

Petition for Contested Case Hearing

The Southern Environmental Law Center files this Petition for a Contested Case Hearing on behalf of the Catawba Riverkeeper Foundation, Inc. (“Petitioner”) to formally challenge the grant by Respondent Environmental Management Commission (the “EMC”) of an interbasin transfer certificate (“IBT Certificate”) to the Cities of Concord and Kannapolis (“IBT Recipients”) to transfer up to 10 million gallons per day (mgd) from the Catawba River basin and up to 10 mgd from the Yadkin River basin to the Rocky River subbasin. A copy of the certificate is included as **Exhibit A** to this petition for a contested case hearing.

Petitioner also formally challenges the Final Environmental Impact Statement (“FEIS”), corrections to the FEIS, and Revised Final Environmental Impact Statement (“RFEIS”), all of which were prepared in connection with the IBT Certificate (collectively the “Environmental Documents”)¹; and the Record of Decision (“ROD”), which sets forth the basis of the EMC's approval of the IBT Certificate. Petitioner further challenges the procedures and process utilized by the EMC and its designated hearing officers, and the staff of the Respondents Division of Water Resources (“DWR”) and the Department of Environment and Natural Resources (“DENR”), that led to the issuance of the Environmental Documents and IBT Certificate.

¹ The Environmental Documents are prepared for the NC Department of Environment and Natural Resources, the Division of Water Resources and the Environmental Management Commission at the expense of the IBT Recipients, by a third party, CH2MHill. “The applicant who petitions the Commission for a certificate under this section shall pay the cost of special studies necessary to comply with Article 1 of Chapter 113A of the General Statutes.” N.C. Gen. Stat. § 143-215.221 (f1). In the North Carolina Environmental Policy Act, Chapter 113A, N.C. Gen. Stat. § 113A-4 sets out the details of what is to be included in an Environmental Impact Statement, and denotes the state agency and state agency official as responsible for compliance with the particulars of the Act.

Petitioner is an aggrieved party as defined by N.C. Gen. Stat. § 150B-2(6) and within the meaning of N.C.Gen. Stat. § 150B-23, and has timely filed this petition, in accordance with N.C. Gen. Stat. § 150B-23(f).

I. Procedural History

The procedural history leading up to the EMC's approval of the IBT Petition and issuance of the IBT Certificate is lengthy and complex. A brief summary is provided herein and will be more fully detailed in later filings. The IBT Recipients produced a Draft Environmental Impact Statement ("DEIS") in December 2003, which was revised and supplemented in October 2004 ("RDEIS"). Concord and Kannapolis then submitted their formal IBT Petition to the EMC in November 2004. The IBT Petition requested 24 mgd on an average daily basis from a combination of the Catawba and Yadkin-Pee Dee river basins to the Rocky River subbasin. The associated maximum IBT would be up to 38 mgd from the Catawba and up to 10 mgd from the Yadkin-Pee Dee. In December 2004, DWR staff recommended that the EMC proceed to public notice and comment on the IBT Petition.

On March 2, 2005, the IBT Recipients produced an addendum to the DEIS, RDEIS, and IBT Petition, purporting to address concerns raised by the EMC (the "March DEIS Addendum"). In May of 2005, DWR issued a notice of public hearings on the IBT Petition, indicating that written comments on the DEIS and Addendum should be received by July 1, 2005.

A Final Environmental Impact Statement was issued in May, 2006 ("FEIS"). The

FEIS requested 22 mgd on an average daily basis from a combination of the Catawba and Yadkin-Pee Dee river basins to the Rocky River subbasin. The associated maximum IBT would be up to 36 mgd from the Catawba and up to 10 mgd from the Yadkin-Pee Dee. On July 7, 2006, the Division of Water Resources released a supplement to the FEIS (the “July Supplement”) to correct modeling errors in the FEIS. In August, 2006, DWR issued a Notice of Public Meeting to be held September 7, 2006 and encouraged the submission of comments through September 30, 2006. On August 31, 2006, the DWR released a document titled “Analysis of Reservoir Levels and Water Supply Impacts of Proposed Concord Kannapolis Interbasin Transfer: Supplement to the Final Environmental Impact Statement” (the “August Supplement”). The stated purpose of this August Supplement to the FEIS was to correct errors in the computer modeling reported in the July Supplement.

