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July 22, 2005

Mr. Phil Fragapane  
Division of Water Resources, DENR  
1611 Mail Service Center  
Raleigh, North Carolina 27699-1611

Subject: Catawba-Wateree Hydroelectric Project FERC No. 2232-407 comments on: (1) Draft Environmental Impact Statement for the Cities of Concord and Kannapolis: Proposed Interbasin Transfer from the Catawba River to the Rocky River Subbasin and (2) Interbasin Transfer Petition for the Cities of Concord and Kannapolis.

Dear Mr. Fragapane:

The Catawba Riverkeeper Foundation has reviewed the Draft Environmental Impact Statement ("DEIS") and the Interbasin Transfer ("IBT") Petition for the Cities of Concord and Kannapolis. The cities of Concord and Kannapolis are petitioning the North Carolina Environmental Commission ("EMC") to approve an IBT of 24 million gallons on an average day basis from a combination of the Catawba River basin and the Yadkin-Pee Dee River basin to the Rocky River subbasin. The IBT would allow the cities to withdraw a maximum of 38 million gallons a day ("MGD") from the Catawba River basin. Both the IBT Petition and DEIS conclude that this proposed IBT will cause no significant impacts to the source or receiving basins.

On behalf of the nearly two million people who depend on the Catawba River and its reservoirs for drinking water, electricity production, recreation and wildlife resources, the Catawba Riverkeeper Foundation offers the following comments on the IBT Petition and DEIS.

### **1. The Request for the IBT is Premature**

The Concord and Kannapolis request for an IBT certificate is premature. Concord and Kannapolis are requesting an IBT at a time when most of the dams on the Catawba and the Yadkin-Pee Dee Rivers are undergoing relicensing by the Federal Energy Regulatory Commission ("FERC"). The terms of these licenses will define the dam releases on the rivers for the next thirty to fifty years. Because the new terms will likely change significantly the minimum flow, base flow and instream flow requirements in both basins, it is imprudent to approve, or even consider, an IBT just before the terms of these new licenses are established.

Additionally, the request for the IBT certificate is not based on the most current, available information. At a minimum, EMC should wait until relicensing studies are complete before considering the IBT. The relicensing studies will provide more accurate and up to date information regarding flow, water quality and the cumulative impacts on the Catawba River basin. For example, the Catawba-Wateree Hydroelectric Relicensing Project's April 2005 Draft Water Supply Study Status Report states that the Catawba River basin currently has a consumptive loss of 181 MGD (280 CFS). A removal of up to 38 MGD, as requested by Concord and Kannapolis, would amount to a 21% increase in consumptive loss. This is a drastic increase in the amount of water permanently leaving the Catawba River basin.

The Concord and Kannapolis request is also premature because the cities base it on an alleged need for water that is not urgent. The IBT Petition states under section 3.1.4 titled “Reasonableness of the IBT Request,” that “existing water supplies within the Rocky River Subbasin available to Concord and Kannapolis have been fully developed and will be maximized by 2015.” That maximization is 10 years away. Concord and Kannapolis should reapply using new data from the relicensing studies and after the terms of the new FERC licenses can inform their analysis and the decision of the EMC.

## **2. The IBT Petition and DEIS Are Substantively Flawed**

### ***a.) The Conclusions in the IBT Petition and DEIS Are Unreliable***

The conclusions in the IBT Petition and DEIS are unreliable. Not only do these documents use an outdated CHEOPS model but also they use old data in the outdated model. Duke Power has updated the CHEOPS model as part of its relicensing process. Therefore, the conclusions in the IBT Petition and DEIS based on the outdated CHEOPS model are no longer credible.

The most egregious flaw of the IBT Petition and DEIS is that these documents analyze impacts on the Catawba River basin using old data up until only the year 2000. The analysis includes no data from 2002, the basin’s lowest flow year (7Q10) in recent history.

That year, the Catawba River basin suffered from unprecedented extreme drought conditions. Union, Lincoln, Cleveland and Mecklenburg counties as well as the cities of Cherryville, Shelby, Statesville, Charlotte, Mooresville, Rock Hill, Fort Mill, Tega Cay and Lake Wylie imposed mandatory water use restrictions for commercial, residential and/or agricultural customers. The U.S. Secretary of Agriculture designated 54 North Carolina counties as primary natural disaster areas. This designation included all the North Carolina counties in the Catawba River basin. The Governor of South Carolina declared many South Carolina counties in the Catawba River basin disaster areas as well. South Carolina towns and counties in the basin also imposed mandatory water use restrictions.

