ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 10-1066

ALCOA POWER GENERATING INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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November 12, 2010

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

To counsel's knowledge, the parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying docket are as listed in Petitioner's brief.

B. Rulings Under Review:

1. Order Denying Petition for Declaratory Order, *Alcoa Power Generating Inc.*, 129 FERC ¶ 61,028 (Oct. 15, 2009) ("Declaratory Order"), R.803, JA 585.

2. Order Denying Rehearing, *Alcoa Power Generating Inc.*, 130 FERC ¶ 61,037 (Jan. 21, 2010) ("Rehearing Order"), R.848, JA 612.

C. Related Cases:

This case, concerning the validity of a state-issued water quality certification, has not previously been before this Court or any other court. Counsel is not aware of any other related cases pending before this Court, other United States courts of appeals or district courts, or any other court in the District of Columbia.

A related case with some of the same parties is pending in the North Carolina Office of Administrative Hearings. In that case, the Petitioner here, Alcoa Power Generating Inc. ("Alcoa"), petitioned for a contested case hearing of the water quality certification issued to it by the North Carolina Division of Water Quality, represented by the State of North Carolina, an Intervenor-Respondent in

this case. *Alcoa Power Generating Inc. v. Dep't of Env't & Natural Res., Div. of Water Quality*, Petition No. 09 EHR 4092 (N.C. Office of Admin. Hearings filed July 6, 2009), R.770, JA 478. Alcoa filed the North Carolina administrative appeal to contest, *inter alia*, a surety bond required by the state certification "and its purported impacts on the efficacy of the [water quality] Certification. . . ." *Id*., Att. A at P 4, JA 481 (arguing North Carolina's action "amounts to an unlawful attempt to avoid the time limits imposed by [North Carolina regulations] and 33 U.S.C. § 1341(a)(1)").

According to Alcoa, part of the issue on appeal before this Court is whether North Carolina . . . waived its rights under . . . 33 U.S.C. § 1341(a)(1), to issue a water quality certificate" for Alcoa's project. Br. 1-2. Here, Alcoa argues that North Carolina violated the time limits of Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), by linking the efficacy of the certification to satisfaction of the bond requirement and, therefore, waived its right to issue a certification for the project. *See, e.g.*, Br. 28, 29, 37-38. This same issue is awaiting decision by an administrative law judge in North Carolina.

/s/ Jennifer S. Amerkhail
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September 22, 2010

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GLOSSARY

2009 Certification	Order issued by North Carolina on May 7, 2009, per Alcoa's request for a water quality certification
Alcoa	Petitioner Alcoa
ALJ	Administrative Law Judge
Commission or FERC	Federal Energy Regulatory Commission
Clean Water Act or CWA	Federal Water Pollution Control Act
Declaratory Order	*Alcoa Power Generating Inc.*, 129 FERC ¶ 61,028 (Oct. 15, 2009), R.803, JA 585
Declaratory Orders	Collectively, the Declaratory Order and Rehearing Order
FPA	Federal Power Act
JA	Joint Appendix
North Carolina	Division of Water Quality of the North Carolina Department of Environment and Natural Resources
North Carolina Stay Order	*Stanly County v. Dep't of Env't & Natural Res., Div. of Water Quality*, 09 EHR 3078 (N.C. Office of Admin. Hearings May 27, 2009), R.747, JA 413
P	Paragraph number in a FERC order
R.	Record citation
Rehearing Order	*Alcoa Power Generating Inc.*, 130 FERC ¶ 61,037 (Jan. 21, 2010), R.848, JA 612
Yadkin Project	Yadkin Hydroelectric Project operated by Alcoa

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Assuming jurisdiction, whether the Federal Energy Regulatory Commission ("FERC" or "Commission") reasonably interpreted Section 401 of Clean Water Act, 33 U.S.C. § 1341, and its own regulations, 18 C.F.R. § 4.34(b)(5), in finding that the North Carolina certifying agency acted within one year on a request for water quality certification for a hydroelectric project subject to FERC licensing.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

COUNTERSTATEMENT OF JURISDICTION

Petitioner Alcoa Power Generating Inc. ("Alcoa") seeks review of a set of declaratory orders issued by the Commission prior to final agency action in the underlying licensing proceeding. *Alcoa Power Generating Inc.*, 129 FERC ¶ 61,028 (2009) ("Declaratory Order"), R.803, JA 585, *reh'g denied*, 130 FERC ¶ 61,037 (2010) ("Rehearing Order"), R.848, JA 612, (collectively, "Declaratory Orders").[1] In the challenged orders, the Commission addressed the validity of the water quality certification required before a final licensing decision. *Id*. The Commission also noted that it was constrained from acting in the licensing proceeding because the certification was stayed in a state administrative proceeding. Rehearing Order at P 15, JA 616. That state proceeding is ongoing and may resolve issues raised here by Alcoa. *See infra* p. 16.

As discussed more fully in Part I of the Argument section of this brief, Alcoa's arguments are not ripe for immediate review. This Court should await resolution of the administrative appeals in North Carolina and the Commission's final decision on Alcoa's license application before moving forward on this appeal. If it does so, this Court may never need to review these disputed issues. Moreover,

[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

the alleged hardships that Alcoa would experience from delay of this Court's review are slight and not recognized as sufficient by this Court.

INTRODUCTION

This case began with an application for a new license for the Yadkin Hydroelectric Project ("Yadkin Project") submitted by Alcoa. With Alcoa continuing to operate the project under an annual license, the complex multi-agency review of the application progressed through the necessary steps toward a final licensing order until May 27, 2009. Prior to that date, Alcoa had received approvals from different resource agencies, including an approval of Alcoa's request for a water quality certification under Section 401(a)(1) of the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. § 1341(a)(1), by the North Carolina certifying agency. As required by the Commission's regulations, Alcoa filed a copy of this water quality certification, the same certification that is at issue in this appeal, in early May 2009.

On May 27, 2009, however, an administrative law judge in North Carolina stayed the water quality certification pending a hearing and merits determination on appeal of the certification. (Thereafter, Alcoa sought appeal of the certification through the same state administrative process.) This stay of the certification at the state level prevents the Commission from issuing a final licensing decision.

Seeking a way around the delay of the final licensing decision, Alcoa petitioned the Commission for a declaratory decision. Alcoa argued that the North Carolina certifying agency waived its authority under section 401(a)(1) of the Clean Water Act because it issued an order that was neither effective nor complete within the one-year period specified by the statute. Dismissing Alcoa's petition, the Commission found that North Carolina had issued a complete certification within the statutory deadline and that, under the statute and Commission regulations, there is no requirement that a certification become effective within one year of the request for certification.

