

Tapoco Hydroelectric Project
FERC No. 2169

Relicensing Settlement Agreement

April 2004

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List of Acronyms

ACHP	Advisory Council on Historic Preservation
ADI	Average Daily Inflow
APGI	Alcoa Power Generating Inc.
BIA	Bureau of Indian Affairs
CFR	Code of Federal Regulation
Cross Creek	Cross Creek Property Owners Association
cfs	Cubic Feet per Second
EBCI	Eastern Band of Cherokee Indians
ESA	Endangered Species Act
FERC	Federal Energy Regulatory Commission
FOLS	Friends of Lake Santeetlah
FPA	Federal Power Act
GSMNP	Great Smoky Mountains National Park
HPMP	Historic Properties Management Plan
HFENP	High Flow Event Notification Procedure
NEPA	National Environmental Policy Act
NFWF	National Fish and Wildlife Foundation
NPCA	National Parks Conservation Association
NPS	National Park Service
NAGPRA	Native American Graves Protection and Repatriation Act
NCDENR	North Carolina Department of Environment and Natural Resources
NCSHPO	North Carolina State Historic Preservation Office
NCWRC	North Carolina Wildlife Resources Commission
O&M	Operations and Maintenance
SMP	Shoreline Management Plan
TCWN	Tennessee Clean Water Network
TDEC	Tennessee Department of Environment and Conservation
THC	Tennessee Historical Commission
TNSHPO	Tennessee State Historic Preservation Office
TVA	Tennessee Valley Authority
TNC	The Nature Conservancy
TWRA	Tennessee Wildlife Resources Agency
USFWS	U.S. Fish and Wildlife Service
USFS	U.S. Forest Service
USGS	U.S. Geological Survey

1.0 General

1.1 Purpose and Effect of Agreement

The Parties have entered into this Agreement for the purpose of resolving all issues that have or could have been raised by the Parties in connection with the FERC relicensing of the Project. The purpose of this Agreement is to establish the Licensee's obligations for the protection, mitigation and enhancement of ecological, environmental, recreational and cultural resources affected by the Project under a New License to be issued by FERC, as well as enforceable obligations of other Parties to this Agreement. It also specifies procedures to be used among the Parties to ensure the implementation of those License Articles and other agreed upon obligations consistent with this Agreement, and with other legal and regulatory mandates. For these purposes, the Parties agree that this Agreement is fair and reasonable and in the public interest. The Parties also agree that the license compliance record by Licensee, and the protection, mitigation and enhancement measures and the other obligations of the Licensee in this Agreement justify the issuance of a New License with a term of 40 years. Except as specifically provided below, each of the Parties that are governmental agencies ("Governmental Parties") agrees that the Licensee's performance of its obligations under this Agreement will be consistent with and is intended to fulfill the Licensee's existing statutory and regulatory obligations, as to each Governmental Party relating to the relicensing of the Project, with regard to the Federal Power Act, 16 U.S.C. § 791(a) et. seq., Federal Water Pollution Control Act (as amended), 33 U.S.C. § 1251 et. seq., the Endangered Species Act 16 U.S.C. § 1531 et. seq., the National Historic Preservation Act 16 U.S.C. § 470F, and the Fish and Wildlife Coordination Act 16 U.S.C. § 661 et. seq. This Agreement is also intended to resolve all issues that have been or could have been raised in connection with the jurisdictional resolution for Project lands lying within the Great Smoky Mountains National Park established by 16 U.S.C. § 403 et. seq.

1.2 Definitions

- 1.2.1 **"Agreements in Principle"** shall mean the preliminary agreements dated September 8-9, 2003

- 1.2.2 **“Annual License”** shall mean the license(s) issued on an annual basis by the Commission, pursuant to 16 U.S.C. § 808(a), upon expiration of the current License on February 28, 2005 until such time as the Commission issues a New License for the Project, or upon expiration of the New License until such time as the Commission issues a subsequent new license for the Project.
- 1.2.3 **“Commission”** or **“FERC”** shall mean the Federal Energy Regulatory Commission.
- 1.2.4 **“Drawdown”** means the difference in reservoir elevation below the normal full pond elevation.
- 1.2.5 **“Effective Date”** means the date as stated in Section 1.3.5 of this Agreement
- 1.2.6 **“FERC-Imposed Modification”** shall exist if 1) the Commission issues a New License that contains a license article that is not included in the L-Form (as defined by 18 C.F.R. § 2.9) applicable to the Project and that is not proposed by the Parties, omits a Proposed License Article, modifies a Proposed License Article or otherwise takes action that is inconsistent with the terms of this Settlement Agreement, and 2) a Party determines, in its sole judgment, that the Commission’s Order issuing the New License materially (i) increases a Party’s overall costs and burdens of and/or (ii) impairs a Party’s bargained-for benefits under this Settlement Agreement. A Proposed License Article will be considered “omitted” to the extent that the Commission declares that it will not enforce the Proposed License Article.

- 1.2.7 **“Final and Non-Appealable”** when used in conjunction with the issuance of the New License, shall be deemed to have occurred on either (1) the thirty-first day after the date FERC issues an order setting forth a new permanent (as compared to annual) license for the Tapoco Project if no Party seeks rehearing of such order; or (2) if any Party seeks rehearing of such an order, the earliest date upon which no further court appeal of a FERC order issuing a new permanent license for the Tapoco Project, including a Petition for Writ of Certiorari to the Supreme Court of the United States, or action by a court or by FERC with respect to such appeal, is possible.
- 1.2.8 **“License”** shall mean the regulatory authorization for construction, maintenance, and operation of the Project subject to the jurisdiction of FERC pursuant to the Federal Power Act, 16 U.S.C. § 791 et seq. (FPA).
- 1.2.9 **“Licensee”** shall mean Alcoa Power Generating Inc., the legal entity holding the existing Federal Power Act license for the Project as well as the legal entity to which the Commission is expected to issue the New License for the Project and any successors in interest.
- 1.2.10 **“New License”** shall mean the license the Parties expect to be issued by the Commission to the Licensee pursuant to Section 15 of the Federal Power Act for the continued operation of the Project.
- 1.2.11 **“Offer of Settlement”** shall mean an offer of settlement to be filed with FERC pursuant to 18 C.F.R. § 385.602, which offer shall be comprised of this Settlement Agreement.
- 1.2.12 **“Park”** means the Great Smoky Mountains National Park in Tennessee and North Carolina as authorized in 16 U.S.C. § 403 et. seq.

- 1.2.13 **“Party”** or **“Parties”** shall mean the entities that are signatories to this Agreement. (The Parties are listed in Appendix D of this Settlement Agreement.)
- 1.2.14 **“Project”** shall mean the Tapoco Hydroelectric Project, licensed to the Licensee as FERC Project No. 2169. 14 FPC 610 (1955).
- 1.2.15 **“Proposed License Article(s)”** shall mean the terms and conditions set forth in Appendix A of this Settlement Agreement.
- 1.2.16 **“Section 401”** shall mean Section 401 of the Federal Water Pollution Control Act (as amended), which section is 33 U.S.C. § 1341.
- 1.2.17 **“Section 401 Agency”** shall mean the agencies of the States of North Carolina (i.e. Division of Water Quality) and Tennessee (i.e. Department of Environment and Conservation) that are authorized to issue certifications pursuant to Section 401 in their respective states to the extent that such agency is acting in its capacity as a decision maker pursuant to Section 401, and not to the extent such agency is acting in any other capacity for example, in commenting in a proceeding before another agency.
- 1.2.18 **“Section 401 Certifications”** shall mean the certifications issued under Section 401 by the Section 401 Agencies in connection with the issuance of the New License.
- 1.2.19 **“Settlement Agreement”** shall mean this document, including appendices, together with any information herein incorporated by reference. Hereinafter “Settlement Agreement” may be referred to as either “Settlement Agreement” or “Agreement”.

1.3 General Provisions

1.3.1 Scope of Settlement Agreement

The Parties agree that this Settlement Agreement resolves all issues among the Parties associated with, and constitutes a comprehensive settlement of, all issues that have or could have been raised by the Parties in connection with, the FERC relicensing of the Project.

1.3.2 Procedures Regarding Certain Statutory Authorities and Obligations

1. The Parties have negotiated this Agreement with the intent that the terms of the Agreement satisfy all legal obligations of all governmental agencies with jurisdiction and mandatory conditioning authority over the Project and related activities, provided that the Parties recognize that to the extent that any Party is also a governmental agency with mandatory conditioning authority, that Party must abide by all applicable procedural and substantive laws and rules in the exercise of such authority in order to issue lawful mandatory conditions, and such Party has not acted unlawfully by negotiating and entering into this Agreement.

2. With regard to any existing Section 401 Certification for the New License for the Project, the Parties shall not seek any amendment of Section 401 conditions unless the proposed amendment would be consistent with this Settlement Agreement. The Section 401 Agencies are not bound by these commitments if such would cause such Agency to compromise or relinquish any of its legal authority or process requirements. Execution of this Settlement Agreement shall not be construed to confer on any Party any right or standing to contest a Section 401 Certification or any condition thereof.

1.3.3 Commitments

The Parties agree to support the issuance of a New License with a 40-year license term and other agency approvals that are consistent with the terms of this Agreement as of its Effective Date. In any proceeding before any agency with mandatory conditioning authority, the Parties may, and are encouraged to urge upon such agency that the terms of

this Agreement satisfy the agency's legal mandates and are within the agency's discretion; provided that Parties who are governmental agencies are not by this commitment compromising or relinquishing any legal authority or process requirements they may have in those situations where they may be the permitting agency. For those issues addressed herein, the Parties agree not to propose or otherwise communicate to FERC or to any other federal or state resource agency with jurisdiction directly related to the relicensing process any comments, recommendations, measures, prescriptions, terms or conditions, other than ones consistent with the terms of this Agreement.

In the event that FERC issues a New License with a term of less than 40 years, the Parties agree that APGI is authorized to file a request for rehearing with FERC and, if necessary, an appeal with the United States Court of Appeals and agree that APGI is authorized to state affirmatively that each of them supports the request of a New License with a term of 40 years. The federal and state resource agency Parties also agree, either individually or collectively, to join APGI in filing such request for rehearing with FERC. If FERC denies the request for rehearing the federal and state resource agency Parties agree to request the United States and the States of North Carolina and Tennessee respectively to join APGI in filing an appeal with the United States Court of Appeals. The Parties' commitments herein with regard to said request for rehearing and appeal shall be limited to the sole issue of the duration of the license term.

1.3.4 Structure of Settlement Agreement

This Settlement Agreement consists of an agreement signed by the Parties together with four appendices to that agreement. Appendix A consists of the Proposed License Articles; Appendix B consists of various orders and agreements that are included in the overall settlement bargain among the Parties, including the Section 401 Certifications and are incorporated by reference into the Agreement or, in the case of the Section 401 Certifications, into the New License; Appendix C consists of the Licensee's Request to Amend the Project Boundary, and Appendix D consists of a list of the Parties executing the Settlement Agreement included to provide information regarding the giving of notice in accordance with Section 1.3.10.5 of this Agreement and otherwise having no

significance within the Settlement Agreement. To the extent that there are conflicts between the language of the Proposed License Articles or the Section 401 Certifications, on the one hand, and the language of the Settlement Agreement on the other hand, the language of the Proposed License Article and Section 401 Certifications shall be controlling; to the extent that there are conflicts between the language of the documents included in Appendix B other than the Section 401 Certifications and the Real Estate Grant and Conveyance documents contained in Appendix B-3 and the language of the Settlement Agreement, the Settlement Agreement language shall be controlling.

1.3.5 Effective Date and Term of Settlement Agreement

This Settlement Agreement shall become effective among its signatories on April 16, 2004. The Settlement Agreement shall remain in effect for the term of the New License issued by the Commission for the Project and for any Annual License issued subsequent thereto, unless terminated pursuant to Section 1.3.11.5.

1.3.6 Effective Date of Settlement Obligations

To the extent that the Licensee's obligations under this Settlement Agreement are contained in the New License, those obligations shall be binding upon the Licensee as set forth in the New License, except to the extent such obligations may be stayed by law. For all Parties other than the Licensee, and for the Licensee with respect to obligations not set forth in the New License, the obligations under this Settlement Agreement shall become binding and effective once the New License becomes Final and Non-Appealable, EXCEPT THAT, from the Effective Date of the Settlement Agreement until termination, all Parties shall have the obligations as set forth in this Agreement including (i) supporting approval of the Settlement Agreement before FERC and, if there be one, in any court appeal regarding the New License; (ii) complying in good faith with respect to the dispute resolution process specified herein; (iii) proceeding with the actions necessary to achieve the Final Jurisdictional Resolution as described in Section 2.10 of this Settlement Agreement; and (iv) implementing interim non-license measures as specifically agreed to in the Settlement Agreement.

1.3.7 Jurisdiction

Execution of this Agreement does not constitute a consent to jurisdiction of any court unless such jurisdiction otherwise exists. Execution of this Agreement also does not constitute a waiver of any immunity or privilege except as provided by law.

1.3.8 Dispute Resolution

1.3.8.1 General

Except where otherwise specifically provided in this Settlement Agreement, a dispute that arises under or is related to any Party's compliance with any obligation arising under this Settlement Agreement or under the New License, including a Party's failure to act or a Party's abuse of discretion in performing such duty shall be resolved as follows:

1.3.8.2 Consensus Required

The Parties will make best efforts to reach consensus and resolve any dispute arising under or related to the Settlement Agreement or the New License. A resolution based on consensus shall have either the unanimous support of all designated and participating Parties, or at least no opposition from any Party.

1.3.8.3 Consultation

In the event any dispute arises under either the New License or this Settlement Agreement, the Parties agree to engage in good faith negotiations for a period of at least 45 days in an effort to resolve the dispute. During the 45-day period, any Party may request the services of a neutral mediator to assist in resolving the dispute. If mediation is acceptable to all of them, the disputing Parties will jointly select such mediator and, before engagement, will reach an agreement on how to cover the costs of such services. If any Party believes that another Party has failed to comply with any obligation under this Agreement (including compliance by the Licensee with the New License), the Party shall notify all other Parties in writing and the interested Parties shall consult and may engage

a mediator as described above. The interested Parties shall attempt to determine (i) whether non-compliance has occurred, and (ii) in the event of non-compliance, establish a reasonable time in which the Party must cure the non-compliance. In emergency situations, a Party may, in good faith and for good cause, seek relief as provided by law without regard to any Consultation requirements, such as those in this paragraph and Section 1.3.8.4 immediately below.

1.3.8.4 Remedies

If after engaging in Consultation pursuant to Section 1.3.8.3, the Parties have not reached consensus or if, in the event of non-compliance for which a schedule to cure the non-compliance has been established through Consultation, the offending Party has not cured the failure within the time established, any Party that participated in the Consultation may seek resolution before any agency or court with jurisdiction over the matter; provided that if the dispute concerns the Licensee's compliance with the New License and the dispute is not resolved at the conclusion of Consultation, or if, in the event of non-compliance for which a schedule to cure the non-compliance has been established through Consultation, the Licensee has not cured the non-compliance within the established time, any Party that participated in the Consultation may petition or otherwise request FERC to enforce the License Article with which the Licensee is alleged to have failed to comply. If FERC affirmatively declines to enforce a License Article or fails to act within a reasonable time after a petition or request to enforce has been filed which period of time shall not be less than six months, then such Party may file with FERC a petition for rehearing regarding the alleged failure and pursue any further remedies, including judicial review. Nothing in this Settlement Agreement shall be construed as creating a right of any Party to enforce the New License against the Licensee as a matter of contract.

1.3.8.5 No Damages at Law

No Party shall be liable for damages at law for any breach of this Settlement Agreement or the New License, any performance or failure to perform an obligation imposed by

them or any other cause of action arising from them. The foregoing sentence, however, shall not otherwise exempt the Licensee from liability for its actions under Section 10(c) of the Federal Power Act, 16 U.S.C. § 803(c).

1.3.9 Withdrawal from Settlement Agreement

1. Withdrawal Once New License is Final and Non-Appealable

A Party may withdraw from this Settlement Agreement once the New License is issued with a FERC-Imposed Modification and has become Final and Non-Appealable, provided the withdrawing Party has exhausted its administrative and judicial remedies in contesting such FERC-Imposed Modification. As used in the preceding sentence, a Party will have exhausted its administrative and judicial remedies if it undertakes all steps necessary to have a FERC-Imposed Modification reviewed up to and including a review by the United States Court of Appeals, but will not be required to seek a Writ of Certiorari from the Supreme Court of the United States.

2. Withdrawal upon Denial of Request for Rehearing

A Party may withdraw from this Settlement Agreement once the New License is issued with a FERC-Imposed Modification and FERC has denied rehearing of the Party's request for rehearing if (i) it has complied with the Consultation procedures in Section 1.3.8.3 and (ii) all other Parties consent to the withdrawal. In determining whether to consent to a Party's request to withdraw, the other Parties shall consider the likelihood of the requesting Party's success on the merits of appealing the denial of rehearing to the United States Court of Appeals and the requesting Party's projected costs in appealing FERC's denial of rehearing to the United States Court of Appeals.

3. A License Term Less Than 40 Years is Not a Basis for Withdrawal

APGI agrees that a New License with a term of less than 40 years does not constitute a basis for withdrawal from the Agreement.

A Party having the right to withdraw from this Settlement Agreement may do so by giving notice in the manner prescribed by Section 1.3.10.5. Withdrawal is effective 10 calendar days after notice. The withdrawal of a Party, other than the Licensee, does not terminate this Settlement Agreement for the remaining Parties.

1.3.10 Miscellaneous

1.3.10.1 Limitations of Applicability

This Settlement Agreement is made on the express understanding that it constitutes a negotiated settlement of issues specific to the Project. No Party shall be deemed, by virtue of execution of this Settlement Agreement, to have established precedent, or admitted or consented to any approach, methodology, or principle except as expressly provided herein. In the event this Settlement Agreement is approved by the Commission, such approval shall not be deemed a precedent for or controlling regarding any particular issue or contention in any other proceeding.

1.3.10.2 Successors and Assigns

This Settlement Agreement shall apply to, and be binding on, the Parties and their successors and assigns. No change in ownership of the Project or transfer of the New License by the Licensee shall in any way modify or otherwise affect any other Party's interests, rights, responsibilities, or obligations under this Settlement Agreement. Unless prohibited by applicable law, the Licensee shall provide in any transaction for a change in ownership of the Project or transfer of the existing or New License, that such new owner shall be bound by, and shall assume the rights and obligations of this Settlement Agreement upon completion of the change of ownership. In the event applicable law prohibits the new owner from assuming the rights and obligations of this Settlement Agreement, any Party may withdraw from this Settlement Agreement. The Licensee shall provide written notice to the other Parties at least 90 days prior to completing such transfer of license.

1.3.10.3 Severability

The terms of this Settlement Agreement are not severable from one another. This Settlement Agreement is made on the understanding that each term is in consideration and support of every other term, and each term is a necessary part of the entire Settlement Agreement.

1.3.10.4 Force Majeure

In those instances where force majeure may apply, unlike FERC enforcement of License conditions under the Federal Power Act, no Party shall be liable to any other Party for breach of this Settlement Agreement as a result of a failure to perform or for delay in performance of any provision of this Settlement Agreement due to any cause reasonably beyond its control. This may include, but is not limited to, natural disasters, strike or other labor or civil disruption or disputes, or breakdown or failure of Project works, so long as any such event is reasonably beyond the control of the Party who delays or fails to perform. The Party whose performance is affected by a force majeure will make all reasonable efforts to promptly resume performance. The Party affected by a force majeure event shall notify the other Parties of the circumstances of the event that it believes constitutes a force majeure event by telephone, facsimile, or electronic mail, as soon as it is reasonably possible and practical to do so. The settlement of strikes or lockouts or industrial disputes or disturbances is entirely within the discretion of the Party declaring force majeure, and that Party will not be required to settle the strikes, lockouts, or industrial disputes or disturbances by acceding to the demands of any opposing Party when such course of action is inadvisable in the discretion of the Party declaring the force majeure.

1.3.10.5 Notices and Communications

All written notices to be given pursuant to this Settlement Agreement shall be mailed by electronic mail, facsimile, certified first class mail return receipt requested, or overnight express service, to each Party at the addresses listed in Appendix D or to such subsequent

address as a Party shall by written notice identify. Notices shall be deemed to be given on the same business day as any electronic mail or facsimile transmitted before 5:00 p.m., eastern time, unless the intended recipient demonstrates that the electronic mail or facsimile was not timely received, or on date of receipt if overnight express or other receipt-notification service is used.

