are considered grandfathered and do not require an IBT Certificate.

Per the current IBT statute G.S. 143-215.22L, an IBT Certificate from the EMC is required to:

- (1) initiate a transfer of 2 MGD of water or more per day, calculated as a daily average of a calendar month and not to exceed 3 MGD per day in any one day, from one river basin to another;
- (2) increase the amount of an existing transfer of water from one river basin to another by 25% or more above the average daily amount transferred during the year ending July 1, 1993 if the total transfer including the increase is 2 MGD or more per day; or
- (3) increase an existing transfer of water from one river basin to another above the amount approved by the Commission in a certificate issued under G.S. 162A-7 prior to July 1, 1993.

To obtain an IBT Certificate under G.S. 143-215.22L, the applicant first submits a Notice of Intent to file a petition, then holds at least three public meetings. The applicant submits a draft environmental document based upon requirements set forth in G.S. 113A-4 or G.S. 143-215.22L, and the EMC holds at least one public hearing. After DEQ issues a determination on the environmental document, the applicant petitions the EMC for an IBT Certificate. After issuing a draft determination on the petition, the EMC holds at least two public hearings prior to issuing their final determination. Nine IBT certificates have been issued by the EMC under this process.

Currently, there are an estimated 133 public water systems across North Carolina that transfer surface water between river basins. Of these surface water transfers:

- 27 systems are transferring more than 1 MGD.
 - 11 of these systems are regulated under nine IBT certificates.
- In addition to the public water systems with IBT certificates, there are ten public water systems that have a grandfathered allowance for their surface water transfers that exceed the 2 MGD threshold requiring a certificate.
- There are approximately six water systems that are transferring between 1 and 2 MGD. The annually submitted Local Water Supply Plans are the primary means that DWR keeps track of compliance for those surface water systems who have not been issued an IBT Certificate.

3. Regulatory Baseline

As part of the permanent rulemaking process, G.S. 150B-19.1 requires agencies to quantify to the “greatest extent possible” the costs and benefits to affected parties of a proposed rule. To understand what the costs and benefits of the proposed rule changes would be to regulated parties and the environment, it is necessary to establish a regulatory baseline for comparison. For the purpose of this regulatory impact analysis, the baseline is comprised of the following:

- current versions of Rules 15A NCAC 02E .0401 and .0402 (effective Sept 1, 1994); and
- G.S. 143-215.22L Regulation of surface water transfers (“IBT statute”).
- G.S. 143-215.22G Definitions (under Part 2A. Registration of Water Withdrawals and Transfers; Regulation of Surface Water Transfers)

4. Proposed Amendments

All of the proposed rule changes are for the purpose of clarifying implementation of the IBT statute. None of the changes will result in a measurable economic or environmental impact. The following table summarizes the notable proposed rule changes.

Subchapter 02E – Water Use Registration and Allocation

Section .0400 – Regulation of Surface Water Transfers

Rule	Action	Proposed Change	Rationale
15A NCAC 02E .0401 Purpose	Readopt	Add statement of purpose.	Provide clarity.
15A NCAC 02E .0402 Definitions	Readopt	List out the system elements that limit transfer capacity and how each element is calculated (see “Grandfathered capacity.”)	IBT statute does not provide a methodology to calculate the grandfathered allowance. The proposed definitions conform to longstanding practice and are intended to provide clarity on implementing statute.
		Specify that “Major river basin” is defined based on the number preceding the hyphen.	Term not defined in statute. Proposed definition clarifies common question regarding environmental document requirement.
		Specify that “Primary applicant” is the entity who owns the waterline as the point of the basin boundary.	Term not defined in statute. Proposed definition clarifies common question regarding the responsible party.
15A NCAC 02E .0403 Applicability	Adopt	Applicability language relocated from .0401.	Provide clarity. Proposed text does not add to existing statutory requirements.

		Specify data needed for a water balance demonstration and the temporal confines.	Statute allows for grandfathering of basin transfers. Proposed text outlines the data needed to make that determination for allowance.
		Specify that the planning horizon is at least 30 years with water demand projections required at 10-year increments.	Statute describes “foreseeable future” for planning horizon but does not define. Proposed 30-year period/10-year increments were chosen for consistency with existing local water supply plan requirements so as to not add additional burden.
15A NCAC 02E .0404 Notification	Adopt	Specify that public comments received after a 30-day comment period will not be considered unless the comment period is otherwise extended.	Statute requires a minimum 30-day comment period. The proposed maximum 30-day comment period will comply with statute while providing transparency and predictability to the public.
		Specify that notification is required in each affected county and in only one newspaper per county.	Proposed language is intended to clarify statute and does not add any additional requirements. Lack of clarity over publication in newspaper of general circulation has been subject of previous litigation.
15A NCAC 02E .0405 Environmental Documents	Adopt	Require environmental documents to include a projection of future water supply, transfers, and demands with a planning horizon of at least 30 years, with projections at 10-year increments.	Statute compels applicants to analyze potential impacts from the requested IBT. Proposed rule provides a planning period for projecting water withdrawals, which is key to estimating impacts. Proposed 30-year period/10-year increments were chosen for consistency with existing local water supply plan requirements so as to not add additional burden.
		Specify that hydrologic models must be used, if available, along with other tools to evaluate beneficial and adverse impacts. Model and modeling results must be made publicly available.	Statute compels applicants to analyze potential impacts but does not specify a methodology. Proposed requirement to use approved basinwide hydrologic models is consistent with longstanding practice. Availability of the applicant’s model to the public has been subject of previous litigation. It has always ultimately been provided.

