

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

CIVIL ACTION NO. 5:13-cv-633

THE STATE OF NORTH CAROLINA, by and )  
through its agency, the NORTH CAROLINA )  
DEPARTMENT OF ADMINISTRATION, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
ALCOA POWER GENERATING, INC. )  
 )  
Defendant. )  
\_\_\_\_\_ )

**NOTICE OF REMOVAL**

TO: Plaintiff The State of North Carolina, by and through its agency, The North Carolina Department of Administration, and its attorneys of record, Alexander McC. Peters, I. Faison Hicks, Donald R. Teeter, Sr. and Gary Mark Teague of the North Carolina Department of Justice:

Defendant Alcoa Power Generating, Inc. ("APGI"), by and through its undersigned counsel, hereby notices removal of this lawsuit from the General Court of Justice, Superior Court Division, Wake County, North Carolina, to the United States District Court for the Eastern District of North Carolina, and respectfully submits the following information to this Honorable Court:

1. On August 2, 2013, Plaintiff the State of North Carolina ("North Carolina") filed a Complaint in the General Court of Justice, Superior Court Division, Wake County, North Carolina, captioned *The State of North Carolina, by and through its agency, the North Carolina Department of Administration v. Alcoa Power Generating, Inc.*, Civil Action No. 13-CVS-

010477 (“State Court Action”).

2. North Carolina served APGI with a copy of the Summons and Complaint by mailing the same by certified mail, return receipt requested, to APGI’s registered agent CT Corporation System on August 2, 2013. CT Corporation System received service of the Summons and Complaint on August 5, 2013.

3. A true and correct copy of the Summons and Complaint and other documents served on APGI in the State Court Action is attached as Exhibit A. This Notice of Removal is timely filed with this Court pursuant to 28 U.S.C. § 1446(b).

4. The United States District Court for the Eastern District of North Carolina is the United States district court embracing the place where the State Court Action was pending. The State Court Action therefore may be removed to this Court pursuant to 28 U.S.C. § 1441(a).

5. As required by 28 U.S.C. § 1446(d), APGI will provide written notice of the filing of this Notice of Removal to Plaintiff, and a copy of this Notice of Removal is being filed with the Clerk of the Wake County General Court of Justice, Superior Court Division. A copy of the filing of the Notice of Filing of Notice of Removal is attached as Exhibit B.<sup>1</sup>

6. This Court has jurisdiction over this action under 28 U.S.C. § 1331. Federal-question removal is warranted when “the plaintiff’s complaint establishes that the case ‘arises under’ federal law.” *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10–11 (1983). A complaint satisfies that standard not only when it asserts a federal-law claim, but also

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<sup>1</sup> To prevent unnecessary duplication, APGI has not attached a second copy of this pleading to Exhibit B, but hereby incorporates it herein by reference.

“where the vindication of a right under state law necessarily turn[s] on some construction of federal law.” *Id.* at 9. Removal of the State Court Action is proper under 28 U.S.C. § 1441(a) because North Carolina’s claim arises under the Constitution, laws, or treaties of the United States and depends upon resolution of a substantial question of federal law.

7. North Carolina seeks a declaration that it has “sole and exclusive” ownership of the submerged bed of a 38-mile stretch of the Yadkin River underlying certain hydropower projects. Compl. ¶ 41(i). North Carolina bases this claim entirely on its assertion that the relevant portion of the Yadkin River, “at the time North Carolina became a state of the United States of America in 1789 and at all times thereafter, ... have been, and continue now to be, navigable in fact.” Compl. ¶ 27. The state therefore maintains that, as an incident of its sovereignty, it “holds title to that submerged land in trust for the people of the State.” Compl. ¶ 28.

8. The U.S. Supreme Court has long held that a “State’s title to lands underlying navigable waters within its boundaries is conferred ... by the Constitution itself.” *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). North Carolina thus has asserted an interest that depends on what sovereign interests North Carolina sacrificed and retained at statehood, which is a question of federal constitutional law. *See, e.g., PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012). Accordingly, North Carolina’s claim necessarily arises under federal law.

9. The Complaint also arises under federal law because North Carolina’s claim to

relief necessarily depends upon resolution of a substantial question of federal law.<sup>2</sup> A complaint that pleads state-law claims arises under federal law “where the vindication of a right under state law necessarily turn[s] on some construction of federal law.” *Franchise Tax Bd.*, 463 U.S. at 9. Whether North Carolina’s title claim is meritless or viable turns on whether the relevant segment of the Yadkin River was navigable at statehood. *See* Compl. ¶ 27. If, as North Carolina claims, the segment of the river at issue was navigable in 1789, title to the underlying riverbeds belonged to North Carolina at statehood. If, as APGI will argue, the segment of the river was not then navigable, then North Carolina’s claim that it assumed title to those lands in 1789 as an incident of its sovereignty fails.

