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# **YADKIN HYDROELECTRIC PROJECT BRIEF**

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**THE ENVIRONMENTAL REVIEW COMMISSION**

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## **OVERVIEW OF DOCUMENT**

This document was prepared at the request of the Co-Chairs of the Environmental Review Commission (ERC) for informational purposes only in response to the [recent litigation initiated by the State](#) seeking a judicial declaration concerning the State's rights in certain lands submerged beneath the waters of the Yadkin River (more fully discussed later in this document), in order to provide members of the ERC and other interested members of the General Assembly an overview of the litigation and the Yadkin Hydroelectric Project (Project) as a whole. The document constitutes a summary of matters relating to the Project, including a description of the Project itself, the licensing process to which the Project is subject, current and past litigation concerning the Project's licensing, and legislative activity relating to the Project. Due to the extensive activity surrounding the Project, this document is intended to provide an overview of key events only, thus many details have been omitted for purposes of brevity, including a host of legal motions and orders filed concerning the matter. Legal motions referenced are described only in terms of relief sought without detailed explanation of the parties' arguments, to the extent possible. More information about the content of specific motions, or other matters, is available upon request. Hyperlinks are provided throughout the document to material cited (note that many of the materials cited are voluminous (several hundred pages or more) rendering the provision of hardcopies of supporting material impracticable).

## **OVERVIEW OF THE YADKIN HYDROELECTRIC PROJECT**

The Yadkin Hydroelectric Project, owned and operated by Alcoa Power Generating, Inc. ((APGI), a wholly-owned subsidiary of Alcoa), is comprised of four hydroelectric stations, dams (Narrows, Falls, High Rock, and Tuckertown), and reservoirs located along a [38-mile stretch of the Yadkin River](#), and includes 38,000 acres within the Project boundary, in Davidson, Davie, Montgomery, Rowan, and Stanly counties.

Alcoa originally acquired some of the facilities associated with the Project in 1915 from a French-owned company which had begun construction of an aluminum smelting plant at Badin, North Carolina, and, after acquisition, Alcoa proceeded to complete construction of the smelting plant (Badin Works). Alcoa then constructed the Narrows Dam, which was placed in operation in

1917. To meet the growing power needs of the operation, Alcoa subsequently constructed the three other dams, Falls in 1919, High Rock in 1927, and Tuckertown in 1962. In [1958](#), Alcoa received a 50-year license to operate the Project from the Federal Power Commission (predecessor to FERC).<sup>1</sup>

The electricity generated at the Project was previously used to support the electric power needs of Badin Works. Aluminum production at Badin Works was curtailed by Alcoa in August 2002, with all product manufacturing concluding in 2007. The electricity generated by the dams is now largely purchased and re-sold to third parties by Alcoa Power Marketing Inc. (APMI), another wholly-owned subsidiary of Alcoa.

The Project has an installed capacity of 210 megawatts, and in October 2013, APGI [reported to federal regulators](#) that the dams generated 964,216 megawatt hours of electricity during the period of October 1, 2012 through September 30, 2013, which, according to an [article](#) from the Associated Press,<sup>2</sup> would have generated revenues of about \$30 million over the 12-month period.<sup>3</sup> Press reports further indicate that Alcoa declined to provide details about operating costs for the Yadkin River dams, or the profit from selling the electricity generated to commercial customers in conjunction with the megawatt hours generated for the period in question. Alcoa did, however, [release financial statements in 2011](#) based on an independent audit of APGI's income statements performed by PricewaterhouseCoopers showing the dams returned profits of between \$7.3 million and \$8.0 million in 2008, 2009, and 2010 on revenue that averaged about \$30 million a year, and that APGI spent \$41.1 million on capital expenditures at the facilities associated with the Project during that 3-year period.

