

## **North Carolina's Contested Waters: Renewed State Efforts to Balance Environmental, Economic, and Political Power on the Yadkin River**

Kira Whitacre

### *Introduction*

In a unanimous Supreme Court decision that addressed the competing interests of two states' access to the Delaware River in 1931, Justice Oliver Wendell Holmes stated, "a river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."<sup>1</sup> Decades later, water allocation in the United States continues as a pressure point for cities, corporations, and private citizens among the Delaware's watery southern counterparts.<sup>2</sup> One such river, the Yadkin, is the chief river of North Carolina's Pee Dee Drainage Basin.<sup>3</sup> Its waters feed river systems throughout North Carolina and traverse the state from its Northwestern foothills southward before entering the Atlantic Ocean at Winyah Bay, South Carolina.<sup>4</sup>

Today, the Yadkin is the center of hotly contested litigation that will determine whether Pittsburg-based Alcoa Power Generation Company (Alcoa) has sufficient grounds to renew a federally-issued license (FERC) granting it continued control over a thirty-eight mile tract of the Carolinian river.<sup>5</sup> Originally issued in 1958 prior to contemporary environmental law, a new FERC license will extend the company's access to use of the Yadkin River for private hydroelectric power production for the next fifty years.<sup>6</sup> However, permit renewal is challenged

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<sup>1</sup> New Jersey v. New York, 283 U.S. 336, 343 (1931).

<sup>2</sup> Southeastern Water Resources Inst., *Challenges to Address*, UNIV. OF TENN. INST. FOR A SECURE & SUSTAINABLE ENV'T. (Jan. 6, 2011, 2:30 PM), <http://isse.utk.edu/swri/#recent>.

<sup>3</sup> *Id.*

<sup>4</sup> Karl Musser, *Pee Dee River Watershed*, WIKIPEDIA, <http://en.wikipedia.org/wiki/File:Peedeerivermap.png> (last modified Feb. 28, 2007).

<sup>5</sup> Joyce Deaton, *Alcoa Re-licensing Getting Muddy*, PILOT MEDIA, Aug. 6, 2009, <http://www.pilotmedia.us/wordpress/admin/features/alcoa-re-licensing-getting-muddy/.html>.

<sup>6</sup> Deaton, *supra* note 5.

by North Carolina Governor, Beverly Perdue, and has evoked alliances between state government, local economic development and conservation bodies in protest.<sup>7</sup> The case is nationally significant in that the North Carolina state government has also requested that FERC recommend repossession of Alcoa's FERC license and private hydropower facilities by the state.<sup>8</sup>

Such a request is unprecedented.<sup>9</sup> By pitting private water rights against state, conservationist, and local economic development interests, the Alcoa conflict highlights new policy complexities inherent to modern water rights allocation.<sup>10</sup> In order to accurately assess the case's potential effects on the American legal framework, we must first root it within the context of pressures that already exist between human, business, and ecological communities competing for water in the Carolinas. The choice by North Carolina to implement interbasin river transfers to address population demands is the most dramatic example of these pressures to date.<sup>11</sup>

*Expansion of Southeastern Water Allocation Measures and Statutory Guidance within the Carolinas: Interbasin River Transfers*

The term "water wars" has traditionally referred to litigious struggles for water access among private industrial, agricultural, and municipal bodies in the western regions of the United States.<sup>12</sup> Yet this notion of Western exceptionalism with regard to water scarcity is fast

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<sup>7</sup> Carrie Hodgen, *Governor Perdue Aims to Block NC Water for Alcoa Dams*, ASSOC. PRESS, May 20, 2009, [http://www.digtriad.com/news/local\\_state/article.aspx?storyid=124502](http://www.digtriad.com/news/local_state/article.aspx?storyid=124502).