10. The U.S. Supreme Court has long held that when navigability is asserted as a basis for state title to riverbeds, “[t]he question of navigability ... is a federal question.” *United States v. Utah*, 283 U.S. 64, 75 (1931); *see also PPL Montana*, 132 S.Ct. at 1227; *United States v. Oregon*, 295 U.S. 1, 14 (1935); *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926); *Massachusetts v. New York*, 271 U.S. 65, 89 (1926). North Carolina’s right to relief therefore necessarily turns on a substantial question of federal law.

11. Under the federal standard of navigability for title, rivers are navigable in law when they are navigable in fact, and navigable in fact “when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel

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<sup>2</sup> Although North Carolina’s Complaint does not acknowledge the federal-law question underlying its cause of action, a plaintiff may not defeat removal by omitting necessary federal questions from its complaint. *Franchise Tax Bd.*, 463 U.S. at 22. The rule for state riverbed title is one of “federal constitutional significance.” *PPL Montana*, 132 S. Ct. at 1227.

are or may be conducted in the customary modes of trade and travel on water.” *The Montello*, 20 Wall. 430, 441-42 (1874). The U.S. Supreme Court has specifically cautioned that “[i]t is not for a state by courts or legislature, in dealing with the general subject of beds of streams to adopt a retroactive rule for determining navigability which would ... grant or would enlarge what actually passed to the state, at the time of her admission.” *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88 (1922). “To treat the [navigability] question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended.” *Holt State Bank*, 270 U.S. at 56. Because North Carolina’s claim to title of the submerged lands under the relevant segment of the Yadkin River must be evaluated under the federal test for navigability for title, the Complaint arises under federal law for purposes of 28 U.S.C. § 1331.

**WHEREFORE**, APGI prays that this Court assume jurisdiction over this action from the General Court of Justice, Superior Court Division of Wake County, North Carolina, and that this action shall proceed as removed under this Court’s jurisdiction pursuant to 28 U.S.C. §§ 1331, 1441 and 1446.

Plaintiffs are notified to proceed no further in state court.

This the 3rd day of September, 2013.

/s/Gary J. Rickner

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 3, 2013, I caused a copy of the foregoing **NOTICE OF REMOVAL** to be electronically filed with the Clerk of Court using the CM/ECF system. I further certify that I have served the same via first class mail, postage prepaid, in envelope(s) addressed as follows:

Alexander McC. Peters  
Senior Deputy Attorney General  
North Carolina Department of Justice  
Special Litigation Division  
114 W. Edenton Street, Office No. 346  
Raleigh, NC 27603

I. Faison Hicks  
Special Deputy Attorney General  
North Carolina Department of Justice  
Special Litigation Division  
114 W. Edenton Street, Office No. 349  
Raleigh, NC 27603

Donald R. Teeter, Sr.  
Special Deputy Attorney General  
North Carolina Department of Justice  
Civil Division, Property Control Section  
Administration Building  
116 W. Jones Street, Suite 4054  
Raleigh, NC 27602

Gary Mark Teague  
Assistant Attorney General  
North Carolina Department of Justice  
Civil Division, Property Control Section  
Administration Building  
116 W. Jones Street, Suite 4054  
Raleigh, NC 27602

/s/Gary J. Rickner

Gary J. Rickner

N.C. State Bar I.D. No.: 025129

E-mail: gjr@wardandsmith.com

For the firm of

Ward and Smith, P.A.

Post Office Box 33009

Raleigh, NC 27636-3009

Telephone: 919.277.9100

Facsimile: 919.277.9177

*Counsel for Defendant Alcoa Power  
Generating, Inc.*



## EXHIBIT "A"



**Service of Process  
Transmittal**

08/05/2013

CT Log Number 523241015

**TO:** Sam Haschets  
Alcoa Inc.  
201 Isabella Street  
Pittsburgh, PA 15212

**RE:** Process Served in North Carolina

**FOR:** Alcoa Power Generating Inc. (Domestic State: TN)

**ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:**

**TITLE OF ACTION:** The State of North Carolina, by and through its agency, the North Carolina Department of Administration, Pltf. vs. Alcoa Power Generating, Inc., Dft.

**DOCUMENT(S) SERVED:** Letter(s), Summons, Return of Service, Complaint, Motion, First Set of Requests

**COURT/AGENCY:** Wake County Superior Court, NC  
Case # 13CV010477

**NATURE OF ACTION:** Environmental Litigation - Government Enforcement Action - Massive footprint of toxic industrial pollution, including cyanide, arsenic, polychlorinated biphenyls, polycyclic aromatic hydrocarbons and a host of other contaminants in the soil, the groundwater and the waters of the Yadkin River

**ON WHOM PROCESS WAS SERVED:** C T Corporation System, Raleigh, NC

**DATE AND HOUR OF SERVICE:** By Certified Mail on 08/05/2013 postmarked: "Illegible"

**JURISDICTION SERVED :** North Carolina

**APPEARANCE OR ANSWER DUE:** Within 30 days after service

**ATTORNEY(S) / SENDER(S):** Alexander McC. Peters  
North Carolina Department of Justice  
114 West Edenton Street  
Office Number 346  
Raleigh, NC 27603  
919/716-6913

