

NORTH CAROLINA  
CUMBERLAND COUNTY

FILED IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

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CLERK OF SUPERIOR COURT  
CUMBERLAND COUNTY

NORTH CAROLINA ENVIRONMENTAL )  
MANAGEMENT COMMISSION; NORTH )  
CAROLINA DEPARTMENT OF )  
ENVIRONMENTAL QUALITY )

PETITIONERS, )

And )

TOWN OF CARY AND TOWN OF APEX, )  
PETITIONERS-INTERVENORS, )

v. )

THE CITY OF FAYETTEVILLE AND THE )  
PUBLIC WORKS COMMISSION OF THE )  
CITY OF FAYETTEVILLE, )

RESPONDENTS, )

And )

TOWN OF EASTOVER AND LOWER CAPE )  
FEAR WATER AND SEWER AUTHORITY, )  
RESPONDENTS-INTERVENORS, )

SUBMITTED IN COURT ON

BY: \_\_\_\_\_  
Ass't. / Deputy, Clerk of Superior Court

**CONSENT JUDGMENT**

THIS CAUSE came on to be heard by consent before the undersigned Superior Court Judge. Counsel for the Parties (further defined in Section A, *infra*) advised the Court that the Parties had reached agreement on a reasonable resolution of the disputes among the Parties which the Parties desire to have incorporated into a Consent Judgment. In accordance with the settlement reached among the Parties, this Consent Judgment has been prepared and submitted by counsel for

the Parties. Upon the Court's consideration, review and approval, this Consent Judgment is duly entered as a final adjudication in this action as follows:

### **FINDINGS OF FACT**

#### **A. PARTIES.**

1. Petitioner the North Carolina Department of Environmental Quality ("DEQ") is a state agency responsible for protecting North Carolina's natural resources. It is comprised, in part, of the Division of Water Resources ("DWR") which is responsible for, among other things, administering and regulating instate interbasin transfer ("IBT") permitting, ground and surface water planning and evaluation, basin modeling and water quality and quantity. *See* N.C. Gen. Stat. §§ 143-215.3, 143B-279.2.

2. Petitioner the North Carolina Environmental Management Commission ("EMC") is a 15-member commission responsible for adopting rules for the protection, preservation and enhancement of the State's air and water resources. The EMC is responsible for approving requests for interbasin transfers and can choose to approve, deny or deny in part a request to modify an existing interbasin transfer certificate. *See* Part 2A of Article 21 of Chapter 143 of the General Statutes ("NC IBT Act" or "Act").

3. Petitioner-Intervenor the Town of Cary ("Town of Cary") is located in Wake County, North Carolina, above Lock & Dam No. 3 on the Cape Fear River. The Town of Cary applied for, and received, an interbasin transfer certificate in 1989, 2001 and 2015.

4. Petitioner-Intervenor the Town of Apex ("Town of Apex") is located in Wake County, North Carolina, above Lock & Dam No. 3 on the Cape Fear River. In conjunction with the Town of Cary, the Town of Apex applied for, and received, an interbasin transfer certificate in 1989, 2001, and 2015.

5. The Towns of Cary and Apex collectively provide water for Morrisville, the Wake County portion of Research Triangle Park, and Raleigh-Durham Airport Authority and have mutual aid agreements with other communities in the area, including, Raleigh, Durham and the Orange Water and Sewer Authority.

6. Respondent the City of Fayetteville (“Fayetteville”) is a municipality in North Carolina which is populated in part by the United States Army Base Fort Bragg.

7. Respondent Fayetteville Public Works Commission<sup>1</sup> (“FPWC”) provides water, electric, and wastewater services to Cumberland County, Fayetteville, portions of Hoke County, as well as water service to Fort Bragg, North Carolina.

8. Respondent-Intervenor the Lower Cape Fear Water and Sewer Authority (“LCFWSA”) serves primarily New Hanover, Brunswick, Pender, Columbus, and Bladen Counties, North Carolina and the City of Wilmington, as well as Smithfield Foods and Invista Corporation.

9. Respondent-Intervenor the Town of Eastover (“Town of Eastover”) gets its water from the Eastover Sanitary District, which gets its water from the City of Dunn, which in turns gets its water from the Cape Fear River.

