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September 17, 2009

Hon. Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426

Re: Alcoa Power Generating Inc., Project No. P-2197-\_\_\_\_  
Petition for Declaratory Order and For Exemption In Lieu of Filing Fee

Dear Secretary Bose:

Enclosed for filing in Project No. P-2197 is Alcoa Power Generating Inc.'s ("APGI") Petition for Declaratory Order. As the Petition for Declaratory Order solely concerns a matter under Part I of the Federal Power Act and the Commission's regulations promulgated thereunder, also enclosed is APGI's Petition for Exemption in Lieu of Filing Fee under 18 C.F.R. § 381.302.

Respectfully,

/s/ David R. Poe  
David R. Poe

*Counsel for Alcoa Power Generating Inc.*

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Alcoa Power Generating Inc.

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P-2197-\_\_\_\_

**PETITION FOR EXEMPTION IN LIEU OF FILING FEE**

Pursuant to Section 381.302 of the regulations of the Federal Energy Regulatory Commission, 18 C.F.R. § 381.302, this Petition for Exemption in Lieu of Filing Fee accompanies the Petition for Declaratory Order filed concurrently herewith by Alcoa Power Generating Inc. in the captioned proceeding. The accompanying Petition for Declaratory Order solely concerns a matter under Part I of the Federal Power Act and the Commission's regulation promulgated thereunder. Thus, no filing fee is required for the Petition for Declaratory Order. 18 C.F.R. § 381.302.

Respectfully submitted,

/s/ David R. Poe

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Dated: September 17, 2009

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Alcoa Power Generating Inc.

)

P-2197-\_\_\_\_

**PETITION FOR DECLARATORY ORDER  
OF ALCOA POWER GENERATING INC.**

Pursuant to Rule 207(a)(2) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”),<sup>1</sup> Alcoa Power Generating Inc. (“APGI”) licensee of, and applicant for a new license for, the Yadkin Hydroelectric Project (the “Project”) in Docket No. P-2197-073, hereby requests that the Commission issue a declaratory order finding that the Division of Water Quality of the North Carolina Department of Environment and Natural Resources (“DWQ”) has waived water quality certification (“WQC”) under Section 401(a)(1) of the Clean Water Act (“CWA”),<sup>2</sup> with respect to the Commission’s issuance of a new license for the Project.<sup>3</sup> Although DWQ purported to issue a Section 401 WQC near the end of the final day in which it could act without waiving its right to certify water quality by operation of law, DWQ’s purported certification, by its terms, was stated to be non-final, requiring further action of the licensee and a third party before the certificate could become effective.<sup>4</sup> As explained below, because the purported certificate was incomplete, DWQ failed to grant or deny certification within the requisite timeframe and thus waived its statutory right to condition the

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<sup>1</sup> 18 C.F.R. § 385.207(a)(2).

<sup>2</sup> 33 U.S.C. § 1341(a)(1).

<sup>3</sup> Pursuant to 18 C.F.R. § 381.302, APGI is filing concurrently a petition for exemption in lieu of filing fee, as this petition pertains to a matter under Part I of the Federal Power Act and the Commission’s regulations promulgated thereunder. In not submitting this Petition for Declaratory Order in its relicensing sub-docket, APGI has left to the Commission’s discretion whether this Petition for Declaratory Order deserves its own sub-docket, although we note that under similar circumstances, Duke Energy Carolina, LLC submitted such a petition in the relicensing docket for Project No. P-2232. APGI respectfully requests that if the Commission issues a new sub-docket number for this Petition for Declaratory Order that the new sub-docket be consolidated with APGI’s relicensing proceeding for the Yadkin Project, Docket No. P-2197-073, as the legal issues to be determined would be common to both dockets.

<sup>4</sup> Water Quality Certification 003173, issued by DWQ on May 7, 2009 (the “May 7th Certification”).

issuance of a new license for the Yadkin Project under Section 401 of the CWA and Section 4.34(b)(5)(iii) of the Commission's regulations.<sup>5</sup>

As explained by APGI in previous filings to the Commission in Docket No. P-2197-073, the Commission presently has the authority to issue a new license for the Project regardless of further action by DWQ or review of the May 7th Certification under North Carolina law.<sup>6</sup> Stanly County, North Carolina ("Stanly County") and the Governor of North Carolina ("the Governor"), both intervenors in the relicensing docket, have argued that the Commission should exercise discretion to refrain from issuing a new license pending the outcome of the appeals of DWQ's May 7th Certification. However, the pendency of appeals of the certification order does not prevent the Commission from acting, as discussed in APGI's prior filings, and is irrelevant if, as APGI contends, North Carolina has waived its right to certify the Project's water quality under Section 401. Thus, APGI respectfully requests that the Commission act on this petition expeditiously so that it can forthwith issue a new license for the Project, without having to be concerned with the timing or outcome of the appeals process in North Carolina. Once the Commission issues a new license, APGI can begin implementing the numerous environmental protection, mitigation and enhancement measures proposed in the Relicensing Settlement Agreement pending before the Commission in Docket No. P-2197-073.

## **I. INTRODUCTION**

Pursuant to Section 401(a)(1) of the CWA, hydroelectric license applicants must obtain either: (1) state certification that any discharge from the project would comply with applicable

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<sup>5</sup> 18 C.F.R. § 4.34(b)(5)(iii).

<sup>6</sup> *See Response of Alcoa Power Generating Inc. to Stanly County's Filing of Order Issued by North Carolina Administrative Law Judge Granting Stay of Section 401 Certification*, Docket No. P-2197-073 (filed on June 10, 2009).

water quality standards; or (2) a waiver of WQC by the appropriate state agency.<sup>7</sup> Section 401(a)(1) permits the Commission to deem certification waived if the certifying agency “fails or refuses” to act on a WQC request within a reasonable period of time, not to exceed one year.<sup>8</sup> The Commission’s implementing regulations for Section 401 provide that a “certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency *has not denied or granted certification* by one year after the date the certifying agency received a written request for certification.”<sup>9</sup>

Thus, under the one-year waiver provision of Section 401(a)(1) as applied by the above-referenced Commission regulation, a state water quality agency must deny or grant an application for WQC within one year of its receipt of the application, and if it fails to do so, the agency is deemed to have waived its right to certify water quality and to have any conditions to such certification incorporated into the license as enforceable terms. In Order No. 533, the order in which the Commission finalized the current language of Section 4.34(b)(5)(iii), the Commission stated succinctly that “[t]he only burden placed on the [state WQC] agency is to look at the request and make a clear decision within one year.”<sup>10</sup>

In this proceeding, APGI filed a request for a WQC for the Yadkin Project with DWQ on May 8, 2008.<sup>11</sup> DWQ issued an order purporting to be a 401 certification for the Yadkin Project

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<sup>7</sup> 33 U.S.C. § 1341(a)(1).

<sup>8</sup> *Id.* (“If the State ... *fails or refuses to act* on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.”) (emphasis added).

<sup>9</sup> 18 C.F.R. § 4.34(b) (emphasis added).

<sup>10</sup> *Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters*, Order No. 533, FERC Stats. & Regs., Regulation Preambles 1991-1996 ¶ 30,921 at 30,136 (1991).

<sup>11</sup> In fact, this was the second time APGI filed a certification request. Although DWQ granted APGI’s initial certification request, which APGI filed in May 2007, DWQ later discovered that it had made a procedural error when issuing notice of the certification process. DWQ thus asked APGI to withdraw its initial certification request and refile the request to prevent waiver of DWQ certification rights.

late in the afternoon on May 7, 2009, the last possible day on which DWQ could act without waiving its certification rights.<sup>12</sup> By its terms, however, the “certification” released on that date did not grant or deny certification, nor did it “make a clear decision” on APGI’s request. Rather, the certification was incomplete because its outcome was not determinable on its face, but instead was to be determined by future events outside of the control of DWQ. Specifically, DWQ explicitly conditioned the outcome of the entire WQC process upon APGI’s future ability – or inability – within 90 days of receipt of the May 7th Certification to post a “surety bond (or equivalent instrument)...executed by a surety approved by the Commission of Insurance.”<sup>13</sup> In fact, the certification explicitly acknowledged that it was not final, stating “[t]his Certification is only effective once the required performance/surety bond is in place.”<sup>14</sup>

By waiting until a couple of hours before the one-year statutory deadline was to expire, DWQ ensured that the required bond could not be posted (and, thus, that its certification could not become “effective”) prior to the expiration of the statutory deadline.<sup>15</sup> Moreover, whether such a bond would be posted by APGI within the 90 day period prescribed by DWQ was unknown when the May 7th Certification was issued and remains so since the May 7th Certification has been stayed.<sup>16</sup> Therefore, despite the DWQ’s use of the phrase “APPROVAL of 401 Water Quality Certification with Additional Conditions” in its cover memorandum to the

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<sup>12</sup> A copy of DWQ’s May 7, 2009 order is attached hereto as Attachment A.

<sup>13</sup> May 7th Certification, Condition 7.0; Attachment A, p. 5.

<sup>14</sup> Under the terms of the certification, APGI had 90 days in which to post the bond. North Carolina Water Quality Certification No. 003173, issued to Alcoa Power Generating Inc. dated May 7, 2009, Paragraph 7.

<sup>15</sup> Surety bonds in an amount of that size are instruments that require days, if not weeks, to negotiate because they involve issues of collateral as well as understanding and specification of the terms of performance.

<sup>16</sup> The entire certification released on May 7, 2009, including the requirement to post a bond, was stayed by a North Carolina administrative law judge pending appeal on May 27, 2009. *Stanly County, North Carolina v. North Carolina Department of Environment and Natural Resources, Division of Water Quality*, Order Granting Petitioner’s Motion for Preliminary Injunction/Stay of Certification, Office of Administrative Hearings 09 HER 3078 (issued May 27, 2009).

certification, whether APGI's application for a certification was actually approved or, alternatively, denied could only be determined by the actions of persons *other than the DWQ*, namely APGI and some surety approved by the Commissioner of Insurance, assuming that there is or will be such a surety willing to issue a bond conforming to the timeframes and requirements set forth in Condition 7 of the May 7th Certificate.

As demonstrated below, because DWQ failed to issue a certification that clearly granted or denied certification by May 7, 2008, DWQ failed to satisfy Section 401's requirement to "act" and the requirement of the Commission's regulations to grant or deny WQC within the requisite one-year time period. Accordingly, the Commission should determine that DWQ waived its statutory right to condition the issuance of a new license for the Yadkin Project under Section 401 of the CWA and, consistent with its precedent, proceed with further action in the relicensing docket for the Project.<sup>17</sup>

## **II. NORTH CAROLINA WAIVED ITS SECTION 401 CERTIFICATION RIGHTS WHEN IT FAILED TO ISSUE A COMPLETE AND EFFECTIVE CERTIFICATION GRANTING OR DENYING APGI'S REQUEST FOR CERTIFICATION WITHIN THE STATUTORY ONE-YEAR PERIOD**

As noted, Section 401 of the CWA provides that a state is deemed to have waived certification if the state "fails or refuses to act on" the certification request within a reasonable period of time, not to exceed one year. The statute contemplates that by the end of the one-year period the state has either acted on the application or has waived its WQC authority. The Commission's regulations further provide that the certifying agency must grant or deny an application for WQC within a year or else the certifying agency waives certification. Thus, to

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<sup>17</sup> Consistent with its precedent, if the Commission deems DWQ to have waived certification, the Commission has the discretion to issue a new license for the Yadkin Project with or without the conditions set forth in the purported WQC issued by DWQ on May 7, 2009. *See, e.g., City of Hamilton, Ohio*, 123 FERC ¶ 62,254 (2008) (holding that where the state is deemed to have waived certification, the Commission may treat the state's certification as late filed comments and recommendations filed in response to the Commission's public notice and choose to incorporate the conditions of the certification in whole or in part).

determine the legal significance of what DWQ did in its May 7<sup>th</sup> order in the context of Section 401's requirements, the questions are: (1) did DWQ's May 7th Certification constitute "action" within the meaning of Section 401; and, if so, (2) was it sufficient to fulfill the requirement of the Commission's regulations to grant or deny certification within the one-year deadline.

