STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
13 EHR 18085

ALCOA POWER GENERATING, INC. Petitioner, vs. DIVISION OF WATER RESOURCES, DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES Respondent.	)	**FINAL DECISION AND ORDER GRANTING PETITIONER'S MOTION FOR RECONSIDERATION, GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT, AND DENYING RESPONDENT'S MOTION FOR RECONSIDERATION**

THE FOLLOWING MATTERS came to hearing before the undersigned, Selina M. Brooks, Administrative Law Judge, on April 9, 2015, in Cary, North Carolina. Any time the term "Court" is used within, it is in reference to the undersigned Administrative Law Judge.

MOTIONS AND BRIEFING

(1) the Motion filed on February 12, 2015, by Petitioner Alcoa Power Generating Inc. ("APGI" or "Petitioner") for Reconsideration of this Court's January 6, 2015, Order Denying Petitioner's Motion for Summary Judgment ("Petitioner's Motion for Reconsideration");

(2) Respondent's Motion for Reconsideration of this Court's January 6, 2015, Order Denying Summary Judgment in favor of Respondent ("Respondent's Motion for Reconsideration");

(3) Respondent's Motion for Stay ("Stay Motion");

(4) Petitioner's Motion for Official Notice filed April 8, 2015 ("Motion for Official Notice"); and

(5) Petitioner's Motion for Summary Judgment filed September 2, 2014 ("SJ Motion").

The parties thoroughly briefed the pending motions prior to hearing on April 9, 2015, with both parties filing supporting briefs with their respective motions on February 12, 2015, with Petitioner filing responses to both of Respondent's Motion for Reconsideration and Stay Motion on March 12, 2015, with Respondent filing a response to Petitioner's Motion for Reconsideration on March 12, 2015, and with both parties filing replies on March 26, 2015.

SUMMARY OF RULINGS ON THE MOTIONS

The Court, after carefully reviewing the pleadings and the materials submitted by all parties in support of the pending motions, has concluded as follows:

(1) Petitioner's Motion for Reconsideration should be granted;

(2) Respondent's Motion for Reconsideration should be denied;

(3) the Stay Motion should be denied;

(4) the Motion for Official Notice should be denied; and

(5) in view of the decision to grant Petitioner's Motion for Reconsideration, and having again reviewed the record and legal arguments of the parties, Petitioner's SJ Motion should now be granted.

The Court's reasoning with respect to its decision on matters (1), (2), and (5) is set forth below. Separate procedural orders, addressing the Court's reasoning and decision on matters (3) and (4), shall be entered contemporaneously with this Order.

PROCEDURAL HISTORY

Proceedings before the Agency

On September 28, 2012, Petitioner submitted an application for a water quality certification ("Application"), which certification is a pre-requisite under Section 401 of the federal Clean Water Act to the issuance by FERC of a renewed license to operate the series of hydroelectric dams located on the Yadkin River at issue in this case. After the filing of the Application, Respondent requested additional information from Petitioner in connection with the Application. Petitioner complied with these information requests.

On May 14, 2013, a public hearing on the Application was held before Mr. Gregson, the Regional Office Supervisor of the Respondent's Wilmington office at which evidence regarding the Application was taken. Among other things, the Yadkin Riverkeeper attempted to challenge Petitioner's ownership of the riverbed in the Yadkin Project. Pursuant to 15A N.C. Admin. Code 02H.0507(b), Respondent was required to issue a decision on the Application no later than sixty (60) days after the public hearing, unless the applicant agrees to an extension or the State's ability to condition issuance of the certification is waived.

On June 13, 2013, the Yadkin Riverkeeper filed comments on the Application.

On June 28, 2013, Petitioner sought the opportunity to submit additional information in support of the Application by July 3, 2013 and further agreed to extend the pending deadline for decision of July 13, 2013 to August 2, 2013.

On July 19, 2013, the hearing officer Mr. Gregson submitted his draft hearing officer report recommending that the Application be granted.

On July 25, 2013, Respondent's general counsel Mr. Presnell recommended certain changes to the language of the hearing officer report, but did not suggest changing the ultimate conclusion regarding the Application.

On July 29, 2013, Mr. Gregson finalized his report, incorporating the recommendations of Mr. Presnell.

On July 29, 2013, Karen Higgins, submitted draft letters of (i) denial and (ii) approval together with the final hearing officer's report to Mr. Reeder, the final decision maker for the agency.

On August 2, 2013, Mr. Reeder concluded that the Application was invalid pursuant to 15A NCAC 02H.0502(f) and stated in the denial letter ("the Denial") that "[t]he required ownership certification ensures that the applicant owns the projects dams and powerhouses and is fully capable of implementing all protections of water quality that may be imposed as conditions in a 401 certification."

Proceedings before this Court

This proceeding was timely initiated by Petitioner as a contested case on September 25, 2013, challenging the Denial.

On January 31, 2014, Petitioner moved for judgment on the pleadings ("Petitioner's Rule 12 Motion"), asking this Court to conclude, as a matter of law and based upon the pleadings alone, that the Denial was erroneous. The Court heard argument on the Petitioner's Rule 12 Motion on April 3 and 23, 2014, and thereafter entered an order denying the Petitioner's Rule 12 Motion.

Discovery followed and, after the close of discovery, Petitioner timely filed its SJ Motion which was fully briefed by the parties pursuant to an agreed schedule.

On October 29, 2014, the Court heard oral argument on Petitioner's SJ Motion and declined to grant summary judgment for either party.

On January 6, 2015, the Court entered an order denying Petitioner's SJ Motion and also ruling that summary judgment should not be granted against Petitioner under N.C. Rule Civ. P. 56(c). That same day, the Court denied Petitioner's Motion to Strike certain materials that had been attached to Respondent's Response to Petitioner's SJ Motion.

On January 13, 2015, the Court entered an Amended Scheduling Order establishing a briefing schedule for the filing of motions for reconsideration or for a stay and for briefing any such motions thereafter. Both parties timely filed motions to reconsider, and Respondent also timely filed a motion to stay. Both parties timely filed Response briefs on March 12, 2015, and

Reply briefs on March 26, 2015. The Court has carefully reviewed the parties' filings and all of the documents in the record to which the parties made reference in those filings.

On April 9, 2015, the Court held a hearing on all pending Motions.

Based upon the arguments of counsel and a full review of the entire record, the Court announced at the hearing on April 9, 2015, that the Court had concluded that the Denial issued by Respondent concluding Petitioner's Application was invalid and therefore denying Petitioner a 401 certification on August 2, 2013 was improper.

The Court now enters this decision confirming its ruling on April 9, 2015: Based upon the undisputed facts in the entire record and as described in detail below, the Court has concluded that there is no genuine issue of any material fact and that Petitioner is entitled to judgment as a matter of law. Therefore, Petitioner is granted summary judgment in its favor as a matter of law on its claim that Petitioner's Application submitted in September of 2012 was a valid application and that Respondent's Denial on August 2, 2013 was improper.

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ISSUES

Whether Respondent substantially prejudiced Petitioner's rights, 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 when it denied Petitioner's Application for a 401 water quality certification on the ground that Respondent cannot consider the Application to be a valid application because of the title and ownership issues raised by the North Carolina Department of Administration.

APPLICABLE STATUTES AND RULES

- Section 401 of the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1341
- N.C. GEN. STAT. § 143B-282.1
- Section .0500 of Subchapter 2H of Title 15A of the North Carolina Administrative Code, 15A N.C. Admin. Code 02H.0500, et seq. ("NC 401 Rules")

EXHIBITS AND PRIMARY RECORD REFERENCES[1]

1. Application for a water quality certification submitted by Petitioner to Respondent[2] on May 10, 2007 (attached to Petitioner's Rule 12 Motion as Exh. 5) ("2007 Application") [3]

2. Water quality certification issued by Respondent to Petitioner on November 16, 2007 (Petitioner's Rule 12 Motion, Exh. 6) ("2007 401")

3. Application for a water quality certification for the Blewett Tillery hydroelectric project filed on May 11, 2007 (Petitioner's Rule 12 Motion, Exh. 1) ("Blewett Tillery Application")

4. Water quality certification issued by Respondent for the Blewett Tillery Project on November 16, 2007 (Petitioner's Rule 12 Motion, Exh. 2) ("Blewett Tillery 401")

5. Application for a water quality certification submitted by Petitioner to Respondent on May 8, 2008 (Petitioner's Rule 12 Motion, Exh. 7) ("2008 Application")

[1] Many of the cited documents appear in multiple submissions in the record; citations here are to the primary or first introduction as the case may be. Cross-references to other record locations of the same documents are not provided.

[2] Petitioner submitted the 2007 Application to the Division of Water Quality, which is now known as the Division of Water Resources, with both parties being hereafter referred to as "Respondent."

[3] Petitioner filed its Rule 12 Motion on January 13, 2014 ("Petitioner's Rule 12 Motion") with Exhibits and a supporting memorandum ("Petitioner's Rule 12 Brief").

