

**Session Law 2008-143 (H 2499 Drought/Water Management Recommendations)**

Drought legislation recently enacted by the General Assembly and signed by Governor Easley, included provisions to improve water use data; reduce drought vulnerability; and allow for quicker response to water shortage emergencies. This document summarizes Session Law 2008-143.

**Section 1 Water Use Reporting.** Water use reporting requirements have been in place for well over a decade. General Statute 143-215.22H requires persons who withdraw or transfer 100,000 gallons or more of water per day for non-agricultural purposes or 1,000,000 gallons or more of water per day for uses related to the production of agricultural products to register the withdrawal and/or transfer with the Environmental Management Commission (EMC). The Division of Water Resources (DWR) collects and maintains the data. The drought bill makes the following changes to the water use reporting requirements:

1. Shortens the time to register a new withdrawal or transfer from 6 months to 2 months after the withdrawal or transfer begins.
2. Replaces late payment fees for failure to register or update a registration with civil penalties of \$100 per day for failure to register and \$50 per day for failure to update a registration.
3. Exempts withdrawals and transfers of less than 1 million gallons per day for “the creation or maintenance of waterfowl impoundments”.
4. Provides that registered water uses and water uses identified in surveys of agricultural water users (to the extent individual water use information is released) may be used as evidence of historic water use if water allocations become necessary or desirable in the future.

**Section 2 Agricultural Water Use.** The bill directs the Department of Agriculture and Consumer Services to survey agricultural water users and report annually, on a county and watershed basis, agricultural water use of 10,000 gallons per day or more. (Agricultural water uses of 1,000,000 gallons per day or more would continue to register with Department of Environment and Natural Resources.)

### **Section 3 Definitions**

The term “large community water system” has replaced “community water system” throughout the session law to refer to water systems, other than those run by local governments that are required to prepare a local water supply plan. “Large community water system” has the same definition as that previously used in the water resource statutes for “community water system”: a water system that serves 1,000 or more service connections or 3,000 or more individuals. The change in term does not either broaden or narrow the universe of water systems required to have a water supply plan. (The term was changed to eliminate a conflict with rules adopted under the Safe Drinking Water Act that define “community water system” more broadly to include much smaller water systems that are not required to have a water supply plan.)

The session law defines “essential water use”. The definition is similar to the definition used in the EMC’s water conservation rules. It covers water necessary for fire fighting, health and safety; water needed to sustain human and animal life; and water necessary to satisfy federal, state, and local laws for the protection of public health, safety, welfare, the environment and natural resources. The definition differs from the EMC rule in also including “a minimum amount of water necessary to maintain the economy of the State, region, or area”. The session law uses the term “essential water use” only as a factor in determining the amount of water transferred in a water shortage emergency.

Several sections of the session law refer to the “U.S. Drought Monitor”, which is defined as the national drought map that designates areas of drought using the following categories D0-Abnormally Dry, D1-Moderate, D2-Severe, D3-Extreme, and D4-Exceptional.

The session law defines a “water shortage emergency” as a shortage of water that “presents an imminent threat to public health, safety, and welfare or to the environment”.

**Sections 4 and 8 Water Shortage Emergency Provisions.** The session law shifts a number of powers with respect to water shortage emergencies from the Environmental Management Commission (EMC) to the Secretary of the Department of Environment and Natural Resources (DENR). Section 4 repeals the EMC's water shortage emergency powers; Section 8 gives those powers to the Secretary of DENR. The changes streamline the process for declaring a water shortage emergency by:

1. Moving the authority to recommend an emergency declaration from a 19-member commission to the Secretary;
2. Allowing the Secretary to recommend an emergency declaration after consulting the water system and the local government where the water system is located. (Prior law only allowed the EMC to act based on a request by a local government); and
3. Eliminating the need for a public hearing.

The Secretary's recommendation for declaration of a water shortage emergency must be based on written findings that "the needs of human consumption, necessary sanitation, and public safety require emergency action". The Governor still maintains the sole authority to declare a water shortage emergency. A water shortage emergency declaration by the Governor is limited to 30 days, but successive declarations can be made based on written findings by the Secretary.