B. GOVERNING SUBSTANTIVE LAW.

10. The regulation of surface water transfers is governed by N.C. Gen. Stat. §143-215.22L. An interbasin transfer refers to the withdrawal of surface water from one river basin (referred to as the source basin) and the discharge of all or any part of the water to another basin (referred to as the receiving basin). “River basin” is defined in N.C. Gen. Stat. § 143-215.22LG(1b) (effective January 1, 2018).

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<sup>1</sup> The Public Works Commission of the City of Fayetteville was renamed “Fayetteville Public Works Commission” as a result of the enactment of Session Law 2016-47.

11. Under N.C. Gen. Stat. § 143-215.22L(a) of the Act, a certificate must be obtained from the EMC before a person can either: (1) initiate a transfer of 2,000,000 gallons of water or more per day, calculated as a daily average of a calendar month and not to exceed 3,000,000 gallons per day in one day, from one river basin to another; or (2) increase the amount of an existing transfer of water from one river basin to another by twenty-five percent (25%) or more above the average daily amount transferred during the year ending July 1, 1993 if the total transfer, including the increase, is 2,000,000 gallons or more per day.

12. Under N.C. Gen. Stat. § 143-215.22L(m) of the Act, the EMC shall grant a certificate for a water transfer if the EMC finds that the applicant has established by a preponderance of the evidence all of the following: (a) the benefits of the proposed transfer outweigh the detriments of the proposed transfer. In making this determination, the EMC is to be guided by the approved environmental document and the policy set out in subsection (t) of this section; (b) the detriments have been or will be mitigated to the maximum degree practicable; (c) the amount of the transfer does not exceed the amount of the projected shortfall under the applicant's water supply plan after first taking into account all other sources of water that are available to the applicant; and (d) there are no reasonable alternatives to the proposed transfer.

13. Under N.C. Gen. Stat. § 143-215.22L(v)(1) of the Act, the EMC or DEQ may make any of the following modifications to a certificate after providing electronic notice to persons who have identified themselves in writing as interested parties: (a) correction of typographical errors; (b) clarification of existing conditions or language; (c) updates, requested by the certificate holder, to a conservation plan, drought management plan, or compliance and monitoring plan; or (d) modifications requested by the certificate holder to reflect altered requirements due to the amendment of Section 22L.

14. Under N.C. Gen. Stat. § 143-215.22L(v)(2) of the Act, a person who holds a certificate for an IBT may request that the EMC modify the certificate.

15. Under N.C. Gen. Stat. §§ 143-215.3(a)(1), 143B-279.2(a)(2), and 143B-282(a)(2)i., the EMC has the power and duty to promulgate rules to be followed in the protection, preservation, and enhancement of the water and air resources of the State.

C. PROCEDURAL HISTORY.

16. On November 3, 1989, the EMC granted the Towns of Cary and Apex the authority to transfer 16.0 million gallons per day (“mgd”) from the Cape Fear River Basin to the Neuse River Basin.

17. On July 12, 2001, the EMC granted the Towns of Cary and Apex, as well as the Town of Morrisville and Wake County (for Research Triangle Park South) (collectively, the “IBT Certificate Holders”) an interbasin transfer increase from 16.0 mgd to 24.0 mgd, calculated on a maximum daily basis. This increase was set forth in a certificate issued by the EMC to the IBT Certificate Holders and shall be referred to herein as the “2001 IBT Certificate.” The 2001 IBT Certificate used water demand projections based on a thirty-year planning horizon.

18. The 2001 IBT Certificate contained a return flow condition, Condition 1, requiring the IBT Certificate Holders to return water to the Haw or Cape Fear River Basins, which read as follows:

The holders of this certificate, after 2010, shall return water supplied from the Haw River Basin used in the Neuse River Basin to either the Haw or Cape Fear River Basins... (a) Any water used in the Neuse Basin in excess of 16 mgd adjusted on a daily basis shall be returned; (b) Water used for consumptive purposes in the Neuse Basin will not be subject to this condition.

Nothing in this certificate shall decrease the amount of any transfer that existed prior to July 1, 1993 or that was approved pursuant to [the

predecessor statutes to the Act], including such approved transfer of 16 million gallons per day.

19. In 2013, the General Assembly amended the NC IBT Act to add subsection (v) regarding modification of an IBT certificate.

