

129 FERC ¶ 61,028
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Alcoa Power Generating Inc.

Project No. 2197-096

ORDER DENYING PETITION FOR DECLARATORY ORDER

(Issued October 15, 2009)

1. Alcoa Power Generating Inc. (Alcoa) has filed a petition for an order declaring that the State of North Carolina has waived its authority under section 401 of the Clean Water Act¹ to issue a water quality certification with respect to the relicensing of the Yadkin Hydroelectric Project No. 2197. Because we conclude that North Carolina has not waived its Clean Water Act authority, we deny the petition.

Background

2. On May 1, 1958, the Federal Power Commission, our predecessor, issued a 50-year license under Part I of the Federal Power Act to Alcoa's predecessor, Carolina Aluminum Company, authorizing the company to construct, maintain, and operate the Yadkin Project, located on the Yadkin River, in Stanly, Montgomery, Davidson, and Rowan Counties, North Carolina.² On April 25, 2006, Alcoa filed an application for a new license for the project. The original license expired on April 30, 2008, while the relicensing proceeding was still pending, and the project is currently operating under an annual license.

¹ 33 U.S.C. § 1341 (2006).

² *Carolina Aluminum Company, Project No. 2197; Carolina Power & Light Company, Project No. 2206*, 19 F.P.C. 704 (1958).

3. Section 401(a)(1) of the Clean Water Act³ provides that

[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates If the State . . . fails or refuses to act on a request for certification within a reasonable period (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. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.

4. On May 8, 2008, Alcoa filed a request for water quality certification with the North Carolina Department of Environmental and Natural Resources, Division of Water Quality (North Carolina).⁴ On May 7, 2009, North Carolina issued the requested certification. The certification included a number of conditions, one of which required Alcoa, within 90 days of receipt of the certification, to provide a surety bond or equivalent instrument in favor of the State of North Carolina, in the amount of \$240 million, to cover the cost of water quality improvements at the projects.⁵ The certification stated that “[t]his certification is only effective once the required performance/surety bond is in place.”⁶

5. On May 27, 2009, a North Carolina administrative law judge stayed the certification pending appeal.⁷

³ 33 U.S.C. § 1341(a)(1) (2006).

⁴ See Alcoa’s petition for declaratory order at 3.

⁵ See North Carolina water quality certification at 5-6 (Attachment A to Alcoa’s petition for declaratory order).

⁶ *Id.* at 6.

⁷ *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 3038.

6. On September 17, 2009, Alcoa filed a petition for declaratory order, asking the Commission to conclude that, because North Carolina had conditioned the effectiveness of the certification on the company obtaining the bond, the state had failed to issue a certification within one year of Alcoa's certification request and had thus waived its authority to issue water quality certification.

Discussion

7. Alcoa argues that because North Carolina's certification, issued on the 365th day after the state received Alcoa's application, contained a requirement that Alcoa obtain a bond within 90 days – an action that Alcoa says could only take place after the expiration of the Clean Water Act's one-year deadline, North Carolina's action was “inherently incomplete,” with the result that the state has waived water quality certification.⁸ The company asserts the manner in which North Carolina crafted the certification “has the practical effect of withholding its final determination as to whether to grant or deny [Alcoa's] application [for water quality certification] well beyond the one- year deadline”⁹

8. We do not agree. Section 401(a)(1) requires that, in order to avoid waiver, a state must “act” on a request for certification within one year. Here, North Carolina acted by issuing its “APPROVAL of 401 Water Quality Certification with Additional Conditions” within the one-year period. The certification states that unless Alcoa requests an adjudicatory hearing “this Certification shall be final and binding.” As Alcoa notes, the certification does contain a condition providing that it will not become effective unless Alcoa provides the required bond within 90 days. However, we cannot conclude that such a requirement vitiates the issuance of the water quality certification. When the certification was issued, the state had completed its action. If Alcoa elected to satisfy the bond condition (and had the certification not been appealed), the certification would have been fully effective. Whether or not that occurred was solely up to Alcoa. We find that North Carolina did act within the one-year certification period, and therefore has not waived its Clean Water Act authority.

⁸ See petition for declaratory order at 6-8.

⁹ *Id.* at 9.

Project No. 2197-096

4

The Commission orders:

The petition for declaratory order filed by Alcoa Power Generating Inc. on September 17, 2009 is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Document Content(s)

P-2197-096.DOC.....1-4