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Thursday, May 06, 2010

Dean Naujoks
Yadkin Riverkeeper, Inc.
2435 Westfield Ave.
Winston Salem, NC 27103

Dear Dean,

We hope you enjoyed your paddle down the Yadkin River. Indeed, as we have discussed many times, we at the Clinic believe that the navigability of the Yadkin River is not only a critical issue in this case but also a critical policy issue for the State. As you have been saying for some time, "Give back the Yadkin." In our opinion, the Yadkin River bed and the flowing waters of the Yadkin belong to the People of North Carolina and cannot be privately owned.

We are of the opinion that the Yadkin River is a public trust resource and the bed of the Yadkin River is public land. Under the North Carolina public trust doctrine, title to land submerged under navigable waters is vested in the State by law. See Gwalthmey v. NC, 342 N.C. 287, 304 (1995). Waters are considered legally navigable if they are navigable in fact by small watercraft, such as rafts and canoes. *Id.* The only way to divest the state's interest is for the legislature to deed away portions by specific grant for a public purpose. If such is not done, then the grant violates both the public trust doctrine and the exclusive emoluments clause of the North Carolina Constitution. See N.C. Const. Art. I, § 32. Such a reading of the law is also most consistent with the North Carolina Constitution's statement of public policy, that the policy of the state is to "protect its lands and waters for the benefit of all its citizens." See N.C. Const. Art. XIV, § 5.

Your 2010 paddle down the river clearly demonstrates that the Yadkin River is navigable in its current state both above and throughout the Yadkin Project area. Historically, the Yadkin was also navigable by small watercraft such as flats and canoes. In 1885, the North Carolina General Assembly enacted a law entitled "An Act to Declare the Great Pee Dee and Yadkin Rivers Public Highways, and for other Purposes." This law, a copy of which is attached, made it illegal to erect dams or other obstructions that would impede the navigation of boats, flats, and rafts and other means of transportation. In State v. Tyre Glen, the North Carolina Supreme Court noted that if legislation declared a river to be a navigable stream, it would be so in law. 52 N.C. 321, 333 (1859).

May 7, 2010

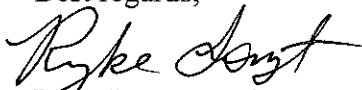
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The North Carolina Department of Environment and Natural Resources (“DENR”) seemed to take the position that the Yadkin River was a publicly-owned resource in Alcoa Power Generating Inc.’s federal relicensing proceeding. DENR’s Division of Water Resources stated as a rationale for their intervention that the State retains title to the beds of navigable waters and the navigable waters themselves are a public resource. (See Attached “North Carolina Department of Environment and Natural Resource’ Notice of Intervention and Alternative Motion to Intervene”). We think that the Division of Water Resources was correct in this assertion made by Assistant Attorney General Marc Bernstein. This assertion is also supported by filings made by the State of North Carolina in its “Motion to Present Evidence” filed in the FERC proceeding by Special Deputy Attorney General Faison Hicks. It is important that the State of North Carolina take a consistent position on the issue of public ownership of lands submerged under navigable waters such as the Yadkin River. The question of ownership of the bed of the Yadkin River will also be a key question in resolving the value of the Yadkin Project in relation to pending legislation to create the Yadkin River Trust.

As you know, Alcoa’s application for a 401 Certification indicated that the Yadkin Project did not involve the use of state land. In the 401 context, the Division of Water Quality accepted Alcoa’s assertion that the Yadkin Project did not involve the use of state land. It is our opinion that the Yadkin Project does involve the use of state land, specifically Alcoa’s proposed continued use of the state-owned bed of the Yadkin River and control of the public trust resources it supports and contains. This use has resulted in increased deposition of sediment in the upper reaches of High Rock Lake, changing the topography of the submerged bed of the Yadkin River.

We believe that the question of the navigability and public ownership of the Yadkin River should be posed to the North Carolina Department of Justice. The Attorney General will provide guidance on questions of law such as this if requested by an elected official. We recommend that you request a local elected official to present this question to the Attorney General. In that way, we can be assured that the answer will be consistent across state agencies.

Best regards,



Ryke Longest, Director
Environmental Law and Policy Clinic

encl

LAWS AND RESOLUTIONS

OF THE

State of North Carolina,

PASSED BY THE

GENERAL ASSEMBLY

AT ITS

SESSION OF 1885,

BEGUN AND HELD IN THE CITY OF RALEIGH

ON WEDNESDAY, THE SEVENTH DAY OF JANUARY, A. D. 1885,

TO WHICH ARE PREFIXED

A REGISTER OF STATE OFFICERS, MEMBERS OF THE GENERAL
ASSEMBLY, JUDICIARY, A LIST OF COMMISSIONERS OF
AFFIDAVITS, AND STATE CONSTITUTION.

831^C

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RALEIGH:

P. M. HALE, STATE PRINTER AND BINDER,
1885.

CAPTIONS OF THE PUBLIC LAWS.