For purposes of implementing this Settlement Agreement, the Parties agree that the individuals listed in Appendix D shall be designated to be the primary contact person and all written notices shall be posted to these individuals at the addresses listed in Appendix D. Notification of changes in the contact persons or addresses must be made in writing and delivered to all other contact persons by certified first class mail return receipt requested.

The Licensee will make reasonably available copies of the Settlement Agreement, together with all amendments including changes to the Parties' contact information, to the extent that such changes have been provided in writing to the Licensee, upon the request of a Party.

1.3.10.6 Responsibility for Costs

Except as expressly provided for in this Settlement Agreement, all Parties are to bear their own costs of participating in the Settlement Agreement.

1.3.10.7 Water Rights Unaffected

This Settlement Agreement does not grant or affirm any property right, license or privilege in any waters or any right of use in any waters. This Settlement Agreement does not authorize any person to interfere with the riparian rights, littoral rights or water use rights of any other person. No person shall interpose this Settlement Agreement as a defense in any action respecting the determination of riparian or littoral rights or other water use rights.

1.3.10.8 Cross Referenced Laws and Documents

Unless otherwise noted, any reference to any statute, regulation or other document refers to the statute, regulation or document as it exists on the Effective Date of this Settlement Agreement.

1.3.10.9 No Third Party Beneficiaries

This Settlement Agreement shall not create any right as a third-party beneficiary in any individual or entity that is not a Party. This Settlement Agreement shall not be construed to authorize any such third party to maintain a suit in law or equity under this Settlement Agreement.

1.3.10.10 No Commitment of Government Funds

Nothing in this Settlement Agreement shall be construed as obligating any federal, state, or local agency to expend in any fiscal year any sum in excess of appropriations made by Congress or state or local legislatures or administratively allocated for the purpose of this Settlement Agreement for the fiscal year or to involve any federal, state, or local agency in any contract or obligations for the future expenditure of money in excess of such appropriations or allocations nor shall it be construed to require the transfer or use of any government lands or other resources (including personnel) except as authorized by law.

1.3.10.11 Occupancy and Use of U.S. Forest Service Lands

This Agreement does not provide the authority to occupy and use National Forest System lands or facilities associated with the operation of the Project. The U.S. Forest Service alone reserves the right to manage all lands and facilities in accordance with established laws and regulations and may extend these rights and privileges for non-federal uses for purposes outlined in this Agreement. Such use will be outlined in separate permits or agreements and shall be made in writing by representatives of the Parties and shall be independently authorized by the appropriate statutory authority. The U.S. Forest Service

does acknowledge however, the Licensee's pre-existing right to flood lands of the U.S. Forest Service along the Cheoah River as necessary to operate and maintain the Project.

1.3.10.12 No Delegation

Nothing in this Agreement shall be construed as requiring or involving the delegation by any government agency to any other body of any authority entrusted to it by Congress or the legislature of any state.

1.3.10.13 Signatory Authority

Intending to be legally bound by the terms of this Settlement Agreement, each Party has executed the Settlement Agreement by the signature of its duly authorized representative(s) and by his or her signature that duly authorized representative(s) certifies that he or she has in fact the authority to commit his or her agency or organization to the terms of this Settlement Agreement to the maximum extent permissible by law.

1.3.10.14 Paragraph Titles for Convenience Only

The titles for the paragraphs of this Agreement are used only for convenience of reference and organization, and shall not be used to modify, explain, or interpret any of the provisions of this Agreement or the intentions of the Parties.

1.3.10.15 Waiver

Failure by any Party to insist upon or otherwise call upon others to account for the strict performance of any term or covenant of this Agreement, or of any right under this Agreement shall not be a continuing waiver. To be effective a waiver must be in writing. A Party's failure to secure a written waiver shall not be construed as a waiver by that Party of any statute of limitations or other limitations period. Waiver of any requirement of law shall not be, or be evidence of, a continuing waiver or recurring waiver of such requirement of law.

1.3.11 Actions upon Execution of Agreement

1.3.11.1 FERC Filings by APGI

Within 30 days after the Effective Date of this Settlement Agreement, the Licensee shall file with FERC an Offer of Settlement pursuant to Rule 602 (18 C.F.R. § 385.602) consisting of the Settlement Agreement. The Offer of Settlement shall request FERC to incorporate all Proposed License Articles, without modification, into the New License for the Project and to identify all Proposed License Articles, if any, that are unenforceable by FERC.

1.3.11.2 Filings with FERC by Parties other than the Licensee

To the extent permitted by law, the Parties, except for the Licensee, agree: a) to submit, individually or collectively, a statement or statements in support of this Agreement to FERC within 45 days of the Effective Date of this Settlement Agreement; b) that the Party's complete and final recommendations, measures, terms, conditions, and/or prescriptions pursuant to Sections 4(e), 10(a), 10(j), and 18 of the Federal Power Act, Section 106 of the National Historic Preservation Act, and Section 7 of the Endangered Species Act, shall be consistent with the Agreement; c) to ensure that any supplemental information, comments or responses to comments filed by them with FERC or any mandatory conditioning agency in the context of the relicensing process are consistent with this Agreement (with the exception of a Section 401 Agency in any appeals of a Section 401 Certification); d) to use their best reasonable efforts to obtain a FERC order approving this Agreement and issuing a New License for the Project consistent with this Agreement in a timely manner, and e) to actively support, in all relevant regulatory and judicial proceedings in which they participate, regulatory and judicial actions consistent with this Agreement.

1.3.11.3 Adoption by FERC Without Modification

The Parties have entered into this Settlement Agreement with the express expectation and condition that FERC will approve the Settlement Agreement as an Offer of Settlement

and issue a New License for the Project that incorporates, without modification, the Proposed License Articles in Appendix A. The Parties shall request that FERC adopt the Proposed License Articles without modification.

The Parties agree that if FERC approves the Offer of Settlement and incorporates the Proposed License Articles into the New License without modification or otherwise does not disapprove or supercede the terms of this Settlement Agreement, they will not seek rehearing of the FERC order granting a New License for any issues covered by this Settlement Agreement, or support in any way any such request for rehearing by any non-Party to this Settlement Agreement.

1.3.11.4 Modification and/or Amendment

1. FERC to Adopt without Modification

If FERC adopts the Proposed License Articles with modification, the Settlement Agreement shall be deemed amended to conform to the New License only if no Party gives notice of objection to the New License with a FERC-Imposed Modification pursuant to Section 1.3.11.4-2 below. Absent such objection, the Parties will be bound by the terms of this Settlement Agreement as amended.

2. Objection To New License With Modification

If in the opinion of any Party, the Commission issues an order with a New License that contains a FERC-Imposed Modification, such Party shall give notice of the existence of the FERC-Imposed Modification to all the other Parties as soon as possible but no later than ten days of the date that the Commission's order is issued. Thereafter, all Parties shall immediately engage in Consultation in accordance with Section 1.3.8.3 in an attempt to reach consensus on (i) conforming the Settlement Agreement to the New License with FERC-Imposed Modification or (ii) filing a request for rehearing of the New License. If consensus has not been reached ten days prior to the due date for the

request for rehearing, such Party may file a request for rehearing of the New License to challenge the FERC-Imposed Modification, which no other Party shall oppose. All Parties shall support such request for rehearing to the greatest extent possible. Any Party filing a request for rehearing is authorized to state affirmatively that no Party opposes such request.

3. Request for Rehearing Shall Not Terminate Consultation

The filing of a request for rehearing shall not terminate Consultation, which shall continue, if necessary, for the full 45-day period, mindful of the demands on Parties involved in a request for rehearing. If at any time the Parties unanimously consent to modify the Settlement Agreement to conform to the New License, the filing Party shall withdraw its request for rehearing.

4. Settlement Agreement Temporarily Amended

After the conclusion of Consultation, and unless and until the New License is Final and Non-Appealable, as defined in Section 1.2.7, the Settlement Agreement shall temporarily be deemed amended by FERC's modification if supported by (i) the Licensee and (ii) each resource agency with jurisdiction over a resource that is a subject of the disputed license article or omission. A resource agency shall be considered to have jurisdiction over a resource if a characteristic of the resource is within the agency's statutory mandate and with respect to state agencies, the resource is within the agency's geographic jurisdiction.

5. Development of Biological Opinion by USFWS Pursuant to Section 7 of the ESA

The USFWS has developed a Biological Assessment, which is attached hereto as Appendix B-6. In the event that a Biological Opinion is required under Section 7 of the ESA and to the extent allowed by law, the USFWS agrees to consult with the Parties in its development of a Biological Opinion, and upon the request of a Party, will provide the

requesting Party, at least 30 days prior to its filing with FERC, a preliminary draft of its Biological Opinion. Within 15 days of receipt of the preliminary draft of the Biological Opinion, the requesting Party may submit written comments to the USFWS, which comments USFWS shall consider.

In the event that the USFWS issues a Biological Opinion that contains measures, recommendations, terms or conditions that 1) modifies a Proposed License Article or are otherwise inconsistent with the terms of this Settlement Agreement, and 2) the Licensee determines, in its sole judgment, that the Biological Opinion materially (i) increases its overall costs and burdens of and/or (ii) impairs its bargained-for-benefits under the Settlement Agreement, then the Licensee may withdraw from this Agreement; provided, however, that, prior to exercising its right to withdraw, the Licensee shall (i) comply with the Consultation provisions in Section 1.3.8.3 and (ii) exhaust its administrative and judicial remedies in contesting the measures, recommendations, terms or conditions up to and including a review by the United States Court of Appeals.

6. License Articles Not Related to Settlement Agreement

Any Party may file a request for rehearing of issues arising under the FERC order issuing the New License that are not deemed to be related to the Settlement Agreement, provided that: (i) the Party shall notify all other Parties of its intention by electronic mail or facsimile at the earliest practicable time; and (ii) the Parties will undertake the Consultation process in Section 1.3.8.3 if any other Party disputes the request as inconsistent with the Settlement Agreement.

7. Amendment of Settlement Agreement

The Parties may amend this Settlement Agreement, as executed, before or after issuance of the New License.

A Party proposing an amendment shall provide notice pursuant to Section 1.3.10.5. The Notice shall state the substance and basis of the proposed amendment. The Parties shall

make best efforts to informally meet and confer within 30 days of such Notice. The proposing Party may request to utilize the Consultation process set forth in Section 1.3.8.3 of this Agreement. Within 60 days of the Notice, or such different period as may be established by mutual consent, each other Party shall provide a written confirmation of its consent to or rejection of the proposed amendment. If a Party does not respond within that period, it shall be deemed to have rejected the proposed amendment.

If an amendment is proposed before issuance of a New License and has the unanimous consent of the Parties, it shall go into effect upon the Parties' execution of an Amended Settlement Agreement, which shall be promptly filed as an amended Offer of Settlement.

If an amendment is proposed after issuance of the New License and has the unanimous consent of the Parties, the Parties shall seek modification of the New License, and any related permits or authorization, to conform to the proposed amendment of the Settlement Agreement. The proposed amendment shall not go into effect until all authorizations, including the New License, are conformed to the proposed amendment.

1.3.11.5 Termination of Settlement Agreement

This Settlement Agreement shall terminate as to all Parties and have no further force or effect upon withdrawal of the Licensee, or upon expiration of the New License and any Annual License issued thereafter. It shall no longer have force and effect with respect to a withdrawing Party upon such Party's withdrawal from this Settlement Agreement.

2.0 Settlement Provisions Not Covered by Proposed License Articles

2.1 Interim Operation of Santeetlah Reservoir

The Licensee agrees to file a request to FERC for authority to begin implementation of the new operating curve for the Santeetlah Development as described in Proposed License Article OR-1 starting on August 1, 2004, with the intent for the reservoir to be at elevation 1936-ft by that date and for the water surface elevation to follow the new operating curve from that point forward.

2.2 Modifications to Repeating Five Year Schedule of High Flow Events

2.2.1 Protocol for Additional High Flow Events in the Cheoah River

The Parties agree that the following protocol will guide the consideration of the provision of any additional high flow events in the Cheoah River as set forth in Appendix A, Section 1.2.4 of this Agreement.

2.2.1.1 Conditions for Consideration of Additional High Flow Releases:

1. Any changes in the currently identified “integrated flow regime” detailed in this Settlement Agreement must be compatible with goals for the protection, enhancement, and restoration of Cheoah River aquatic and riparian associated biological communities. Restoration objectives include establishment of a diverse assemblage of fish, mollusks, and aquatic insects; maintenance and enhancement of populations of rare species such as the Appalachian Elktoe mussel and the plant Virginia Spiraea; and establishment of a viable sport fishery.
2. Additional high flow releases must consider and balance other recreational uses of the Cheoah River, such as angling.

3. Additional high flow releases must not violate the agreed upon operating curve for Santeetlah Reservoir.
4. The cumulative and secondary impacts of additional high flow events on the ecological and aesthetic resources of the Cheoah River corridor must be considered.
5. High flow releases from Santeetlah Reservoir beyond those set forth in Proposed License Article OR-2 will be provided through compensation to the Licensee by the requesting entity.
6. Expenses for additional monitoring requirements associated with an evaluation of the biological effects of additional high flow releases for whitewater recreation will be the responsibility of the entity requesting the additional releases. Pre-licensing baseline monitoring begun in 2003 by the resource agencies, combined with restoration effectiveness monitoring the resource agencies will begin after establishment of prescribed instream flows, will provide a baseline against which effects of additional high flow releases can be evaluated. Furthermore, it is likely that some restoration monitoring will be in place and continuing during a period when additional high flow releases may be occurring and being evaluated. The resource agencies will strive to make maximum utility of monitoring and inventories planned for other purposes or already ongoing to limit additional monitoring expenses.
7. Additional high flow releases beyond those set forth in Proposed License Article OR-2 must have the full concurrence of the resource agencies (i.e., the U.S. Fish and Wildlife Service, the North Carolina Wildlife Resources Commission, the U.S. Forest Service, the North Carolina Department of Environment and Natural Resources) and the Eastern Band of the Cherokee Indians.
8. Additional high flow releases to be evaluated by the resource agencies will be identified through discussions among representatives of the Licensee, the resource agencies, EBCI and the requesting entity.

2.2.1.2 Process to Evaluate the Feasibility of Additional Cheoah River High Flow Events:

1. Five years after implementation of the high flow events set forth in Proposed License Article OR-2, the resource agencies and EBCI will assess whether biological recovery has proceeded to a point that additional high flow releases for whitewater recreation purposes should be implemented and evaluated on a trial basis. This assessment will occur through resource agency analyses of specifically targeted monitoring results and will be shared and discussed with the Licensee and the requesting entity, if any.
2. If the resource agencies and EBCI determine that the targeted ecological restoration measures have reached a point that additional high flow releases should be scheduled and evaluated on a trial basis for a specified number of years, the additional high flow releases, upon receipt of FERC approval, will be implemented by the Licensee and evaluated annually by the resource agencies. The evaluation will consist of a determination of whether the effects on Cheoah River aquatic and riparian associated biological communities are compatible with restoration objectives. Evaluation of the effects of additional high flow releases may include determinations such as: “Is the diversity, relative abundance, and/or species composition of Cheoah River fish, mollusk, or aquatic insect communities different than was observed during baseline monitoring?”; “Are populations of focus species such as rare fish, mollusks, plants, or salamanders maintaining themselves with recruitment of new individuals in a pattern similar to that during the baseline period, or to that in other reference populations in the region?”.
3. The resource agencies and EBCI will also make evaluations of the impacts of the additional high flow releases on other recreational uses of the Cheoah River, on water levels in Santeetlah Reservoir, and of cumulative and secondary effects on the ecological and aesthetic resources of the Cheoah River corridor.
4. If, after the initial five year assessment of Cheoah River restoration, the resource agencies and EBCI determine that biological recovery has not proceeded to a point

that additional high flow releases should be scheduled and evaluated, no additional high flow releases will be planned for the next 12 months.

5. After the initial five-year assessment, the resource agencies and EBCI will re-evaluate annually Cheoah River biological restoration success and the opportunity to provide additional high flow releases for whitewater recreation until they determine that it is appropriate to schedule and evaluate a trial series of additional high flow releases.

2.2.2 Protocol for Purchasing Additional High Flow Events in the Cheoah River

In the event that the Licensee is requested to provide additional high flow events in accordance with the process and protocol set forth in Section 2.2.1 of this Agreement, the requesting entity shall compensate the Licensee for its costs incurred by providing such additional high flow events in accordance with the following:

2.2.2.1 Purchased High Flow One, Two, or Three Day Events are defined as Follows:

1. An event starts at midnight, hour 0.
2. Hour 0 the ramping from base flow to 100 cfs at a rate of 2 inches per hour begins.
3. Hour 8 the flow begins ramping from 100 cfs to the specified flow for the event.
4. Hour 9 the specified flow for the event is achieved.
5. Hour 18 ramping down begins.¹
6. Hour 19 flow is 100 cfs for one day events and 500 cfs for two or three day events.
7. For one day events and end of second or third day for two and three day events, respectively; flow remains at 100 cfs until flow is ramped down at a rate of 2 inches per hour to the base flow at hour 24, 48, or 72.
8. For two or three day events flow remains at 500 cfs until beginning of ramp up to second or third day specified flow which is at hour 32 for second day or hour 56 for third day.
9. Hour 33 for second day or hour 57 for third day specified flow is achieved for the event.

¹ Release is a full 9 hours, which allows for a 10 hour event.

10. Hour 42 for second day or hour 66 for third day ramping down begins.²
11. Hour 43 flow is 100 cfs for two day events and 500 cfs for three day events.
12. Hour 67 flow is 100 cfs.

2.2.2.2 The Following Formulae and Definitions shall be used to Calculate the Compensation due to the Licensee:

$$C = (MWh_L \times P_{AWP}) + A$$

$$MWh_L = Q_{Total}/G_C$$

C is total compensation in \$

MWh_L (MWh) is the total energy loss that is calculated using the formula above

P_{AWP} (\$/MWh) is the average of the Trades for Standard 16-hour Daily Products Index price of energy into TVA as published in Platts Megawatt Daily (or other comparable publicly available source if Megawatt Daily is no longer available) for Monday through Friday prior to the event.

A is an administrative charge that covers the cost of personnel during the release, operations planning to have adequate water available, calculation of energy price, calculation and preparation of the invoice. In the first year that additional high flow events are provided, the administrative charge will be \$3,000 per day in 2004 dollars escalated according to the Gross Domestic Product Implicit Price Deflator (GDP-IPD) and shall be adjusted annually thereafter by the GDP-IPD.

Q_{Total} is the sum of the flows $Q_1 \dots Q_n$

$Q_1 \dots Q_n$ is the flow above base flow in hour 1 through hour n of the event

G_C is currently 16.7 cfs/MWh. The G_C will be recalculated when generating units are upgraded at Santeetlah or Cheoah.

² Release is a full 9 hours, which allows for a 10 hour event.

2.2.2.3 The requesting entity shall pay the Licensee's invoice upon receipt. Any invoice not paid within 30 days will have a 1.5% penalty added per month and all future additional high flow events will be suspended until payment of invoice and all penalties are received.

2.3 North Carolina and Tallassee Funds

North Carolina Resource Management and Enhancement Fund

Except as otherwise provided in Section 2.13, starting with the year in which the New License for the Tapoco Project is effective, the Licensee will establish and maintain a fund, to be known as the North Carolina Resource Management and Enhancement Fund to mitigate the continuing environmental impacts associated with the Project's operations, in particular the Santeetlah and Cheoah developments, and the portion of the Calderwood Development in North Carolina, on the Cheoah River and Little Tennessee River during the New License term and within the scope of subject matter of the Fish and Wildlife Coordination Act, the Endangered Species Act, and Section 10 of the Federal Power Act. The North Carolina Resource Management and Enhancement Fund shall be operated, managed, and administered according to the North Carolina Resource Management and Enhancement Fund Agreement, as set forth as Appendix B-4.1 and incorporated herein by reference. As set forth in Proposed License Article F-1 in Appendix A, the Licensee will contribute the amount of \$100,000 in year one of the new license and \$25,000 annually thereafter, by no later than January 31, except for the final three years of the License term. All dollars are deemed to be stated as of the year 2003 and the Licensee shall escalate such sums as of January 1 of each following year (starting in January 2004) according to the Gross Domestic Product Implicit Price Deflator, for the duration of the term of the New License.