#### **A. DWQ Failed to Act within the One-Year Deadline of the Statute**

Because DWQ's purported certification was inherently incomplete – *i.e.*, the certification could not become effective within the one-year deadline and the ultimate outcome of its purported certification (to grant or deny certification) was only determinable by events outside of the control of DWQ *after* the expiration of the one-year statutory deadline – DWQ failed to "act" under the CWA within the one-year deadline and, as a result, waived certification for the Yadkin Project.

The CWA does not define "act on" and neither the courts nor the Commission has ever discussed precisely what it means for a state to "act on" an application.<sup>18</sup> Nevertheless, the only meaningful interpretation of the language of Section 401 is that either the certifying agency issues a certification capable of becoming effective within the one-year period or else it is deemed to have waived certification. To interpret Section 401 otherwise would allow a state to indefinitely block or delay federal action, which is inconsistent with the overall scope, structure, and purpose of Section 401, as well as the fundamental purpose of imposing a federal statutory

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<sup>18</sup> Both the courts and the Commission have discussed whether a state has "acted on" an application within one year or waived certification with respect to a certification that is subsequently appealed and/or stayed at the state level, and the appeal or stay is not resolved within the one-year period. *See, e.g., FPL Energy Maine Hydro LLC v. FERC*, 551 F.3d 58, 63 (1st Cir. 2008) (stating that "the one year deadline seemingly does not apply to state judicial review after certification by a state agency, as both parties agree..." but also expressing doubt as to whether that is the case with respect to administrative appeals of WQCs); *FPL Energy Maine Hydro LLC*, 108 FERC ¶ 61,261 (2004), *order on reh'g* 111 FERC ¶ 61,104 (2005) (holding that a state is deemed to have "acted" under Section 401 once it issued a 401 certification even though an appeal of the certification was pending after the one-year deadline had elapsed). These cases are not instructive with respect to DWQ's action, however, because at the time the certifications were issued in those cases each certification was effective according to its own terms. In this case, the May 7th Certification, by its own terms, was incapable of being effective within the one-year period for action.

deadline for state certification action. It is also inconsistent with well-established FERC precedent and basic principles of federalism. As the courts and the Commission have recognized, the policy and intent underlying the one-year deadline is to prevent a state from blocking or delaying a federal license or permit by stalling issuance of a WQC.<sup>19</sup> Allowing a state to issue a purported “certification” that keeps the agency’s final decision in doubt until well after the one-year period plainly contravenes the policy and intent of Section 401.

Although DWQ may argue that its order only extended the period by 90 days or less, the fact remains that it represents an extension of the one-year period for action. Indeed, as written, unless APGI posts a bond as prescribed within the 90-day period, there apparently would be no effective certificate. The May 7th Certificate does not explicitly say what would happen if an acceptable bond was not posted within the deadline.<sup>20</sup> So, on its face, it is possible that the outcome of APGI’s request for WQC would not be known to be either granted or denied for a period of 90 days, if at all, after the expiration of the one-year deadline. The Commission recognizes that the issuance of a WQC that is not yet effective “makes [the Commission’s] compliance with Section 401(a)(1) ambiguous and problematical.”<sup>21</sup>

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<sup>19</sup> See *Airport Cmty. v. Graves*, 280 F. Supp. 2d 1207, 1215-16 (W.D. Wash. 2003) (“Whether a state begins to act but does not complete the issuance of a certification or whether the state entirely fails to act at all, the legislative history of Section 401 makes clear that either of those two situations was unacceptable to Congress because both result in delays in issuing Federal permits.”); *Central Vermont Pub. Serv. Corp.*, 113 FERC ¶ 61,167 at PP 18-19, 21.

<sup>20</sup> Given the turmoil in the credit markets within the last year, the mere existence of a surety approved by the North Carolina Commissioner of Insurance and willing to execute such a bond, cannot be prudently assumed.

<sup>21</sup> *Great Northern Paper, Inc.*, 77 FERC ¶ 61,066 at 61,242-43 (1996). In *Great Northern Paper*, the Commission rejected a condition in a WQC issued by the State of Maine that provided, in part, that the certification was not effective until the issuance of the new license. The Commission stated:

This condition is rejected. As noted, section 401(a)(1) of the Clean Water Act prohibits the Commission from issuing the new license unless the certification agency has issued (or waived) certification. Issuance of the new license without issuance of an “effective” certification makes our compliance with section 401(a)(1) ambiguous and problematical.

On rehearing of *Great Northern Paper*, the Commission incorporated this condition based on the ruling of the U.S. Court of Appeals for the Second Circuit in *American Rivers, Inc. et al. v. FERC*, 129 F.3d 99 (2d Cir. 1997), that the Commission cannot alter or delete the conditions that a state places on the WQCs it issues for licensed hydropower

Because of the inability to know the outcome of the decision, either granting or denying certification, DWQ's May 7th Certification was legally a failure to "act" within the deadline. Accordingly, the Commission should find that the State of North Carolina has waived its rights under Section 401 and, consistent with Commission precedent, proceed to issue a new license to APGI for the Yadkin Project.

**B. DWQ Failed to Grant or Deny Certification Within One Year as Required by FERC's Regulations**

Even if one interprets DWQ's decision to constitute an "act" under Section 401, DWQ's decision does not satisfy the requirement in the Commission's regulations that the certifying agency grant or deny certification within one year from receiving a certification request. DWQ's action, even if not considered inherently incomplete, nonetheless failed to meet the requirements of the Commission's regulations because its outcome – whether it granted or denied the certification sought by APGI – could not be determined within the one-year deadline imposed by the regulations.

Upon a plain reading of Condition 7, it would appear that if APGI were to agree that all aspects of the bond were reasonable and it could successfully post a bond meeting all aspects of that condition, then DWQ's certification eventually would be made "effective." In light of the recent financial crisis and enduring economic realities of the financial markets, however, this outcome is not certain. In particular, it is well-documented that credit markets have been especially hit hard and have yet to recover, making financial assurance products like the one called for by Condition 7 difficult to obtain. As a consequence whether the May 7th

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projects pursuant to Section 401 of the Clean Water Act. While the Commission was compelled to accept Maine's condition under *American Rivers*, APGI is not requesting that the Commission reject the condition; rather, APGI asserts that the Commission, in giving full effect to the conditions set forth by the DWQ, must conclude that by the very terms of its action on May 7, 2009, the DWQ in fact waived certification.

Certification would *ever* become “effective,” as written, let alone “effective” prior to the expiration of the deadline imposed by Section 401, cannot be yet known.

DWQ’s crafting of the certification in this manner has the practical effect of withholding its final determination as to whether to grant or deny APGI’s application for a WQC well beyond the one-year deadline imposed by Section 401 the Clean Water Act. For example, should APGI post a suitable bond successfully, that act would have the effect of approving the application by rendering the certification “effective” for this time. Conversely, should APGI fail to post such a bond, by its own terms the certification would never be able to be “effective.”<sup>22</sup> In sum, even if FERC determines for purposes of Section 401 of the CWA that issuance of the May 7th Certification met the one-year deadline for state action, the very terms of the certification in this case operate in a manner to actually withhold an effective decision by the DWQ until after the one-year deadline has passed.<sup>23</sup> Accordingly, the Commission should find that DWQ did not grant or deny certification within the one-year deadline as required by the Commission’s regulations.

DWQ’s purported certification in this case is fundamentally different than DWQ determining APGI’s *compliance* with the terms of a valid WQC at some point after it is issued. It is well settled that a WQC issued pursuant to Section 401 of the CWA may be made subject to a range of conditions reasonably calculated to be necessary to ensure that a federally permitted or licensed activity maintains compliance with applicable water quality standards.<sup>24</sup> APGI does not

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<sup>22</sup> The fact that the certification was never effective could explain why DWQ did not object to its being stayed. *See* Note 38, *infra*.

<sup>23</sup> Note that the posting of the bond is not within the control of either APGI or DWQ. APGI has within its control the application for a surety bond, but not the granting of it; DWQ has neither of these factors within its control.

<sup>24</sup> *P.U.D. No. 1 of Jefferson County v. Washington Dep’t of Ecology*, 511 U.S. 700, 711–13 (1994); *American Rivers, Inc.*, 129 F.3d at 107-08.

challenge the validity of such conditions. Rather, APGI asserts that DWQ's decision to condition the effectiveness of the certification itself to the subsequent posting of a suitable bond had the practical effect of withholding the agency's final decision on APGI's application until an indeterminable date in the future that is beyond the one-year deadline. To the extent that the DWQ maintained serious concerns that APGI and/or its parent company might lack the financial wherewithal to undertake all that the DWQ determined would be necessary to maintain compliance with water quality concerns, the agency's proper course of action would have been to either: (a) grant certification subject to a condition that a performance bond be maintained; or (b) deny APGI's application.<sup>25</sup> By seeking to condition the effectiveness of its certification to the subsequent posting of a bond, the DWQ ultimately did neither and, as a result, must be deemed to have waived their authority by failing to grant or deny certification within one year.

### **III. THE COMMISSION HAS THE AUTHORITY TO DETERMINE WHETHER DWQ WAIVED ITS SECTION 401 CERTIFICATION RIGHTS FOR THE YADKIN PROJECT**

The Commission has the authority to determine whether DWQ, by its actions, waived its certification rights under Section 401 because this issue is a matter of federal, not state, law and must be determined by FERC in the first instance. Precedent holds that, although challenges with respect to Section 401 certifications that involve state law issues must be brought in state court, where federal law is at issue, such as the state certifying agency's compliance with the terms of Section 401, then the federal licensing agency (*e.g.*, FERC) must address it in the first instance.<sup>26</sup>

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<sup>25</sup> See *American Rivers, Inc.*, 29 F.3d at 107-08 ("Section 401(d), reasonably read in light of its purpose, restricts conditions that states can impose to those affecting water quality in one manner or another."); *cf. Fourth Branch Assocs. v. Dep't of Env'tl. Conservation*, 550 N.Y.S.2d 769 (N.Y. Sup. Ct. 1989) (holding that Section 401(d) does not allow state to subject 401 certificate applications to full SEQRA environmental review).

<sup>26</sup> *City of Tacoma, Washington v. FERC*, 460 F.3d 53, 67-69 (D.C. Cir. 2006); *Keating v. FERC*, 927 F.2d 616, 621-24 (D.C. Cir. 1991). See also, *Flambeau Hydro, LLC*, 113 FERC ¶ 61,291 at P 8 (2005).

In *City of Tacoma*, the U.S. Court of Appeals for the D.C. Circuit held that FERC has an obligation to confirm that the state has complied with the Section 401(a)(1) public notice requirements in issuing its certification because such a question is a matter of federal law. The court explained:

In most cases, if a party seeks to challenge a state certification issued pursuant to section 401, it must do so through the state courts. The reason for this rule is plain enough. The Clean Water Act gives a primary role to states “to block ... local water projects” by imposing and enforcing water quality standards that are more stringent than applicable federal standards. Therefore, the decision whether to issue a section 401 certification generally turns on questions of state law. FERC’s role is limited to awaiting, and then deferring to, the final decision of the state. Otherwise, the state’s power to block the project would be meaningless.