Environmental contamination is present at the Badin Works site consisting of predominantly inorganic compounds (cyanide and fluoride) from the production of aluminum. Low concentrations of organic constituents (mainly polycyclic aromatic hydrocarbons, PCB aroclors, and trichloroethene) are found in localized areas of the plant site associated with a limited

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<sup>1</sup> Historical information for Project obtained from the 1958 permit (DECISION UPON APPLICATIONS FOR LICENSE UNDER THE PROVISIONS OF THE FEDERAL POWER ACT, 19 F.P.C. 704 (Feb. 11, 1958). See also: [http://www.alcoa.com/yadkin/en/info\\_page/relicensing\\_timeline.asp](http://www.alcoa.com/yadkin/en/info_page/relicensing_timeline.asp)

<sup>2</sup> Emery Dalesio, AP business writer, October 25, 2013

<sup>3</sup> Based on an average wholesale price of \$31.04 per megawatt hour provided by energy information company Platts.

number of solid waste management units. Detailed information on the contamination present, assessment activities, and corrective action measures taken at the site to date is available through the following documents:

- [RCRA Facility Investigation Report](#) prepared by MFG, Inc., for the Alcoa Badin Works facility, March 1, 2001.
- [Alcoa Corrective Action](#) memorandum from the Division of Waste Management of the Department of Environment and Natural Resources, received January 2, 2014.

## **OVERVIEW OF GENERAL LICENSURE PROCESS FOR HYDROELECTRIC PROJECTS**

Under the authority of the [Federal Power Act](#), the [Federal Energy Regulatory Commission \(FERC or Commission\)](#) has the exclusive authority to license most non-federal hydropower projects located on navigable waterways or federal lands, or connected to the interstate electric grid.

FERC "is an independent federal agency with a mission to regulate and oversee energy industries in the economic, environmental, and safety interests of the American public. Part of this mission involves promoting the development of a strong national energy infrastructure that includes hydropower, which is currently the leading renewable energy source in the United States. Congress has charged the Commission with evaluating whether proposed non-federal hydropower projects should be approved. The Commission does not propose, construct, operate, or own such projects. But it does issue preliminary permits and licenses for hydropower projects, enforces the conditions of each license for the duration of its term, and conducts project safety and environmental inspections."<sup>4</sup>

"For any licenses issued, the Commission must determine that the projects would be best adapted to a comprehensive plan for improving or developing the waterway. In addition to the power and development purposes for which licenses are issued, the Commission must give equal

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<sup>4</sup> [Hydropower Licensing— Get Involved: A GUIDE FOR THE PUBLIC](#), Federal Energy Regulatory Commission, Washington, DC, April 2004.

consideration to energy conservation and the protection and enhancement of fish and wildlife, aesthetics, cultural resources, and recreational opportunities."<sup>5</sup>

FERC may issue an original license for up to 50 years for constructing, operating, and maintaining jurisdictional projects. At the end of a stated term of an original license, a licensee must undertake the relicensing process. In response, FERC can issue a new license (relicense) to either the existing licensee or to a new licensee for a period of 30 to 50 years, the federal government can take over a project, or a project may be decommissioned.<sup>6</sup> With regard to federal takeover of a project, [16 USC § 807](#) provides that the United States, upon or after the expiration of any license may take over, maintain, and operate any project, or may take over upon mutual agreement with the licensee all property owned and held by the licensee. The section further provides that the United States shall pay the net investment of the licensee in the project taken, not to exceed its fair value, plus such reasonable damages, if any, to property of the licensee – such value to be determined by FERC. Under the section, the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under the chapter at any time by condemnation proceedings upon payment of just compensation is expressly reserved. It is believed that such authority, often referred to as "recapture," has never been exercised by the federal government.

### **OVERVIEW OF RELICENSURE HISTORY FOR YADKIN PROJECT**<sup>7</sup>

As previously noted, in [1958](#) the Federal Power Commission, predecessor to FERC, issued a 50-year license to Carolina Aluminum Company (a wholly-owned subsidiary of Alcoa, Inc.) to operate and maintain the Yadkin Project. In anticipation of the scheduled expiration of the 1958 license in 2008, APGI filed a license application with FERC for the Yadkin Project on [April 25,](#)

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<sup>5</sup> [\*FERC Final Environmental Impact Statement for the Yadkin and Yadkin-Pee Dee River Projects Docket Nos. P-2197-073 And 2206-030 Executive Summary\*, Issued April 18, 2008.](#)

<sup>6</sup> [\*Handbook for Hydroelectric Project Licensing and 5 Mw Exemptions From Licensing\*, Federal Energy Regulatory Commission, Washington, DC, April 2004.](#)

<sup>7</sup> Filings and orders concerning FERC proceedings for the Project, and other Project information are available at:

- [Alcoa\Yadkin Project FERC E-Library.htm](#)
- at the ERC website --  
<http://www.ncleg.net/gascripts/DocumentSites/browseDocSite.asp?nID=12&sFolderName=\Archives\Working Groups\Alcoa - Stanly County - FERC Re-licensing>

[2006](#). The Commission docket for the matter is Docket No. P-2197. A new 50-year license has yet to be issued by the Commission, but APGI has received a year-to-year license renewal from FERC from 2008 to date.

