

Attachment - A

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 applicant, the public, and the EMC on the settlement 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 will use its discretion in choosing whether to initiate a mediated settlement discussion. The Commission's decision will be based on the decision factors listed in §143-215.22L(k),(l),(m),(n), or other factors that it finds appropriate. 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 and Duties of Mediation Officer

The EMC shall appoint a mediation officer to govern the settlement discussions. The officer may be a member of the Commission, an employee of DENR, or a neutral third party. However the mediator may not be anyone who has served (or will serve) as a hearing officer for any of the public hearings required as part of the IBT certification process. The primary duty of the mediation officer is to facilitate productive settlement discussions between the applicant and other interested parties. 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 mediation officer will also be required to make regular progress reports, either written or verbal to the EMC.

The mediator is not authorized to make decisions on behalf of the EMC.

Conduct of Negotiations

The mediation officer will be responsible for providing public notification that a settlement process will occur, and inviting 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 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 EMC will work with the parties to avoid unnecessary costs and make use of resources (such as meeting space, administrative support and mediation capability) that can be provided by the Department or by the parties. Any unavoidable costs will be equally apportioned among all parties participating in the settlement process unless the parties agree to a different method of allocating the costs.

DENR will be responsible for providing the mediation officer with staff support. Support could 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.

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.

Termination of Settlement Discussions

The mediation 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. The mediation will be limited by a 120-day timeframe. At the end of 120 days, the mediator may determine that a consensus will not be reached, or request additional time from the EMC. 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 mediation, the officer will produce a summary and recommendations to the EMC. The Commission may choose to request additional mediation, request additional information from the applicant, or recommence the IBT review process. If a settlement agreement is reached, the applicant will submit the agreement along with the Environmental Document and petition. Neither the EMC nor DENR will be a signatory to a settlement agreement. The settlement agreement will not limit the EMC's full discretion in issuing a certificate consistent with NC General Statutes. However the EMC may choose to include all or parts of any settlement agreement as conditions of an interbasin transfer certificate.

Additional Issues Under Consideration

Do the State's open meeting regulations apply to the mediation process?

- a) Does the mediator have the ability to have private conferences with individual parties?
- b) Does the mediator have the ability to have private conferences with the entire group that are closed to the public?
- c) Is there a requirement that meetings be open to the public?
- d) Can the parties choose to agree on the confidentiality of the entire settlement discussion?