20. On March 12, 2015, the EMC granted the IBT Certificate Holders an interbasin transfer increase from 24.0 mgd to 33.0 mgd, calculated as a daily average of a calendar month. This increase was set forth in a certificate issued by the EMC to the IBT Certificate Holders and shall be referred to herein as the "2015 IBT Certificate."

21. The 2015 IBT Certificate, as issued by the EMC on March 12, 2015, does not contain a return flow condition to either the Haw or Cape Fear River Basins. The Western Wake Regional Water Reclamation Facility (WWRWRF) had begun to operate and discharge water into the Cape Fear River Basin prior to the issuance of the 2015 IBT Certificate.

22. The 2015 IBT Certificate, as issued by the EMC on March 12, 2015, also contains Condition 7 (the "Reopener Provision"), which provides that:

If the [EMC] determines that the record on which this Certificate is based is substantially in error or if new information becomes available that clearly demonstrates that any Finding of Fact (including those regarding environmental, hydrologic, or water use impacts) pursuant to G.S. § 143-215.22L(k) was not or is no longer supported or is materially incomplete, the [EMC] may re-open and modify this Certificate to ensure continued compliance with G.S. Chapter 143, Article 21, Part 2A.

The 2001 IBT Certificate also contained a reopener provision in Condition 5.

23. On May 5, 2015, Fayetteville and FPWC challenged the issuance of the 2015 IBT Certificate by filing a petition for contested case hearing in the North Carolina Office of Administrative Hearings, case no. 15 EHR 03241. Fayetteville and FPWC alleged that the EMC and DEQ exceeded their authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and/or failed to act as required by law or rule by issuing

the 2015 IBT Certificate. A primary contention of the petition was that the EMC and DEQ erred by failing to include in the 2015 IBT Certificate a return flow condition to the Haw or Cape Fear River Basins.

24. The Towns of Cary and Apex intervened in the contested case to defend issuance of the 2015 IBT Certificate on July 20, 2015.

25. LCFWSA and Town of Eastover also intervened to challenge the issuance of the 2015 IBT Certificate on January 6, 2016.

26. On April 22, 2016, the Towns of Cary and Apex sent a letter to the EMC entitled "Request for Clerical Correction of the Certificate to Conform to Language of the [EMC's] Motion Approving the Certificate." The Decision portion of the 2015 IBT Certificate stated that "the [EMC] has determined that... any detriments to the proposed certificate modification will be mitigated to a reasonable degree under the condition of this Certificate." However, during the EMC's regularly scheduled meeting on March 12, 2015, the motion predicating the issuance of the 2015 IBT Certificate provided, in pertinent part, "the detriments have been mitigated to the maximum degree possible." North Carolina General Statute Section 143-215.22L(m)(2) requires the EMC to grant a certificate upon finding, in relevant part, that "the detriments have been or will be mitigated to the maximum degree practicable." At its May, 2016 regularly scheduled meeting, the EMC directed its staff to conform the language in the 2015 IBT Certificate to the language contained in the March 11 and March 12, 2015 motions.

27. On May 18, 2016, Fayetteville, FPWC, LCFWSA and the Town of Eastover filed a second petition for contested case hearing, case no. 16 EHR 05130, challenging the EMC's action and authority for directing its staff to conform the language in the 2015 IBT Certificate to the language in the EMC's motions. The two cases were consolidated on June 7, 2016.

28. The consolidated cases were heard before Administrative Law Judge (“ALJ”) Donald J. Overby in the North Carolina Office of Administrative Hearings from June 13 to June 21, 2016.

29. On February 7, 2017, after considering the hearing testimony and evidentiary exhibits, the Parties’ proposed findings of fact and conclusions of law and post-hearing briefs, ALJ Overby issued his Final Decision, holding as follows:

NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that [EMC and DEQ] substantially prejudiced [Fayetteville, FPWC, LCFWSA and Town of Eastover’s] rights, and also exceeded their authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously and failed to act as required by law or rule when [EMC and DEQ] issued the 2015 IBT Certificate to the Applicants.<sup>2</sup> This Tribunal could, and arguably should, reverse the entire flawed procedure used in issuing this IBT Certificate, however, under the facts and circumstances of this contested case the following is fair and reasonable:

1. Condition number 7 in the 2015 IBT Certificate, known as the re-open provision is void.
2. For consideration of future interbasin transfers, [EMC and DEQ] should properly promulgate and enact rules through the formal rule-making process.
3. [EMC and DEQ] are directed to re-issue the 2015 IBT Certificate with a condition requiring return to the Cape Fear River Basin in at least the quantities that were assumed in the Applicants’ Environmental Assessment. The average quantities of these returns to the Cape Fear River Basin through discharges from the WWRWRF (Western Wake Regional Water Reclamation Facility) were projected in the Applicants’ 2013 Long Range Water Resources Plan and Environmental Assessment to increase over time as follows: 6.9 mgd in 2020, 8.5 mgd in 2025, 9.7 mgd in 2030, 11.2 mgd in 2035, 12.3 mgd in 2040 and 13.0 mgd in 2045. Should the Applicants’ actual water demands in the Neuse River Basin be higher in any year than they projected, then the condition shall adjust the required return upward. Should the Applicants’ actual water demands in the Neuse River Basin demands be lower in any year than they projected, then the condition shall adjust the required

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<sup>2</sup> The term “Applicants” in ALJ Overby’s Final Decision and the record on appeal, refers to the Towns of Cary and Apex, Morrisville and Research Triangle Park South, and is synonymous with the term “IBT Certificate Holders” herein.



return downward. Required compliance with the condition shall take effect immediately upon reissuance of the 2015 IBT Certificate because the WWRWRF is now operational.

30. ALJ Overby also concluded that Fayetteville, FPWC, LCFWSA and Town of Eastover were denied due process of law.

31. ALJ Overby did not overturn, reverse, or modify the increase in the interbasin transfer from 24.0 mgd to 33.0 mgd, calculated as a daily average of a calendar month, authorized by the 2015 IBT Certificate.

32. On March 8, 2017, the EMC and DEQ filed a Petition for Judicial Review with this Court, seeking to overturn ALJ Overby's Final Decision nearly in its entirety. That Petition challenged all of the pertinent findings of fact and conclusions of law in ALJ Overby's decision, taking the position that the 2015 IBT Certificate was adopted in accordance with the procedural and substantive requirements of the Act and supported by substantial evidence in the hearing record, and that neither the 2015 IBT Certificate nor its terms violated any provision of the Act or the North Carolina Administrative Procedures Act ("APA"), as codified in Chapter 150B of the General Statutes.

33. On April 7, 2017, Fayetteville, FPWC, LCFWSA and the Town of Eastover filed their Response to Petition for Judicial Review, requesting the court affirm the Final Decision.

34. On April 10, 2017, the Towns of Cary and Apex filed their Response to Petition for Judicial Review, joining the petition and adopting the position of the EMC and DEQ as stated therein.

35. On June 26, 2017, the EMC and DEQ filed a Brief in support of the Petition for Judicial Review.

36. On June 26, 2017, the Towns of Cary and Apex filed a Brief in support of the Petition for Judicial Review.

37. On August 28, 2017, Fayetteville, FPWC, LCFWSA and the Town of Eastover filed a Memorandum of Law in Opposition to the briefs filed in support of the Petition for Judicial Review.

38. Thereafter, the Parties entered into settlement negotiations to resolve the disputed matters subject to the Petition for Judicial Review.

39. The Parties have reached a mutually agreeable and reasonable resolution of their disputes including a return flow condition which they seek to memorialize in this Consent Judgment, as well as a reinsertion of the Reopener Provision contained in Condition 7 and a clarification that the EMC is not obligated to initiate rule-making regarding the implementation of the Act.

40. This Court has reviewed the pleadings, briefs and supporting materials that have been submitted by the Parties in this matter. Counsel for all Parties have represented to the Court that their respective clients had reviewed and approved the substance of the proposed Consent Judgment and the settlement and compromise that it represented, and that all Parties supported a request that this Court approve a Consent Judgment that would embody those agreements that would replace ALJ Overby's Final Decision.

#### **CONCLUSIONS OF LAW**

41. This matter is properly before this Court, which has jurisdiction over the Parties and subject matter of this action pursuant to Article 4 of the APA and other provisions of law.

42. The Parties are authorized to submit and support the settlement reflected in the proposed Consent Judgment, with their respective governing bodies having taken the necessary actions to approve the settlement and its presentation to the Court.