**ACTION ITEMS:** CT has retained the current log, Retain Date: 08/05/2013, Expected Purge Date: 08/10/2013  
Image SOP  
Email Notification, Sam Haschets sam.haschets@klgates.com  
Email Notification, Naju Tata naju.tata@klgates.com

**SIGNED:** C T Corporation System  
**PER:** Ronnie Strickland  
**ADDRESS:** 150 Fayetteville St.  
Box 1011  
Raleigh, NC 27601  
919-821-7139

**TELEPHONE:**

Page 1 of 1 / JC

Information displayed on this transmittal is for CT Corporation's record keeping purposes only and is provided to the recipient for quick reference. This information does not constitute a legal opinion as to the nature of action, the amount of damages, the answer date, or any information contained in the documents themselves. Recipient is responsible for interpreting said documents and for taking appropriate action. Signatures on certified mail receipts confirm receipt of package only, not contents.



## State of North Carolina

ROY COOPER  
ATTORNEY GENERAL

Department of Justice  
PO Box 629  
Raleigh, North Carolina  
27602

August 2, 2013

**BY CERTIFIED MAIL, RETURN  
RECEIPT REQUESTED**

CT Corporation System  
150 Fayetteville Street  
Post Office Box 1011  
Raleigh, North Carolina 27601

Re: *The State of North Carolina, by and through its agency,  
the North Carolina Department of Administration v.  
Alcoa Power Generating, Inc., No. 13-CVS-10477  
(Superior Court, Wake County, North Carolina filed  
Aug. 2, 2013)*

Dear Sirs/Madams:

Enclosed herewith and served upon Alcoa Power Generating, Inc. in accordance with the North Carolina Rules of Civil Procedure are the plaintiff's Summons and Complaint in the above-referenced action, together with the plaintiff's First Set of Requests for Production of Documents and Things and the plaintiff's Motion filed under Rule 2.1 of the General Rules of Practice for the Superior and District Courts.

I am serving you with the enclosed pleadings and the enclosed discovery request because CT Corporation System is identified by Alcoa Power Generating, Inc. in the records of the North Carolina Secretary of State, Corporations Division, as Alcoa Power Generating, Inc.'s registered agent for service of process in this State.

CT Corporation System  
August 2, 2013  
Page 2

Should you have any questions concerning this letter or its enclosures, please let me know.

Very truly yours,

A handwritten signature in black ink, appearing to read "I. Faison Hicks". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

I. Faison Hicks  
Attorney for the State of North Carolina

Enclosures

13CV010477

## STATE OF NORTH CAROLINA

File No.

WAKE County

In The General Court Of Justice  
☐ District ☒ Superior Court Division

<b>Name Of Plaintiff</b> STATE OF NORTH CAROLINA, by & through the NCDOA		<b>CIVIL SUMMONS</b>  <input type="checkbox"/> ALIAS AND PLURIES SUMMONS (ASSESS FEE)
<b>Address</b> 116 West Jones Street		
<b>City, State, Zip</b> Raleigh, North Carolina 27603		
<b>VERSUS</b>		
<b>Name Of Defendant(s)</b> ALCOA POWER GENERATING, INC.		<b>Date Original Summons Issued</b>
		<b>Date(s) Subsequent Summons(es) Issued</b>

G.S. 1A-1, Rules 3, 4

## To Each Of The Defendant(s) Named Below:

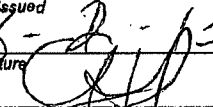
<b>Name And Address Of Defendant 1</b> 201 Isabella Street, Pittsburg, Pennsylvania 15221	<b>Name And Address Of Defendant 2</b>
--	--

## A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

<b>Name And Address Of Plaintiff's Attorney (If None, Address Of Plaintiff)</b> I. Faison Hicks, Special Deputy Attorney General, North Carolina Department of Justice, 114 West Edenton Street, Office Number 349, Raleigh, NC 27603, Post Office Box 629, Raleigh, NC 27602-0629, telephone: 919/716-6629	<b>Date Issued</b> 8-2-13	<b>Time</b> 10	<input type="checkbox"/> AM <input type="checkbox"/> PM
	<b>Signature</b> 		
	<input type="checkbox"/> Deputy CSC <input type="checkbox"/> Assistant CSC <input type="checkbox"/> Clerk Of Superior Court		

☐ **ENDORSEMENT (ASSESS FEE)**  
 This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

<b>Date Of Endorsement</b>	<b>Time</b>	<input type="checkbox"/> AM <input type="checkbox"/> PM
<b>Signature</b> <input type="checkbox"/> Deputy CSC <input type="checkbox"/> Assistant CSC <input type="checkbox"/> Clerk Of Superior Court		

**NOTE TO PARTIES:** Many counties have **MANDATORY ARBITRATION** programs in which most cases where the amount in controversy is \$15,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.