Because the administrative review at the state level is ongoing and the certification stay has not been lifted, the Commission has not been able to act on the merits of Alcoa's application for a new license.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Part I of the Federal Power Act ("FPA"), § 4 *et seq.*, 16 U.S.C. § 797 *et seq.*, constitutes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation." *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 180 (1946). Under this Part of the FPA, a license "shall be conditioned upon acceptance by the licensee of all the terms and conditions of this chapter and such further conditions, if any, as the

Commission shall prescribe . . . ." FPA § 6, 16 U.S.C. § 799. These conditions include any contained in water quality certifications issued pursuant to Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1). CWA § 401(d), 33 U.S.C. § 1341(d); s*ee also Am. Rivers v. FERC*, 129 F.3d 99, 102 (2d Cir. 1997) (§ 401 of the CWA requires the Commission to "incorporate all state-imposed certification conditions into hydropower licenses" without modification).

A water quality certification is required under Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), before the Commission issues a license for an activity that may result in any discharge into the nation's waters unless the appropriate state agency has waived certification. *See S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 374 (2006). As most relevant here, Section 401(a)(1) provides that certification is waived if the state certifying agency "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request . . . ."

With regard to Section 401 compliance, the Commission's regulations specify that, after the Commission declares that the project is ready for environmental analysis, a license applicant must file the application for a water quality certification, the certification issued by the certifying agency (here, the state), or evidence of waiver of the certification. 18 C.F.R. § 4.34(b)(5)(i). For the

purpose of the applicant's submission of evidence of waiver, the regulations further define waiver:

> A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification.

18 C.F.R. § 4.34(b)(5)(iii); *see also Waiver of Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, Order No. 464, FERC Stats. & Regs. ¶ 31,730, at 30,543, *order on reh'g*, Order No. 464-A, 39 FERC ¶ 61,021, at 61,055 (1987) (amending prior regulations at 18 C.F.R. § 4.38 "to define when the certification requirements of section 401(a)(1) . . . have been waived by failure of a state . . . to act on a request for certification").

II. The Yadkin Project Relicensing Proceeding

A. Description Of The Project And Relicensing Application

The Yadkin Project consists of four hydroelectric developments, including dams, reservoirs, and appurtenant facilities, on the Yadkin River in North Carolina. License Application at A-1, R.1, JA 14. In 1958, the Commission issued Alcoa's predecessor a 50-year license for the project. Declaratory Order at P 2, JA 585. On April 25, 2006, pursuant to FPA Section 15, 16 U.S.C. § 808, Alcoa filed an application to renew the project license for another 50 years. License Application at ES-1, JA 12.

On March 13, 2007, the Commission notified parties to the proceeding that the project was ready for environmental analysis, solicited comments, and directed a submission related to water quality certification. Commission Notice at 1-2, 5, R.204, JA 30-31, 34. In response, to comply with the Commission's regulations, 18 C.F.R. § 4.34(b)(5)(i), Alcoa filed a stamped copy of its water quality certification application. Notice of Filing of Certification Application at 1, R.240, JA 184 (filed May 14, 2007). Thereafter, the Commission issued Draft and Final Environmental Impact Statements on September 28, 2007 and April 18, 2008, respectively. *See* R.315, JA 189, and R.418, JA 222. The Yadkin Project relicensing proceeding is currently pending before the Commission.

B. Water Quality Certifications

1. Issuance Of Certifications

On May 10, 2007, Alcoa applied to the Division of Water Quality of the North Carolina Department of Environment and Natural Resources ("North Carolina"), under Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), for a water quality certification. Certification Application at 1, JA 186. Six months later, on November 16, 2007, North Carolina granted the water quality certification ("2007 Certification"). APPROVAL of 401 Water Quality Certification with Additional Conditions, R.348, JA 200 (filed Nov. 30, 2007).

However, because North Carolina failed to publish notice of Alcoa's request for certification, North Carolina stated that it would revoke this water quality certification. 2008 Certification Application at 1, R.435, JA 305 (filed May 19, 2008). In response, on May 8, 2008, Alcoa withdrew its first request and simultaneously filed another certification request with North Carolina. *Id*.

A year later, on May 7, 2009, North Carolina issued a document to Alcoa, that, like the 2007 Certification, contained an introductory letter with the phrase "APPROVAL of 401 Water Quality Certification with Additional Conditions" in bold. North Carolina 401 Water Quality Certification at 1, R.708, JA 385("2009 Certification") (declaring six times that document is a "Certification"). The 2009 Certification specifies nine conditions with which Alcoa must comply, including a requirement that Alcoa post, within 90 days, "a surety bond (or equivalent instrument) . . . . in the amount of $240 million to cover all water quality improvement costs." *Id*. at 3-6, JA 387- 390. As relevant here, the bond condition states that "[t]his Certification is only effective once the required performance bond is in place." *Id*. at 6, JA 390.

One day after issuance, on May 8, 2009, Alcoa filed with FERC what it described as "the Section 401 Water Quality Certificate issued . . . by [North Carolina]." Alcoa Cover Letter, R.707, JA 334 (filed May 8, 2009).

2. State Water Quality Litigation And Stay Of Certification

Also on May 8, 2009, Stanly County, North Carolina filed an appeal of the 2009 Certification at the North Carolina Office of Administrative Hearings. Response of Alcoa, Ex. B at 4, R.748, JA 443 (filed June 10, 2009). On May 20, 2009, Stanly County filed to support a motion for preliminary injunction requesting a stay of the water quality certification. *Id*. at 1, JA 440. A state administrative law judge ("ALJ") stayed the 2009 Certification, pending state administrative appeal on May 27, 2009. *Stanly County v. Dep't of Env't & Natural Res., Div. of Water Quality*, "Order Granting Petitioner's Motion for Preliminary Injunction/Stay of Certification," 09 EHR 3078 (N.C. Office of Admin. Hearings May 27, 2009), R.747, JA 413 ("North Carolina Stay Order").

Alcoa later appealed the certification at the state level. *See Alcoa Power Generating Inc. v. Dep't of Env't & Natural Res., Div. of Water Quality*, Petition No. 09 EHR 4092 (N.C. Office of Admin. Hearings filed July 6, 2009), R.770, JA 480. In that petition, Alcoa made the following allegation:

> The provisions regarding the timing of the bond and its purported impacts on the efficacy of the 401 Certification, coupled with Respondent's absolute and arbitrary power to approve the bond, amounts to an unlawful attempt to avoid the time limits imposed by 15A NCAC § 2H.0507(b) and 33 U.S.C. § 1341(a)(1).