DWR subsequently issued another Notice of Public Meeting, at the request of the EMC, to be held on September 19, 2006. On September 22, 2006, DENR issued a press release announcing that the EMC would postpone consideration of the IBT Petition until its January 11, 2007 meeting. Six days later, DENR issued another press release announcing that the deadline for the submission of comments would be extended until October 31, 2006. The comment period did, in fact, close on that date. On October 31, 2006, Petitioner Catawba Riverkeeper Foundation, Inc. submitted written comments on the IBT Petition, the FEIS and the two supplements to the FEIS. A copy of those comments is attached as **Exhibit B** and incorporated by reference herein.

Although the comment period had officially closed, DWR issued yet another iteration of the FEIS, which purported to supersede the May FEIS, on November 28, 2006. The Revised Final Environmental Impact Statement ("RFEIS") purported to incorporate the revisions and supplements issued in July and August, as well as changes made in response to the written comments submitted on or before October 31. Although public comment on the new version was not invited, the State Environmental Review Clearinghouse indicated, upon questioning, that it would accept written comments until January 8, 2007. This was three days before the EMC was scheduled to meet to consider the IBT Petition.

In December 2006, three members of the EMC designated as "hearing officers" released a report to the EMC on the IBT Petition. This report recommended that Concord and Kannapolis be authorized to transfer 10 million gallons a day from the Catawba River and the same amount from the Yadkin River, subject to a series of conditions. This recommendation was not among the alternatives requested by the IBT Recipients, nor was it considered in the Environmental Documents. Around this time, it was announced that the EMC would consider the IBT Petition on January 10 rather than January 11. On January 10, the EMC met and adopted the recommendation of the Hearing Officers. The IBT Certificate was signed on January 25, 2007. On January 31, 2007, DWR issued a Notice of Certificate announcing that the IBT Certificate had been issued. A copy of the Notice of Certificate is attached hereto as Exhibit C.

II. Parties

A. Petitioner Catawba Riverkeeper Foundation, Inc.

Petitioner Catawba Riverkeeper Foundation, Inc. is a non-profit, tax exempt organization formed pursuant to the laws of the state of North Carolina. It is dedicated to advocating for and securing the protection and enhancement of the Catawba River, its lakes, tributaries and watershed so that it will always sustain the human and wildlife populations that depend on it for life. The Catawba Riverkeeper Foundation was founded in 1997 and has approximately 1250 members, the majority of whom live, work and pay taxes in one of the fourteen counties that border that Catawba River. The Catawba Riverkeeper Foundation members regularly use and enjoy the Catawba River. Members depend upon and use the river for activities including, but not limited to, hiking, fishing, swimming, kayaking, canoeing, boating, water skiing and bird watching. Additionally, members rely on the Catawba River as a source of drinking water.

As part of its work, the Catawba Riverkeeper Foundation participates in numerous proceedings involving decisions that affect the Catawba River and its tributaries. Specifically, the Foundation provided detailed, timely oral and written comments during the public hearing process for the DEIS on the IBT Petition. Members and staff also provided technical review and commentary for the multiple versions of the environmental impact statements and submitted at least two separate Public Records requests to the North Carolina Department of Environment and Natural Resources on the IBT certification process.

B. Respondent Environmental Management Commission

Respondent Environmental Management Commission ("EMC"), is a 19-member Commission appointed by the Governor, the Senate Pro Tempore and the Speaker of the House.² The Commission is responsible for adopting rules for the protection, preservation and enhancement of the State's air and water resources.³ Commission members are chosen to represent various interests, including the medical profession, agriculture, engineering, fish and wildlife, groundwater, air and water pollution control, municipal or county government, and the public at large.⁴ The Commission oversees and adopts rules for several divisions of the Department of Environment and Natural Resources, including the Divisions of Air Quality, Land Resources, Water Quality, and Water Resources.⁵ As a primary entity tasked with stewardship of the state's water resources, the EMC is also tasked with shepherding the evaluation and study of applications for transfers of surface waters, more widely known as interbasin transfers.

