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ENVIRONMENT &
NATURAL RESOURCES

May 8, 2009

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Ms. Kim Hausen, Chief Hearings Clerk
Office of the Clerk
North Carolina Office of Administrative
Hearings
6714 Mail Service Center
Raleigh, North Carolina 27699-6714

**Re: Petition for Contested Case Hearing, Stanly County, North Carolina v.
NCDENR, Division of Water Quality**

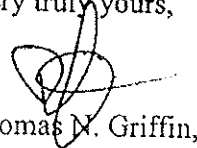
Dear Madame Clerk:

Please find attached Stanly County's Petition for a Contested Case Hearing being filed by e-mail and First Class U.S. Mail (original and one copy) as permitted by the OAH rules.

I would appreciate your returning a file-stamped copy of the Petition for a Contested Case Hearing in the enclosed stamped, self-addressed envelope. By copy of this letter, I am serving counsel for the Respondent with this Petition.

Thank you for your attention to this matter.

Very truly yours,


Thomas N. Griffin, III

Attachment

cc: Mary Penny Thompson, Esq. (w/attachment via e-mail)
Charles D. Case, Esq. (w/attachment via e-mail)
Craig A. Bromby, Esq. (w/attachment via e-mail)
Donald W. Laton, Esq. (w/attachment via e-mail)
David R. Poe, Esq. (w/attachment via e-mail)
William Bunker (w/attachment via U.S. mail)

PPAB 1561745v1

CHARLESTON, SC
COLUMBIA, SC
MYRTLE BEACH, SC
RALEIGH, NC
SPARTANBURG, SC

PLEASE PRINT CLEARLY OR TYPE

STATE OF NORTH CAROLINA
COUNTY OF STANLY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

STANLY COUNTY, NORTH CAROLINA

PETITIONER,

v.

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

RESPONDENT.

PETITION
FOR A
CONTESTED CASE HEARING

I hereby ask for a contested case hearing as provided for by North Carolina General Statute § 150B-23 because the Respondent has:

(Briefly state facts showing how you believe you have been harmed by the State agency or board.)

On May 7, 2009, the North Carolina Department of Environment and Natural Resources Division of Water Quality issued a Certification (No. 003173) under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, and 15A N.C.A.C. 2H.0501 et seq. to Alcoa Power Generating Inc. ("APGI") related to APGI's operation of the "Yadkin Project" (FERC Project No. 2197) in Stanly County and surrounding areas. Petitioner Stanly County, North Carolina contests Respondent's issuance of the Section 401 Certification for the reasons set forth in the attached summary.

(If more space is needed, attach additional pages.)

Because of these facts, the State agency or board has: (check at least one from each column)

☒ deprived me of property;

☐ ordered me to pay a fine or civil penalty; or

☒ otherwise substantially prejudiced my rights;

AND

☐ exceeded its authority or jurisdiction;

☒ acted erroneously;

☒ failed to use proper procedure;

☒ acted arbitrarily or capriciously; or

☒ failed to act as required by law or rule.


Date: May 8, 2009

Your phone number: (704) 372-9000

Print your full address: 401 South Tryon Street, Suite 3000
(street address/p.o. box)

Charlotte, NC 28202
(city) (state) (zip)

Print your name Thomas N. Griffin, III, Esq., Counsel for the Petitioner Stanly County, North Carolina

Your signature: 

You must mail or deliver a COPY of this Petition to the State agency or board named on line (3) of this form. You should contact the agency or board to determine the name of the person to be served.

CERTIFICATE OF SERVICE

I certify that this Petition has been served on the State agency or board named below by depositing a copy of it with the United States Postal Service with sufficient postage affixed OR by delivering it to the named agency or board:

Mary Penny Thompson

(name of person served)

NC Dept. of Environment & Natural Resources, Div. of Water Quality

(State agency or board listed on line 3)

Office of General Counsel, 1601 Mail Service Center

Raleigh

NC

27699-1601

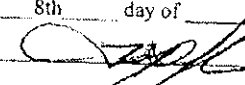
(street address/p.o. box)

(city)

(state)

(zip code)

This the 8th day of May, 2009


(your signature)

When you have completed this form, you MUST mail or deliver the ORIGINAL AND ONE COPY to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

**ATTACHMENT TO THE PETITION FOR A CONTESTED CASE HEARING
FILED BY STANLY COUNTY, NORTH CAROLINA AGAINST
THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND
NATURAL RESOURCES, DIVISION OF WATER QUALITY**

Stanly County files this petition to challenge the North Carolina Department of Environment and Natural Resources, Division of Water Quality's ("Respondent") issuance of a certification (No. 003173), dated May 7, 2009, to Alcoa Power Generating, Inc. ("APGI") under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, and 15A N.C.A.C. 2H .0501 *et seq.* (the "Certification"). The Certification, in turn, was issued in connection with APGI's application to the Federal Energy Regulatory Commission ("FERC") for a renewal of its license to operate four hydroelectric dams and associated reservoirs and water systems on the Yadkin River, FERC Project No. 2197 (the "Yadkin Project"). By issuing the Certification, Respondent is stating that the Yadkin Project meets the applicable State water quality standards and other appropriate requirements of State law. Respondent is wrong.