The drought devastated aquatic life and wildlife resources across the basin. Many of the tributaries throughout the Catawba River basin watershed dried up completely. For the first time ever, the Catawba River experienced negative hydrologic flow—more water left the river through evaporation, ground water recharge, electricity production and withdrawals than the amount of water that entered the river. Local economies suffered considerably as the low water conditions caused recreation facilities to close swimming beaches and boat access areas. The drought also led Duke Power to reduce water flow through its dams on the Catawba River, which decreased the company’s hydroelectric generation 70%. Neither the IBT Petition nor the DEIS report this dramatic reduction in power generation.

Both the IBT Petition and the DEIS rely on the old CHEOPS model and old data to conclude that withdrawing a maximum of 38 MGD from Lake Norman will have no significant impact on lake levels, downstream flow, water supply withdrawal or hydro power generation in the Catawba River basin during normal or drought conditions. This conclusion is completely uncorroborated by the drought conditions the Catawba River and its reservoirs experienced during 2002. The discrepancy between this conclusion and the actual conditions in 2002 demonstrates that the IBT Petition and DEIS do not reliably predict all the potential impacts of the proposed IBT on the Catawba River basin.

### ***b.) The IBT Petition and DEIS Do Not Adequately Assess Cumulative Impacts***

The IBT Petition and DEIS fail to adequately assess the cumulative impacts of the proposed IBT. Under the North Carolina Administrative Code (“NCAC”) an EIS must analyze the “cumulative effects and significance” of the proposed action.<sup>1</sup> NCAC defines “cumulative effects” as the “environmental impacts

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<sup>1</sup> 1 N.C. Admin. Code 25.0603 (2005).

resulting from incremental effects of an activity when added to other past, present, and reasonably foreseeable future activities regardless of what entities undertake such other actions.”<sup>2</sup>

The cumulative impacts analysis in the IBT Petition and DEIS does not fully assess past activities because, as discussed above, these documents do not account for past projects that took place in the Catawba River basin during the drought of 2002. For example, many outside communities withdrew water from the Catawba River basin by connecting emergency hook-ups and temporary pumps, dramatically increasing the pressure on Catawba water suppliers to provide water outside of the basin. Neither document includes these or other past projects from the drought in the cumulative impacts analysis.

Additionally, the cumulative impacts analysis in the IBT Petition and DEIS does not fully consider the impacts of present and foreseeable future activities. Most notably, the cumulative analysis makes no mention of whether or how new FERC license requirements following from dam relicensing in both basins could add to the impacts of the IBT.

The cumulative impacts analysis also fails to fully account for the impacts of other foreseeable future IBTs from the Catawba River basin. Union County currently has a pending IBT petition and is just one of the counties or municipalities looking to the Catawba River basin for water. Although the analysis in the IBT Petition and DEIS includes some estimate of future IBTs by relying on the consumptive loss estimate in the old CHEOPS model, the analysis is flawed because the old model is unreliable for the reasons previously stated.

As a result, the DEIS does not meet the requirements of NCAC because it fails to fully analyze the cumulative effects of past, present and foreseeable future activities on both the source and receiving basins. These activities may be individually minor but collectively significant. The IBT Petition is objectionable for those same reasons.

***c.) The IBT Petition and the DEIS Fail to Adequately Evaluate the Impact to Impaired Lakes***

Neither the IBT Petition nor the DEIS sufficiently evaluate the impacts to impaired lakes and both fail to discuss the trends of declining water quality throughout the Catawba River basin. In the September 2004 Catawba River Basinwide Water Quality Plan, the North Carolina Division of Water Quality (“DWQ”) identified Lake Rhodhiss as impaired in its support of aquatic life and Lake Wylie as impaired by eutrophication. These recent impairment designations illustrate the present and increasing challenge the Catawba River basin faces in supporting its own growing population. Neither document addresses these impairment designations nor discusses the potential impact of the IBT on the trend of declining water quality that they represent.

***d.) The IBT Petition and DEIS Are Incomplete***

The IBT Petition and the DEIS are incomplete for the following reasons:

- i. Neither document provides a determination of the safe yield from the Catawba River basin. The documents provide the safe yield for the Rocky River and then completely omit the same information for the Catawba. Without a safe yield determination, the impact to the Catawba River basin was not properly nor meaningfully evaluated.
- ii. Neither document fully analyzes the impacts of the proposed IBT on South Carolina.