The reason for this rule, however, also establishes its outer limits. *If the question regarding the state’s section 401 certification is not the application of state water quality standards but compliance with the terms of section 401, then FERC must address it.* This conclusion is evident from the plain language of section 401: “No license or permit shall be granted until the certification *required by this section* has been obtained or has been waived ....” 33 U.S.C. § 1341(a)(1) (emphasis added). FERC, in other words, may not act based on any certification the state might submit; rather, it has an obligation to determine that the specific certification “required by [section 401] has been obtained....”

In *City of Tacoma*, the court held that the Commission’s failure to confirm, at least facially, that the state issued the certification in compliance with Section 401(a)(1) was a violation of the Commission’s obligations under Section 401 of the CWA.<sup>27</sup>

Similarly, in *Keating*, the D.C. Circuit held that where a state claims to have revoked a certification pursuant to Section 401(a)(3), FERC is obligated to confirm that the state has complied with the requirements of that subsection.<sup>28</sup> In *Keating*, the Commission initially refused to rule on whether the state complied with the requirements of Section 401(a)(3), stating that it was powerless to apply the standards of Section 401(a)(3), and that the licensee’s only

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<sup>27</sup> *Id.*

<sup>28</sup> *Keating*, 927 F.2d at 621-24.

recourse for contesting the validity of the state's revocation was in the state courts.<sup>29</sup> The D.C. Circuit disagreed, finding that the question of whether a state's purported revocation of its prior certification satisfied the terms of Section 401(a)(3) is undoubtedly a matter of federal law and "that it is one for FERC to decide in the first instance."<sup>30</sup>

In this case, the question of whether a state has waived certification under 401(a)(1), like the questions of whether a state has complied with the public notice requirement of Section 401(a)(1) or the revocation requirements of 401(a)(3), is undoubtedly a question of federal law to be decided by FERC in the first instance. Indeed, that determination is central to the underlying question of the Commission's jurisdiction to issue a license. Whether the state has waived certification does not depend on any state law issues, substantive or procedural, or the outcome of any appeal of a certification order under state law.<sup>31</sup> Rather, waiver under Section 401 of the CWA is solely a matter of compliance with a federal law and, as implemented by the Commission, depends on whether the state has acted to deny or grant certification within the one-year timeframe. As demonstrated above, the purported certification fails to fulfill DWQ's statutory and regulatory requirement to act on APGI's request within one year, and thus state Section 401 certification has been waived.

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<sup>29</sup> *Id.* at 618.

<sup>30</sup> *Id.* at 622.

<sup>31</sup> The Governor argued in her July 12 letter to the Commission in Docket No. P-2197-73, that DWQ did not intend to waive its 401 certification rights by conditioning the effectiveness of the May 7th Certification on the posting of the bond. The intent of DWQ, however, is irrelevant to the Commission's determination as to whether DWQ failed to grant or deny certification within the one-year timeframe. DWQ was obligated to make a clear decision to grant or deny certification by May 7, 2009 and it failed to do so.

**IV. COMMISSION ACTION ON THIS PETITION IS NECESSARY TO PREVENT THE STATE OF NORTH CAROLINA FROM CONTROLLING THE TIMING OF FERC DECISION MAKING REGARDING APGI'S APPLICATION FOR A NEW LICENSE**

FERC action on this Petition for Declaratory Ruling is necessary in order to thwart the attempt by the State of North Carolina, through this 401 certification decision by DWQ, to control the timing of the relicensing process, an issue exclusively within FERC's authority under the Federal Power Act. As noted above, the authority reserved to states under Section 401 of the CWA is limited to evaluating the impact of federally permitted activities on the quality of water within their borders, and then to act within one year to either grant or deny (or waive) an application seeking certification from the state that the activity will not impede the maintenance of water quality standards. While recent case precedent has expanded the scope of conditions that may be imposed to ensure that water quality will be protected,<sup>32</sup> a state is not authorized to use its procedures to manipulate the process and timing of the issuance of the underlying federal license or permit sought.<sup>33</sup> As discussed above, it was for this very reason that the Congress required states to act within one year or risk waiving their ability to certify a particular activity.

According to the mechanisms set forth under Section 401 of the CWA, if the state harbored grave concerns over the impact on the quality of its state waters, it should have affirmatively denied APGI's request for WQC. Instead, by issuing the certificate at the last possible moment (despite previously issuing a certificate that was void only on procedural grounds) and making the certification "effective" only upon the satisfaction of additional conditions at some point in the future (if ever), the DWQ sought to control FERC's ability to

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<sup>32</sup> See *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 374 n.1 (2006) (noting the broad range of interests a State may seek to protect through the Section 401 process); *Jefferson County*, 511 U.S. 700 (holding minimum flow condition was appropriate requirement).

<sup>33</sup> *Airport Cmty's*, 280 F. Supp. 2d at 1215-16; *Central Vermont*, 113 FERC ¶ 61,167 at PP 18-19, 21;

timely issue a license for the Project. It is FERC, and not a state seeking to abuse its limited authority under Section 401, that maintains exclusive authority under the FPA to issue licenses.

It is apparent that the Governor has been trying to block the Commission's issuance of a new license for the Yadkin Project for some time. The Governor intervened in APGI's relicensing proceeding well after the deadline for interventions had passed for the express purpose of delaying the Commission's licensing decision.<sup>34</sup> The Governor sought to have the Commission delay and revise the procedural schedule in this case to hear contentions about federal take-over issues, the deadline for which passed a number of years ago.<sup>35</sup> The Governor filed a motion seeking a 120-day suspension of the procedural schedule in order to present to the Commission reasons and evidence to support reconsideration of federal takeover.<sup>36</sup> Such a filing, however, has not yet been made despite the passage of 120 days since the Governor's request.

Further, the Governor has gone on record as arguing that APGI should be denied a new license, and there is pending in the North Carolina legislature a bill that, on its face, would permit the state to take over the Yadkin Project.<sup>37</sup> An ALJ in North Carolina has issued a stay of the Section 401 certificate,<sup>38</sup> at least in part because DWQ, which is a subset of the Department of Environment and Natural Resources and the Secretary of which serves at the pleasure of the

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<sup>34</sup> See Motion of Intervenor, the State of North Carolina, By and Through Its Governor, Beverly Eaves Perdue, for Approval of a Reasonable Schedule To Present Evidence To Assist the Commission in Its Determination of Alcoa's Re-Licensing Application and of the State's Request that the United States Recapture the License for a Public Use, Docket No. P-2197-073 (May 5, 2009) ("Governor's May 5 Motion").

<sup>35</sup> See, e.g., *Governor's May 5 Motion*; Stanly County May 13th Comments; Response of Alcoa Power Generating Inc. to "Comments of Stanly County in Response to Submission of Section 401 Water Quality Certification, Docket No. P-2197-073 (May 18, 2009).

<sup>36</sup> Governor's May 5 Motion at 1.

<sup>37</sup> *Id.*

<sup>38</sup> *Stanly County, North Carolina v. North Carolina Department of Environment and Natural Resources, Division of Water Quality*, Order Granting Petitioner's Motion for Preliminary Injunction/Stay of Certification, Office of Administrative Hearings, 09 HER 3078 (issued May 27, 2009).

Governor of North Carolina, represented to the ALJ that “the public interest might be best served if a stay issued in this case.”<sup>39</sup> The Governor and a number of groups continue to state publicly their intent to prevent FERC from acting on the license application.<sup>40</sup>

It is the intent of Section 401(a)(1) and the Commission’s policy to minimize delay in relicensing proceedings and issue a new license in a timely manner once a licensing docket is ready for final decision.<sup>41</sup> With the waiver by DWQ of its 401 WQC authority, the relicensing application by APGI became ripe for a Commission determination because all other milestones for decision-making, including the issuance of a Final Environmental Impact Statement with a recommendation for issuance of a new license, had been achieved.<sup>42</sup> There is neither a legal requirement nor a compelling justification to delay action on the license any longer. The relicensing process in this case has lasted seven years and the Yadkin Project is already into its second successive annual license upon expiration of the original project license. The public interest now mandates the Commission render a final licensing decision.

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<sup>39</sup> *Stanly County, North Carolina v. North Carolina Department of Environment and Natural Resources, Division of Water Quality*, Transcript of Hearing at 40: 11-13, Office of Administrative Hearings, 09 HER 3078 (May 20, 2009).

<sup>40</sup> See, e.g., Jack Betts, *Perdue Alcoa and the Jobs*, Charlotte Observer, May 31, 2009, available at <http://www.charlotteobserver.com/343/story/754655.html>.

<sup>41</sup> *Flambeau Hydro, LLC*, 113 FERC ¶ 61,291 at P 9 (2005) (stating that “the public interest in the timely completion of licensing proceedings requires us to act when our record is complete”).

<sup>42</sup> As explained in previous APGI filings in Docket No. P-2197-073, even if the Commission does not consider DWQ to have waived certification, the Commission still has the authority to issue a new license for the Yadkin Project during the pendency of the appeal of the May 7th Certification. See *Response of Alcoa Power Generating Inc. to Stanly County’s Filing of Order Issued by North Carolina Administrative Law Judge Granting Stay of Section 401 Certification*, Docket No. P-2197-073 (filed on June 10, 2009).

## V. CONCLUSION

APGI respectfully requests that the Commission expeditiously issue an order finding that the State of North Carolina has waived Section 401(a)(1) CWA water quality certification with respect to the Commission's issuance of a new license for the Project.

Respectfully submitted,

/s/ David R. Poe

David R. Poe

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Washington, D.C. 20005

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*Counsel for Alcoa Power Generating Inc.*

Date: September 17, 2009

## **ATTACHMENT A**



North Carolina Department of Environment and Natural Resources  
Division of Water Quality

Beverly Eaves Perdue  
Governor

Coleen H. Sullins  
Director

Dee Freeman  
Secretary

May 7, 2009

Mr. William Bunker  
Alcoa Power Generating Inc.  
V.P. Hydro Operations - Yadkin Division  
P.O. Box 576  
Badin, NC 28009-0576

Re: Yadkin Hydroelectric Project  
Stanly County  
DWQ # 2007-0812; FERC Project No. 2197

***APPROVAL of 401 Water Quality Certification with Additional Conditions***

Dear Mr. Bunker:

The Division staff have reviewed your application, supporting documentation, additional information and public comments and attached hereto is a copy of Certification No. 003173 issued to Alcoa Power Generating, Inc. dated May 7, 2009. Please note that this Certification requires Alcoa Power Generating Inc. to submit a surety bond (or equivalent instrument) to address the need for financial assurance that the improvements related to improvement in water quality will be completed. Please see condition #7 for the specifics of the requirements.

Please note that this Certification is not transferable except after notice to the Division. This Certification does not affect the legal requirements to obtain any other federal, state or local permits including (but not limited to) permits which may be required by the Division of Land Resources, the Division of Waste Management and any other permits required by the Division of Water Quality..

Please contact John Dorney at 919/733-9646 or me at 919/807-6357 if you have questions regarding this Certification.