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CHAPTER 211.

An act to establish a new township in Yancey county.

The General Assembly of North Carolina do enact:

SECTION 1. That a new township to be known as "Price's Creek" township, is hereby created and established in the county of Yancey, and bounded as follows:

Price's Creek township established in Yancey county

Beginning on the Madison county line, on top of the Knob in said line, runs east with the meanders of the McElroy mountain, which divide the waters of Bald creek and Price's creek, to the Summer's gap; thence north to the Cove Knob above W. Hensley's store house; thence east with Cane ridge to the fork of the wagon road at B. B. Whittington's house; thence with the Burnsville road to the ford of Cane river at John Gibbs'; thence up said Cane river and with the old Cane River township line back to the beginning.

Boundaries.

Sec. 2. That said township shall have all the rights, powers and privileges now granted to townships by law.

Powers, &c.

Sec. 3. That the permanent place of voting in said township shall be established by the board of county commissioners of said county.

Commissioners to establish voting place.

Sec. 4. This act shall be in force from and after its ratification.

In the General Assembly read three times, and ratified this the 4th day of March, A. D. 1885.

CHAPTER 212.

An act to declare the Great Pee Dee and Yadkin rivers public highways, and for other purposes.

The General Assembly of North Carolina do enact:

SECTION 1. That the Yadkin river from the northern boundary line of the county of Davidson to its junction

Yadkin and Great Pee Dee rivers declared public highways.

with the Great Pee Dee river, and the Great Pee Dee from said junction to the boundary line of the State of South Carolina, be and the same are hereby declared public highways for the free passage of boats, flats, rafts and other means of transportation.

Removal of dams and other obstructions.

SEC. 2. That any person desiring the removal of a dam or other obstruction in said river may file his or her petition before the board of county commissioners of the county in which said obstructions or any part thereof is situated to have said obstruction removed in whole or in part.

Commissioners to order removal on petition.

SEC. 3. That upon the filing of said petition the said board of county commissioners shall, if in their discretion they deem it necessary, order the said obstruction to be removed in whole or in part, and the method of procedure shall be the same as prescribed for the laying out of highways in chapter fifty of The Code.

Method of procedure.

Damages paid by petitioners.

SEC. 4. That all damages assessed by any jury appointed by this act shall be paid by the petitioners.

Unlawful to erect dam after June 1st, 1885, without sluice-way.

SEC. 5. That after the first day of June, one thousand eight hundred and eighty-five, it shall be unlawful for any person to erect any dam or other obstruction in either of said rivers within the limits prescribed, unless the person erecting said obstructions shall leave in the middle of said Yadkin river a sluice-way forty-five feet in width, and in the middle of the Great Pee Dee river a sluice-way sixty feet in width, for the passage of boats, flats, rafts and other means of transportation, and any person who shall so erect and maintain such a dam or other obstruction shall be guilty of a misdemeanor and be fined twenty-five dollars for each day said obstruction shall remain in either of said rivers, after having been notified by any person damaged by said obstruction to remove the same.

Misdemeanor.

Penalty.

Dam, when condemned, to be removed within thirty days.

SEC. 6. That whenever any jury appointed under this act shall condemn any dam or other obstruction or part thereof in either of said rivers, the owner of said dam or

other obstruction shall remove the part condemned within thirty days after the verdict of said jury is filed: *Provided*, Proviso. the amount of damages assessed by said jury is paid or tendered to him; and if said owner shall fail to remove the said obstruction within the time prescribed, then any person damaged by the erection or maintenance of said obstruction may remove the part condemned, and the cost of the removal thereof shall be deducted from the amount awarded to such owner as damages.

Sec. 7. That in estimating the damages caused to any owner by removal of his dam in whole or in part, the jury may also include the annual cost of making any sluice-way and maintaining the same. Damages, how estimated.

Sec. 8. This act shall be in force from its ratification. In the General Assembly read three times, and ratified this the 4th day of March, A. D. 1885.

CHAPTER 213.

An act to drain the lowlands of Lick Fork creek, in Rockingham and Caswell counties.

The General Assembly of North Carolina do enact:

SECTION 1. That R. D. Harris, J. L. Wright, P. B. John- Commissioners.
and Felix Hubbard be appointed commissioners,

and it shall be, on or before the first day of July, To lay off Lick
Fork of Hogan's
creek in sections.
the thousand eight hundred and eighty-five, to lay off

the Lick Fork of Hogan's creek in Rockingham and Caswell Overseer.
counties from Watts' old mill dam on said creek to its
mouth, and to appoint one overseer to each section,

and to hold his office for the term of two years and
the overseer shall be a land owner in the section to which he is
appointed overseer.

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.¹

¹ 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.² 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.

* * *

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

* * *

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

² 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:³

- 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.

³ 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.⁴

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

⁴ 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.

ROY COOPER
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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.

/s/ Marc Bernstein

Marc Bernstein

Special Deputy Attorney General

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