<sup>8</sup> Lisa O'Donnell, *Battle for Control of Yadkin Dams at Critical Point*, WINSTON-SALEM JOURNAL, Sept.27, 2010, <http://www2.journalnow.com/news/2010/sep/27/battle-for-control-of-yadkin-dams-at-critical-poin-ar-421206/>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Lauren J. Caster, *General Stream Adjudications and Eastern River Systems*, 133 J. OF CONTEMP. WATER RES. & EDUC., May 2006, 43-51.

changing.<sup>13</sup> Over the past twenty years, growing population pressures and environmental constraints such as drought and overexploitation have forced Southeastern cities, agricultural users, and industrial powerhouses to compete for rights to channel and utilize water flows.<sup>14</sup>

Private riparian rights in the Eastern United States have for centuries reflected a public regard for water as an abundant resource.<sup>15</sup> As a result, water law in the East and the Carolinas specifically has been defined by a “reasonable use” doctrine that seeks to secure owners’ rights to access water to the extent that other owners are not deprived of their own usage.<sup>16</sup> In recent years, however, intensive population pressures such as those created in Atlanta and Charlotte have forced the region to consider implementing new, aggressive measures to satisfy state water needs.<sup>17</sup> While the Carolinas have traditionally maintained lax ownership rights with regard to water, the need for statutory and legal remedies became apparent after the appearance of state regulatory proposals such as interbasin transfers.<sup>18</sup>

Interbasin transfers involve the permanent removal of substantial quantities of self-contained water systems from one river basin to another.<sup>19</sup> The most contentious of these measures was approved in 2006 by the North Carolina Department of Natural Resources, and permits the collective withdrawal of twenty million gallons a day from the Catawba-Wateree and Yadkin River Basins to downstream portions of the Yadkin River in order to satisfy dramatic

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<sup>13</sup> *North Carolina: North Carolina Planners Should Weigh Climate-Related Impacts, Conference Told*, BNA ST. ENV’T DAILY, Mar. 5, 2010

<sup>14</sup> *Id.*

<sup>15</sup> Caster, *supra* note 12, at 2.

<sup>16</sup> APPLIED RESOURCE ECON. & POLICY GRP., WATER LAW IN NORTH CAROLINA (Allain C. Audry, IV ed., 1994, rev. by Theodore A. Feithshans, 1996), available at <http://www.bae.ncsu.edu/programs/extension/publicat/arep/waterlaw.html>.

<sup>17</sup> Douglas Jehl, *Development and a Drought Cut Carolinas’ Water Supply*, N.Y. TIMES, Aug. 29, 2002, <http://www.nytimes.com/2002/08/29/us/development-and-a-drought-cut-carolinas-water-supply.html>.

<sup>18</sup> *Id.*

<sup>19</sup> ENVTL. MGMT. COMM’N, *Charlotte-Mecklenburg Utilities Hearing Officer’s Report: Proposed Increase in Interbasin Transfer*, N.C. Div. of Water Resources, (Feb. 2002), [http://www.newater.org/Permits\\_and\\_Registration/Interbasin\\_Transfer/Status/CMud/CMUD\\_Certificate.pdf](http://www.newater.org/Permits_and_Registration/Interbasin_Transfer/Status/CMud/CMUD_Certificate.pdf).

water shortfalls in Cabarrus County, North Carolina.<sup>20</sup> Since the time of its initial release, the proposal has brought continued statewide attention to issues of water ownership and conservation.<sup>21</sup>

In anticipation of the proposal's implementation, environmental non-profit American Riverkeepers named the Catawba-Wateree "America's Most Endangered River."<sup>22</sup> Municipal and state environmental coalitions also successfully engaged in legislative efforts to create new water law which redefined North Carolina's previously lax water laws and strengthened the bargaining power of local governments affected by future interbasin transfers.<sup>23</sup> The law continued to be scrutinized and underwent minor amendments during the 2009 Legislative Session.<sup>24</sup> Finally, the transfer gave rise to two legal claims in 2007, including one between the affected municipalities and a second filed by the State of South Carolina against North Carolina.<sup>25</sup> Both claims persisted into 2010, and placed heavy financial burdens on governments already affected by economic downturn.<sup>26</sup>

By January 2010, litigation between environmental organizations and supplying local governments achieved a settlement that provided for decreased transfer water volumes by the

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<sup>20</sup> *Id.*

<sup>21</sup> Lisa O'Donnell, *Battle for Control of Yadkin Dams at Critical Point*, WINSTON-SALEM JOURNAL, Sept. 27, 2010, <http://www2.journalnow.com/news/2010/sep/27/battle-for-control-of-yadkin-dams-at-critical-poin-ar-421206/>.