**RETURN OF SERVICE**

I certify that this Summons and a copy of the complaint were received and served as follows:

**DEFENDANT 1**

Date Served

Time Served

☐ AM☐ PM

Name Of Defendant

- ☐ By delivering to the defendant named above a copy of the summons and complaint.
- ☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.
- ☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

- ☐ Other manner of service (specify)

- ☐ Defendant WAS NOT served for the following reason:

**DEFENDANT 2**

Date Served

Time Served

☐ AM☐ PM

Name Of Defendant

- ☐ By delivering to the defendant named above a copy of the summons and complaint.
- ☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.
- ☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

- ☐ Other manner of service (specify)

- ☐ Defendant WAS NOT served for the following reason.

Service Fee Paid

\$

Signature Of Deputy Sheriff Making Return

Date Received

Name Of Sheriff (Type Or Print)

Date Of Return

County Of Sheriff

FILED

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF WAKE

2013 AUG -2 AM 10:13

SUPERIOR COURT DIVISION

13-CVS-\_\_\_\_\_

WAKE COUNTY, C.S.C.

THE STATE OF NORTH CAROLINA, by and )  
 through its agency, the NORTH CAROLINA )  
 DEPARTMENT OF ADMINISTRATION, )

Plaintiff, )

**COMPLAINT**

- against - )

ALCOA POWER GENERATING, INC., )

Defendant. )

NOW COMES the State of North Carolina, by and through its agency, the North Carolina Department of Administration, and, by its undersigned counsel, alleges and says as follows:

**INTRODUCTION**

1. By this action, the State of North Carolina 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.

**THE PARTIES**

2. The plaintiff, the State of North Carolina, is a State of the United States of America. North Carolina became a State of the United States in 1789 and is one of the original 13 American states.

3. The North Carolina Department of Administration (hereinafter referred to as the "Department of Administration") is an agency of the Government of the State of North Carolina duly created under and pursuant to the Constitution of the State of North Carolina and the North Carolina General Statutes. Pursuant to N.C. Gen. Stat. §143-341(4)l, the Department of

Administration is charged with responsibility for, *inter alia*, managing and controlling the vacant and unappropriated lands, swamplands and submerged lands of the State. Through its Division of State Property, the Department of Administration is the administering agency in the State Government for, *inter alia*, the disposition of all State-owned lands not constituting highway rights of way, or any interest therein, by deed, lease, easement or allocation.

4. Alcoa Power Generating, Inc. (hereinafter referred to as "Alcoa") is a corporation organized and existing under the laws of the State of Tennessee, with its principal offices and place of business located at 201 Isabella Street, Pittsburg, Pennsylvania 15221. Alcoa's President's offices are located at 390 Park Avenue, New York, New York 10022.

5. Neither Alcoa, its parent corporation, its affiliates, its subsidiaries nor its predecessors in interest or title is or ever was a public utility regulated by the North Carolina Utilities Commission. As such, Alcoa is not required by law to act in the public interest, but is simply a private, for-profit corporation which seeks after the private economic interests of its shareholders.

#### **JURISDICTION AND VENUE**

6. This Court has jurisdiction over the subject matter of this action under and by virtue of, *inter alia*, N.C. Gen. Stat. §§7A-3, 7A-240, 1-253 and 1-254.

7. This Court has *in personam* jurisdiction over Alcoa under and by virtue of, *inter alia*, N.C. Gen. Stat. §§1-75.3(b) and 1-75.4(1)d.

8. Venue of this action in this Court is proper under and by virtue of, *inter alia*, N.C. Gen. Stat. §1-80(1).



## **GENERAL ALLEGATIONS**

### **Background and History**

9. During the past 100 years or more, Alcoa and its predecessors in interest and/or predecessors in title (hereinafter referred to as "Alcoa and its Predecessors") came to North Carolina and constructed four hydroelectric dams that span the Yadkin River in the area of Rowan, Davie, Davidson, Stanly and Montgomery counties.

10. These four hydroelectric dams are the High Rock Dam, the Narrows (Badin) Dam, the Falls Dam and the Tuckertown Dam (collectively referred to hereinafter as the "Dams").

11. By one or more actions taken at various times by the North Carolina General Assembly, the State conditionally permitted Alcoa and its Predecessors, or some of them, to enter upon the State's real property in Rowan, Davie, Davidson, Stanly and/or Montgomery County, including certain of the State's lands submerged under the waters of the Yadkin River, and to construct and thereafter operate the Dams under certain limited circumstances.

12. The State permitted Alcoa and its Predecessors, or some of them, to enter upon the bed of the Yadkin River during this period, construct the Dams and thereafter operate the Dams for the primary purpose of promoting economic development in this part of the State.