Declaration of a water shortage emergency gives the Secretary authority to exercise certain emergency powers in the area affected by the emergency. The powers can only be exercised after the Secretary has consulted with affected water systems and determined that the emergency cannot be effectively managed otherwise. The emergency powers exist only for the period of the declared emergency and include authority to:

1. Require a water system that has more than enough water to meet its own essential water uses to supply water to a system experiencing a water shortage emergency. The amount transferred must be limited to the amount needed to meet the "essential water uses" within the receiving water system. (Under prior law, the EMC had this authority.)

2. Adopt rules governing conservation and use of water within the water shortage emergency area by both the receiving water system and supplying water system. Previously, the EMC could impose additional water conservation measures in the receiving water system, but did not have authority to require water conservation measures in the supplying water system.

Since the power to divert water from one system to another in an emergency already existed in state law, there were also existing provisions on compensation for transferred water and installation of temporary water lines. Those provisions have been modified in the 2008 legislation as follows:

- The supplying water system cannot charge the receiving water system more than 110% of the retail cost that would be charged to a customer of the supplying system for a similar volume of water plus any additional cost incurred by the supplier for alterations to its infrastructure or water treatment.
- The law extends authority to install temporary emergency water lines to the supplying water system as well as the receiving water system and also allows installation of temporary emergency water lines to connect a water system to an intake in a new water source.
- New language requires removal of temporary emergency water within 90 days following the end of the water shortage emergency; the Secretary can authorize a 30-day extension.

A water system is still liable for loss or damage resulting from the laying of temporary emergency water lines but the process for providing compensation has changed. The law repeals statute language that required a water system to post a bond to cover potential liabilities before the EMC could order an emergency diversion of water. In its place, the session law requires the water system to use an eminent domain proceeding to determine compensation to property owners for the temporary use of right of way for an emergency water line. The water system does not have to acquire right-of-way for a temporary emergency water line before the line is installed, but within 10 days after

laying the line the water system must start a condemnation proceeding under the same “quick take” process authorized for the Department of Transportation. Details of the “quick take” eminent domain process can be found at G.S. 136-103. The process allows installation of a water line to begin before there is a final decision on the amount of compensation owed to the property owner, but the water system must deposit an amount estimated to cover the value of any compensable property interest with the court at the beginning of the proceeding.

**Section 5 Water Shortage Response Plans/Drought Response.** After the 2002 drought, the General Assembly required local government and large community water systems to include a section in the local water supply plan to describe how the water system would “respond to drought and other water emergencies and continue to meet essential public water supply needs during the emergency”. The EMC adopted rules, effective in March 2007 that set general requirements for these water shortage response plans.

#### Water Shortage Response Plans

Session Law 2008-143 requires local water shortage response plans to have DENR approval and sets the following criteria for an approved plan:

1. The plan must have tiered levels of water conservation measures or other response actions based on the severity of water shortage conditions.
2. The tiers must result in progressively more stringent water conservation measures that correspond to increased severity of water shortage or drought conditions.  
Note: A plan that lacks specific triggers for water conservation measures or makes implementation of measures optional at each step (or dependent on a decision by a public official or governing body) will not meet this requirement.
3. The plan must meet all other requirements set out in the EMC’s rules.
4. Water shortage response plans cannot regulate or require the metering of private drinking water wells (defined as wells that serve fourteen or fewer service connections or twenty-four or fewer individuals).

A water shortage response plan submitted to DENR is presumed to be approved until DENR notifies the system of disapproval. If the system’s existing water shortage

response plan meets the new criteria, the water system can continue to operate under that plan. Otherwise, an updated water shortage response plan must be submitted to the Department by July 1, 2009. In the meantime, systems that submitted a water shortage response plan under Session Law 2002-167 should implement the measures in that plan.

A water system that never submitted a water shortage response plan must implement the default water conservation measures for, extreme and exceptional drought set out in the EMC's 2007 rules. (15A NCAC 02E .0612 - .0614). Any water system that failed to submit a water shortage response plan meeting the minimum requirements of 15A NCAC.02E. 0607 will come under this provision.

### Drought Response

Prior law required water systems to develop water shortage response measures, but left decisions about implementation to the water system. Session Law 2008-143 requires implementation; water conservation measures must go into effect within 10 days following:

1. Water shortage conditions that trigger implementation of water conservation measures under the system's water shortage response plan; or
2. A drought designation that requires implementation of default water conservation measures (in a water system that lacks an approved water shortage response plan).