III. Argument

The Record of Decision, FEIS and RFEIS violate the North Carolina Environmental Policy Act ("NCEPA"), N.C. Gen. Stat. §§ 113A-1-20 and form an inadequate basis for the issuance of the IBT Certificate. In addition, the decision to grant the IBT Certificate based upon the Environmental Documents, and the procedures employed by the EMC violate the statute regulating surface water transfers ("IBT

² EMC homepage, <http://h2o.enr.state.nc.us/admin/emc/>

³ Id.

⁴ Id.

⁵ Id.

statute”), N.C. Gen. Stat. § 143-215.22I, *et seq.* Finally, the IBT Certificate granted by the EMC and the decision to grant the Certificate without considering proper mitigation measures violate North Carolina’s rules for conservation during times of drought and other water emergencies. 15 N.C. ADMIN. CODE 0E.0601-.0615.

Through these actions, the EMC exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, failed to act as required by law or rule, and have otherwise substantially prejudiced Petitioner’s rights, in violation of the North Carolina Administrative Procedures Act, N.C. Gen. Stat. §150B-23. These violations include, but are not limited to, the following errors:

i. Violations of North Carolina Environmental Policy Act

The NCEPA, N.C. Gen. Stat. §§ 113A-1-20, directs the entity seeking an interbasin transfer of water to conduct an Environmental Impact Statement (“EIS”) to evaluate and disclose the impacts on the natural resources and human environment that may result from the transfer of the water between river basins. N.C. Gen. Stat. § 113A-8.1.⁶ As part of the environmental review, the responsible agency must prepare a “detailed statement” of the environmental impact of the proposed action, any significant adverse environmental effects that would result from the proposed action and could not be avoided, mitigation measures to minimize the impact, alternatives to the proposed action, the relationship between the short-term uses of the environment and the

⁶ NCEPA is based on the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 - 4345 and sometimes is referred to as a “little NEPA.” NEPA requirements are applicable to state agency action and are enforceable against state agencies as state law. *See Mullin v. Skinner*, 756 F. Supp. 904 (E.D.N.C. 1990); *Orange County Sensible Highways & Protected Environments, Inc. v. N.C. Dep’t of Transportation*, 46 N.C. App. 350, *cert. denied* 301 N.C. 94 (1980).

enhancement of long-term productivity, and any irreversible and irretrievable environmental changes that would result from the proposed action. N.C. Gen. Stat. § 113A-4(2); 1 N.C. ADMIN. CODE 25.0603(6). NCEPA further requires the publication of the draft of the EIS (“DEIS”) and provides for a minimum of 45 days for public review and comment. 1 N.C. ADMIN. CODE 25.0605(a). A minimum of 30 days is required for public review and comment of the final EIS (“FEIS”) before the agency may publish its record of decision (“ROD). *Id.* § 25.0605(c); §25.0606.

Although the IBT Recipients, as applicants for the IBT Certificate, had the Environmental Documents prepared, those documents form the basis for the EMC’s ultimate decision whether to grant or deny a certificate authorizing the interbasin transfer. As North Carolina courts have ruled, NCEPA clearly mandates “that State agencies assume the responsibility of studying and considering environmental consequences of proposed actions.” *In re Environmental Management Commission*, 53 N.C. App. 135, 144 (1981). Consequently, the EMC bears ultimate responsibility for compliance with NCEPA, a responsibility they failed to execute. The EMC violated NCEPA and its implementing regulations, including but not limited to the assertions below, by:

- A. Failing to take a “hard look” at the environmental impacts of its decision and alternatives to that decision, by, *inter alia*;
 - 1. Failing to examine impacts to wetlands;
 - 2. Failing to examine impacts to threatened or endangered species;
 - 3. Failing to examine impacts on outstanding resource waters, such as designated trout streams;

