

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Alcoa Power Generating Inc.
Cube Yadkin Generation LLC

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Project No. 2197-109
Transfer of Major License

**NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL
QUALITY'S NOTICE OF INTERVENTION AND
ALTERNATIVE MOTION TO INTERVENE**

NOW COMES the Department of Environmental Quality of the State of North Carolina (NC DEQ), through the undersigned counsel, and (i) gives notice of intervention in the above-listed matter pursuant to Rule 214(a)(2) of the Federal Energy Regulatory Commission's (FERC or Commission) Rules of Practice and Procedure, and (ii) moves in the alternative to intervene under Rule 214(a)(3). 18 C.F.R. §§ 385.214(a)(2) and (a)(3).

NOTICE OF INTERVENTION PURSUANT TO RULE 214(a)(2)

In support of this notice NC DEQ shows the following: The North Carolina Environmental Management Commission (EMC) has delegated to the Director of the Division of Water Resources (DWR) authority to issue water quality certifications on behalf of the State of North Carolina (State). N.C. Gen. Stat. § 143B-282(a)(1)(u); 15A N.C.A.C. 2H .0501. The Division of Water Resources is a division of NC DEQ¹, which is a statutorily created department of the State. See N.C. Gen. Stat. § 143B-279.1(a). The Division of Water Quality and the Division of Water Resources were formerly separate divisions within the Department. The divisions were consolidated into the Division of Water Resources effective 23 August 2013.

¹Effective July 1, 2015, the North Carolina Generally Assembly renamed the North Carolina Department of Environment and Natural Resources the North Carolina Department of Environmental Quality. See 2015 N.C. Sess. Laws 141 §33.7.

See 2013 N.C. Sess. Laws 413 § 57(a). The Commission has previously recognized the authority of NC DEQ to certify hydroelectric projects -- including the Yadkin Hydroelectric Project-- licensed by the Commission under the Federal Power Act.²

Alcoa Power Generating Inc. (Alcoa) currently holds the license to operate the Yadkin Hydroelectric Project. This project is located on the Yadkin River in Stanly, Montgomery, Davidson, and Rowan counties, North Carolina. On August 1, 2016, the FERC issued a “Notice of Application for Transfer of License and Soliciting Comments, Motions to Intervene, and Protests” regarding the proposed transfer of the license for the Yadkin Hydroelectric Project from Alcoa to Cube Yadkin Generation LLC (Cube).

On October 23, 2015, NC DEQ issued a 401 Certification with Conditions to Alcoa to continue the operation of the hydropower dams at High Point, Tuckertown, Narrows and Falls Reservoirs in the Yadkin Project, as described within the application submitted by Alcoa to NC DEQ on September 28, 2012, the Relicensing Settlement Agreement dated February 2007, and subsequent information received by the agency prior to issuance of the Certification. Issues regarding the 401 Water Quality Certification are within the purview of NC DEQ and must be handled in accordance with the terms of the 401 Certification and the laws and rules governing North Carolina’s 401 Water Quality Certification Program. Therefore, NC DEQ has authority to intervene as of right in the present matter.

² E.g., Alcoa Power Generating, Inc., 110 FERC ¶ 61,056, at 61,273, 61,306 (25 Jan. 2005) (“the North Carolina State Division of Water [Quality] . . . issued [a] timely water quality certification[] for the Tapoco Project”); Nantahala Power & Light, 98 FERC ¶ 62,214, at 64,436 (28 March 2002) (“This license is subject to the water quality certification conditions submitted by the North Carolina Department of Environment and Natural Resources under Section 401(a) of the Clean Water Act”); Duke Power Co., 72 FERC ¶ 61,030, at 61,182 (13 July 1995) (“North Carolina [Department of Environment and Natural] Resources issued [a] water quality certification for the Spencer Mountain Project”); Alcoa Power Generating Inc. v. Federal Energy Regulatory Commission, 643 F.3d 963 (2011) (“[T]he State [North Carolina], acting through its Division of Water Quality, timely issued a water quality certification that complied with the requirements of Section 401”).

ALTERNATIVE MOTION TO INTERVENE PURSUANT TO RULE 214(a)(3)

In support of this alternative motion, NC DEQ shows the following:

I. NC DEQ’S POSITION REGARDING THE PROPOSED TRANSFER

NC DEQ is not aware of any protests having been submitted. Nevertheless, NC DEQ has a direct and substantial interest in this matter and may be affected by its ultimate determination. NC DEQ will not be represented adequately by any other party and may be adversely affected or bound without opportunity to present its position unless it is permitted to fully participate in this proceeding. At this time, NC DEQ by virtue of this Motion, the agency reserves its right to oppose or support the application in the future.