Session Law 2008-143 also gives DENR the authority to require local government and large community water systems to step up water conservation efforts in a drought:

1. DENR can require a water system to begin implementing the first tier of water conservation measures in its water shortage response plan if:
  - a. The water system has not begun implementing water conservation measures;
  - b. The system's water source is located in a county that is in severe, extreme, or exceptional drought; and

- c. DENR makes written findings that implementation of water conservation measures is necessary to “minimize the harmful impacts of drought on public health, safety, and the environment”.
2. DENR can require a water system to move to the next tier of water conservation measures set out in the system’s approved water shortage response plan, if:
    - a. The water system gets its water from an area designated as experiencing extreme or exceptional drought conditions;
    - b. The water system has implemented the water conservation measures required under the system’s water shortage response plan for at least 30 days; and
    3. The measures have not reduced water use sufficiently to minimize the harmful impacts of drought on public health, safety, and the environment.

In each case, harmful drought impacts may include impacts to interconnected water systems and to other water systems withdrawing water from the same source.

#### Relationship to other state and federal law

The session law states that it is not the intention of the General Assembly to authorize or require the implementation of water conservation management measures that are inconsistent with a federal or state court order; administrative order; interstate agreement allocating water resources; or any license for a hydroelectric facility issued by the Federal Energy Regulatory Commission.

**Section 6** Authorizes the legislature’s Environmental Review Commission (ERC) to study issues related to creation of new water supplies, including reservoirs, as part of the ERC’s ongoing water allocation study.

**Section 7 Water System Reporting** Amends G.S. 143-355(k) to allow DENR to require local government water systems and large community water systems located in areas designated as being in extreme or exceptional drought conditions to report “the amount of water used, withdrawn, diverted, or obtained” on a weekly basis.

**Section 8** See Section 4 above.

**Section 9 Water System Efficiency.** The session law requires local government water systems and large community water systems to put new in-ground irrigation systems connected to the water system on separate meters to more easily distinguish irrigation use from other household water use. The law also places additional conditions on eligibility for state grants or loans to expand water system infrastructure. To receive funds appropriated by the General Assembly to extend water lines or expand water treatment capacity (whether in the form of a grant or loan), a water system must show that:

- The system has an approved local water supply plan.
- The system implements a water conservation education program and a leak detection and repair program.
- The system meters all water uses that are practical to meter.
- The system's water rate structure is adequate to operate, maintain, and repair the system during both periods of normal and reduced water use.
- The system's rate structure does not give residential water customers a lower per-unit rate as water use increases.
- The system has evaluated use of reclaimed water to meet some future water needs.

The provision requiring separate meters for new in-ground irrigation systems and the eligibility criteria for infrastructure funds become effective on July 1, 2009.

**Section 10 Policy on Water Reuse.** The session law includes a policy statement recognizing the safety of water reuse systems that are properly constructed and operated and the importance of treated wastewater in meeting the State's future water supply needs. It directs the EMC to promote reuse of treated wastewater and to adopt rules to: identify acceptable uses for reclaimed water; establish standards for reclaimed water systems that will prevent the "direct distribution of reclaimed water as potable water"; and facilitate the permitting of reclaimed water systems. Note: Existing EMC rules identify a number of allowable uses of reclaimed wastewater.

**Section 11 Enforcement Provisions.** The session law allows DENR to assess a civil penalty of up to \$10,000 per month against a local government or large community water system that:

- fails to implement water conservation measures required under the system's approved water shortage response plan;
- fails to implement the EMC's default water conservation measures in the absence of an approved plan; or
- fails to implement more restrictive water conservation measures as required by the Department.

Factors to be considered in assessing the civil penalty and remission procedures are addressed in existing statutes that are cross-referenced in the session law.

The Department is authorized to assess a civil penalty of \$100-\$500 per day if a water system fails to comply with a request for weekly water use information under G.S. 143-355(k). The new civil penalty provisions become effective December 1, 2008.

As under prior law, the violation of emergency water conservation rules is a Class 1 misdemeanor.

**Section 12** Requires reports submitted by public water systems under the Safe Drinking Water Act to be submitted electronically. DENR can waive the requirement for electronic reporting if a water system lacks the technical capability.

