

Regulation of Surface Water Transfers Statutory Guidance

In 1993, the North Carolina Legislature adopted the Regulation of Surface Water Transfers Act (G.S. §143-215.22I). The intent of the law is to regulate large surface water transfers between river basins. It does this by requiring a certificate from the Environmental Management Commission (EMC). The act has been modified several times since it was first adopted, most recently in 2007 when part .22I was repealed and replaced with part .22L.

A unique feature of the IBT law is that certain sub-basins are also defined as river basins. According to G.S. §143-215.22G, there are 38 river basins (subbasins to the major river basins), rather than 17. An IBT certificate is required for any transfer, above the following thresholds, between any of these defined river basins.

Water systems that meet the following criteria are required to apply for an Interbasin Transfer (IBT) Certificate:

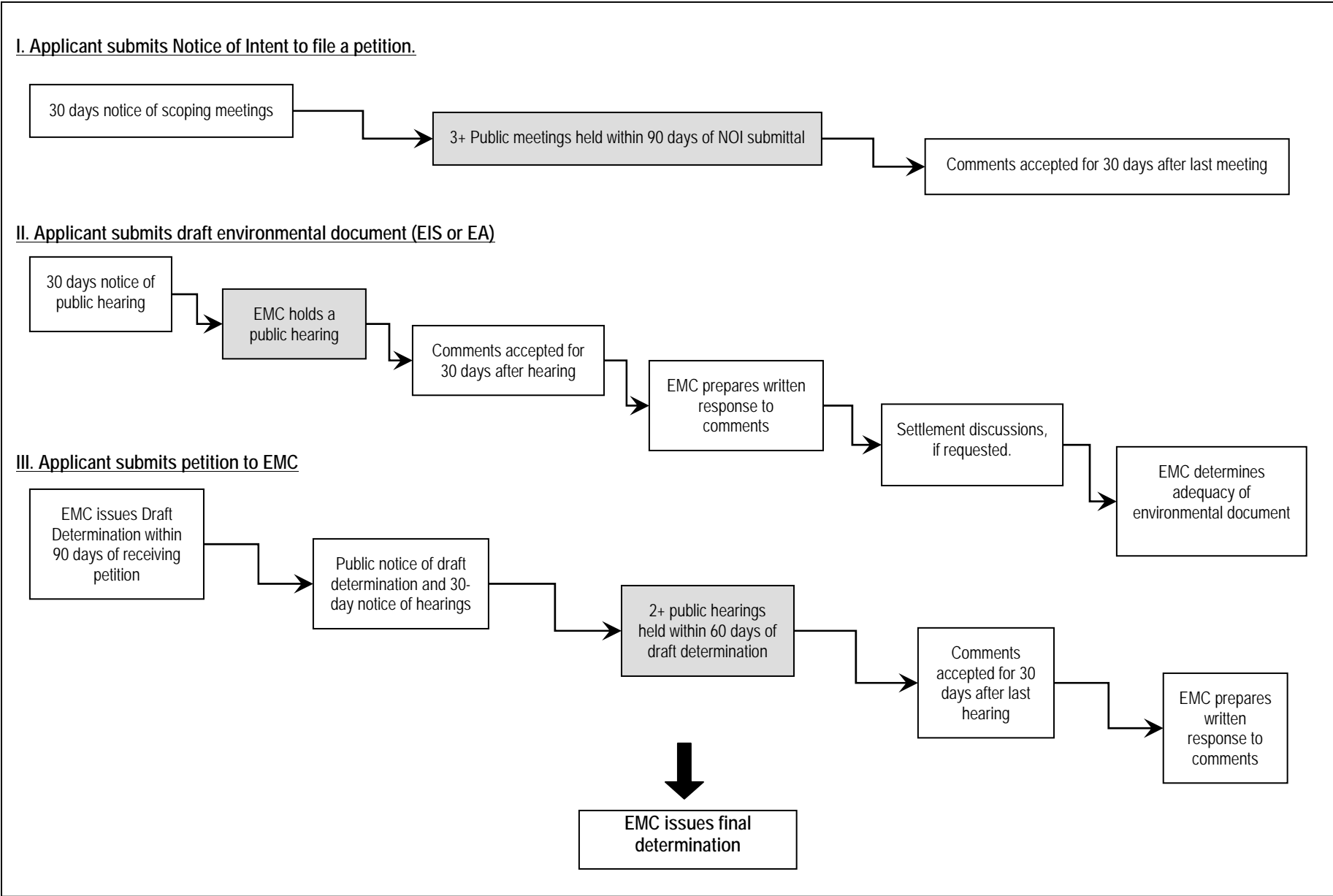
- (1) Initiate a new transfer of at least 2 million gallons per day (MGD) of surface water from one river basin to another;
- (2) Increase an existing transfer by 25% or more above the average daily flow (ADF) transferred from June 30, 1992- 1 July 1993 (if the total transfer including the increase is more than 2 MGD);
- (3) Increase an existing transfer above the amount approved by the Commission in a certificate issued prior to 1 July 1993.