Sincerely,



Coleen H. Sullins

CHS/jrd/ijm

Attachments: Certificate of Completion  
Surety Bond Form

cc: Becky Fox, EPA, 1307 Firefly Road, Whittier, NC 28789  
Alan Johnson, DWQ, Asheville Regional Office  
DLR Mooresville Regional Office  
File Copy  
Central Files  
David Treme, Office of the City Manager, Town of Salisbury, P.O. Box 479, Salisbury, NC 28145  
Steve Reed, N.C. Division of Water Resources  
Ms. Kimberly Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E.,  
Washington, DC 20426  
Andy Lucas, County Manager's office, Stanly County, 1000 N. First Street, Suite 10, Albemarle, NC 28001  
Thomas N. Griffin, III, Three Wachovia Center, Suite 3000, 401 South Tryon Street, Charlotte,  
NC 28202-1935  
Todd Ewing, NC Wildlife Resources Commission  
Rob McDaniel, Hazardous Waste Section, Division of Waste Management  
Sandy Mort, DHHS  
Commentors from Public Notice  
W. Max Walser, Commissioner Davidson County

Filename: **Certification 003173**

## NORTH CAROLINA 401 WATER QUALITY CERTIFICATION

**THIS CERTIFICATION** is issued in conformity with the requirements of Section 401 Public Laws 92-500 and 95-217 of the United States and subject to the North Carolina Division of Water Quality (DWQ) Regulations in 15 NCAC 2H, Section .0500 to Alcoa Power Generation Incorporated (APGI) to relicense the Yadkin Project (High Rock, Tuckertown, Narrows (Badin) and Falls reservoirs) on the Yadkin River in Stanly County, North Carolina, pursuant to an application originally filed on the May 10, 2007, withdrawn on May 8, 2008 and subsequently refiled on May 8, 2008 and additional correspondence received August 27, 2007, October 19, 2007, June 20, 2008, October 1, 2008, March 9, 2009, February 16, 2009, March 17, 2009, April 3, 2009 and April 15, 2009.

The application and supporting documentation provides adequate assurance that the proposed work will not result in a violation of applicable Water Quality Standards and discharge guidelines. Therefore, the State of North Carolina certifies that this activity will not violate the applicable portions of Sections 301, 302, 303, 306, 307 of PL 92-500 and PL 95-217 if conducted in accordance with the application, the supporting documentation, and conditions hereinafter set forth.

This approval is only valid for the purpose and design submitted in the application. If the project is changed, written notification to DWQ and a new application for a new Certification may be required. If the property is sold, the new owner must be given a copy of the Certification and is thereby responsible for complying with all conditions of this Certification. Any new owner must notify the Division and request that the Certification be issued in its name. For this approval to be valid, compliance with the conditions listed below is required.

### Conditions of Certification:

#### Sediment and Erosion Control for any project-related construction:

1. During any project-related construction, erosion and sediment control practices must be in full compliance with all specifications governing the proper design, installation and operation and maintenance of such Best Management Practices in order to protect surface waters standards:
  - a. The erosion and sediment control measures for the project must be designed, installed, operated, and maintained in accordance with the most recent version of the *North Carolina Sediment and Erosion Control Planning and Design Manual*.
  - b. The design, installation, operation, and maintenance of the sediment and erosion control measures must be such that they equal, or exceed, the requirements specified in the most recent version of the *North Carolina Sediment and Erosion Control Manual*. The devices shall be maintained on all construction sites, borrow sites, and waste pile (spoil) projects, including contractor-owned or leased borrow pits associated with the project.
  - c. For borrow pit sites, the erosion and sediment control measures must be designed, installed, operated, and maintained in accordance with the most recent version of the *North Carolina Surface Mining Manual*.
  - d. The reclamation measures and implementation must comply with the reclamation in accordance with the requirements of the Sedimentation Pollution Control Act.

2. No waste, spoil, solids, or fill of any kind shall occur in wetlands, waters, or riparian areas. All construction activities, including the design, installation, operation, and maintenance of sediment and erosion control Best Management Practices, shall be performed so that no violations of state water quality standards, statutes, or rules occur;
3. Sediment and erosion control measures shall not be placed in wetlands or waters to the maximum extent practicable. If placement of sediment and erosion control devices in wetlands and waters is unavoidable, they shall be removed and the natural grade restored within six months of the date that the Division of Land Resources has released the project;

Continuing Compliance:

4. APCI shall conduct project operations and any construction activities in a manner consistent with State water quality standards (including any requirements resulting from compliance with section 303(d) of the Clean Water Act) and any other appropriate requirements of State law and federal law. If the Division determines that such standards or laws are not being met by the operation of the Yadkin Project (including the failure to sustain a designated or achieved uses of High Rock, Tuckertown, Badin and Falls Lakes related to water quality of the discharge or sediment levels of toxicants) or that State or federal law is being violated, or that further conditions are necessary to assure compliance, the Division may reevaluate and modify this Certification to include conditions appropriate to assure compliance with such standards and requirements in accordance with 15A NCAC 2H.0507(d). Before modifying the Certification, the Division shall notify APCI and the Federal Energy Regulatory Commission (FERC), provide public notice in accordance with 15A NCAC 2H.0503 and provide opportunity for public hearing in accordance with 15A NCAC 2H.0504. Any new or revised operating conditions shall be provided to APCI in writing, shall be provided to the FERC for reference in any License issued pursuant to the Federal Power Act, and shall become conditions of the License to operate the Yadkin Hydroelectric Project.

Other conditions:

5. Sediment removal at City of Salisbury water supply intake

APCI shall allow access to and provide for dredging operations to remove sand and other debris that may accumulate at the City of Salisbury's water supply intake whenever the accumulation of sand and other debris makes use of the intake inoperable. If this condition conflicts with any existing arrangements between APCI and other parties, then additional written approval is from DWQ to resolve this conflict.

## 6. Additional monitoring conditions

- 6.1. The Fish Sampling Work Plan for Narrows Reservoir dated December 14, 2007 as prepared by URS Corporation shall be conducted by APGI. DWQ shall approve the timing of this sampling.
  - 6.2. APGI shall provide yearly monitoring of the discharges from the four lakes for pollutants to include heavy metals and organic pollutants including volatile organic compounds, acid-extractable compounds, base-neutral compounds, and PCBs using a priority pollutant scan analyzed in accordance with 40 CFR Part 136. Test results shall be reported to DWQ, Wetlands Unit and the Mooresville Regional Office of DWQ within 90 days of sampling using DWQ Form – A MR=PPA1 or in a form approved by the Director. This monitoring shall be done annually for at least five years unless the monitoring detects levels of pollutants that violate water quality standards. At the end of five years, APGI may submit a request for approval to modify the monitoring requirements. If this monitoring reveals levels of contaminants that are of concern with respect to water quality standards, then the Continuing Compliance Clause (condition 4 above) shall be invoked and a plan developed by APGI for DWQ's written approval to address these concerns. Sensitivity levels for these analyses must be at least those used by DWQ's Central Laboratory.
  - 6.3. APGI shall provide yearly monitoring for lake sediment in a series of transects from the Alcoa Badin Works Plant site to the discharge from the dam for those heavy metals and compounds including PCBs and PAHs that are present in the sediment in the swimming area as reported in the Badin Lake Swim/Picnic Area and Badin Boat Assess Sediment Assessment, Stanly County. This monitoring shall be done annually for at least five years unless the monitoring detects movement of these contaminants from the cove toward the dam. Sensitivity levels for these analyses must be at least those used by DWQ's Central Laboratory. At the end of the five years, APGI may submit a request for approval to modify the monitoring requirements. If movement of these toxicants is detected, then APGI shall submit a plan for written DWQ approval that ensures that the contaminant movement shall be stopped and that water quality and uses are not degraded.
- 7.0 Performance/surety bond – APGI or its parent company Alcoa, shall provide a surety bond (or equivalent instrument) in favor of the State of North Carolina, executed by a surety approved by the Commissioner of Insurance. This bond shall be in the amount of \$240 million to cover all water quality improvement costs including costs associated with modifications at High Rock, Tuckertown, Narrows (Badin) and Falls Lake dams for turbine improvements, including the dissolved oxygen monitoring necessary to show the success of these improvements. This bond shall be provided within ninety days of receipt of the Certification, must be continuous in nature, must bind to APGI or Alcoa as well as their heirs and successors. The bond shall be conditioned upon the faithful performance of the requirements set forth in this Certification. Upon filing the bond with the Department, APGI or its parent company Alcoa, or its heirs and successors shall lose all right, title, and interest in the bond while the bond is held by the Department. The bond shall be maintained until the improvements and the monitoring confirms that the dissolved oxygen standard has been met for at least three (3) consecutive years and approved in writing by the Division unless released via written notification from the Division. In no event shall the liability to the surety exceed the amount of the surety bond required by this Condition. Notification shall be given upon completion of compliance or acceptance by the Division of a substitute bond. This bond shall remain in force until canceled by the surety. Cancellation by the surety shall be effectuated only upon 60 days written notice thereof to the Division and to the operator. If the surety bond is canceled, then APGI or its parent company Alcoa as well as their heirs and successors shall provide a

new surety bond within ninety days of the cancelation that also meets the same requirements as previously described in this Condition. If that new surety bond is not issued in this time frame, then this Certification is null and void. This surety bond may be terminated by the State of North Carolina upon an affirmative showing that the improvements and the monitoring have been successfully accomplished such that dissolved oxygen water quality standards have been met for at least three (3) consecutive years. This Certification is only effective once the required performance/surety bond is in place.

8. APGI must conduct a study similar to the 2004 study on the Narrows (Badin) Lake turbines during the summer of 2009 (with both turbines upgraded) in order to provide scientific and engineering assurance that the plan to meet dissolved oxygen standards will be successful below Narrows (Badin) Lake. DWQ must approve the final study plan and the results of the study. A similar study will need to be once both upgrades are done to the High Rock Lake turbines. A study plan shall be submitted to DWQ for approval prior to implementation. The final results of the study shall be submitted to DWQ upon completion.
9. Other Relicensing Settlement Agreement Conditions – The following conditions were taken from appropriate sections of the Relicensing Settlement Agreement February 2007 related to project operations affecting water quality standards and uses including dissolved oxygen enhancements, in-stream flows, reservoir shoreline protection and compliance monitoring. Any conflict with these conditions and the Relicensing Settlement Agreement will need additional written confirmation from DWQ in order to address these conflicts.

*a. Project Operations*

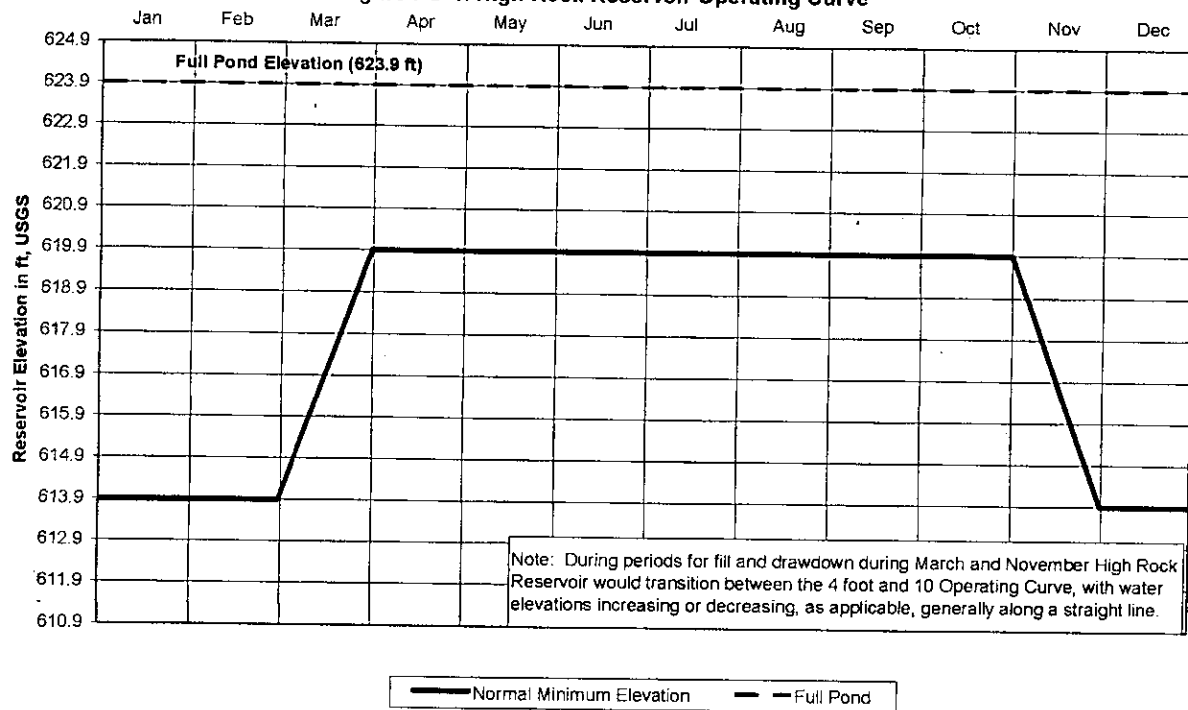
Unless in accordance with the Hydro Project Maintenance and Emergency Protocol (HPMEP) and Low Inflow Protocol (LIP), Project minimum flows take priority over reservoir water elevations, as specifically described in Articles PO-1 and PO-2, below.