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<sup>2</sup> 15A N.C. Admin. Code 1C.0103.

- iii. The IBT Petition does not investigate or analyze the harm or increased operational costs that the IBT might have on other drinking water operators in the Catawba River basin. In 2002 and more recently, the Hickory, Valdese and Lenoir area experienced taste and odor problems in public drinking water supplies as a result of declining water quality in Lake Rhodhiss and Lake Hickory. A removal of up to 38 MGD of clean water from the Catawba River could lower lake levels in the upper Catawba reservoirs, further concentrating pollutants in less clean water. The IBT could impose substantial treatment costs on Hickory, Valdese, Lenoir and other drinking water providers in the upper basin. The IBT Petition ignores these potential impacts and uses a unidirectional analysis, only considering the benefit of the IBT to Concord and Kannapolis. The petition process requires a multi-directional analysis, one that considers the benefit to Concord and Kannapolis and as well as an estimation of the resultant harm to Hickory, Valdese, Lenoir and other Catawba drinking water providers.
- iv. Neither document analyzes the potential for the transfer of non-native, invasive species from source to receiving basin or the impacts that these species may have on endangered, threatened, or sensitive species. Lake Norman and Lake James are currently infested with hydrilla. Upstream, Lake Lookout is infested with parrot feather. Additionally, a population of the endangered Carolina heelsplitter is present in Goose Creek and Duck Creek, both of which ultimately discharge into the Rocky River. Because the proposed IBT calls for transferring raw water from Lake Norman to Lake Howell, the IBT could not only spread invasive species but also allow them to threaten protected species.
- v. Both the IBT Petition and DEIS rely on old CHEOPS model results from the CMU 2001 Environmental Assessment on increasing CMU's water withdrawal from Mountain Island Lake not Lake Norman; therefore, the initial modeling analysis was not designed to evaluate the environmental impacts to Lake Norman. The attempt to adapt this modeling exercise to a lake it was not originally calibrated for is not acceptable. Additionally, neither document addresses the public comments submitted in response to that Environmental Assessment. Those comments are relevant to the environmental impact of the proposed IBT. Specifically, the documents fail to address comments the U.S. Fish and Wildlife Service submitted to FERC expressing concern over the impact of an increase in water withdrawals on downstream water resources, endangered species, candidate species, species of concern and critical habitat in the Catawba River basin. (See Exhibit A).
- vi. Both the IBT Petition and the DEIS fail to include the underlying assumptions and methodology of the CHEOPS model. The DEIS states that it includes details of its CHEOPS analysis in Appendix C. However, neither Appendix C nor any other appendix includes any information related to the CHEOPS analysis. Concord and Kannapolis should openly and explicitly identify the assumptions of their analysis and the methodology supporting their conclusions or at least provide the public with easy access to this information. By obfuscating the basis of their conclusions, the cities have presented the public with incomplete documents and an unfair burden to find the missing information on its own.
- vii. Secondary impacts were not evaluated or included in the DEIS, making the petition fatally flawed. On page 11, the application states:

“ Eighteen MGD of raw water would be transferred from Lake Norman that would pump through a new raw water main and discharge into Lake Howell in Cabarrus County and Kannapolis Lake in Rowan County.”

Currently there exists no connection for distribution of raw water from either of the two Charlotte Mecklenburg Utilities (CMU) pump stations on Lake Norman or Mountain Island Lake

nor from any CMU service lines pumping raw water to water treatment facilities located in west Charlotte. The petition requests EMC approval for a preferred alternative that would result in enormous secondary impacts from construction of a raw water distribution line through Charlotte, Huntersville and Kannapolis capable of delivering 18 MGD and pumping water up and across a watershed ridge line to receiving lakes more than 30 miles away from the source basin. No preliminary routing, cost or construction information was provided much less a full disclosure of the potential environmental impacts that would result from such a massive construction project.

Because the documents are incomplete, the public cannot adequately assess, scrutinize or comment on the IBT Petition or DEIS. More importantly, EMC cannot make a fully informed decision on whether to certify the IBT.