Due to the fact that the Surface Water Transfer Act was first adopted in 1993, many of the IBT rules and requirements reference a system's daily flows and capacity at that time. Facilities that were in existence prior to 1993 are said to have Grandfathered Transfers up to either 25% above their ADF at that time, their maximum system capacity at that time, or 2 MGD - whichever is greater. If a facility existed or was under construction by July 1, 1993, a certificate is not required up to the full capacity of that facility to transfer water, regardless of the transfer amount.

It is important to note that although North Carolina does allow systems to take water from one river basin in order to meet needs in another, the needs of certain communities may take precedence over others. It is state policy that the foreseeable needs of systems serving areas outside their source river basin are subordinate to the needs of systems serving areas within their source river basin.

The procedure for obtaining an Interbasin Transfer Certificate is specifically laid out in G.S. §143-215.22L. The full process can take three to five years and offers a number of opportunities for public comment and review. Figure 1 is a schematic of the interbasin transfer certification process.

FIGURE 1 – IBT CERTIFICATION PROCESS FLOW CHART



An applicant for an Interbasin Transfer may be any “person” who transfers over 2 MGD (maximum daily amount) of water . Although the primary applicant does not need to be a public water system, the statutes do prohibit reselling transferred water to any public water system not listed on the certificate as a co-applicant. Therefore all public water systems having a foreseeable need to purchase transferred water should become a co-applicant to the certificate.

“Public water system” means a system for the provision to the public of water for human consumption through pipes or other constructed conveyances if the system serves 15 or more service connections or which regularly serves 25 or more individuals. The term includes:

- a. Any collection, treatment, storage or distribution facility under control of the operator of the system and used primarily in connection with the system; and*
- b. Any collection or pretreatment storage facility not under the control of the operator of the system that is used primarily in connection with the system. A public water system is either a “community water system” or a “noncommunity water system” as follows:*

- a. “Community water system” means a public water system that serves 15 or more service connections or that regularly serves at least 25 year-round residents.*
- b. “Noncommunity water system” means a public water system that is not a community water system.*

- G.S. §130A-313

STEP I: NOTICE OF INTENT AND SCOPING MEETINGS

To begin the IBT Certification process, an applicant must submit a Notice of Intent to File a Petition (NOI) to the EMC. The primary applicant may file the notice on behalf of any co-applicants. The notice should identify the proposed source water, source basin, receiving basin(s), and include a nontechnical description of the request.

DWR staff recommends that the applicant be prepared to move forward with both the scheduling and notice of the scoping meetings when submitting the NOI is submitted to the EMC. Within 90 days after the NOI is filed, the applicant is required to hold at least three public meetings:

- at least one in the source river basin, upstream from the proposed point of withdrawal;
- at least one in source river basin, downstream from the proposed point of withdrawal;
- and at least one in each receiving river basin.