4. Failing to examine impacts on water supplies within the source basins; and
 5. Failing to consider the environmental impacts downstream of the intake pipe in the Catawba River Basin and downstream of the outfall in the Yadkin River Basin;
- B. Allowing the IBT Recipients to make an irreversible and irretrievable commitment of resources prior to the completion of the NCEPA-required environmental review and prior to the EMC's issuance of the IBT Certificate, in violation of 1 N.C. ADMIN. CODE 25.401(f);
 - C. Choosing an alternative that was neither proposed by the IBT Recipients nor disclosed, discussed or analyzed in the "final" EIS, in violation of N.C. Gen. Stat. § 113A-4(2)(d) and 1 N.C. ADMIN. CODE 25.0601 and 25.0603(4);
 - D. Failing to consider the environmental impacts of proposed alternatives, in violation of N.C. Gen. Stat. § 113A-4(2)(d) and 1 N.C. ADMIN. CODE 25.0601 and 25.0603(4);
 - E. Failing to publish a true final environmental impact statement for public review and comment before issuing the IBT Certificate;
 - F. Failing to consider the environmental impacts associated with construction of the infrastructure necessary for transferring the water in both basins, erroneously segmenting the project and subverting the intent of NCEPA to understand and evaluate the impacts of the entire project;
 - G. Failing to consider measures to mitigate environmental harm in both the source and receiving basins, in violation of N.C. Gen. Stat. § 113A-4(2)(c);
 - H. Failing to consult with other agencies with legal jurisdiction or special expertise regarding any anticipated environmental impacts, in violation of N.C. Gen. Stat. § 113A-4(2)(a); and
 - I. Failing to consider the cumulative, indirect and secondary impacts from the interbasin transfer, in violation of N.C. Gen. Stat. § 113A-4(2)(b) and 1 N.C. ADMIN. CODE. 25.0603(6);

1. Failure to assess the secondary, indirect and cumulative impacts from growth-inducement in the Rocky River sub-basin, i.e., the receiving basin; and
2. Failure to assess the cumulative, indirect and secondary impacts of other IBTs and consumptive uses that have been approved or under consideration within the region.

ii. Violations of the IBT Statute, N.C. Gen. Stat. § 143-215.22I, et seq.

The IBT Statute directs the EMC to determine that the benefits of the proposed transfer outweigh the detriments, and requires that the detriments be mitigated to a reasonable degree before issuing a certificate for the transfer of water. N.C. Gen. Stat. § 143-215.22I(g). The EMC must find these conditions are met “by a preponderance of the evidence,” *id.*, a legal standard requiring that the evidence on which a decision rests be credible, and the evidence, taken as a whole, shows that the fact sought to be proved is more probable than not. Given the numerous inadequacies, errors and oversights in the Environmental Documents, including but not limited to the RFEIS, upon which comments were not invited, as well as the IBT process, this standard cannot be met.

The EMC violated the provisions of IBT Statute, including but not limited to the assertions below, by:

- A. Failing to properly notify downstream users, in violation of N.C. Gen. Stat. §143-215.22I(d), by;
 1. Failing to properly notify downstream users in South Carolina of public hearings on the proposed transfer, depriving certain downstream users of fair opportunity to review and comment on the Environmental Documents and making the decision with limited or no input from the state of South Carolina;
- B. Failing to show adequate specific consideration of necessity, reasonableness and beneficial effects of the amount of surface water proposed to be transferred and its proposed uses, in violation of N. C. Gen. Stat. § 143-215-22I(f)(1), by;

1. Failing to consider admissions and other statements by the IBT recipients that they did not need the water requested in the petition;
 2. Failing to consider indications by one or more of the hearing officers during the hearing on the IBT before the EMC that the water requested could have come entirely from the Yadkin River basin, but that Respondents could not and did not consider this alternative because the IBT petition did not request it;
 3. Considering only two non-IBT alternatives to the transfer, as documented in the alternatives section of the RFEIS;
 4. Failing to adequately analyze water supply needs in the receiving basin;
 5. Arbitrarily and capriciously considering information outside of the scope of review of necessity, reasonableness and beneficial effects, including economic development for 30 year growth in Concord and Kannapolis and prior economic investment in infrastructure by Concord and Kannapolis;
- C. Failing to show specific consideration of cumulative effects on the source major river basins, in violation of N.C. Gen. Stat. §143-215.22I(f)(2a), by;
1. Failing to include information in the RFEIS regarding secondary impacts associated with expanding pumping facilities, existing waste water treatment facilities, raw water transmission lines, water treatment plants, and the finished distribution system in the Catawba River Basin;
 2. Failing to adequately consider impacts of the FERC re-licensure process;
 3. Failing to consider the safe yield of the reservoir system in the Yadkin River Basin, when it is possible that the transfer would violate the river's safe yield;
- D. Failing to consider adequacy of drought measures;
- E. Failing to observe the state's public policy to maintain, protect, and enhance water quality as well as the state and federal antidegradation policy, in violation of N.C.Gen.Stat.§ 143-215.22I(m), by;