*e.) The IBT Petition and DEIS Over Estimate the Need for Water*

Concord and Kannapolis provide an illusory assessment of their need. There is a clear and important distinction between critical water needs and discretionary, perhaps even wasteful water use. By its own admission and included in its application, Concord states that in its service area, "lawn watering accounts for 60 percent of residential water use." Concord and Kannapolis calculate their need for the IBT without separating these kinds of discretionary uses from critical water needs such as providing water for hospital and fire department use. It is wrong to include grass watering, which is purely for ornamental and aesthetic appreciation, in calculating water needs. The Catawba River basin's water should not be expected to help keep the grass green in front of strip malls in Concord and Kannapolis. Because Concord and Kannapolis fail to separate critical water needs from ornamental needs, the Catawba Riverkeeper Foundation feels their future water demand calculations grossly overestimate their actual need for water.

*f.) Concord and Kannapolis Use Data to Their Advantage*

The most disconcerting element of the IBT request is that Concord and Kannapolis justify the need for an IBT from the Catawba River basin in large part on the shortfall of water these cities experienced during the height of the drought in 2002, yet they use old data that does not include this year as evidence that a 38 MGD IBT will have no significant impact on the Catawba River basin. The cities use the worst case year (2002) to justify their need and then use an entirely different year (2000) to state that there would be no impact to the Catawba River basin during drought conditions. They cherry pick two different years in such a way that it makes their need seem much more pronounced and the impact to the Catawba River basin much less significant. This approach causes their entire justification as well as the conclusion that there will be no impact to the Catawba River basin to be undetermined at best and grossly incorrect at worst.

**3. The Certification Process is Improper**

*a.) The EIS Has Not Served as a Decision-Making Tool*

The certification process is improper because the DEIS violates both the North Carolina State Environmental Policy Act ("SEPA") and the National Environmental Policy Act ("NEPA"), on which SEPA is based.<sup>3</sup>

"The primary purpose of an EIS is to serve as a decision-making tool.<sup>4</sup> An EIS "should provide a full and fair discussion of significant environmental impacts and should inform decision-makers and the public of the reasonable alternatives."<sup>5</sup> Moreover, an EIS "is more than a disclosure document."<sup>6</sup> It "shall serve as

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<sup>3</sup> See e.g. *Washington County, et al. v. Dep't of the Navy*, 357 F.Supp.2d 861 (E.D.N.C. 2005).

<sup>4</sup> 1 N.C. Admin. Code 25.0601.

<sup>5</sup> *Id.*

<sup>6</sup> 40 C.F.R. § 1502.1 (2005).

the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.”<sup>7</sup>

The Catawba Riverkeeper Foundation seriously questions whether Concord and Kannapolis have honestly prepared a decision-making tool rather than merely a disclosure document. Materials in the December 2003 DEIS suggest that the cities choose the proposed IBT as the preferred alternative well before completing the final EIS, not to mention before completing the December 2003 or revised DEIS.

In Appendix D of the December 2003 DEIS, an undated water resources information brochure developed and published by the city of Concord states,

“We continue to pursue a long-term solution to our water needs by applying for an interbasin certificate which will allow us to access water from the Catawba and Yadkin Rivers. We anticipate receiving the State’s approval for this certificate next year.”

Also in Appendix D of the December 2003 DEIS, a fact sheet developed and published by the city of Kannapolis states,

“City officials also continue working with the city of Concord to pursue new raw and treated water options from the Yadkin and Catawba rivers as well as future connections with the city of Charlotte. Both cities have contracted with an outside consultant to conduct the environmental assessments necessary to begin the process of applying to the State for interbasin transfers (IBT). Receipt of an IBT is expected in 2004.”

These statements, which Concord and Kannapolis made before they completed the first DEIS in December 2003, demonstrate that both cities had concluded that an IBT from the Catawba River basin was the solution to their water shortage problem from the beginning of the decision-making process and that they have not used the DEIS as a decision-making tool.

Moreover, because the DEIS is incomplete, non-cumulative and unreliable, the document not only fails to provide a “full and fair discussion of significant environmental impacts” but also fails to genuinely “inform decision-makers and the public of the reasonable alternatives” to the proposed IBT. These failures are further evidence that Concord and Kannapolis have prepared nothing more than a disclosure document in an attempt to justify a preordained decision.

The DEIS, therefore, violates both SEPA and NEPA. As a result of the cities’ cursory approach to preparing the DEIS and failure to meet the standards of both SEPA and NEPA, the certification process for the proposed IBT is improper.