43. Based on the Court's review of the pleadings, briefs, and supporting materials, the Court has concluded that the settlement reflected in the Consent Judgment represents a lawful, fair, and reasonable resolution of this matter, consistent with the requirements of the Act, and this Court further concludes that it is fully authorized and justified in entering this Consent Judgment.

44. The 2015 IBT Certificate shall include as Condition 9 of the 2015 IBT Certificate the following required discharge flow condition agreed upon by the Parties:

9. Effective immediately and from this time on the Towns of Cary and Apex shall discharge at least the Required Discharge from the Towns of Cary and Apex's service areas in the form of treated wastewater discharged to the Cape Fear River Basin (2-3) and Haw River Basin (2-1) receiving waters. The Required Discharge shall be a calendar year average daily discharge measured in millions of gallons per day ("mgd") and calculated as follows:

$$\text{Required Discharge} = \text{NBD} - 9.756 \text{ mgd}$$

Neuse Basin Demand ("NBD") = The three-year running annual average daily amount for the three preceding calendar years of all finished water supplied from sources within the Haw River (2-1) and Cape Fear River (2-3) Basins, including both billed and unbilled amounts, expressed in mgd, used by the Towns of Cary and Apex in the Neuse River Basin (10-1). Unbilled amounts of finished water use are to be quantified using procedures detailed in AWWA's M36 Water Audits and Loss Control Programs publication in effect as of 2017. For purposes of this calculation, the annual average daily amount of all such finished water for calendar 2015 shall be 11.1 mgd and for calendar year 2016 shall be 11.2 mgd.

The amount of treated wastewater that the Towns of Cary and Apex actually discharge to the Haw River Basin (2-1) and Cape Fear River Basin (2-3) receiving waters (the "Actual Discharge") shall be the annual average daily flow calculated as the three-year running annual average daily treated wastewater discharged by the Towns of Cary and Apex to the Haw River Basin (2-1) and Cape Fear River Basin (2-3) receiving waters during the three preceding calendar years. The Actual Discharge shall be determined without regard to which Town of Cary or Apex treatment facilities (whether by ownership or third-party contract) from which the treated wastewater is discharged. For purposes of this calculation, the Actual Discharge for calendar 2015 shall be 4.3 mgd and for calendar year 2016 shall

be 4.9 mgd. Return wastewater discharges from the Cary/Apex Water Treatment Plant are not to be included in the calculation of Actual Discharge.

The Towns of Cary and Apex shall include within the compliance and monitoring plan implementation protocols that are designed to achieve compliance with this Condition and to provide for the timely implementation of corrective measures for compliance purposes. The implementation protocols shall not be modified or interpreted so as to reduce any required discharge; however, compliance with the implementation protocols in the compliance and monitoring plan shall be deemed to constitute compliance with this Condition. The time periods for corrective action included by the Towns of Cary and Apex in the implementation protocols, as approved by the Division of Water Resources, shall not be extended except for good cause shown as determined by the Division of Water Resources. Nothing in this Condition shall restrict the authority of the Division of Water Resources to determine compliance with the implementation protocols in the compliance and monitoring plan or to require additional actions by the Towns of Cary and Apex to implement measures necessary to address unforeseen circumstances.

The Towns of Cary and Apex shall include in the compliance and monitoring plan additional, annual reporting information and data with respect to the following: (a) the Required Discharge; (b) all data supporting the computation of the NBD; (c) the Actual Discharge; (d) all data supporting the computation of the Actual Discharge; and (e) each of the mitigation measures and temporary compliance solutions undertaken by the Towns of Cary and Apex in the prior calendar year, the estimated impact of each such measure, and all data supporting each estimated impact ((a)-(e) are collectively the "Discharge Report").

45. The compliance and monitoring plan shall include the following implementation protocols and annual reporting requirements:

1. If the Actual Discharge is less than the Required Discharge, then the Towns of Cary and Apex shall take the following actions to ensure that future Actual Discharges equal or exceed the concurrent Required Discharges:

(a) The Discharge Report of the Towns of Cary and Apex shall be submitted to the Division of Water Resources by May 1 each year. A "Deficiency Year" means a calendar year in which the Actual Discharge is less than the Required Discharge but at least ninety-five percent (95%) of the Required Discharge. A "Deficiency Report" means the Discharge Report due by May 1 immediately following a Deficiency Year. The Towns of Cary and Apex shall take into account their Committed Wastewater Flows and develop within twelve (12) months after the due date of each Deficiency Report (the last day of the twelfth month being the "Deficiency Trigger Date"), an engineering evaluation sealed by a licensed Professional Engineer that outlines specific plans for meeting the Required Discharge within five (5) years of the Deficiency Trigger Date (the "Engineering Evaluation"). The Engineering Evaluation shall also identify

temporary compliance solutions (e.g., the Towns of Cary and Apex sending wastewater through Durham County Triangle WRF) that can be implemented within one (1) year after the completion of the Engineering Evaluation. For purposes of estimating future actual flows, "Committed Wastewater Flows" means 65% of the Towns of Cary and Apex's reasonably projected volume of permitted, obligated flows associated with new and anticipated residential and commercial developments in the Towns of Cary and Apex's service areas. A copy of the Engineering Evaluation shall be filed promptly after its completion with the Division. The Towns of Cary and Apex shall promptly either obtain a new Engineering Evaluation or obtain written reconfirmation from the licensed Professional Engineer who sealed the most recent existing Engineering Evaluation of its conclusions and recommended solutions following (i) each subsequent Deficiency Report; and (ii) each 95% Deficiency Trigger Date (defined below) that occurs more than two years after the most recent Deficiency Report.

(b) "95% Deficiency Trigger Date" means the November 1st that immediately follows the date by which a Discharge Report is due that documents the fact that the Actual Discharge is less than ninety-five percent (95%) of the Required Discharge in a calendar year. In any year that the Actual Discharge is less than ninety-five percent (95%) but at least eighty-five percent (85%) of the Required Discharge:

(i) if the first year in which the Actual Discharge is less than 95% of the Required Discharge occurs at any time after a Deficiency Year, then by the 95% Deficiency Trigger Date, the Towns of Cary and Apex shall: (A) apply for all permits needed to achieve compliance with the Required Discharge unless permit applications first require approvals pursuant to the North Carolina Environmental Policy Act (NCEPA) or National Environmental Policy Act (NEPA) as described in (iii) below, and (B) submit approvable final plans and specifications to bring the Actual Discharge above the Required Discharge, if construction is needed, and (C) prepare a construction schedule or schedule for other actions to ensure that Actual Discharge does not drop below 85% of the Required Discharge at any time and that the Actual Discharge will equal or exceed the Required Discharge within five (5) years of the 95% Deficiency Trigger Date ((A)-(C) are collectively, the "Construction Initiation").

(ii) if the first year in which the Actual Discharge is less than 95% of the Required Discharge occurs at any time before the first Deficiency Year has occurred, then the Towns of Cary and Apex shall complete an Engineering Evaluation and the Construction Initiation within twelve (12) months after the 95% Deficiency Trigger Date, except as delayed by permitting and approvals pursuant to the NCEPA or NEPA as described in (iii) below. All construction to be performed in accordance with the Construction Initiation for paragraphs (b) (i) or (ii) shall be completed

within five (5) years of the 95% Deficiency Trigger Date (the “Construction Completion Date”).

(iii) Permit applications will be submitted as soon as the permitting agency indicates they will be accepted and no later than 30 days after public notice of a Finding of No Significant Impact (FONSI) or Record of Decision (ROD) pursuant to NCEPA or NEPA. If compliance with the NCEPA/NEPA approval process may delay the Construction Initiation in a manner that would reasonably be expected to delay the completion of construction beyond the Construction Completion Date or impede the Towns of Cary and Apex’s ability to comply at all times with the minimum requirement for 85% of the Required Discharge, the Towns of Cary and Apex shall identify and pursue other engineering and financial solutions that will permit the Towns of Cary and Apex to ensure by any available means, including means other than construction, that the Actual Discharge will equal or exceed the Required Discharge within the five (5) year period equivalent to the Construction Completion Date, and to satisfy at all times the minimum requirement for 85% of the Required Discharge without having to comply with NCEPA/NEPA.

(c) The Actual Discharge shall not at any time be less than eighty-five percent (85%) of the Required Discharge. The Towns of Cary and Apex shall immediately and proactively implement measures, such as, for example, the temporary compliance solutions identified in the Engineering Evaluation, as may be necessary from time to time to ensure that the Actual Discharge is not at any time less than eighty-five percent (85%) of the Required Discharge.