Tallassee Fund

Except as otherwise provided in Section 2.13, starting with the year in which the New License for the Tapoco Project is effective, the Licensee will establish and maintain a

watershed/conservation trust fund, to be known as the “Tallassee Fund,” to mitigate the continuing environmental impacts in Tennessee associated with the Project’s operations and within the scope of subject matter of the Fish and Wildlife Coordination Act, the Endangered Species Act, and Section 10 of the Federal Power Act. The Tallassee Fund shall be operated, managed, and administered according to the Tallassee Fund Agreement, set forth in Appendix B-4.2 and incorporated herein by reference. As set forth in Proposed License Article F-2 in Appendix A, the Licensee will contribute annually the amount of \$100,000, by no later than January 31. All dollars are deemed to be stated as of the year 2003 and the Licensee shall escalate such sums as of January 1 of each following year (starting in January 2004) according to the Gross Domestic Product Implicit Price Deflator, for the duration of the term of the New License.

2.4 Funding Commitments by Parties other than the Licensee for Specified New Recreational Facilities and Upgrades

2.4.1 Construction Related Funding Commitments

Table 2-4.1 identifies the specific new recreation facilities and upgrades to existing facilities subject to this Agreement. Table 2-4.1 also shows the construction related funding commitments of the Licensee, U. S. Forest Service (USFS), North Carolina Wildlife Resources Commission (NCWRC) and Tennessee Wildlife Resources Agency (TWRA) [funding Parties] during the first 30 years of the new License term, based on the best available information at the time of this Agreement regarding the cost of implementing the identified recreation facility elements. As shown in Table 2-4.1, the Licensee agrees to commit \$1,585,892, USFS agrees to commit \$1,872,892, NCWRC agrees to commit \$217,327, and TWRA agrees to commit \$50,000 in construction related funding under this Agreement.

As shown in Table 2-4.1, where more than one Party is shown as contributing to the funding of the construction of a specific facility or facility upgrade, it is the intent of the funding Parties to share the cost of that facility or facility improvement on an equal basis. In addition, the USFS agrees to fund all costs of design, contract administration,

permitting and NEPA compliance activities related to new facility construction and existing facility upgrades located on USFS lands, estimated at an additional \$465,576.

2.4.2 Operations and Maintenance Funding Commitments

Table 2-4.1 also shows the annual operations and maintenance funding commitments for Project-related recreation facilities of the Licensee, USFS, and NCWRC during the term of the New License. As shown, the Licensee agrees to fund \$75,000, USFS agrees to fund \$120,000, and NCWRC agrees to fund \$12,500 annually towards the operations and maintenance requirements for these facilities. USFS funding is estimated based on the level and type of use for existing and planned new facilities. This amount is subject to change based on actual needs.

Table 2.4-1 Recreational Facilities Funding Commitments

Proposed New Recreation Facility Elements	Total Cost Estimate	Licensee Funding Commitment	USFS Funding Commitment	USFS Design, NEPA, Permitting, Contract Administration Commitment (13% of Total Cost Estimate)¹	NCWRC Funding Commitment	TWRA Funding Commitment
Santeetlah Reservoir						
Expand/Improve Massey Branch Boat Launch: boat ramp repair/replacement and limited expanded parking	\$228,541	\$66,277	\$66,277	\$29,710	\$66,277	
Cheoah Point Access Improvements for reconstructed boat ramp and dock	\$60,600	\$17,574	\$17,574	\$7,878	\$17,574	
Cheoah Point Campground Components						
Restroom rebuild	\$280,000					
New construction and replacements (hydrants and water distribution system, utility building, vault toilet, bathhouse, dump station, stairway, septic tanks/drain fields, road gate, road signs, information boards/kiosks, fee station, table pads, fire rings, lantern posts)	\$705,000					
Accessibility improvements	\$250,000					
Entire facility to ADA standards	\$530,000					
Contingency	\$45,000					
Total	\$1,810,000	\$787,350	\$787,350	\$235,300		
Dispersed campsite improvements for improvements at 20 sites identified by USFS	\$80,500	\$35,000	\$35,000	\$10,500		
Avey Branch boat launch for replacement concrete ramp, reconstruct ramp side drainage channel, regravels parking (10,000 sq. ft.), replace information board, new SST, new 4-in-1 trash receptacle, courtesy dock (also for ADA access), accessible path, 3 picnic tables with pads and grills	\$92,445	\$26,809	\$26,809	\$12,018	\$26,809	
Bank fishing improvements	\$48,000	\$20,880	\$20,880	\$6,240		

Proposed New Recreation Facility Elements	Total Cost Estimate	Licensee Funding Commitment	USFS Funding Commitment	USFS Design, NEPA, Permitting, Contract Administration Commitment (13% of Total Cost Estimate)¹	NCWRC Funding Commitment	TWRA Funding Commitment
Subtotal Santeetlah	\$2,320,086	\$953,890	\$953,890	\$301,646	\$110,660	
Cheoah River						
US 129 Access Areas – Phase 1	\$225,000	\$97,875	\$97,875	\$29,250		
US 129 Access Areas – Phase 2	\$96,000	\$41,760	\$41,760	\$12,480		
2 additional gravel parking lots on US 129	\$23,001	\$6,667	\$6,667	\$3,000	\$6,667	
Trail along Cheoah River (9 miles)	\$206,900	\$90,000	\$90,000	\$26,900		
Accessible fishing pier at river trail	\$50,000	\$25,000			\$25,000	
Boater Put-in Facilities	\$565,000		\$500,000	\$65,000		
Boater Take-out Facilities	\$210,000		\$182,700	\$27,300		
Subtotal Cheoah River	\$1,375,901	\$261,302	\$919,002	\$163,930	\$31,667	
Cheoah Reservoir						
Canoe portage around Cheoah Dam	\$100,000	\$100,000				
Improved bank fishing facilities on Cheoah Reservoir	\$10,000	\$10,000				
Relocate Panel Branch Boat Access to Llewellyn Branch	\$150,000	\$75,000			\$75,000	
Calderwood Reservoir						
5 primitive campsites on Calderwood Reservoir	\$15,700	\$15,700				
Calderwood Dam canoe/kayak take-out	\$75,000	\$75,000				
Fish delivery chute near Calderwood Dam	\$10,000	\$10,000				
Calderwood Bypass						
N/A						

Proposed New Recreation Facility Elements	Total Cost Estimate	Licensee Funding Commitment	USFS Funding Commitment	USFS Design, NEPA, Permitting, Contract Administration Commitment (13% of Total Cost Estimate)¹	NCWRC Funding Commitment	TWRA Funding Commitment
Chilhowee Reservoir						
Canoe portage around Chilhowee Dam	\$25,000	\$25,000				
Two accessible fishing piers on Chilhowee Reservoir	\$100,000	\$50,000				\$50,000
Improved day use areas along US 129	\$10,000	\$10,000				
Subtotal Mainstem Reservoirs	\$495,700	\$370,700			\$75,000	\$50,000
Total Facility Cost Commitment	\$4,191,687	\$1,585,892	\$1,872,892	\$465,576	\$217,327	\$50,000
Recreation Related Annual O&M						
USFS recreation facility maintenance	\$161,500	\$34,000 ³	\$120,000 ²		\$7,500	
Tapoco recreation facility maintenance	\$31,000	\$26,000 ⁴			\$5,000	
Additional clean up/maintenance at US 129 day use areas	\$15,000	\$15,000				
Recreational fish stocking in Calderwood Reservoir	\$20,000	\$10,000				\$10,000
Total Annual O&M Cost Commitment	\$227,500	\$85,000	\$120,000		\$12,500	\$10,000

¹ Subject to agency appropriations.

² Cash or in-kind contribution. USFS annual O&M costs are estimated based on projected use of existing and new facilities. This is subject to change based on actual use and is not intended to be a commitment of funding but an estimate as to expenses incurred by the USFS.

³ The USFS will operate and maintain the public boating access areas located on National Forest System lands on Santeetlah Reservoir and use a portion of the funding for this purpose in accordance with the agreement between the USFS and the NCWRC.

⁴ Of this total, \$5,000 is committed to cost share boating facility operations and maintenance with the NCWRC for the new Llewellyn Branch boating access site and the existing Calderwood Reservoir boating access site.

2.4.3 In-Kind Services

The Parties agree that the construction related and annual operations and maintenance funding commitments of USFS, NCWRC, and TWRA can be met through in-kind services. This includes, but is not limited to, labor, equipment, materials and supplies that directly contribute to the construction, operation, and maintenance of the facility. The funding Parties agree that available funding amounts, including in-kind services, for the subsequent year will be reviewed at the annual planning meeting described further below.

2.4.4 Construction Related Funding Schedule

The investments in new or upgraded recreational facilities shown in Table 2-4.1 will be scheduled in years 1 - 15 of the New License in order to provide some predictability of annual funding needs and to accommodate other significant capital expenditures for New License commitments (i.e., new water release structures at Santeetlah and Calderwood dams) competing for limited financial resources, with the objective of more levelized Licensee funding.

The direct construction component for investments on USFS lands (\$1,872,892) will be scheduled to complete all projects on USFS lands within the first 15 years of the New License term. Should the Licensee's funds allocated for facilities on USFS lands not be utilized during this 15-year period or should the USFS be unable to secure matching funding, the Licensee's contribution can be "banked" and applied toward future projects. In addition, should any of the agencies be able to fund a greater share of new facilities or facility upgrades than set forth in the above funding schedule, the Licensee's contribution that is not required to fund those new facilities or facility upgrades can be applied toward other recreation facilities falling within the same cost-sharing category (i.e. excess Licensee funding for USFS facilities must be utilized for other USFS facilities, excess Licensee funding for non-USFS facilities must be utilized for other non-USFS facilities). The use of Licensee funding for any new facilities or facility upgrades other than those identified in Table 2-4.1 requires the concurrence of the Licensee.

Funding of new recreation facilities or facility upgrades shown in Table 2-4.1 by any of the funding Parties that may occur prior to the Effective Date of the New License will be considered as applying toward that Party's total commitment for facilities contemplated by this Agreement.

2.4.5 Recreation Planning Meetings and Reporting

The funding Parties will meet annually during July of each year, or at another mutually agreeable time, to discuss funding priorities for the subsequent calendar year based on projected funding availability, including in-kind services and other relevant considerations. Additional meetings of the funding Parties may be held at the request of any of the funding Parties. The funding Party interested in holding an additional meeting shall notify the other funding Parties of the perceived need for such a meeting and shall work with the other funding Parties to identify a mutually acceptable time for the meeting. The funding Parties will also prepare a report during the 1st quarter of each calendar year that summarizes expenditures and accomplishments during the previous calendar year.

2.4.6 Disposition of Funding Beyond 30-year License Term

The USFS, NCWRC and TWRA commit to making diligent efforts to implement the identified recreational facility improvements as cost-effectively as possible, while fully meeting applicable agency design standards, so as to minimize any additional need for expenditures by the Licensee beyond year 30 of the New License, should FERC issue a New License with a longer license term. To the extent that the total Licensee construction funding commitment exceeds the new facility and facility upgrade needs at the Project during the first 30 years of the New License term, through successful efforts to involve other funding partners and manage costs, remaining committed Licensee funds will remain available for possible new facility and facility upgrade needs at the Project beyond the initial 30 years of the New License, should FERC issue a license with a longer license term. In the event that FERC issues a New License with a 30-year license

term and there are Licensee funds that have been received by, but not committed by the USFS, those funds would be returned by the USFS to the Licensee.

2.4.7 Assessing Future Recreational Needs

Nothing in this Agreement shall preclude the use of established mechanisms for monitoring growth in recreation facility demands such as the FERC Form 80, North Carolina State Comprehensive Outdoor Recreation Plan, and USFS recreation use monitoring. The information generated by these processes will serve as indicators of future recreational needs beyond those noted in this Agreement.

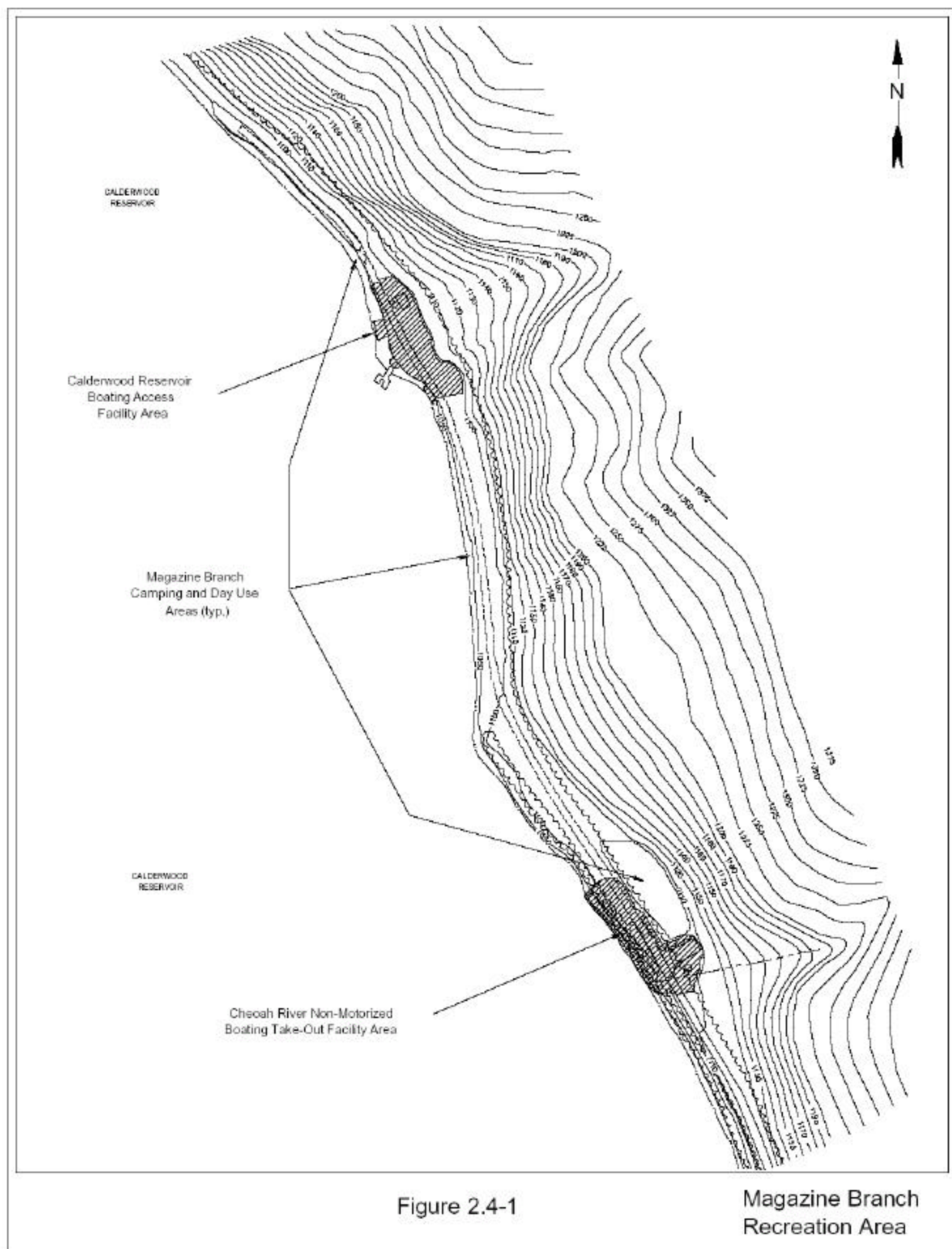
2.4.8 Cheoah River Non-motorized Boating Facilities

The USFS commits to the development, operation and maintenance of a recreational non-motorized boating put-in facility on National Forest Service land adjacent to the Cheoah River below Santeetlah Dam and a Cheoah River non-motorized boating take-out facility on the Little Tennessee River downstream of the US Highway 129 bridge. These facilities will be constructed, operated and maintained in accordance with USFS design standards.

2.4.9 Magazine Branch Recreation Area Maintenance Responsibilities

To reduce the duplication of routine, ongoing maintenance and for more efficient operations, the recreation facilities located on the Little Tennessee River below Cheoah Dam downstream of the US Highway 129 bridge will be divided into three administrative parts (see Figure 2.4-1):

- Magazine Branch Camping and Day Use Area
- Calderwood Reservoir Boating Access Facility
- Cheoah River Non-motorized Boating Take-out Facility



The Licensee will be responsible for all daily and annual operations and maintenance of the Magazine Branch Camping and Day Use Area.

The Licensee will be responsible for: 1) all daily operations and maintenance of the Calderwood Reservoir Boating Access Facility and 2) daily operations and maintenance of the Cheoah River Non-motorized Boating Take-out Facility on days when there are no scheduled boating flow releases from Santeetlah Dam. On days with scheduled boating releases from Santeetlah Dam, the USFS will be responsible for operations and maintenance activities of the Cheoah River Non-motorized Boating Take-out Facility.

The USFS will be responsible for all annual maintenance of the Cheoah River Non-motorized Take-out Facility. The NCWRC will be responsible for all annual maintenance of the Calderwood Reservoir Boating Access Facility.

For the purpose of this section, the following definitions apply:

Daily Maintenance: Maintenance, reconditioning, or renovation that neither materially adds to the value of the property nor appreciably prolongs its life. The work serves only to keep the facility in an ordinary, efficient operating condition. From an accounting or tax perspective, it is work that may be expensed, but not capitalized. Examples include but are not limited to interior decorating, interior painting, vandalism repair, repair of broken windows, light bulb replacement, cleaning, unplugging drains, drive belt replacement, preventative maintenance, lubrication of motors, greasing, servicing, inspecting, oiling, adjusting, tightening, aligning, watering, weeding, sweeping, waxing, refinishing picnic tables, routine housekeeping, and general snow removal. In fulfilling these responsibilities, the responsible party shall obtain any licenses and certified inspections required by regulatory agencies and follow state and local laws, regulations, and ordinances and industry standards or codes applicable to the permitted operation.

Annual Maintenance: Maintenance reconditioning, renovation, or improvement that arrests deterioration, improves and upgrades facilities, and appreciably prolongs the life of property. Examples include but are not limited to installing a new roof, new floor, or

new siding; rebuilding boilers; replacing pipes, pumps, and motors; repairing or maintaining the paths, lands, walks, walls, or landscaping adjacent to other government-owned structures; replacing vault toilets with flush facilities, paving interior roads, upgrading facilities, and installing utilities; and performing exterior painting and refinishing. Exterior painting that repairs unsightly visual marks caused by everyday use does not meet the definition outlined above.

2.4.10 Compliance with Project's Shoreline Management Plan

The Parties agree that any new recreational facilities or upgrades to existing facilities shall also be in accordance with the requirements of the Project's approved Shoreline Management Plan.

2.4.11 Consideration of Alternate Management Proposals for Licensee's Recreational Facilities

USFS, NCWRC and TWRA acknowledge the Licensee's interest in leasing Licensee recreational facilities to other agencies or local government during the New License term and providing for a portion of the costs to operate and maintain those facilities via cooperative funding while minimizing active Licensee involvement in day-to-day recreational management activities. These agencies agree to consider any such opportunities that may be identified during the New License term and to discuss specific proposals with the Licensee during the annual planning meeting. Agency consensus will be required for provisions in any such leasing arrangement that would involve charging members of the general public access or use fees for Licensee recreational facilities.

2.4.12 Escalation

Unless otherwise indicated, all costs or payment amounts specified in dollars shall be deemed to be stated as of the year 2003, and such sums shall be escalated as of January 1 of each following year (starting in January 2004) according to the formula set forth in Proposed License Article RF-1 included in Appendix A.

2.4.13 Addressing Project Recreational Needs Beyond 30-years

The USFS, NCWRC, TWRA and the Licensee agree that concerns regarding the potential need for additional facilities or major rebuilds of existing facilities at the Project beyond 30 years, should FERC issue a New License for longer than 30 years, should be addressed in the same cooperative manner following the model utilized in the development of the current recreational facility plan. The USFS, NCWRC, TWRA, and the Licensee agree that any Licensee funding in excess of the current \$1,585,892 commitment for new and upgraded facilities needed in the years beyond year 30 of the New License will only be required to the extent that such funding is committed on a 50/50 cost-share basis (including costs of design, contract administration, permitting and NEPA compliance activities related to facilities located on lands owned by state or federal agencies) with the appropriate agencies.

2.4.14 Retention of USFS fees for Project Related USFS Facilities

The USFS agrees that to the extent possible during the term of the New License, it will strive to retain as much of the fees collected from users of USFS recreational facilities covered by this Agreement as allowable under relevant USFS requirements, for use in ongoing operations and maintenance of these facilities.

2.4.15 Acknowledgement of USFS Authority

The Parties to this Agreement acknowledge that the USFS retains the authority to modify the purposes for which any recreation facility located on USFS lands is managed, consistent with applicable USFS management plans.