***b.) The Present Certification Process Violates the North Carolina Administrative Procedure Act.***

The present certification process is also improper because it is a new rule adopted in violation of the North Carolina Administrative Procedure Act (“NCAPA”). NCAPA requires an agency to notify the public and hold a public hearing if one is timely requested and accept public comments for at least 60 days before making any changes to its rules.<sup>8</sup> NCAPA defines a “rule” as “any agency regulation, standard, or statement of general applicability that . . . describes the procedure or practice requirements of an agency.”<sup>9</sup>

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<sup>7</sup> 40 C.F.R. § 1502.2(g).

<sup>8</sup> N.C. Gen. Stat. §§ 150B-18, 150 B-21 (2005).

<sup>9</sup> N.C. Gen. Stat. § 150B-2(8a).

The certification process depicted in the Division of Water Resources' ("DWR") flow chart titled "Interbasin Certification Process"<sup>10</sup> is a rule within the meaning of NCAPA. DWR itself presents the certification process as a rule by providing the flow chart as one of the links on its website under the subtitle "Rules, Policies, & Regulations."<sup>11</sup> Moreover, the certification process clearly "describes the procedure" the DWR follows and requires all applicants to follow during the IBT certification process. Therefore, the certification process is a rule that DWR may not change without complying with the requirements of NCAPA.

DWR adopted the new certification process in violation of NCAPA. On June 24, 2005, after EMC held the public hearings on June 22 and 23, 2005, DWR posted a new flow chart in place of the old one.<sup>12</sup> In the previous flow chart, an applicant prepares its IBT petition and EIS before EMC holds the public hearing and seeks public comment on these finished documents (see Exhibit B). In the new flow chart, EMC holds the public hearing and seeks public comment on the IBT petition and the DEIS at the same time (see Exhibit C).

The new flow chart reflects the present process DWR and EMC are following for the Concord and Kannapolis IBT certification. This process is not only different from the process DWR previously followed for other IBT certifications but also from the process DWR published on its website up until and including the days EMC held the public hearings. Because the new process allows EMC to seek public comment only on the DEIES and before the public has the opportunity to review a final EIS, it improperly denies the public of the opportunity to effectively comment on the proposed IBT and to sufficiently and meaningfully inform EMC's certification decision. As a result, it is a dramatically different process that greatly reduces the opportunity for public input.

Because the certification process is (1) a rule within the meaning of NCAPA and (2) a rule that DWR changed without following the public notice requirements of NCAPA, the present certification process is not only improper but also illegal.

***c.) EMC Cannot Make a Proper Decision***

The certification process is improper because EMC does not have sufficient information to make the proper decision on whether to grant certification. Under the North Carolina statute governing the regulation of surface water transfers, EMC may not grant a certificate for a water transfer unless the applicant establishes and EMC concludes, based upon findings of fact made in the EIS that "the benefits of the proposed transfer outweigh the detriments of the proposed transfer."<sup>13</sup>

Here, the DEIS is incomplete, non-cumulative, and contains unreliable conclusions. Unless the final EIS addresses all of these faults, EMC cannot properly weigh the benefits of the proposed transfer against the detriments based on the findings of fact in the EIS. In that case, the certification process would be improper because any conclusion EMC makes would be arbitrary, capricious and not meeting the standard of law.

***d.) The Certification Process is Improper Because it Has Not Included South Carolina or the U.S. Fish and Wildlife Service***

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<sup>10</sup> Division of Water Resources, North Carolina Department of Environment and Natural Resources, *Interbasin Transfer Certification Process*, [http://www.ncwater.org/Permits\\_and\\_Registration/Interbasin\\_Transfer/process.php](http://www.ncwater.org/Permits_and_Registration/Interbasin_Transfer/process.php) (last modified Jan. 15, 2004).

<sup>11</sup> Division of Water Resources, North Carolina Department of Environment and Natural Resources, *Interbasin Transfer Certification*, [http://www.ncwater.org/Permits\\_and\\_Registration/Interbasin\\_Transfer/](http://www.ncwater.org/Permits_and_Registration/Interbasin_Transfer/) (last modified June, 24, 2005).

<sup>12</sup> Although DWR changed the last modified date on its main Interbasin Certification Process page, it has not yet changed the date on the flow chart page.

<sup>13</sup> N.C.Gen. Stat. § 143-215.221.