Id., Att. A at P 4, JA 481. Alcoa's petition was consolidated with Stanly County's petition (and a third appeal of the water quality certification by Yadkin Riverkeeper, Inc.) and scheduled for hearing after a mandated mediation period.

III. Challenged FERC Orders

The issue now before the court arises from Alcoa's request for declaratory order, filed on September 17, 2009. Petition for Declaratory Order at 1, R.783, JA 484. Alcoa asked the Commission to find that North Carolina waived its authority to issue a water quality certification for the Yadkin Project by "fail[ing] to grant or deny certification within the requisite timeframe" and by "requiring further action of [Alcoa] and a third party before the certificate could become effective." *Id*.

On October 15, 2009, the Commission denied Alcoa's request. *Alcoa Power Generating Inc.*, 129 FERC ¶ 61,028 (Oct. 15, 2009) ("Declaratory Order"), JA 585. The Commission concluded that North Carolina had not waived its Clean Water Act authority because "North Carolina did act within the one-year certification period" when it issued its approval of the water quality certification. *Id*. at P 8, JA 587. The Commission based that conclusion on its finding that North Carolina had issued a certification that, by its terms, was "final and binding" unless Alcoa appealed it at the state level. *Id*.

On January 21, 2010, the Commission issued its Order Denying Rehearing, *Alcoa Power Generating Inc.*, 130 FERC ¶ 61,037 (2010) ("Rehearing Order"), JA 612. The Commission explained that the stay of the certification by the North Carolina ALJ, not the bond condition in the state certification, restrained FERC from issuing a final order in Alcoa's licensing proceeding. *Id*. at P 15, JA 616. Under its own policy, the Commission will not issue a license if the necessary water quality certification has been stayed in state litigation. *Id*. With regard to the bond condition and the effectiveness language contained therein, the Commission found nothing in the Clean Water Act that requires effectiveness of a certification within the one-year statutory period. *Id*. at PP 15, 16, JA 616 (citing, *inter alia*, 33 U.S.C. § 1341(a)(1), providing that "no license . . . shall be granted until the certification required by this section has been obtained").

The Commission reiterated its finding that North Carolina had "act[ed] on" Alcoa's certification request within one year, consistent with Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1). *Id*. at PP 14, 19, JA 615- 616, 617. The Commission further found that the certification requirements were not waived according to the Commission's regulations, 18 C.F.R. § 4.34(b)(5)(iii), because "the issuance of the certification here is a grant of the request for certification . . . ." *Id*. at P 18, JA 617.

In response to Alcoa's submission of an affidavit describing the difficulties and details needed for bond placement, the Commission acknowledged the difficulties inherent in securing the substantial bond as a condition of the water quality certification. But, the reasonableness of the state bond condition is not reviewable by the Commission. *Id*. at P 16, JA 616. Moreover, the Commission determined that the reasonableness of the condition is irrelevant to Alcoa's argument that the certification failed to become effective within a year of Alcoa's certification request. *Id*. at P 16 & n.7, JA 616- 617.

The Commission concluded that "under the plain language of section 401(a)(1) [of the Clean Water Act], the [North Carolina] Division did not fail or refuse to act on the request for certification within one year of the receipt of the request," *id*. at P 19, JA 617, and Alcoa had not shown otherwise, *id*. at P 20, JA 618.

This appeal followed.

SUMMARY OF ARGUMENT

For reasons of timing, this Court should allow the ongoing state administrative process to run its course and the Commission to issue final licensing orders before it undertakes review of issues in this appeal. Doing so would prevent time-consuming judicial consideration of a narrow question that may become unnecessary given the potential for these administrative proceedings to meet Alcoa's primary objective of securing a new license.

Alcoa's sole purpose in bringing this appeal is to "accelerate" the FERC relicensing proceeding in order to put aside the uncertainty associated with operating the Project under annual licenses and the obligation to participate in state administrative appeals. These alleged hardships are insufficient to overcome the need for judicial restraint from unnecessary decisions. Accordingly, the Court should dismiss the appeal for lack of ripeness.

On the merits, Alcoa asks this Court to analyze anew the intricacies of North Carolina's order to determine whether the conditions in that order fit within the requirements of the Clean Water Act. The Commission reasonably construed Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), to find that North Carolina "acted on [Alcoa's] request for certification" within the one-year statutory period.

Contrary to Alcoa's arguments, certification was not waived because the state certifying agency's order was not fully effective within one year of Alcoa's request. There is no statutory language, express or implied, that requires effectiveness within one year of the request. Moreover, Congress' purpose, as expressed through the language of the statute, and reflected in the Commission's implementing regulations, 18 C.F.R. § 4.34(b)(5), supports a finding that states should have one year, no more and no less, to act on each request for certification. Under the circumstances, the Commission reasonably could conclude that the approval order issued by North Carolina within the one-year statutory period was a conditional grant of the certification request, and not a waiver of its certification authority.

ARGUMENT

I. The Court Should Dismiss Alcoa's Petition Because The Controversy Is Not Ripe For Judicial Review

Alcoa's claims are unripe now because Alcoa's interest in "accelerat[ing] FERC's consideration" of its license application, Br. 20, does not overcome the benefits to be gained from postponing review of this interlocutory dispute.

"Ripeness is a justiciability doctrine" that is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003). The doctrine is designed to prevent courts from "entangling themselves

in abstract disagreements . . . until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967).

In determining ripeness, this Court balances "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Ohngo Gaudadeh Devia v. NRC*, 492 F.3d 421, 424 (D.C. Cir. 2007) (quoting *Abbott Labs.*, 387 U.S. at 149). In this balancing, the Court looks to see whether "if [it] do[es] not decide the claim now, [it] may never need to." *Id*. (citation omitted).

While the Declaratory Orders at issue here represent a dispositive agency decision on the timing issue presented under the Clean Water Act, they are not final orders in the underlying relicensing proceeding. *See* Br. 19 (characterizing a decision on license application as the "final decision"). In that proceeding, Alcoa seeks the issuance of a new 50-year license for the Yadkin Project, Br. 2, a question that the Commission has not yet addressed. *See Toca Producers v. FERC*, 411 F.3d 262, 266 (D.C. Cir. 2005) ("[FERC] has yet to pass conclusively upon whether the producers are entitled to the only relief they now seek"). If this Court delays decision in this case until the Commission makes a final decision on the license application, the Court will benefit from a full resolution of all the licensing issues in a more concrete setting should the same or different Clean

Water Act issues be raised in a later appeal. *See id.* (appeal unripe because orders were not "sufficiently final"); *see also Friends of Keeseville v. FERC*, 859 F.2d 230, 237 (D.C. Cir. 1988) ("availability of judicial review at a later stage" favors a finding that appeal is unripe).