2.5 Law Enforcement Authority of TWRA and USFS on Licensee-owned Lands

Within one year of the Effective Date of the New License issued for the Project, the Licensee shall negotiate with TWRA an agreement whereby TWRA will be given permission to enter upon Licensee-owned lands and lands that may be transferred to TNC as a result of this Settlement Agreement for purposes of law enforcement. TWRA shall

have enforcement authority on said lands unless and until such time as they are transferred to TWRA, USFS or NPS as set forth in this Settlement Agreement.

In addition, in order to facilitate a TWRA enforcement presence on the US Highway 129 day-use areas adjacent to Chilhowee Reservoir, the Licensee agrees to request that the TWRA make a rule change proclaiming the area adjacent to Chilhowee Reservoir and US Highway 129 located between Chilhowee Dam and Tabcat Creek, currently leased to TWRA as part of the Foothills Wildlife Management Area, for day-use only, with no overnight camping allowed. The Licensee will make this request such that the change will become effective on March 1, 2005, the anticipated Effective Date of the New License.

Permission for the USFS to enter upon APGI lands in order to exercise law enforcement authority shall be negotiated and included within the lease agreements for USFS constructed and operated recreational areas located on Licensee-owned lands.

2.6 Negotiation of Separate Agreement Between APGI and TWRA Addressing Vegetation Management Along the Non-Project Transmission Line Rights-of-Way in the Vicinity of the Foothills Parkway

Within one year of the Effective Date of the New License issued for the Project, the Licensee shall negotiate an agreement with TWRA addressing vegetation management by TWRA along the non-Project transmission line rights-of-way in the vicinity of the Foothills Parkway.

2.7 Matching Funds for Fish Stocking in Calderwood Reservoir

Starting with the year in which a New License for the Project becomes effective, TWRA will contribute annually for the term of the New License the amount of \$10,000 on a cost-share basis with the Licensee for recreational fish stocking in Calderwood Reservoir. If for any reason in any year the TWRA annual contribution is not made, the Licensee's obligation to fund \$10,000 annually for this recreational fish stocking as required by the

Proposed License Article RF-1 in Appendix A shall not be increased and the amount of fish stocking in that year shall be limited to the available funding.

2.8 Negotiation of Recreational Easements to the U.S. Forest Service and the States of North Carolina and Tennessee

In the event that the Project ceases to be a federally licensed hydropower project, the Licensee shall convey recreational easements to the United States of America and/or the States of North Carolina and Tennessee. No later than one year prior to the date that the Project ceases to become a federally licensed hydroelectric project, the Licensee shall negotiate recreational easements with the United States of America and/or the States of North Carolina and Tennessee to ensure continued public access to the Project reservoirs and associated recreational facilities. Such easements will only become effective in the event that the Project ceases to be a federally licensed hydroelectric project.

2.9 Design of Boating Access Facilities Located on USFS Lands in North Carolina

The USFS, NCWRC and the Licensee agree to cooperate in the design of boating access facilities located on USFS lands in North Carolina. NCWRC agrees to commit the necessary staff to assist in design work and/or consult on USFS designs as deemed appropriate by these Parties.

The Parties acknowledge the Memorandum of Agreement between the NCWRC and USFS, particularly as it relates to boating access facilities on USFS lands. The Parties agree to work together to reconcile any potential items of conflict between this provision and the Memorandum of Agreement.

2.10 Description of the Final Jurisdictional Resolution

The NPS, USFWS, BIA, and USFS within the constraints imposed upon them by law, and American Rivers (AR), Cross Creek Property Owners Association (Cross Creek), the Eastern Band of the Cherokee Indians (EBCI), Friends of Lake Santeetlah (FOLS), Sierra Club, The Nature Conservancy (TNC), The National Parks Conservation Association (NPCA), Tennessee Clean Water Network (TCWN), Tennessee Department of

Environment and Conservation (TDEC), and Tennessee Wildlife Resources Agency (TWRA) will support efforts necessary to finally resolve all issues related to the FERC jurisdiction over existing Project lands lying within the current authorized legislative boundary of the Great Smoky Mountains National Park (GSMNP), including but not limited to legislation granting FERC jurisdiction over approximately 100 acres of Project lands lying within the current authorized legislative boundary of GSMNP (the “Final Jurisdictional Resolution”). These Parties understand and agree that if the Final Jurisdictional Resolution is made through legislation, the legal requirement for a NEPA analysis of the land exchange described below may be obviated. The Licensee and these Parties will draft a bill to accomplish these ends and these Parties other than the federal government agencies shall approach the Congress to suggest enactment. In the event that appropriate legislation is not enacted in a timely fashion, and it becomes necessary for the Licensee to expend funds on a NEPA analysis of the land swap, the costs incurred by the Licensee related to the performance of the required NEPA analysis will be reimbursed to the Licensee out of the Tallassee Fund. Reimbursement to the Licensee from the Tallassee Fund will be given priority over other funding priorities until the reimbursement has been completed. The Licensee shall document all of its costs, if any, for work on a NEPA analysis of a land exchange. The Licensee’s costs eligible for reimbursement shall not include expenditures it makes for monitoring or reviewing NEPA work performed by the NPS or its contractors.

2.11 Land Grants and Conveyances

Within six months from the date that the New License becomes Final and Non-Appealable, the Licensee and any other entity identified as a signatory in the agreements listed below will execute the agreements listed below substantially in the form attached hereto as Appendix B-3 and incorporated herein by this reference:

1. Permanent Conservation Easement and Declaration of Restrictive Covenants Between the Licensee and The Nature Conservancy – Bulge Lands (Tennessee)

2. Agreement for Option and Sale of Real Estate Between the Licensee and The Nature Conservancy – Bulge Lands (Tennessee)
3. Permanent Conservation Easement and Declaration of Restrictive Covenants Between the Licensee and The Nature Conservancy – Corridor Lands (Tennessee)
4. Agreement for Option and Sale of Real Estate Between the Licensee and The Nature Conservancy – Corridor Lands (Tennessee)
5. Term Conservation Easement and Declaration of Restrictive Covenants Between the Licensee and The Nature Conservancy – Remaining APGI Lands (Tennessee)
6. Agreement for Option and Sale of Real Estate Between the Licensee and The Nature Conservancy – Remaining APGI Lands (Tennessee)
7. Permanent Conservation Easement and Declaration of Restrictive Covenants Between the Licensee and The Nature Conservancy – Tennessee Riparian Lands
8. Term Conservation Easement and Declaration of Restrictive Covenants Between the Licensee and a Qualified Land Trust Acceptable to the Parties – North Carolina Riparian Lands

The properties addressed by the aforementioned agreements are generally depicted on the maps attached hereto as Appendix B-5.

Within 90 days from the date that legislation is enacted as contemplated by the Final Jurisdictional Resolution described above, the Licensee and the NPS will execute the agreements listed below substantially in the form attached hereto in Appendix B-3 and incorporated herein by this reference:

1. Warranty Deed from Licensee to NPS to a Tract of Land Lying North of U.S. Highway 129 between Chilhowee and Calderwood Reservoirs (Tennessee)
2. Law Enforcement and Resource Management Easement from the Licensee to NPS on Powerline Areas Retained by the Licensee (Tennessee)
3. Quitclaim Deed from NPS to Licensee to Project Lands in the Embayments of Abrams Creek, Shop Creek, Chilogatee Creek, and an Unnamed Tributary to Chilhowee Reservoir with a Reservation by the NPS of a Law Enforcement and Resource Management Easement on Same Lands (Tennessee)

The properties intended to be conveyed pursuant to the aforementioned agreements are generally depicted on the maps attached hereto as Appendix B-5.

2.12 Request to Amend Project Boundary

The Parties acknowledge that the Licensee is filing for Commission approval a request to amend the FERC Project boundary to include five parcels of property that (i) abut the current FERC Project boundary and (ii) abut lands intended to be conveyed to NPS and/or abut lands to be conveyed by permanent conservation easement to TNC in accordance with this Agreement (see Appendix C). These parcels are identified as “Non-Project Lands To Be Included In Project” on the maps attached hereto as Appendix B-5. The Parties agree either to (i) support such request or (ii) not oppose such request. If the Commission rejects the Licensee’s request to include said parcels within the Project boundary, then, at the time that the Licensee conveys the permanent conservation easement for the Bulge Lands (also known as Lakey Woods Knob) to TNC, the Licensee shall place a condition on said parcels that restricts the use of said parcels to uses deemed necessary by the Licensee to provide a safety, management, and operational buffer for the Project and related purposes.

2.13 APGI Commitments During Annual License(s)

In the event that FERC does not issue a New License prior to or upon expiration of the current License on February 28, 2005 and FERC issues one or more Annual Licenses, pursuant to 16 U.S.C. §808 (a), the Licensee agrees to implement the following measures:

1. The Licensee will establish and initiate its contributions to the Tallassee and North Carolina Funds (the amount of contributions shall be as provided in Section 2.3 of the Agreement) prior to August 31, 2005;
2. The Licensee's annual contributions to the Tallassee Fund shall continue until the expiration of the New License;
3. The Licensee's annual contributions to the North Carolina Fund shall continue until three years prior to the expiration of the New License;
4. Starting September 1, 2005, the Licensee shall begin releasing, using the existing Tainter gates, aquatic base flows from Santeetlah Dam as set forth in Appendix A, Section 1.2.1;
5. Starting September 1, 2005, the Licensee shall begin providing, using the existing Tainter gates, high flow events from Santeetlah Dam as set forth in Appendix A, Section 1.2.3;
6. Starting March 1, 2005, the Licensee shall begin releasing, using the existing gates, minimum instream flows in the Calderwood Bypass reach of the Little Tennessee River as set forth in Appendix A, Section 1.4.1;
7. Starting March 1, 2005, the Licensee shall maintain in their current condition its lands that are intended to be conveyed by easement or deed pursuant to Section 2.11; and

8. The Licensee shall hold its first annual planning meeting with USFS, NCWRC, and TWRA in July 2005 regarding the prioritization of recreational enhancements to be implemented for the following year and prior to January 31, 2006, shall initiate its funding commitments as set forth in Appendix A, Section 2.1.

Signatures

**Tapoco Hydroelectric Project FERC No. 2169
Relicensing Settlement Agreement – April 2004**

Signature Page

Alcoa Power Generating Inc., Tapoco Division

Signature: Walter F. Brockway

Date April 16, 2004

Walter F. Brockway
Operations Manager Hydroelectric Systems
Alcoa Primary Metals

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American Rivers

Signature: Rebecca R. Wodder Date 4/8/04
Print: Rebecca R. Wodder
Title: President

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Relicensing Settlement Agreement – April 2004**

Signature Page

Blount County

Signature:

Beverley D. Woodruff

Date

4/15/04

Print:

Beverley D. Woodruff

Title:

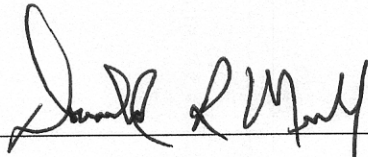
Blount County Mayor

**Tapoco Hydroelectric Project FERC No. 2169
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City of Alcoa

Signature:



Date April 14, 2004

Print:

Donald R. Mull

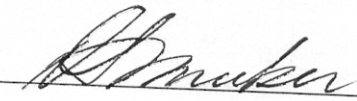
Title:

Mayor

**Tapoco Hydroelectric Project FERC No. 2169
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Cross Creek Property Owners Association

Signature: 

Date 3/25/04

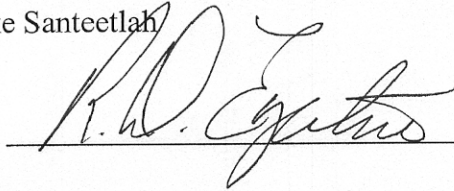
David Meeker
Director

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Friends of Lake Santeetlah

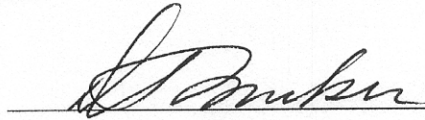
Signature: _____



Date 6 APRIL 2004

Richard Eyestone
President

Signature: _____



Date 4/4/04

David Meeker
Vice President

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Signature Page

Graham County

Signature:

Dirk Cody

Date

4/23/04

Dirk Cody

Title:

Graham County Representative

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National Park Service

Signature:

Patricia A. Hooks

Date

4/12/04

Print:

Patricia A. Hooks

Title:

Regional Director, Southeast Region

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Signature Page

National Parks Conservation Association

Signature: Don Barger Date APRIL 8, 2004

Print: DON BARGER

Title: SENIOR DIRECTOR, SOUTHEAST REGIONAL OFFICE

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North Carolina Department of Environment and Natural Resources –
Divisions of Water Resources, Water Quality and Parks and Recreation

Signature: William G. Ross, Jr.

Date 13 April 2004

William G. Ross, Jr.
Secretary

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North Carolina Wildlife Resources Commission

Signature: Charles R. Fullwood Date 4-5-04

Charles R. Fullwood
Executive Director

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Tennessee Clean Water Network

Signature: Renee Victoria Hoyos Date 3/30/04

Print: Renee Victoria Hoyos

Title: Executive Director

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Tennessee Department of Environment and Conservation

Signature: Betsy L. Child Date: 4/25/04

Print: Betsy L. Child

Title: Commissioner of the Tennessee Department of Environment and Conservation

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Tennessee Wildlife Resources Agency

Signature: Gary T. Myers Date 04/08/04

Print: Gary T. Myers

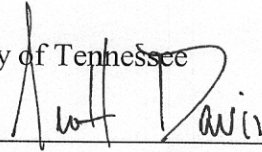
Title: Executive Director

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The Nature Conservancy of Tennessee

Signature:



Date 4/2/04

Print:

SCOTT DAVIS

Title:

STATE DIRECTOR, TN CHAPTER, TNC

**Tapoco Hydroelectric Project FERC No. 2169
Relicensing Settlement Agreement – April 2004**

Signature Page

Town of Robbinsville

Signature: _____

Date _____

Print: _____

Title: _____

[Handwritten Signature]

Robert H. Mosley

Agmt

3/30/04

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Relicensing Settlement Agreement – April 2004**

Signature Page

Town of Lake Santeetlah

Signature: Sheldon Singer

Date 3/29/04

Sheldon Singer
Mayor

Signature: Robert Moseley

Date 3/30/04

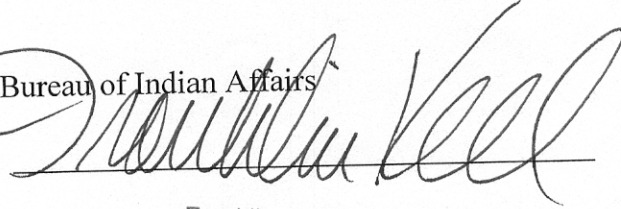
Robert Moseley

**Tapoco Hydroelectric Project FERC No. 2169
Relicensing Settlement Agreement – April 2004**

Signature Page

United States Bureau of Indian Affairs

Signature:



APR 02 2004
Date _____

Print:

Franklin Keel
Director, Eastern Region
Bureau of Indian Affairs

Title: _____

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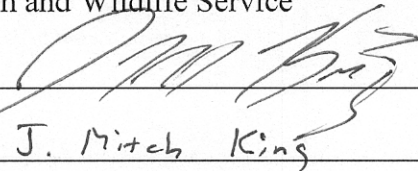
United States Fish and Wildlife Service

Signature: _____

Date _____

Print: _____

Title: _____



4/18/04

J. Mitch King

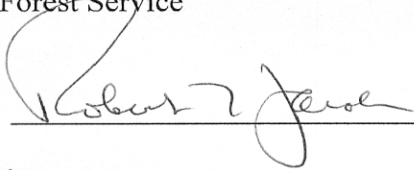
Deputy Regional Director

**Tapoco Hydroelectric Project FERC No. 2169
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United States Forest Service

Signature: _____

A handwritten signature in dark ink, appearing to read "Robert T. Jacobs", is written over a horizontal line.

Date _____

4/2/04

Robert T. Jacobs
Regional Forester

**Tapoco Hydroelectric Project FERC No. 2169
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Western North Carolina Alliance

Signature: 

Date 4/15/04

Jody Flemming

Title: Executive Director, WNC Alliance

Appendices

A. Proposed License Articles

1.0 Operational Requirements

1.1 Article OR-1. Santeetlah Reservoir

1.1.1 Santeetlah Reservoir Operating Curve

The Licensee shall operate Santeetlah Reservoir at or above the minimum levels as depicted on the Santeetlah Reservoir Operating Curve (Figure OR-1.1).

1.1.2 Planning Period

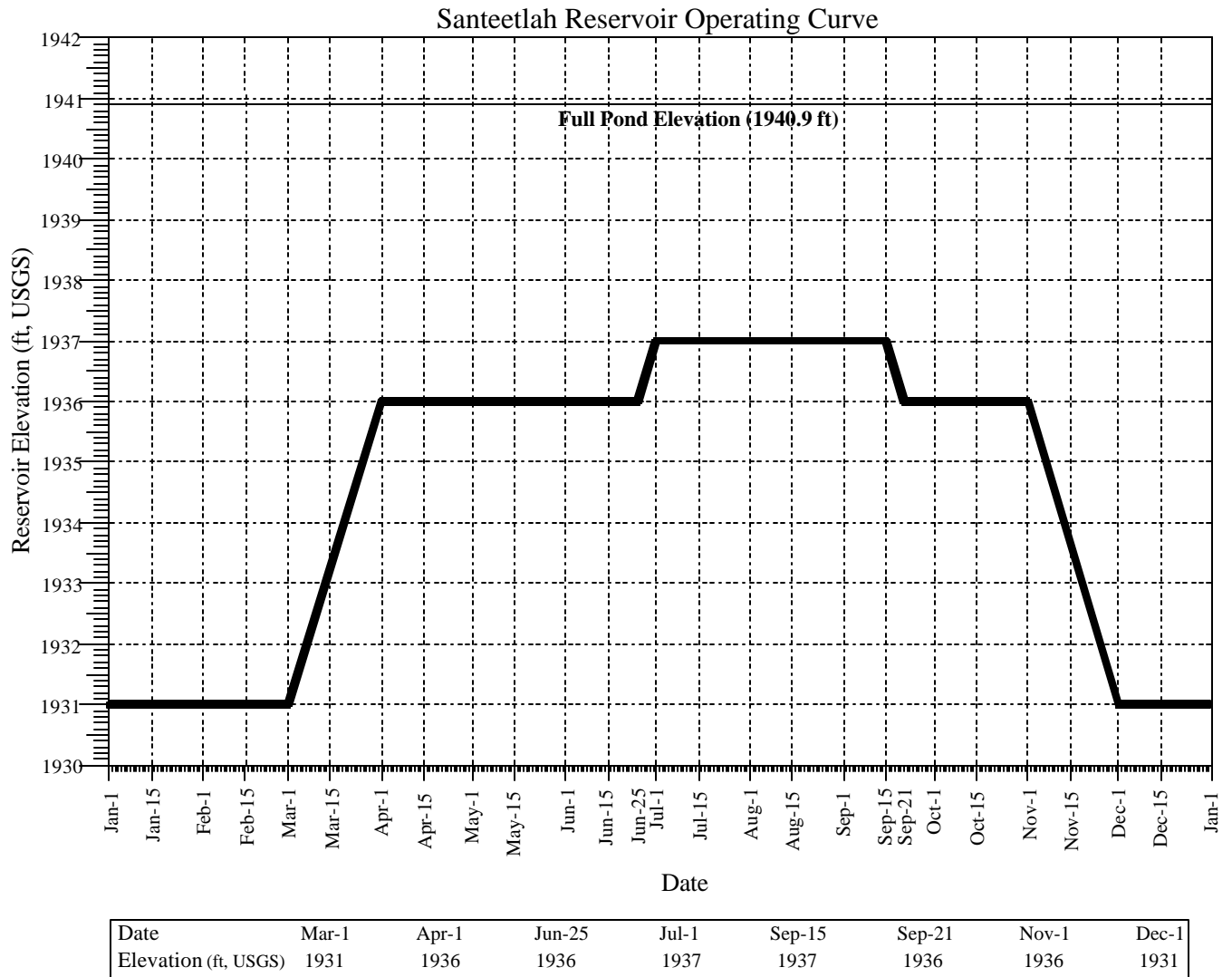
Each Friday the Licensee will project the inflow for the next 10 days, the “planning period”. The water requirement for the planning period is the volumetric sum of base flows; high flow events, if any; flood discharge flows, if any; Santeetlah Reservoir Operating Curve increase, if any; and generation. The water available for the planning period is the volumetric sum of storage above the Santeetlah Reservoir Operating Curve and the planning period projected inflow. During normal operations the Licensee will adjust generation to maintain Santeetlah Reservoir elevations at or above the Santeetlah Reservoir Operating Curve. Generation is not restricted for normal operations.