<sup>22</sup> *Eight Months after "Most Endangered River" Listing, Hope Lies in Upcoming Legislative Session*, AM. RIVERS, (Dec. 11, 2008), <http://www.americanrivers.org/newsroom/press-releases/2008/no-progress-catawba-wateree.html>.

<sup>23</sup> *See An Act to direct the Environmental Review Commission to study issues related to the transfer of water from one river basin to another river basin*, 2007 N.C. Sess. Laws 518.

<sup>24</sup> Susan Stabley, *Water Legislation Would Open Door to Sweeping Shift in N.C.*, CHARLOTTE BUS. J., Jun. 8, 2009, available at <http://www.bizjournals.com/charlotte/stories/2009/06/08/story3.html>.

<sup>25</sup> *Id.*

<sup>26</sup> John Marks, *Settlement Possible in Catawba River Water War*, LAKE WYLIE PILOT, Aug. 30, 2010, <http://www.catawbariverkeeper.org/issues/library-of-documents-on-drought/settlement-possible-in-catawba-river-water-war>.

recipient Cabarrus County.<sup>27</sup> However, the federal case, in which petitioner South Carolina alleges that North Carolina's interbasin transfer deprives South Carolina of its "equitable share of the river" is now before the Supreme Court.<sup>28</sup> Both parties have publicly stated a desire to reach settlement prior to the Court's hearings to avoid additional litigation costs, yet substantial progress has not been achieved as of November 2010.<sup>29</sup>

North Carolina's implementation of interbasin river transfers has brought the state into a larger national discourse on water rights and resource management.<sup>30</sup> That discourse is but a piece of the broader policy concerns that interplay with North Carolina Governor Beverly Perdue's efforts to challenge Alcoa's FERC license.<sup>31</sup> As of 2010, the state's renewable electricity standard requires that the state increase its renewable energy production by ten to twelve percent in public and private utility sectors respectively.<sup>32</sup> Hydropower is currently the largest source of that energy.<sup>33</sup> Yet water consumption in the South has increased more than six times since 1990, a rate that is double the national average.<sup>34</sup> Finally, North Carolinian policymakers continue to actively pledge the state's interest in maintaining business-friendly

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<sup>27</sup> Larry Clark, *Water War Led to Rewrite of State Law*, HICKORY DAILY RECORD, Jan. 21, 2010, <http://www2.hickoryrecord.com/news/2010/jan/21/water-war-led-rewrite-state-law-ar-94382/>.

<sup>28</sup> *South Carolina v. North Carolina*, 130 U.S. 854 (2010).

<sup>29</sup> John Marks, *S.C.'s Water War with N.C. Could be Settled Soon*, FORT MILL TIMES, Aug. 27, 2010, <http://www.fortmilltimes.com/2010/08/27/1233183/scs-water-warwith-nc-could-be.html>.

<sup>30</sup> Douglas Jehl, *Development and a Drought Cut Carolinas' Water Supply*, N.Y. TIMES, Aug. 29, 2002, <http://www.nytimes.com/2002/08/29/us/development-and-a-drought-cut-carolinas-water-supply.html>.

<sup>31</sup> Rick Henderson, Governor Purdue Calls Out Alcoa at Year-End Press Conference, CAROLINA J., Dec. 24, 2010, available at <http://www.yadkinriverkeeper.org/news/201012/governor-perdue-calls-out-alcoa-year-end-press-conference.html>.

<sup>32</sup> *North Carolina Renewable Energy and Energy Efficiency Portfolio*, DSIRE, (Aug. 13, 2010), [http://www.dsireusa.org/incentives/incentive.cfm?Incentive\\_Code=NC09R&re=1&ee=1](http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=NC09R&re=1&ee=1) (examining North Carolina's Renewable Energy and Energy Efficiency Portfolio Standard (REPS) created by N.C. Gen. Stat. § 62-133.8 in August 2007, which requires all investor-owned utilities to supply 12.5% of 2020 retail electricity sales from eligible energy resources by 2021, and requires municipal utilities and electric cooperatives to attain 10% renewables by 2018).