**Article PO-1 - Reservoir Operations**

**A. High Rock Reservoir Operations**

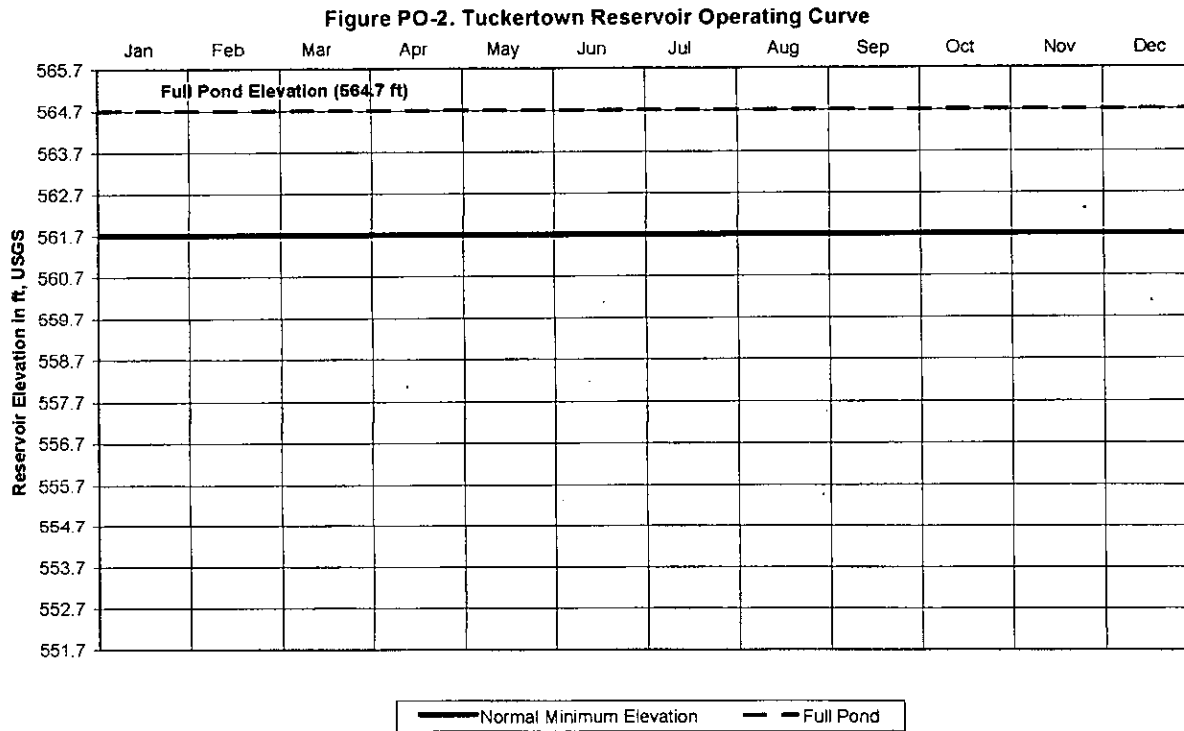
The Applicant (APGI) shall operate High Rock Reservoir at or above the normal minimum elevation (NME) as depicted on the High Rock Operating Curve (Figure PO-1), except as needed in order to maintain minimum flows or as provided under the Low Inflow Protocol (LIP) or the Hydro Project Maintenance and Emergency Protocol (HPMEP). High Rock Reservoir may be drawn down below its NME in order to meet the Required Minimum Instream Flow at Falls, as specified in Article PO-2, only after Narrows Reservoir has reached its NME. If High Rock Reservoir water elevation is below the NME at 12:01 AM on any operating day, where the operating day is defined as 12:01 AM through 12:00 midnight, the Applicant shall reduce releases from High Rock Reservoir for that operating day up to a maximum of the daily average flow equivalent of the minimum flow requirement at Falls, as specified in Article PO-2. Under this condition, releases from Falls will be limited to those defined in Article PO-2.

Figure PO-1. High Rock Reservoir Operating Curve



## B. Tuckertown Reservoir Operations

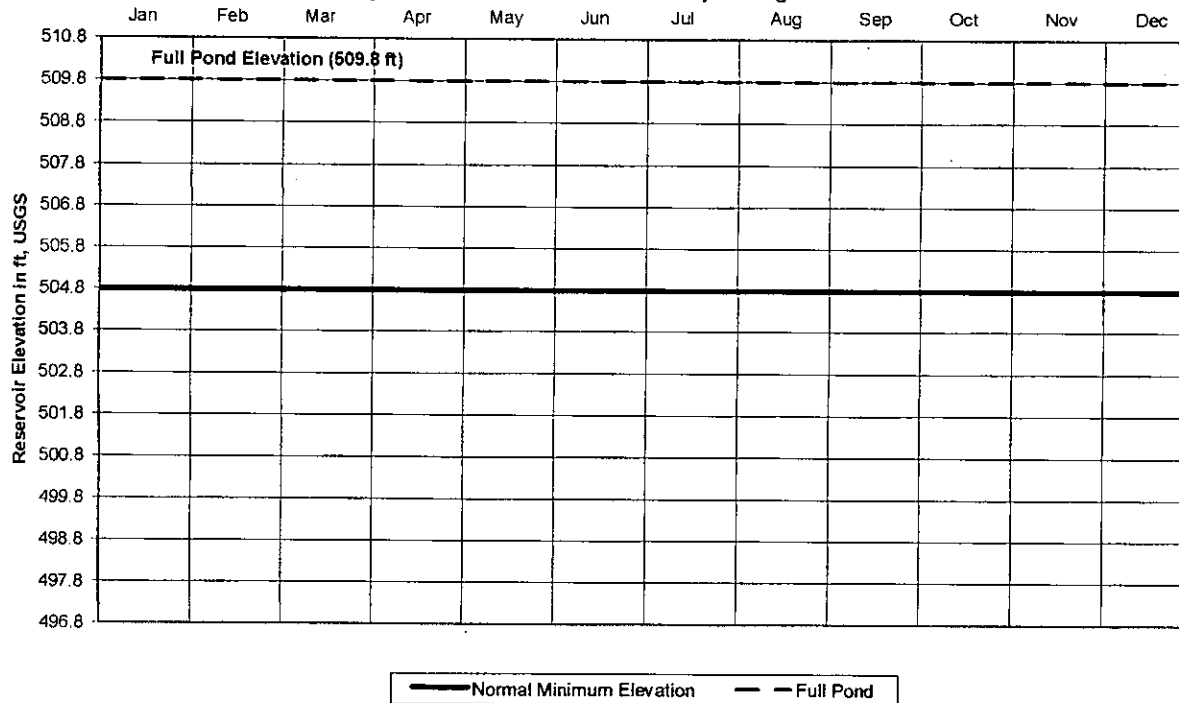
The Applicant shall operate Tuckertown Reservoir at or above the NME as depicted on the Tuckertown Operating Curve (Figure PO-2), except as provided in the HPMEP.



### C. Narrows Reservoir Operations

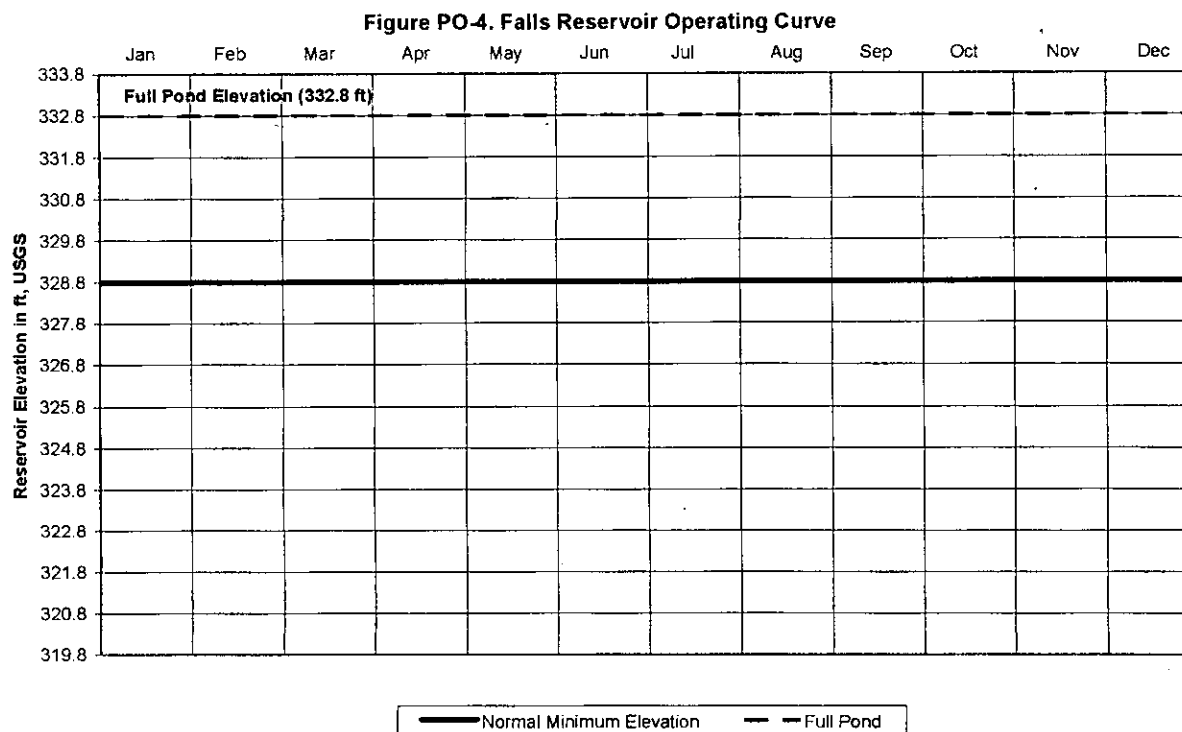
The Applicant shall operate Narrows Reservoir at or above the NME as depicted on the Narrows Operating Curve (Figure PO-3), except as needed in order to maintain minimum flows, or as provided under the LIP or HPMEP.

Figure PO-3. Narrows Reservoir Operating Curve



### D. Falls Reservoir Operations

The Applicant shall operate Falls Reservoir at or above the NME as depicted on the Falls Operating Curve (Figure PO-4), except as provided in the HPMEP.



### E. Reservoir Stabilization to Enhance Fish Spawning

From April 15 through May 15 of each year, the Applicant will endeavor to maintain reservoir water elevations at all four Project reservoirs no lower than -1.0 feet below the elevation of each reservoir on April 15 to enhance conditions for fish spawning in the reservoirs. No later than August 31 of each year, the Applicant will report the resulting reservoir water elevations at each reservoir during the April 15 through May 15 period in a letter report to the North Carolina Wildlife Resources Commission (NCWRC). The letter report will provide an explanation of any circumstances that prevented the Applicant from maintaining the target water elevations. Within 60 days of filing the letter report with the NCWRC, a copy of the letter report will be filed with NCDWQ and FERC. Satisfaction of these reporting commitments shall constitute compliance with this Article.