1.1.3 Reservoir Elevation Monitoring

The Licensee shall monitor the elevation of Santeetlah Reservoir on an hourly basis using a water level sensor located upstream of the gatehouse, on the upstream face of the intake. The water level data recorded by the sensor will be transmitted electronically to the dispatcher’s office in Alcoa, Tennessee. The Licensee shall make available electronically (e.g., the Internet) the hourly Santeetlah Reservoir elevation data.

Based on actual experience, the Licensee may consult with the Parties to the Tapoco Project Settlement Agreement on the actual water level results at Santeetlah Reservoir from the management practices implemented. After such consultation, the Licensee may request Commission approval of minor adjustments to the Santeetlah Reservoir Operating Curve, provided that such adjustments have been first approved by applicable state and federal agencies.

Figure OR-1.1 Santeetlah Reservoir Operating Curve



1.2 Article OR-2. Cheoah River Flow Regime

1.2.1 Aquatic Base Flows

In order to enhance, maintain, and protect fish and wildlife habitat and biological integrity and water quality in the Cheoah River bypass reach, the Licensee shall release aquatic base flows from Santeetlah Dam in the magnitude and for the duration described in Table OR-2.1. The Licensee shall determine the aquatic base flow for each month by calculating the average daily inflow (ADI) value for the three preceding months. The Licensee shall calculate the ADI using its recorded measures of daily change in reservoir elevation and total discharge (generation flows, instream flow releases, high flow events, and flood discharge flows). If the ADI is greater than the historic 25th percentile average flow for that month (Table OR-2.2.), the Licensee shall release flows according to Tier A and if the ADI is less than or equal to the historic 25th percentile average flow for that month, the Licensee shall release flows according to Tier B.

In order to allow state and federal agencies to complete the collection of three full years of baseline data in the Cheoah River below Santeetlah Dam, the Licensee shall release aquatic base flows starting September 1, 2005.

[Drafting Note to Commission Staff: The Parties request that the following provision be included in the License in lieu of the preceding sentence if the Commission issues a New License after September 1, 2005.]

The Licensee shall release aquatic base flows starting in the month after the effective date of the License.

Table OR-2.1 Aquatic Base Flows

Month	Tier A Flowrate (cfs)	Tier B Flowrate (cfs)
January	50	50
February	100	90
March	100	90
April	100	90
May	90	80
June	60	60
July	60	50
August	50	40

September	50	40
October	50	40
November	50	40
December	60	50

Table OR-2.2 Historic 25th Percentile Average Flows Based on 31-year Period of Record (1971-2001)

Month	Threshold Flow (cfs)
Jan	256
Feb	446
Mar	484
Apr	615
May	617
Jun	526
Jul	403
Aug	289
Sep	208
Oct	141
Nov	116
Dec	148

1.2.2 High Flow Events

The Licensee shall provide high flow events, which follow a repeating five-year schedule for the term of the License according to Table OR-2.3.

In order to allow state and federal agencies to collect three full years of baseline data in the Cheoah River below Santeetlah Dam, the Licensee shall provide high flow events starting September 1, 2005.

[Drafting Note to Commission Staff: The Parties request that the following provision be included in the License in lieu of the preceding sentence if the Commission issues a New License after September 1, 2005.]

The Licensee shall release high flow events starting in the month after the effective date of the License.

When implementing the high flow events, the following conditions apply:

1. Use the Tainter gates at Santeetlah Dam for the high flow events. The Licensee shall use the headwater elevation of Santeetlah Reservoir to determine the gate opening necessary to make the required high flow release from Santeetlah Dam. The downstream gage at Bearpen Gap shall be used during the initial system set up to confirm the required gate positions to make the high flow releases;
2. Schedule all high flow events on weekend days (Saturday and Sunday); schedule three day events on Saturday, Sunday, and Monday;
3. Schedule the March event for the third weekend in March and the November event for the first weekend in November;
4. Schedule one 3-day high flow event in April in years 1, 3, and 4 of the repeating sequence;
5. Utilize the downstream gage at Bearpen Gap during the initial system set up to confirm the required gate positions and gate change frequencies in order to ramp the high flow events. Ramp high flow events at a rate of 2-inches per hour for flows between the aquatic base flow and 100 cfs;
6. Release flows for 4 hours for day 1 high flow releases for 2-day events in February; releases are targeted to begin at hour 11;
7. Release flows for 8 hours for day 1 high flow releases for 1-, 2-, and 3-day events in March through November; releases on day 1 are targeted to begin at hour 8 in March, April, October, and November, and at hour 9 in May through September;
8. Release flows for 8 hours for day 2 high flow releases for 2-day events in April through July; releases on day 2 are scheduled to begin at hour 8 in April and at hour 9 in May, June, and July;

9. Reduce the flow to 500 cfs after the end of the 8 hours of high flow on day 1 until the beginning hour of high flow on day 2 for 2-day events in April through July;

10. Schedule single day high flow events from July through November with a minimum of 10 days between events.

The Licensee will provide 12 months prior notice to the USFWS, USFS, NCWRC, NCDENR, EBCI, and Graham County of the proposed schedule of high flow events.

Table OR-2.3 High Flow Events – 5-year Repeating Schedule

High Flows	Year 1		Year 2		Year 3		Year 4		Year 5		Magnitude (cfs) ³		
	Events	Total Days Per Month	Events	Total Days Per Month	Events	Total Days Per Month	Events	Total Days Per Month	Events	Total Days Per Month	Day 1	Day 2	Day 3
January													
February	1	2	1	2	1	2	1	2	1	2	1000	Var ¹	
March	1	3	1	3	1	3	1	3	1	3	1000	600 ²	300
April	2	5	3	6	2	5	2	5	3	6	1000	850	300
May	2	4	2	4	3	6	3	6	3	6	1000	850	
June	1	2	1	2					1	2	1000	850	
July					1	2					1000	850	
August							1	1			1000		
September	1	1			1	1					1000		
October	1	1	1	1			1	1			1000		
November	1	1	1	1	1	1	1	1	1	1	1000		
December													
Total Per Year:	10	19	10	19	10	20	10	19	10	20			
¹ 600 cfs from hour 15 to hour 19; 400 cfs from hour 20 to hour 34; 200 cfs from hour 35 to hour 47; 100 cfs for hour 48 ² 600 cfs from hour 16 to hour 36; 300 cfs from hour 37 to hour 48 ³ 12:00 a.m. (midnight) shall be the starting point for determining the appropriate time for initiating and changing flow releases													

1.2.3 Reallocation of Flows

The Licensee shall convene an annual planning meeting in early October each year which shall include the U.S. Fish and Wildlife Service (USFWS), the U.S. Forest Service (USFS), the North Carolina Wildlife Resources Commission (NCWRC), the North Carolina Department of Environment and Natural Resources (NCDENR), and the Eastern Band of Cherokee Indians (EBCI). If the USFWS, USFS, NCWRC, NCDENR, and EBCI notify the Licensee prior to the annual meeting that they have determined by consensus that unanticipated circumstances have arisen that indicate that additional aquatic habitat enhancement would result from the reallocation of water previously committed to the aquatic base flows and/or high flow event schedule as required in Sections 1.2.1 and 1.2.2 above, then the Licensee shall discuss with these entities the reallocation of water for aquatic habitat enhancement purposes within the aquatic base flow regime and/or the high flow event schedule for any year. The Licensee shall cooperate with the USFWS, USFS, NCWRC, NCDENR, and EBCI in evaluating any requested water reallocation, with due consideration given to the following factors:

1. Any reallocation requests shall be based on periodic (i.e. every several years) re-evaluations of aquatic conditions in the Cheoah River by the above-listed entities;
2. Any requested reallocation shall be designed to minimize any additional lost generation (either in lost megawatts and/or lost value) and operating costs;
3. Under no circumstances shall water allocated as part of the aquatic base flow regime be utilized for high flow events and vice versa nor shall water from one calendar year be reallocated to any other calendar year;
4. Any requested reallocation of water must be able to be accommodated with the gate structures in existence at that time.

If agreement is reached on reallocation, the Licensee shall make a filing with the Commission requesting the approval of the requested revised allocation of flows for that calendar year, and

upon Commission approval will implement the revised aquatic base flow regime and/or high flow event schedule.

1.2.4 Potential Modifications to Repeating Five Year Schedule of High Flow Events

Starting in October 2010, in conjunction with the annual planning meeting required in Section 1.2.3 above, the Licensee will consult with the U.S. Fish and Wildlife Service (USFWS), the U.S. Forest Service (USFS), the North Carolina Wildlife Resources Commission (NCWRC), the North Carolina Department of Environment and Natural Resources (NCDENR), the Eastern Band of Cherokee Indians (EBCI), and Graham County regarding the possibility of providing high flow events for whitewater boating purposes on a trial basis in addition to the high flow events contemplated in the repeating five year schedule included in Section 1.2.2 above.

If the USFWS, USFS, NCWRC, NCDENR, and EBCI notify the Licensee that they are in full concurrence that biological recovery in the Cheoah River has proceeded to a point that additional high flow events should be scheduled and evaluated on a trial basis, then the Licensee will consult with USFWS, USFS, NCWRC, NCDENR, EBCI and Graham County, to determine the specific number, magnitude and timing of such additional trial high flow events. The Licensee will provide the additional high flow events upon Commission approval and if (i) the requesting entity has agreed, in writing to, and does compensate the Licensee for its costs incurred as a result of the additional high flow events, (ii) the requesting entity has agreed to and in fact does fully fund the expenses incurred for additional monitoring of resources in the Cheoah River associated with the evaluation of the biological effects of the additional high flow events, and (iii) the additional high flow events can be provided in a manner consistent with other requirements of the License (including but not limited to the Santeetlah Reservoir Operating Curve, the Low Inflow Protocol, and the Maintenance and Emergency Protocol).

In the event that the Licensee, USFWS, USFS, NCWRC, NCDENR, EBCI, and Graham County agree on the provision of additional trial high flow events, then no later than 60 days prior to the anticipated start of the additional high flow events, the Licensee shall file for Commission approval a plan of the proposed revisions to the repeating five year schedule of high flow events.

In conjunction with subsequent annual planning meetings, the Licensee will consult with the USFWS, USFS, NCWRC, NCDENR, and EBCI in order to determine whether to terminate, continue, or modify the additional trial high flow events, or to recommend to FERC a permanent change in the repeating five year schedule of high flow events. The determination shall be based on USFWS, USFS, NCWRC, NCDENR, and EBCI's assessment of the effects of the additional trial high flow events on the Cheoah River aquatic and associated riparian biological communities, on other recreational uses of the Cheoah River, on water levels in Santeetlah Reservoir, and of cumulative and secondary effects on the ecological and aesthetic resources of the Cheoah River corridor. The determination will also be based upon the Licensee's assessment of the performance of the requesting entity in reimbursing the Licensee and the agencies for costs associated with the additional releases, and any other factors associated with Project operations and other relevant License requirements that may be affected by the additional high flow events.

The Licensee shall make additional filings, as appropriate, notifying the Commission of any additional requested revisions to the repeating five year schedule of high flow events, and upon Commission approval will implement the revised high flow event schedule.

1.2.5 Low Inflow Protocol

If inflow is not adequate to provide high flow releases and maintain required reservoir levels while maintaining instream flows, then equitable reductions in Santeetlah Reservoir water levels, and high flow releases to the Cheoah River will be made as follows. If the water available for the planning period (as defined in Appendix A Section 1.1.2) is less than the water requirement with no generation for the scheduling period the following low flow stages will be implemented. The low flow stage will remain in effect until the next planning period when the water requirement is compared to the water available. If the water available is less than the water requirement, the next stage will be implemented. If the water available is greater than the water requirement the previous stage will be implemented or normal operations if at Stage 1. If the actual inflow is appreciably different than the projected inflow the Licensee may make adjustments to the low flow stage during the planning period.

Stage 1: Reduce high flow duration by 25% (2 hours for each day of the high flow event).
Elevation minimum decreased by 0.25 feet below operating curve.

Stage 2: Reduce high flow duration by 50% (4 hours for each day of the high flow event).
Elevation minimum decreased by 0.50 feet below the operating curve.

Stage 3: Reduce high flow duration by 100%. Elevation minimum decreased by 0.75 feet below the operating curve.

Stage 4: Elevation minimum decreased by 1.0 feet below operating curve. If continuous discharge is at Tier A reduce continuous discharge from Tier A to Tier B level.

Stage 5: Continue releasing Tier B continuous discharge through spillway gates until elevation reaches bottom of the spillway gates (or valve).

Stage 6: Reduce continuous discharge to inflow.

Based on actual experience, the Licensee may consult with state and federal agencies to modify the Low Inflow Protocol. If agreement is reached on modifying the protocol, the Licensee shall make a filing with the Commission requesting approval of the proposed modification and upon Commission approval will implement the modified protocol.

1.2.6 Gaging Requirements

The Licensee shall continue funding the existing U.S. Geological Survey (USGS) Bearpen Gap gage (Station No. 0351706800) on the Cheoah River below Santeetlah Dam. Additionally, the Licensee shall install and maintain a calibrated staff gage, or the equivalent, at the Joyce Kilmer Bridge to allow for visual confirmation of Cheoah River flows. The Licensee shall make available electronically (e.g., the Internet) the calculated hourly Cheoah River flow release data (cfs).

1.2.7 Interim Implementation

Prior to the completion of the gate modifications required in Section 1.2.8 below, the continuous base flow release shall consist of a flow of approximately 50 cfs released through an existing Tainter gate at Santeetlah Dam. Prior to the completion of the Tainter gate automation required in Section 1.2.8 below, high flow events shall be made with consideration of the following factors:

1. Releases from November 1 through March 31 will be scheduled to occur during the regular work week (Monday through Friday) to minimize additional personnel costs associated with releases on weekends using the existing gates and related equipment; releases from April 1 through October 31 will occur on weekends;
2. Releases will be initiated using the “Year 1” release schedule in Table OR-2.3 and subsequent years will use “Year 2”, “Year 3” etc.;
3. Ramping rates will not apply;
4. The Licensee shall make a reasonable effort to provide the high flow events according to the high flow event schedule in Table OR-2.3, however some variation in terms of actual timing of events may occur during this interim period until the gate modifications are complete.

1.2.8 Gate Modifications and Schedule

To accommodate release of the aquatic base flow and high flow events, the Licensee shall add “piggy-back” gates to, and automate, either two or three of the existing Tainter gates on Santeetlah Dam within 24 months of the effective date of this License. The Licensee may deviate from the Santeetlah Operating Curve, the aquatic base and high flow releases during the winter drawdown period to allow for construction in the field of the modified Tainter gates. Within 90 days of the effective date of this License, the Licensee shall file, for approval by the Commission, a plan and schedule for modifying the Tainter gates.

1.3 Article OR-3. Cheoah Reservoir

The Licensee shall operate Cheoah Reservoir with no seasonal drawdown and maximum drawdowns of 7 feet from normal full pool elevation of 1276.8 feet USGS datum.

1.4 Article OR-4. Calderwood Bypass Flows

1.4.1 Minimum Flow Releases

Beginning with the effective date of this License, the Licensee shall release minimum instream flows in the Calderwood Bypass reach of the Little Tennessee River according to the repeating 10-year schedule shown in Table OR-4.1. The minimum flow regime shall vary annually in both discharge and timing (i.e. adjustments in flows will be made on the first Tuesday of the month, no later than 12:00 p.m., so as to not always occur at the end of one month and beginning of another). The Licensee shall use the gate position and headpond elevation to determine the magnitude of the flow release. The Licensee shall release water from the base of the gate, down approximately 6-ft from normal full pond elevation of 1087.8 feet USGS datum.

The Licensee shall make the determination to release minimum instream flows in the Calderwood Bypass according to Scenario A, B or C for each calendar year, so long as the required frequency of each of these scenarios is met within each ten-year period.

Table OR-4.1 Calderwood Bypass Instream Flows

Scenario	A	B	C
January	45	50	55
February	40	50	60
March	35	50	65
April	20	40	60
May	30	40	50
June	25	30	35
July	30	30	30
August	20	25	30
September	25	25	25
October	35	30	25
November	45	40	25
December	40	40	40
Average Annual Flow	32.5 cfs	37.5 cfs	41.5 cfs
Frequency	3/10 years	5/10 years	2/10 years

1.4.2 Target Flows

In order to reduce the potential for thermal impacts on stream biota, during the normally hot and dry months of July – September, the Licensee shall consider the flows in Table OR-4.1 for each month as target flows. The Licensee shall operate within a limited flow band around the flow values due to the variation in headpond elevations during normal operation and the small magnitude of some of the required flows. The Licensee may exceed target flows if water is released upstream or inflows exceed the turbine capacity of the Calderwood Powerhouse or as necessary to pass trash at the dam.

In releasing the target flows into the Calderwood Bypass reach consistent with Table OR-4.1, the Licensee shall ensure that the released flows are no greater than 50 cfs above the target flows, except as provided in the previous paragraph, and no lower than 5 cfs below the target flows.

1.4.3 Gate Modifications and Schedule

The Licensee shall complete gate modifications necessary to release Calderwood Bypass flows within 18 months of the effective date of this License. Within 90 days of the effective date of this License, the Licensee shall file for approval by the Commission a plan and schedule for modifying the gates.

1.4.4 Flow Data Recording

The Licensee shall record the flow data electronically using the control system at Calderwood Dam. The Licensee shall make available electronically (e.g., the Internet) the calculated hourly Calderwood Bypass flow release data.

1.4.5 Reduction of Flows for Access to Goat Creek

1. The Licensee may temporarily reduce instream flows in the Calderwood Bypass as deemed necessary by the Licensee for the purpose of safely crossing the Little Tennessee River to utilize the Goat Creek access route to construct, reconstruct, inspect, maintain or perform related activities with respect to the Calderwood transmission lines. The maximum flow in

the Calderwood Bypass that allows safe crossing has been determined to be approximately 20 cfs.

2. In order to allow the elevation of the Calderwood Bypass to stabilize for safe crossing, the Licensee may initiate the reduction of minimum flows in the Calderwood Bypass to approximately 20 cfs 18 hours before any planned crossing of the Calderwood Bypass.
3. The Licensee shall maintain the flow at approximately 20 cfs during the entire period that transmission line work is being performed.
4. The Licensee shall consult with the USFWS, TDEC, TWRA, and USFS prior to initiating any modifications or additions of material to the streambed to facilitate vehicle passage.
5. When access for planned maintenance on transmission lines will require deviation from the minimum flows in the Calderwood Bypass, the Licensee will provide 15 days prior notice to the Commission, USFWS, TDEC, TWRA, and USFS. The notice will include an estimate of the proposed starting date and duration of the reduced flow. To the extent practicable, the Licensee will conduct planned maintenance during months of the lowest required flows into the Calderwood Bypass, i.e., June through October.
6. When access for unplanned transmission line maintenance or emergencies requires deviation from the minimum flows in the Calderwood Bypass, the Licensee will provide notice to the Commission, USFWS, TDEC, TWRA, and USFS as soon as practicable but not longer than five days after the initiation of the flow reduction.

1.5 Article OR-5. Calderwood Reservoir

The Licensee shall operate Calderwood Reservoir with no seasonal drawdown and maximum drawdowns of 6 feet from normal full pool elevation of 1087.8 feet USGS datum.

1.6 Article OR-6. Chilhowee Reservoir

The Licensee shall operate Chilhowee Reservoir with no seasonal drawdown and maximum drawdowns of 5 feet from normal full pool elevation of 874.0 feet USGS datum.

1.7 Article OR-7. Maintenance and Emergency Protocols

1.7.1 Maintenance and Emergency Situations

The following table (Table OR-7.1) identifies 1) the assumed most likely emergency, unplanned maintenance (e.g. equipment failure), and maintenance situations when certain license conditions may be impacted and 2) the potential actions to be taken by the Licensee for each situation. The Licensee shall determine the specific details of actions to be taken on a case-by-case basis, however, the Licensee shall place the highest priority on maintaining and restoring minimum flows in the bypass channels.