2. The Towns of Cary and Apex shall forward, in accordance with the procedures in this section, a copy of each of the following documents: Discharge Report, Deficiency Report, Engineering Evaluation, and the construction notice to proceed for any construction undertaken as a result of these documents (collectively, “Discharge Documents”) via electronic mail to an email address designated each by FPWC and LCFWSA in writing to the Cary Town manager as the person or entity authorized to receive such service, contemporaneously with the Towns’ submittal of those documents to the Division of Water Resources. The Town of Cary will also continue to post copies of the Discharge Documents on the Town’s website, or, if the document is posted on the Division of Water Resources’ Cary/Apex IBT web page, the Town of Cary will post on its website a cross-link to the document’s address on the Division of Water Resources’ Cary/Apex IBT web page, which is currently entitled the “TOWN OF CARY, APEX, MORRISVILLE, AND WAKE COUNTY (FOR RTP SOUTH) INTERBASIN TRANSFER CERTIFICATE” and which can be currently accessed through the “Jordan Lake Water Supply Allocation” portion of the Division of Water Resources’ website.

3. The above described implementation protocols are designed to achieve compliance with Condition 9 of the 2015 IBT Certificate and to provide for the timely implementation of corrective measures for purposes of compliance with Condition 9. The

Division of Water Resources agrees to not modify these protocols for a period of two (2) years from the date of their inclusion in this compliance and monitoring plan pursuant to the Consent Judgment.

4. During the period the 2015 IBT Certificate remains in effect, the Division of Water Resources agrees to provide all persons who have identified themselves in writing as interested parties with electronic notice and a 30-day notice period before modifying the implementation protocols. For the purposes of this notification provision, the Division of Water Resources will provide electronic notice to those individuals who commented on the Environmental Assessment document prepared for the Towns of Cary and Apex. The initial list of interested parties may be updated to include additional interested persons who identify themselves in writing as interested parties or who provide updated contact information. The list may also be updated to remove those individuals who no longer wish to have notification provided to them.

46. Except as specified in the language inserted into the 2015 IBT Certificate as Condition 9 set forth in paragraph 44 herein, and the language inserted into the compliance and monitoring plan by paragraph 45, nothing in this Consent Judgment shall be interpreted or applied to limit the authority of the Division of Water Resources or DEQ to enforce the conditions of the 2015 IBT Certificate or to otherwise limit the authority of the Division of Water Resources to approve or modify the compliance and monitoring plan as provided in Condition 3 of the 2015 IBT Certificate. The modifications of the 2015 IBT Certificate and compliance and monitoring plan shall not prevent any future modification of the 2015 IBT Certificate under G.S. 143-215.22L(v) nor establish any requirement or precedent for their inclusion in any such modification.

47. Notwithstanding paragraph 2 of the Conclusions section of ALJ Overby's Final Decision, as quoted above, nor any other finding or conclusion in ALJ Overby's Final Decision, neither EMC nor DEQ are required to promulgate or enact rules through the APA's formal rule-making process, nor take any other similar rule-making action, before considering or acting on future interbasin transfer requests.

48. This Court and the Parties agree that the entry of this Consent Judgment resolves any and all disputes and matters regarding the 2015 IBT Certificate and replaces ALJ Overby's Final Decision as the final judgment and law of the case.

49. All Parties waive the right to appeal this Consent Judgment. Fayetteville, FPWC, LCFWSA and the Town of Eastover shall not pursue further any claim or damages, including but not limited to attorney's fees, on the basis that EMC and DEQ violated their due process rights arising out of or related to this proceeding.

50. This Consent Judgment will terminate no later than upon the issuance of any future final and non-appealable interbasin certificate that modifies or replaces the 2015 IBT Certificate pursuant to the NC IBT Act.

**IT IS THEREFORE ORDERED, ADJUDGED, DECLARED AND DECREED** that:

1. As provided herein, the ALJ's Final Decision is reversed and replaced by the terms of this Consent Judgment.

2. The EMC shall promptly re-issue the 2015 IBT Certificate with the required return flow condition set forth in paragraph 44 above, and the Towns of Cary and Apex shall comply with the obligations set forth in paragraph 45 above.

