

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

McMahan Hydroelectric, LLC

Project No. 14858-000

**NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY'S  
MOTION FOR LEAVE TO FILE A LIMITED RESPONSE TO PK VENTURES'  
REQUEST FOR REHEARING**

Pursuant to Rules 212 and 713(d)(2) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"), the North Carolina Department of Environmental Quality ("NCDEQ") hereby moves for leave to file a limited response to the Request for Rehearing filed by PK Ventures I Limited Partnership ("PK Ventures") on October 21, 2019. In support of this Motion, NCDEQ states the following:

1. On September 20, 2019, the Commission issued an order ("Order") granting McMahan Hydroelectric, LLC ("McMahan Hydro") an original minor license for the Bynum Hydroelectric Project ("Bynum Project"). In its Order, the Commission determined that NCDEQ waived its authority to issue a water quality certification pursuant to section 401 of the Clean Water Act.

2. On October 18, 2019, NCDEQ filed a Request for Rehearing with the Commission, contending that the Commission erred in reaching its waiver determination and requesting that the Commission withdraw the determination and incorporate the 401 Certification issued by NCDEQ on September 20, 2019 into the license for the Bynum Project.

3. On October 21, 2019, PK Ventures filed a Request for Rehearing contending that NCDEQ did not waive its authority to issue the 401 Certification for the Bynum Project but that the 401 Certification issued by NCDEQ is nonetheless invalid. The Request for Rehearing contains several allegations relating to NCDEQ's processing of McMahan Hydro's application, including that (1) NCDEQ failed to provide proper notice to PK Ventures and deprived PK

Ventures, the Commission, and the public of information to which they were entitled; (2) NCDEQ and McMahan Hydro “concocted a scheme” to deprive PK Ventures of its property; and (3) McMahan Hydro’s application was invalid under North Carolina and federal law because it was not signed by the owner of the Project.

4. Pursuant to Rule 713(d)(2), “[t]he Commission may afford parties an opportunity to file briefs . . . on one or more issues presented by a request for rehearing.” The Commission has broad discretion in permitting the filing of such briefs, and will authorize a party to file a response to a request for rehearing under this rule where “a responsive brief would assist [the Commission] in [its] decision-making.” *Williams Natural Gas Co.*, 75 F.E.R.C. ¶ 61,274, 61,892 (1996). The Commission has also permitted responsive briefing where the request for rehearing makes “detailed factual and legal contentions” to which a party has “not previously had the opportunity to respond.” *Georgia Pacific Corp.*, 91 F.E.R.C. ¶ 61,047, 61,170 (2000).

5. Furthermore, while the Commission generally does not allow “answers” to requests for rehearing, the Commission has discretion to do so pursuant to Rule 213(a)(2). *See Arkansas Power & Light Co.*, 52 F.E.R.C. ¶ 61,029, 61,156 (1990). The Commission has alternatively referred to its decision to permit an answer to a request for rehearing as “waiving” the requirements of Rule 713(d)(2) for good cause. *See, e.g., Northwest Pipeline Corp.*, 77 F.E.R.C. ¶ 61,323, 62,467 (1996). The Commission has permitted parties to file answers to requests for rehearing where the answer “provides information that assisted [the Commission] in [its] decision making process,” *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 125 F.E.R.C. ¶ 61,042, 61,142 (2008), “helps clarify the matters under discussion and it will not delay the proceeding,” *K N Interstate Gas Transmission*, 80 F.E.R.C. ¶ 61,212, 61,837 (1997), or

“will insure a complete and accurate record,” *Northwest Pipeline Corp.*, 77 F.E.R.C. ¶ 61,323, 62,467 (1996).

6. Here, NCDEQ’s limited response to PK Ventures Request for Rehearing will provide information that will assist the Commission in its decision making process; help clarify matters under discussion; ensure that necessary information is included in the record; and not delay the proceeding. Furthermore, PK Ventures’ Request for Rehearing makes detailed factual and legal contentions to which NCDEQ has not previously had the opportunity to respond.

7. NCDEQ does not seek to respond to every allegation made in PK Ventures Request for Rehearing, many of which, the Commission can and should dismiss out of hand. Rather, NCDEQ has limited its response to a few factual issues, providing relevant information that will aid the Commission in its decision making process.<sup>1</sup>

8. PK Ventures’ Request for Rehearing suggests that NCDEQ failed to provide adequate notice to the public regarding McMahan Hydro’s 401 application. NCDEQ’s response will explain the extent to which NCDEQ adhered to public notice requirements and describe the myriad ways in which documents and information relating to McMahan Hydro’s permit application were made available to the public and PK Ventures.