6. Water quality certification issued by Respondent to Petitioner on May 7, 2009 (Petitioner's Rule 12 Motion, Exh. 8) ("2009 401")

7. Application for a water quality certification submitted by Petitioner to Respondent on September 28, 2012 (Petitioner's Rule 12 Motion, Exh. 9) ("Application")

8. Letter transmitting the Application (Petitioner's SJ Motion, Exh. 9)

9. Relicensing Settlement Agreement, Yadkin Hydroelectric Project, FERC No. 2197, dated February of 2007 (Petitioner's Rule 12 Motion, Exh. 3; Admission 68) ("RSA")

10. Informal opinion by the North Carolina Attorney General, dated June 6, 2013 (SJ Motion,[4] Exh. 22) ("AG FERC License Opinion")

11. Letter Regarding Request for Additional Information from Karen Higgins of Respondent to E. Ray Barham of Petitioner, dated October 4, 2012 (Petitioner's Rule 12 Motion, Exh. 11; Admission 72) ("AIR #1")

12. Letter Regarding Request for Additional Information from Karen Higgins of Respondent to E. Ray Barham of Petitioner, dated December 7, 2012 (Petitioner's Rule 12 Motion, Exh. 12; Admission 73) ("AIR #2")

13. Letter Regarding Request for Additional Information from Karen Higgins of Respondent to E. Ray Barham of Petitioner, dated February 27, 2013 (Petitioner's Rule 12 Motion, Exh. 13; Admission 74) ("AIR #3")

14. Handwritten notes by Lori Montgomery of telephone conference on July 3, 2013 (Petitioner's SJ Motion, Exh. 11)

15. Emails dated July 18, 2013, circulating a draft Hearing Officer Report internally within Respondent (Petitioner's SJ Motion, Exh. 12)

16. Email dated July 25, 2013, from Mr. Presnell to Ms. Higgins suggesting changes to the draft Hearing Officer Report (Petitioner's SJ Motion, Exh. 14)

17. Affidavit of Jim Gregson dated October 30, 2014, but notarized as of September 30, 2014 (filed with Respondent's Response to SJ Motion[5]) ("Gregson Aff.")

18. Hearing Officer's July 25, 2013 draft Report and Recommendations prepared by Jim Gregson and dated July 29, 2013 (Petitioner's Response to Respondent's Motion to Reconsider, Exh. 17) ("Draft Hearing Officer Report")

[4] Petitioner filed its Memorandum in support of its SJ Motion on September 2, 2014 ("Petitioner's SJ Brief").

[5] Respondent filed its Response to the SJ Motion on October 3, 2014 ("Respondent's SJ Response")

19. Hearing Officer's final Report and Recommendations prepared by Jim Gregson and dated July 29, 2013 (Attached to the Petition for Contested Case Hearing and as Exhibit 5 to the SJ Motion) ("Hearing Officer Report")

20. Draft Approval of Individual 401 Water Quality Certification with Additional Conditions, attached to Hearing Officer Report (See SJ Motion, Exh. 6, pp. 3-34) ("Draft Petitioner 401")

21. Letter from the Secretary of the Department of Administration to Karen Higgins, dated August 1, 2013 (Petitioner's Response to Respondent's Motion to Reconsider, Exh. 20) ("DOA Letter")

22. Complaint, *State ex rel N.C. Dep't of Admin. v. Alcoa Power Generating, Inc.*, 13-CV-010477 (Wake Co. Super. Ct., filed Aug. 2, 2013) (Petitioner's SJ Motion, Exh. 2) ("Lawsuit Complaint")

23. The Denial, in the form of a letter from Thomas A. Reeder of Respondent to E. Ray Barham of Petitioner, dated August 2, 2013 (attached as an Exhibit to the Petition for Contested Case Hearing filed by Petitioner on September 25, 2013; Respondent Doc. 564)

24. Email from Karen Higgins of Respondent to Ray Barham of Petitioner dated August 2, 2013, forwarding the Denial (Petitioner's SJ Motion, Exh. 1)

25. Affidavit of Lacy M. Presnell III dated October 3, 2014 (filed with Respondent's Response to Petitioner's SJ Motion) ("Presnell Aff.")

26. Memorandum to File from Lacy M. Presnell III, dated August 6, 2013 (Petitioner's SJ Motion, Exh. 18) ("Presnell File Memo")

27. Affidavit of Karen Higgins dated October 1, 2014 (filed with Respondent's Response to SJ Motion) ("Higgins Aff.")

28. Transcript of Video Deposition of Thomas Reeder on May 1, 2014 (Respondent's SJ Response, Exh. 2)

29. Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment, *State ex rel N.C. Dep't of Admin. v. Alcoa Power Generating, Inc.*, Civil Action No. 5:13-cv-633, filed July 21, 2014 (Petitioner's SJ Motion, Exh. 21) ("DOA Brief")

30. Letter from Donald R. Teeter, Sr. ("Teeter"), Special Deputy Attorney General of the Property Control Section of the North Carolina Department of Justice, to Kathleen Waylett, Senior Deputy Attorney General of the Environmental Section of the North Carolina Department of Justice, dated October 2, 2014 (Respondent's SJ Response, Exh. 4) ("Teeter Letter")

31. Affidavit of Teeter dated October 21, 2014 and filed and served October 22, 2014 ("Teeter Affidavit")

32. Respondent's Response to Alcoa Power Generating, Inc.'s First Set of Interrogatories, Requests for Admissions, and Requests for Production of Documents (Petitioner's SJ Motion, Exh. 3) ("Respondent's Discovery Responses")

33. The State of North Carolina's 21st Century Plan for the Use of the Yadkin River Resources, dated September 8, 2009, attached as Exhibit B to Petitioner's Discovery to Respondent ("21st Century Plan") (see Admission 67 of Respondent's Discovery Responses); the 21st Century Plan was attached as Exhibit 1 to a motion filed with FERC by Governor Perdue on September 18, 2009 ("NC Takeover Motion").

34. Respondent's Supplemental Response to Alcoa Power Generating, Inc.'s First Set of Interrogatories, Requests for Admissions, and Requests for Production of Documents (Respondent's SJ Response, Exh. 3) ("Respondent's Supplemental Discovery Responses")

35. 2012 Tailwaters Dissolved Oxygen Report, Yadkin Project, FERC Project No. 2197, submitted by Petitioner to Respondent in March of 2013 (Petitioner's Rule 12 Motion, Exh. 4) ("DO Report").

DISCUSSION

This case arises from the Denial by Respondent's Division of Water Resources ("DWR")[6] of the Application filed by Petitioner for a Water Quality Certification pursuant to § 401 of the Clean Water Act (generally, "a 401 certification," and specifically with respect to the Application, "the 401 Certification"). Petitioner sought the 401 certification in connection with its continued operation of a series of dams on the Yadkin River – the Narrows, Falls, Tuckertown, and High Rocks Dams – which together form a hydroelectric project licensed by the Federal Energy Regulatory Commission ("FERC"), of which Petitioner is the licensee (the "Yadkin Project" or the "Project"). Petitioner has applied to renew its FERC license for the Yadkin Project and, in connection with this relicensing effort, is required by § 401 of the Clean Water Act to obtain a 401 certification from Respondent.

BASED UPON careful consideration, the undersigned hereby makes the following:

FINDINGS OF FACT[7]

Background on Yadkin Project and License

1. Petitioner is the licensee of and operates the Yadkin Project which is located along a 38-mile stretch of the Yadkin River in the counties of Davie, Davidson, Rowan, Stanly and

[6] As noted in Respondent's PHS, DWR is the successor to Respondent's predecessor division, DENR's Division of Water Quality ("DWQ"), effective August 1, 2013. As used herein, references to "DWR" will include "DWQ," unless the context indicates otherwise. This decision may make specific references to DWR (as opposed to other parts of DENR) for clarity, but references to "Respondent" will generally include both DWR and DENR, unless the context indicates otherwise.

[7] See also the list of undisputed facts at pages 5-10 of Respondent's SJ Response.

Montgomery. (Respondent's Response to Petitioner's Request for Admis. 34;[8] Hearing Officer Report at 2).

2. The Yadkin Project includes four hydroelectric dams and powerhouses, along with their associated reservoirs, and from north to south, these dams are the High Rocks, Tuckertown, Narrows, and Falls Dams. (Admission 35; Hearing Officer Report at 2).

3. The Federal Power Commission (FPC), the predecessor of the FERC, issued a license to operate these dams to Petitioner in 1958. (Admission 41).

4. Three of the four dams that comprise the Yadkin Project long predate the issuance of FERC or FPC licenses generally and the original 1958 FERC license applicable to this matter as well.

(a) Construction of the Narrows Dam was completed by a predecessor of Petitioner in 1917. (Admission 36; Hearing Officer Report at 2, 13).