In conjunction with the relicensure process, APGI filed a Relicensing Settlement Agreement (RSA or Agreement) with FERC on [May 7, 2007](#). FERC encourages applicants and stakeholders to reach such agreements in conjunction with the licensure/relicensure process. According to FERC, "[a] settlement agreement is a written agreement among the license applicant and stakeholders about how the project will operate and what environmental measures will be implemented over the term of the license. Settlement agreements may be comprehensive or may include only some of the stakeholders or some of the key issues. In either case, the Commission encourages applicants and stakeholders to reach a settlement. The license will typically include the provisions of a settlement, as long as they are consistent with the Commission's policy on settlements."<sup>8</sup>

The RSA was signed by a number of representatives of relicensing interests. According to APGI's filing concerning the matter, the signatories represented a super-majority of the parties that participated in intensive negotiations with APGI that preceded the RSA, and included:

Alcoa Power Generating Inc., Yadkin Division  
American Rivers  
Badin Historic Museum Inc.  
Badin Lake Association  
Catawba Indian Nation  
City of Albemarle  
High Rock Business Owners Group  
High Rock Lake Association  
Montgomery County  
North Carolina Department of Environment and Natural Resources  
    Division of Parks and Recreation  
    Division of Water Resources  
    Division of Water Quality  
North Carolina Wildlife Resources Commission  
Pee Dee River Coalition  
Piedmont Boat Club  
Rowan County

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<sup>8</sup> [Hydropower Licensing— Get Involved: A GUIDE FOR THE PUBLIC](#), Federal Energy Regulatory Commission, Washington, DC, April 2004.

Salisbury/Rowan Association of Realtors  
South Carolina Coastal Conservation League  
South Carolina Department of Health and Environmental Control  
South Carolina Department of Natural Resources  
The Land Trust for Central North Carolina  
The Nature Conservancy  
Town of Badin  
U.S. Forest Service  
Uwharrie Point Community Association

Several affected local governments that had participated in negotiations preceding the RSA, including Stanly County, did not sign the final agreement, and, on [September 18, 2006](#), Stanly County filed a Motion to Intervene and Comments on Agreement in Principal Submitted by Alcoa Power Generating, Inc. with FERC. In addition to requesting intervention in the licensing proceedings, the motion also requested that the Commission "urge" APGI to continue negotiations with other parties so long as both sides exercise good faith efforts, and requested that FERC include Stanly County's comments as part of the relicensing proceeding and the Commission's consideration of the agreement.

One required component in the process for FERC relicensure of a hydropower project, is an environmental review of the project resulting in a final environmental impact statement. As described in a letter from FERC to then Lieutenant Governor Perdue dated [July 3, 2008](#):

"[t]o date, this project has been the subject of extensive environmental review as required by the National Environmental Policy Act and the Commission's own regulations. Commission staff has received and reviewed numerous comments during the relicensing process and on the environmental impact statement (EIS) prepared for the Yadkin Project.

Staff's environmental review process included issuance of a public notice and scoping document for the project on December 21, 2006, public scoping meetings in Lexington, Albemarle, and Wadesboro, North Carolina, and issuance of a second scoping document based on oral and written comments on the original scoping document on March 13, 2007. Also on March 13, 2007, staff issued

notice that the project was ready for environmental analysis and solicited comments, recommendations, terms and conditions, and prescriptions.

On September 28, 2007, staff issued its draft EIS for the project. Public meetings on the draft EIS were held in Salisbury and Hamlet, North Carolina on November 14 and 15, 2007.

The final EIS was issued by staff on April 18, 2008. This document was based on the review of the relicensing application; scoping record; the settlement agreement among Alcoa Generating and 25 parties representing federal and state resource agencies, Indian tribes, local government, and non-governmental organizations; and public comments received during the process. The final EIS presented staff's independent analysis of the effects of the proposed project and reasonable alternatives on developmental and non-developmental resources including fish and wildlife, recreation, and socioeconomics."