1. Failing to consider specific statements in the RFEIS that growth in the receiving basin could have significant secondary impacts including continued degradation of water quality.

iii. Violation of North Carolina's rules for conservation during times of drought and other water emergencies. 15 N.C. ADMIN. CODE 02E.0601-.0615

After the culmination of the drought of 2002 North Carolina passed legislation requiring the drafting of rules to address drought conditions.⁷ The rules are at 15 N.C.ADMIN. CODE 02E.0601-.0615. Not only does the drought plan articulated in the IBT Certificate at Exhibit A not comply with the new rules, the decision to grant the IBT Certificate without adequate consideration of mitigation measures also violates the provisions of the IBT Statute. Respondents violate the rules for Water Use During Droughts and Water Supply Emergencies as well as the IBT statute by:

- A. Issuing a certificate that does not comply with the more strict Extreme Drought designations at 15 N.C. ADMIN. CODE. 02E.0613, and thereby also not complying with the IBT statute by granting a certificate without sufficient consideration of mitigation measures;
- B. Issuing a certificate that does not comply with the more strict Exceptional Drought designations at 15 N.C. ADMIN. CODE. 02E.0614, and thereby also not complying with the IBT statute by granting a certificate without sufficient consideration of mitigation measures;
- C. Issuing a certificate that does not comply with the water use reduction reporting at 15 N.C. ADMIN.CODE. 02E.0605, and thereby also not complying with the IBT statute by granting a certificate without sufficient consideration of mitigation measures;

⁷ NCDENR, DWR website on HB1215, Water Conservation and Water Reuse, http://www.ncwater.org/Water_Supply_Planning/Water_Conservation/hb1215/

- D. Issuing a certificate that does not comply with the local government water shortage response planning requirements at 15 N.C. ADMIN. CODE 02E.0609, and thereby also not complying with the IBT statute by granting a certificate without sufficient consideration of mitigation measures.

IV. Conclusion

For the foregoing reasons, in violating the North Carolina Environmental Policy Act, N.C. Gen. Stat. § 113A, et. seq., the North Carolina IBT Statute, N.C. Gen. Stat. § 143-215.22I, and the North Carolina rules for Water Use During Droughts and Water Supply Emergencies 15 N.C. ADMIN. CODE 02E.0601-.0615, respondents have acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, failed to act as required by law and rule, exceeded Respondents' authority and jurisdiction, acted contrary to the provisions of the APA, and have otherwise substantially prejudiced Petitioner's rights. THEREFORE, the Catawba Riverkeeper Foundation, Inc., hereby respectfully petitions for a contested case hearing pursuant to N.C. Gen. Stat. § 150B-23.

This the 28th day of March, 2007.

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CERTIFICATE OF SERVICE

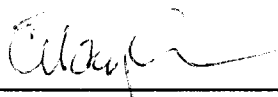
The undersigned hereby certifies that the foregoing PETITION FOR CONTESTED CASE HEARING (with attachments) have been delivered by electronic mail and by U.S.P.S. to the following:

The Office of Administrative Hearings
Mail Service Center
Raleigh, North Carolina 27699-6714

and that an electronic version of the foregoing PETITION FOR CONTESTED CASE HEARING (with attachments) has been delivered by electronic mail to the following:

Mary Penny Thompson, Esq. General Counsel and Registered Agent for Respondents mary.p.thompson@ncmail.net Department of Environment and Natural Resources 1601 Mail Service Center Raleigh, NC 27699-1601	Marc D. Bernstein, Esq. Special Deputy Attorney General mbernstein@ncdoj.gov N.C. Department of Justice, Environmental Protection Division 9001 Mail Service Center Raleigh, NC 27699-9001
H. Glenn Dunn, Esq. Poyner & Spruill, L.L.P. hgdunn@poynerspruill.com 3600 Glenwood Avenue P. O. Box 10096 Raleigh, NC 27605-0096 ATTORNEY FOR THE IBT RECIPIENTS, CONCORD AND KANNAPOLIS	

This the 28th day of March, 2007.



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