(b) Falls and High Rocks Dams were constructed in 1919 and 1927, respectively. (Admission 37; Hearing Officer Report at 2, 13).

(c) The Tuckertown Dam, located between the High Rock and Narrows Dams and the last of the four dams built by Petitioner, was completed in 1962. (Admission 38; Hearing Officer Report at 2, 13).

5. The original Petitioner FERC license had a term of 50 years which expired on April 30, 2008. (Admissions 41 & 42).

6. In April of 2006, Petitioner timely applied for renewal of its FERC license. (Admission 43).

7. Since the expiration of Petitioner's FERC license on April 30, 2008, Petitioner has continued to operate the Yadkin Project under a series of one-year licenses that are automatically renewed. (Admission 42).

8. On September 18, 2009, the State of North Carolina filed its 21st Century Plan with FERC.[9]

9. As noted above, the process for renewing a FERC license includes the requirement, under § 401 of the Clean Water Act, that the State of North Carolina provide a certification that the continued operation of the dams will satisfy the State's water quality standards and conditions

[8] Hereafter, references to Respondent's Response to Petitioner's Request for Admission shall be referred as "Admission" followed by the number of the Request.

[9] As noted in listed Exhibit 33 above, the 21st Century Plan was attached to the NC Takeover Motion which requested FERC, among other things, to "recapture" the Project from Petitioner and transfer it to the State of North Carolina.

prior to FERC processing an application for license renewal. Petitioner sought such a certification by filing several applications over the period beginning in 2007 and culminating with the Application that is at issue today.

Prior 401 Applications[10]

Petitioner's 2007 Application

10. On May 11, 2007, Petitioner submitted the 2007 Application to Respondent.[11] (Higgins Aff. ¶3). The 2007 Application was signed by William Bunker, Petitioner's then Vice President. (Admission 58). The 2007 Application indicated, on the form created by Respondent, that the Project did not involve the use of public (state) land. (Admission 61).

11. Petitioner withdrew its 2007 Application after receiving notice from Respondent that the agency intended to revoke that 401 certification due to alleged errors in the public participation process. (Higgins Aff. ¶ 3). Respondent presented the issue slightly differently in its pre-hearing statement in this case by stating that, in 2008, Respondent granted the 2007 Application and issued a 401 certification ("2008 401"), but the certification was later withdrawn and revoked due to a procedural error. (*See* Respondent's Amended Prehearing Statement, dated January 21, 2014 ("Respondent PHS"), at 2 n.1).

12. Respondent reviewed and acted on the 2007 Application without a property owner raising a conflicting claim of ownership, (Admission 16), and the 2007 Application was treated as valid throughout the process.

13. In evaluating the 2007 Application, neither Respondent nor any other state agency raised the issue of ownership of submerged lands or the correctness or sufficiency of the signatures on the applications. (Admission 16).

Petitioner 2008 Application

14. Because the 2007 Application process resulted in the withdrawal or revocation of the 2008 401 certification, on May 8, 2008, Petitioner submitted a new application for a 401 certification (Admission 70) and, after completing the review process, Respondent issued a 401 certification on May 7, 2009 (the "2009 Certification"). (Higgins Aff. ¶ 4). That second process is described below. Once again, no challenge was made to Petitioner's ownership, the application was treated as valid, and a certification was issued after Respondent reviewed and acted upon the application.

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[10] Based upon the admissions of Respondent, as well as the affidavits submitted by Respondent as described in the following paragraphs, the Court accepts as true many of the facts regarding these prior applications. A recitation of those facts is included only for context.

[11] Petitioner submitted this 2007 Application to Respondent's Division of Water Quality ("DWQ"), the functions of which are now performed by Respondent's Division of Water Resources ("DWR"). As previously noted, references to "Respondent" herein include DWR, and DWR is only used where it is required to distinguish DWR staff from other DENR personnel, such as those in the DENR Secretary's office.

15. The 2008 Application indicated, on the form created by Respondent, that the project did not involve the use of public land. (Admission 62). Respondent reviewed and acted on the 2008 Application without a property owner raising a conflicting claim of ownership. (Admissions 19 & 20).

16. In evaluating the 2008 Application neither Respondent nor any other state agency raised the issue of ownership of submerged lands or the correctness or sufficiency of the signatures on the applications. (Admission 19).

17. On May 5, 2009, Respondent granted the 2008 Application and issued a second 401 certification ("2009 401"). (Respondent's PHS, at 2 n.1).[12] The 2009 Certification was challenged by Stanly County and the Yadkin Riverkeeper, each of which filed contested case petitions in the Office of Administrative Hearings challenging Respondent's issuance of the 2009 Certification. (Higgins Aff. ¶ 4). Petitioner also filed a contested case petition challenging a condition of the 2009 Certification. (Higgins Aff. ¶ 4). The contested cases were consolidated for trial ("2009 Appeal"). (Higgins Aff. ¶ 4). By letter dated December 1, 2010, Respondent revoked the 2009 Certification for reasons unrelated to Petitioner's ownership status, as certified on the prior applications. (Higgins Aff. ¶ 4 & att. B)

Blewett Tillery Application

18. Immediately downstream of the Falls Dam (the southernmost dam in the Yadkin Project) is another series of hydroelectric dams, comprising a different FERC-licensed hydroelectric project on the Yadkin River, comprised of the Tillery and Blewett Falls Dams and their associated powerhouses and reservoirs ("Blewitt Tillery Project"). (Admission 54).

19. The application for a 401 certification for the Blewitt Tillery Project was filed with Respondent on May 11, 2007. (Admission 55).

20. Respondent granted a 401 certification for the Blewitt Tillery Project on September 30, 2008 (Admission 56) which was upheld by the reviewing ALJ, the agency, and both reviewing courts. City of Rockingham, et al v. N.C. DENR, — N.C. App. —, 736 S.E.2d 764, 767, 772, 2012 N.C. App. LEXIS 1465, 2012 WL 6584399 (N.C. Ct. App. 2012).

Petitioner 2012 Application

21. On September 28, 2012, Petitioner submitted the Application, which was its third application to Respondent for a 401 certification for the Yadkin Project. (Higgins Aff. ¶ 5).

22. The Application included the form "FERC 401 Water Quality Certification Application," which was labeled as "Attachment A" and which Mr. E. Ray Barham signed on behalf of Petitioner, showing his title to be "Vice-President." (Higgins Aff. ¶ 6).

[12] Petitioner appealed that revocation, but subsequently submitted a new application and dismissed its appeal.

23. On page two of Attachment A to the Applciation, Petitioner included footnote 1 which states, among other things, that the Project does not involve "the use of state land," and further that although "[c]ertain members of the public have contended to the contrary," Petitioner "disagrees."[13] (Higgins Aff. ¶ 7).

24. Ms. Higgins, who was in charge of reviewing the Application,[14] relied on Mr. Barham's signature pursuant to 15A N.C. Admin. Code 2H .0502(f) and accepted this as sufficient evidence that Petitioner was the owner of the property or had been authorized by the owner to apply for the 401 certification. (Higgins Aff. ¶ 9).

25. Respondent generally takes as true the applicant's certification that the applicant is the owner of the property or has permission to apply for a 401 certification unless there is a conflicting claim of ownership. (Higgins Aff. ¶ 11).

26. In connection with the Application, DENR General Counsel Mr. Presnell[15] became aware in January or February 2013 of contentions by the Yadkin Riverkeeper that the riverbed of the Yadkin River belonged to the State of North Carolina and of the Riverkeeper's continuing efforts to convince the State to assert its ownership rights. (Presnell Aff. ¶ 4).

27. At some time after February 2013, Mr. Presnell learned that the North Carolina Department of Administration ("DOA") was considering asserting the State's purported ownership rights to segments of the riverbed associated with the Project. He did not discuss the possibility of a DOA lawsuit with DWR until late July 2013 in an effort to keep DWR "consideration of water quality concerns separated from legal issues of ownership." (Presnell Aff. ¶ 5).

28. Mr. Presnell understood that Respondent relied on Petitioner's certification of its ownership or right to use the submerged lands, (Presnell Aff. ¶ 19), and that Respondent did not and would not resolve title disputes. (Presnell Aff. ¶ 10). Therefore, when a title issue was first raised as set forth above, Mr. Presnell did not undertake a legal analysis of the merits of arguments set forth in the Yadkin Riverkeeper's comments either before or after the public hearing. (Presnell Aff. ¶ 10).

29. Mr. Gregson was the Regional Office Supervisor in the DENR Wilmington office, and in that capacity, he served as the hearing officer for the public hearing held on May 14, 2013 on the 2012 APGI Application. (Gregson Aff. ¶¶ 2-5; Higgins Aff. ¶ 15; Hearing Officer Report at 7).

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[13] Petitioner removed from that footnote #1 in the Application a statement of Petitioner's understanding of DENR's position on ownership at Respondent's request.