<sup>33</sup> Rick Miller, *No Need to Open the Floodgates, Efforts to influence license-renewal process at Alcoa's facilities could undermine attractiveness of a clean source of energy*, CHARLOTTE BUS. J., (May 22, 2009, 6:01 PM), <http://yadkinproject.blogspot.com/2009/05/ncs-last-minute-effort-to-take-alcoas.html>.

<sup>34</sup> *White Paper, Trend Alerts on Water Wars*, COUNCIL OF STATE GOVERNMENTS (July 2003), <http://www.cviog.uga.edu/services/policy/environmental/georgiacommittee/whitepapers/waterwars.pdf>.

policies as part of efforts to ensure the state's economic survival.<sup>35</sup> The way in which these interests interact in the context of a federally-licensed, privately-owned hydropower plant can now be examined by returning again to the northern riverbanks of the Yadkin, in Stanly County, North Carolina.

*Negotiating Private Interests within a State Trust: FERC and North Carolina*

Private interests, especially large-scale utilities, are an integral part of evolving water laws.<sup>36</sup> For example, the Supreme Court acknowledged the role of private stakeholders in January 2010, when it agreed to allow Duke Energy (Duke) to intervene as a party to South Carolina's interbasin transfer suit against North Carolina.<sup>37</sup> Duke constitutes a compelling stakeholder in the Catawba River not only due to its interest in accessing water for its operational survival, but also due to the fact that it controls water rights over significant portions of the Catawba.<sup>38</sup>

There are currently over one thousand federally issued licenses which secure private hydropower rights to rivers in the United States.<sup>39</sup> Eleven currently exist in North Carolina.<sup>40</sup> The licenses are issued by the Federal Energy Regulatory Commission (FERC) under the authority of the Federal Power Act, and grant licensees rights of possession surrounding designated river areas as well as the use of the river's waters for a term ranging from twenty to

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<sup>35</sup> Martha Brock, *Numbers Are Up*, N.C. STATEHOUSE EXAMINER, Oct. 18, 2010, <http://www.examiner.com/statehouse-in-raleigh/governor-perdue-says-numbers-are-up?render=print.html> (regarding announcement of North Carolina as third best business-friendly state by *Forbes* magazine).

<sup>36</sup> *Id.*

<sup>37</sup> John Marks, *Settlement Possible in Catawba River Water War*, LAKE WYLIE PILOT, Aug. 30, 2010, <http://www.catawbariverkeeper.org/issues/library-of-documents-on-drought/settlement-possible-in-catawba-river-water-war>.

<sup>38</sup> *Id.*

<sup>39</sup> Federal Energy Regulatory Commission, Federal Statutes, Authority, Requirements, <http://www.ferc.gov/legal/fed-sta.asp> (last visited Oct. 12, 2010); Env't'l Law Inst., *News & Analysis*, 40 Env't'l L. Rep. No. 10696 (July 2010).

<sup>40</sup> Federal Energy Regulatory Commission, *supra* note 39, at Attachment A.

fifty years.<sup>41</sup> Licensees hold exclusive water rights which are then shared at will with municipalities and other corporate users.<sup>42</sup>

Private water rights are also affected by the public trust doctrine honored by North Carolina statutory law, which considers rivers and all other surface and ground waters as “waters of the State” entrusted for the benefit of the public.<sup>43</sup> Industrial water users may therefore own the grounds beneath and surrounding a river, as well as control the waters flowing over those grounds without the state surrendering ownership rights to the water itself.<sup>44</sup> Where overexploitation of resources is dire to the extent that interbasin transfers are necessary, it is inevitable that state interests in protecting public and private ownership rights fundamentally conflict.<sup>45</sup> In a state that markets itself as business-friendly, North Carolina’s policymakers face the increasingly Herculean challenge to equitably allocate water among citizens, neighboring states, and bulwark state industries.<sup>46</sup>

Facing unprecedented state-led lawsuits in 2009, Alcoa Power Generating Company and Duke Energy continue to combat state government effort to block their renewal of fifty year-long FERC permits that grant each corporation the ownership rights necessary to hydroelectric production.<sup>47</sup> In past decades, such long-term water permits proceeded with little fanfare from

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<sup>41</sup> Env't'l Law Inst., *supra* note 39, at Attachment A.