## Article PO-2 - Project Instream Flows

### A. Required Minimum Instream Flows

Commencing no later than six months from the effective date of the License and except when operating under the Low Inflow Protocol (LIP) or Hydro Project Maintenance and Emergency Protocol (HPMEP), the Applicant shall operate the Project to provide a daily average minimum flow from the Falls Development according to the following schedule:

June 1 – January 31	1,000 cfs
February 1 – May 15	2,000 cfs
May 16 – May 31	1,500 cfs

### B. Flow Adjustment for Enhancement of Downstream Spawning

The Applicant will work with the licensee of the Yadkin-Pee Dee River Project, FERC No. 2206, (Downstream Licensee), the North Carolina Division of Water Resources (NCDWR), the North Carolina Wildlife Resources Commission (NCWRC), the South Carolina Department of Natural Resources (SCDNR), the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), The Nature Conservancy (TNC) and American Rivers (collectively, Group) to develop a process to allow the Downstream Licensee to provide adjusted flow between February 1 and May 15 to enhance spawning conditions in the lower river downstream of the Blewett Falls development, part of the Yadkin-Pee Dee River Project.

The Applicant's role in enhancing downstream spawning below Blewett Falls will be limited to:

1. Attending an annual meeting with the Group, if held, to consider expected flow and hydrologic conditions and to schedule adjusted flow period(s) for the upcoming spawning season, and
2. Once the schedule for adjusted spawning flow period(s) has/have been established by the Group, the Applicant will communicate its daily generation/flow release schedule during the adjusted spawning flow period(s) to the Downstream Licensee at least one week in advance of the start of the adjusted spawning flow period(s). If unexpected hydrologic conditions, or other conditions, such as those covered in the Low Inflow Protocol (LIP, Appendix A) or the Hydro Project Maintenance and Emergency Protocol (HPMEP, Appendix B), occur during any adjusted spawning flow period, the Applicant shall communicate to the Downstream Licensee any resulting changes in its daily generation/flow release schedule for the remainder of that adjusted spawning flow period.

The Applicant will not be required to attempt to match Yadkin Project outflow to inflow during any adjusted spawning flow period(s), nor will the Applicant be required to provide an instantaneous minimum flow release from the Yadkin Project during any adjusted spawning flow period(s).

The Applicant's participation in enhancement of downstream spawning will take place within the confines of the other requirements of the New License and 401 Water Quality Certification relating to management of flows and reservoir water elevations, and would not result in any modification of those flow and reservoir management requirements. Specifically, nothing in this section will require or cause the Applicant to fall below the Project Minimum Flows as described in Article PO-2 or to have to modify its reservoir operations as prescribed in Article PO-1.

If state and federal agencies and the Downstream Licensee are unable to come to an agreement on what measures are to be undertaken by the Downstream Licensee to achieve Flow Adjustment for Enhancement of Downstream Spawning, the Applicant will be under no obligation to meet the commitments outlined in Article PO-2, section B.

### **Article PO-3 - Flow and Reservoir Elevation Monitoring**

Within six months of the effective date of the License, the Applicant shall file with the North Carolina Division of Water Quality (NCDWQ) a final Flow and Reservoir Elevation Monitoring and Compliance Plan for the Yadkin Project. The Flow and Reservoir Elevation Monitoring and Compliance Plan shall be developed in consultation with the North Carolina Division of Water Resources (NCDWR), the South Carolina Department of Natural Resources (SCDNR), the U.S. Geological Survey (USGS) and the Downstream Licensee (the Licensee of the Yadkin-Pee Dee River Project, FERC No. 2206), and shall include detailed provisions for monitoring reservoir water elevations and for monitoring flows from both the Falls and High Rock developments.

The Applicant shall include with the final plan documentation of consultation, copies of comments and recommendations on the draft plan after it has been prepared and provided to the agencies and Downstream Licensee, and specific descriptions of how comments are accommodated by the final plan. The Applicant shall allow a minimum of 30 days for the agencies and Downstream Licensee to comment prior to filing the plan with the NCDWQ. If the Applicant does not adopt a recommendation, the filing shall include the Applicant's reasons, based on Project-specific information.

The NCDWQ reserves the right to require changes to the plan. Upon NCDWQ approval, the Applicant shall submit the plan to the FERC for approval. Upon receiving FERC approval, APGI shall implement the plan, including any changes required by the NCDWQ. The Applicant shall file the final plan with NCDWQ within 30 days of receiving FERC approval.

#### **A. Releases from High Rock Development**

Flow monitoring from the High Rock Development will serve as the measure for the flow releases from the High Rock Development required under Article PO-1 or under the Low Inflow Protocol (LIP). Daily average flows within +25% of the applicable maximum flow, measured from 12:01 AM to 12:00 midnight, shall be considered compliant for each operating day.

## B. Releases from Falls Development

Flow monitoring from the Falls Development will serve as the compliance measure for the flow release from the Falls Development required under Articles PO-1, PO-2 or under the LIP. Daily average flows within -5% of the applicable minimum flow, measured from 12:01 AM to 12:00 midnight, shall be considered compliant for any operating day so long as:

- a) Whenever High Rock Reservoir is at or above its normal minimum elevation (NME), the applicable daily average minimum flow is achieved on a weekly average basis, measured from 12:01 AM Saturday to 12:00 midnight Friday.
- b) Whenever High Rock Reservoir is drawn down below its NME (when a maximum release from Falls is also applicable), releases from Falls shall be limited to +/- 5% of the cfs equivalent of the Required Instream Minimum Flow at Falls, as measured on a weekly average basis from 12:01 AM Saturday to 12:00 midnight Friday.

The Applicant shall endeavor to meet the Required Minimum Instream Flows required in Article PO-2, and shall not routinely use the flow variances provided above. The Applicant shall prepare an annual flow monitoring report documenting its compliance with minimum flow releases, including a record of any days during the year when the daily average required minimum instream flow fell within the -5% and was made up as part of the weekly average, a record of flows during any period when High Rock was below its NME, and a record of any LIP events. By no later than March 31 of the following year, the Applicant shall file the report with NCDWQ of the North Carolina Department of Environment and Natural Resources (NCDENR) summarizing its evaluation. If, based on the results of the report, the State of North Carolina has a concern about the frequency or pattern of use of the variance by the Applicant, the State may request consultation with the Applicant to discuss the Applicant's reasons for that use and any practicable alternatives to that use.

## Article PO-4 - Low Inflow Protocol (LIP)

This Article highlights the responsibilities of the Applicant from Appendix A, "Low Inflow Protocol for the Yadkin and Yadkin-Pee Dee River Hydroelectric Projects." The complete text of the LIP is also attached for inclusion by reference in the 401 Water Quality Certificate.

### A. Definitions

The following definitions shall be applicable to this Article PO-4:

- Stream Gage Three-Month Rolling Average Flow – The three-month rolling average of streamflow at the following U.S. Geological Survey (USGS) stream gages:
  - Yadkin River at Yadkin College (02116500)
  - South Yadkin River near Mocksville (02118000)

- Abbotts Creek at Lexington (02121500)
- Rocky River near Norwood (02126000)

On the last day of each month, the Applicant shall calculate the arithmetic mean of (a) the daily flows of the current month and (b) the arithmetic mean of the daily flows of each of the two preceding months. The sum of the three-month rolling average for these four gage stations shall be compared by the Applicant to the Historic Stream Gage Three-Month Rolling Average Flow for the corresponding period and a percentage of Historic Three-Month Rolling Average shall be calculated.

- Historic Stream Gage Three-Month Rolling Average Flow – The historical three-month rolling average flow for each of the four designated USGS stream gages for the period 1974 through 2003 (except for the Abbotts Creek gage, for which the period is 1988 through 2003) are set forth in Table LIP-1 below:

**Table LIP-1. Historic Stream Gage Three-Month Rolling Average Flow**

For Evaluation of Flow Trigger on:	Average of daily flows during:	Historic Three-Month Rolling Average Flow, cfs
January 1	Oct-Nov-Dec	4,000
February 1	Nov-Dec-Jan	5,200
March 1	Dec-Jan-Feb	6,250
April 1	Jan-Feb-Mar	7,700
May 1	Feb-Mar-Apr	7,550
June 1	Mar-Apr-May	6,850
July 1	Apr-May-Jun	5,350
August 1	May-Jun-Jul	4,200
September 1	Jun-Jul-Aug	3,600
October 1	Jul-Aug-Sep	3,200
November 1	Aug-Sep-Oct	3,300
December 1	Sep-Oct-Nov	3,550

- Full Pond Elevation – The Full Pond Elevation for each development's reservoir is listed in Table LIP-2.

**Table LIP-2. Full Pond Elevations**

Reservoir	Full Pond Elevation (feet, USGS datum - NGVD 1929)
High Rock	623.9
Tuckertown	564.7
Narrows	509.8
Falls	332.8

- Normal Minimum Elevation (NME) – NME for each Project reservoir is listed in Table LIP-3.

**Table LIP-3. Normal Minimum Elevations (feet, USGS datum - NGVD 1929)**

Month	High Rock	Tucker-town	Narrows	Falls
Full Pond	623.9	564.7	509.8	332.8
January 1	613.9	561.7	504.8	328.8
February 1	613.9	561.7	504.8	328.8
March 1	transition	561.7	504.8	328.8
April 1	619.9	561.7	504.8	328.8
May 1	619.9	561.7	504.8	328.8
June 1	619.9	561.7	504.8	328.8
July 1	619.9	561.7	504.8	328.8
August 1	619.9	561.7	504.8	328.8
September 1	619.9	561.7	504.8	328.8
October 1	619.9	561.7	504.8	328.8
November 1	transition	561.7	504.8	328.8
December 1-15	613.9	561.7	504.8	328.8
December 16-31	613.9	561.7	504.8	328.8

- U.S. Drought Monitor Three-Month Numeric Average** – The Applicant shall calculate a three-month rolling average of U.S. Drought Monitor (<http://www.drought.unl.edu/dm/monitor.html>) values by (a) assigning a numeric value equal to the highest U.S. Drought Monitor designation (e.g. D0=0, D1=1, D2=2, D3=3 and D4=4) for any part of the Yadkin-Pee Dee River Basin draining to Blewett Falls development as of the last day of that month; and (b) calculating an arithmetic mean of that numeric value and numeric values correspondingly assigned for the previous two months. A normal condition in the basin, defined as the absence of a drought designation, shall be assigned a numeric value of negative one (-1).
- Yadkin-Pee Dee River Basin Drought Management Advisory Group (YPD-DMAG)** –The YPD-DMAG shall consist of one representative from each of the following organizations (to the extent that they are willing to participate): Alcoa Power Generating Inc. (APGI), Progress Energy (PE), North Carolina Department of Environment and Natural Resources (NCDENR), North Carolina Division of Water Resources (NCDWR), North Carolina Division of Water Quality (NCDWQ), North Carolina Wildlife Resources Commission (NCWRC), South Carolina Department of Natural Resources (SCDNR), South Carolina Department of Health and Environmental Control (SCDHEC), the United States Fish and Wildlife Service (USFWS), High Rock Lake Association (HRLA), Badin Lake Association (BLA), Duke Power Company, Lake Tillery Homeowners Association, South Carolina Pee Dee River Coalition (SCPDRC) and owners of intakes that withdraw more than one million gallons of water per day from the impoundments of either the Yadkin Project (FERC Project 2197) or the Yadkin-Pee Dee Project (FERC Project 2206).