9. PK Venture’s Request for Rehearing also alleges that NCDEQ failed to adhere to its own 401 regulations and states that NCDEQ engaged in a “scheme” to deprive McMahan Hydro of property. NCDEQ’s response will provide needed information to the Commission

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<sup>1</sup> In limiting its proposed response in this way, NCDEQ acknowledges and takes into account the Commission’s general disfavoring of responsive pleadings to Requests for Rehearing. However, in seeking to file this voluntary and limited response, NCDEQ does not waive its right to raise any additional arguments or claims regarding PK Ventures’ Request.

regarding PK Ventures' misunderstanding of North Carolina's 401 application process and the 401 program in general.

**CONCLUSION**

For the foregoing reasons, NCDEQ respectfully requests that the Commission consider and accept for filing and inclusion in the record the Response to PK Ventures' Request for Rehearing, attached hereto as **Exhibit A**.

Respectfully submitted, this the 1<sup>st</sup> day of November, 2019.

JOSHUA H. STEIN

By: /s/ Asher P. Spiller  
Asher P. Spiller  
Assistant Attorney General  
NC Department of Justice  
Post Office Box 629  
Raleigh, NC 27602  
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*Counsel for the North Carolina Department  
of Environmental Quality*

**CERTIFICATE OF SERVICE**

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

Respectfully submitted, this the 1<sup>st</sup> day of November, 2019.

JOSHUA H. STEIN

By: /s/ Asher P. Spiller  
Asher P. Spiller  
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*Counsel for the North Carolina Department  
of Environmental Quality*

# **Exhibit A**

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

McMahan Hydroelectric, LLC

Project No. 14858-000

**NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY'S LIMITED  
RESPONSE TO PK VENTURES' REQUEST FOR REHEARING**

Pursuant to Rule 713(d)(2) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"), the North Carolina Department of Environmental Quality ("NCDEQ") hereby files this Response to the Request for Rehearing filed by PK Ventures I Limited Partnership ("PK Ventures") on September 21, 2019. NCDEQ files this document in order to briefly respond to certain erroneous allegations set forth in PK Ventures' Request for Rehearing.

Given the Commission's general disfavoring of responsive pleadings to requests for rehearing, NCDEQ has limited its response. NCDEQ submits the information below to aid the Commission in its decision-making process, address erroneous factual allegations in PK Ventures' Request, and include necessary materials in the record. NCDEQ will not here present legal argument, particularly given the general lack of any legal authority backing PK Ventures' arguments.<sup>1</sup> The absence of a response to a particular position taken by PK Ventures should not be construed as NCDEQ's concurrence. It is NCDEQ's position that the 401 Certification and NCDEQ's processing of McMahan Hydro's application were consistent with state and federal law in all respects.

**1. PK Ventures' allegations regarding defective notice and "secret" meetings are meritless.**

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<sup>1</sup> For example, PK Ventures' argument is premised, in part, on the conclusion that McMahan Hydro's request that its application be placed "on hold" is tantamount to a withdrawal of that application. Even assuming *arguendo* that it was outside NCDEQ's authority to place an application on "hold" at an applicant's request, PK Ventures cites nothing that would convert McMahan Hydro's request into a constructive withdrawal of the application.

In its request for rehearing, PK Ventures makes several allegations that NCDEQ concealed information from PK Ventures, the Commission, and the public relating to its issuance of a 401 certification to McMahan Hydro. For instance, PK Ventures states that NCDEQ's "process for the license is seriously flawed from both a procedural and public participation standpoint" and that PK Ventures "repeatedly requested notification of actions before DEQ (not provided), copies of official action (not provided), and notified DEQ that its website and email lists were not functional."<sup>2</sup> NCDEQ believes that in making this statement, PK Ventures may be referring to email communications that David Moore, counsel for PK Ventures, had with NCDEQ staff regarding technical difficulties he had signing up for the listserv<sup>3</sup> maintained by NCDEQ. Those emails are attached hereto as Exhibit 1.

The attached emails show NCDEQ staff's repeated efforts to resolve Mr. Moore's technical difficulties in signing up for NCDEQ's 401 email listserv. The attached emails also show that, as early as July 16, 2018, NCDEQ provided Mr. Moore with website links to access NCDEQ's project file for Bynum Project, NCDEQ's public notices,<sup>4</sup> and NCDEQ's permit tracker.

In accordance with State law, NCDEQ issued its public notice for the Bynum Project on July 29, 2019 by posting the notice on NCDEQ's website<sup>5</sup> and distributing the notice to its 401

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<sup>2</sup> PK Ventures Request for Reh'g, p. 11.

<sup>3</sup> Members of the public interested in receiving emails regarding public notices issued for 401 certifications can subscribe to a public listserv by following the instructions available at the following website: <https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/public-notices>

<sup>4</sup> All public notices are available at the following website: <https://deq.nc.gov/news/events/public-notices-hearings>. In addition, archived public notices for 401 certifications are also available at the following website: <https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/public-notices>.

