

**EXHIBIT**  
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UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Alcoa Power Generating, Inc. ) P-2197-073  
)  
Yadkin Hydroelectric Project ) Application for New Major License

**NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES' NOTICE OF INTERVENTION AND ALTERNATIVE MOTION TO INTERVENE**

NOW COMES the Department of Environment and Natural Resources of the State of North Carolina ("NC DENR"), through the undersigned counsel, and (i) gives notice of intervention pursuant to Rule 214(a)(2), and (ii) moves in the alternative to intervene under Rule 214(a)(3). 18 C.F.R. § 385.214.

**NOTICE OF INTERVENTION**

NC DENR gives notice of intervention under Rule 214(a)(2). In support of this notice NC DENR shows the following: The North Carolina Environmental Management Commission ("EMC") has delegated to the Director of the Division of Water Quality authority to issue water quality certifications on behalf of the State of North Carolina ("State"). 33 U.S.C. § 1341; N.C. Gen. Stat. § 143B-282(1)(u); 15A N.C.A.C. 2H.0500. The Division of Water Quality is a division of NC DENR, which is a statutory department of the State. See N.C. Gen. Stat. § 143B-279.1. The Commission has recognized on numerous previous occasions the authority of NC DENR and its Division of Water Quality to certify hydroelectric projects licensed by the Commission under the Federal Power Act.<sup>1</sup>

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<sup>1</sup> E.g., Alcoa Power Generating, Inc., 110 FERC ¶ 61,056, at 61,273, 61,306 (25 Jan. 2005) ("the North Carolina State Division of Water [Quality] . . . issued [a] timely water quality certification[] for the Tapoco Project"); Nantahala Power & Light, 98 FERC ¶ 62,214, at 64,436 (28 March 2002) ("This license is subject to the water quality certification conditions submitted by the North Carolina Department of Environment and Natural Resources under Section 401(a) of the Clean Water Act . . ."); Duke Power Co., 72 FERC ¶ 61,030, at 61,182 (13 July 1995) ("North Carolina [Department of Environment and Natural Resources issued [a] water quality certification for the Spencer Mountain Project").

NC DENR submits that this project requires a water quality certification.<sup>2</sup> Therefore, NC DENR has authority to intervene as of right pursuant to Rule 214(a)(2).

### **ALTERNATIVE MOTION TO INTERVENE**

In the alternative, NC DENR moves the Commission, pursuant to Rule 214(a)(3), to allow NC DENR to intervene. In support of this alternative motion, NC DENR shows the following:

#### **I. GROUNDS FOR INTERVENTION**

##### **A. NC DENR Has a Right to Participate in this Proceeding**

As stated above, NC DENR has a right to participate in this proceeding by virtue of its authority to certify federally-licensed projects pursuant to section 401 of the Clean Water Act. Rule 214(b)(2)(i).

##### **B. NC DENR Has a Paramount Interest in the Waters of the State Which May Be Directly Affected by the Outcome of this Proceeding**

NC DENR is a statutory department of the State of North Carolina. N.C. Gen. Stat. § 143B-279.1.

It is hereby declared to be the public policy of this State to provide for the conservation of its water and air resources. Furthermore, it is the intent of the General Assembly ... to achieve and to maintain for the citizens of the State a total environment of superior quality.

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It is the public policy of the State to maintain, protect, and enhance water quality within North Carolina.

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It is the purpose of this Article to create an agency which shall administer a program of water and air pollution control and water resource management. It is the intent of the General Assembly, through the duties and powers

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<sup>2</sup> S. D. Warren Co. v. Me. Bd. of Env'tl. Prot., 126 S. Ct. 1843 (2006).

defined herein, to confer such authority upon the Department of Environment and Natural Resources as shall be necessary to administer a complete program of water and air conservation, pollution abatement and control and to achieve a coordinated effort of pollution abatement and control with other jurisdictions. Standards of water and air purity shall be designed to protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property, to insure the continued enjoyment of the natural attractions of the State, to encourage the expansion of employment opportunities, to provide a permanent foundation for healthy industrial development and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources.

