

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
13 EHR 18085

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ALCOA POWER GENERATING, INC.,	)	
	)	
Petitioner,	)	
	)	RESPONDENT’S
v.	)	RESPONSE TO NOTICE OF
	)	CONTESTED CASE AND
DIVISION OF WATER QUALITY,	)	PREHEARING STATEMENT
NORTH CAROLINA DEPARTMENT OF	)	
ENVIRONMENT AND NATURAL RESOURCES,	)	
	)	
Respondent.	)	

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NOW COMES Respondent North Carolina Department of Environment and Natural Resources, Division of Water Resources (“Respondent” or “DWR”), by and through its undersigned attorneys, and files this Response to Notice of Contested Case and Prehearing Statement pursuant to 26 NCAC 3.0104 and the October Order for Prehearing Statement signed by the Honorable Beecher R. Gray, Administrative Law Judge. A copy of Respondent’s

**1. The issues to be resolved**

August 2, 2013, in the Superior Court of Wake County by the North Carolina Department of Administration (“NCDOA”) against APGI seeking a judicial declaration concerning ownership by the State of the submerged bed of portions of the Yadkin River located beneath the Yadkin Hydroelectric Project, Federal Energy Regulatory Commission Project No. P-2197 (“the Yadkin Hydroelectric Project” or “the Project”). In the currently pending lawsuit, the NCDOA asserts that the State of North Carolina owns and holds in trust for the people of North Carolina the submerged bed of the Yadkin River and portions of the Project’s dams standing on the State’s

riverbed land. North Carolina regulations governing the issuance of 401 Certifications require that an applicant for a 401 Water Quality Certification certify “that the applicant has title to the property, has been authorized by the owner to apply for certification or is a public entity and has the power of eminent domain.” 15A NCAC 02H.0502(f). At the time Petitioner submitted its application for a 401 Certification, an officer of APGI signed the certification required by 15A NCAC 2H.0502(f). However, as stated above, on August 2, 2013, the State of North Carolina, through its DOA, asserted ownership of the submerged riverbed land of the Yadkin River which lies within the project boundary of the Yadkin Hydroelectric Project. In its Complaint, the State of North Carolina asserts that the State, and not APGI, owns the riverbed lands lying beneath four Project dams such that the State, and not APGI, owns that portion of each of the four Project dams. Under these circumstances, Respondent concluded that it could not consider the application to be a valid application until the issues and conflicting claims of ownership raised by NCDOA in its pending lawsuit were resolved by the parties or a court.

Petitioner argues that Respondent exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously or failed to act as required by rule and law in denying of Petitioner’s 401 Certification application. Respondent contends that the August 2, 2013 denial of Petitioner’s 401 Certification application is reasonable and justified; that Respondent did not exceed its authority or fail to use proper procedure; that Respondent did not act erroneously or arbitrarily or capriciously and that Respondent did not fail to act as required by law or rule.

**2. A brief statement of the facts and reasons supporting the issues in dispute:**

Petitioner’s application for a 401 Water Quality Certification for its Yadkin Hydroelectric Project was denied by Respondent in a letter dated August 2, 2013. A brief summary of the

facts and reasons supporting the issues in dispute are set forth in Respondent's August 2, 2013 letter of denial to Petitioner, which is attached hereto as Exhibit A and incorporated herein by reference.

**3. The statutes, rules and legal precedent, if known:**

The controlling statutes and rules include the Clean Water Act, 33 U.S.C. § 1431 and the rules promulgated thereunder; Article 21 of Chapter 143 of the North Carolina General Statutes, N.C. Gen. Stat. §§ 143-211 *et seq.*, and rules promulgated thereunder; the Administrative Procedures Act (hereinafter "APA"), N.C. Gen. Stat. Chapter 150B, N.C. Gen. Stat. §§ 150B-1 *et seq.* and rules promulgated thereunder. At this early stage of the proceedings, Respondent has not determined additional legal precedent which might be relevant or controlling in this contested case.

**4. A list of proposed witnesses.**

Respondent anticipates that it may call one or more of the following witnesses to testify at a hearing in this matter. In addition, Respondent may call as a witness any person familiar with the facts of this case, as well as any person named as a witness by Petitioner or any other potential party.

Lacy Presnell, General Counsel, Department of Environment and Natural Resources;

Thomas A. Reeder, Director, Division of Water Resources, DENR;

Karen Higgins, Supervisor Compliance and Permitting Unit, DWR, DENR;

Jim Gregson, Wilmington Regional Office Supervisor, Surface Water Protection Section,  
DWR, DENR; and

Other DWR employees related to this case.

**5. Whether you wish to pursue discovery. If so the estimated length of time required:**

Respondent anticipates that it will conduct discovery in this case and anticipates, at this time, that discovery can be completed prior to the January 13, 2014 deadline set forth in the October 4, 2013 Scheduling Order. Respondent reserves the right to request that the deadline for discovery be extended, if it determines that additional discovery is necessary.

**6. If you received a Scheduling Order, is the date and location of the hearing acceptable? If not, you must file a separate motion requesting a change:**

Counsel for Respondent is working with Counsel for Petitioner to select a mediator and to schedule mediation pursuant to the Order for Mediated Settlement Conference signed by the Honorable Julian Mann, III, Chief Administrative Law Judge, on October 4, 2013. At this time, Respondent does not object to a hearing in this case during the week beginning January 27, 2014; neither does Respondent object to the Raleigh, North Carolina location set forth in the October 4, 2013 Scheduling Order.

**7. If you do not have an attorney representing you in this contested case, please provide the following information in order to receive communication from this Office.**

Not applicable.

**8. Estimated length of hearing.**

Respondent anticipates that a hearing in this matter will take one to three days.

**9. Other special matters:**

Respondent's Division of Water Resources is the successor to Respondent's predecessor division, DENR's Division of Water Quality, effective August 1, 2013. All actions taken by DWQ in this matter are considered to have been taken by DWR. Respondent requests the caption in the matter be amended to reflect this change.

Respectfully submitted this the 4<sup>th</sup> day of November 2013.

ROY COOPER  
Attorney General

By: \_\_\_\_\_

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing RESPONDENT'S RESPONSE TO NOTICE OF CONTESTED CASE AND PREHEARING STATEMENT with Document Constituting Agency Action on the Petitioner through its attorneys by depositing a copy in an official depository of the United States Postal Service, first class, postage prepaid, and addressed as follows:

Charles D. Case, Esq.  
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*Attorneys for the Petitioner*

This the 4<sup>th</sup> day of November 2013.

ROY COOPER  
Attorney General

By: \_\_\_\_\_  
John A. Payne  
Assistant Attorney General