<sup>5</sup> The public notice issued for the Bynum Project is available at [https://files.nc.gov/ncdeq/Water%20Quality/Surface%20Water%20Protection/401/Public%20Notices/PN\\_07\\_29\\_2019.pdf](https://files.nc.gov/ncdeq/Water%20Quality/Surface%20Water%20Protection/401/Public%20Notices/PN_07_29_2019.pdf).



listserv that included the email address for counsel for PK Ventures. NCDEQ's July 29, 2019 public notice provides a link to McMahan Hydro's 401 application and provides contact information for members of the public interested in making an appointment to conduct a physical inspection of the application file. All "official action[s]"<sup>6</sup> by NCDEQ relating to the Bynum Project are available on NCDEQ's website through NCDEQ's online document management system.<sup>7</sup>

When NCDEQ ultimately issued the 401 Certification to McMahan Hydro on September 20, 2019, NCDEQ copied Mr. Moore as well as Robert L. Rose of PK Ventures on the correspondence.<sup>8</sup> NCDEQ never hid information from PK Ventures, the Commission, or the public relating to its processing of McMahan Hydro's application.

PK Ventures also alleges that NCDEQ met with McMahan Hydro "in secret" and thereby hid information from it. As a public regulatory agency, NCDEQ staff routinely meet and talk on the telephone with permit applicants and third parties regarding pending applications, as NCDEQ has done with both McMahan Hydro and counsel for PK Ventures. Documents associated with such meetings are generally public records<sup>9</sup> and NCDEQ has repeatedly provided Mr. Moore with the website link to access those records. NCDEQ staff are not required by state or federal law to issue a public notice every time they have a telephone conversation or an in-person meeting with an applicant or a third party regarding a pending application.

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<sup>6</sup> PK Ventures Request for Reh'g, p. 11.

<sup>7</sup> The Bynum Project folder on the Electronic Document Management System for NCDEQ's 401 program is available can be accessed at the following website: <https://edocs.deq.nc.gov/WaterResources/0/fol/493500/Row1.aspx>. In addition, all public notices relating to NCDEQ's 401 Certifications are published here: <https://deq.nc.gov/news/events/public-notices-hearings>.

<sup>8</sup> See NCDEQ's Request for Reh'g, Higgins Dec. Ex. M (401 Certification)

<sup>9</sup> See generally N.C. Gen. Stat. § 132-1 *et seq.*

PK Ventures' allegations regarding NCDEQ's alleged inadequate disclosure of information to PK Ventures, the Commission, and the public relating to the Bynum Project are meritless.

**2. The 401 certification does not infringe upon PK Ventures' property rights.**

PK Ventures alleges that, by processing McMahan Hydro's certification request, NCDEQ "concocted a scheme by which it would assist McMahan in condemning the project" and acted in concert with McMahan Hydro to "depriv[e] PK Ventures of its lawful rights and property interests in the project."<sup>10</sup> This allegation is patently false.

A 401 certification does not and cannot grant authority to infringe upon the property rights of another. A state 401 certification does not grant a recipient with eminent domain authority, and NCDEQ has no involvement in eminent domain proceedings conducted pursuant to the Commission's regulations. Rather, a 401 certification certifies that a federally permitted activity, if carried out in a manner consistent with the conditions listed in the certification, will comply with water quality laws.<sup>11</sup>

NCDEQ expressly called attention to this fact in the cover letter for the 401 Certification issued in this case, which states in bold print:

**DWR's understanding is that McMahan Hydroelectric LLC does not currently own the Bynum Hydroelectric Project. Please note Condition 14 that states in part:**

**This Certification neither grants nor affirms any property rights, riparian rights, littoral rights, or water use rights. This Certification does not authorize trespass and does not authorize interference with the property rights, riparian rights, littoral rights, or water use rights of others.**<sup>12</sup>

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<sup>10</sup> PK Ventures' Request for Reh'g, p. 13.

<sup>11</sup> See 33 U.S.C. § 1341; 15A N.C. Admin. Code 2H .0501 *et seq.*

<sup>12</sup> See NCDEQ Request for Reh'g, Higgins Dec., Ex. M (401 Certification).

In processing McMahan Hydro's certification request, NCDEQ did not deprive PK Ventures of property rights, or "concoct a scheme" to do so. Rather, the agency fulfilled its regulatory obligations.

**3. The 401 Certification was issued in compliance with North Carolina's 401 regulations.**

PK Ventures alleges that McMahan Hydro's 401 Certification is invalid because McMahan Hydro's application was not signed by the "owner" of the project. In support of this argument, PK Ventures cites a North Carolina regulation that is no longer in effect.<sup>13</sup> The current version of the regulation, which was the version in effect when the 401 Certification was issued to McMahan Hydro, does not require a 401 application be signed by the owner of the project.<sup>14</sup>

PK Ventures also cites an internal NCDEQ email written by Drew Hargrove in early 2017. Mr. Hargrove's email from 2017 is irrelevant because it discusses the old version of 15A N.C. Admin. Code 2H. 0502(f), which is not applicable to the 401 Certification issued to McMahan Hydro on September 20, 2019. Without citing any authority, PK Ventures calls this email a "conclusive admission against interest by DEQ."<sup>15</sup> As discussed above, the requirement referenced in Mr. Hargrove's email does not apply to the 401 Certification that NCDEQ issued to McMahan Hydro. Moreover, the email acknowledges that Mr. Hargrove's supervisor, then-

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<sup>13</sup> See PK Ventures Request for Reh'g, pp. 12-13; 15A N.C. Admin. Code 2H. 0502 (2018), attached hereto as Exhibit 2.