Finally, the IBT certification process is improper because it seems that neither the State of South Carolina nor the U.S. Fish and Wildlife Service have been involved. The proposed IBT could result in significant impacts to the State of South Carolina as well as to federally protected threatened and endangered species. The Catawba Riverkeeper Foundation would like to know whether Concord and Kannapolis notified and provided any of the following stakeholders the opportunity to comment: the South Carolina Department of Health and Environmental Control, South Carolina drinking and wastewater operators in the Catawba River basin and the U.S. Fish and Wildlife Service. Additionally, the Catawba Riverkeeper Foundation would like to know whether the United States Environmental Protection Agency has been involved in what appears to us to be a procedurally improper application and a grossly flawed environmental impact analysis.

#### **4. Conclusion**

Because the application seeks approval for an IBT that meets the needs of Concord and Kannapolis for the next 30 years, it is the functional equivalent of a 30-year permit request in advance of relicensing processes occurring in both the Catawba and Yadkin Pee Dee River basins. The Catawba Riverkeeper Foundation believes this is the equivalent of a "water grab" before new flow requirements are required by the FERC relicensing processes.

The minimum flows required in relicensing could significantly change the amount of Catawba River water available to the 14 counties and 22 municipalities that operate drinking water and wastewater facilities within the Catawba River basin. This water should be reserved for Catawba River basin operators, not given to cities and counties far outside the basin before current studies determine the cumulative impacts to water quality and water quantity. There is great concern over whether the Catawba River basin can withstand the negative impacts of its own growing population much less be expected to provide for the needs of growing populations outside the basin.

It is critically important to take an integrated regional view of the way the Catawba River system is managed to assure that adequate water resources will be available to support aquatic resources, wildlife, recreation, drinking water needs, power production and the equitable growth of reliant communities besides just Concord and Kannapolis. The drought of 2002 demonstrated how important it is to take a step back and consider some other management model than "first come first served."

For the reasons stated above, the Catawba Riverkeeper Foundation requests that EMC deny Concord and Kannapolis their request for IBT certification. However, if EMC finds that outright denial is inappropriate, we ask that it considers taking one of the following alternatives in decreasing order of preference:

1. Require the applicant to reapply using new data and an updated model after the new FERC license terms are established;
2. Require the applicant to reapply using new data and an updated model after the relicensing studies are complete;

Thank you for considering the Catawba Riverkeeper Foundation's comments on the IBT Petition and DEIS.

Sincerely,

A handwritten signature in black ink that reads "Donna Lisenby". The signature is written in a cursive style with a large, looped 'D' and 'L'.

Donna Marie Lisenby  
Catawba Riverkeeper®

A handwritten signature in black ink that reads "Marirose Pratt". The signature is written in a cursive style with a large, looped 'M' and 'P'.

Marirose J. Pratt  
Legal Intern

# Exhibit A



## United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

AUG 26 2002

RECEIVED  
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FEDERAL ENERGY  
REGULATORY COMMISSION

Ms. Magalie R. Salas, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20240

Re: Catawba-Wataree Hydroelectric Project, FERC No. 2232-407, COMMENTS in  
Response to Notice of Availability of Environmental Assessment

Dear Ms. Salas:

The Department of the Interior (Department) has reviewed the environmental assessment that was developed by the Federal Energy Regulatory Commission (Commission) in response to Duke Energy Corporation's Application for Amendment of License for the Catawba-Wataree Hydroelectric Project, FERC No. 2232-407. This environmental assessment was developed to assist the Commission in determining whether it should amend Duke Energy Corporation's (Duke Energy) license to allow the Charlotte-Mecklenburg Utilities District to increase its water withdrawals at the Catawba River Raw Water Pump Station, which is located on Mountain Island Lake.

On behalf of the U.S. Fish and Wildlife Service (Service), the Department submits the following comments on the Commission's environmental assessment.

### **Concerns Regarding Endangered Species**

The Commission's environmental assessment fails to adequately address the impacts of the proposed action on endangered species, candidate species, species of concern and critical habitat. The Catawba River contains a diverse and abundant aquatic community, and the Service is concerned that the amendment and its associated water withdrawal will negatively impact these species and their associated habitat. In particular, the Service is concerned about the proposed withdrawal's potential impacts on the following aquatic and terrestrial species:

***Carolina heelsplitter.*** The environmental assessment erroneously states that "there is no evidence to confirm that the Carolina heelsplitter is or is not present" in the vicinity of the proposed action, and that an increased water withdrawal would have "little effect on mussel habitat." See Environmental Assessment at 4-36. The Commission came to this conclusion, however, without requiring Duke Energy to survey for the presence of the Carolina heelsplitter. There is historical evidence that the Carolina heelsplitter has been found in the Catawba River system. While the species' range has been seriously reduced by impoundments and the general deterioration of habitat and water quality, six surviving populations remain and one of these

populations is found in Goose Creek, which is located within the Charlotte-Mecklenburg Utilities District. In light of the Carolina heelsplitter's status as an endangered species, the Commission should have required a thorough survey of the area of affect.