As the letter indicates, the Commission issued the Final Environmental Impact Statement for the Yadkin Project on [April 18, 2008](#).

On [April 1, 2009](#), the State of North Carolina, through then Governor Perdue, filed a motion to intervene out of time with FERC in Alcoa's Yadkin River Hydroelectric Dam relicensing proceeding. FERC granted the State's motion to untimely intervene on [April 17, 2009](#). Of note, on [September 18, 2009](#), the State filed a motion to "Present Evidence in Support of its Request that the Commission Recommend Federal Recapture, Comments, and Evidence of the State in Support of its Opposition to the Issuance of a New License to Alcoa, Motion of the State to Supplement Final Environmental Impact Statement, Request of the State for Waivers of Commission Regulations, if Necessary, and Motion of the State for Oral Argument Before the Full Commission." No order or other response from the Commission to the State's motion concerning recapture was found.



A variety of other motions to intervene were submitted in the matter from stakeholder individuals, organizations, municipal and State entities, and resource agencies, and were largely granted intervention, including Stanly County, Anson County, the Davidson County Board of Commissioners, the City of Salisbury, the City of Rockingham, the High Rock Lake Association, the Yadkin Riverkeeper, and others. With regard to Stanly County, it is noteworthy that on [May 6, 2013](#), Stanly County and Alcoa entered into a settlement agreement concerning the matter, which, per the terms of the document "provides support and resources for the County's water and sewer infrastructure, while resolving various disputes between the County and APGI and Alcoa over the Project and Badin Works." Subsequently, on [May 20, 2013](#), Stanly County filed a certification from the County Board of Commissioners with FERC stating that Stanly County now supported the issuance of a new license to APGI for the Yadkin Project, provided that a new license issued was consistent with the terms of the Settlement Agreement.

FERC, however, recently denied a petition to intervene from New Energy Capital Partners, LLC, (New Energy) filed on [April 30, 2013](#) (Petition to Reopen Relicensing Application Process and in the alternative, Motion for Late Intervention in the Yadkin Project Relicensing). FERC's Notice Denying Motion to Intervene, entered on [May 30, 2013](#), indicated that the petition was denied on the grounds that New Energy failed to meet the good cause standard for granting a late intervention. On [November 13, 2013](#), New Energy filed a petition for review of FERC's decision with the federal Court of Appeals for the D.C. Circuit.

Other filings and orders of note in the FERC relicensure process for the Project include a petition filed by APGI with FERC on [September 17, 2009](#) requesting an order declaring that the State had waived its authority under section 401 of the Clean Water Act to issue a water quality certification with respect to the relicensing of the Project by not issuing a certification that was effective and complete within one year.<sup>9</sup> FERC denied the petition on [October 15, 2009](#), finding that the State had not waived its Clean Water Act authority, and ruling there was no waiver because the State had "act[ed] on" Alcoa Power's application within one year of its filing. On [March 19, 2010](#), APGI filed a Petition for Review with United States Court of Appeals for the

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<sup>9</sup> Section 401(a)(1) of the Clean Water Act requires that a State "act on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request," or else "the certification requirements of this subsection shall be waived with respect to such Federal application." [33 U.S.C. § 1341\(a\)\(1\)](#).

D.C. Circuit. Per the Court of Appeals decision issued [May 3, 2011](#), Alcoa's appeal of FERC's decision was based on the contention "that FERC had misinterpreted the law and the facts and that the State violated the time limit in Section 401(a)(1) by linking the effectiveness of the certification to satisfaction of a bond requirement after the expiration of the one-year period, thereby waiving its right to issue a certification for the project." In its decision, the Court of Appeals agreed with the Commission's interpretation of Section 401 in ruling that there was no waiver by the State, and denied APGI's petition for review (*Alcoa Power Generating Inc. v. F.E.R.C.*, 643 F.3d 963, 72 ERC 1865, 395 U.S.App.D.C. 425, Util. L. Rep. P 14,811). See more detailed information on the 401 Certification history for the Project below.