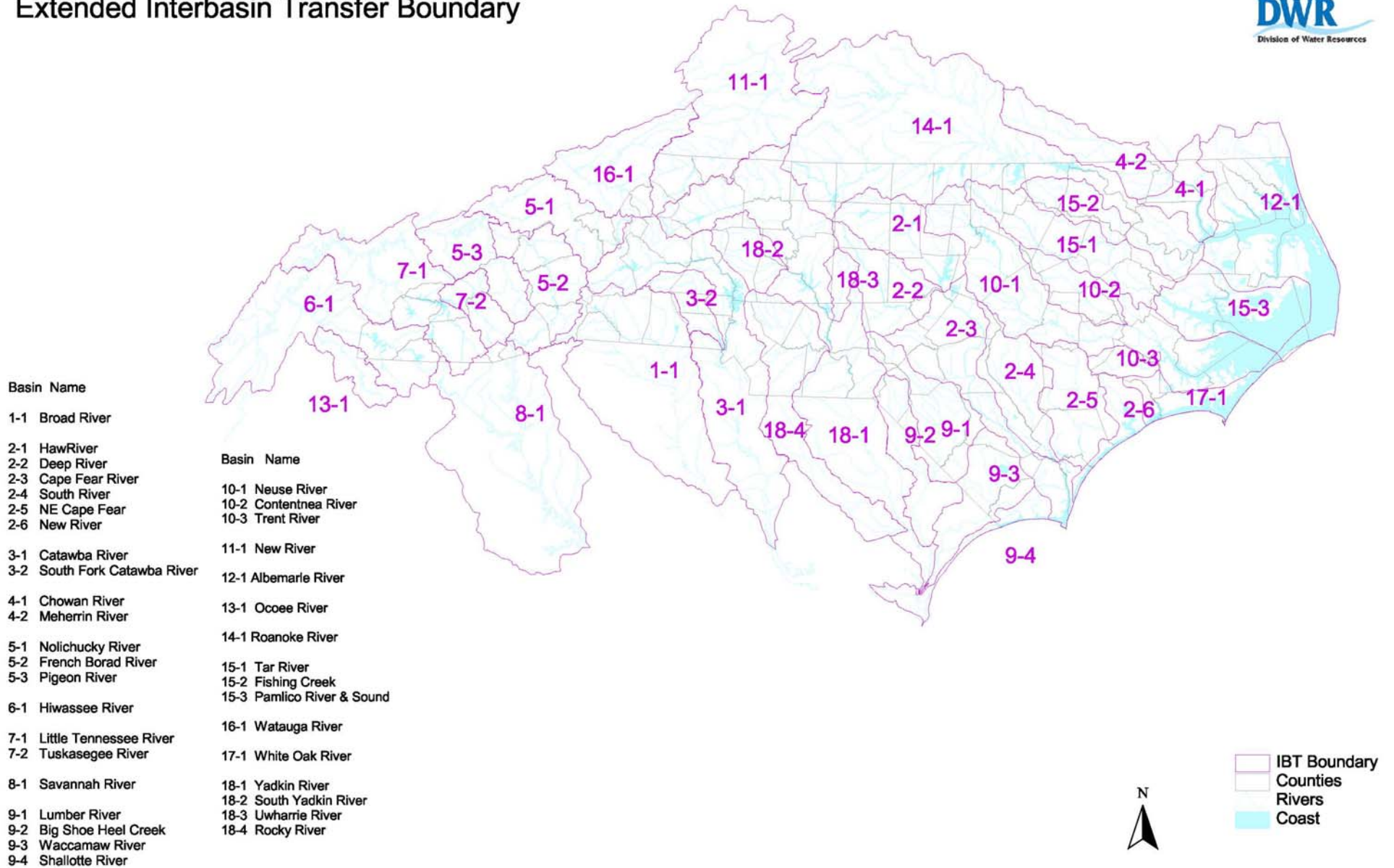
The purpose of these meetings is to 1) to receive comments on the scope of the environmental documents that the applicant will prepare and 2) provide information regarding the nature and extent of the proposed transfer.