<sup>14</sup> See 15A N.C. Admin. Code 2H. 0502 (2019) attached hereto as Exhibit 3. The hearing officer report accompanying the modification of this rule noted that this revision was necessary to ensure consistency with federal permitting requirements, which do not require ownership as a precondition to the submittal of an application. See Hearing Officer Report for Water Quality Permitting Rules p. 45 (March 14, 2019), available at [https://files.nc.gov/ncdeq/Environmental%20Management%20Commission/EMC%20Meetings/2019/march\\_2019/attachments/AttachmentA\\_19-08\\_HOReport\\_WQPermittingRules.pdf](https://files.nc.gov/ncdeq/Environmental%20Management%20Commission/EMC%20Meetings/2019/march_2019/attachments/AttachmentA_19-08_HOReport_WQPermittingRules.pdf).

<sup>15</sup> PK Ventures' Request for Reh'g, p. 13.

Deputy General Counsel Craig Bromby, “may have another take on the legal analysis.” NCDEQ is not bound by preliminary internal opinions on old, inapplicable versions of State regulations.

Finally, NCDEQ notes that PK Ventures’ argument regarding the proper application of NCDEQ’s regulations is lodged in the wrong forum. The Commission has no authority to override NCDEQ’s determination that the 401 application submitted by McMahan Hydro complies with North Carolina regulations.

### **CONCLUSION**

For the foregoing reasons, NCDEQ respectfully requests that the Commission reject PK Ventures’ arguments regarding defects in NCDEQ’s processing of McMahan Hydro’s 401 certification request.

Respectfully submitted, this the 1<sup>st</sup> day of November, 2019.

JOSHUA H. STEIN

By: /s/ Asher P. Spiller  
Asher P. Spiller  
Assistant Attorney General  
NC Department of Justice  
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Raleigh, NC 27602  
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*Counsel for the North Carolina Department  
of Environmental Quality*

**CERTIFICATE OF SERVICE**

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

Respectfully submitted, this the 1<sup>st</sup> day of November, 2019.

JOSHUA H. STEIN

By: /s/ Asher P. Spiller  
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Email: [aspiller@ncdoj.gov](mailto:aspiller@ncdoj.gov)

*Counsel for the North Carolina Department  
of Environmental Quality*

# **Exhibit 1**

---

**From:** David Moore <david.moore@earthandwatergroup.com>  
**Sent:** Thursday, September 05, 2019 1:51 PM  
**To:** Higgins, Karen  
**Cc:** Hargrove, Andrew D; Nancy Berry  
**Subject:** RE: [External] RE: Bynum Hydropower - Objection to 401 Certification DEQ Project # 2015-0124  
**Attachments:** 190905 Moore to DEQ.pdf; 20181126-5007(33253821).pdf

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Ms. Higgins – attached is a followup from correspondence last Fall on the Bynum project. We have not heard anything since that time and want to be certain to get notice and that the objection is in the file.

Thanks

David Montgomery Moore, Esq. | **Earth & Water Law Group**  
1230 Peachtree Street, NE, Suite 1900, Atlanta, GA 30309  
(404) 245-5421 (c) | [www.earthandwatergroup.com](http://www.earthandwatergroup.com)



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**From:** Higgins, Karen <karen.higgins@ncdenr.gov>  
**Sent:** Thursday, October 18, 2018 8:35 AM  
**To:** David Moore <david.moore@earthandwatergroup.com>; Dave Moore <dmontgomerymoore@bellsouth.net>  
**Cc:** Hargrove, Andrew D <drew.hargrove@ncdenr.gov>  
**Subject:** RE: [External] RE: Bynum Hydropower - Objection to 401 Certification DEQ Project # 2015-0124

Mr. Moore-

I apologize that you're having issues signing up for the listserv – you should have gotten a second email with a password. I just tried another way to sign you up so hopefully that will work. There have not been any PNs re Bynum, but here is a list of all the PNs if you'd like to see what's been posted recently:

<https://deq.nc.gov/about/divisions/water-resources/water-resources-permits/wastewater-branch/401-wetlands-buffer-permits/401-public-notice>.

