

PLEASE PRINT CLEARLY OR TYPE

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

(2) ALCOA POWER GENERATING INC.,

PETITIONER,

v.

(3) DEPARTMENT OF ENVIRONMENT AND NATURAL
RESOURCES, DIVISION OF WATER QUALITY,

RESPONDENT.

(The State agency or board about which you are complaining)

PETITION
FOR A
CONTESTED CASE HEARING

I hereby ask for a contested case hearing as provided for by North Carolina General Statute § 150B-23 because the Respondent has:

(Briefly state facts showing how you believe you have been harmed by the State agency or board.)

The Division of Water Quality issued a water quality certification pursuant to Section 401 of the federal Clean Water Act and comparable North Carolina statutes and federal and North Carolina rules (the "401 Certification"). The 401 Certification, although generally acceptable, contains certain, specific unsatisfactory terms and conditions, as outlined in Attachment A, which is incorporated by reference herein, and which is intended to define and limit the scope of this appeal to the extent permitted by the North Carolina Administrative Procedure Act and any other applicable statutes.

(If more space is needed, attach additional pages.)

(4) Because of these facts, the State agency or board has: (check at least one from each column)

☒ deprived me of property;

☐ ordered me to pay a fine or civil penalty; or

☒ otherwise substantially prejudiced my rights;

AND

☒ exceeded its authority or jurisdiction;

☒ acted erroneously;

☒ failed to use proper procedure;

☒ acted arbitrarily or capriciously; or

☒ failed to act as required by law or rule.

(5) Date: July 6, 2009

(6) Your phone number: (919) 899-3000

(7) Print your full address: Hunton & Williams LLP, One Bank of America Plaza, Suite 1400, Box 109, Raleigh, NC 27602
(street address/p.o. box) (city) (state) (zip)

(8) Print your name: Charles D. Case, Esq.

(9) Your signature: Charles D. Case

You must mail or deliver a COPY of this Petition to the State agency or board named on line (3) of this form. You should contact the agency or board to determine the name of the person to be served.

CERTIFICATE OF SERVICE

I certify that this Petition has been served on the State agency or board named below by depositing a copy of it with the United States Postal Service with sufficient postage affixed OR by delivering it to the named agency or board:

(10) Mary Penny Thompson

(name of person served)

(11) Department of Environment & Natural Resources

(State agency or board listed on line 3)

(12) Mail to: 1601 Mail Service Center, Raleigh, NC 27699

(street address/p.o. box)

Deliver to: 512 N. Salisbury Street, Raleigh, NC 27604

(city)

(state)

(zip code)

(13) This the 6th day of July, 2009

(14) Charles D. Case

(your signature)

When you have completed this form, you MUST mail or deliver the ORIGINAL AND ONE COPY to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

ATTACHMENT A

By letter dated May 7, 2009, Respondent, the North Carolina Department of Environment and Natural Resources ("DENR") and its Division of Water Quality ("DWQ") purported to issue to Alcoa Power Generating Inc. ("APGI") a water quality certification ("401 Certification") pursuant to Section 401 of the Clean Water Act pertaining to APGI's application to the Federal Energy Regulatory Commission ("FERC") for its relicensing of the Yadkin Hydroelectric Project (DWQ # 2007-0812; FERC Project No. 2197) (the "Project"). The 401 Certification was issued unlawfully and contained certain specific terms and conditions which are not authorized by law or rule, are arbitrary and capricious, are unsupported by the record in this matter, and/or unlawfully impose improper procedures, including the following:

Section 7, Performance/Surety Bond

1. The 401 Certification purports to require APGI to post a performance/surety bond of Two Hundred and Forty Million Dollars (\$240,000,000) to cover the costs of certain water quality improvements. Such a requirement for a bond as a condition of the 401 Certification is unsupported by authority in rule or statute. For this reason, DWQ acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, and failed to act as required by law or rule.
2. The amount of the performance/surety bond, in the event it is determined that such a bond is authorized, is grossly excessive, unsupported in the record, and not directly or adequately based on or related to water quality concerns. For this reason, DWQ acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, and failed to act as required by law or rule in setting the amount of any such surety bond.
3. The 401 Certification purports to require further approvals by Respondent and other agencies within the State of North Carolina government subsequent to the issuance of the 401 Certification, with no standards for the additional approvals and without authority in rule or statute. For this reason, DWQ acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, and failed to act as required by law or rule.
4. The 401 Certification states that it is "only effective once the required performance/surety bond is in place." The provisions regarding the timing of the bond and its purported impacts on the efficacy of the 401 Certification, coupled with Respondent's absolute and arbitrary power to approve the bond, amounts to an unlawful attempt to avoid the time limits imposed by 15A NCAC § 2H .0507(b) and 33 U.S.C. § 1341(a)(1). For these reasons, DWQ acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, and failed to act as required by law or rule.

Section 9, Other Relicensing Settlement Agreement Conditions

5. The 401 Certification purports to impose certain conditions related to dissolved oxygen levels in the tailwaters of each of the four dams in the Project. These conditions differ in several respects from the conditions to the first 401 Certification issued by Respondent in 2008, and also differ from the terms agreed to by the State of North Carolina in the Relicensing Settlement

Agreement February 2007 ("RSA"), negotiated as part of the FERC license process and to which Respondent is a signatory. Because the 401 Certification purports to impose conditions related to dissolved oxygen that differ from conditions Respondent previously agreed to without sufficient justification in the record, and because these conditions are not supported by an adequate factual and legal basis, these conditions lack statutory authority, are arbitrary and capricious, and ignore appropriate and lawful procedure for imposition of lawful requirements.

Failure to Comply with Applicable Time Limits

6. 15A NCAC § 2H .0507(b) provides that the 401 Certification must have been "granted or denied within 60 days after public hearing," subject to certain exceptions. A public hearing on the 401 Certification was conducted on January 15, 2009. Pursuant to 15A NCAC § 2H.0507(b), the deadline for DWQ to take final action regarding issuing the 401 Certification was March 16, 2009. Failure on the part of DWQ on or before March 16 to issue an effective 401 Certification, 2009, resulted in a waiver of the 401 Certification requirement. For this reason, DWQ was without authority to issue the 401 Certification, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, and failed to act as required by law or rule.