

**Agenda Item:** 10-21 **Presentation of Administrative Law Judge's Recommended Decision, Jackson County v. DENR, Duke Energy, 08 EHR 0019; Town of Franklin v. DENR, Duke Energy, 07 EHR 2201**

**Explanation:**

The Director of the Division of Water Quality issued a 401 Water Quality Certification to Duke Energy for the removal of the Dillsboro Dam and Powerhouse on the Tuckasegee River. Jackson County and the Town of Franklin challenged the issuance of the certification and the petitions for contested case were consolidated for hearing.

The Petitioners filed a motion for summary judgment on all issues. In October 2008 the ALJ denied the motion as to Petitioners but made certain conclusions of law in favor of the Respondents, essentially entering summary judgment in favor of the Respondents on the issues addressed. The ALJ determined that the issues remaining were whether the 2007 401 Certification should have been issued and whether Respondent properly applied applicable North Carolina law and rules to the Respondent Intervenor's application for approval of the method for removal of the Dillsboro Dam and Powerhouse. In November 2008 Petitioners filed a notice of voluntary dismissal with regard to the pending issues specified in the ALJ's Order of 30 October 2008.

The ALJ later amended the October 2008 Order to include the issue whether the Respondent violated the North Carolina Environmental Policy Act concerning public funding when it issued the 2007 Certification. The parties submitted cross motions for summary judgment on this sole remaining issue.

The Administrative Law Judge entered a Summary Judgment Decision in September 2009 recommending that the EMC grant summary judgment to DENR and Duke Energy and deny the motion for summary judgment of Petitioners on the issue of whether the Respondent violated the North Carolina Environmental Policy Act concerning public funding when it issued the 2007 Certification.

The ALJ recommends upholding the 401 Certification issued to Duke Energy.

**Recommendation:**

Summary judgment is properly allowed "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. Summary judgment, when appropriate, may be rendered against the moving party. N.C.G.S. § 1A-1, Rule 56(c).

Under the APA, the Commission shall adopt the ALJ's decision unless it demonstrates that the ALJ's decision is clearly contrary to the preponderance of the admissible evidence; modify the decision or reject the decision with a statement of reasons and corresponding findings of fact that are supported by a preponderance of the evidence.