N.C. Gen. Stat. § 143-211(c). In furtherance of these policies NC DENR retains authority to:<sup>3</sup>

- Provide for the protection of the environment. N.C. Gen. Stat. § 143B-279.2.
- Implement the federal Clean Water Act by developing and applying water quality standards and issuing National Pollutant Discharge Elimination System Permits. N.C. Gen. Stat. §§ 143-214.1, 143-215.1 and 143B-282, and 33 U.S.C. §§ 1313 and 1342.
- Certify compliance of federally licensed activities with State law pursuant to section 401 of the Clean Water Act. N.C. Gen. Stat. § 143B-282, 15A N.C.A.C. 2H. 0500 and 33 U.S.C. § 1341.
- Manage water quality at the basinwide level and cooperate in local watershed protection. N.C. Gen. Stat. §§ 143-214.5 and 143-215.8B.
- Investigate the need for and affects of interbasin water transfers and make recommendations regarding approval of such transfers. N.C. Gen. Stat. § 143-215.22I.
- Investigate conditions of localized water depletion and make recommendations regarding regulations to coordinate, conserve, and apportion available supplies. N.C. Gen. Stat. § 143-215.11 et seq.

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<sup>3</sup> The duties of NC DENR exist by virtue of express legislative mandate, delegation from the EMC, and as NC DENR's function as staff to the EMC. See N.C. Gen. Stat. § 143-215.3.

- Coordinate statewide water supply planning by providing technical assistance to local government for development of local water supply plans and developing a state water supply plan. N.C. Gen. Stat. § 143-355.
- Assist in the development of rules for conservation of water during drought by, among other things, evaluating current water conservation measures and making recommendations regarding those measures. 2002 N.C. Sess. L. 167.
- Investigate fish kills. N.C. Gen. Stat. §§ 143B-279.7, 143B-282 and 143-215.3.

These authorities are merely representative. See, generally, e.g., N.C. Gen. Stat. ch. 143, art. 21; and ch. 143B, art. 7. In essence, NC DENR, in coordination with the EMC and the North Carolina Wildlife Resources Commission, retains broad authority and responsibility regarding water quality and natural resource issues. In addition, the State retains title to the beds of navigable waters and the navigable waters themselves are a public resource.<sup>4</sup>

The operation of this project may change the quantity and quality of fish habitat in the river, alter the chemical and physical properties of the river, affect the recreational opportunities in the river, affect submerged lands to which the State retains title, *etc.* Certainly, these outcomes will affect the implementation NC DENR's regulatory and other statutory authorities on behalf of the public, and its ability to carry out its legal mandates. See Rule 214(b)(2)(ii).

### **C. NC DENR's Participation in this Proceeding Is in the Public Interest**

The mandates discussed above uniquely position NC DENR to oversee and manage water resources affected by this proceeding. As a governmental agency with broad

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<sup>4</sup> E.g., Shepard's Point Land Co. v. Atlantic Hotel, 132 N.C. 517, 44 S.E. 39 (1903); State v. Narrows Island Club, 100 N.C. 477, 5 S.E. 411 (1888).

jurisdiction over public waters, NC DENR is well positioned to balance the interests of various users of this public resource. In the exercise of its authority, NC DENR often must resolve conflicts with regard to competing uses and pressures on water resources. See, e.g., N.C. Gen. Stat. § 143-214.1. The experienced and technically expert staff of NC DENR periodically monitors the status of the waters affected by this proceeding, including the operations of the project. NC DENR's mandate requires it to coordinate all of the information it receives in order to render advice, provide assistance, and make determinations regarding the best overall use of this limited resource. Therefore, the participation by NC DENR in this proceeding is in the public interest. See Rule 214(b)(2)(iii).

**II. NC DENR SUPPORTS SETTLEMENT CONSISTENT WITH THE TERMS OF THE AGREEMENT IN PRINCIPLE AND ISSUANCE OF A LICENSE THAT ADOPTS THE LICENSE ARTICLES THAT THE PARTIES WILL PROPOSE IN THE SETTLEMENT AGREEMENT**

NC DENR, the licensee, and many other interested stakeholders, including federal, State, tribal, and local government, local business and non-governmental organizations, have prepared a good faith Agreement in Principle ("AIP") to address the substantive matters involved in this proceeding. The parties intend to execute a settlement agreement that is consistent with and incorporates the substantive provisions of the AIP. The agreement will include proposed license articles that the parties will recommend should govern the relationship between the Commission and the licensee over the course of the new license, and other obligations and agreements to govern the interaction of the parties during that time as well. NC DENR supports the AIP and urges the Commission, when the agreement is

executed and filed, to approve the agreement in full and incorporate the proposed license articles into the new license for the project. Also, NC DENR intends to issue a water quality certification pursuant to section 401 of the Clean Water Act with conditions to be incorporated into the new license.

### **III. CONCLUSION**

For all of the foregoing reasons, to the extent NC DENR is not eligible for intervention pursuant to Rule 214(a)(2), NC DENR respectfully requests that the Commission grant this Alternative Motion to Intervene pursuant to Rule 214(a)(3).

### **CONTACT INFORMATION**

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Respectfully submitted, this the 22nd day of February 2007.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

This the 22nd day of February 2007.

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