## B. Implementation Procedure

1. Table LIP-4 sets forth the combinations of conditions under which the LIP shall be implemented. The determination of the applicable LIP Stage shall be made using the High Rock Reservoir water elevation as of midnight between the last day of the previous month and the first day of the current month in combination with the U.S. Drought Monitor Three-Month Numeric Average and the Stream Gage Three-Month Rolling Average Flow to determine the need to declare or change a Stage of the LIP. The LIP shall be implemented beginning at Stage 0 and, if the combination of conditions becomes more severe, the Stages shall increase in one Stage increments.

<b>Table LIP-4: Summary of LIP Triggers</b>					
<b>Stage</b>	<b>High Rock Reservoir Elevation</b>		<b>US Drought Monitor Three-Month Numeric Average</b>		<b>Stream Gage Three-Month Rolling Average as a percent of the Historical Average</b>
<b>0</b>	< NME minus 0.5 ft	<b>and</b>	any	<b>or</b>	any
	<b>OR</b>				
	< NME	<b>and either</b>	$\geq 0$	<b>or</b>	< 48 %
<b>1</b>	< NME minus 1 ft	<b>and either</b>	$\geq 1$	<b>or</b>	< 41 %
<b>2</b>	< NME minus 2 ft	<b>and either</b>	$\geq 2$	<b>or</b>	< 35 %
<b>3</b>	< NME minus 3 ft	<b>and either</b>	$\geq 3$	<b>or</b>	< 30 %
<b>4</b>	< ½ of ( NME minus Critical Reservoir Water Elevation)	<b>and either</b>	$\geq 4$	<b>or</b>	< 30 %

2. The average daily flows set forth in Table LIP-5 shall be initiated no later than seven days after the determination of the applicable LIP Stage and shall be in effect for the balance of the month except as provided in the section titled "Recovery from LIP Stages."

Table LIP-5: LIP Flows <sup>(1)</sup> , cfs						
Stage	High Rock (daily average maximum flow target)			Falls <sup>(2)</sup> (daily average flow target)		
	Feb 1-May 15	May 16- 31	Jun 1- Jan 31	Feb 1- May 15	May 16-31	Jun 1- Jan 31
0	2000	1500	1000	2000	1500	1000
1	1450	1170	900	1450	1170	900
2	1080	950	830	1080	950	830
3	770	770	770	770	770	770
4	Additional measures may be determined by consensus of the Applicant and State Agencies, subject to NCDWQ approval					
<p>1 (1) Developments shall be operated to achieve the target flows to the extent practicable as a first priority and to supplement inflows equitably from the storage reservoirs as a second priority. For LIP Stages 1, 2, 3 and 4, APGI shall achieve the indicated average daily flows set forth in this table by supplementing Project inflows by drawing proportionally from High Rock and Narrows reservoirs such that the difference between the respective drawdowns below NME of High Rock and Narrows reservoirs shall be approximately one foot.</p> <p>2</p> <p>3 (2) For LIP Stages 0-3, the values shown in this table reflect flow targets. These values cannot be met exactly as shown and shall likely vary slightly on a real time basis from the values shown here, but it is expected that the variances from the target flows shall be minimal.</p>						

3. The Applicant shall notify via email the NCDWR of LIP implementation or a change in Stage as soon as practicable but no later than (i) three business days after a Stage 0 determination; (ii) two business days after a Stage 1 or a Stage 2 determination; or (iii) 48 hours after a Stage 3 or Stage 4 determination.

4. The Applicant shall consult with the YPD-DMAG with respect to issues relating to or arising out of implementation of the LIP, including, but not limited to, (i) notification to the public of the possible effects of and/or continuance of drought; (ii) issues relating to the effects of drought conditions on life, health,

property, wildlife, aquatic life; (iii) possible public health concerns; and (iv) short and long term prospects for recovery from drought.

5. The Applicant shall develop and provide information on its website to inform the public on reservoir water elevations, Project releases, usability of public access areas, reservoir inflows, meteorological forecasts, Historic and Actual Stream Gage Three-Month Rolling Average Flow calculations, U.S. Drought Monitor Three-Month Numeric Average calculations, LIP status, YPD-DMAG meeting summaries, and implementation of maintenance or emergency operation plans.

### **C. Recovery from LIP Stages**

1. Recovery from the LIP shall be triggered by the occurrence of any of the three following conditions either separately or in combination:

- Condition 1: All three triggering conditions associated with a lower numbered LIP Stage, as described in Table LIP-4, are met.

**OR**

- Condition 2: High Rock Reservoir water elevations return to at or above the NME plus 2.5 ft.

**OR**

- Condition 3: High Rock Reservoir water elevations return to at or above the NME for 2 consecutive weeks.

2. When any of these three conditions occurs, the Applicant shall take the following actions as indicated by the particular condition:

- Condition 1: The LIP recovery shall be a stage-by-stage reversal of the staged approach described in Table LIP-4 above, beginning at the first day of each month.
- Condition 2: Implementation of the LIP shall be immediately discontinued.
- Condition 3: Implementation of the LIP shall be immediately discontinued.

3. The Applicant shall notify the NCDWR via email within 3 business days following attainment of any of the conditions necessary to return to a lower stage of the LIP.

## **D. Updating the LIP**

During the term of this license, the Applicant shall consult with the YPD-DMAG at least once every five (5) years to review and consider updating the LIP. The use of the period of record 1974 through 2003 to calculate the Historic Stream Gage Three-Month Rolling Average flows set forth in Table LIP-1 of this Article shall be evaluated every five years during such review. On the basis of such consultation, review and consideration, the Applicant may propose modifications to this Article for the NCDWQ's review and approval.

### **Funding of Gages**

Assuming the U.S. Geological Survey (USGS) has necessary rights for the License term, the Applicant shall continue to provide 100% funding support during the License term for the maintenance of the following USGS standard flow gages that are used in the LIP to determine the Three-Month Rolling Average Flow:

- Yadkin River at Yadkin College (02116500)
- South Yadkin River near Mocksville (02118000)
- Abbotts Creek at Lexington (02121500)

Any substantial increase in funding support due to changes in these flow gages are subject to review by the Applicant with the North Carolina Department of Environment and Natural Resources (NCDENR). The Applicant may review and propose changes in the contractor, location, or equipment associated with these gages. Any changes proposed by the Applicant will require agreement of NCDENR's Division of Water Quality.

## **Article PO-5 - Hydro Project Maintenance and Emergency Protocol**

If conditions so warrant, the Applicant shall operate the Project in accordance with the Hydro Project Maintenance and Emergency Protocol (HPMEP) included as Appendix B, "Yadkin Project Hydro Project Maintenance and Emergency Protocol." The complete text of the HPMEP is also attached for inclusion by reference in the 401 Water Quality Certificate.

**b. Water Quality****Article WQ-1 - Water Quality****A. Tailwater Dissolved Oxygen Enhancement Schedule**

The Applicant shall install equipment and implement measures designed to enhance Yadkin Project (Project) tailwater dissolved oxygen (DO) conditions as specified in the schedule in Table WQ-1.

**Table WQ-1. Dissolved Oxygen Enhancement and Monitoring Schedule**

<b>Year</b>	<b>DO Enhancement Action</b>	<b>Monitoring/Reporting</b>
2007 <sup>1</sup>		<ul style="list-style-type: none"> <li>- Continuous DO/temperature monitoring 5/1-11/30 at existing stations in all four tailwaters.</li> <li>- File Draft DO Monitoring Plan and Quality Assurance Project Plan (QAPP) with the North Carolina Division of Water Quality (NCDWQ) as part of 401 Application.</li> </ul>
	Narrows Units 2 & 4 - Completed	<ul style="list-style-type: none"> <li>- Continuous DO/temperature monitoring 5/1-11/30 at existing stations in all four tailwaters.</li> <li>- File Final DO Monitoring Plan and QAPP for approval by NCDWQ and the Commission.</li> </ul>
2009	Narrows Unit 1 - Addition of two aeration valves by 12/31/09.	<ul style="list-style-type: none"> <li>- Implement NCDWQ/FERC approved DO Monitoring Plan.</li> <li>- File annual DO monitoring data report with NCDWQ by March 31.</li> </ul>
2010	<p>Narrows Unit 3 - Addition of two aeration valves by 12/31/10.</p> <p>High Rock Unit 3 - Install "through the blade" aerating turbine by 12/31/10.</p>	- Monitoring/reporting in accordance with DO Monitoring Plan.
2011	High Rock Unit 2 - Install a "through the blade" aerating turbine by 12/31/11.	<ul style="list-style-type: none"> <li>- Monitoring/reporting in accordance with DO Monitoring Plan.</li> <li>- Initiate special study (up to 2 years) to evaluate the effectiveness of the aeration at Narrows on DO levels being discharged from Falls (2011-2012).</li> </ul>

Year	DO Enhancement Action	Monitoring/Reporting
2012	High Rock Unit 1 - Install a "through the blade" aerating turbine by 12/31/12.	<ul style="list-style-type: none"> <li>- Monitoring/reporting in accordance with DO Monitoring Plan.</li> <li>- Complete second year of 2-year study of effectiveness of aeration at Narrows on DO at Falls by 12/31/12 and prepare Study Report.</li> </ul>
2013		<ul style="list-style-type: none"> <li>- Monitoring/reporting in accordance with DO Monitoring Plan.</li> <li>- File 2-year Narrows/Falls DO Study Report with NCDWQ by 3/1/13.</li> <li>- If 2-year study does not demonstrate compliance at Falls, file an Action Plan for DO (DOAP) enhancement at Falls with NCDWQ by 12/31/13.</li> <li>- Initiate special study (up to 2 years) to evaluate the effectiveness of aeration at High Rock on DO levels being discharged from Tuckertown (2013-2014).</li> </ul>
2014	Falls Unit 1 - Install aeration valves or other appropriate aeration technology, if needed, in accordance with Falls Action Plan by 12/31/14.	<ul style="list-style-type: none"> <li>- Monitoring/reporting in accordance with DO Monitoring Plan.</li> <li>- Complete second year of 2-year study of High Rock/Tuckertown DO by 12/31/14 and prepare Study Report.</li> </ul>
2015	Falls Unit 2 - Install aeration valves or other appropriate aeration technology, if needed, in accordance with Falls Action Plan by 12/31/15.	<ul style="list-style-type: none"> <li>- Monitoring/reporting in accordance with DO Monitoring Plan.</li> <li>- File 2-year High Rock/Tuckertown DO Study Report with NCDWQ by 3/1/15.</li> <li>- If 2-year study does not demonstrate compliance at Tuckertown, file an Action Plan for DO enhancement at Tuckertown by 12/31/15.</li> </ul>

Year	DO Enhancement Action	Monitoring/Reporting
2016	<p>Falls Unit 3 - Install aeration valves or other appropriate aeration technology, if needed, in accordance with Falls Action Plan by 12/31/16.</p> <p>Tuckertown - Install aeration technology, if needed, at Tuckertown in accordance with Tuckertown Action Plan by 12/31/16.</p>	- Monitoring/reporting in accordance with DO Monitoring Plan.

Notes: 1 Actions to be taken under the current, existing FERC License for the Yadkin Project, not the New License.

### B. Tailwater Dissolved Oxygen Enhancement Operations

As DO enhancement equipment or measures are installed or implemented on the schedule in Table WQ-1, the Applicant shall operate the generating units with DO enhancement equipment added on a "first-on-last-off" basis, subject to unit availability, from no later than May 1 of each year through November 30 of each year. If DO enhancement equipment or measures are not associated with generating equipment, once completed, that equipment or those measures shall be operated or implemented as designed from no later than May 1 of each year through November 30 of each year.