30 days written notice of the public meetings and the opportunity to comment must be provided as described below in Table 1. The notice should specifically include a request from the applicant for comments on the alternatives and issues that should be addressed in the environmental documents.

The applicant must accept written comment on the scope of the environmental documents for a minimum of 30 days following the last public meeting.

Figure 2

Extended Interbasin Transfer Boundary



STEP II: PREPARATION AND SUBMITTAL OF ENVIRONMENTAL DOCUMENTS

All applicants must prepare an environmental document in support of their petition. The applicant prepares this document on behalf of the Department for approval by the Environmental Management Commission. In all cases, the applicant must prepare an Environmental Assessment (EA), with an Environmental Impact Statement (EIS) being additionally required for any transfer between the 17 major river basins.

An EIS should address the following requirements, which are also set forth in G.S. §113A-4 and §143-215.22L(d):

1. A comprehensive analysis of the environmental impacts that would occur in the source and the receiving river basins if the petition for a certificate is granted;
2. Any significant adverse environmental effects which cannot be avoided;
3. A description of measures to mitigate any adverse impacts that may arise from the proposed interbasin transfer;
4. An evaluation of alternatives to the proposed interbasin transfer, including water supply options that do not require an Interbasin transfer and use of water conservation measures.
5. The relationship between the short-term uses of the environment involved in the proposed action and the maintenance and enhancement of long-term productivity and;
6. Any irreversible and irretrievable environmental changes which would be involved in the proposed action should it be implemented.

The Commission is required to hold a public hearing on the draft environmental document. Thirty-days notice of the hearing will be published via the Environmental Bulletin and as listed in Table 1. Anyone wishing to view the environmental document and submit written comments may do so. The Commission will accept written comments for 30 days after hearing. After the public hearing the Commission will prepare a record of all comments, including written responses to those questions posed in writing. The record will also include complete copies of scientific or technical comments related to the potential impact of the interbasin transfer.

The Commission may not act on any petition until they have determined that the environmental document is adequate. Any decision made by the EMC regarding the adequacy of the environmental document is subject to review if their final decision on the certificate is contested.

STEP III: PETITION

Although there is no application required to apply for an Interbasin Transfer Certificate, all applicants are required to submit a petition. The Division recommends that the applicant begin preparing its Petition while the draft environmental document is being reviewed by the EMC. A petition must include all of the components listed in Table 2. The petition must also be signed by all public water systems intending to purchase or otherwise use the transferred water.⁵

⁵ The Division can assist the applicant by providing a current list of existing public water systems; however, the applicant will need to determine which current and future users should be included as co-applicants on the certificate.

TABLE 2 : PETITION REQUIREMENTS

TABLE 2 : PETITION REQUIREMENTS	
PROJECT OVERVIEW	
✓	A description of any facilities used to transfer water (including the location and capacity of water intakes, pumps, pipelines, etc.)
✓	A description of all proposed consumptive and non-consumptive uses of the transferred water.
WATER QUALITY	
✓	A summary of the water quality for both the source and receiving waterbodies, including any waters that are 303(d) listed for being impaired.
✓	Information on aquatic habitats for rare, threatened, and endangered species in both the source and receiving waterbodies.
✓	In-stream flow data for segments of the source and receiving waterbodies that may be affected by the transfer.
✓	A demonstration that the proposed transfer, if added to all other existing and planned transfers (or registered withdrawals) in the source river basin, would not reduce the amount of available water to a degree that would impair existing uses, pursuant to NC's antidegradation policy. This demonstration should also include: <ul style="list-style-type: none"> • Existing and planned consumptive uses in the source river basin; • Existing and planned nonconsumptive uses in the source river basin; • A finding that the transfer would not result in a water level inadequate to support existing uses of the reservoir (if the proposed transfer would impact a reservoir in the source basin).
MITIGATION AND ANTIDEGRADATION	
✓	A description of water conservation measures in use by the applicant at the time of the petition and additional conservation measures that will be implemented if the certificate is granted.
✓	A description of existing and future water transfers (or withdrawals) from the source river basin that are either registered or included in a local water supply plan (LWSP).
WATER SUPPLY	
✓	A LWSP. If the plan is more than two years old, the petition should include an updated version.
✓	An assessment of the applicant's future water supply needs.
✓	A summary of present and future water supply needs, as identified in LWSPs, for public water systems within the source river basin. This analysis should include agricultural, recreational, and industrial uses, as well as electric power generation.
✓	A description of existing, planned, and potential sources of water within the receiving river basin that are a practicable alternative to the proposed transfer. This should include surface water impoundments, groundwater wells, reinjection storage, and purchases.
OTHER	
✓	Any other information deemed necessary by the Commission for review of the proposed water transfer. <ul style="list-style-type: none"> • A compliance and monitoring plan • Water balance table showing how increase in water use and transfer change over time.