As previously noted, many filings, motions, orders, and notices associated with the FERC Docket for the Project have been omitted in this document for purposes of brevity. For a complete list of such documents submitted during the period from April 2006 through January 2010, see the Certified Index to the Record submitted to the Court of Appeals on [April 27, 2010](#). For documents filed after that date, please see the Commission's [eLibrary](#).

## **OVERVIEW OF 401 CERTIFICATION REQUIREMENTS AND HISTORY FOR PROJECT**

Another required component in the process for FERC relicensure is that a hydropower project obtain a water quality certificate from the state within which the project is located pursuant to the federal Clean Water Act ([Section 401](#)). **As previously noted, under Section 401(a)(1) of the Clean Water Act, the Commission may not issue a license to Alcoa for the Yadkin Hydroelectric Project unless and until DENR has either issued a water quality certification for the Project or has waived certification.** On [May 10, 2007](#), APGI submitted an application for a 401 Certification to the Division of Water Quality (DWQ) of the Department of Environment and Natural Resources (DENR). DWQ initially issued a 401 Certification to APGI on [November 16, 2007](#), but subsequently revoked the certification by letter dated [April 16, 2008](#), requesting that APGI withdraw and resubmit its application for 401 Certification due to deficiencies in associated requirements for public notice. Alcoa subsequently reapplied for a certification on [May 9, 2008](#). DWQ issued a new 401 Certification for the Project on [May 7, 2009](#).

Stanly County and the Yadkin Riverkeeper subsequently filed actions with the State's Office of Administrative Hearings, on [May 8, 2009](#) and [May 13, 2009](#) respectively, to challenge issuance of the 401 Certification, and on [May 27, 2009](#), an order was issued granting a preliminary injunction/stay of the 401 Certification issued by DWQ on May 7, 2009. A number of hearings were held, motions filed by the respective parties, and settlement negotiations were conducted during the pendency of the litigation.<sup>10</sup> DWQ subsequently revoked the certificate on [December 1, 2010](#) (per the revocation letter issued by DWQ, the revocation resulted from the discovery of evidence submitted by APCI during a hearing before an administrative law judge involving Stanly County's challenge to the issuance of the 401 water quality certification, which evidence DENR asserted was material to the certification and Alcoa had intentionally withheld).

On [January 28, 2011](#), Alcoa filed an appeal of the revocation with the State's Office of Administrative Hearings. On [August 28, 2012](#), however, APCI announced that it filed a motion for an order dismissing without prejudice its appeal concerning the 401 water quality certificate for the Project. The press release stated that if the Court granted the motion to dismiss, APCI would submit a new request for a 401 Certification for the Project in an effort to expedite the regulatory process that had been delayed by legal issues for more than three years. On [September 27, 2012](#), the Administrative Law Judge did grant the motion to dismiss, and on [September 28, 2012](#), Alcoa filed a new request for a 401 Certification with DWQ.

On [August 2, 2013](#), however, DWQ issued a denial of the application for certification, citing the State's filing of a lawsuit on the same date seeking a judicial declaration that the State owned the submerged bed of portions of the Yadkin River located beneath the Project. On [September 25, 2013](#), APCI filed a petition for a contested case to challenge the State's August 2, 2013 denial of its application for certification. Both [APCI](#) and [DENR](#) filed Prehearing Statements in the matter in November 2013. On [January 8, 2014](#), the Honorable Beecher R. Gray, Administrative Law Judge, issued an Amended Scheduling Order for filing of motions, discovery, conferences, and hearings.

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<sup>10</sup> Note on [July 6, 2009](#), APCI filed a petition for a contested case with the State's Office of Administrative Hearings concerning the bond requirement (and the amount thereof, \$240 million), as well as additional requirements pertaining to dissolved oxygen levels, imposed in association with the 401 Certification issued on May 7, 2009.