<sup>42</sup> *Id.*

<sup>43</sup> Allain C. Audry, IV, *Water Law in North Carolina*, APPLIED RESOURCE ECON. & POLICY GRP. (Mar. 1996), <http://www.bae.ncsu.edu/programs/extension/publicat/arep/waterlaw.html>.

<sup>44</sup> See N.C. Gen. Stat. § 143-212 (1997) (defining “waters” as any stream, river, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway, or other body or accumulation of water, whether surface or underground, public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State, including any portion of the Atlantic Ocean over which the State has jurisdiction).

<sup>45</sup> Castor, *supra* note 12, at 1; see also Douglas *supra* note 30.

<sup>46</sup> *North Carolina Named Nations ‘Top Business Climate’ for 9<sup>th</sup> Year in a Decade*, OFFICE OF GOVERNOR BEV PURDUE, (Nov. 1, 2010), <http://www.governor.state.nc.us/NewsItems/PressReleaseDetail.aspx?newsItemId=1559>.

<sup>47</sup> See *South Carolina v. North Carolina*, 130 U.S. 854 (2010).

the government and public sector.<sup>48</sup> At the time Alcoa received its initial FERC license in 1958, it was the predominant employer in Badin, North Carolina and surrounding areas.<sup>49</sup> The environmental movement, still in its infancy, was more than a decade away from garnering the public support necessary to establish the Environmental Protection Agency and major environmental legislation.<sup>50</sup> Alcoa successfully developed four dams on the Yadkin River and used them to power its aluminum smelter and, at its peak, employed nine hundred local workers.<sup>51</sup> In 2002, however, Alcoa closed its Badin smelter operations and reduced its Carolinian workforce to thirty employees.<sup>52</sup> The company now generates approximately \$500,000 tax dollars for the state each year while generating forty-four million dollars a year in wholesale electricity sales for its corporate shareholders.<sup>53</sup>

When Alcoa's FERC relicensing period began in 2008, Alcoa complied with FERC requirements established pursuant to contemporary environmental law that it assess the health of the Yadkin and gauge the continued benefits of its ownership to state and local communities.<sup>54</sup> Alcoa argued that once it obtained a new license, it would increase drought management and drinking water access for local communities, as well as implement upgrades to the facility to reduce environmental damage caused by the smelter during its operation in the early 1900s.<sup>55</sup>

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<sup>48</sup> *Public v. Private: Power Struggles for the Yadkin: Segment III*, WFAE CHARLOTTE PUBLIC RADIO (May 13, 2009), [http://www.wfae.org/wfae/1\\_218\\_332.cfm](http://www.wfae.org/wfae/1_218_332.cfm) (stating that Alcoa once employed over 900 people at the Badin smelter).

<sup>49</sup> *Id.*

<sup>50</sup> Jack Lewis, *The Birth of EPA*, EPA.GOV, <http://www.epa.gov/history/topics/epa/15c.html> (last visited Jan. 4, 2011).

<sup>51</sup> *Power Struggles*, *supra* note 48.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at *Segment II*.

<sup>54</sup> *Federal Statutes, Authority, Requirements*, FEDERAL ENERGY REGULATORY COMMISSION, <http://www.ferc.gov/legal/fed-sta.asp> (last visited Oct. 12, 2010).

<sup>55</sup> Alcoa Power Generating, Inc., *Relicensing Issue: The Section 401 Water Quality Certificate*, ALCOA.COM, [http://www.alcoa.com/yadkin/en/info\\_page/relicensing\\_issues\\_401.asp](http://www.alcoa.com/yadkin/en/info_page/relicensing_issues_401.asp) (last visited Oct. 29, 2010).