Table OR-7.1 Maintenance and Emergency Situations

		Potentially Impacted License Conditions		
Situation	Indications	Minimum Flows in Bypass Channels	High Flow Releases from Santeetlah Dam into the Cheoah River	Normal Operating Range for Reservoir Levels
		Potential Actions to be Taken		
Outage of Tainter gate(s) at Santeetlah Dam	Maintenance or equipment failure prevents opening or closing one or more gates		Notify using High Flow Event Notification Procedure (HFENP). Release from alternate gate, delay start of event or reschedule, lower flow for event	Repair gate or operating mechanism to close gate ¹
Outage of aquatic flow gate(s)	Maintenance will require one or more aquatic flow gates to be inoperable	Release flow from Tainter gate		
Outage of gate control system	Maintenance or failure of control system	Control gate manually, release flow from Tainter gate	Notify using the HFENP. Open gate manually, release from alternate gate, delay start of event or reschedule, lower flow for event	
Voltage or capacity	TVA curtails	Reduce Cheoah	Notify using	Reduce generation to

emergency (typically less than 24 hours in duration)	delivery of power to Alcoa Inc. TN Operations, voltage or capacity conditions in the TVA system or larger regional electric system failure has occurred or is imminent, or releases from Fontana are reduced or curtailed.	River continuous flow to 40 cfs. Increase to Tier A or B when normal operations resume	HFENP. Reduce generation and resume event when normal operations resume	allow reservoir to refill when normal operations resume
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¹For notification procedures see Section 1.7.2 Notification Guidance

1.7.2 Notification Guidance

The Licensee shall notify the Commission, resource agencies, and other affected parties regarding emergency, unplanned maintenance (e.g., equipment failure), and maintenance situations under which certain license conditions may need to be temporarily suspended or modified. Due to the potential variability of the situations, the Licensee shall determine the specifics of notifications on a case-by-case basis but shall follow the general guidance provided below.

1. **Planned Maintenance:** For planned maintenance on equipment that will require deviation from (i) the minimum flows in the bypass channels, (ii) the high flow releases from Santeetlah Dam into the bypass channel, or (iii) the normal operating range for reservoir elevations, the Licensee will provide a minimum of 15 days prior notice to the Commission, appropriate federal and state resource agencies, TVA and other parties whose interests the Licensee determines could be affected by the planned maintenance activity. The notice will include the planned starting date, expected duration of the activity, the expected deviation from requirements of the License, and the planned actions to minimize the need to deviate from the License requirements. In implementing the planned maintenance activity, the Licensee shall consider any comments received in response to the notification.
2. **Unplanned Maintenance:** For unplanned maintenance that will require deviation for a period of longer than 24 hours from (i) the minimum flows in the bypass channels, (ii) the high flow releases from Santeetlah Dam into the bypass channel, or (iii) the normal operating range for

reservoir elevations, the Licensee will notify the Commission, appropriate federal and state resource agencies, TVA, and other parties whose interests the Licensee determines could be affected by the unplanned maintenance activity. The notification will occur as soon as practicable but not longer than five days after the initiation of the deviation.

3. Emergencies: For emergencies, the Licensee will notify the Commission, appropriate federal and state resource agencies, TVA, and other parties whose interests the Licensee determines could be affected by the emergency as soon as practicable but not longer than five days after the initiation of the deviation.
4. Within 120 days of the effective date of the License, the Licensee will develop and file with the Commission a High Flow Event Notification Procedure (HFENP) for situations when emergency, unplanned maintenance, and maintenance activities could affect high flow releases into the Cheoah River below Santeetlah Dam. The Licensee shall issue a draft HFENP to the appropriate federal and state resource agencies, TVA, and other parties for a minimum review period of 30 days. The HFENP shall include any comments received on the draft HFENP along with a discussion of how the Licensee addressed those comments.

2.0 Article RF-1. Recreational Enhancements

2.1 Funding Commitments

2.1.1 New Recreation Facilities and Improvements to Existing Facilities

The Licensee shall contribute \$1,585,892, less any monies spent on new or improvements to existing recreation facilities between January 1, 2003 and the effective date of this License, in order to cost-share upgrades to existing recreational facilities and the construction of new recreational facilities related to the Project (see Table RF-1.1).

1. Prioritization of Recreational Enhancements

The Licensee shall consult with the U.S. Forest Service (USFS), the North Carolina Wildlife Resources Commission (NCWRC) and Tennessee Wildlife Resources Agency (TWRA) annually

in July or at another mutually agreed to time to prioritize recreational enhancements to be implemented for the following year based on funding availability and other relevant considerations.

2. USFS Facilities

The Licensee shall distribute to the USFS by no later than January 31 of each year, the portion of the funding (\$1,215,192) for the construction of new or the upgrade of existing recreational facilities identified in Table RF-1.1 that are located on USFS lands in equal amounts in each of the first 15 years of the License term. The use of Licensee funding for any new facilities or facility upgrades other than those identified in Table RF-1.1 will require the concurrence of the Licensee.

3. Non-USFS Facilities

The Licensee shall commit the portion of the funding (\$370,700) for the construction of new or upgrade of existing non-USFS recreational facilities in equal amounts in each of the first five years of the License term.

2.1.2 Fish Stocking Support

Beginning with the year in which this License becomes effective, the Licensee shall contribute for the term of this License \$10,000 annually, by January 31, on a cost-share basis to TWRA for recreational fish stocking in Calderwood Reservoir.

2.1.3 Operations and Maintenance

The Licensee shall commit \$75,000 annually to operations and maintenance costs for recreational facilities and related purposes associated with the Tapoco Project (see Table RF-1.1). The Licensee shall provide a portion of these funds (\$34,000) to the USFS for operation and maintenance of recreational facilities associated with the Project located on USFS lands. The Licensee shall use a portion of these funds (\$26,000) for operations and maintenance of recreational facilities on Licensee-owned lands. The Licensee shall use the remaining \$15,000 of

the \$75,000 to fund additional cleanup and maintenance of the US Highway 129 day-use areas and, to the extent that there are unspent monies, for operation and maintenance of recreational facilities on Licensee-owned lands.

2.1.4 Escalation of funds

All costs or payment amounts specified in dollars (Table RF-1.1) shall be deemed to be stated as of the year 2003, and the Licensee shall escalate such sums as of January 1 of each following year (starting in January 2004) according to the following formula:

$$AD = D \times ((NGDP)/IGDP)$$

Where:

AD = Adjusted dollar amount as of January 1 of the year in which the adjustment is made

D = Dollar amount prior to adjustment

IGDP = GDP-IPD for the third quarter of the year before the previous adjustment date (or, in the case of the first adjustment, the third quarter of the year before the effective date of the license)

NGDP = GDP-IPD for the third quarter of the year before the adjustment date

“GDP-IPD” is the value published for the Gross Domestic Product Implicit Price Deflator by the U.S. Department of Commerce, Bureau of Economic Analysis in the publication Survey of Current Business, Table 7.1 (being on the basis of 2000 = 100), in the third month following the end of the applicable quarter. If that index ceases to be published, any reasonably equivalent index published by the Bureau of Economic Analysis may be substituted. If the base year for GDP-IPD is changed or if publication of the index is discontinued, the Licensee shall promptly make adjustments or, if necessary, select an appropriate alternative index to achieve the same economic effect.

2.1.5 Future Recreation Needs

[Drafting Note to Commission Staff: The Parties request that this provision be included in the License if the License term exceeds 30 years.]

In year 31 of the License term, the Licensee shall consult with state and federal resource agencies regarding the potential need for additional recreational facilities or improvements to existing recreational facilities. Any Licensee funding in excess of the current \$1,585,892

commitment for new and upgraded facilities will only be required to the extent that such funding is matched on an equal cost-share (50/50) basis (including costs of design, contract administration, permitting and NEPA compliance activities related to facilities located on lands owned by state or federal agencies) with the appropriate agencies.

2.1.6 Licensee Approval

The Licensee shall approve the construction of all facilities located on Project lands.

2.2 Lease of Lands

The Licensee agrees to lease lands to the USFS within one year of the effective date of this License, necessary for the construction and operation of the Cheoah River Non-motorized Boating Take-out Facility on the Little Tennessee River below Cheoah Dam and downstream of US Highway 129 and an overflow parking area below Santeetlah Dam adjacent to the Non-motorized Boating Put-in Facility to be constructed by the USFS on USFS land. The terms of the lease will be subject to the Licensee's approval and will be in consideration of \$1.00 for the term of the lease. The term of the lease shall coincide with the effective date and expiration date of this License, with the option by the Licensee, but not the obligation, to renew once the initial lease term has expired. Until such a time as the take-out facility is operational, a portion of the existing Magazine Branch recreation area can be utilized for non-motorized boating take-out purposes, subject to the public being provided adequate notice of the temporary use (e.g., sign at the site). All development by the USFS on leased Licensee properties must be approved in advance by the Licensee.

Table RF- 1.1 Recreation Facilities Funding Commitments

New and/or Upgraded Recreation Facilities	Total Cost Estimate	Licensee Funding Commitment
Santeetlah Reservoir		
Expand/Improve Massey Branch Boat Launch	\$228,541	\$66,277
Cheoah Point Access Improvements	\$60,600	\$17,574
Cheoah Point Campground new construction and replacements	\$1,810,000	\$787,350
Dispersed campsite improvements	\$80,500	\$35,000
Avey Branch Boat Launch improvements	\$92,445	\$26,809

Bank fishing improvements	\$48,000	\$20,880
Subtotal Santeetlah	\$2,320,086	\$953,890
Cheoah River		
US 129 Access Areas – Phase 1	\$225,000	\$97,875
US 129 Access Areas – Phase 2	\$96,000	\$41,760
Two additional gravel lots on 129	\$23,001	\$6,667
Trail along Cheoah River	\$206,900	\$90,000
Accessible fishing pier	\$50,000	\$25,000
Boater put-in facilities	\$565,000	
Boater take-out facilities	\$210,000	
Subtotal Cheoah River	\$1,375,901	\$261,302
Cheoah Reservoir		
Canoe portage around dam	\$100,000	\$100,000
Improved bank fishing facilities	\$10,000	\$10,000
Relocate Panel Branch Boat Access	\$150,000	\$75,000
Calderwood Reservoir		
Five primitive campsites	\$15,700	\$15,700
Canoe/kayak take-out	\$75,000	\$75,000
Fish delivery chute	\$10,000	\$10,000
Chilhowee Reservoir		
Canoe portage	\$25,000	\$25,000
Two accessible fishing piers	\$100,000	\$50,000
Improve day-use areas	\$10,000	\$10,000
Subtotal Mainstem Reservoirs	\$495,700	\$370,700
Total Facility Cost Commitment	\$4,191,687	\$1,585,892
Recreation Related Annual O&M		
USFS recreation facilities	\$161,500	\$34,000 ¹
Licensee recreation facilities	\$31,000	\$26,000 ²
Additional cleanup/maintenance of 129 day-use areas	\$15,000	\$15,000
Recreational fish stocking in Calderwood Reservoir	\$20,000	\$10,000
Total Annual O&M Cost Commitment	\$227,500	\$85,000

¹ The USFS will operate and maintain the public boating access areas located on National Forest System lands on Santeetlah Reservoir and use a portion of the funding for this purpose in accordance with the agreement between the USFS and the NCWRC.

² Of this total, \$5,000 is committed to cost share boating facility operations and maintenance with the NCWRC for the new Llewellyn Branch boating access site and the existing Calderwood Reservoir boating access site.

3.0 Article SMP-1. Shoreline Management Plan Provisions

[Drafting note to Commission staff: The Parties request that this provision be included in the License only if the Licensee has not filed a SMP for the Project prior to the effective date of the License.]

3.1 Development of a Shoreline Management Plan

The Licensee shall prepare and file a Shoreline Management Plan for the Project with the Commission within three months of the effective date of this License. The Licensee shall

prepare the Shoreline Management Plan in consultation with North Carolina Department of Environment and Natural Resources, North Carolina Wildlife Resources Commission, North Carolina State Historic Preservation Office, U.S. Forest Service, U.S. Fish and Wildlife Service, Bureau of Indian Affairs, Great Smoky Mountains National Park, Eastern Band of Cherokee Indians, Cross Creek Property Owners Association, Friends of Lake Santeetlah, Town of Lake Santeetlah, Town of Robbinsville, Graham County, Sierra Club, American Rivers, Tennessee Clean Water Network, The Nature Conservancy, Tennessee Department of Environment and Conservation, Tennessee Wildlife Resources Agency, Tennessee Historic Commission and Tennessee State Historic Preservation Office.

The Licensee shall provide the consulted parties with a 30-day period to review and comment on a draft Shoreline Management Plan. The Licensee shall also provide the public an opportunity to comment on the draft Shoreline Management Plan by holding a public meeting on the draft Plan at least 30 days prior to filing the Plan with the Commission.

The Licensee shall include with its filing copies of all comments received on the draft Plan and a discussion of those comments, including whether the Licensee adopted the comments or the Licensee's rationale for not incorporating the comments into the final Plan.

The Licensee shall request permission to implement the terms of the Shoreline Management Plan upon its filing with the Commission.

[Drafting note to Commission staff: The Parties request that the following provision be included in the License if the Licensee has filed a SMP for the Project prior to the effective date of the License.]

The Shoreline Management Plan for the Project shall be considered a condition of and incorporated into this License upon its approval by the Commission.

4.0 Article HP-1. Historic Properties Management Provisions

4.1 Compliance with Programmatic Agreement

The Licensee shall implement the provisions of the Programmatic Agreement for the Tapoco Hydroelectric Project, in accordance with its terms.

4.2 Development and Filing of a Historic Properties Management Plan

The Licensee shall prepare and file with the Commission a Historic Properties Management Plan (HPMP) within one year of the effective date of this License. The Licensee shall prepare the HPMP in consultation with the North Carolina State Historic Preservation Office, the Tennessee Historical Commission, the Tennessee State Historic Preservation Office, the Eastern Band of Cherokee Indians, the Bureau of Indian Affairs, the U.S. Forest Service and the Great Smoky Mountains National Park (the CR Workgroup). The Licensee shall provide the CR Workgroup with a 30-day period to review and comment on a draft HPMP.

The Licensee shall include with its filing copies of all comments received on the draft HPMP and a discussion of those comments, including whether the Licensee adopted the comments or the Licensee's rationale for not incorporating the comments into the final HPMP.

At a minimum, the HPMP shall include provisions addressing the following elements:
identification of Licensee representatives responsible for ongoing implementation of the HPMP;
continued use and maintenance of historic and cultural properties, protection of historic and cultural properties threatened by Project-induced shoreline erosion, Project-related ground-disturbing activities and vandalism, mitigation of unavoidable adverse effect on historic and cultural properties, treatment and disposition of any human remains that may be discovered, taking into account any applicable state laws and the Advisory Council on Historic Preservations' (ACHP) Policy Statement Regarding Treatment of Human Remains and Grave Goods, compliance with the Native American Graves Protection and Repatriation Act (NAGPRA) for any tribal or federal lands within the Project area, discovery of previously unidentified historic and cultural properties during Project operations, public interpretation of the

historic and archeological values of the Project, environmental review of proposed mitigation measures, and establishment of and coordination with the CR Workgroup during the implementation of the HPMP.

5.0 Section 18 Fish Passage Provisions

5.1 Article FP-1. Prescription of a Fishway for the Chilhowee Development

1. Within six months of the effective date of this License for the Project, the Licensee shall develop and file with the Commission a plan for fish passage at the Chilhowee Development. The plan shall be prepared in consultation with the U.S. Fish and Wildlife Service and shall provide for fish passage at the Chilhowee Development for four target fish species, the Spotfin chub (*Erimonax monachus*), Yellowfin madtom (*Noturus flavipinnis*), Smoky madtom (*Noturus baileyi*) and Duskytail darter (*Etheostoma percnurum*). The Licensee shall develop in consultation with and submit for approval by the USFWS, all functional and final fishway plans, schedules, and effectiveness studies for the fishway described herein.

2. Fish passage will entail annual funding estimated to be no more than \$10,000 per year by the Licensee for trapping and relocation of certain numbers of each target fish species, each season. Actual numbers of each species will be determined annually in consultation with the U.S. Fish and Wildlife Service. Annual funding shall be used first to accomplish the primary fish passage objective of moving a certain number of each of the target fish species between Abrams Creek and Citico Creek, and between Abrams Creek and the Tellico River. Funding will be used secondarily to conduct associated sampling, marking and genetics testing to help demonstrate that the USFWS's goal of genetic mixing between the sub-populations of the four fish species is being met. Funding can also be used to trap and transport fish between the Tellico River and Citico Creek, to the extent that such efforts may also enhance the overall genetic health of the Abrams Creek populations.

3. The populations to be passed are those occurring at the tributaries to the Little Tennessee River, including Abrams Creek (tributary at Little Tennessee River River Mile 37), Citico Creek (tributary at Little Tennessee River River Mile 31.8), and the Tellico River (tributary at Little

Tennessee River River Mile 19.2). The population of Spotfin chub at the Little Tennessee River (Little Tennessee River River Mile 88.5) is also a source for augmentation of the populations.

4. The design population to be “passed” between each of the three designated tributaries for each of the target species is:

Target Species	Fishway Exchange
Spotfin chub	100 per generation
Yellowfin madtom	1 effective genome/generation
Smoky madtom	1 effective genome/generation
Duskytail darter	1 effective genome/generation

At this time, the best information available for rate of exchange indicates that naturally a few individuals per decade moved successfully between these populations. Movement of individuals probably comprised young-of-year dispersal movements during fall and winter, therefore, translocations scheduled during this same timeframe (August-May) would most closely mimic natural dispersal.

5. The fishway shall be fully operational as soon as possible, but no later than six months after the effective date of this License.

5.2 Article FP-2. Determination of the Need for Additional Fishways at the Chilhowee Development and Reservation of Authority

Within one year of the effective date of this License, the Licensee shall develop and file with the Commission a study plan for evaluating the presence and status of important potamodromous and diadromous fishes (including but not limited to American eel (*Anguilla rostrata*), Lake sturgeon (*Acipenser fulvenscens*), Black buffalo (*Ictiobus niger*), Smallmouth buffalo (*Ictiobus bubalus*), Sauger (*Sander canadense*), and River redhorse (*Moxostoma carinatum*) in the upper end of Tellico Reservoir in the vicinity of the Chilhowee Dam tailrace. The plan will require initial monitoring within five years of the effective date of this License, with additional monitoring to be conducted in year 10 and year 20 of this License. The Licensee shall submit the proposed plan to the U.S. Fish and Wildlife Service for comment prior to filing it with the

Commission. The Licensee shall include with the study plan documentation of consultation with the U.S. Fish and Wildlife Service, including copies of any comments received on the plan and discussion of how any comments are accommodated by the plan. The need for fishways for the listed species will be determined by the USFWS when certain conditions of populations or congregations, outlined in the study plan required by this Article, occur. Presence of the target species at the base of Chilhowee Dam will be a condition precedent to the requirement of additional fishways at the Chilhowee Development. No additional structural fishway will be required by the U.S. Fish and Wildlife Service for the passage of these species before the twentieth year of this License. Subject to this limitation, the Secretary of the Department of Interior reserves the right to require fishways at the Chilhowee Development.

5.3 Article FP-3. Reservation of Authority for Santeetlah, Cheoah, and Calderwood Developments

Pursuant to Section 18 of the Federal Power Act, as amended, the Secretary of the Department of Interior, as delegated to the U.S. Fish and Wildlife Service, exercises her authority under Section 18 by reserving the authority to prescribe the construction, operation and maintenance of such fishways as deemed necessary, including measures to determine, ensure, or improve the effectiveness of such fishways at the Santeetlah, Cheoah and Calderwood developments. No structural fishway will be required at any of these developments before the twentieth year of this License.

6.0 Article BMR-1. Sampling of Benthic Macroinvertebrate Resources in the Chilhowee Dam Tailwater Area

Within two years of the effective date of this License, the Licensee shall develop and file with the Commission a sampling plan to periodically sample benthic macroinvertebrate resources in the tailwater area of the Chilhowee Development. At a minimum, the sampling plan shall include the following elements: the sampling study design will be substantially similar to the benthic macroinvertebrate resource sampling undertaken for the Santeetlah, Cheoah and Calderwood developments during the relicensing of the Project; benthic macroinvertebrate community health and species assemblages will be assessed at upper, middle, and lower sections of the Chilhowee tailwaters; and benthic samples will include kicknet, airlift, sweepnet, ponar or

Peterson grabs, or visual collection techniques at each sampling site. The sampling plan shall require that sampling occur during year 3 of this License and during year 15 of this License if warranted by significant or questionable results of the initial sampling or by significant improvements in the water quality or thermal regime of the Chilhowee tailwater. The sampling plan shall also require that, within six months of completion of each sampling effort, the Licensee prepare and file with U.S. Fish and Wildlife Service, Tennessee Wildlife Resources Agency, Tennessee Department of Environment and Conservation, U.S. Forest Service and National Park Service a report documenting the results of the sampling.