13. The State took this action with the understanding and expectation that Alcoa and its Predecessors could and would use the Yadkin River and its bed to develop industry in this part of the State, thus creating and thereafter maintaining large numbers of high quality jobs for the people living in this region, and because Alcoa and its Predecessors assured the State that they would, in fact, use the Yadkin River and its bed in this manner and for this public purpose.

14. In taking the actions referred to above, the State never granted, conveyed or relinquished, whether in favor of Alcoa and its Predecessors, or any of them, or anyone else, any of its ownership interest in the bed of any portion of the Yadkin River. Indeed, the State has never granted, conveyed or relinquished its ownership interest in the bed of the Yadkin River to or in favor of any person or entity.

15. Before the mid-twentieth century, Alcoa was operating a large aluminum smelting plant in Badin, Stanly County, North Carolina that employed a large number of the area's residents in high-paying industrial jobs. This plant also spurred the creation and subsequent maintenance of a substantial amount of economically significant indirect employment and business development in the area and the region.

16. Alcoa's Badin aluminum smelting plant was powered and was made economically viable (and highly profitable) by electricity generated by the waters of the Yadkin River as it flows through Rowan, Davie, Davidson, Stanly and Montgomery counties.

17. Upon information and belief, by the late second half of the twentieth century, if not before that time, the profits earned by the operation of the Dams and Alcoa's Badin aluminum smelting plant had re-paid the investment costs of building the Dams and the smelting plant.

**Alcoa's Decision to Close its Badin Plant While Continuing  
to Use the Yadkin River to Generate and Sell Electricity**

18. By the 1990s, Alcoa had begun to reduce its industrial operations at its Badin aluminum smelting plant and, at the same time, the number of people employed there began to decline.

19. In 2004, Alcoa's parent corporation made the strategic decision to begin shutting down its and its subsidiaries' aluminum smelting plants in the United States and to outsource

those smelting operations to countries with low-cost labor and relaxed environmental and other regulatory standards.

20. Since that time, Alcoa's parent corporation has invested billions of dollars in the construction of new, state-of-the-art smelting operations in Saudi Arabia and Iceland, where it now employs large numbers of people in the same sorts of jobs that used to exist in Badin.

21. By 2007, Alcoa had ceased virtually all operations at its Badin plant; however, it continued to operate the Dams, selling the electricity generated by the Dams on the wholesale (mostly out-of-state) market.

22. In April 2010, Alcoa announced that it was permanently shutting down its Badin aluminum smelting plant; however, it also announced that it would continue to operate the Dams and that it would continue to sell the electricity generated by the Dams on the wholesale market.

23. According to its own records, as of April 2006, Alcoa and its parent and affiliate corporations earned an average annual net profit after taxes of \$19 million per year from their sales of electricity generated by the waters of the Yadkin River.

24. Thus, since at least 2007, Alcoa has been using the Yadkin River, North Carolina's second largest river system, to generate enormous revenues and profits for itself, its parent corporation and one or more of its affiliated corporations without providing the people of North Carolina with any commensurate economic benefit in return. Alcoa's failure in this regard was exacerbated and made permanent by the closure of its Badin aluminum smelting plant and the demolition of the plant site.

### **Alcoa's Legacy of Environmental Pollution**

25. As Alcoa has shuttered its Badin aluminum smelting plant and moved its aluminum smelting operations overseas (while continuing to operate the Dams and sell the electricity made possible by the Yadkin River), it has left in its wake a massive footprint of toxic industrial pollution, including cyanide, arsenic, polychlorinated biphenyls (also known as "PCBs"), polycyclic aromatic hydrocarbons and a host of other contaminants in the soil, the groundwater and the waters of the Yadkin River (including in the bed of the River), all of which threaten the health, safety and welfare of area and downstream residents, as well as the health and welfare of the Yadkin River and the River's aquatic life.

26. Alcoa has taken little or no action to clean up its environmental contamination and pollution, which has left the State and its people with a significant economic and public health burden.

### **The Ownership of the Bed of the Yadkin River**

27. At the time North Carolina declared its independence from Great Britain, at the time the citizens of North Carolina first took up arms against Great Britain in the War for American Independence, at the successful conclusion of that War, at the time North Carolina became a state of the United States of America in 1789 and at all times thereafter, all portions of the waters of the Yadkin River lying within and lying 100 yards to the north and 100 yards to the south of the project boundary of what is now the Yadkin Hydroelectric Project, Federal Energy Regulatory Commission (hereinafter referred to as "FERC") Project No. P-2197 (this section of the Yadkin River being hereinafter referred to as the "Relevant Segment of the Yadkin River") have been, and continue now to be, navigable in fact.

28. Accordingly, at all times relevant to this Complaint and at the present time, the State of North Carolina has owned and continues to own the submerged bed of the Relevant Segment of the Yadkin River in its entirety and holds title to that submerged land in trust for the people of the State.