The applicant, any interested party, the Department, or the Commission may request a settlement discussion. In this event, the Commission will appoint a mediator who may be a member of the Commission, an employee of the Department, or a neutral third party. The mediator may not be someone who has served or will serve as a hearing officer.

The mediation officer will make all reasonable efforts to initiate settlement discussions between the applicant and all other interested parties. Nothing occurring during the settlement discussions may be subject to discovery. All statements or conduct by a party, the mediation officer, or other persons are inadmissible in any subsequent proceedings on the petition.

STEP IV: DRAFT DETERMINATION

Within 90 days after applicant submits its petition, the Commission will issue a draft determination on whether or not to grant the certificate.

The draft determination must include the same conditions and limitations, findings of fact, and conclusions of law that would be required in a final determination. The Commission will give notice of the draft determination as previously described in Table 1.

Within 60 days of the issuance of the draft determination, the Commission will hold several public hearings:

- At least one in the affected area of the source river basin,
- at least one in the affected area of the receiving river basin(s),
- additional hearings based on various interests of either upstream or downstream parties potentially affected by the proposed transfer.

Thirty-day written notice of the public hearing will be provided (as described in Table 1) and written comments on the draft determination will be accepted for a minimum of 30 days following the last public hearing. After the public hearings, the Commission will again prepare a record of all comments, which will include written responses to those questions posed in writing. The record will also include complete copies of scientific or technical comments related to the potential impact of the interbasin transfer.

STEP V: FINAL DETERMINATION

In determining whether or not to issue a certificate, the Commission is required by law to consider specific documents, factors, and adhere to a burden of proof. Each of these requirements is explicitly defined by regulation.

A. Documents.

The Commission is required to reference each of the following documents:

1. Petition;
2. Environmental document prepared by the applicant;
3. Information on the water quality of the source and receiving river basins;
Including waters that are identified as impaired, that are subject to a total maximum daily load (TMDL), or that would have their assimilative capacity impaired if the certificate is issued.
4. All oral and written comments;
5. Any other information that the Commission determines to be relevant and useful.

B. Findings of Fact.

The Commission is required to consider each of the following factors and state, in writing, Findings of Fact and Conclusions of Law with regard to each:

1. The necessity and reasonableness of both the amount of water to be transferred and its proposed uses;
2. The present and reasonably foreseeable⁶ detrimental impacts on the source and receiving river basins, including:
 - Present and future effects on water supply needs (*public, industrial, economic, recreational, and agricultural*)
 - Wastewater assimilation
 - Water quality
 - Fish and wildlife habitat
 - Electric power generation
 - Navigation
 - Recreation

This determination should also include specific findings about measures that would avoid the above detrimental impacts.