[14] Ms. Higgins was, at the time of her affidavit, the 401 and Buffer Permitting Unit Supervisor with DWR. (Higgins Aff. ¶ 2). Previously, Ms. Higgins served as Supervisor of the Wetlands, Buffers, Stormwater, Compliance and Permitting Unit. (*Id.*) In each position, Ms. Higgins was responsible for overseeing the agency's processing of applications for 401 Certifications. (*Id.*)

[15] Mr. Presnell served as General Counsel for DENR from January 2013 through August 25, 2014. (Presnell Aff. ¶ 2).

30. During the public hearing on May 14, 2013, the Yadkin Riverkeeper submitted comments "concerning ownership of the riverbed in the Yadkin Project," summarized by Mr. Gregson as follows:

> The Yadkin Riverkeeper is requesting denial of the 401 Certification unless and until the applicant obtains an easement from the NC Department of Administration for its use of state-owned public trust lands. The comments state that APGI's application for certification does not meet the requirements of [Respondent's] rules because it has not obtained permission to use the property from its owner, the State of North Carolina.

(Hearing Officer Report at 7).

31. The Hearing Officer also received numerous comments regarding water quality and environmental issues, which the Hearing Officer ultimately reviewed and took into account in preparing the Hearing Officer Report. (Hearing Officer Report at 4-5 and 8-9).

32. On June 13, 2013, the Yadkin Riverkeeper filed additional written comments on Petitioner's Application reiterating his belief that the State of North Carolina was the owner of the riverbed of the Yadkin River and that Petitioner needed an easement from the State. (Higgins Aff. ¶ 10).

33. Section .0507(b) of the NC 401 Rules, 15A N.C. Admin. Code 02H.0507(b), requires that an application for a 401 certification must be granted or denied within 60 days of a public hearing, unless the applicant agrees to an extension. (Higgins Aff. ¶ 15).

34. By letter dated June 28, 2013, Petitioner requested the opportunity to provide additional information by July 3, 2013, and agreed to extend the time within which the agency was required to take a final action on the Application from the then pending deadline of July 13, 2013, until August 2, 2013 as the new deadline. (Higgins Aff. ¶ 15; Exhibit F).

35. Based on a telephone call involving DWR staff Ms. Higgins, Ms. Montgomery, and Mr. Gregson on July 3, 2013, Ms. Montgomery's handwritten notes indicate that the Application was "[s]igned by [an] authorized rep[resentative] of Company," so it was a "[v]alid application." After discussing the issue of "[d]oes Petitioner need easement from State for dams?" the notes further reflect the conclusion that, "[i]f so, still not a 401 issue." (Petitioner's SJ Motion, Exh. 11 at 2).

36. On July 16, 2013, Mr. Presnell contacted Ms. Higgins to request copies of portions of the Application file, including public comments related to ownership of the submerged lands. (Higgins Aff. ¶ 12; Presnell Aff. ¶ 6). Ms. Higgins provided this information, along with copies of the draft Hearing Officer Report, a draft 401 Certification document, a draft Denial letter, and other materials Ms. Higgins had gathered regarding the ownership issue. (Higgins Aff. ¶ 12; Presnell Aff. ¶ 6).

37. Mr. Presnell reviewed the information provided by Ms. Higgins, which included information from Petitioner's Application, the Yadkin Riverkeeper's comments, a draft Hearing Officer Report, a draft 401 Certification, and a draft Denial letter. (Presnell Aff. ¶ 6

38. On July 19, 2013, the hearing officer, Mr. Gregson, forwarded a draft of his hearing officer report to Ms. Higgins, who, in turn, forwarded to Ms. Lori Montgomery on the DWR staff. (Petitioner's SJ Motion, Exh. 12).

39. On July 25, 2013, Ms. Higgins received an email from Mr. Presnell, which suggested revisions to the Hearing Officer Report and the draft 401 Certification, and which Ms. Higgins forwarded to the Hearing Officer, Mr. Gregson. (Presnell Aff. ¶ 9; Higgins Aff. ¶ 13).

40. The final Hearing Officer Report incorporates, verbatim, the language that the Hearing Officer received from DENR General Counsel, Mr. Presnell, regarding ownership claims and disputes concerning the Project and the Yadkin Riverbed that were raised by the Yadkin Riverkeeper. (Gregson Aff. ¶ 7). Those changes, made by Mr. Presnell and adopted by Mr. Gregson, were as follows:

> Comments received stated that APGI's application for certification does not meet the requirements of DWQ (sic) rules because it has not obtained permission to use the property from its owners, the State of North Carolina. ***The comments are premised on the contention that DWQ is required to resolve submerged land issues before it can consider the application complete. Submerged land issues are outside the scope of the 401 Certification process, and a resolution of those issues is not required for the application to be considered sufficient under DWQ rules.*** 15A N.C. Admin. Code 02H.0502(f) states: ~~that~~ "The application shall be considered a 'valid application' only if the application bears the signature of a responsible officer of the company, municipal official, partner or owner. This signature certifies that the applicant has title to the property, has been authorized by the owners to apply for certification of is a public entity and has the power of eminent domain." ~~It is the understanding of DWQ that APGI owns the powerhouses and dams of the Yadkin project, therefore APGI is the correct applicant for the project. A review of other 401 Certification applications for FERC projects in North Carolina indicates that APGI's application for the Yadkin project was process consistent with other similar projects in North Carolina.~~ ***Consistent with its review of other applications for 401 Certification in connection with the licensing of FERC projects, DWQ deemed APGI's application sufficient for purposes of Rules .0502(f) based on APGI's representation that it owns the powerhouses and dams. APGI reiterated its claim of ownership in a letter, dated July 3, 2013, stating that "APGI owns the facilities from which the discharges originate, which are the Yadkin project's four hydroelectric dams." As stated previously, DWQ's 401 certification process focuses on the project's impact on water quality. DWQ is making no determination of ownership of submerged lands.***

Mr. Presnell's additions are shown in bolded italics and his deletions in strike-through. (Compare Petitioner's SJ Motion, Exh. 12 [draft Hearing Officer Report, p.19] with Exh. 5 [final Hearing Officer Report] and Exh. 15 [Presnell July 25, 2013 email]).

41. On July 25, 2013, Mr. Presnell also recommended the following similar changes to the draft 401 approval, which Ms. Higgins incorporated into a revised draft 401 Certification that she forwarded internally on the same day, adding the following new language to condition #6 of the draft 401:

> This certification shall not be construed as addressing or making a determination with respect to title or ownership of submerged lands beneath navigable waters or public trust property. Disputes and claims involving ownership of submerged lands and public trust property are outside the scope of 401 certification and must be resolved by parties with competing claims or an appropriate court.

(Petitioner's SJ Motion, Exh. 15).

42. Mr. Presnell has stated that his suggested changes were intended to clarify that, if the 401 Certification were issued, Respondent "was not undertaking to resolve any ownership issues"; and confirmed Respondent's long-standing "position that property disputes should be resolved by parties with competing ownership claims or by a court of competent jurisdiction." (Presnell Aff. ¶ 9). Respondent relied on Petitioner's certification as sufficient. (Presnell Aff. ¶ 19).

43. On July 29, 2013, Ms. Higgins finalized both a draft Denial letter and a draft approval letter for the draft 401 Certification which she delivered to Mr. Reeder, the final decision maker, along with a copy of the final Hearing Officer Report. (Higgins Aff. ¶ 14; Admissions 65 & 81). This included a draft 401 Certification for Petitioner ("Draft 401"). (Admission 78)

44. At this point,[16] Ms. Higgins and the other DWR staff who had reviewed the Application recommended that the Application, as supplemented by Petitioner during the Application review process,[17] be granted. (Admission 10).

45. On July 29, 2013, Mr. Gregson finalized the Hearing Officer Report and recommended that the Application, as supplemented though the application review process,[18] be granted. (Admission 10; Gregson Aff. ¶ 6). He was unaware that DOA intended to assert a claim of ownership, and he had not been informed that DOA filed the Lawsuit prior to the issuance of the Denial. (Gregson Aff. ¶ 8).

[16] Respondent's Admission 10 says that this was true "prior to August 1, 2013."

[17] Petitioner supplemented the Application primarily through responding to Respondent's requests for additional information; those responses are listed as Exhibits 11, 12, and 13 above.

[18] See footnote 17 above.

46. The Hearing Officer Report states that the "401 [c]ertification process is only to certify compliance with state water quality standards." (Hearing Off. R. at 18) The Hearing Officer Report concludes, in accordance with Mr. Presnell's suggestions, that ownership of submerged lands is not at issue in the 401 Certification and that the Application is sufficient for Respondent to act in a manner within its jurisdiction and on a proper basis. (Hearing Off. R. at 20).

47. On the morning of July 29, 2013, in response to an inquiry from the Governor's General Counsel, Mr. Presnell advised that the deadline for a decision on Petitioner's Application was August 2, 2013. (Admission 26; Presnell Aff. ¶ 12).