The specific relief sought by Alcoa in this appeal is acceleration of the Commission's licensing decision, not a new license. Br. 20. But that relief could come whether or not this Court adjudicates this appeal. At any time, the certification stay could be lifted by the North Carolina Office of Administrative Hearings, allowing FERC to act on Alcoa's application. Alternatively, the state certification proceeding could conclude with a modification of the bond condition, thus changing the terms of the certification that this Court must otherwise review in resolving this appeal. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 736 (1998) (declining to undertake "time-consuming consideration of the details" of a plan and its impacts that "may change over time"). Or, as a result of ongoing negotiations, Br. 38 n.63, Alcoa could reach settlement with North Carolina regarding satisfaction of the bond condition. *See* Rehearing Order at P 16 n.7, JA 616 (noting that Alcoa has had many months to satisfy the bond condition).

Thus, further development of the ongoing administrative proceeding could render this Court's review unnecessary or, at least, substantially limit it. *See Toca Producers*, 411 F.3d at 266 (waiting "until the conclusion of the ongoing

administrative proceeding could therefore avoid a piecemeal, duplicative, tactical and unnecessary appeal which . . . consumes limited judicial resources" (quotation omitted)); *see also FPL Energy Me. Hydro LLC v. FERC*, 551 F.3d 58, 62 (1st Cir. 2008) (after holding case in abeyance for conclusion of state-level appeals, court decided case was finally ripe for its review).

Nor is this a situation in which Alcoa will never receive judicial review because it is caught between two agencies asserting a "dual denial of responsibility." *Process Gas Consumers Group v. Dep't of Agric.*, 694 F.2d 778, 790 & n.42 (D.C. Cir. 1982) (finding an Alphonse and Gaston standstill resulted from agency inaction). The Commission properly awaits a lifting of the stay to issue a final decision on Alcoa's license application. Declaratory Order at P 8, JA 587 (noting state appeal of state certification); Rehearing Order at P 15, JA 616 (stay of certification, "not the 'effectiveness' provision" of bond condition, is the reason for not issuing licensing order); *see also City of Tacoma, Washington*, 99 FERC ¶ 61,067, at 61,309 (2002) (staying license due to state stay of certification), *order on reh'g*, 104 FERC ¶ 61,092 at P 15 (2003) (explaining same). Meanwhile, only the 2009 Certification has been stayed and the state administrative appeals of that certification are moving forward. North Carolina Stay Order at 4, JA 416 ("staying the effectiveness of the Section 401 Certification" until the presiding ALJ "holds a full hearing on Petitioner's claims[,] . . . makes a final determination on

the merits[, and] determines whether the [certification] should be affirmed, modified or voided").

While it is far from certain whether this case will ever require judicial review, Alcoa's hardship from delaying such review is slight. "[T]he hardship to those affected by the agency's action must be immediate and significant" to gain immediate review of a case that is otherwise unfit for judicial review. *Ohngo Gaudadeh Devia*, 492 F.3d at 427 (citations omitted). Here, withholding judicial review will not impose a hardship on Alcoa because, as it recognizes, Br. 20, it currently operates the Yadkin Project pursuant to an annual license that renews the terms of the original license issued in 1958. *See* Declaratory Order at P 2, JA 585. Because Alcoa's continued operation of the Project is not called into question by the Declaratory Orders, any hardship from the Commission's decision to delay action on the new license application, pending ongoing state proceedings, is neither immediate nor significant.[2]

[2] The cases cited by Alcoa, Br. 20, do not support its assertion that agency delay on a license application is a legally cognizable injury in this Court. The only cited decision of this court contains no standing or ripeness analysis because, there, petitioner sought a writ of mandamus. *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 72 (D.C. Cir. 1984). The First Circuit case supports the notion that FERC must await state action, as it does here, before it takes final action on an application. *Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d 458, 467-68 (1st Cir. 2009). And the Tenth Circuit case considers agency delay in light of the First Amendment, a context very different from this one. *Utah Animal Rights Coal. v. Salt Lake City Corp*., 371 F.3d 1248, 1256 (10th Cir. 2004).

The courts have repeatedly rejected the proposition, like that in Alcoa's brief at 20, that business uncertainty resulting from agency action (or inaction) constitutes a cognizable hardship under the ripeness analysis. *See Nat'l Park Hospitality Ass'n*, 538 U.S. at 811 (rejecting the assertion that "mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis"); *Ohngo Gaudadeh Devia*, 492 F.3d at 427 (rejecting, as insufficient, hardship claims of uncertainty about the viability of fuel storage project and associated business marketing difficulties); *Toca Producers*, 411 F.3d at 267 (producer claim of uncertainty in natural gas processing obligations arising from FERC inaction is insufficient hardship). Here, Commission inaction has not deprived Alcoa of the use of its license. Indeed, the Declaratory Orders "do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license," *Ohio Forestry*, 523 U.S. at 733, because no action has been taken on Alcoa's pending license application.

Nor does sufficient hardship flow from Alcoa's need to participate in the state administrative appeal. *See* Br. 20 (Alcoa is "hostage to further proceedings in North Carolina, which involve significant cost, time and uncertainty"). "If the only hardship a claimant will endure as a result of delaying consideration of the disputed issue is the burden of having to engage in another suit, this will not suffice to overcome an agency's challenge to ripeness." *AT&T Corp. v. FCC*, 349

F.3d 692, 700 (D.C. Cir. 2003) (quotation omitted) (finding agency's declaratory order and decision to delay consideration of rate issues unripe for review); *see Ohio Forestry*, 523 U.S. at 735 ("Court has not considered . . . litigation cost-saving sufficient by itself to justify review" in an otherwise unripe appeal). In fact, if Alcoa is successful in its appeal at the state level, there is no reason why that "victory could not, through preclusion principles, effectively carry the day." *Ohio Forestry*, 523 U.S. at 734-35; *see FPL Energy*, 551 F.3d at 63 (final state court judgment given preclusive effect on issue of Clean Water Act interpretation).