## **OVERVIEW OF RECENT LITIGATION FILED BY THE STATE CONCERNING THE YADKIN PROJECT**

On [August 2, 2013](#), the State, through the Department of Administration, filed a civil action in the Superior Court of Wake County that "seeks a judicial declaration pursuant to N.C. Gen. Stat. §§1-253, *et seq.*, concerning the State's rights in certain lands submerged beneath the waters of the Yadkin River along an approximately 38-mile stretch of that River in Rowan, Davie, Davidson, Stanly and Montgomery counties." Specifically, the State's Complaint requests judicial declarations as follows:

- [T]he submerged bed of the Relevant Segment of the Yadkin River is the sole and exclusive property of the State of North Carolina, held by the State in trust for the people of the State;
- Alcoa has taken actions which have so fundamentally changed the basis on which the State permitted Alcoa and its Predecessors to enter upon and thereafter use the State's submerged Yadkin River property that any permit, license, easement, possessory right or other interest which Alcoa and its Predecessors, or any of them, may have ever had in the bed of the Relevant Segment of the Yadkin River has been extinguished and no longer exists;
- [T]o the extent that Alcoa and its Predecessors, or any of them, ever held or were the beneficiaries of any permit, license, easement, possessory right or other interest in the bed of the Relevant Segment of the Yadkin River which allowed or permitted Alcoa and its Predecessors, or any of them, to enter upon and use the bed of the Relevant Segment of the Yadkin River, or any part of it, to operate the Dams, any such permit, license, easement, possessory right or other interest has been extinguished and no longer exists;
- [T]he Riverbed Portions of the Dams are located atop and stand on riverbed land which belongs to the State of North Carolina and which is held by the State in trust for the people of North Carolina, together with a delineation and definition of the Riverbed Portions of the Dams;

- [A]s a consequence of their location on real property belonging to the State, the Riverbed Portions of the Dams are the property of the State of North Carolina, held in trust by the State for the people of North Carolina;
- [N]either Alcoa nor its parent, subsidiaries, affiliates or predecessors in interest has any permit, license, easement, possessory right or other interest in or to the submerged bed of the Relevant Segment of the Yadkin River or in or to the Riverbed Portions of the Dams;

The State's Complaint also requests the Court to issue the following Order(s):

- [D]irecting Alcoa to take actions to respect the State's rights in and to the Riverbed Portions of the Dams and the bed of the Relevant Segment of the Yadkin River;
- [S]upplemental relief as this Court may decree;
- [T]axing the costs of this action to Alcoa; and
- [A]warding the State such other and further relief as the Court may deem just and proper.

According to a press release from the [Department of Administration](#), Governor McCrory stated with regard to the litigation “[t]he Yadkin River is a North Carolina River. We should be able to use it for North Carolina water needs and to create North Carolina jobs. The benefits of the Yadkin River belong to North Carolina’s people.”

On [September 3, 2013](#), APGI filed a notice of removal of the litigation from the Superior Court to the United States District Court for the Eastern District of North Carolina, asserting that the State's lawsuit involved questions of federal law thus giving the federal Court jurisdiction over the action. On [October 3, 2013](#), the State filed a motion with the federal Court to remand the action back to the State's Superior Court "for lack of subject matter jurisdiction, or on the basis of the bar of sovereign immunity under the Eleventh Amendment to the Constitution of the United States, or, in the alternative, abstain from the exercise of jurisdiction in this case." On [November 27, 2013](#), Judge Terrence W. Boyle issued an Order denying the State's motion to remand finding that the federal Court had jurisdiction inasmuch as the State's complaint involved

an issue that "necessarily turns on construction of federal law." With regard to the State's claim to support remand based on the bar of sovereign immunity under the Eleventh Amendment to the Constitution of the United States, the Court held "that the Eleventh Amendment cannot operate to shield the State from a suit that it commenced in order to defeat Alcoa's proper removal." And finally, with regard to the State's request for abstention, the Court found that there was no ongoing State judicial proceeding, and that being a key requirement for abstention, abstention in the case would be wholly inappropriate.

Other filings of note in the matter (see Docket No. 5:13-Cv-633-Bo in the United States District Court for the Eastern District of North Carolina, Western Division) include: a joint motion filed by APGI, the Yadkin Riverkeeper, and the State on [December 24, 2013](#) to move the Court to enter a Consent Order dismissing the Riverkeeper as a Plaintiff-Intervenor and, instead, granting the Riverkeeper leave to participate as amicus curiae in merits issues before the Court; and, a Joint Rule 26(f)<sup>11</sup> Report and Discovery Plan filed on [December 24, 2013](#). For a full list of filings through December 30, 2013, please see the Court's [Case History](#).