The Service is extremely concerned about the potential impacts of the proposed water withdrawal on this species. The low numbers of individuals and the restricted range of the surviving populations make the Carolina heelsplitter extremely vulnerable to extirpation. Additionally, existing and potential land use in the surrounding areas threaten the habitat and water quality of the existing Carolina heelsplitter populations by increasing the discharge and runoff of silt, sediments and pollutants. The Service is also concerned about the rapid development of the areas surrounding the Charlotte-Mecklenburg Utility District; such rapid development has led to excessive storm-water runoff, which has had an adverse impact on the stability of the river's and streams' banks and channels.

Moreover, the environmental assessment fails to sufficiently address the impacts of the proposed action on the Carolina heelsplitter's critical habitat. In July 2002, the Service designated critical habitat for the Carolina heelsplitter. See 67 Fed. Reg. at 44,502-44,522. Two of these designated critical habitat units are within the area affected by the proposed action. These critical habitat units are part of the currently-occupied range of the Carolina heelsplitter, and these units provide the physical and biological habitat elements necessary for the life cycle needs of the species. In accordance with the recovery goals and criteria outlined in the recovery plan for the Carolina heelsplitter, the protection of these units are essential to the conservation of the species. The Commission's environmental assessment should have discussed the potential impacts that the proposed water withdrawal will have on these critical habitat units.

Finally, the Service believes that the Commission should initiate consultation as required by 50 C.F.R. Part 402. These regulations require federal agencies to consult with the Service on any prospective action that "may affect" listed species or critical habitat. See 50 C.F.R. §§ 402.11 and 402.14. Because the proposed water withdrawal may detrimentally affect the Carolina heelsplitter and its habitat, the Service recommends that the Commission initiate consultation and thoroughly assess the direct, cumulative and secondary effects that are associated with the withdrawal. Moreover, the Service recommends that the Commission assess whether the construction activity associated with the withdrawal is substantial enough to warrant the preparation of a biological assessment. A federal agency is required to prepare a biological assessment for "major construction activities." See 50 C.F.R. § 402.12. It is not clear from the Commission's environmental assessment whether the Commission conducted this necessary analysis.

Schweinitz's sunflower. The environmental assessment concludes that the Schweinitz's sunflower "would not be adversely affected by the proposed action." See Environmental Assessment at 4-37. It is unclear from the environmental assessment, however, whether the habitat that surrounds the proposed action has been assessed for the presence of the Schweinitz's sunflower. Without a thorough assessment of the area surrounding the proposed action, the

Commission cannot conclude that this species will not be impacted by the proposed water withdrawal.

*Georgia aster*. The environmental assessment fails to discuss the proposed action's potential impacts on the Georgia aster, a species that is currently a candidate for listing as endangered. The Georgia aster occurs in an area that is likely to be affected by the proposed action. The Service therefore recommends that the Commission's environmental assessment be revised to include a discussion of the impacts of the proposed action on this species. The Service further recommends that the Commission confer with the Service if the Commission determines that the Georgia aster may be affected by the proposed action.

#### **Concerns Related to the Sufficiency of the Commission's Environmental Analysis**

The Service has general concerns as to whether the Commission's environmental analysis satisfies the requirements of the National Environmental Policy Act (NEPA). In particular, the Service is concerned that the proposed action may constitute a "major Federal action significantly affecting the quality of the human environment" and may therefore warrant the preparation of an environmental impact statement (EIS). The Commission has concluded that the proposed water withdrawal does not constitute a "major Federal action," but provides little support for this determination. The Service is concerned that the impacts of the proposed water withdrawal may be significant enough to rise to the level of a "major Federal action" and may therefore warrant a more thorough environmental analysis.

