Agenda Item: 11-29 **Presentation of Administrative Law Judge's Recommended Decision, The City of Rockingham and American Rivers v. NC DENR and Progress Energy Carolinas, Inc., 08 EHR 0955, Montgomery County**

Explanation: The Director of the Division of Water Quality issued the 401 Water Certification, which was subsequently amended, to Progress Energy in connection with Progress Energy's application for an operating license from the Federal Energy Regulatory Commission for the hydropower dams on the Yadkin-Pee Dee River at the Tillery and Blewett Falls Reservoirs. The City of Rockingham and the American Rivers, a non-profit conservation organization, filed this contested case challenging the 401 Certification for failing to ensure a minimum stream flow to protect the existing and attainable primary and secondary recreational uses and the survival of the aquatic and biological habitat of the waters in the Tillery Reach. They also challenged the condition attached to the Certification that allowed land conservation in lieu of increased stream flows in the reach.

Progress Energy was permitted to intervene and participate in the hearing process.

The Administrative Law Judge entered a Decision recommending that the EMC uphold the issuance of the 401 Water Quality Certification after determining that the Division of Water Quality acted in accordance with its authority, used proper procedure and did not act erroneously or arbitrarily or capriciously in issuing the original Certification and later the Amended Certification.

Commission Action: 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.