Karen

--

**Karen Higgins**

401 & Buffer Permitting Branch Supervisor  
Division of Water Resources  
Department of Environmental Quality

(919) 707-3630 office **\*\*please note my phone number has changed\*\***

[karen.higgins@ncdenr.gov](mailto:karen.higgins@ncdenr.gov)

<https://deg.nc.gov/about/divisions/water-resources/water-resources-permits/wastewater-branch/401-wetlands-buffer-permits>

512 N. Salisbury Street (Archdale Building), Suite 942-E, Raleigh, NC 27604  
1617 Mail Service Center, Raleigh, NC 27699-1617

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**From:** David Moore [<mailto:david.moore@earthandwatergroup.com>]

**Sent:** Wednesday, October 17, 2018 9:07 PM

**To:** Higgins, Karen <[karen.higgins@ncdenr.gov](mailto:karen.higgins@ncdenr.gov)>; Dave Moore <[dmontgomerymoore@bellsouth.net](mailto:dmontgomerymoore@bellsouth.net)>

**Cc:** Hargrove, Andrew D <[drew.hargrove@ncdenr.gov](mailto:drew.hargrove@ncdenr.gov)>

**Subject:** RE: [External] RE: Bynum Hydropower - Objection to 401 Certification DEQ Project # 2015-0124

**CAUTION:** External email. Do not click links or open attachments unless verified. Send all suspicious email as an attachment to [Report Spam](#).

Ms. Higgins – I am attorney for Bynum Hydropower project. I had requested notice of any action on the project and also signed up to the list serve on 6/1 and again on 6/28 and just did so again. I am not receiving any 401 notifications (or any notifications at all).

Here is the screen shot from my sign up attempt:

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## denr.dwq.wetlands-public Subscription results

Your subscription request has been received, and will soon be acted upon. Depending on the configuration of this mailing list, your su  
If confirmation is required, you will soon get a confirmation email which contains further instructions.

[denr.dwq.wetlands-public list run by karen.higgins at ncdemr.gov](#)

[denr.dwq.wetlands-public administrative interface \(requires authorization\)](#)

[Overview of all lists.ncmail.net mailing lists](#)



version 2.1.12



Thanks.



David Montgomery Moore, Esq. | **Earth & Water Law Group**  
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---

**From:** Higgins, Karen <[karen.higgins@ncdenr.gov](mailto:karen.higgins@ncdenr.gov)>  
**Sent:** Monday, July 16, 2018 10:00 AM  
**To:** David Moore <[david.moore@earthandwatergroup.com](mailto:david.moore@earthandwatergroup.com)>; Dave Moore <[dmontgomerymoore@bellsouth.net](mailto:dmontgomerymoore@bellsouth.net)>  
**Cc:** Hargrove, Andrew D <[drew.hargrove@ncdenr.gov](mailto:drew.hargrove@ncdenr.gov)>  
**Subject:** RE: [External] RE: Bynum Hydropower - Objection to 401 Certification DEQ Project # 2015-0124

Mr. Moore-

We have not sent any public notices on this project. You should have received one notice on June 28 (attached). If you did not, I apologize that it didn't work. I would suggest trying to sign up for the listserv again.

We also post our public notices online: <https://deq.nc.gov/about/divisions/water-resources/water-resources-permits/wastewater-branch/401-wetlands-buffer-permits/401-public-notice>.

In addition, you can check the status of a specific project online as well: <https://deq.nc.gov/permits-regulations/permit-guidance/environmental-application-tracker> (select "Facility/Project Name", type "bynum" and click "show on map". A Green circle will show up in Chatham County. If you click on that circle, a window will pop up with the current status of the project. There is also a link that will take you directly to the project file online (here is a direct link to the project file: <https://edocs.deq.nc.gov/WaterResources/0/foi/493500/Row1.aspx>).

Thanks-  
Karen

**Karen Higgins**  
401 & Buffer Permitting Branch Supervisor  
Division of Water Resources  
Department of Environmental Quality

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<https://deq.nc.gov/about/divisions/water-resources/water-resources-permits/wastewater-branch/401-wetlands-buffer-permits>

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1617 Mail Service Center, Raleigh, NC 27699-1617

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---

**From:** David Moore [<mailto:david.moore@earthandwatergroup.com>]  
**Sent:** Friday, July 13, 2018 8:15 AM  
**To:** Higgins, Karen <[karen.higgins@ncdenr.gov](mailto:karen.higgins@ncdenr.gov)>; Dave Moore <[dmontgomerymoore@bellsouth.net](mailto:dmontgomerymoore@bellsouth.net)>  
**Cc:** Hargrove, Andrew D <[drew.hargrove@ncdenr.gov](mailto:drew.hargrove@ncdenr.gov)>  
**Subject:** RE: [External] RE: Bynum Hydropower - Objection to 401 Certification DEQ Project # 2015-0124










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Ms. Higgins, I wanted to thank you for your assistance with getting information on applications for my client's Bynum hydropower facility.

I did sign up for this website email distribution on 6/1 but I have never received any emails on any project which concerns me a bit. That may be correct if there are not pending 401 applications, but I am a little concerned that I did not receive an email confirmation either (the website says it may send a confirmation).