**Sections 13 and 14 Use of Gray Water.** Section 13 of the session law requires that wastewater from water-using fixtures and appliances must be discharged to an approved wastewater treatment system unless another provision of law allows for an alternative use. (This is an existing requirement under environmental health rules and the state plumbing code.) Section 14 allows alternative uses of "gray water" (defined as "wastewater removed from household wash basins, bathtubs and showers"). The session law requires the Commission for Health Services to adopt rules that allow use of gray water to hand water trees, shrubs, and inedible plants on single-family residential property during periods of drought, but also protect the public health, safety,

welfare, and the environment. The session law provides interim standards for use of gray water for hand-watering inedible plants that will sunset when rules adopted by the Commission for Health Services go into effect. The interim standards allow use of gray water under the following conditions:

- Use is restricted to the single-family residence where the gray water originated;
- Gray water must be applied using a handheld container; it cannot be used in an irrigation system unless treated to State Plumbing Code requirements.
- Gray water containing hazardous substances, such as solvents, cannot be used.
- Gray water must be applied at least 100 feet from surface waters or a water supply well and cannot be allowed to run off onto adjoining property, roadways or into ditches or storm drains.
- Untreated gray water must be used as soon as practical and cannot be stored for later use.

**Section 15 Drought Mitigation Projects.** Session Law 2008-143 adds drought mitigation and prevention projects to the list of projects receiving priority for funding under the State Drinking Water Revolving Loan Fund:

- Bulk water facilities and distribution systems for reclaimed water;
- Water meter installation and replacement;
- Repair or replacement of leaking water lines; and
- Construction of interconnections between water systems.

**Section 16 Drought Management Advisory Council.** Session Law 2008-143 makes minor changes to the law establishing the Drought Management Advisory Council. The session law requires that appointees to the Council must have expertise in water resource evaluation and management related to drought and drought impacts. It removes language that previously allowed DENR to expand the membership of the Council; DENR can invite representatives of other organizations, including water systems regulated by the Utilities Commission, to “participate in the work of the Council”.

The law now requires the Council to recommend drought designations to the Secretary of Environment and Natural Resources; designations become official upon approval by the Secretary. The drought designations in the U.S. Drought Monitor serve as the default designations unless the Secretary approves an alternative designation on the recommendation of the Drought Management Advisory Council. The Secretary can approve a drought designation that differs from the U.S. Drought Monitor if necessary to more accurately reflect local conditions.

The factors used to make drought designations generally have not changed. Recognizing that the U.S. Drought Monitor does not follow county lines, however, the session law provides that a county should receive the most severe drought designation that covers at least 25% of the land area in the county.

**Sections 17 and 18 Studies.** The legislation directs the State Water Infrastructure Commission to develop guidelines for water rate structures (in consultation with DENR, the Public Staff of the Utilities Commission, the Local Government Commission, and the School of Government at the University of North Carolina at Chapel Hill) that are: 1. adequate to maintain and operate water systems; and 2. consistent with water conservation. A progress report must be provided to the Environmental Review Commission by January 1, 2009.

The session law directs DENR to recommend water efficiency standards for water-using fixtures in residential and commercial buildings; in-ground irrigation systems; and water metering systems in consultation with a technical working group. Recommendations must be submitted to the Commissioner of Insurance, the Chair of the Building Code Council and the Environmental Review Commission by January 1, 2009.

**Section 19 Restrictive Covenants.** The session law provides that restrictive covenants registered prior to October 1, 2008 cannot be interpreted to require landscape irrigation contrary to water conservation measures imposed by the Governor, a State agency, or a unit of local government unless the covenants include specific language to that effect. Fines cannot be issued for violation of an irrigation requirement

unless the covenant specifically authorizes fines. Covenants registered after October 1, 2008 must clearly state that any irrigation requirements will be made consistent with water conservation measures imposed by the Governor, a State agency or unit of local government. To allow for enforcement of covenants by assessment of fines, covenants registered after October 1, 2008 must indicate on the first page of the covenant document in boldface type that fines may be assessed for violation of the covenants. These provisions become effective October 1, 2008.

**Section 20 Private Wells.** States that nothing in the act is to be construed “to expand or limit” the authority of a unit of local government or public water supply system to regulate use of a private water supply well.

**Section 21 Effective Dates.** Most of the provisions of Session Law 2008-143 became effective when the act was signed and became law. The exceptions are:

- Sections 1 & 2 (water use registration/surveys of agricultural water use) and Section 19 (restrictive covenants) become effective October 1, 2008.
- Section 11 (enforcement provisions) becomes effective December 1, 2008.
- Section 9 (separate meters for new in-ground irrigation systems and revised eligibility criteria for state water infrastructure loans and grants) is effective July 1, 2009.