3. The cumulative effect of any existing/proposed water transfer or consumptive use (in the source basin) on the source major river basin;
4. The availability of reasonable alternatives to the proposed transfer (not limited to those proposed by the applicant), including the potential capacity of alternative water sources, the potential of each alternative to either reduce or avoid the proposed transfer, probable costs, and environmental impacts. The final determination must also include specific findings on the following issues related to alternatives:
 - Why the applicant's need for water cannot be satisfied by alternatives within the receiving basin (including unused capacity under an existing transfer certificate);
 - The extent to which access to potential surface and ground water sources within the receiving river basin is no longer available due to depletion, contamination, or the declaration of a capacity use area;
 - The feasibility of purchasing water from other suppliers in the receiving basin and of the transfer of water from another sub-basin within the receiving major river basin. When technically and economically feasible, the Commission must give preference to alternatives involving transfers within the major receiving river basin;
5. The applicant's right of withdrawal and present/proposed usage of impoundment storage;
6. The storage allocations (and purposes) for any water, withdrawn or transferred, that would be stored in a multipurpose reservoir constructed by the United States Army Corps of Engineers;
7. Whether the service area of the applicant is located in both the source river basin and the receiving river basin;
8. Any other facts and circumstances that are reasonably necessary to meet regulatory requirements.

⁶ LWSPs are to estimate future water needs, however other more recent information may be used if the EMC finds it reliable.

C. Burden of Proof

The Commission will to grant a certificate if it finds that the applicant has established, by a preponderance of evidence, all of the following:

1. The benefits of the proposed transfer outweigh its detriments (decision guided by the approved environmental document).
2. Any detriments have been (or will be) mitigated to the maximum degree practicable.
3. The amount of the transfer does not exceed the amount of the projected shortfall under the applicant's water supply plan. This determination should take into account all other sources of water that are available to the applicant.
4. There are no reasonable alternatives to the proposed transfer.

STEP VI: CERTIFICATE CONDITIONS AND LIMITATIONS

The Commission may choose to grant the certificate in whole, in part, or deny the certificate. They may also impose any conditions or limitations that they find necessary, including placing a limit on the time period that the certificate is valid. One particular requirement is that the conditions include mitigation measures to minimize detrimental effects in the source and receiving river basins. In addition, the certificate requires all of the following:

- (1) A water conservation plan specifying measures to be implemented by the applicant, to ensure efficient use of the transferred water in the receiving basin. Except in circumstances of technical or economic infeasibility, or adverse environmental impact, the water conservation plan shall require measures that equal or exceed the most stringent conservation plan implemented by a community water system withdrawing from the source river basin.
- (2) A drought management plan that specifies how the transfer will be managed during drought conditions or other emergencies. Except in circumstances of technical or economic infeasibility, or adverse environmental impact, this plan will include mandatory reductions based on the severity and duration of a drought in the source river basin. The plan must also equal or exceed the most stringent water conservation plan implemented by a community water system withdrawing water from the source river basin.
- (3) A limit on the maximum daily water transfer. The certificate must also include specific methods or devices to measure the amount of water transferred.
- (4) A provision that the Commission may amend a certificate to reduce the authorized transfer whenever it appears that an alternative source of water is available to the certificate holder from within the receiving river basin. This may include, but not be limited to, the purchase of water from another supplier within the receiving basin or the transfer of water from another sub-basin within the receiving major river basin.

(5) A provision that the Commission may amend the certificate, at any time, to reduce the authorized transfer if they find that the applicant's projected water needs are less than the projected needs as defined at the time the certificate was granted.

(6) A requirement that the certificate holder report the quantity of water transferred during each calendar quarter. The report should be submitted to the Commission no later than 30 days after the end of the quarter.

(7) A provision that the applicant will not sell transferred water to another public water supply system in the receiving basin that is not listed as a co-applicant on the certificate.

When any transfer equals or exceeds eighty percent (80%) of the amount authorized in the certificate, the applicant must submit a detailed plan to the Commission specifying how future water needs will be addressed. The applicant must begin implementing the plan when the transfer equals or exceeds ninety percent (90%) of the authorized amount.

Any final decision by the Commission may be subject to both administrative and judicial reviews. Anyone wishing to appeal the EMC's decision may do so by contacting the Office of Administrative Hearings.