48. Later that day, July 29, 2013, Mr. Presnell attended a second meeting, or a portion of a meeting, which was also attended by DOA representatives and by the Governor's General Counsel. (Presnell Aff. ¶ 12). Mr. Presnell informed the attendees that he expected Respondent to act on the Application by the August 2, 2013, deadline and that he did not expect to extend that deadline. (Presnell Aff. ¶ 12).

49. During these July 29, 2013 meetings, Mr. Presnell indicated to those present that he did not know what action Respondent would take with respect to the Application. (Presnell Aff. ¶ 12).

50. On August 1, 2013, Mr. Presnell learned that Secretary of Respondent, had received a letter earlier in the day dated August 1, 2013 from the Secretary of DOA, setting out objections and comments to the Application ("DOA Letter"). (Presnell Aff. ¶ 14 & Exhibit C).

51. The DOA Letter makes clear DOA's contention that the Application should be denied and provides guidance as to the basis to be used for that denial. (Presnell Aff. ¶ 14 & Exhibit C). In summary, the DOA Letter contains the following key components:

(a) First, the DOA Letter explains DOA's objections and comments to the Application and asserts that the State of North Carolina, not Petitioner, is the owner of the land comprising the submerged bed of relevant portions of the Yadkin River, including the portion of the bed lying beneath the four dams comprising the Yadkin Hydroelectric Project.

(b) Second, the DOA Letter states that DOA has not authorized Petitioner to apply for a 401 certification and directly challenges the validity of Petitioner's certification of ownership or permission.

(c) Third, the DOA Letter refers to and includes a draft complaint captioned, "State of North Carolina, by and through its agency, the North Carolina Department of Administration v. Alcoa Power Generating, Inc." as an attachment.

(d) Fourth, and most critically, the DOA Letter directly states that Respondent should determine that the Application was not a "valid application" because, according to DOA, the Application was incomplete and "invalid" due to DOA's competing ownership claims.

52. The DOA Letter concludes:

> Therefore, DOA believes that Alcoa's application for a Section 401 Certification regarding the Yadkin River and the submerged lands referred to above is not a "valid application" under the relevant statutes and administrative rules governing DWQ's and DENR's assessment of such applications and that DWQ and DENR should thus deny Alcoa's application for a section 401 Certification and therefore the DOA objects to the granting of any such certification to Alcoa. At the very minimum DENR should deny the application without prejudice to Alcoa's ability to renew its application when and if the relevant title questions are finally resolved in its favor in the North Carolina General Court of Justice.

(Presnell Aff., Exhibit C at 3).

53. DENR Secretary Skvarla scheduled a meeting later on August 1, 2013 with DOA Secretary Daughtridge, DOA's legal counsel, and Mr. Presnell. (Presnell Aff. ¶ 15). DOA Secretary Daughtridge and counsel for DOA informed them that DOA would be filing a complaint in Wake County Superior Court, possibly that afternoon. (Presnell Aff. ¶ 16). No one from Petitioner was invited or included in this meeting.

54. After the meeting with Secretary Daughtridge on August 1, 2013, Mr. Presnell met with Secretary Skvarla, DWR Director Reeder, Assistant Secretary Mitch Gillespie, and legal counsel to discuss Respondent's options in light of what had been learned that day from the DOA Letter and the meetings with DOA. (Presnell Aff. ¶ 17).

55. The group discussed various options available to Respondent in ruling on Petitioner's Application, if, in fact, DOA filed the complaint on or before the decision deadline of August 2, 2013: (1) issue the 401 Certification, specifically conditioned on Petitioner establishing its ownership rights in the lawsuit, as well as any other conditions deemed appropriate by the Director; (2) "conditionally" deny the 401 Certification and set forth the conditions of a 401 certification, which Respondent would issue upon a settlement or court ruling establishing Petitioner's ownership rights; (3) deny Petitioner's Application; and (4) seek an extension of time to grant or deny the certification under 15A N.C. Admin. Code 21-I .0507(a). (Presnell Aff. ¶ 17).

56. Mr. Presnell has indicated that Respondent rejected the option of extending the time to grant or deny the 401 Certification under Rule .0507(a) because neither additional time nor other information would have enabled Respondent to make a different decision. (Presnell Aff. ¶ 21).

57. On the morning of August 2, 2013, Mr. Presnell met again with DENR Secretary Skvarla, DWR Director Reeder, DOA's legal counsel, and DENR General Counsel Mr. Presnell; during the meeting, Respondent's attendees learned that DOA had, in fact, filed the Lawsuit earlier that morning. (Presnell Aff. ¶ 18; Admissions 22, 23 & 24).

58. During this meeting on August 2, 2013, the decision was made to deny Petitioner's Application on the basis that it was an "invalid application" until the issues and conflicting claims of ownership were resolved by the parties or by the Court. (Presnell Aff. ¶ 19)

59. DWR Director Reeder issued the Denial in the form of a letter from him to E. Ray Barham of Petitioner on the last day by which Respondent had to act on the Application within hours of the filing of the Lawsuit. (Exhibit to the Petition for Contested Case Hearing filed by Petitioner on September 25, 2013; see Exh. 1 to the Petitioner's SJ Motion)

60. Petitioner was given no opportunity to review or respond to the DOA Letter before or after the Denial.

61. To the best of Mr. Presnell's knowledge, the Hearing Officer was never requested to revise his final Hearing Officer's Report to reflect the basis for the Denial. (Presnell Aff. ¶ 22).

62. Respondent admits that:

(a) the Denial was based solely on the title and ownership issues raised by the DOA through the DOA Letter and the Lawsuit. (Admissions 1-4, 7-8).

(b) the Denial was not based on water quality issues. (Admission 9).

(c) Respondent made no determination that Petitioner did not own the submerged lands. (Admission 6)

(d) in issuing the Denial, DWR Director Reeder did not undertake any determination concerning the allegations in the Complaint. (Admission 7).

63. The Denial, among other things, states that:

(a) "Under 15A NCAC 02H.0502(f) your signature on the certification application 'certifies 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.' The required ownership certification ensures that the applicant owns the project's dams and powerhouses and is fully capable of implementing all protections of water quality that may be imposed as conditions in a 401 certification."

(b) "In the pending lawsuit, the North Carolina Department of Administration asserts that the State of North Carolina owns . . .the submerged bed of the Yadkin River and portions of the project's dams standing on the State's riverbed land."

(c) "With the filing of the pending lawsuit and the issues of ownership raised, the Division cannot consider the application to be a valid application until the issues and conflicting claims of ownership are resolved by the parties or by a final order of the Court in the pending lawsuit."

(Petitioner's SJ Motion, Exh. 1)

64. In stating that the certification requirement in §.0502(f) of the NC 401 Rules "ensures that the applicant owns the project's dams and powerhouses," the Denial interpreted that provision to impose a substantive requirement of ownership of the submerged bed of the river.

65. Prior to August 1, 2013 and the filing of the Lawsuit, Respondent's staff recommended that the application be granted. (Admission 10).

66. Prior to the issuance of the Denial on August 2, 2013, Respondent's staff involved in reviewing Petitioner's Application, as supplemented with supporting documentation, did not take the position that the Application should be denied. (Admission 11).

67. Prior to the issuance of the Denial, no one on the Respondent's staff recommended denying the Application. (Admission 12).

68. Mr. Reeder issued the Denial based upon his determination that Petitioner's Application was invalid because of title and ownership issues raised by the DOA through the DOA Letter and the Lawsuit. (Admissions 1-4 & 7-8; Reeder Depo. 49, ll. 19-20 and at 51, ll. 3-4)

69. On July 21, 2014, the State of North Carolina filed its DOA Brief[19] in the Lawsuit[20] (initially filed in North Carolina State Court, but removed to the United States District Court for Eastern District of North Carolina). In that DOA Brief, although the State of North Carolina indicated that the Lawsuit was "to remove a slander of the title" to the bed of the Yadkin River, the Brief clarified the scope of the Lawsuit's purpose and its requested remedy "is NOT an attempt to force the demolition of the hydroelectric dams now existing; NOR is it an attempt to take those dams or reservoirs; NOR is it an attempt to supplant Alcoa as the licensed operator of the project via litigation . . . ." (DOA Brief at 4; capitalized words are in the original).

70. The DOA Brief indicated that its second purpose was to determine that Petitioner must pay money to continue to operate the Project, rather than to continue to operate "gratis, in disregard of our State's Constitution." (Id.) While the Brief says that the purpose of the Lawsuit is not to determine the exact amount that Petitioner is to be required to pay, the DOA Brief makes clear that the purpose of the Lawsuit is to establish that Petitioner must make those payments to the State of North Carolina "to rebalance the benefits to the people of the State and to Alcoa, which balance must be present to fulfill the mandates of the North Carolina Constitution." (Id.)