The Licensee shall prepare the sampling plan in consultation with U.S. Fish and Wildlife Service, Tennessee Wildlife Resources Agency, Tennessee Department of Environment and Conservation, Tennessee Valley Authority, U.S. Forest Service and National Park Service. The Licensee shall provide the consulted parties with a 30-day period to review and comment on the draft sampling plan. The Licensee shall include with its filing copies of all comments received on the draft sampling plan and a discussion of those comments, including whether the Licensee adopted the comments or Licensee's rationale for not incorporating the comments into the final sampling plan.

7.0 Article F-1. North Carolina Resource Management and Enhancement Fund

7.1 Purpose of Funds

Within six months of the effective date of this License, the Licensee shall establish the North Carolina Resource Management and Enhancement Fund (North Carolina Fund) to be used by the North Carolina Wildlife Resources Commission, North Carolina Department of Environment and Natural Resources, U. S. Forest Service, Eastern Band of Cherokee Indians, and U. S. Fish and Wildlife Service for purposes within the scope of subject matter of the Fish and Wildlife Coordination Act, the Endangered Species Act, and Section 10 of the Federal Power Act including but not limited to 1) monitoring of biotic and abiotic parameters, 2) addition of large woody debris, and gravel and vegetation management in the Cheoah River below Santeetlah Dam, and 3) for other natural resource stewardship activities, including, but not limited to, a) threatened and endangered species recovery efforts, b) control of exotic species and

environmental outreach and c) education directly related to those Cheoah River and Little Tennessee River basin resources affected by ongoing Project operations, in particular the Santeetlah and Cheoah developments, and the portion of the Calderwood Development in North Carolina.

Monies in the fund shall be held and managed by an entity unanimously agreed to by the beneficiary entities listed above and the Licensee. The Fund shall be available to receive contributions from other sources to match or exceed contributions by the Licensee and the Fund shall remain available for its intended purposes until expended, even if the life of the Fund shall exceed the term of this License.

7.2 Funding Commitment

At the time of fund establishment, the Licensee shall deposit an initial payment of \$100,000, subject to the escalation provisions below. Thereafter for the duration of this License except for the final three years of the License term, the Licensee shall deposit annually, by no later than January 31, an additional \$25,000, subject to the escalation provisions below. The funds shall be deposited with the fiduciary entity specified by unanimous agreement of the beneficiary entities and the Licensee for management and disbursement of the funds. Any interest accrued by the North Carolina Fund shall be reinvested in the North Carolina Fund to be used for the purposes described above.

7.3 Implementation Report

The Licensee shall file with the Commission prior to June 30 of each year, a report prepared by the beneficiary entities on the implementation and status of funding proposals approved pursuant to this North Carolina Fund that reflects the amount of payments deposited into and disbursed from the North Carolina Fund and the specific activities undertaken with monies from the North Carolina Fund in the previous calendar year.

7.4 Escalation of Funds

All costs or payment amounts specified in dollars shall be deemed to be stated as of the year 2003, and the Licensee shall escalate such sums as of January 1 of each following year (starting in January 2004) according to the following formula:

$$AD = D \times ((NGDP)/IGDP)$$

WHERE:

AD = Adjusted dollar amount as of January 1 of the year in which the adjustment is made.

D = Dollar amount prior to adjustment.

IGDP = GDP-IPD for the third quarter of the year before the previous adjustment date (or, in the case of the first adjustment, the third quarter of the year before the Effective Date).

NGDP = GDP-IPD for the third quarter of the year before the adjustment date.

“GDP-IPD” is the value published for the Gross Domestic Product Implicit Price Deflator by the U.S. Department of Commerce, Bureau of Economic Analysis in the publication Survey of Current Business, Table 7.1 (being on the basis of 2000 = 100), in the third month following the end of the applicable quarter. If that index ceases to be published, any reasonably equivalent index published by the Bureau of Economic Analysis may be substituted. If the base year for GDP-IPD is changed or if publication of the index is discontinued, the Licensee shall promptly make adjustments or, if necessary, select an appropriate alternative index to achieve the same economic effect.

8.0 Article F-2. Tallassee Fund

8.1 Purpose of Funds

Within six months of the effective date of this License, the Licensee shall establish the Tallassee Fund to be used by the U. S. Forest Service, U. S. Fish and Wildlife Service, Great Smoky Mountains National Park, Tennessee Department of Environment and Conservation, Tennessee Wildlife Resources Agency, Eastern Band of Cherokee Indians and The Nature Conservancy of Tennessee for natural resource stewardship and Project mitigation activities within the scope of subject matter of the Fish and Wildlife Coordination Act, the Endangered Species Act, and Section 10 of the Federal Power Act including, but not limited to, 1) threatened and endangered

species recovery efforts, 2) ecosystem enhancements and restoration, 3) management and control of exotic species, and 4) environmental outreach and education directly related to the Tapoco Project and non-Project lands in Tennessee currently owned by the Licensee to mitigate the continuing environmental impacts associated with the Project's operations.

Monies in the Fund shall be held and managed by an entity unanimously agreed to by the beneficiary agencies listed above and the Licensee. The Fund shall be available to receive contributions from other sources to match or exceed contributions by the Licensee and the Fund shall remain available for its intended purposes until expended, even if the life of the Fund shall exceed the term of this License.

8.2 Funding Commitment

At the time of fund establishment, the Licensee shall deposit an initial payment of \$100,000, subject to the escalation provisions below. Thereafter for the duration of this License, the Licensee shall deposit annually an additional \$100,000, by no later than January 31, subject to the escalation provisions below. The funds shall be deposited with the fiduciary entity specified by unanimous agreement of the beneficiary entities and the Licensee for management and disbursement of the funds. Any interest accrued by the Tallassee Fund shall be reinvested in the Tallassee Fund to be used for the purposes described above.

8.3 Implementation Report

The Licensee shall file with the Commission prior to June 30 of each year, a report prepared by the beneficiary entities on the implementation and status of funding proposals approved pursuant to the Tallassee Fund that reflects the amount of payments deposited into and disbursed from the Tallassee Fund and the specific activities undertaken with monies from the Tallassee Fund for the previous calendar year.

8.4 Escalation of Funds

All costs or payment amounts specified in dollars shall be deemed to be stated as of the year 2003, and the Licensee shall escalate such sums as of January 1 of each following year (starting in January 2004) according to the formula in Proposed License Article F-1.

B. Various Orders and Agreements

B-1 State Water Quality Certifications



December 17, 2003

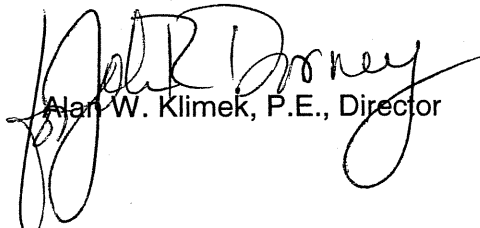
Mr. Randall M. Overbey, President
Alcoa Power Generating Inc.
Tapoco Division
300 North Hall Road
Alcoa, TN 37701-2516

Dear Mr. Overbey:

Re: Certification Pursuant to Section 401 of the Federal Clean Water Act for the Tapoco
Hydroelectric FERC Relicensing Project
WQC Project #03-0191
FERC Number 2169
Graham and Swain Counties

Attached hereto is a copy of Certification No. 3447 issued to Alcoa Power Generating, Inc –
Tapoco Division dated December 17, 2003. If we can be of further assistance, do not hesitate to
contact us.

Sincerely,



Alan W. Klimek, P.E., Director

Attachments

Cc: Norman Pierson; Property and Relicensing Manager; Alcoa Power Generating Inc., Tapoco
Division, 300 North Hall Road, Alcoa, TN 37701-2516
Larry Frost, Asheville DWQ Regional Offices
File Copy
Central Files
Darlene Kucken; DWQ Basinwide Planning Program Unit
Steve Reed, NC Division of Water Resources
Marc Bernstein, NC Attorney General's Office
D. Randall Benn; LeBoeuf, Lamb, Greene and MacRae; 1875 Connecticut Ave., NW; Suite
1200; Washington, DC 20009-5728
Chris Goudreau NC Wildlife Resources Commission
Mark Cantrell, US Fish and Wildlife Service - Asheville
John Boaze; Fish and Wildlife Associates (rep. for EBCI)



NORTH CAROLINA 401 WATER QUALITY CERTIFICATION

THIS CERTIFICATION is issued in conformity with the requirements of Section 401 Public Laws 92-500 and 95-217 of the United States and subject to the North Carolina Division of Water Quality ("DWQ") Regulations in 15 NCAC 2H, Section .0500. It is issued to Alcoa Power Generating, Inc – Tapoco Division ("the applicant") in Graham and Swain Counties pursuant to a revised application filed on the 19th day of February, 2003 with a revision dated March 18, 2003 (extension to October 20, 2003) to, among other things, retain the Santeetlah and Cheoah Dams on the Cheoah and Little Tennessee Rivers.

The application provides adequate assurance that the retention of fill material into the waters of the Cheoah and Little Tennessee Rivers in conjunction with retention and operation of these dams and other project activities will not result in a violation of applicable Water Quality Standards, discharge guidelines and other applicable State laws. Therefore, the State of North Carolina certifies that this activity will not violate the applicable portions of Sections 301, 302, 303, 306, 307 of PL 92-500 and PL 95-217 if conducted in accordance with the application and conditions hereinafter set forth.

This approval is only valid for the purpose and design that you submitted in your application, as described in the revised application. If you change your project, you must notify us and may be required to send us a new application for a new Certification. If the property is sold, the new owner must be given a copy of the Certification and approval letter and is thereby responsible for complying with all conditions. For this approval to be valid, you must follow the conditions listed below. The issuance of this Certification shall not exempt the applicant from complying with any and all statutes, rules, regulations, or ordinances that may be imposed by other government agencies (local, state and federal) which have jurisdiction, including but not limited to applicable river buffer rules in 15A NCAC 2B .0200, erosion and sedimentation control requirements in 15A NCAC Chapter 4 and under the Division's General Permit NCG010000, and any requirements pertaining to wetlands under 15A NCAC 2B .0200, 15A NCAC 2H .0500 and 15A NCAC 2H .1300.

Condition(s) of Certification:

1. The Applicant shall release aquatic base flows from Santeetlah Dam in the magnitude and for the duration described in Table 1. The Applicant shall determine the aquatic base flow for each month by calculating the average daily inflow (ADI) value for the preceding three months. The Applicant shall calculate the ADI using its recorded measures of daily change in reservoir elevation and total discharge (generation flows plus instream flow releases, high flow event releases and flood discharge flows). If the ADI is greater than the historic 25th percentile average flow for that month (Table 2), the Applicant shall release flows according to Tier A. If the ADI is less than or equal to the historic 25th percentile average flow for that month, the Applicant shall release flows according to Tier B.

Each Friday, the Applicant shall project inflow for the next ten days, which is the "planning period." The water requirement for the planning period is the volumetric sum of base flows; high flow event releases, if any; flood discharge flows, if any; Santeetlah Reservoir Operating Curve increase, if any; and generation. The water available for the planning period is the volumetric sum of storage above the Santeetlah Reservoir Operating Curve and the planning period projected inflow. During normal operations, generation will be adjusted to maintain Santeetlah reservoir elevations at or above the Santeetlah Reservoir Operating Curve. Except as necessary to meet other requirements of this Certification, such as aquatic base flows and the Santeetlah Reservoir Operating Curve, generation is not restricted for normal operations.

Table 1. Aquatic base flow releases from Santeetlah dam into the Cheoah River.

Month	Flow Rate (cfs)	
	Tier A	Tier B
January	50	50
February	100	90
March	100	90
April	100	90
May	90	80
June	60	60
July	60	50
August	50	40
September	50	40
October	50	40
November	50	40
December	60	50

Table 2. Historic 25th percentile average flow for Cheoah River.

Month	Threshold Flow (cfs)
January	256
February	446
March	484
April	615
May	617
June	526
July	403
August	289
September	208
October	141
November	116
December	148

- The Applicant shall provide high flow events, which follow a repeating five-year schedule for the term of the License according to Table 3.

Table 3. High flow releases for the Cheoah River.

High Flows	Year 1		Year 2		Year 3		Year 4		Year 5		Magnitude (cfs)		
	Event s	Days	Event s	Days	Event s	Days	Event s	Days	Event s	Days	Day 1	Day 2	Day 3
January													
February	1	2	1	2	1	2	1	2	1	2	1000	Var ¹	
March	1	3	1	3	1	3	1	3	1	3	1000	600 ²	300
April	2	5	3	6	2	5	2	5	3	6	1000	850	300
May	2	4	2	4	3	6	3	6	3	6	1000	850	
June	1	2	1	2					1	2	1000	850	
July					1	2					1000	850	
August							1	1			1000		
September	1	1			1	1					1000		
October	1	1	1	1			1	1			1000		
November	1	1	1	1	1	1	1	1	1	1	1000		
December													
Total:	10	19	10	19	10	20	10	19	10	20			

¹ 600 cfs from hour 15 to hour 19, 400 cfs from hour 20 to hour 34; 200 cfs from hour 35 to hour 47; 100 cfs for hour 48

² 600 cfs from hour 16 to hour 36; 300 cfs from hour 37 to hour 48

- a. The Applicant shall release high flows via the Tainter gates at Santeetlah Dam. The Applicant shall use the headwater elevation of Santeetlah Reservoir to determine the gate opening necessary to make the required high flow release from Santeetlah Dam. The Applicant shall use the downstream gage at Bearpen Gap during the initial system set up to confirm the required gate positions to make the high flow releases;
 - b. The Applicant shall schedule high flow events on weekend days (Saturday and Sunday); schedule three day events on Saturday, Sunday and Monday;
 - c. The Applicant shall schedule the March event for the third weekend in March and the November event for the first weekend in November;
 - d. The Applicant shall schedule one 3-day high flow event in April in years 1, 3, and 4 of the repeating sequence;
 - e. The Applicant shall ramp high flow events at 2-inches per hour for flows between the aquatic base flow and 100 cfs. The Applicant shall use the downstream gage at Bearpen Gap during the initial system set up to confirm the required gate positions and gate frequencies in order to ramp the high flow events;
 - f. For 2-day events in February, the release duration is 4 hours for day 1; releases are targeted to begin at hour 11;
 - g. For 1-, 2-, and 3-day events in March through November, the release duration is 8 hours for the day 1 high flow releases; releases on day 1 are targeted to begin at hour 8 in March, April, October, and November, and at hour 9 in May through September;
 - h. For 2-day events in April through July, the release duration is also 8 hours for the day 2 high flow releases; releases on day 2 are scheduled to begin at hour 8 in April and at hour 9 in May, June, and July;
 - i. For 2-day events in April through July, after the end of the 8 hours of high flow on day 1, the flow will be reduced to 500 cfs until the beginning hour of high flow on day 2;
 - j. The Applicant shall schedule single day high flow events between September and November with a minimum of 10 days between events.
3. The Applicant shall convene an annual planning meeting in early October of each year which shall include the N.C. Department of Environment and Natural Resources (NCDENR), the North Carolina Wildlife Resources Commission (NCWRC), the U.S. Forest Service (USFS), the U.S. Fish and Wildlife Service (USFWS) and the Eastern Band of Cherokee Indians (EBCI). If the NCDENR, NCWRC, USFS, USFWS, and EBCI notify the Applicant prior to the annual meeting that they have determined by consensus that unanticipated circumstances have arisen that indicate that additional aquatic habitat enhancement would result from the reallocation of water previously committed to the aquatic base flows and/or high flow event schedule as required in Conditions 1 and 2, then the Applicant shall discuss with these entities the reallocation of water for aquatic habitat enhancement purposes within the aquatic base flow regime and/or the high flow event schedule for any year. The Applicant shall cooperate with the NCDENR, NCWRC, USFS, USFWS, and EBCI in implementing any requested water reallocation, with due consideration given to the following factors:
- a. Any reallocation requests shall be based on periodic (i.e. every several years) re-evaluations of aquatic conditions in the Cheoah River by the above-listed entities;

- b. Any requested reallocation shall be designed to minimize any additional lost generation (either in lost megawatts and/or lost value) and operating costs;
- c. Under no circumstances shall water allocated as part of the aquatic base flow regime be utilized for high flow events and vice versa; nor shall water from one year be reallocated to any other calendar year;
- d. Any requested reallocation of water must be able to be accommodated with the gate structures in existence at that time;

If agreement is reached on reallocation, the Applicant shall take all reasonable and necessary actions to implement the agreement on reallocation.

4. The Applicant shall continue funding the existing U.S. Geological Survey (USGS) Bearpen Gap gage (Station No. 0351706800) on the Cheoah River below Santeetlah Dam. Additionally, the Applicant shall install and maintain a calibrated staff gage, or the equivalent, at the Joyce Kilmer Bridge to allow for visual confirmation of Cheoah River flows. The Applicant shall also make available the calculated release to the Cheoah River at the Santeetlah dam on an hourly basis via the Internet.
5. The Applicant shall operate Santeetlah Reservoir according to the following operating rules except when operating under the Low Inflow Protocol (Condition 7):
 - a. From January 1 to March 1, the elevation of Santeetlah Reservoir shall not drop below elevation 1931 ft.
 - b. From March 1 to April 1 the elevation of Santeetlah Reservoir shall not drop below the line between elevation 1931 ft. on March 1 and elevation 1936 ft. on April 1.
 - c. From April 1 to June 23, the elevation of Santeetlah Reservoir shall not drop below elevation 1936 ft.
 - d. From June 23 to July 1 the elevation of Santeetlah Reservoir shall not drop below the line between elevation 1936 ft. on June 23 and elevation 1937 ft. on July 1.
 - e. From July 1 to September 8, the elevation of Santeetlah Reservoir shall not drop below elevation 1937 ft.
 - f. From September 8 to September 16 the elevation of Santeetlah Reservoir shall not drop below the line between elevation 1937 ft. on September 8 and 1936 ft. on September 16.
 - g. From September 16 to November 1, the elevation of Santeetlah Reservoir shall not drop below elevation 1936 ft.
 - h. From November 1 to December 1 the elevation of Santeetlah Reservoir shall not drop below the line between elevation 1936 ft. on November 1 and elevation 1931 ft. on December 1.
 - i. From December 1 through December 31, the reservoir elevation shall not drop below elevation 1931-ft.
6. The Applicant shall monitor the elevation of Santeetlah Reservoir on an hourly basis using a water level sensor located upstream of the gatehouse, on the upstream face of the intake. The Applicant shall electronically transmit the water level data recorded by the sensor to the dispatcher's office in Alcoa, Tennessee. The Applicant shall make available Santeetlah Reservoir elevation data on an hourly basis via the Internet.

Based on actual experience, the Applicant may consult with interested parties on the actual water level results at Santeetlah from the management practices implemented. The Applicant may implement only minor adjustments of the Santeetlah Reservoir Operating Curve, and only after such consultation and approval by the North Carolina Division of Water Quality (DWQ).