If at any time during the term of the New License, the Applicant can demonstrate through studies and/or monitoring that DO conditions have improved, the Applicant may consult with the North Carolina Division of Water Quality (NCDWQ) regarding the possibility of reducing the period of DO enhancement operations (May 1 – November 30). Should any such consultation result in an agreement between the Applicant and the NCDWQ to modify the operation of the Project for purposes of DO enhancement, the Applicant shall consult with the NCDWQ to develop a plan to revise DO enhancement operations. The Applicant shall include with the plan, an implementation schedule, documentation of consultation, copies of comments and recommendations on the plan after it has been prepared and provided to NCDWQ, and specific descriptions of how NCDWQ's comments are accommodated by the plan. The Applicant shall file the plan with the FERC within 30 days of receiving NCDWQ's written approval of the plan.

## **Article WQ-2 - Dissolved Oxygen Monitoring**

Within six months of the effective date of the New License, the Applicant shall file with NCDWQ a Dissolved Oxygen Monitoring Plan (DO Monitoring Plan) and Quality Assurance Project Plan (QAPP) for the Project. The DO Monitoring Plan and QAPP will be developed in consultation with NCDWQ and other appropriate state and federal resource agencies.

The primary component of the DO Monitoring Plan will be the operation of four (4) continuous DO/temperature monitors (one in each tailwater), for the period May 1 through November 30 of each year. The Plan shall include a schedule for preparing an annual DO and temperature data report. The annual report shall be filed with NCDWQ and the Downstream Licensee no later than March 31 of the following year.

The Plan shall also include provisions for conducting two studies as part of the overall DO enhancement schedule (Table WQ-1) designed specifically to investigate the effectiveness of aeration technology installed and operating at Narrows on the DO conditions in the Narrows and Falls tailwaters, and the effectiveness of aeration technology installed and operating at High Rock on DO conditions in the High Rock and Tuckertown tailwaters. At the completion of each of the two studies, the Applicant shall prepare a study report which shall be filed with NCDWQ in accordance with the schedule in the DO Monitoring Plan. If the study results demonstrate that the Falls and/or Tuckertown tailwaters do not meet state dissolved oxygen standards as a result of Project operations, the Applicant shall prepare a DO Action Plan (DOAP) for the Falls and Tuckertown developments, respectively. The resulting DOAP(s), if needed, will be filed with NCDWQ in accordance with the schedule shown in Table WQ-1.

The Applicant shall file the DO Monitoring Plan with the FERC within 30 days of receiving NCDWQ's written approval of the plan. The Applicant shall include with the DO Monitoring Plan an implementation schedule, documentation of consultation, copies of comments and recommendations on the plan after it has been prepared and provided to NCDWQ, and specific descriptions of how NCDWQ's comments are accommodated by the plan.

## **Article WQ-3 - Additional Dissolved Oxygen Enhancement Actions**

If at any time during the term of the New License, after all the DO enhancement equipment and measures outlined in Table WQ-1 have been installed and implemented, all of the planned unit upgrades have been completed and the upgraded units are operational, and at least two additional years of monitoring have been completed, the Applicant is notified by the NCDWQ that based on the results of monitoring under the DO Monitoring Plan, State water quality standards are not being met as a result of the Applicant's hydroelectric operations, the Applicant shall consult with the NCDWQ to develop a plan to implement corrective actions. The Applicant shall file a Dissolved Oxygen Corrective Action Plan (DOCAP) for NCDWQ approval within one year of initiating consultation with the NCDWQ. The Applicant shall include with the DOCAP an implementation schedule, documentation of consultation, copies of comments and recommendations on the plan after it has been prepared and provided to NCDWQ, and specific descriptions of how NCDWQ's comments are accommodated by the plan. The Applicant shall file the plan with the FERC within 30 days of receiving NCDWQ's written approval of the plan.

## **Article WQ-4 - Total Maximum Daily Load Process**

The Applicant agrees to participate in the High Rock Total Maximum Daily Load (TMDL) process for High Rock Reservoir initiated by the State of North Carolina in 2005. The Applicant will contribute up to \$50,000 in in-kind services for planned water quality sampling efforts, upon notification that the Yadkin-Pee Dee River Basin Association has received federal or state grants of at least \$50,000, for which the Applicant's contribution will be used as the required "matching funds".

If, during the term of the New License, other TMDL processes are required for the Yadkin River or its tributaries, within the Project Boundary of the Yadkin Project, the Applicant will participate in these processes.

### **c. *Shoreline Management***

#### **Article SMP-1 - Shoreline Management Plan**

The Applicant shall file a revised Shoreline Management Plan (SMP) for the Project with the Federal Energy Regulatory Commission within two years of the effective date of this License. The Applicant shall revise the SMP in consultation with state and federal resource agencies and other interested parties. The Applicant shall provide the consulted parties with a 30-day period to review and comment on a draft revised SMP. The Applicant shall include with its filing copies of all comments received on the draft revised SMP and a discussion of those comments, including whether the Applicant adopted the comments or the Applicant's rationale for not incorporating the comments in the final revised SMP. Additional written DWQ approval is needed for this shoreline management plan notably for those issues related to water quality such as buffer zones and management of shoreline erosion.

Upon Federal Energy Regulatory Commission approval, the Applicant shall implement the approved SMP, including any changes required by the Commission.

### **d. *Incorporation of Appendix A and B by reference.***

The following Appendices are hereby incorporated by reference as conditions to this Certification and are drawn verbatim from the Relicensing Settlement Agreement. In a few instances, "NCDWQ" should be substituted for "FERC" or "Commission" in these appendices – specifically in the sections that describe approval of LIP or HPMEP updates or revisions, and approval of additional stages (level 4 and beyond) to the LIP.

Appendix A: Low Inflow Protocol for the Yadkin & Yadkin-Pee Dee River Hydroelectric Projects

Appendix B: Yadkin Project, Hydro Project Maintenance and Emergency Protocol

Also, this approval to proceed with your proposed impacts or to conduct impacts to waters as depicted in your application shall expire upon expiration of the new FERC License and any Annual Licenses issued after the expiration of the new License.

If this Certification is unacceptable to you, you have the right to an adjudicatory hearing upon written request within sixty (60) days following receipt of this Certification. This request must be in the form of a written petition conforming to Chapter 150B of the North Carolina General Statutes and filed with the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714. If modifications are made to an original Certification, you have the right to an adjudicatory hearing on the modifications upon written request within sixty (60) days following receipt of the Certification. Unless such demands are made, this Certification shall be final and binding.

This the 7th day of May 2009  
DIVISION OF WATER QUALITY

  
Coleen H. Sullins, Director

CHS/jrd

**STATE OF NORTH CAROLINA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

**Water Quality Section**

KNOW ALL MEN BY THESE PRESENTS, That \_\_\_\_\_

\_\_\_\_\_

a \_\_\_\_\_ and having its principal office at \_\_\_\_\_

in the State of \_\_\_\_\_, as principal, and \_\_\_\_\_

a corporation organized under the laws of the State of \_\_\_\_\_ and duly authorized by the

Insurance Commissioner of North Carolina to do business in North Carolina, with an office located at \_\_\_\_\_

\_\_\_\_\_, in the City of \_\_\_\_\_, North Carolina, as surety, are held and firmly bound

unto the State of North Carolina in the sum \_\_\_\_\_ of Bond No. \_\_\_\_\_

lawful money of the United States of America, to the payment of which will and truly be made, we bind

ourselves, our heirs, administrators and successors jointly and severally, firmly by these presents.

Signed, sealed and delivered this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

THE CONDITIONS OF THIS BOND ARE SUCH, That Whereas, the said

\_\_\_\_\_

conducts or will conduct the required water quality-related modifications to the APGI project in North Carolina as described in the original application for a 401 Certification dated May 9, 2008 (received May 8, 2009) and has obtained approval of this application on the \_ day of \_\_\_\_\_, 20\_\_, from the Department of Environment and Natural Resources under Water Quality Certification Number 003173 issued on May 7, 2009.

NOW THEREFORE, if the said \_\_\_\_\_  
 shall comply with the requirements set forth in Water Quality Certification Number 003173 issued on May 7, 2009 and with the rules and regulations adopted pursuant thereto and faithfully perform all obligations under the Certification then this obligation shall be null and void; otherwise to be and remain in full force and effect until released by the Department of Environment and Natural Resources or canceled by the surety. Cancellation by the surety shall be effectuated only upon 60 days written notice thereof to the Department of Environment and Natural Resources and the operator.

ATTEST:

\_\_\_\_\_  
 Secretary or  
 Assistant Secretary

\_\_\_\_\_  
 Principal

( Attach )  
 ( Corporate Seal )  
 ( here of Corporation )

By

\_\_\_\_\_  
 President, Vice President,  
 Partners, or Owner

\_\_\_\_\_  
 Surety

Countersigned at \_\_\_\_\_, North Carolina

By: \_\_\_\_\_  
 Resident Agent of NC

\_\_\_\_\_  
 Agent and Attorney in Fact

**\*PLEASE MAIL THIS FORM AND THE ATTACHED INSTRUMENT  
 TO THE FOLLOWING ADDRESS:**

WATER QUALITY SECTION  
 WETLAND PROGRAM DEVELOPMENT UNIT  
 1617 MAIL SERVICE CENTER  
 RALEIGH, NC 27699-1617



North Carolina Department of Environment and Natural Resources  
Division of Water Quality

Beverly Eaves Perdue  
Governor

Coleen H. Sullins  
Director

Dee Freeman  
Secretary

DWQ Project No.: 003173 County: Stanley County

Applicant: Alcoa Power Generating Inc.

Project Name: Yadkin Hydroelectric Project

Date of Issuance of 401 Water Quality Certification: May 7, 2009

**Certificate of Completion**

Upon completion of all work approved within the 401 Water Quality Certification or applicable Buffer Rules, and any subsequent modifications, the applicant is required to return this certificate to the 401/Wetlands Unit, North Carolina Division of Water Quality, 1650 Mail Service Center, Raleigh, NC, 27699-1650. This form may be returned to DWQ by the applicant, the applicant's authorized agent, or the project engineer. It is not necessary to send certificates from all of these.

***Applicant's Certification***

I, \_\_\_\_\_, hereby state that, to the best of my abilities, due care and diligence was used in the observation of the construction such that the construction was observed to be built within substantial compliance and intent of the 401 Water Quality Certification and Buffer Rules, the approved plans and specifications, and other supporting materials.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

***Agent's Certification***

I, \_\_\_\_\_, hereby state that, to the best of my abilities, due care and diligence was used in the observation of the construction such that the construction was observed to be built within substantial compliance and intent of the 401 Water Quality Certification and Buffer Rules, the approved plans and specifications, and other supporting materials.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

***If this project was designed by a Certified Professional***

I, \_\_\_\_\_, as a duly registered Professional \_\_\_\_\_ (i.e., Engineer, Landscape Architect, Surveyor, etc.) in the State of North Carolina, having been authorized to observe (periodically, weekly, full time) the construction of the project, for the Permittee hereby state that, to the best of my abilities, due care and diligence was used in the observation of the construction such that the construction was observed to be built within substantial compliance and intent of the 401 Water Quality Certification and Buffer Rules, the approved plans and specifications, and other supporting materials.

Signature \_\_\_\_\_ Registration No. \_\_\_\_\_

Date \_\_\_\_\_

### **CERTIFICATE OF SERVICE**

I hereby certify that I have this 17th day of September, 2009, served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

*/s/ Shamai Elstein*

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Shamai Elstein

Document Content(s)

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