In checking the application tracker site I do not see anything later than February 2018:

<https://deq.nc.gov/permits-regulations/permit-guidance/environmental-application-tracker>

Name	Hits	Curr Stat
 20150124 Ver 2 - Reapplication Request for 401 WQC - 2/20/2018	0	
 20150124 Ver 2 - Project Withdrawal Email - 2/22/2018	0	
 20150124 Ver 2 - 401 Application - 2/20/2018	0	
 20150124 Ver 1 - USFWS Comments - 5/5/2017	0	
 20150124 Ver 1 - Time Ext Request - 6/28/2017	0	
 20150124 Ver 1 - Time Ext Request - 5/12/2017	0	
 20150124 Ver 1 - Other Agency Correspondence - 5/22/2017	0	
 20150124 Ver 1 - McMahan Hydro Monitoring Plan Proposal P-4093 - 1/3/2018	0	
 20150124 Ver 1 - 401 Application - 3/3/2017	0	

Page 1 of 1

As representative of the owner of this hydropower project I want to reiterate my request that the owner and myself be notified in the event any party makes an application regarding their property and hydropower facilities. If I need to do anything else to properly get on the website please let me know.

Thanks again and I hope you have a great day!

Dave Moore

David Montgomery Moore, Esq. | **Earth & Water Law Group**  
 1230 Peachtree Street, NE, Suite 1900, Atlanta, GA 30309  
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**From:** Higgins, Karen <[karen.higgins@ncdenr.gov](mailto:karen.higgins@ncdenr.gov)>  
**Sent:** Friday, June 1, 2018 12:21 PM  
**To:** Dave Moore <[dmontgomerymoore@bellsouth.net](mailto:dmontgomerymoore@bellsouth.net)>  
**Cc:** David Moore <[david.moore@earthandwatergroup.com](mailto:david.moore@earthandwatergroup.com)>; Hargrove, Andrew D <[drew.hargrove@ncdenr.gov](mailto:drew.hargrove@ncdenr.gov)>  
**Subject:** RE: [External] RE: Bynum Hydropower - Objection to 401 Certification DEQ Project # 2015-0124

Mr. Moore-

I did receive your email and letter and spoke with my counsel as well. To sign up to receive public notices, please go to this website to register: <https://lists.ncmail.net/mailman/listinfo/denr.dwq.wetlands-public>. Please note this listserv is for all 401 and buffer related notices, not to the Bynum project specifically.

Thanks-  
Karen

**Karen Higgins**  
401 & Buffer Permitting Branch Supervisor  
Division of Water Resources  
Department of Environmental Quality

(919) 807-6360 office  
[karen.higgins@ncdenr.gov](mailto:karen.higgins@ncdenr.gov)  
<https://deq.nc.gov/about/divisions/water-resources/water-resources-permits/wastewater-branch/401-wetlands-buffer-permits>

512 N. Salisbury Street (Archdale Building), Suite 942-E, Raleigh, NC 27604  
1617 Mail Service Center, Raleigh, NC 27699-1617

*Email correspondence to and from this address is subject to the North Carolina Public Records Law and may be disclosed to third parties.*

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**From:** Dave Moore [<mailto:dmontgomerymoore@bellsouth.net>]  
**Sent:** Friday, June 1, 2018 7:13 AM  
**To:** Higgins, Karen <[karen.higgins@ncdenr.gov](mailto:karen.higgins@ncdenr.gov)>  
**Cc:** 'David Moore' <[david.moore@earthandwatergroup.com](mailto:david.moore@earthandwatergroup.com)>  
**Subject:** [External] RE: Bynum Hydropower - Objection to 401 Certification DEQ Project # 2015-0124

**CAUTION:** External email. Do not click links or open attachments unless verified. Send all suspicious email as an attachment to [Report Spam](#).

Ms. Higgins- I hope you are well. I wanted to be sure you received this (I did get call from your counsel), but also ensure we are on any public notice or mailing list regarding the Bynum hydro matter. Thanks.

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**From:** Dave Moore <[dmontgomerymoore@bellsouth.net](mailto:dmontgomerymoore@bellsouth.net)>  
**Sent:** Thursday, April 26, 2018 7:55 AM  
**To:** 'karen.higgins@ncdenr.gov' <[karen.higgins@ncdenr.gov](mailto:karen.higgins@ncdenr.gov)>  
**Cc:** 'David Moore' <[david.moore@earthandwatergroup.com](mailto:david.moore@earthandwatergroup.com)>  
**Subject:** Bynum Hydropower - Objection to 401 Certification DEQ Project # 2015-0124

Dear Ms. Higgins – I am an attorney representing the owner of Bynum hydropower facilities and associated water rights. By the enclosed PK Ventures I Limited Partnership (“PK Ventures”) objects to issuance of a 401 Water Quality Certification to McMahon Hydropower or any entity not owning or having rights to the property and water at the area.

Can you please place me on the mailing and distribution list regarding the matter. Additionally I have requested under open records provisions status of the matter and would appreciate DEQ correspondence and also a copy of the application document from the applicant.