3. Decretal paragraph 3 of the ALJ's Final Decision is hereby reversed and stricken.

4. The ALJ's decision in decretal paragraph 1 that "Condition number 7" is "void" is hereby reversed, and in accordance with the consent of the Parties, Condition 7, the Reopener Provision, shall be retained in the 2015 IBT Certificate and is deemed valid and effective.

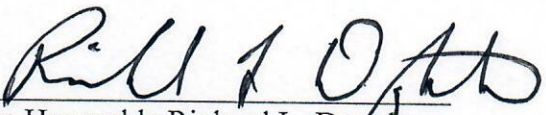
5. The ALJ's decision in decretal paragraph 2 that "[EMC and DEQ] should properly promulgate and enact rules through the formal rule-making process" is hereby reversed and stricken.

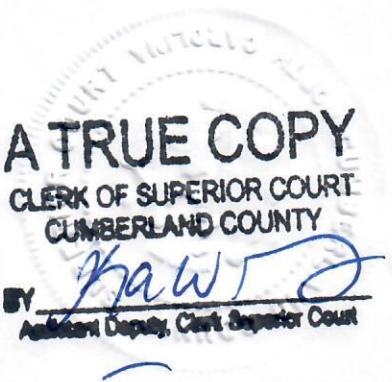



6. Fayetteville, FPWC, LCFWSA and the Town of Eastover shall not pursue further any claim or damages, including but not limited to attorney's fees, on the basis that EMC and DEQ violated their due process rights arising out of or related to this proceeding.

7. This Consent Judgment is entered in full settlement, satisfaction and discharge of all claims, demands and causes of action that the Parties have relating to all matters, transactions, disputes and occurrences appearing in the pleadings herein, to the date of this Consent Judgment.

This the 18 day of January, 2018.

  
The Honorable Richard L. Doughton  
Superior Court Judge

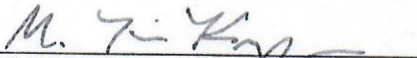
  
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CLERK OF SUPERIOR COURT  
CUMBERLAND COUNTY  
BY   
Assistant Deputy, Clerk Superior Court

WE CONSENT:

RESPONDENTS AND RESPONDENTS-INTERVENORS FAYETTEVILLE, FWPC,  
LCFWSA AND TOWN OF EASTOVER

By: **WILLIAMS MULLEN**

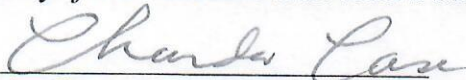
*Attorneys for Respondents and Respondents-Intervenors  
Fayetteville, FPWC, LCFWSA and Town of Eastover*

  
M. Keith Kapp, Esq. (N.C. Bar No. 8850)  
Amos C. Dawson, III, Esq. (N.C. Bar No. 6584)  
Ruth A. Levy, Esq. (N.C. Bar No. 43011)  
301 Fayetteville Street, Suite 1700  
Raleigh, NC 27601  
Telephone: (919) 981-4024  
E-mail: [kkapp@williamsmullen.com](mailto:kkapp@williamsmullen.com)

PETITIONERS-INTERVENORS TOWNS OF CARY AND APEX

By: **MCGUIREWOODS**

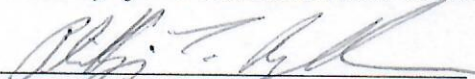
*Attorneys for Petitioners-Intervenors Towns of Cary and Apex*

  
Charles Case, Esq. (N.C. Bar No. 7652)  
W. Dixon Snukals, Esq. (N.C. Bar No. 48088)  
434 Fayetteville Street, Suite 2600  
Raleigh, NC 27601  
[ccase@mcguirewoods.com](mailto:ccase@mcguirewoods.com)  
[wsnukals@mcguirewoods.com](mailto:wsnukals@mcguirewoods.com)

THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION  
AND DEPARTMENT OF ENVIRONMENTAL QUALITY

By: **N.C. DEPARTMENT OF JUSTICE**

*Attorneys for Petitioners EMC & DEQ*

  
Phillip T. Reynolds, Esq. (N.C. Bar No. 34174)  
Elizabeth J. Weese, Esq. (N.C. Bar No. 16652)  
P.O. Box 629  
Raleigh, NC 27602  
[preynolds@ncdoj.gov](mailto:preynolds@ncdoj.gov)  
[jweese@ncdoj.gov](mailto:jweese@ncdoj.gov)