The FERC renewal process also requires that Alcoa obtain a 401 Water Quality Certificate issued by the North Carolina Department of Environmental Resources.<sup>56</sup>

Between 2003 and 2007, Alcoa succeeded in receiving endorsements by the N.C. Department of Environment and Natural Resources and the N.C Wildlife Resources Commission as part of its relicensing effort.<sup>57</sup> The company also contends that it conducted technical environmental impact studies to evaluate its effects on the Yadkin.<sup>58</sup> Finally, Alcoa states that, as federally required, it held transparent and publicly accessible meetings with stakeholder groups, resulting in a formal Relicensing Settlement Agreement that was signed by 23 North Carolinian organizations in 2006.<sup>59</sup> The Water Quality Certificate was awarded in May 2009.<sup>60</sup>

During the spring of 2009, however, Stanly County and a non-profit coalition called the Yadkin Riverkeeper appealed the certification on grounds that Alcoa no longer provided a substantial economic or community benefit to Stanly County.<sup>61</sup> The parties also alleged that the company was at fault in releasing polychlorinated biphenyls (PCBs) at toxic levels in the Yadkin's Badin Lake.<sup>62</sup> The North Carolina Division of Public Health released a memo in July 2010 exculpating Alcoa as the sole contributor to PCBs in Badin Lake. However, North Carolina State Senator Fletcher Hartsell and special deputy attorney general for the North Carolina Department of Justice continue to advocate against Alcoa based on an internal epidemiological

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<sup>56</sup> *Id.*

<sup>57</sup> Alcoa Power Generating, Inc., *Relicensing Issue: The Section 401 Water Quality Certificate*, ALCOA.COM, [http://www.alcoa.com/yadkin/en/info\\_page/relicensing\\_issues\\_401.asp](http://www.alcoa.com/yadkin/en/info_page/relicensing_issues_401.asp) (last visited Oct. 29, 2010).

<sup>58</sup> *Id.*

<sup>59</sup> Alcoa Power Generating, Inc., *supra* note 55.

<sup>60</sup> Lisa O'Donnell, *Battle for Control of Yadkin Dams at Critical Point*, WINSTON-SALEM JOURNAL, Sept.27, 2010, <http://www2.journalnow.com/news/2010/sep/27/battle-for-control-of-yadkin-dams-at-critical-poin-ar-421206/>.

<sup>61</sup> *Id.*

<sup>62</sup> Keith Barber, *Political Heavyweights From Davidson and Cabarrus Counties, Raleigh Line Up against Alcoa*, HOME DIRT (Aug. 4, 2010), <http://www.yesweekly.com/article-10088-political-heavyweights-from-davidson-and-cabarrus-counties-raleigh-line-up-against-alcoa.html>.

study released by the company in 1996 that revealed local residents develop kidney cancer at a rate 3.7 times greater than the general population.<sup>63</sup>

In spring 2009, North Carolina Governor Beverly Purdue filed a separate motion requesting that FERC revoke Alcoa's license and designate the state as its licensee.<sup>64</sup> The Governor and other parties opposing the license renewal argued that Alcoa no longer adequately benefitted Stanly County due to the company's decision to shift production and manpower out of North Carolina.<sup>65</sup> Petitioners also contended that the permit was weighted against public interests in that the Badin site wielded complete control over thirty-eight miles of the Yadkin River to the exclusion of community.<sup>66</sup>

The loss of a FERC license would render Alcoa's hydropower plants inoperable absent the waters necessary to fuel them.<sup>67</sup> Section 807 of the Federal Power Act currently provides for a process by which expired licenses and hydropower facilities may then be purchased at market value by the federal government or an individual state pursuant to Congressional approval.<sup>68</sup> However, while recapture is permitted by the Federal Power Act in the sense that it only confers the rights of the water in question, FERC has never considered such a request until now.<sup>69</sup>

According to Bill Holman, Director of State Policy for Duke University's Nicholas Institute for

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<sup>63</sup> Keith Barber, *Deputy AG: Alcoa Official's Answer to Legislative Committee about Epidemiological Study 'Not Factual'*, HOME DIRT (July 14, 2010), <http://www.yesweekly.com/article-9925-deputy-ag-alcoa-officials-answer-to-legislative-committee-about-epidemiological-study-not-factual.html>.