II. The Commission Properly Dismissed Alcoa's Petition And Properly Treated North Carolina's Water Quality Certification As Timely

A. Standard Of Review

This Court reviews Commission decisions made in the context of hydroelectric licensing proceedings under the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *Lichoulas v. FERC*, 606 F.3d 769, 775 (D.C. Cir. 2010) (surrender of license); *Jackson County v. FERC*, 589 F.3d 1284, 1286 (D.C. Cir. 2009) (removal of hydroelectric project). "Under this deferential standard, [the Court] must affirm the Commission's orders as long as it has 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Lichoulas*, 606 F.3d at 775 (quoting *Wis. Pub. Power, Inc.*

v. FERC, 493 F.3d 239, 256 (D.C. Cir. 2007), and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

This Court also gives substantial deference to the Commission's interpretation of its own regulations and precedents. *See NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007); *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 600 (D.C. Cir. 1997). The Commission's interpretations of its regulations are affirmed "unless [FERC's] interpretation is plainly erroneous or inconsistent with the regulation." *Bluestone Energy Design v. FERC*, 74 F.3d 1288, 1292 (D.C. Cir. 1996); *see also Howmet Corp. v. EPA*, No. 09-5360, 2010 U.S. App. LEXIS 16305, at *8 (D.C. Cir. Aug. 6, 2010) ("We accord an agency's interpretation of its own regulations a high level of deference, accepting it unless it is plainly wrong." (quotation omitted)).

The Commission is not given the same deference in its interpretations of the Section 401 of the Clean Water Act, 33 U.S.C. § 1341. *Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 297 (D.C. Cir. 2003). Because that statute is administered by another agency, the Environmental Protection Agency, courts review the Commission's interpretations using a *de novo* standard. *Id.*; *Am. Rivers*, 129 F.3d at 107. Even so, in reviewing Commission decisions that evaluate compliance with the Clean Water Act, the Court "treat[s] the Commission's findings of fact as

'conclusive' if they are 'supported by substantial evidence.'" *Ala. Rivers*, 325 F.3d at 296 (quoting FPA § 313(b), 16 U.S.C. § 825*l*(b)).

B. The Commission Reasonably Manages Its Own Proceedings

In the challenged orders, the Commission properly dismissed Alcoa's assertion that the order issued by North Carolina was not valid within one year of Alcoa's request for certification. *See, e.g.*, Rehearing Order at P 19, JA 617. Although it was satisfied that the order issued by North Carolina was a timely water quality certification and did not constitute waiver of the certifying agency's authority, *id*., the Commission nevertheless was restrained from issuing a license while the certification was stayed pending state administrative appeals. *Id*. at P 15, JA 616.

This action was proper because the Commission "enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities," *Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991), unless "its manner of proceeding significantly prejudices a party or unreasonably delays a resolution." *La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 510, 520-521 (D.C. Cir. 2007) (citation omitted); *see also U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004) (agency has "broad discretion to . . . defer consideration of particular issues to future proceedings when it thinks that doing so would be conducive to the efficient dispatch of business").

Just as this court need not expend its resources on this appeal at this stage of the licensing proceeding, the Commission reasonably decided not to waste its resources on circumstances that may change as a result of the state proceeding.

Regarding a future license, Alcoa, on appeal, asserts that the Commission cannot issue a new license "until there is an effective water quality certification." Br. 33 n.57. In Alcoa's opinion, the state certification may not become effective for a long time, if ever, because the state bond condition is onerous and possibly incapable of ever being fulfilled. Br. 38-39. But this concern is beside the point. Although it sympathized with Alcoa, the Commission could not review the bond condition. Rehearing Order at P 16 & n.7, JA 616; *see also Ala. Rivers*, 325 F.3d at 293 ("Any limitations included in the state certification become a condition on the federal license."); *Am. Rivers*, 129 F.3d at 110-11 (FERC does not have authority "to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401").

The Commission has not previously ruled on a certification provision that conditions effectiveness on a future event, Rehearing Order at P 19, JA 617, and it did not rule here on whether such a provision would prevent it from issuing a license. The challenged orders do not express a clear opinion on whether FERC could issue a license in this underlying proceeding if Alcoa does not meet the bond requirement. *See id*. at P 15 n.6, JA 616 (until FERC "indicates that [it is]

constrained from acting because the certification is not effective," Alcoa's petition is "premature"); *but see id*. at P 19, JA 618 ("we do not regard the "effectiveness" provision [the certification] contains as a cause for delaying license issuance").

But whether the 2009 Certification *ever* becomes effective is not an issue before this court. Rather, here, Alcoa is pursuing a line of reasoning that depends on the lack of an effective certification *within one year* of Alcoa's request for certification. *See, e.g.*, Br 10, 24-25, 27. At some point in the future, should the issue not resolve itself, the Commission may need to decide whether it should issue a license in a situation where a certification is not effective by its own terms. But that is not the case before the Court in this appeal.

C. The Commission Properly Found That North Carolina Did Not Waive Its Authority Under The Clean Water Act When It "Acted On" The Certification Request Within One Year

Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), requires that a state certifying agency "act on" a request for water quality certification within a year. If the state agency fails or refuses to do so, it waives its opportunity to impose conditions on a FERC-issued hydroelectric license, or to keep a hydroelectric license from issuing altogether. *Id*. The Commission may issue a license only if the "specific certification required by section 401 has been obtained" or if the certifying agency has waived its authority. *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (quotation omitted).

The statute does not define the term "act on" with regard to any range of certifying agency actions. The Commission's regulations provide that, under Section 401(a)(1) of the Clean Water Act, the state certifying agency is deemed to have waived its certifying authority if it "has not denied or granted certification" within one year. 18 C.F.R. § 4.34(b)(5)(iii); *see also Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (restating CWA § 401 as requiring "a state's decision to grant or deny a request for certification").

In discussing its regulations that define terms in the Clean Water Act, the Commission contemplated that Section 401 required the certifying agency to "make a decision" on the application within a year. *See Waiver of Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, 39 FERC ¶ 61,021 at 61,055 (FERC will not judge the information requirements needed for a state to make "an *informed decision* on a certification request" (emphasis added)); *Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters*, Order No. 533, FERC Stats. & Regs. ¶ 30,921, at 30,136 (1991) ("The only burden placed on the [state certifying] agency is to look at the request and *make a clear decision* within one year." (emphasis added)); *accord AES Sparrows Point LNG v. Md. Dep't of Env't*, 589 F.3d 721, 725 (4th Cir. 2009) (per the Army Corps of Engineers, "[t]he Section 401 certifying agencies have a

statutory limit of one year in which to *make their decisions*" (emphasis added)). This interpretation is consistent with the dictionary definition of the verb "act" as "to give a decision or award (as by vote of a deliberative body or by judicial decrees)." *Webster's New Int'l Dictionary* 20 (3d ed. 1961) (adding that this definition of "act" is "often used with *on*").