29. At no time since it acquired title to the bed of the Relevant Segment of the Yadkin River has the State of North Carolina conveyed its title to any portion of that riverbed to Alcoa or to any other person or entity.

30. By its closure of the Badin aluminum smelting plant and its other actions and omissions, Alcoa has 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.

31. Therefore, to 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 of any kind 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.

32. Indeed, if Alcoa were to be allowed to continue to use the bed of the Relevant Segment of the Yadkin River as it has heretofore to operate the Dams and to use the State's second largest river system to generate and sell electricity at enormous profits to Alcoa with no commensurate economic benefit to the people of the State, that would constitute a monopoly and

an exclusive emolument, which, under the North Carolina Constitution, may not be granted by the State except upon consideration of public service and benefit.

**The Dispute Between the State and Alcoa as to the Ownership of the Riverbed**

33. From approximately 2006 and continuing since that time, Alcoa has repeatedly stated to FERC and to the Division of Water Quality (hereinafter referred to as the "DWQ") of the North Carolina Department of Environment and Natural Resources (hereinafter referred to as "DENR") that the State does not own the bed of the Relevant Segment of the Yadkin River.

34. During this same period, Alcoa has repeatedly represented to FERC that it owns all of the real property that is necessary to operate the Yadkin Hydroelectric Project as licensed by FERC.

35. Through its officials, representatives, spokespersons and surrogates, Alcoa has also repeatedly stated publicly that it owns the bed of some or all of the Relevant Segment of the Yadkin River.

36. On the strength of its representations to FERC that the State is not the owner of the bed of the Relevant Segment of the Yadkin River and that Alcoa has the legal right to use that bed for its operation of the Yadkin Hydroelectric Project, Alcoa is seeking to obtain from FERC an exclusive monopoly license to continue to use the Yadkin River and the bed of the Relevant Segment of the Yadkin River for the next 50 years to generate and sell electricity at enormous profits to itself, its parent and its affiliate(s), without giving any commensurate economic or other benefit to the people of North Carolina.

37. On the strength of its statements to the DWQ of DENR, Alcoa is seeking to obtain an administrative certification that is legally required in order to render Alcoa eligible to obtain the FERC monopoly hydropower license that it is currently seeking.

38. Absent a declaration by this Court that the bed of the Relevant Segment of the Yadkin River is owned by the State of North Carolina and that Alcoa has no permit, license, easement, possessory right or other interest in or to that bed, Alcoa is likely to be awarded the hydropower license referred to above by FERC and it is likely that the people of the State will not be permitted to share in the hydropower-related and other significant economic and other benefits of the Relevant Segment of the Yadkin River.

39. Accordingly, there is an actual and genuine controversy between the State and Alcoa as to, *inter alia*, whether the State or Alcoa owns and/or has the right to use the bed of the Relevant Segment of the Yadkin River for the purpose of, *inter alia*, operating the Dams.

#### **CLAIM FOR DECLARTORY JUDGMENT**

40. The State re-alleges and incorporates by reference herein the allegations contained in paragraphs 1 through 39 of this Complaint above.

41. By reason of the matters alleged above in this Complaint, the State of North Carolina is entitled to:

(i) a judicial declaration that the 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;

(ii) a judicial declaration that 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;

(iii) a judicial declaration that, to 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;

(iv) a judicial declaration that a portion of each of the Dams is located atop and stands 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 (this portion of the Dams is hereinafter referred to as the "Riverbed Portions of the Dams"), together with a delineation and definition of the Riverbed Portions of the Dams;

(v) a judicial declaration that, as 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;

(vi) a judicial declaration that neither 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;

(vii) an Order directing 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; and

(viii) any supplemental relief as this Court may decree.

WHEREFORE, the plaintiff, the State of North Carolina, by and through its agency, the North Carolina Department of Administration, respectfully prays that the Court enter:



1. a judicial declaration that the 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;

2. a judicial declaration that 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;

3. a judicial declaration that, to 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;

4. a judicial declaration that the 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;

5. a judicial declaration that, as 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;

6. a judicial declaration that neither 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;

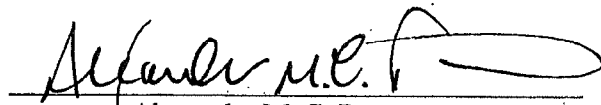
7. an Order directing Alcoa to take actions to respect the State's rights in and to the Riverbed Portions of the Dams and the bed of the Relevant Segment of the Yadkin River;

8. any supplemental relief as this Court may decree;

9. an Order taxing the costs of this action to Alcoa; and

10. an Order awarding the State such other and further relief as the Court may deem just and proper.

This 2<sup>nd</sup> day of August 2013.