Thank you for your assistance.

Best regards

David Montgomery Moore, Esq. | **Earth & Water Law Group**  
1230 Peachtree Street, NE, Suite 1900, Atlanta, GA 30309  
(404) 245-5421 (c) | (404) 942-3340 (o) | [www.earthandwatergroup.com](http://www.earthandwatergroup.com)



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**From:** Hargrove, Andrew D <drew.hargrove@ncdenr.gov>  
**Sent:** Thursday, January 17, 2019 3:27 PM  
**To:** David Moore  
**Subject:** follow up--Bynum

David,

I enjoyed speaking with you yesterday. Here is the link to the Laserfiche file:  
<https://edocs.deq.nc.gov/WaterResources/0/foi/493500/Row1.aspx>.

Thanks,

Drew Hargrove

Assistant General Counsel  
NC Department of Environmental Quality  
Mailing Address: 1601 Mail Service Center, Raleigh, NC 27699-1601  
Phone: (919) 707-8662  
Fax: (919) 807-6489

# **Exhibit 2**

## 2018 15A N.C.A.C. 2H.0502

2018 North Carolina Administrative Code Archive

**NORTH CAROLINA ADMINISTRATIVE CODE > TITLE 15A. ENVIRONMENTAL QUALITY > CHAPTER 2. ENVIRONMENTAL MANAGEMENT > SUBCHAPTER 2H. PROCEDURES FOR PERMITS: APPROVALS > SECTION .0500. WATER QUALITY CERTIFICATION**

### **.0502 APPLICATION**

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**(a)**Application for Certification. Any person, as defined in Article 21, Chapter 143, North Carolina General Statutes, desiring issuance of the state certification or coverage under a general certification required by Section 401 of the Federal Water Pollution Control Act as amended shall file with the Director of the North Carolina Division of Water Quality (director), at the office in Raleigh, North Carolina, an original and six copies of an application for certification. Submission of an application to the Division of Coastal Management for permits to develop in North Carolina's coastal area shall suffice as an application for certification. The application shall specify:

- (1)**the date of application;
- (2)**the name, address, and phone number of the property owner;
- (3)**if the applicant is a corporation, the state in which it is domesticated, the name of its principal officers, the name and address of the North Carolina process agency, and the name of the individual who shall be primarily responsible for the conduct of the activity for which certification is sought;
- (4)**the nature of the activity to be conducted by applicant;
- (5)**whether the discharge has occurred or is proposed;
- (6)**the location of the discharge, stating the municipality, if applicable; the county; the drainage basin; the name of the receiving waters; and the location of the point of discharge with regard to the receiving waters;
- (7)**a description of the receiving waters, including type (creek, river, swamp, canal, lake, pond or estuary) if applicable; nature (fresh, brackish or salt); and wetland classification;
- (8)**description of the type of waste treatment facilities if applicable.

**(b)**Maps. There shall be attached to the application a map(s) or sketch(es) of sufficient detail to accurately delineate the boundaries of the lands owned or to be utilized by the applicant in carrying out its activity; the location, dimensions and type of any structures erected or to be erected on said lands for use in connection with the activity; and the location and extent of the receiving waters including wetlands within the boundaries of said lands.

**(c)**Power to Request Additional Information. The Director may request, and the applicant shall furnish, any additional information that may be found necessary for the proper consideration of the application.

**(d)**Omissions From Applications. If the applicant considers that it is not feasible or is unnecessary to furnish any portion of the information required by Paragraphs (a) and (b) of this Rule, applicant shall submit a detailed statement explaining the reasons for omission of any such information.

**(e)**Investigations. The staff of the Department of Environment, Health, and Natural Resources (department) shall conduct such investigation as the Director deems necessary; and applicant shall cooperate in the investigation to the extent that it shall furnish necessary information, allow the staff safe access to the lands and facilities of the applicant and lend such assistance as shall be reasonable.



**(f)**Who Must Sign Applications. The application shall be considered a "valid application" only if the application bears the signature of a responsible officer of the company, municipal official, partner or owner. This signature certifies that the applicant has title to the property, has been authorized by the owner to apply for certification or is a public entity and has the power of eminent domain. Said official in signing the application shall also certify that all information contained therein or in support thereof is true and correct to the best of his knowledge.

**(g)**An application form may be obtained from the Division of Water Quality, the Division of Coastal Management, or the U.S. Army Corps of Engineers, Wilmington District, Regulatory Branch.

## Statutory Authority

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### Statutory Authority:

Authority [G.S. 143-215.3\(a\)\(1\)](#); 143 215(c); 143B-282(1)(u);Eff. February 1, 1976;Amended Eff. December 1, 1984; January 1, 1979;RRC Objection Eff. July 18, 1996 due to lack of statutory authority and ambiguity;Recodified from *15A NCAC 2H .0501* Eff. October 1, 1996;Amended Eff. October 1, 1996.