<sup>64</sup> PennWell, *Alcoa to Challenge North Carolina effort to seize 210-MW Yadkin*, HYDRO REVIEW (Apr. 4, 2009), [http://www.hydroworld.com/index/display/article-display/4841871894/articles/hrhrw/regulationandpolicy/general/Alcoa\\_to\\_challenge\\_North\\_Carolina\\_effort\\_to\\_seize\\_210-MW\\_Yadkin.html](http://www.hydroworld.com/index/display/article-display/4841871894/articles/hrhrw/regulationandpolicy/general/Alcoa_to_challenge_North_Carolina_effort_to_seize_210-MW_Yadkin.html).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Federal Regulation and Development of Power [Federal Power Act] 16 U.S.C. § 807 (2006) (granting the United States right to take over expired FERC licenses and hydropower facilities).

<sup>68</sup> *State Seeks Return of Yadkin River Flows, Hydroelectric License to the People of North Carolina*, OFFICE OF GOVERNOR BEV PURDUE (Sept. 21, 2009), <http://www.governor.state.nc.us/NewsItems/PressReleaseDetail.aspx?newsItemID=642>.

<sup>69</sup> *See* Federal Regulation and Development of Power [Federal Power Act] 16 U.S.C. § 807 (2006).

Environmental Policy Solutions, “the Alcoa case is being widely watched [...] it’s hard to predict how the [FERC] Commissioners will respond.”<sup>70</sup>

Alcoa argues that a government takeover of the Yadkin Project through section 807 would constitute the involuntary governmental taking of a private business, and amount to an unconstitutional provision within the Act.<sup>71</sup> Fiscally-conservative organizations and allies of Alcoa agree, and argue that shifting Badin Lake’s cleanup costs from the private sector to North Carolinian taxpayers would place an undue burden on the public.<sup>72</sup> Alcoa policy managers argue that effectively punishing the corporation for its diminished Carolinian workforce will create a chilling effect over other corporations considering the Carolinas.<sup>73</sup> Finally, Alcoa advocates a pro-environmental argument alleging that cost-shifting rehabilitation costs to the public will actually create a disincentive for the repair of Badin Lake, since the state government would be subject to its own agency’s review.<sup>74</sup>

As of January 21, 2010, FERC has denied Alcoa’s attempts to quash the state’s objection to its Section 401 Water Quality Certificate. Alcoa, for example, sought declaratory judgment on appeal by asserting that the state did not protest the issuance of the certificate in a timely manner. The Court rejected the motion, and reasoned that North Carolina could proceed in its ultimate request for possession of the Alcoa Yadkin site.<sup>75</sup> The case is ongoing.<sup>76</sup> The state action by the Yadkin Riverkeepers and Stanly County, meanwhile, is currently in a hearing under State

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<sup>70</sup> O’Donnell, *supra* note 8.

<sup>71</sup> Alcoa Power Generating, Inc., *Yadkin Hydropower Project: A Federal Takeover Solution*, ALCOA.COM, [http://www.alcoa.com/yadkin/en/info\\_page/relicensing\\_issues\\_federal.asp](http://www.alcoa.com/yadkin/en/info_page/relicensing_issues_federal.asp) (last visited Oct. 29, 2010).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Ray Barham, *Salisbury Post: Takeover is Anti-business*, THE YADKIN PROJECT RELICENSING BLOG (Apr. 21, 2009, 10:39 AM), <http://yadkinproject.blogspot.com/2009/04/salisbury-post-takeover-is-anti.html>.

<sup>75</sup> Order Denying Rehearing, *Alcoa Power Generating Inc. v. FERC*, 130 FERC 61,037, (D.C. Cir. Ct. Sept. 19, 2010), FERC No. 10-1066, *available at* <http://www.ferc.gov/legal/court-cases/pend-case.asp> (follow “130 FERC ¶ 61,037” hyperlink).

<sup>76</sup> Henderson, *supra* at note 31.

