

Filed

STATE OF NORTH CAROLINA

COUNTY OF STANLY

STANLY COUNTY, NORTH CAROLINA,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF
ENVIRONMENT AND NATURAL
RESOURCES, DIVISION OF WATER
QUALITY,

Respondent,

ALCOA POWER GENERATING, INC.,

Respondent-Intervenor.

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
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N.C. ATTORNEY GENERAL
Environmental DivisionORDER GRANTING
PETITIONER'S MOTION FOR
PRELIMINARY INJUNCTION/
STAY OF CERTIFICATION

THIS MATTER came on for hearing on May 20, 2009 before the undersigned Administrative Law Judge Joe L. Webster upon Petitioner Stanly County's Motion for Temporary Restraining Order and Preliminary Injunction, seeking to stay the effectiveness of the North Carolina Section 401 Water Quality Certification (No. 003173) issued by Respondent North Carolina Department of Environment and Natural Resources, Division of Water Quality ("Respondent") to Respondent-Intervenor Alcoa Power Generating, Inc. ("APGI") on May 7, 2009 (the "Section 401 Certification") pending the outcome of this contested case. Petitioner's Motion was made pursuant to N.C. Gen. Stat. § 150B-33(b)(6), 26 NCAC 03 .0115 and Rule 65 of the North Carolina Rules of Civil Procedure. Notice of the Motion was provided to Respondent and to APGI. Petitioner, Respondent and APGI were represented by counsel at the hearing, and all parties had the opportunity to present arguments, authorities and exhibits supporting their positions. The undersigned Administrative Law Judge also permitted the submission of a written *amicus curiae* statement by the Governor of the State of North Carolina. Based on the Motion, the attachments thereto, the representations of counsel at the hearing, the

exhibits presented at the hearing and the submissions of the parties, the undersigned finds that Petitioner has met its burden of establishing the facts necessary for the issuance of a preliminary injunction/stay, in that:

A. Petitioner has demonstrated a likelihood of success on the merits of its claim that Respondent erred in one or more of the ways contemplated by N.C. Gen. Stat. § 150B-23(a) when it did not exercise the full scope of its jurisdiction in deciding that certain water quality impacts in Badin Lake were beyond the scope of its Section 401 water quality certification review. This is demonstrated by, among other things, the deposition testimony of John Dorney and the May 6, 2009 Hearing Officer Report on the Public Hearing for Alcoa 401 Water Quality Certification for FERC Re-license.

B. Petitioner has demonstrated a likelihood of success on the merits of its claim that Respondent erred, in one or more of the ways contemplated by N.C. Gen. Stat. § 150B-23(a), in the manner in which it determined the scope of its jurisdiction under the Section 401 water quality certification program. This is demonstrated by, among other things, the deposition testimony of John Dorney.

C. Petitioner has demonstrated a likelihood of success on the merits of its claim that the nature of the prolonged compliance schedule included in the Section 401 Certification for coming into compliance with North Carolina's dissolved oxygen standards does not comply with Respondent's obligations under the Federal Clean Water Act, and that Respondent therefore erred in one or more of the ways contemplated by N.C. Gen. Stat. § 150B-23(a). This is demonstrated by, among other things, the language of the Section 401 Certification.

D. Petitioner has demonstrated that it will suffer irreparable harm if an injunction/stay is not issued, given the effect of the issuance of a final Federal Energy Regulatory

Commission ("FERC") license to APGI even if there is future modification of the Section 401 Certification, and the impact of that issuance on the effectiveness of these proceedings.

E. Petitioner has demonstrated that the environment will suffer irreparable harm in the absence of an injunction/stay.

F. The undersigned has taken into account that Respondent stated on the record, both in its Responsive Pleading and oral argument that the Respondent Division of Water Quality (DWQ) believes the 401 Certification was issued in accordance with all substantive requirements and the DWQ does not concede any error. Respondent DWQ also believes its decision was made for the right reasons and addresses the necessary elements. (Transcript, p. 76)

G. Petitioner has demonstrated that it has no adequate remedy at law and that money damages are not adequate to compensate for the irreparable injury that will be suffered in the absence of an injunction/stay.


H. Petitioner has demonstrated that the balance of hardships and equities weighs heavily in favor of the issuance of the injunction/stay.

I. The undersigned acknowledges the statements concerning the public interest made at the hearing and in submissions, including the Respondent's statement that the public interest may be best served by a stay and the statement by the Governor of the State of North Carolina, as *amicus curiae*, that the public interest should serve as an important factor in the undersigned's consideration of Petitioner's Motion. The undersigned finds it unnecessary to address these statements in that he has determined that Petitioner has met the standards and requirements of N.C. Gen. Stat. § 150B-33(b)(6) and Rule 65 of the North Carolina Rules of Civil Procedure. The issuance of the injunction/stay is based solely on N.C. Gen. Stat. § 150B-33(b)(6) and Rule 65 of the North Carolina Rules of Civil Procedure.

NOW THEREFORE, pursuant to N.C. Gen. Stat. § 150B-33(b)(6) and Rule 65 of the North Carolina Rules of Civil Procedure, it is hereby ORDERED that:

1. Petitioner's Motion is granted and the undersigned hereby issues a preliminary injunction staying the effectiveness of the Section 401 Certification for all purposes.
2. The preliminary injunction/stay shall remain in place until the undersigned holds a full hearing on Petitioner's claims in this contested case proceeding and makes a final determination on the merits of those claims.
3. Accordingly, the Section 401 Certification issued on May 7, 2009 is not yet effective to demonstrate APGI's compliance with Section 401 of the Federal Clean Water Act until such time as the undersigned determines whether the Section 401 Certification should be affirmed, modified or voided as a result of Petitioner's claims.
4. No bond is required pursuant to Rule 65(c) of the North Carolina Rules of Civil Procedure because Petitioner is a County of the State of North Carolina.
5. This preliminary injunction/stay is effective immediately.
6. Respondent shall immediately notify FERC of this injunction/stay.

ENTERED this 27th day of May, 2009, nunc pro tunc for April 26, 2009 at 9:00 a.m.



Joe L. Webster
Administrative Law Judge

A copy of the foregoing was mailed to:

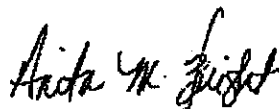
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This the 27th day of May, 2009.



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Document Content(s)

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