71. Respondent has filed as an exhibit to its SJ Response a letter dated October 4, 2014, written by Mr. Donald R. Teeter, Special Deputy Attorney General in the Department of Justice to Ms. Waylett, Senior Deputy Attorney General in the Department of Justice ("Teeter Letter").[21] Mr. Teeter is counsel of record for DOA in the Lawsuit and a signatory of the DOA Brief described previously. Among other things, the Teeter Letter reaffirms the statements in the DOA Brief that

[19] See Exhibit 29 listed above.

[20] See Exhibit 22.

[21] The Teeter Letter is listed as Exhibit 30 above.

there is nothing in the Lawsuit "that would immediately require Alcoa or Petitioner to quit the site or result in the State's vested rights in the project structures becoming immediately possessory."[22]

72. The Teeter Letter clarifies that the Lawsuit is to require that Petitioner "reach agreement with the State to rebalance the value of their continued use of the public resource that is the historic bed of the Yadkin River with a restored public benefit through fair rentals or otherwise . . . ." Finally, the Teeter Letter provides the connection between DOA's filing of the Lawsuit and Respondent's consideration of the Application: "Once such a rebalancing has been agreed to, and only then, might Petitioner be otherwise free to obtain its 401 Permit and, if successful before FERC, its re-licensure as the operator of the Yadkin Project."

73. The Court reviewed the DOA Brief submitted by Petitioner and the Teeter Letter submitted by Respondent, and considered both documents in ruling on the parties' motions for reconsideration and for summary judgment.

74. Based on the foregoing Findings of Fact, the Lawsuit cannot be reasonably interpreted to negatively affect Petitioner's ability to satisfy the conditions concerning water quality that might reasonably be included in a 401 certification from Respondent.

75. As stated above,[23] the Denial Letter states that the certification requirement in §.0502(f) of the NC 401 Rules "ensures that the applicant . . . is fully capable of implementing all protections of water quality that may be imposed as conditions in a 401 certification." By making that statement, the Denial Letter linked the ownership requirement that it found in §.0502(f) to Respondent's view that the applicant is required to show it is fully capable of implementing all protections of water quality that may be imposed as conditions in a 401 certification.

76. Petitioner has undertaken improvements to increase and improve water quality in the Yadkin River, particularly by increasing levels of dissolved oxygen ("DO") in the waters below the Narrows and Falls dams by installing DO enhancement technology at three of the four turbines at Narrows (Units 1, 2 and 4); those upgrades were installed on Unit 4 in January 2001, on Unit 2 in July 2008 and on Unit 1 in April 2009. (Admissions 48 & 49).

77. Using information from monitoring of DO concentrations in the Dams tailwaters that Petitioner has been performing beginning in 2009; Petitioner has submitted annual reports to Respondent summarizing that monitoring and its indications of the efficacy of the equipment installed by Petitioner in the Narrows dam to increase those levels of DO to enhance water quality in the Yadkin River; Petitioner introduced into the record the annual report that it submitted to Respondent in March of 2013, based on DO monitoring data for 2009-2012 ("2012 DO Report").[24] (Admissions 50 & 51). That 2012 DO Report describes, for example, the achievement of

[22] The Teeter Letter clarified that the Lawsuit did "not seek immediate or summary effect of its prayed-for declarations, but instead asks for 'an Order directing Alcoa to take actions to respect the State's rights in and to the Riverbed Portions of the Dams and the bed of the Relevant Segment of the Yadkin River.'"

[23] See Finding of Fact 63(a) above.

[24] The 2012 DO Report is listed as Exhibit 35 above.

significant increases in DO in the waters below the Falls Dam, where Petitioner has installed DO enhancement equipment. (Admissions 52 & 53).

78. In his Report, the Hearing Officer indicates that while the Project is currently "not meeting the instantaneous or average minimum DO standards during all times of the year or during all periods of operation," he concluded that "[c]ontinued operation of the Yadkin Project is not expected to result in degradation of surface or groundwaters." (Hearing Officer Report at 15, 17). The Hearing Officer Report notes further that, "DO upgrades at Narrows have shown a significant increase in tailwater DO and it is expected, as other upgrades are installed at the four powerhouses that continued improvement in tailwater DO will be realized." (Id. at 17).

79. The Denial has had the unavoidable effect of preventing the further improvements that would be made, once a 401 issued. ("AG 2013 Opinion").[25] The expiration of the Project's FERC license in 2008 means that the Petitioner's Project is operating under annual licenses issued by FERC, which do not allow for any further upgrades. Thus, until Petitioner receives a 401 that leads to a new FERC license, the DO enhancements that are to be made under a new 401 cannot be installed. (AG 2013 Opinion at 2-3).

80. Respondent offered no evidence to rebut any of the findings in Findings of Fact 82 - 85 above.

BASED UPON the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings and this Court have jurisdiction over the parties and the subject matter pursuant to Chapter 150B of the North Carolina General Statutes ("APA").

Petitioner's Motion for Reconsideration Should Be Granted

The Court's initial decision to deny summary judgment was based upon an assumption that it should not take into account information in the record concerning events that occurred after the issuance of the Denial; however, based on additional briefing and submittals by the Parties, Petitioner has persuaded the Court otherwise, and, therefore, the Court makes the following conclusions in reaching the decision to grant Petitioner's Motion for Reconsideration as follows:

2. On January 6, 2015, this Court entered an order denying summary judgment, and motions to reconsider based upon the Court's view that it could not and had not considered certain submissions made by the parties relating to events occurring after Respondent's issuance of the Denial.

[25] The AG 2013 Opinion is listed as Exhibit 10 at the beginning of this Final Decision.

3. The denial of summary judgment did not constitute a final decision, and this Court may reconsider that decision. Compare 26 N.C. Admin. Code 03.0129.

4. Even if the denial of summary judgment were a final order or decision, the Court can correct orders due to mistake or inadvertence, among other things. 26 N.C. Admin. Code 03.0101(b); N.C. GEN. STAT. § 1A-1, Rule 60.

5. The Court's order of January 6, 2015 denying summary judgment was filed in contemplation of the entry of a scheduling order shortly thereafter, which scheduling order provided, among other things, a deadline of February 12, 2015, by which any motions for reconsideration pursuant to applicable rules were required to be filed. Both parties filed motions for reconsideration on that date.

6. Both parties included in their respective filings in support of and in opposition to the SJ Motion information that each party contended was uncontroverted evidence concerning the scope, purpose, and potential impacts of events occurring after August 2, 2013, including events in the Lawsuit. In previously denying Petitioner's SJ Motion, the Court gave no weight to that evidence, although that evidence had been properly admitted into the record. The Court now concludes that it may and should take such evidence into account in rendering its decision on summary judgment.

7. The final "decision in a contested case hearing must be based on the 'official record prepared pursuant to N.C. GEN. STAT. § 150B-37.'" *Everhart & Assocs. v. DENR*, 127 N.C. App. 693, 697, 493 S.E.2d 66, 69 (1997), *cert. denied*, 347 N.C. 575, 502 S.E.2d 590 (1998) (quoting G.S.150B-36(b) of the APA). This holding is consistent with the wording of the APA and the OAH Rules. The APA requires the official record to include the collection of information upon which the ALJ makes the final decision. *See Deep River Citizens Coal. v. DEHNR*, 119 N.C. App. 232, 234, 457 S.E.2d 772, 774 (1995) (contents of record on appeal in a contested case). For example, the Court of Appeals has approved an ALJ's reliance on an expert's testimony that was not available to the agency when it made its decision, noting that "[t]he agency has failed to cite and we have found no applicable case law or statutory authority for the proposition that the ALJ erred by considering Dr. Timmons's expert testimony regarding Robinson's medical needs in rendering his decision." *Robinson ex rel. Robinson v. N.C. Dep't of Health & Human Servs.*, 215 N.C. App. 372, 377, 715 S.E.2d 569, 572 (2011).

8. The essence of the *Robinson* decision was that a contested case hearing before an independent ALJ is essential to provide a "way to remedy deficiencies" in the agency process and for a person aggrieved by an agency decision "to have a meaningful opportunity to be heard." *Id.* at 378, 715 S.E.2d at 572. Here, the State did not formally raise its claim of ownership of the riverbed until the DOA Letter was issued on August 1, 2013 and the filing of the Lawsuit on August 2, 2013, the day by which Respondent was required to make a decision on the Application. As a result of the timing and circumstances of how the issue of ownership was raised by DOA, Petitioner did not have a meaningful opportunity to be heard on whether the Lawsuit was a proper basis for the Denial prior to the Denial's issuance. Consequently, Petitioner's only opportunity to raise the issue of whether the Lawsuit was a proper basis for the Denial was before this Court.

9. In 2011, the General Assembly amended the APA to give ALJs final decision-making authority. S.L. 2011-398, s.18. However, those 2011 amendments did not alter the APA's provisions regarding creating and considering the whole or official record in any manner that would indicate that the General Assembly intended to change those provisions regarding creation and consideration of the contested case official record.