II. GROUNDS FOR INTERVENTION

A. NC DEQ Has a Right to Participate in this Proceeding.

As set forth above, NC DEQ has the authority to certify federally-licensed projects pursuant to section 401 of the Clean Water Act. Thus, participation by NC DEQ in this proceeding is conferred by statute and by Commission rule in satisfaction of Rule 214(b)(2)(i).

B. NC DEQ Has a Paramount Interest in the Waters of the State Which May Be Directly Affected by the Outcome of this Proceeding.

It is the public policy of North Carolina to “maintain, protect, and enhance water quality” within the State. N. C. Gen. Stat. § 143-211(b). NC DEQ is the statutorily created department of the State having responsibility to provide for the protection of the environment. N.C. Gen. Stat. §§143B-279.1(a); 143B-279.2. Pursuant to N. C. Gen. Stat. § 143-211(c), the purpose behind the creation of NC DEQ was to give the agency broad authority to “... administer a program of

water and air pollution control and water resource management.” The statute further provides that “[i]t is the intent of the General Assembly, through the duties and powers defined herein, to confer such authority upon the Department of Environmental Quality as shall be necessary to administer a complete program of water and air conservation, pollution abatement and control and to achieve a coordinated effort of pollution abatement and control with other jurisdictions.”

Id. In order to carry out these responsibilities, NC DEQ has broad authority to:

- Implement the federal Clean Water Act by developing and applying water quality standards and issuing National Pollutant Discharge Elimination System Permits. N.C. Gen. Stat. §§ 143-214.1, 143-215.1 and 143B-282, and 33 U.S.C. §§ 1313 and 1342.
- Certify compliance of federally licensed activities with State law pursuant to section 401 of the Clean Water Act. N.C. Gen. Stat. § 143B-282, 15A N.C.A.C. 2H. 0501 et seq. and 33 U.S.C. § 1341.
- Manage water quality at the basinwide level and cooperate in local watershed protection. N.C. Gen. Stat. §§ 143-214.5 and 143-215.8B.
- Investigate the need for and effects of interbasin water transfers and make recommendations regarding approval of such transfers. N.C. Gen. Stat. § 143-215.22I.
- Investigate conditions of localized water depletion and make recommendations regarding regulations to coordinate, conserve, and apportion available supplies. N.C. Gen. Stat. § 143-215.11 et seq.
- Coordinate statewide water supply planning by providing technical assistance to local government for development of local water supply plans and developing a state water supply plan. N.C. Gen. Stat. § 143-355.
- Assist in the development of rules for conservation of water during drought by, among other things, evaluating current water conservation measures and making recommendations regarding those measures. 2002 N.C. Sess. L. 167.
- Investigate fish kills. N.C. Gen. Stat. §§ 143B-279.7, 143B-282 and 143-215.3.

These examples are representative of DEQ’s statutory authority; however, they are not exclusive. See generally, N.C. Gen. Stat. Ch. 143, Art. 21; and Ch. 143B, Art. 7. Further, NC

DEQ, in coordination with the EMC and the North Carolina Wildlife Resources Commission, retains responsibility for regulating and protecting water quality and natural resources. See N.C. Gen. Stat. §143-237 et seq. In addition, the State retains title to the beds of navigable waters and the navigable waters themselves are a public resource.³ Consequently, NC DEQ's participation in this proceeding represents multiple interests which may be directly affected by the outcome of the transfer proceeding. See Rule 214(b)(2)(ii).

C. NC DEQ's Participation in this Proceeding Is in the Public Interest.

The mandates set forth above require NC DEQ to oversee and manage water resources affected by this proceeding. As a governmental agency with broad jurisdiction over public waters, NC DEQ is well positioned to balance the interests of various stakeholders in this public resource. The experienced and technically expert staff of NC DEQ periodically monitors the status of the waters in and around the geographical area impacted by this proceeding, including operation of this project. Therefore, the participation by NC DEQ in this proceeding is in the public interest. See Rule 214(b)(2)(iii).

CONCLUSION

For all of the foregoing reasons, to the extent NC DEQ is not eligible for intervention of right pursuant to Rule 214(a)(2), NC DEQ respectfully requests that the Commission grant this

Alternative Motion to Intervene pursuant to Rule 214(a)(3).

³ See, Shepard's Point Land Co. v. Atlantic Hotel, 132 N.C. 517, 44 S.E. 39 (1903); State v. Narrows Island Club, 100 N.C. 477, 5 S.E. 411 (1888).

CONTACT INFORMATION

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Respectfully submitted, this the 31st day of August 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

This the 31st day of August 2016.

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