In the challenged orders, the Commission reviewed the statute, Declaratory Order at PP 3, 8, JA 586, 587, and reasonably concluded that North Carolina acted on Alcoa's request when it issued its 2009 decision entitled "APPROVAL of 401 Water Quality Certification with Additional Conditions." *Id*. at P 8, JA 587; *see also supra* pp. 7-9 (explaining course of state action). The Commission based that conclusion on its finding that the 2009 Certification is a "complete" decision: it is "entire," Rehearing Order at P 19, JA 618, and "no additional decision will be required from [North Carolina] on the certification request itself." *Id*. at P 14, JA 616. In addition, because Section 401(a)(1) of the Clean Water Act does not contain any express reference to a requirement that a certification become effective within the one-year period, the Commission found that the effectiveness language in the state bond condition is immaterial to North Carolina's compliance with the statute. *Id*. at P 16, JA 616.

Alcoa challenges the Commission's findings and its conclusion. Alcoa asserts that "the only reasonable interpretation of Section 401(a)(1) of the CWA" is that the statutory phrase "act on a request for certification" means that "the certifying agency issues a [certification] that is complete and capable of becoming effective within the one-year period." Br. 27-28; *see id*. at 37 (North Carolina's "Order cannot be considered an 'act' under any reasonable interpretation of Section 401"). Alcoa also argues that the Commission erred in finding that the certification was complete within the one-year period. These arguments are without merit.

1. Alcoa Reads An Effectiveness Requirement Into The Clean Water Act That Is Not There

On appeal, Alcoa alleges that the Commission's interpretation of the statute, as not requiring an "effective" certification within one year of the application request, is unreasonable. Br. 27, 40. Alcoa adds that the Commission failed to explain why it chose to interpret the lack of any reference to effectiveness in the statute as a reason for ignoring the effectiveness provisions of the 2009 Certification. Br. 16. To the contrary, the Commission's reasonable interpretation resulted from a proper examination of the language and purpose of Section 401 of the Clean Water Act. Rehearing Order at PP 16-17, JA 616- 617. The Commission did not ignore the bond condition or effectiveness language contained therein; rather, it properly determined that whether a certification is effective

within one-year statutory period is irrelevant to the waiver inquiry. *Id*. at PP 14, 16, JA 615, 616.

In its request for rehearing below and again on appeal here, Alcoa failed to provide any reference to the text of the statute that the Commission could use to find an effectiveness requirement. *See* Alcoa's Request for Rehearing at 12-15, R. 822, JA 600- 603; Br. 27- 40, *id*. at 29 (arguing that the Courts and Commission have not interpreted the term "act on" but that "[c]ommon sense suggests" Alcoa's interpretation). Faced with no interpretation of the statutory text for which it might provide a response, the Commission properly looked to the plain language of Section 401(a)(1). Rehearing Order at P 19, JA 617; s*ee Jimenez v. Quarterman*, 129 S. Ct. 681, 685 (2009) ("As with any question of statutory interpretation, our analysis begins with the plain language of the statute."), citing *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) ("[t]he starting point in discerning congressional intent is the existing statutory text").

The Commission examined the provision in Section 401(a)(1) that provides that it shall not grant a license until "the certification required by this section has been obtained." *See* Rehearing Order at P 15, JA 616. This text has been interpreted to require a specific certification, one that "facially satisfie[s] the express requirements of section 401." *City of Tacoma*, 460 F.3d at 68 (FERC "may not act based on any certification the state might submit; rather, it has an

obligation to determine that the specific certification required by [section 401] has been obtained" (alterations in original)). In *City of Tacoma*, the Court found that the Commission must enforce the public notice provisions of Section 401(a)(1) because the public notice requirement was an implied requirement springing from express language in the section. *Id*. Here, the Commission looked for text that would require an "effective" certification during the statutory one-year period, and found none. Rehearing Order at P 16, JA 616. It thereby completed the initial step of the statutory analysis.

As it did below, Alcoa focuses its argument on the purpose of the Clean Water Act, claiming that for reasons of public policy the Commission, and this Court on appeal, should read an effectiveness requirement into Section 401(a)(1) of the Clean Water Act. Br. 28, 30-33. This argument is unavailing.

The applicable statutory scheme adopted by Congress requires cooperation among federal and state administrative agencies in balancing competing interests in hydroelectric licensing matters. *See Pub. Util. Dist. No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 704-705 (1994). "State certifications under CWA § 401 are essential in the scheme to preserve state authority to address" changes to rivers caused by dams. *S.D. Warren*, 547 U.S. at 386; *see also City of Tacoma*, 460 F.3d at 67 ("Clean Water Act gives a primary role to states 'to block . . . local water projects' by imposing and enforcing water quality standards"

(citation omitted)); *United States v. Puerto Rico*, 721 F.2d 832, 838 (1st Cir. 1983) ("states are the prime bulwark in the effort to abate water pollution").

In this system of cooperative federalism, Congress intended that states would have up to one year, no more and no less, to act on a request for certification. Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1). Alcoa cites to legislative history to show that Congress was aware of the ability for states to delay the process and that some members of Congress acted out of concern for this potential. Br. 31. But "Congress expresses its purposes through the ordinary meaning of the words it uses . . . ." *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984).

Thus, the Commission reasonably found that "[w]hile Congress certainly wished to keep states from delaying action indefinitely, it also intended that a state have up to the full one-year period to consider a certification request and to fashion an appropriate certification." Rehearing Order at P 17, JA 617. The Commission furthered the goals, purpose, and intent of the statute by finding that North Carolina had acted within one year of Alcoa's second application. *Id*. at P 19, JA 617.

Alcoa contends that the Commission's reasoning ignores the fact that North Carolina had "far greater than the statutory one-year" period to consider Alcoa's request for certification because North Carolina began reviewing Alcoa's

application in May 2007. Br. 36-37; *see supra* p. 8 (explaining that, in May 2008, Alcoa simultaneously withdrew and resubmitted its original request for certification at the direction of North Carolina). That states have "a second opportunity" (or third or fourth opportunity, as the case may be) to consider requests for water quality certification applications is also a concern to the Commission. Br. 37; *see, e.g, FPL Energy*, 551 F.3d at 60 n.1 (applicant withdrew and simultaneously resubmitted water quality certification request every year for six years before certification issued); *Hydroelectric Licensing Under the Federal Power Act*, Order No. 2002, FERC Stats. & Regs. ¶ 31,149, 104 FERC ¶ 61,109 at P 263 (2003) ("the single most common cause of new licenses not being issued prior to expiration of the existing license is the absence of water quality certification").