10. In its pleadings, Respondent cited two North Carolina appellate cases that consider the issue of evidence to be considered by an ALJ in a contested case, *Stark v. Dep't of Env't & Natural Resources*, – N.C. App. –, 736 S.E.2d 553 (2012), and *Clark Stone Co. v. Dep't of Env't & Natural Resources*, 164 N.C. App. 34, 594 S.E.2d 832 (1984). However, the *Clark Stone* case is inapplicable to this matter and the *Stark* opinion, properly interpreted, does not support Respondent's position. The *Stark* opinion affirms the proposition in the APA that parties should be assured meaningful input and ample opportunity to provide evidence and participate as the issues are being considered. The petitioners in *Stark* were given such an opportunity and were not permitted to provide additional evidence of more recent events. However, in this case, Petitioner was given no opportunity to offer evidence to Respondent or discuss the implications of the impact of the filing of the Lawsuit on August 2, 2013 only hours before Respondent issued the Denial. Petitioner's only avenue to challenge the Denial was to file this contested case and to present evidence about the Lawsuit, some of which arose after August 2, 2013, since the Lawsuit is ongoing still today.

11. Like the subsequently developed expert report admitted by the ALJ and approved by the Court of Appeals in the *Robinson* decision cited above, this Court has determined that it should consider evidence introduced at the summary judgment hearing regarding developments that occurred after the Denial, including developments in the Lawsuit occurring on and after it was filed on August 2, 2013, which was the date of the Denial.

12. Therefore, the Court concludes it should have considered the evidence introduced into the record by the parties regarding events occurring on and after August 2, 2013, even though it was not available for consideration by Respondent in issuing the Denial. This post-Denial evidence is composed primarily of the Reeder deposition testimony, the DOA Brief, and the Teeter Letter; all of which clarify the scope, purpose, and potential impacts of the Lawsuit. While some of this post-Denial evidence was introduced by Petitioner and some was introduced by Respondent, all of the evidence is transcriptions of or written statements of representatives of the State of North Carolina communicating in their official capacity. Each statement is either under oath or subject to the pleading requirements of Rule 11.

13. Further, after considering the post-Denial evidence described in the previous paragraph, the Court concludes that the Lawsuit cannot reasonably be interpreted to negatively affect Petitioner's ability to satisfy the conditions concerning water quality that might reasonably be included in a 401 certification from Respondent. In addition, after considering those documents, as well as the facts found herein concerning contacts with Respondent by DOA and the Governor's General Counsel, the Court concludes that it should grant Petitioner's Motion for Reconsideration.[26]

[26] See Finding of Facts 53-68.

Respondent's Motion for Reconsideration Should be Denied

14. Respondent identified no error requiring reconsideration and for this reason and the reasons set forth below, Respondent's Motion for Reconsideration should be denied.

Petitioner's Summary Judgment Motion Should be Granted

15. Upon careful review of the entire record, the material facts set forth above are undisputed and those facts lead the Court to conclude, as a matter of law, that Petitioner is entitled to judgment in its favor as stated below.

16. An administrative law judge is authorized to "grant summary judgment, pursuant to a motion made in accordance with N.C. GEN. STAT. § 1A-1, Rule 56, that disposes of all issues in the contested case." N.C. GEN. STAT. § 15B-34(e). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. GEN. STAT. § 1A-1, Rule 56(c). "Summary judgment, like judgment on the pleadings, is appropriately granted only where no disputed issues of fact have been presented and the undisputed facts show that any party is entitled to judgment as a matter of law." *Minor v. Minor*, 70 N.C. App. 76, 79, 318 S.E.2d 865, 867 (1984). However, summary judgment differs from judgment on the pleadings in that "judgment on the pleadings is not favored and the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmovant," on a motion for judgment on the pleadings, *see Flexolite Elec., Ltd. v. Gilliam*, 55 N.C. App. 86, 88, 284 S.E.2d 523, 524 (1981), whereas in a summary judgment motion, a party may, by producing evidence, shift the burden of proof to the non-moving party, *see e.g., Boyce & Isley, PLLC v. Cooper*, 211 N.C. App. 469, 710 S.E.2d 309, 315 (2011).

17. Respondent argues that its interpretation of its own NC 401 Rules should be given "due deference unless it is plainly erroneous or inconsistent with the regulation." Respondent's SJ Response, at 20, citing *Pamlico Marine Co. v. N.C. Dep't of Natural Resources & Cmty. Dev.*, 30 N.C. App. 201, 206, 341 S.E.2d 108, 112 (1986). However, when an agency announces an interpretation of a law for the first time in a particular case, a judge may view that interpretation "skeptically." *Rainey v. N.C. Dep't of Pub. Instruction*, 361 N.C. 679, 681, 652 S.E.2d 251, 252-3 (2007).

18. Respondent has consistently said that it has never before faced the issues raised in this case, saying that this was the "first time Respondent was required to consider an application for a §401 Certification, where the State of North Carolina, through its Department of Administration, challenged an applicant's certification of ownership . . . ." (Respondent PHS at 4). Respondent characterizes this situation as "the first 401 application submitted to Respondent in which the applicant's certification of ownership has been directly challenged by what is essentially a title dispute."[27]

[27] Respondent's SJ Response, at 29.

19. Reviewing courts make clear that deference is not due "when 'the only authority for the agency's interpretation of the law is the decision in that case, that interpretation may be viewed skeptically on judicial review .... [I]f the agency's interpretation of the law is not simply a 'because I said so' response to the contested case, then the agency's interpretation should be accorded ... deference." *Cashwell v. Dep't of State Treasurer,* 196 N.C. App. 80, 89, 675 S.E. 2d 73, 78 (2009). In such a case, "[t]he court may freely substitute its own judgment for that of the agency." *Friends of Hatteras Island*, 117 N.C.App. 556, 567, 452 S.E.2d 337, 344 (1995) (internal quotation marks omitted).

20. Because the Denial issued in this case was a clear change of approach by the agency in interpreting and applying §.0502(f) of the NC 401 Rules, 15A NCAC 02H.0502(f), Respondent's interpretation of that rule is not entitled to the deference ordinarily afforded to an agency decision and to which it might have otherwise been entitled has this not been the first time the Agency faced this particular situation.

21. An agency action violates the APA if it is shown that the agency, in taking the challenged action or decision, (1) exceeded its authority; (2) acted erroneously; (3) failed to use proper procedure; (4) acted arbitrarily or capriciously; (5) failed to act as required by law or rule; or (6) acted in a manner unsupported by substantial evidence admissible under N.C. Gen. Stat. §§ 150B-29(a), -30, or -31 in view of the entire record as submitted. N.C. GEN. STAT. § 150B-23(a), see N.C. GEN. STAT. § 150B-51(b).

22. Thus, in reviewing an agency decision under the APA, "[t]he administrative law judge must, therefore, 'determine whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights,' as well as whether 'the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule.'" *CaroMont Health, Inc. v. N.C. Dept. Health & Human Servs.*, – N.C. App. –, 751 S.E.2d 244, 248 (2013) (citations omitted); *The Charlotte-Mecklenburg Hospital Auth. v. N.C. Dep't of Health & Human Servs.,* 09 DHR 6116, 2010 WL 3283837 (July 26, 2010) (same conclusion).

23. A decision by an administrative agency is "arbitrary and capricious" if it "clearly evinces a lack of fair and careful consideration or want of impartial, reasoned decision making." Joyce v. Winston-Salem State Univ., 91 N.C. App. 153, 156, 370 S.E.2d 866, 868 (1988). As the North Carolina Supreme Court recognized,

> Agency decisions have been found arbitrary and capricious, inter alia, when such decisions are "whimsical" because they indicate a lack of fair and careful consideration; when they fail to indicate "any course of reasoning and the exercise of judgment" . . . or when they impose or omit procedural requirements that result in manifest unfairness in the circumstances though within the letter of statutory requirements.
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> State ex rel Comm'r of Ins. v. N.C. Rate Bureau, 300 N.C. 381, 420 (1980); see Richard Lee Taylor v. City of Charlotte, 11 MIS 14140, 2012 WL 2673270 (May 14, 2012) (citing N.C. Rate Bureau for the same conclusion); Charlotte-Mecklenburg Hospital Auth., 2010 WL 3283837 (recognizing standard for arbitrary and capricious agency actions).

24. Based on the undisputed facts in the record, the Denial reflected a last-minute determination based upon the actions and opinions of persons outside of Respondent that the Application was invalid, rather than a fair and impartial ruling on the merits of the Application itself and could not have been a careful or deliberate ruling on the merits of the Application.

25. While the undisputed facts show that government officials outside of Respondent affected the 401 decision-making process at Respondent, this Court expressly does not conclude that any person communicated or acted improperly in doing so or attempting to do so. In short, this Court's conclusion does not require and expressly does not rely upon a legal conclusion that the influence was "undue" or improper in any respect.