## **OVERVIEW OF LEGISLATIVE ACTIVITY RELATED TO YADKIN PROJECT**

In 2008, the General Assembly directed the Environmental Review Commission (ERC) to study the impacts on the State of the potential issuance by FERC of a new 50-year license to APGI for the Yadkin Project (S.L. 2008-137). The study authorized the ERC to consider and develop proposals regarding all of the following issues:

- The socioeconomic impacts of APGI's decision to discontinue its job-producing manufacturing activities at its Badin facility that relied on the use of low-cost power from the Yadkin Hydroelectric Project.
- Assurance of an adequate, clean future water supply for the region.
- The allocation of water for non-power uses from the Yadkin Hydroelectric Project.

To facilitate the study, representatives of APGI and Stanly County submitted various materials to the ERC for consideration (see [ERC folder](#) for briefs and supporting materials submitted), and

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<sup>11</sup> [Fed. R. Civ. P. 26\(f\)](#)

several meetings were held between the parties and staff to the ERC. No formal report or proposals on the matter were issued.

In 2009 [Senate Bill 967 \(Creation of Yadkin River Trust\)](#) was introduced which would have authorized: (i) creation of the Yadkin River Trust (Trust); (ii) acquisition by the Trust of the license issued by FERC for the Yadkin Project; and (iii) the State to negotiate, pursue transfer of property, and execute agreements as necessary for acquisition of the Yadkin Project. The bill passed the Senate on a vote of 44 ayes to 4 noes, but failed in the House on a vote of 39 ayes to 66 noes.

In 2012, the General Assembly enacted a provision that required the Program Evaluation Division of the General Assembly to study, in conjunction with the Department of Administration, the inventory of all state-owned lands and the issue of public ownership of lands submerged under navigable rivers in the State ([S.L. 2012-194, Sec. 71.5\(c\)](#)). The Final Report to the Joint Legislative Program Evaluation Oversight Committee ([Report No. 2013-02](#)), dated January 14, 2013, contained the following executive summary:

**The General Assembly directed the Program Evaluation Division to study, in conjunction with the Department of Administration, the inventory of all state-owned lands and the issue of public ownership of lands submerged under navigable rivers in the State.** North Carolina gained ownership of lands submerged under navigable waters through the Declaration of Independence and victory in the Revolutionary War. Current state law prohibits the conveyance of title to submerged lands except by an act of the General Assembly, and does not allow for adverse possession of submerged lands. However, the State may have conveyed certain lands submerged under navigable rivers to private owners in the past.

**The Department of Administration (DOA) is charged with managing and controlling the State's submerged lands, but its overall management approach is largely passive.** DOA operates under the assumption that all lands beneath navigable rivers are sovereign lands of the State. Whereas DOA grants and tracks certain types of easements, it does not require easements for many structures built on lands submerged under navigable rivers for which it has the authority. In addition, DOA does not exercise its authority to lease or convey mineral deposits for most mining that takes place on riverbeds.

**North Carolina does not have a comprehensive inventory of lands submerged under navigable rivers, so the extent to which private parties may hold title to these lands is unknown.** Ten of the 12 other original colony states do not track ownership of their submerged lands. Those that do track ownership only track coastal or tidally influenced submerged lands. Between 1985 and 2004, North Carolina administered a process to resolve and map all private claims to submerged lands in 25 coastal counties at a cost of more than \$4.1 million to operate the office. The State has not conducted a comparable process for lands submerged under navigable rivers in the remaining 75 counties.

**To more actively manage the use of lands submerged under navigable rivers in the future and protect its ownership interest, the General Assembly could consider**

- requiring DOA to improve its management and tracking of all submerged lands; and
- using the coastal submerged lands claims process as a model to resolve private ownership claims to lands submerged under navigable rivers in the remaining 75 counties.

### **SUMMARY**

The Project has been the subject of extensive activity related to its relicensure since APGI filed its application for relicensure with the Federal Energy Regulatory Commission in April 2006. The Commission has yet to issue a license, and is unable to do so unless and until DENR has either issued a water quality certification for the Project or has waived certification. The last action concerning 401 Certification was a denial issued on August 2, 2013 citing the State's filing of a lawsuit on the same date seeking a judicial declaration that the State owned the submerged bed of portions of the Yadkin River located beneath the Project. That lawsuit is now pending in the United States District Court for the Eastern District of North Carolina, Western Division.