		Clarify that when considering alternatives, economic infeasibility is temporally defined by the planning period.	Statute allows economic infeasibility to be considered but does not specify a timeframe. Proposed timeframe aligns with proposed 30-year planning period.
15A NCAC 02E .0406 Petition	Adopt	Clarifying language for requirements in an IBT petition. Specify that the purposes for which a reservoir was constructed, and any mandatory management activities must be considered in evaluating impacts to reservoir water levels.	Statute requires that the purposes and water storage allocations established at the time of construction be considered by the EMC in a final determination; as such, specifying this requirement in the Petition rule is for clarity and will not produce an additional regulatory burden.
15A NCAC 02E .0407 Settlement/ Mediation	Adopt	Direct mediation officer to use guidance approved by the EMC in the settlement/mediation process.	Statute allows for a settlement process but does not specify requirements for conducting the mediation process. Statute allows EMC to adopt rules to govern the conduct of the mediation process. Proposed requirement to use EMC-approved guidance will provide consistency and predictability to the regulated parties.
15A NCAC 02E .0408 Final Determination	Adopt	Specify approval process for the applicant to meet the water conservation requirement described in the IBT statute.	Statute requires the production of a water conservation plan with measures that equal or exceed the most stringent plan in the source basin but does not provide an approval process. The proposed process will provide clarity for complying with statute.
		Require that any proposed ordinances, initiatives, or programs shall be approved by the unit of local government within 90 days of issuance of the IBT Certificate to document the water conservation efforts.	Statute requires “mandatory implementation” of a water conservation plan as a condition of approval but does not specify a timeframe for implementation. The timeframe is intended to provide consistent guidance to water systems on meeting the statutory mandate; the 90-day timeframe is consistent with other local water supply planning requirements and should not result in any additional burden.

		List examples of metrics for water conservation measures.	The proposed language provides examples of metrics that may be used to meet the water conservation requirement in statute.
		Specify that a modification will be necessary to add a co-applicant to an existing IBT Certificate.	Statute allows reselling of water to entities in the receiving basin if they are listed as co-applicants. Intent of proposed language is to specify that a process exists for addition of a co-applicant.
15A NCAC 02E .0409 Emergency Transfers	Adopt	Define conditions that may qualify for an emergency transfer.	Statute provides some examples of conditions that may qualify for a temporary emergency transfer. Proposed language provides further examples and categorizes them into anticipated and unanticipated situations.
		Specify information required to request an emergency transfer.	Statute states that the Secretary has the authority to approve emergency transfers and to specify conditions of the allowance. Proposed language lists the types of information that must be provided for the Secretary's consideration.
		Require a summary report detailing the transfer event within 60 days from the end of the approved transfer period.	Statute allows the Secretary to specify conditions to protect other water users when approving emergency transfers. Tracking and reporting water usage is a customary practice among large water systems; as such, the requirement to provide a report of water usage (amount of water, duration of transfer event) should not create an additional burden. The 60-day timeframe was chosen to ensure ample time for the local water system to report, although it is unlikely that a water system will need that much time. For the two emergency transfers that have been approved, the local water system provided a report within one week.
		Specify the process to request an "after-the-fact" emergency transfer, and require notification within 72 hours after the transfer occurred.	Statute allows for emergency transfers but does not explicitly provide a process for an after-the-fact emergency transfer. Proposed language reflects stakeholder comments that this scenario should be recognized in the rules.

5. Impact Summary

The proposed rules will allow DEQ to continue to provide a transparent and consistent IBT Certificate process for applicants in compliance with the IBT statute G.S. 143-215.22L. The IBT statute is very prescriptive as far as the required elements to request and get approval of an IBT Certificate. The sole intent of the proposed rules is to provide additional direction, transparency, and clarity on some procedural aspects of the IBT statute (e.g., data needed to calculate a transfer; examples of metrics for water conservation plan). In providing greater procedural direction, the requirements of G.S.143-215.22L will be better understood, thereby saving time for the regulated community (i.e, local water systems) as well as for DWR staff who administer the IBT program. The amount of time saved is expected to be negligible and will not provide a significant financial benefit.

It is possible that the greater clarity provided by the proposed rules will reduce the likelihood that contested cases will be brought over certain procedural aspects of the statute. Past contested cases have been brought by various interested parties seeking legal interpretation of procedures outlined in the statute. Several of the proposed rule changes seek to clarify these procedures (e.g., “a newspaper” changed to “a single newspaper”). Benefits would be mainly in the form of avoided costs from attorney fees (if retained by the regulated party) as well as time savings to the regulated party, DWR staff, and the EMC. There are too many unknown variables to determine how likely it is that such benefits will be realized or to estimate the potential magnitude of savings; as such, we have not attempted to quantify or monetize these potential benefits.

The proposed rules do not add additional requirements beyond what is already provided for and authorized in the statute. As such, the proposed rules will not impose an additional cost or time burden on the regulated community.

None of the changes will require DEQ or local governments to revise their existing procedures or to procure additional staff; as such, there is no anticipated economic cost to DEQ or local governments. The proposed changes will not affect environmental permitting of the NC Department of Transportation (NCDOT); as such, there will be no costs or benefits to NCDOT.

Lastly, as measured from the baseline conditions, the proposed changes will maintain existing environmental protections at an equivalent level with no cost or benefit to the environment.