NORTH CAROLINA ADMINISTRATIVE CODE

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End of Document

# **Exhibit 3**

## 15A N.C.A.C. 2H.0502

Current through issue 34:7 NC.R October 1, 2019

### **NC - North Carolina Administrative Code > TITLE 15A. ENVIRONMENTAL QUALITY > CHAPTER 2. ENVIRONMENTAL MANAGEMENT > SUBCHAPTER 2H. PROCEDURES FOR PERMITS: APPROVALS > SECTION .0500. WATER QUALITY CERTIFICATION**

#### **.0502 FILING APPLICATIONS**

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(a) Any person needing issuance of an individual water quality certification or Certificate of Coverage under a general certification required by this Section and Section 401 of the Clean Water Act shall file with the Director, at 1617 Mail Service Center, Raleigh, North Carolina, 27699-1617 or 512 N. Salisbury Street, Raleigh, NC 27604, one complete copy of an application for certification or submit one complete copy of an application electronically via the following website:

[https://edocs.deq.nc.gov/Forms/DWR\\_Wetlands\\_Online\\_Submittal\\_Page](https://edocs.deq.nc.gov/Forms/DWR_Wetlands_Online_Submittal_Page). The application shall be made on a form provided or approved by the Division or the U.S. Army Corps of Engineers, available electronically via the following website: <https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/401-buffer-permitting-branch/application>. The application shall include at a minimum the following:

- (1) the date of application;
- (2) the name, address, and phone number of the applicant. If the applicant is not the property owner(s), the name, address, and phone number of the property owner(s);
- (3) if the applicant is a corporation, the name and address of the North Carolina process agency, and the name, address, and phone number of the individual who is the authorized agent of the corporation and responsible for the activity for which certification is sought. The corporation must be registered with the NC Secretary of State's Office to conduct business in NC;
- (4) the nature of the activity to be conducted by applicant;
- (5) whether the discharge has occurred or is proposed;
- (6) the location of the discharge, stating the municipality, if applicable; the county; the drainage basin; the name of the receiving waters; and the location of the point of discharge with regard to the receiving waters;
- (7) a description of the receiving waters, including type (creek, river, swamp, canal, lake, pond, or estuary) if applicable; nature (fresh, brackish, or salt); and wetland classification;
- (8) a description of the type of waste treatment facilities, if applicable;
- (9) a map(s) or sketch(es) with a scale(s) and a north arrow(s) that is legible to the reviewer and of sufficient detail to delineate the boundaries of the lands owned or proposed to be utilized by the applicant in carrying out the activity; the location, dimensions, and type of any structures erected or to be erected on the lands for use in connection with the activity; and the location and extent of the receiving waters, including wetlands within the boundaries of the lands;
- (10) an application fee as required by [G.S. 143-215.3D\(e\)](#); and
- (11) a signature by the applicant for the federal permit or license or an agent authorized by the applicant. If an agent is signing for the applicant, an agent authorization letter must be provided. In signing the application, the applicant certifies that all information contained therein or in support thereof is true and correct to the best of their knowledge.

## 15A N.C.A.C. 2H.0502

**(b)**Submission of an application to the Division of Coastal Management for a permit to develop in North Carolina's coastal area in accordance with the rules of 15A NCAC 07J .0200 shall suffice as an application for a water quality certification or certificate of coverage under a general certification upon receipt by the Division from the Division of Coastal Management.

**(c)**The Division may request in writing, and the applicant shall furnish, any additional information necessary to clarify the information provided in the application under Paragraph (a) of this Rule, or to complete the evaluation in Rule .0506 of this Section.

**(d)**If the applicant believes that it is not feasible or is unnecessary to furnish any portion of the information required by Paragraphs (a), (b) and (c) of this Rule, then the applicant shall submit an explanation detailing the reasons for omission of the information. The final decision regarding the completeness of the application shall be made by the Division based upon the information required in Paragraphs (a), (b) and (c) of this Rule, and any explanation provided by the applicant regarding omitted information provided in this Paragraph.

**(e)**Pursuant to [G.S. 143-215.3\(a\)\(2\)](#), the staff of the Division shall conduct such investigation as the Division deems necessary to clarify the information provided in the application under Paragraph (a) of this Rule or to complete the evaluation in Rule .0506 of this Section. The applicant shall allow the staff safe access to the lands and facilities of the applicant and lend such assistance as shall be reasonable for those places, upon the presentation of credentials.

## Statutory Authority

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### Statutory Authority:

Authority [G.S. 143-211\(c\)](#); 143-215.3(a)(1); 143-215.3(c); 143B-282(a)(1)(u); Eff. February 1, 1976; Amended Eff. December 1, 1984; January 1, 1979; RRC Objection Eff. July 18, 1996 due to lack of statutory authority and ambiguity; Recodified from 15A NCAC 2H .0501 Eff. October 1, 1996; Amended Eff. October 1, 1996; Readopted Eff. June 1, 2019.

NORTH CAROLINA ADMINISTRATIVE CODE