But the existence of a process that permits (or arguably encourages) state delay is not a reason for the Commission to override Congressional intent. Nor is it a reason for reading text into the statute in search of waiver for a state order that Alcoa concedes was issued within one year of its second request for certification. *See* Br. 3. "FERC's role is limited to awaiting, and then deferring to, the final decision of the state. Otherwise, the state's power to block the project would be meaningless." *City of Tacoma*, 460 F.3d at 67.

For these reasons, the Commission reasonably concluded that the Clean Water Act, in defining waiver of state Section 401(a)(1) authority, does not obligate the Commission to evaluate a certification to ensure that it becomes "effective" within the statutory one-year period.

2. The Effectiveness Provision In The 2009 Certification Is Immaterial To The Clean Water Act § 401 Waiver Inquiry

The 2009 Certification includes language purporting to delay its own effectiveness until after the one-year statutory period expired. *See* Br. 27. To the extent that Alcoa argues, Br. 29 n.53, that the 2009 Certification is unique in this respect, it is incorrect. *See* Rehearing Order at P 19, JA 618 (citing *Great N. Paper, Inc.*, 77 FERC ¶ 61,066, at 61,243 (1996) for example of a certification that withheld effectiveness until license issuance); *see, e.g.*, *FPL Energy Maine Hydro LLC*, 106 FERC ¶ 62,232, at 64,460 (2004) (water quality certification did not become effective until effective date of FERC-issued license).

Section 401(d) of the Clean Water Act shows that certifications are expected to contain conditions as a matter of course. 33 U.S.C. § 1341(d) ("requirements necessary to assure" compliance with water quality standards "shall become a condition on any Federal license"); *see also Dep't of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) ("conditions of [a water quality] certification . . . become terms and conditions of the license as a matter of law"); *Keating*, 927 F.2d at 623 ("recogniz[ing] the authority of states to impose express conditions upon the

issuance of a particular certification"). The Clean Water Act leaves enforcement of these conditions to the federal licensing or permitting authority, e.g., FERC. *See, e.g.*, *Keating*, 927 F.2d at 623 ("When states make compliance with specified conditions a prerequisite to the effectiveness of a certification, the federal Government has been prepared to enforce those conditions." (citation omitted)); *Natural Res. Def. Council v. EPA*, 859 F.2d 156, 188 (D.C. Cir. 1988) (Environmental Protection Agency "enforces compliance with permit conditions" including state-imposed conditions); *accord Dep't of Interior*, 952 F.2d at 547 (describing the enforcement of license conditions by FERC through its own action or on motion of other parties). Because these conditions cannot be enforced absent incorporation into a federal license under FPA Section 6, 16 U.S.C. § 799, a water quality certification has little or no "legal effectiveness" until a license issues.

Because certification conditions cannot be enforced absent incorporation into a federal license and some certifications delay their own effectiveness until license issuance, the existence of a provision in the 2009 Certification that delays the certification's effectiveness past the one-year statutory period is neither unexpected nor illogical. As explained above, there is no indication in the statute that a certification must become effective within one year after the certification request. *See supra* pp. 27-29. Thus, it does not "def[y] logic," Br. 27, to conclude

that the effectiveness provision in the 2009 Certification is immaterial to the determination of waiver.

3. A Certification Is Complete If It Provides Consideration Of All Water Quality Issues Raised By The Request

Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), requires that the certifying agency "act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request" or waive its certification authority. The Commission reasonably interpreted that phrase to mean that the state must complete its action on a certification request within one year. Declaratory Order at P 8, JA 587 ("state had completed its action"). "Complete," according to the Commission, meant that: (1) no further certification request was required from Alcoa; and (2) North Carolina made a decision on every issue raised with regard to the certification request. Rehearing Order at P 14, JA 616 ("no additional decision will be required from [North Carolina] on the certification request").

By contrast, Alcoa ignores the statutory language concerning action *on the certification request*. Instead, Alcoa contends that North Carolina has failed to act by issuing what Alcoa asserts is an incomplete certification – one in which further action by the applicant, state certifying agency or other state agency is required within the one-year statutory period. Br. 37-38; *Id*. at 39 (the state's "Order was incomplete when issued, inherently requiring further decision by [North

Carolina]"). Again, here it is Alcoa's, not the Commission's, statutory interpretation that is unreasonable. Not only does the Commission's interpretation cleave to the text of the statute, but the Commission's definition of "complete" is more consistent with the design of the statute as a whole and the practical considerations of water quality certifications. *See* Rehearing Order at P 18, JA 617 (this certification is "one that is dependent on the satisfaction of certain conditions").

That a "condition . . . is basically unfinished and needs a great deal of work" before completion, Br. 39, is common for certification conditions and otherwise consistent with the statutory structure. *See* CWA § 401(d), 33 U.S.C. § 1341(d) (providing that "effluent limitations and other limitations, and monitoring requirements necessary to assure" compliance with federal and state water quality standards, "shall become a condition on any Federal license or permit subject to the provisions" of § 401). Reference in the statute to "monitoring" indicates that some conditions imposed in certifications will entail further actions by the applicant or certifying agency after expiration of the year that is allowed for review of the certification request. The Commission explained that under Alcoa's interpretation of the statute, states would be given far less than a year to "fashion a certification" if they also are required to complete work on all conditions within the same time period. *See* Rehearing Order at P 17, JA 617.

Here, the 2009 Certification has conditions, like the bond condition, that require further action by Alcoa or North Carolina after North Carolina finished consideration of the certification request. *See* 2009 Certification at 5, JA 389 (Condition 6.1 requires implementation of a "Fish Sampling Work Plan" by Alcoa with approval of the timing of the sampling by North Carolina); *id*. at 6, JA 390 (Condition 8 requires that Alcoa conduct a study of dissolved oxygen after upgrading its turbines and receiving approval for its study plan from North Carolina). In another proceeding, a certification issued by North Carolina required the filing of another request for water quality certification, and, yet, it was complete enough for the issuance of a FERC licensing decision. *See Jackson County*, 589 F.3d at 1290 n.6 ("subsequent 401 certification . . . required for dam removal" that the licensee then obtained). That conditions remain incomplete after the one-year statutory period is common in practice and consistent with the statute as a whole.

In sum, the Commission reasonably determined, based on statutory text and practical considerations, that if a "complete" certification was required by the Clean Water Act to avoid waiver, it must judge its completeness in relation to the certifying agencies' consideration of the request for certification.