The Service is also concerned about the cumulative and secondary impacts of the actions that Duke Energy has been taking in the vicinity of the Catawba-Wataree Project. In particular, the Service is concerned about the impacts that the proposed interbasin transfer and the proposed wastewater treatment facility will have on the fish and wildlife resources in the Project area. Duke Energy, the Charlotte-Mecklenburg Utilities District and the Commission appear to be considering each of these actions separately.<sup>1</sup> In so doing, however, they fail to sufficiently acknowledge that these actions, when considered in the aggregate, may have significant impacts on fish and wildlife resources and their related habitat. An increased water withdrawal will require an increase in transmission and distribution facilities, and an expanded discharge will result in an increase in wastewater collection and treatment. These interrelated actions should be analyzed collectively so as to ensure that their environmental impacts are sufficiently addressed.

#### **Specific Comments and Concerns**

In addition to the general comments set forth above, the Service would like to take this

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<sup>1</sup> For example, the interbasin transfer of the water proposed for withdrawal was analyzed in a separate environmental document, as was the construction and use of the Three-County Regional Water Reclamation Facility. See Environmental Assessment at 4-40.

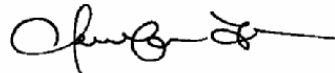
opportunity to articulate the following specific concerns:

- The Service questions the use of daily average flow levels as a means of estimating impacts on aquatic habitat. Even short-term low flows may have a significant effect on aquatic species, especially on benthic macro invertebrates. Moreover, the Service recommends that an instream flow study be conducted. The data from such a study would allow for a more thorough analysis of the effects that the proposed water withdrawal will have on future flow requirements. Also, instream flows will be a topic of concern when the Project is up for relicensing, and an instream flow study will help determine the flow patterns necessary to restore habitat diversity and maintain a healthy riverine ecosystem.
- In August 2001, the Service submitted a comprehensive plan entitled "Santee-Cooper Diadromous Fish Passage Restoration Plan," which addresses rebuilding the populations of the basin's diadromous fish. The environmental assessment did not discuss this plan and did not address how the proposed increase in water withdrawal will affect the goals and objectives of the plan.
- The environmental assessment fails to adequately address the impact that increased wastewater discharge will have on Sugar Creek.

**Conclusion**

Thank you for considering the Service's comments on the Commission's environmental assessment. If you have questions about this submission, please contact Mr. Mark Cantrell at 828-258-3939, extension 227.

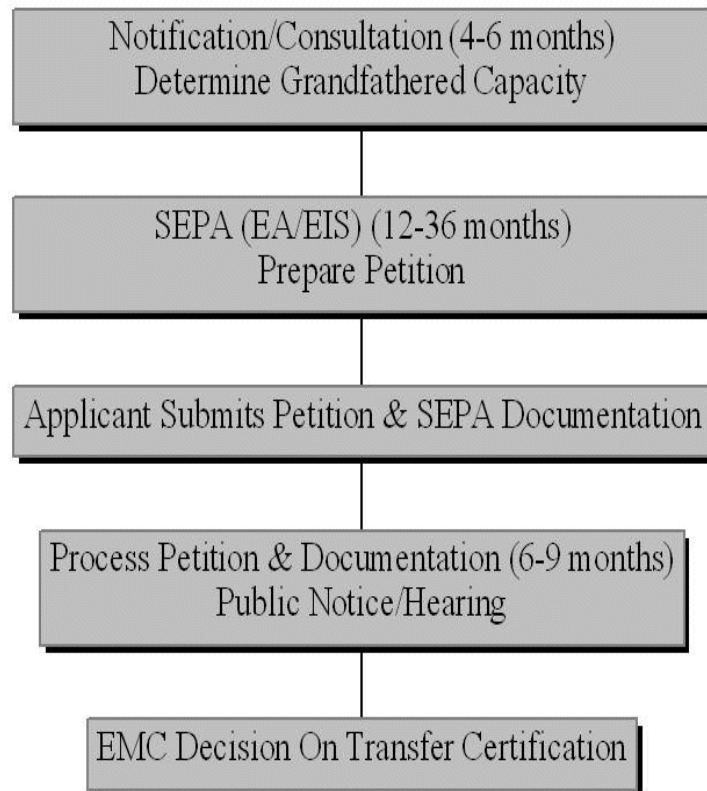
Sincerely,



Jennifer L. Frozena  
Attorney-Advisor  
Office of the Solicitor

Exhibit B

## *Interbasin Transfer Certification Process*



## Interbasin Transfer Certification Process