26. Because, as noted previously, this case involves, at least in some respects, the correctness of Respondent's interpretation of the NC 401 Rules adopted by the Environmental Management Commission, it raises the issue of the degree of deference properly to be given to Respondent's interpretation of the NC 401 Rules, for which reviewing courts traditional accord deference to the agency's interpretation of its own rules. [28]

27. In its papers and before this Court, Respondent acknowledged that this contested case and the Denial were unique. According to Respondent, there has never been a case with a conflicting claim of ownership asserted by another state agency on the very day that a decision from Respondent was required to be issued. When an agency announces an interpretation of a law for the first time in a particular case, such deference need not be accorded, and the interpretation may properly be viewed "skeptically."[29]

28. Further, because the Denial issued in this case was a clear change of approach by the agency in interpreting and applying section .0502(f) of the NC 401 Rules, the Denial is not entitled to the deference ordinarily afforded by this Court to an agency decision and to which it might have otherwise been entitled.[30] Nevertheless, even if the Court were to afford such deference, the clearly arbitrary and capricious nature of the circumstances surrounding the issuance of the Denial and lack of an explicit regulatory basis for it support the Court's conclusion that in issuing the Denial, Respondent exceeded its authority; acted erroneously; acted arbitrarily or capriciously and failed to act as required by law or rule, contrary to N.C. GEN. STAT. § 150B-23(a).

29. Based on the foregoing and the Court's findings of fact, the Court concludes that the decision of Respondent to issue the Denial on the basis that the Application was not valid was made incorrectly, was not made according to law, and was arbitrary and capricious because it was based upon improper consideration of a dispute over ownership of submerged land.

30. An agency exceeds its authority or jurisdiction when it acts outside the powers granted to it by statute or the powers that are necessarily implied by the statutory grant of authority. *Mehaffey v. Burger King*, – N.C. –, 749 S.E.2d 252, 256 (2013); *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 318-19, 735 S.E.2d 300, 303 (2012).

[28] See Conclusion of Law 17.

[29] See Conclusions of Law 17.

[30] See Conclusion of Law 20.

31. In supporting a decision, an agency may not rely on facts or factors that it is not authorized by statute to consider or that are irrelevant to the agency's decision. *See, e.g.*, *R.J. Reynolds Tobacco Co. v. N.C. Dep't of Env't & Natural Res.*, 148 N.C. App. 610, 618, 560 S.E.2d 163, 169 (2002) (holding that DENR considered irrelevant facts that did not support its decision); *Williams v. N.C. Dep't of Env't & Natural Res.*, 144 N.C. App. 479, 485, 548 S.E.2d 793, 797-98 (2001), *superseded by statute on other grounds*, N.C. GEN. STAT. § 113A–120.1, *as recognized by Riggings Homeowners, Inc. v. Coastal Res. Comm'n of State*, – N.C. App. –, 747 S.E.2d 301, 313 (2013) (holding that an impermissible consideration was "irrelevant and insufficient to support [the Coastal Resources Commission's] conclusion of law").

32. Respondent based the Denial on an ownership dispute over submerged land[31] and therefore based its decision upon an improper factor beyond the scope of its authority under § 401 of the Clean Water Act, 33 U.S.C. § 1341; N.C. GEN. STAT. § 143B-282.1; and the NC 401 Rules, as discussed below.

33. The Denial specifically notes that, in reviewing the purposes of the certification provision in §.0502(f) of the NC 401 Rules, "[t]he required ownership certification ensures that the applicant owns the project's dams and powerhouses and is fully capable of implementing all protections of water quality that may be imposed as conditions in a 401 certification."[32] That is, in describing the purposes of the certification, the Denial itself makes clear that the ownership of the bed of the river is irrelevant to the issuance of the 401 certification.

34. Respondent failed to properly construe and apply its enabling statutes and the NC 401 Rules in issuing the Denial. Up until the issuance of the Denial, the agency consistently asserted that there was no need to resolve such disputes in order to effectuate its duties to protect water quality through its implementation of the 401 program under the Clean Water Act.[33]

35. As reflected in the Hearing Officer Report and its recommendation of issuance of the 401 Certification, there appears to be no factual dispute that Petitioner satisfied the substantive requirements for issuance of a water quality certification.

36. Petitioner cannot install water quality capital enhancements until it receives a FERC license as discussed in the previous paragraph, and because the FERC license cannot be issued until Petitioner receives a 401 water quality certification, the Denial has resulted in additional and unnecessary delay to Petitioner's ability to install those water quality capital enhancements, which, in turn, has delayed the improvements to the water quality below the Project dams and in the Yadkin River generally, contrary to purposes and intent of §401 of the CWA and the NC 401 Rules to protect and enhance water quality. Due to these limitations, the Denial has had the effect of delaying the water quality improvements that would be included in a 401 certification and a new

[31] See, e.g., Findings of Fact 62.

[32] See Findings of Fact 63(a)

[33] See Admissions 16-21, ; Exhibit 19 at 20; and Respondent's Response to SJ Motion at 21-24.

FERC license that could be issued (and that would reflect the improvements mandated in the 401 Certification).[34]

37. The plain language of the NC 401 Rules does not include a land ownership requirement. No provision of the NC 401 Rules requires, treatment of the claims in the Lawsuit any differently than other competing claims or assertions as to ownership. Compare 15A NCAC 02H.0500, particularly §§.0502 and .0506.

38. Even if the Lawsuit had originally provided any basis to deny the Application, it no longer does so, as there is no longer any basis for a concern that a resolution of the Lawsuit would impair Petitioner's ability to comply with the conditions of a water quality certification.

39. An agency action violates the APA if it is shown that the agency failed to use proper procedure, or failed to act as required by law or rule. N.C. GEN. STAT. § 150B-23(a), see N.C. GEN. STAT. § 150B-51(b).

40. In issuing the Denial in the manner reflected in the uncontroverted facts in this record, Respondent failed to avail itself of the opportunity under the NC 401 Rules to seek information about ownership and also failed to accord Petitioner an opportunity to submit such information, and, thus, failed to use proper procedure, or failed to act as required by law or rule.

41. Petitioner has met its burden of showing that Respondent acted in an arbitrary and capricious manner in issuing the Denial, because it was not the result of a careful consideration of Petitioner's Application or of an impartial decision-making process and because it resulted in manifest unfairness to Petitioner. Respondent provided insufficient substantial evidence in the Record to support the Denial in the face of uncontradicted evidence provided by both Parties that demonstrated deficiencies in the manner and bases underlying the Denial. Respondent exceeded its authority, acted erroneously, and failed to act as required by law or rule, because the Denial was based upon a factor that Respondent is not authorized by statute and its rules to consider. Respondent failed to use proper procedure by acting on the basis of ownership issues without requesting information from Petitioner about those issues or otherwise providing Petitioner with an opportunity to address them before issuing the Denial. Respondent failed to act as required by law or rule and in a manner unsupported by substantial admissible evidence because it had no basis to conclude that Petitioner would be unable to comply with the water quality provisions in a water quality certification such as the draft 401 that Respondent had prepared. The Denial has resulted in the delay of the water quality protections and improvements that ultimately follow the issuance of a 401 certification. While any one of these errors or deficiencies would likely be sufficient to justify overturning the Denial, the collection of all of the errors and deficiencies clearly establish that the Denial should be reversed under N.C. GEN. STAT. § 150B-23(a) and other provisions of the APA

[34] See Finding of Fact **Error! Reference source not found.**.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

Respondent's decision on August 2, 2013, to deny Petitioner's Application is REVERSED.

REMEDY

Pursuant to N.C. GEN. STAT. § 150B-23(a4), Respondent is directed to proceed to review Petitioner's Application as expeditiously as possible and in no event shall issue a decision later than thirty days after the date of this Order based upon the record before the agency as it existed as of August 2, 2013; provided, however, the parties may mutually agree to an extension of such thirty day period.

NOTICE

This is a Final Decision issued under the authority of N.C. GEN. STAT. § 150B-34(e).

Under the provisions of N.C. GEN. STAT. § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. GEN. STAT. § 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision. N.C. GEN. STAT. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. GEN. STAT. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 29th day of May, 2015.

Selina M. Brooks
Administrative Law Judge

STATE OF NORTH CAROLINA COUNTY OF STANLY		IN THE OFFICE OF ADMINISTRATIVE HEARINGS 13 EHR 18085
ALCOA POWER GENERATING, INC., Petitioner vs. DIVISION OF WATER RESOURCES, NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, Respondent	)	**ORDER AMENDING FINAL DECISION**

Pursuant to 26 NCAC 3.0129, for the purpose of correcting a clerical error, IT IS HEREBY ORDERED that the above-captioned Final Decision, issued from this Office on May 29, 2015, is amended as follows:

Finding of Fact 80. Respondent offered no evidence to rebut any of the findings in Findings of Fact 75-79.

This the 10th day of June, 2015.

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Selina M. Brooks
Administrative Law Judge