

INTERBASIN TRANSFER SETTLEMENT PROCESS GUIDANCE

NC General Statute §143-215.22L(h) allows the Environmental Management Commission (EMC) to initiate settlement discussions during the interbasin transfer certification process.

(h) Settlement Discussions. – Upon the request of the applicant, any interested party, or the Department, or upon its own motion, the Commission may appoint a mediation officer. The mediation officer may be a member of the Commission, an employee of the Department, or a neutral third party but shall not be a hearing officer under subsections (e) or (j) of this section. The mediation officer shall make a reasonable effort to initiate settlement discussions between the applicant and all other interested parties. Evidence of statements made and conduct that occurs in a settlement discussion conducted under this subsection, whether attributable to a party, a mediation officer, or other person shall not be subject to discovery and shall be inadmissible in any subsequent proceeding on the petition for a certificate. The Commission may adopt rules to govern the conduct of the mediation process.

The purpose of this document is to provide additional guidance to the EMC, the applicant, and the public regarding the IBT settlement discussion process.

INITIATION OF SETTLEMENT DISCUSSIONS

The statute allows the EMC to initiate settlement discussions with the support of a mediator at the request of the applicant, interested persons listed in §143-215.22L(c)(3)(a)-(g), the Department of Environment and Natural Resources (DENR), or on its own. For mediation to be meaningful, it should begin after the draft Environmental Document required by §143-215.22L(d) has been completed.

The EMC has discretion in choosing whether to initiate a mediated settlement discussion. The Commission shall base its decision to initiate or forego mediation based on a review, after presentation by the Department, of the major issues in controversy and an assessment as to whether mediation may aid in resolving factual or legal questions related to those issues.

Mediation is not mandatory, whether it is initiated by the EMC or requested by another interested party. As a result, the EMC cannot compel any party to participate and may decide not to pursue a requested mediation if it is not possible to bring in all of the parties necessary to reach a settlement.

APPOINTMENT OF MEDIATION OFFICER

The EMC may appoint a mediation officer (mediator) to govern the settlement discussions. In its selection of the mediator, the Commission will consider input from the applicant and any interested party the Commission considers appropriate. The Commission will attempt to appoint a mediation officer to whom the applicant and other appropriate interested parties are agreeable.

The mediator may be a member of the Commission, an employee of DENR, or a neutral third party, however the mediator may not be any individual who has served or may serve as a hearing officer at any stage of this specific proceeding.

It is the EMC's responsibility to determine which parties may participate in the settlement discussions, however the EMC may choose to delegate this task to the mediator. The mediator is not authorized to make decisions on behalf of the EMC. The primary duty of the mediation officer is to facilitate productive settlement discussions between the applicant and other interested parties. The mediation officer will be required to make regular progress reports, either written or verbal, to the EMC.

CONDUCT OF NEGOTIATIONS

The mediation officer will be responsible for providing public notification that a settlement process will occur, and inviting appropriate interested persons listed in § 143-215.22L(c)(3)(a)-(g) to participate. The mediation officer has full flexibility in managing the settlement discussions including determining the number and frequency of meetings, the scope of the settlement discussions, and the ground rules for participation (i.e., recognition of speakers, sharing of written materials).

The Division of Water Resources will be available to provide staff support to the mediation officer. Support may include providing web conferencing, a secure web site to host shared documents, and assisting the mediator with the preparation of the settlement summary and recommendations.

The mediator (whether an EMC member, staff member or private mediator) may hold private conferences with the parties individually or as a group. The parties may agree not to discuss what occurred or was said during the mediation. However any documents (including electronic mail and other computer files) possessed by State employees may be subject to disclosure under the Public Records Law. As noted in the statute, neither the statements nor the conduct of participants in mediation are subject to discovery or admissible in any potential legal proceedings on the petition.

Any unavoidable costs will be equally apportioned among the applicant and participating parties unless all parties agree to a different method of allocating costs. The mediator should not initiate any meetings without first securing a written cost-sharing agreement from all participants in advance. Federal and State resource management agencies responsible for reviewing environmental documents are not to be considered “participating parties” for the purposes of allocating costs.

The EMC shall not participate in the mediation in any substantive manner (except to the extent that Commission members may serve as mediators).

TERMINATION OF SETTLEMENT DISCUSSIONS

The mediation will terminate a maximum of 120-days from the date the EMC selects a mediator, unless, at the end of 120 days, the mediator requests additional time from the EMC. The process may end by 1) consensus and a settlement agreement, 2) determination by the mediation officer that a consensus cannot be reached, or 3) voluntary withdrawal of the applicant or any other party necessary to a successful settlement.

Participation in the mediation process is voluntary and the applicant or any other party may withdraw from the mediation at any time. Upon termination of the settlement, the mediator will produce a summary report and recommendations to the EMC. The Commission may choose to request additional mediation, request additional information from the applicant, or recommence the IBT certification process. If a settlement agreement is reached, the applicant will submit to the EMC the agreement along with the Environmental Document and Petition. Neither the EMC nor DENR will be a signatory to a settlement agreement. However, the EMC may choose to include all or part of any settlement agreement as a condition of an interbasin transfer certificate. The settlement agreement is not binding on the EMC and will not limit the EMC's full discretion in issuing a certificate consistent with NC General Statutes.