Administrative Judge Joe Webster, and will determine whether North Carolina incorrectly presented a Section 401 Water Quality Certificate to Alcoa after its initial request in 2006.<sup>77</sup>

States' ameliorative measures to stave off future water crises in ways that are both economically and environmentally feasible force the juxtaposition of public policy values in ways that are often incongruent.<sup>78</sup> The unprecedented decision of FERC to consider revocation of Alcoa's license renewal places North Carolina and its changing legal and social pressures on the center stage of national water law issues.<sup>79</sup> It should also demonstrate that the fundamental premise on which the Southeastern riparian "reasonable use" framework is based--the notion of water as a reliable and abundant resource--no longer holds true.<sup>80</sup> Left with a legal apparatus that is rendered defunct by the reality of Southeastern business practices and population growths, it is imperative that state and private policy makers examine a new model.<sup>81</sup> It remains to be seen whether the universality of water scarcity will ultimately supply the pressure needed to draw government and private actors into cooperative and sophisticated methods of resource allocation.<sup>82</sup> If the Alcoa case study is instructive of nothing else, it should be that for purposes of both commerce and conservation, water is an increasingly precious and finite resource.

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<sup>77</sup> Tiffany Thompson, *Water Quality Case Set to Go to Trial*, THE STANLY NEWS & PRESS (Sept. 15, 2010), <http://thesnaponline.com/breakingnews/x176916985/Water-Quality-case-set-to-go-to-trial>.

<sup>78</sup> Barham, *supra* note 74; *see also Power Struggles*, *supra* note 48.

<sup>79</sup> O'Donnell, *supra* note 60.

<sup>80</sup> *See Douglas*, *supra* note 17.

<sup>81</sup> North Carolina Dep't. of Env't and Natural Res., *River Basin Water Supply Planning*, NCWATER.ORG, <http://www.ncwater.org/basins/> (last visited Jan. 5, 2011).

<sup>82</sup> *Id.*

# FERC Issued Licenses Currently Held in North Carolina

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<b>Docket No.</b>	<b>Project Name</b>	<b>Licensee</b>	<b>Waterway</b>	<b>Auth KW</b>	<b>ST</b>	<b>Issue Date</b>	<b>Expiration Date</b>
P- 2206	YADKIN-PEE DEE	PROGRESS ENERGY CAROLINAS, INC.	PEE DEE R	108600	NC	05/19/58	04/30/08
P- 2601	BRYSON	DUKE ENERGY CAROLINAS, LLC.	OCCONALUFTEE RIVER	980	NC	07/22/80	07/31/05
P- 2602	DILLSBORO	DUKE ENERGY CAROLINAS, LLC.	TUCKASEGEE RIVER LITTLE TENNESSEE RIVER	225	NC	07/17/80	07/31/05
P- 2603	FRANKLIN	DUKE ENERGY CAROLINAS, LLC.	SOUTH FORK CATAWBA R	1040	NC	07/22/80	07/31/05
P- 2607	SPENCER MOUNTAIN	L.L.C.	HIMVASSEE RIVER	640	NC	07/13/95	06/30/25
P- 2619	MISSION	DUKE ENERGY CAROLINAS, LLC.	WHITE OAK CREEK	1800	NC	08/04/80	07/31/05
P- 2692	NANTAHALA QUEENS CREEK	DUKE ENERGY CAROLINAS, LLC.	QUEENS CREEK	43200	NC	02/06/81	02/28/06
P- 2694	WORTHVILLE DAM	MILLER & MILLER	DEEP RIVER	280	NC	10/28/82	09/30/22
P- 9842	WARD MILL DAM	WARD RAY F	WATAUGA RIVER	168	NC	09/09/86	08/31/16
P- 11437	JORDAN DAM	JORDAN HYDROELECTRIC L.P.	HAW RIVER	4400	NC	06/26/97	05/31/47

Source: Federal Energy Regulatory Commission, Federal Statutes, Authority, Requirements, <http://www.ferc.gov/legal/fed-sta.asp> (last visited Oct. 12, 2010); Env't'l Law Inst., *News & Analysis*, 40 Env't'l L. Rep. No. 10696 (July 2010).