In particular, Respondent has acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, failed to act as required by law or rule and acted without supporting substantial evidence because it:

1. On information and belief, applied an improperly narrow interpretation of its duties and responsibilities under Section 401 and applicable State regulations, thereby failing to act as required by law and rule. In particular, Respondent failed to consider the water quality conditions in, and impacts from, the Yadkin Project as a whole. It instead narrowly focused on only those conditions that would be directly related to the operation of Yadkin Project dams and discharges. As a result, Respondent has failed to employ the full scope of its regulatory jurisdiction in the face of known water quality impacts demanding that such jurisdiction be exercised, and in the face of North Carolina law that would require that it do so. Respondent's failures in this regard include, on information and belief and without limitation, that it:
 - a. Improperly restricted its review of water quality impacts in and to the Yadkin Project so as to exclude violations of water quality standards that arise from "watershed" effects, ignoring the fact that operation of the Yadkin Project can and does impact (mitigate and/or exacerbate) such watershed effects, and that APGI can and should take steps to protect water quality regardless of the source of such violations.
 - b. Improperly restricted its review of water quality impacts in and to the Yadkin Project so as to exclude known impacts from immediately adjacent sources of contamination.
 - c. Failed to follow proper procedure in the establishment of its policy of restricting its jurisdiction in these types of matters.
2. Issued the Certification without requiring that the Yadkin Project comply in all material respects with applicable State water quality standards and other appropriate requirements of State law. Current violations of water quality standards in and related to the Yadkin Project and/or its discharges include, for example and without limitation, the presence of toxic algal species (such as *Lyngbya wollei*); the presence of toxic constituents injurious to ecological health (such as

ammonia and sulfides); the presence of invasive species (such as *Corbicula fluminea*); the presence of oxygen demanding waters, constituents and sediments; and the presence in sediments of chemical contaminants (such as polychlorinated biphenyls and polyaromatic hydrocarbons). In short, Respondent certified that the Yadkin Project will not violate or degrade applicable water quality standards when violations of such standards exist today, at the time of issuance.

3. Issued the Certification despite its knowledge that the discharge from the Yadkin Project currently violates water quality standards for dissolved oxygen, and that those violations will continue into the future. Therefore, Respondent certified that the Yadkin Project will not violate or degrade applicable water quality standards when in fact known violations of such standards exist.
4. Issued the Certification with a compliance schedule that violates the plain language of the Clean Water Act.
5. Issued the Certification in the absence of critical data that are necessary to evaluate fully whether the Yadkin Project in general, and its discharges in particular, are and will be in compliance with applicable State water quality standards, or are causing or will cause continued degradation of such standards. For example and without limitation, Respondent does not have proper information on dissolved oxygen sag and/or the Yadkin Project's impacts on water quality (including in particular ecological health and best uses) downstream of Project tailraces. Respondent cannot certify that the Yadkin Project and/or its discharges will comply with or not degrade applicable water quality standards when Respondent has not gathered or considered sufficient information to make that determination.
6. Commissioned and/or approved studies that were intended to investigate discharges from the Narrows Dam and/or the movement of contaminated sediments, but were not properly designed to accomplish these purported goals.
7. Issued the Certification without including conditions that would be necessary to address current, ongoing violations of water quality standards in the Yadkin Project, which violations are affected and/or caused by the operations of and discharges from the Yadkin Project (including without limitation the presence of invasive species, toxic algae and toxic constituents in Yadkin Project waters).
8. Issued the Certification without including conditions sufficient to address the contamination of fish tissues in the Yadkin Project. The ability of the Yadkin Project to sustain aquatic life, recreational fishing and human health is directly related to its best uses, and is therefore directly related to water quality.
9. On information and belief, ignored the impact of water quality conditions in the Yadkin Project on ecological health, as opposed to human health, in considering whether to issue and/or condition the Certification. No requirements were included in the Certification to address levels of contaminants in Yadkin Project sediments that clearly exceed applicable screening values for ecological health.

10. On information and belief, failed to review or properly consider critical data in its evaluation of the Certification prior to its issuance.

11. On information and belief, failed to perform a critical review of crucial water quality and other environmental reports prepared by or on behalf of APGI. Respondent instead, on information and belief, relied on those reports wholesale without seeking additional information to fill important holes in the data that bear directly on water quality in the Yadkin Project in general, and on the impact of Project discharges on water quality in particular.

12. Improperly abdicated its authority to protect water quality to APGI and a group of certain "stakeholders," by incorporating wholesale certain terms of a "Relicensing Settlement Agreement" ("RSA") into the Certification. The RSA is a compromised negotiation of what APGI is willing to do, not a finding of what would be necessary to ensure that the Yadkin Project does not degrade water quality standards.

13. Issued the Certification in the face of conditions in or related to the Yadkin Project that could have a detrimental effect on rare, threatened or endangered species in the Yadkin Project area, such as the bald eagle.

14. Issued the Certification with requirements for further study, sampling and/or monitoring that are wholly inadequate to ensure maintenance and/or compliance with water quality standards.

Because of these actions and inactions, Respondent violated the North Carolina Administrative Procedures Act.

Stanly County is a "person aggrieved" as defined by N.C. Gen. Stat. § 150B-2(6). Among other things, a material portion of the Yadkin Project is located in Stanly County, and the County is vitally interested in the health and welfare of its citizens and the health and preservation of its environment. Respondent's actions and inactions directly implicate these and other interests of the County.