Examining the certification presented for its review, the Commission reasonably found that it was "entire," in that it was not a partial decision on some

issues raised by the certification request. Rehearing Order at P 19, JA 618; *but see Am. Rivers*, 129 F.3d 107-108 (certifications that are partial in that they preserve the right to add more conditions without review of another request for certification are not reviewable by FERC under the CWA). The certification also required no further action by North Carolina on the certification request itself." Rehearing Order at P 14, JA 616.

Thus, the Commission properly concluded that the certification was complete within one year of Alcoa's request. These findings of fact should be upheld by this Court. *Ala. Rivers*, 325 F.3d at 296 (in reviewing decisions that evaluate compliance with the CWA, the Court "treat[s] the Commission's findings of fact as conclusive if they are supported by substantial evidence" (quotation omitted)).

D. The Commission Reasonably Interpreted Its Own Regulations When It Found North Carolina Had Granted Certification

The Commission's regulations, 18 C.F.R. § 4.34(b)(5)(iii), provide that a certifying agency is deemed to have waived the certification requirements of Section 401(a)(1) if it "has not denied or granted certification by one year after the date the certifying agency received a written request for certification." This definition of waiver is included to assist license applicants in determining when a certifying agency has waived certification, and what evidence need be submitted if waiver is alleged. *See supra* pp. 5-6. Because Alcoa submitted both its application

for water quality certification and the 2009 Certification, it complied with these regulations and was not required to submit evidence of waiver. *see supra* pp. 7, 8.

On appeal, Alcoa argues that "FERC failed to enforce its own regulations" when it determined that North Carolina granted certification within one year. Br. 41 (capitalization removed). To the contrary, the Commission fully adhered to the definition of waiver in its regulations when it examined Alcoa's claims. In so doing, the Commission reasonably found that North Carolina's approval was a "grant" of certification within one year of the request for certification. Rehearing Order at P 18, JA 617. "The Commission's interpretation of its regulations is entitled to substantial deference." *Oconto Falls v. FERC*, 204 F.3d 1154, 1162 (D.C. Cir. 2000).

In interpreting its own regulations, the Commission defines the term "grant" to include a "conditional grant." Rehearing Order at P 18, JA 617 ("certification here is a grant of the request for certification, albeit one that is dependent on the satisfaction of certain conditions"). This is not an unreasonable interpretation, given that conditions in water quality certifications are common and "[a]ny certification . . . shall become a condition on any Federal license." CWA § 401(d), 33 U.S.C. § 1341(d). It is also unsurprising, given that the Commission itself frequently issues conditional grants of permits or licenses and otherwise conditions its orders. *See, e.g., Del. Dep't of Natural Res. & Envtl. Control v. FERC*, 558

F.3d 575, 577 (D.C. Cir. 2009) (FERC "issued an order approving [LNG terminal] application subject to some sixty-seven conditions precedent"); *DTE Energy Co. v. FERC*, 394 F.3d 954, 960 (D.C. Cir. 2005) (FERC "conditionally accepted" electricity transmission application, subject to further filing); *City of Fall River v. FERC*, 507 F.3d 1, 3 (1st Cir. 2007) (FERC issued a "conditional permit [that] is subject to a number of stipulations including approval of [a] transportation plan" by a different agency).

Contrary to Alcoa's assertion, Br. 42, the Commission considered the facts raised by Alcoa regarding the burden of complying with the bond condition, summarizing the uncertainty created by the incompleteness of the condition. *See* Rehearing Order at P 11 & n.4, JA 614- 615 (citing the affidavit of Alcoa's bond expert). It determined that these facts were irrelevant to whether the 2009 Certification was a grant or denial of water quality certification. *See id*. at P 18, JA 617; *see also id*. at P 16, JA 616 ("'effectiveness' . . . has no bearing . . . on whether a state has acted on a certification request").

Even if the bond condition language deprived the 2009 Certification of any legal effect within the one-year period, it is of no matter in interpreting the regulations. There is nothing in 18 C.F.R. § 4.34(b)(5)(iii), or Section 401(a)(1) of the Clean Water Act, that expressly or impliedly indicates that a certification must become effective within the one-year period. *Accord* Rehearing Order at P 16, JA

616. Moreover, the 2009 Certification is not unique in that it contains conditions that purport to delay effectiveness until more than one year after Alcoa's request for certification. *See supra* p. 32. Therefore, after considering the facts raised by Alcoa in the context of the statute, its own regulations, and the effectiveness provisions in other certifications, the Commission reasonably concluded that the North Carolina certification was a grant of Alcoa's certification request. Rehearing Order at P 18, JA 617.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of ripeness. Otherwise, the petition should be denied on the merits, and the Commission's orders should be upheld in all respects.

Respectfully submitted,

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Alcoa Power Generating Inc. v. FERC **Docket No. P-2197**
D.C. Cir. No. 10-1066

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 9,200 words, not including the table of contents and authorities, the certificates of counsel and the addendum.

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November 12, 2010

ADDENDUM
STATUTES AND REGULATIONS

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Section 6 of the Federal Power Act, 16 U.S.C. § 799, provides as follows:

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.

Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), provides as follows:

(b) Judicial review - Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), provides as follows:

(a) Compliance with applicable requirements; application; procedures; license suspension
(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311 (b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371 (c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

Section 401(d) of the Clean Water Act, 33 U.S.C. § 1341(d), provides as follows:

(d) Limitations and monitoring requirements of certification
Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

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18 C.F.R. § 4.34(b)(5) provides as follows:

(5)(i) With regard to certification requirements for a license applicant under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), an applicant shall file within 60 days from the date of issuance of the notice of ready for environmental analysis:

(A) A copy of the water quality certification;

(B) A copy of the request for certification, including proof of the date on which the certifying agency received the request; or

(C) Evidence of waiver of water quality certification as described in paragraph (b)(5)(ii) of this section.

(ii) In the case of an application process using the alternative procedures of paragraph 4.34(i), the filing requirement of paragraph (b)(5)(i) shall apply upon issuance of notice the Commission has accepted the application as provided for in paragraph 4.32(d) of this part.

(iii) A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification. If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.

(iv) Notwithstanding any other provision in title 18, chapter I, subchapter B, part 4, any application to amend an existing license, and any application to amend a pending application for a license, requires a new request for water quality certification pursuant to paragraph (b)(5)(i) of this section if the amendment would have a material adverse impact on the water quality in the discharge from the project or proposed project.

Alcoa Power Generating Inc. v. FERC **Docket No. P-2197**
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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 12th day of November 2010, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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