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North Carolina State Bar No. 13654  
*Attorney for the State of North Carolina*

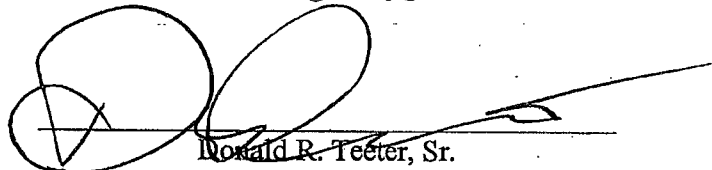
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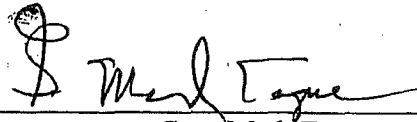
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Gary Mark Teague

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STATE OF NORTH CAROLINA

FILED

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

COUNTY OF WAKE

2013 AUG -2 AM 10:13

13-CVS-\_\_\_\_\_

WAKE COUNTY, C.S.C.

THE STATE OF NORTH CAROLINA, by and )  
through its agency, the NORTH CAROLINA )  
DEPARTMENT OF ADMINISTRATION, )

Plaintiff, )

- against - )

ALCOA POWER GENERATING, INC., )

Defendant. )

**MOTION TO DESIGNATE  
CASE AS EXCEPTIONAL**

TO THE HONORABLE SENIOR RESIDENT SUPERIOR COURT JUDGE OF WAKE  
COUNTY AND TO THE HONORABLE CHIEF JUSTICE OF THE NORTH CAROLINA  
SUPREME COURT:

Pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts,  
Supplemental to the North Carolina Rules of Civil Procedure, the plaintiff, the State of North  
Carolina, acting through its agency, the North Carolina Department of Administration  
(hereinafter referred to as the "State"), hereby respectfully moves the Court to designate this case  
as exceptional.

In support of this Motion, the State respectfully shows unto the Court that:

1. This action was commenced on August 2, 2013, and is currently pending in the  
Superior Court of Wake County, North Carolina.

2.- This action is an exceptional case as defined by the factors set forth in Rule 2.1(d)  
of the General Rules of Practice by reason of the complexity of the evidentiary matters and legal  
issues involved, as well as the potentially great significance of the case to the jurisprudence of

the State. In addition, the designation of this action as exceptional will substantially promote the efficient administration of justice.

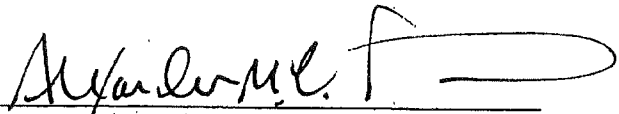
More particularly, the State respectfully shows unto the Court that the State's Complaint in this action seeks a judicial declaration that the State owns the submerged bed of a particularly described 38-mile segment of the Yadkin River in Rowan, Davie, Davidson, Stanly and Montgomery counties; that the State owns this submerged property in trust for the people of North Carolina; and that the State likewise owns and holds in trust for the people of this State all structures erected and standing atop this submerged property, including four hydroelectric dams which span the Yadkin River in Rowan, Davie, Davidson, Stanly and Montgomery counties.

The legal and factual issues presented by this action are highly complex and include: (i) the question whether the segment of the Yadkin River at issue in this action was navigable in fact at the approximate time of the conclusion of the War for American Independence and/or at the time of North Carolina's entry into the Union as a State of the United States of America; and (ii) the question whether the State has ever conveyed its interest in the bed of the relevant segment of the Yadkin River to any person or entity, or, alternatively, whether the State continues to own this property in trust for the people of North Carolina.

WHEREFORE, the plaintiff, the State of North Carolina, respectfully prays that this Court recommend to the Chief Justice of the Supreme Court of North Carolina that this case be designated as an exceptional case and that a Superior Court Judge be appointed to administer the case for discovery and trial purposes.

Respectfully submitted this 2<sup>nd</sup> day of August 2013.

*Signature lines appear on the following pages.*



Alexander McC. Peters

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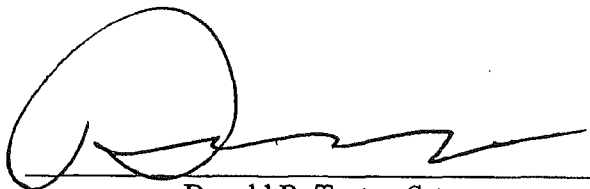


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STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
13-CVS-\_\_\_\_\_

THE STATE OF NORTH CAROLINA, by and )  
through its agency, the NORTH CAROLINA )  
DEPARTMENT OF ADMINISTRATION, )  
 )  
Plaintiff, )  
 )  
- against - )  
 )  
ALCOA POWER GENERATING, INC., )  
 )  
Defendant. )

**THE STATE OF NORTH  
CAROLINA'S FIRST SET  
OF REQUESTS FOR  
PRODUCTION OF  
DOCUMENTS AND THINGS**

Pursuant to Rules 26 and 34 of the North Carolina Rules of Civil Procedure, the plaintiff, the State of North Carolina, by and through its agency, the North Carolina Department of Administration (hereinafter referred to as the "State"), hereby requests that the defendant, Alcoa Power Generating, Inc. (hereinafter referred to as "Alcoa"), produce copies of the following described documents and things to counsel for the plaintiff no later than forty-five (45) days after the date of service hereof upon Alcoa:

**REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS**

**REQUEST 1:** All documents and things of any description in your possession, custody or control which you (Alcoa) contend demonstrate that all or any portion or segment of that part of the Yadkin River which is referred to in the Complaint in this action as the "Relevant Segment of the Yadkin River" was not "navigable in fact," as that term is defined in, among other cases, *PPL Montana, LLC v. Montana*, \_\_ U.S. \_\_, 132 S.Ct. 1215 (2012), as of the time: (i) the State of North Carolina declared its independence from Great Britain; (ii) the end of the War for American Independence; and (iii) North Carolina became a state of the United States of America.

**RESPONSE:**

**REQUEST 2:** All documents and things of any description in your possession, custody or control which you (Alcoa) contend demonstrate that the State of North Carolina has ever conveyed any portion of its ownership, title or other interest in that portion or segment of the bed

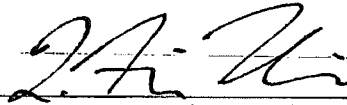
of the Yadkin River which is referred to in the Complaint in this action as the "Relevant Segment of the Yadkin River" to any person or entity.

**RESPONSE:**

**REQUEST 3:** All documents and things of any description in your possession, custody or control which you (Alcoa) contend demonstrate that Alcoa or any other person or entity was ever given or conveyed any permit, license, easement, possessory right or other interest in or to any portion or segment of the bed of that portion or segment of the Yadkin River that is referred to in the Complaint in this action as the "Relevant Segment of the Yadkin River" and all documents relating to any such gift or conveyance and the terms and/or conditions on which any such gift or conveyance was made or granted.

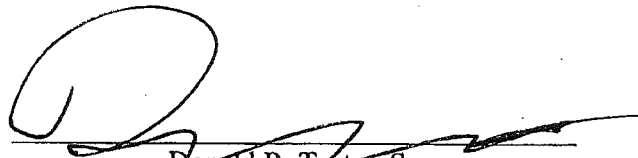
**RESPONSE:**

This 2<sup>nd</sup> day of August 2013.



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North Carolina State Bar No. 10672  
*Attorney for the State of North Carolina*

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North Carolina Department of Justice  
Special Litigation Division  
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## **EXHIBIT "B"**

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 13-CVS-10477

THE STATE OF NORTH CAROLINA, )  
by and through its agency, the NORTH )  
CAROLINA DEPARTMENT OF )  
ADMINISTRATION, )

Plaintiff )

v. )

ALCOA POWER GENERATING, )  
INC., )

Defendant )

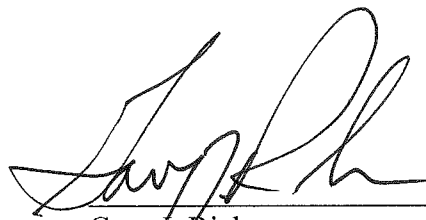
NOTICE OF FILING NOTICE  
OF REMOVAL

TO: Plaintiff The State of North Carolina, by and through its agency, The North Carolina Department of Administration, and its attorneys of record, Alexander McC. Peters, I. Faison Hicks, Donald R. Teeter, Sr. and Gary Mark Teague of the North Carolina Department of Justice:

PLEASE TAKE NOTICE that the undersigned has this day filed in the United States District Court for the Eastern District of North Carolina, Western Division, the attached Notice of Removal. Pursuant to 28 U.S.C. §§ 1331, 1441 and 1446, the above-captioned action is now removed and all further proceedings in the Superior Court of Wake County, North Carolina, are stayed and the state court is divested of jurisdiction.

This the 3rd day of September, 2013.

[SIGNATURE APPEARS ON NEXT PAGE]



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*Counsel for Defendant Alcoa Power  
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OF COUNSEL

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pclement@bancroftpllc.com

emurphy@bancroftpllc.com

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing NOTICE OF FILING NOTICE OF REMOVAL by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail addressed to the following person at the following address which is the last address known to me:

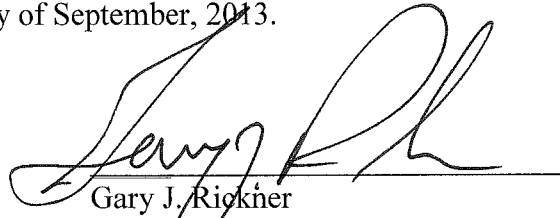
Alexander McC. Peters  
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Gary Mark Teague  
Assistant Attorney General  
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This the 3rd day of September, 2013.

A handwritten signature in black ink, appearing to read "Gary J. Rickher", is written over a horizontal line.

Gary J. Rickher

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