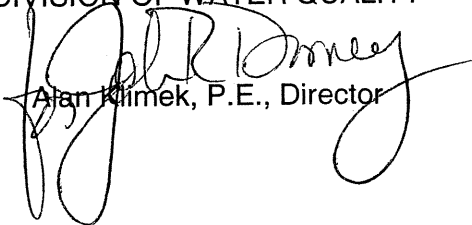
7. The Applicant shall work with the Parties to the Agreement in Principle Regarding Project Operations, Land Protection and Funding of Resource Measures in North Carolina Related to a New FERC License for the Tapoco Project (AIP), dated 8 September 2003, to develop a Low Inflow Protocol (LIP) for approval by DWQ within 6 months of acceptance by the Applicant of the License. If the water available for any planning period (see Condition 1) is less than the water requirement with no generation for the planning period, then the Applicant shall implement measures according to the LIP. Based on experience in implementing the LIP, the Applicant may consult with state and federal agencies to propose modifications to the LIP. No modification shall become effective without written approval by DWQ.
8. During emergencies and for planned project maintenance or inspection activities, the Applicant may vary from the reservoir operating curve, vary flows below the required aquatic base flows or lake levels, or vary from the high flow release schedule. Under such conditions, the Applicant shall notify the NCDENR, NCWRC, USFS and USFWS in writing and via telephone according to the following schedule. For planned project maintenance or inspection activities, the Applicant shall notify said agencies no less than 15 days prior to the variance. For unforeseen circumstances required by an operating emergency, the Applicant shall notify the same agencies in writing as soon as practical, but not more than 7 days after the beginning of the event. If requested by DWQ, the Applicant shall expeditiously consult with any concerned agency to discuss the Applicant's emergency, maintenance and inspection activities, and the Applicant shall give due regard to any agency's recommendations. In lieu of the aforesaid requirements in this paragraph, the Applicant may develop and implement a protocol to manage reservoir levels and flows during emergency, maintenance and inspection activities. If DWQ determines that any recurring variances may have an adverse effect on water quality, DWQ may require the Applicant to develop and implement a protocol to minimize the impacts of the Applicant's emergency, maintenance and inspection activities on water quality. No protocol will become effective without approval by DWQ. The Applicant shall take all reasonable and necessary actions to implement any such protocol.
9. The Applicant shall identify and report in writing existing and proposed consumptive uses to DWQ and the N.C. Division of Water Resources (DWR). The Applicant shall report the existing or projected (as appropriate) average consumptive withdrawal and maximum capacity for each withdrawal. The applicant shall report existing consumptive uses to DWQ and DWR within 60 days of the acceptance of the License and shall report proposed new or expanded consumptive uses to DWQ and DWR within 30 days of receiving a request for the proposed new or expanded withdrawal and before submitting any requests to FERC.
10. The Applicant shall conduct its activities in a manner consistent with State water quality standards (including any requirements resulting from compliance with section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d)) and any other appropriate requirements of State law and federal law. If DWQ determines that such standards or laws are not being met (including the failure to sustain a designated or achieved use or to comply with any new or amended water quality standards or other appropriate requirements of State or federal law) or that State or federal law is being violated, or that further conditions are necessary to assure compliance, DWQ may reevaluate and modify this Certification to include conditions appropriate to assure compliance with such standards and requirements in accordance with 15A NCAC 2H.0507(d). Before modifying the Certification, DWQ will notify the Applicant and FERC, provide public notice in accordance with 15A NCAC 2H.0503 and provide opportunity for public hearing in accordance with 15A NCAC 2H.0504. Any new or revised conditions will be provided to the Applicant in writing, will be provided to the U.S. Army Corps of Engineers for reference in any permit issued pursuant to Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344, for the project, and shall also become conditions of the License. The conditions of this Certification are not modified or superseded by any condition or article of the License.
11. This Certification does not grant or affirm any property right, license or privilege in any waters or any right of use in any waters. This Certification does not authorize any person to interfere with the riparian rights, littoral rights or water use rights of any other person, and this Certification does not create any prescriptive right or any right of priority regarding any usage of water. No person shall interpose this Certification as a defense in any action respecting the determination of riparian or littoral rights or other water use rights. No

consumptive user is deemed by virtue of this Certification to possess any prescriptive or other right of priority with respect to any other consumptive user regardless of the quantity of the withdrawal or the date on which the withdrawal was initiated or expanded. This Certification issues on the express understanding of DENR that, pursuant to Federal Power Act section 27, 16 U.S.C. § 821, the License does not establish or determine a proprietary right to any use of water. It establishes the nature of the use to which a proprietary right may be put under the Federal Power Act.

Violations of any condition herein set forth may result in revocation of this Certification and may result in criminal and/or civil penalties or other enforcement action. This Certification shall become null and void unless the above conditions are made conditions of the FERC Permit. This Certification shall expire upon expiration of the FERC permit.

If this Certification is unacceptable to you, you have the right to an adjudicatory hearing upon written request within sixty (60) days following receipt of this Certification. This request must be in the form of a written petition conforming to Chapter 150B of the North Carolina General Statutes and filed with the Office of Administrative Hearings, P.O. Box 27447, Raleigh, N.C. 27611-7447. If modifications are made to an original Certification, you have the right to an adjudicatory hearing on the modifications upon written request within sixty (60) days following receipt of the Certification. Unless such demands are made, this Certification shall be final and binding.

This the 17th day of December 2003
DIVISION OF WATER QUALITY


Alan Klimmek, P.E., Director

Certification Number 3447

STATE OF NORTH CAROLINA
COUNTIES OF GRAHAM AND SWAIN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

Alcoa Power Generating Inc.,
Tapoco Division

Petitioner,

v.

North Carolina Department of Environment and
Natural Resources, Division of Water Quality

Respondent.

**PETITION
FOR A
CONTESTED CASE HEARING**

Alcoa Power Generating Inc., Tapoco Division ("APGI") hereby requests a contested case hearing as provided for by North Carolina General Statute § 150B-23, concerning Certification No. 3447 issued pursuant to Section 401 of the federal Clean Water Act, Public Laws 92-500 and 95-217 of the United States, by the North Carolina Department of Environment and Natural Resources, Division of Water Quality ("NCDWQ") on December 17, 2003. The certification in question concerns APGI's operation of the Tapoco Hydroelectric Project, P-2169, under a new project license currently being sought from the Federal Energy Regulatory Commission ("FERC"). As described in more detail below, certain substantive changes and technical clarifications must be made to Certificate No. 3447. Failure to make such changes would substantially prejudice APGI's rights in the operation of the project for which Certification No. 3447 was issued. Although it intends to seek a prompt settlement with NCDWQ concerning the necessary changes to Certification No. 3447, APGI must seek a contested hearing at this time in order to protect and preserve all of its rights in the event settlement negotiations are unsuccessful.

DISCUSSION

APGI currently is seeking a new license from FERC for its Tapoco hydroelectric project, portions of which are located in Graham and Swain Counties, North Carolina. Pursuant to the provisions of Section 401 of the federal Clean Water Act, before FERC may issue a new federal license for the project the State of North Carolina must certify that the operation of the Tapoco project during the new license term will not cause the violation of applicable state water quality standards. See 33 U.S.C. § 1341. Accordingly, APGI filed an application for water quality certification with NCDWQ on February 19, 2003, prior to its filing of the application for a new project license at FERC on February 21, 2003.

From the outset of the Tapoco relicensing APGI has employed an alternative licensing process available under FERC's licensing regulations through which APGI has involved representatives of a wide range of entities having an interest in the continued operation of the project, including all governmental agencies with jurisdiction over various aspects of the project and related activities (e.g., NCDWQ). The ultimate goal of this alternative process is the development of a comprehensive settlement agreement and draft license articles to be submitted to FERC as the basis for a new license for the Tapoco Project.

In the fall of 2003, the relicensing participants with interests in North Carolina (including NCDWQ) reached a preliminary settlement agreement in principle concerning the terms and conditions necessary to protect, mitigate, and enhance the resources of North Carolina that would be affected by Tapoco Project operations during the new license term. In particular, the agreement outlined provisions for regulating the Cheoah River flow regime and operating rules governing Santeetlah Reservoir levels.

Terms of the preliminary agreement relevant to water quality in North Carolina were used to form the basis of and are reflected in the conditions ultimately placed on Certification No. 3447 by NCDWQ. However, the preliminary settlement terms included as conditions to Certification No. 3447 later evolved and changed as negotiations among the parties to the relicensing progressed. Of particular relevance to this Petition, Condition 2 to Certification No. 3447 calls for no more than 10 high flow releases from Santeetlah dam to the Cheoah River over 19 to 20 days each year to provide for recreational boating opportunities. See Certification No. 3447 at 3-4. As a result of recently completed negotiations to develop the final comprehensive settlement terms to be submitted to FERC, however, APCI has agreed to create an opportunity for additional high flow events for recreational boating in the Cheoah River above and beyond the requirements of Condition 2. If requested, APCI has agreed to provide these additional high flow events (after a minimum of five years of new license implementation) if certain biological criteria are met and if APCI is fully compensated for the additional releases. APCI and certain interested parties (including NCDWQ) have agreed to protocols that establish the biological and compensation terms that will be utilized if a request for additional flows is made. These protocols will be submitted to FERC as part of the final settlement agreement among the parties to the relicensing.

APCI believes that creating an opportunity for these additional high flow events could represent a significant change in the operation of the Santeetlah development and requires substantive changes to Condition 2. Furthermore, other progress made in negotiating the final settlement terms also has resulted in various inconsistencies with Certification No. 3447. These inconsistencies are more technical in nature and should require only minor modification and clarification of various conditions to the water quality certification issued last December.

CONCLUSION

Accordingly, for the reasons set forth above APGI is entitled to a hearing on Certification No. 3447 in order to prevent APGI's rights from being substantially prejudiced by any failure of NCDWQ to make the conditions to Certification No. 3447 consistent with the terms of the final settlement agreement for the relicensing of the Tapoco Project by FERC.

Respectfully submitted,

David R. Poe
State Bar No. 7972
D. Randall Benn
Paul C. Freeman
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
1875 Connecticut Ave., N.W., Suite 1200
Washington, D.C. 20009
(202) 986-8000 *telephone*
(202) 986-8102 *facsimile*

Counsel for APGI

CERTIFICATE OF SERVICE

I hereby certify that this Petition was served on the North Carolina Department of Environment and Natural Resources, Division of Water Quality by depositing a copy of it with the United States Postal Service with sufficient postage affixed.

This 24th day of February, 2004.

Paul C. Freeman

**DEPARTMENT OF ENVIRONMENT & CONSERVATION**

Division of Water Pollution Control

401 Church Street

7th Floor, L & C Annex

Nashville, TN 37243-1534

February 11, 2004

Certified Mail Receipt Number P 178 021 558

Randall M. Overbey, President
Alcoa Power Generating Inc.
Tapoco Division
300 North Hall Road
Alcoa, Tennessee 37701-2516

SUBJECT: §401 Water Quality Certification for the Federal Energy Regulatory
Commission (FERC) Relicensing of Alcoa Power Generating Inc.'s
Tapoco Hydroelectric Project
FERC Project Number 2169
State of Tennessee Application #NRS 03-055

Dear Mr. Overbey:

Attached is a copy of the §401 Water Quality Certification for the referenced action. If you have questions or require additional assistance on this matter, please contact me at the letterhead address or by telephone at 615/532-0708.

Sincerely,

A handwritten signature in cursive script that reads "Daniel C. Eagan".

Daniel C. Eagan, Manager
Natural Resources Section

cc: D. Randall Bern, LeBoeuf, Lamb, Greene & MacRae
David McKinney, TWRA
Norm Pierson, APCI
Mark Cantrell, USFWS

**DEPARTMENT OF ENVIRONMENT & CONSERVATION**

Division of Water Pollution Control

401 Church Street

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Nashville, TN 37243-1534

February 11, 2004

Certified Mail Receipt Number P 178 021 558

Randall M. Overbey, President
Alcoa Power Generating Inc.
Tapoco Division
300 North Hall Road
Alcoa, Tennessee 37701-2516

SUBJECT: §401 Water Quality Certification for the Federal Energy Regulatory Commission (FERC)
Relicensing of Alcoa Power Generating Inc.'s Tapoco Hydroelectric Project
FERC Project Number 2169
State of Tennessee Application #NRS 03-055

Dear Mr. Overbey:

Pursuant to §401 of the Federal Clean Water Act (33 U.S.C. §1341), the State of Tennessee is required to certify whether the activity described below will violate applicable water quality standards. Accordingly, the Division of Water Pollution Control requires reasonable assurance that the activity will not violate provisions of *The Tennessee Water Quality Control Act of 1977* (T.C.A. § 69-3-101 et seq.) or of §§ 301, 302, 303, 306 or 307 of *The Clean Water Act*.

Subject to conformance with approved plans, specifications, and other information submitted in support of the referenced application, the State of Tennessee hereby certifies the proposed activity pursuant to 33 U.S.C. 1341. This shall serve as authorization pursuant to T.C.A. § 69-3-101 et seq.

This approval is only valid for the purpose and design that you submitted in your application, as described in the revised application. If you change your project, you must notify us and may be required to send us a new application for a new Certification. If the property is sold, the new owner must be given a copy of the Certification and approval letter and is thereby responsible for complying with all conditions. For this approval to be valid, you must follow the conditions listed below.

LOCATION: Little Tennessee River, Blount and Monroe Counties

DESCRIPTION: This §401 Water quality Certification is for the relicensing by the Federal Energy Regulatory Commission (FERC) and continuing operation of the Tapoco Project by Alcoa Power Generating Inc (APGI). The Tapoco Project consists of four impoundments and associated power generation and transmission facilities. Two of the impoundments (Chilhowee Reservoir and Calderwood Reservoir) are in Tennessee, and two (Cheowah Reservoir and Santeetlah Reservoir) are upstream in North Carolina. To mitigate for ongoing damages to water resources resulting from continued operation of the project, the permittee will restore flow to the Calderwood bypass. Flows shall vary seasonally, with highs of 90 cubic feet per second (CFS) in winter months and low flows of 25-30 CFS in late summer and fall, except as provided for emergency or maintenance measures. A natural resource management fund of \$100,000 per year for the life of the FERC license will be established in part for the management of aquatic organisms adversely affected by the project. A permanent conservation easement will be placed on a 200 foot riparian buffer strip on project lands totaling 188 acres and on 5.718 acres of land within the project watershed in Tennessee. Additionally, a term easement for the duration of the FERC license period will be

Alcoa Power Generating
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placed on another 4119 acres of land within the watershed. This Certification is intended to reflect the water quality related aspects of the *Agreement in Principle Between Tennessee Interest Groups and Resource Agencies (TIGRA) and Alcoa Power Generating Inc. (APGI) (Agreement in Principle)* and the draft Settlement Agreement. In the event that any terms in the final Settlement Agreement or FERC License differ from what is contained herein, the division will consider modifications to this certification.

EFFECTIVE DATE: February 11, 2004

SPECIAL CONDITIONS:

- 1) The project shall be operated in conformance with the approved plans, specifications, agreements, data and other information submitted in support of the above application and the limitations, requirements, and conditions set forth herein.
- 2) Starting with the year in which the new license for the Tapoco Project is effective, APGI (Permittee/Licensee) will establish and maintain a watershed/conservation trust fund, to be known as the "Tallassee Fund," and as set forth in Proposed License Article F-2 in Appendix B of the Settlement Agreement, will contribute annually the amount of \$100,000, by January 31, adjusted annually thereafter for the Gross Domestic Product Implicit Price Deflator for the term of the new license to mitigate the continuing environmental and social impacts in Tennessee associated with the Project's operations and within the scope of subject matter of the Fish and Wildlife Coordination Act and Section 10 of the FPA.
- 3) As described in Article FP-1 included in Appendix B of the Settlement Agreement, the Permittee/Licensee shall develop, operate, and maintain a fishway to provide effective (safe, timely, convenient) passage for Spotfin Crub (*Erimonax monachus*), Yellowfin Madtom (*Noturus flavipinnis*), Smoky Madtom (*Noturus baileyi*) and Duskytail Darter (*Etheostoma percnurum*) between Citico Creek and Abrams Creek, and between Tellico River and Abrams Creek.
- 4) The Permittee/Licensee shall release instream flows in the Calderwood Bypass reach of the Little Tennessee River consistent with a biologically diverse cool-warm water fishery, according to the repeating 10-year schedule shown in Table 1. The flow regime shall vary annually in both discharge and timing (i.e. adjustments in flows will be made on the first Tuesday of the month, no later than 12:00 p.m., so as to not always occur at the end of one month and beginning of another). The Permittee/Licensee may release instream flows in the Calderwood Bypass according to Scenario A, B or C, so long as the Permittee/Licensee ensures that the frequency of each of these scenarios is met over repeating ten-year periods.

Table 1. Calderwood Bypass Instream Flows

Scenario	A	B	C
January	45	50	55
February	40	50	60
March	35	50	65
April	20	40	60
May	30	40	50
June	25	30	35
July	30	30	30
August	20	25	30
September	25	25	25
October	35	30	25
November	45	40	25
December	40	40	40
Average Annual Flow	32.5 cfs	37.5 cfs	41.5 cfs
Frequency	3/10 years	5/10 years	2/10 years

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- 5) In order to reduce the potential for thermal impacts on stream biota, during the normally hot and dry months of July – September, the Permittee/Licensee shall consider the flows in Table 1 for each month as target flows. The Permittee/Licensee shall operate within a limited flow band around the flow values due to the variation in headpond elevations during normal operation and the small magnitude of some of the required flows. The Permittee/Licensee may exceed target flows if water is released upstream or inflows exceed the turbine capacity of the Calderwood Powerhouse.
- 6) In releasing the target flows into the Calderwood Bypass reach consistent with Table 1, the Permittee/Licensee shall ensure that the released flows are no greater than 50 cfs above the target flows, except as provided in the previous paragraph, and no lower than 5 cfs below the target flows. Gate modifications are necessary in order to release Calderwood Bypass flows, and the Licensee shall complete gate modifications within 18 months of the effective date of the License. Within 90 days of the effective date of the FERC License, the Permittee/Licensee shall file for approval by the Commission a plan and schedule for modifying the gates.
- 7) The Permittee/Licensee shall use the gate position and headpond elevation to determine the magnitude of the flow release. The Permittee/Licensee shall release water from the base of the gate, down approximately 6-ft from normal full pond elevation of 1087.8 feet U.S. Geological Survey (USGS) datum.
- 8) The Permittee/Licensee shall record the flow data electronically for compliance purposes, using the control system at Calderwood Dam. The Licensee shall make Calderwood Bypass flow release data on an hourly basis available on the Internet.
- 9) The Licensee shall operate Calderwood Reservoir with no seasonal drawdown and maximum drawdowns of 6 feet from normal full pool elevation of 1087.7 feet USGS datum.
- 10) The Permittee/Licensee shall operate Chilhowee Reservoir with no seasonal drawdown and maximum drawdowns of 5 feet from normal full pool elevation of 874.0 feet USGS datum.
- 11) The Permittee/Licensee may modify instream flows releases required in Special Conditions 4 through 8, and may modify impoundment drawdowns required in Special Conditions 10 and 11 on a temporary basis for any of the following reasons:
 - i) Maintenance, repair, or reconstruction of Project facilities.
 - ii) Maintenance, repair, or reconstruction of non-Project facilities such as roads, bridges, or other structures in, or adjacent to, the Cheoah and/or Little Tennessee rivers.
 - iii) Any emergency situations, including flood events, related to dam safety, human life and property, or rescue.
 - iv) For the purpose of safely accessing Goat Creek to maintain the Calderwood transmission lines.
- 12) Within two years of the effective date of the FERC License, the Permittee/Licensee shall develop and file with the Commission a sampling plan to periodically sample benthic macroinvertebrate resources in the tailwater area of the Chilhowee Development. At a minimum, the sampling plan shall include the following elements: the sampling study design will be substantially similar to the benthic macroinvertebrate resource sampling undertaken for the Santeetlah, Cheoah and Calderwood developments during the relicensing of the Project; benthic macroinvertebrate community health and species assemblages will be assessed at upper, middle, and lower sections of the Chilhowee tailwaters; and benthic samples will include kicknet, airlift, sweepnet, ponar or Peterson grabs, or visual collection techniques at each sampling site. The sampling plan shall require that sampling occur during year 3 of this License and during year 5 of the FERC License if warranted by significant or questionable results of the initial sampling or by significant improvements in the water quality or thermal regime of the Chilhowee tailwater. The sampling plan shall also require that, within six months of completion of each sampling effort, the Permittee/Licensee prepare and file with the Tennessee Department of Environment and Conservation a report documenting the results of the sampling. The Permittee/Licensee shall include with its filing copies of all comments received on the draft sampling

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 February 11, 2004
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- plan and a discussion of those comments, including whether Permittee/Licensee adopted the comments or Permittee/Licensee's rationale for not incorporating the comments into the final sampling plan.
- 13) In the event that the issues related to the FERC jurisdiction over existing Tapoco Project lands lying within the current legislative boundary of GSMNP are finally resolved, as evidenced by appropriate documentation ("Final Jurisdictional Resolution"), then within one year thereafter, APGI will grant and convey a permanent conservation easement (the "Bulge Easement"), consistent with the terms of the Agreement in Principle, to TNC on a tract south of US Highway 129, known as "The Bulge," which lies within the current authorized legislative boundary of the GSMNP, except for a portion of this tract adjacent to the current Project boundary, which will serve as a safety, management and operational buffer for the Project and related purposes (the "Bulge Lands") [see map developed as an attachment to the *Agreement in Principle Between Tennessee Interest Groups and Resource Agencies (TIGRA) and Alcoa Power Generating Inc. (APGI)*, parcel P-1].
 In the event that the Final Jurisdictional Resolution is achieved, APGI will also grant to TNC the option to purchase the remaining fee simple interest underlying the Bulge Lands (the "Bulge Option"), in accordance with the terms of the Agreement in Principle, or as subsequently modified in any final Settlement Agreement.
 - 14) Within six months after issuance of the new license, APGI will grant and convey a permanent conservation easement on current APGI non-project lands to TNC that creates a total of 200 feet of protection based on a horizontal projection as measured from the normal full pool reservoir elevation on the shorelines of the Chilhowee and Calderwood reservoirs (the "Shoreline Easement"). In certain areas, this 200-foot area will include land already protected by the Corridor Easement or already included in the Project boundary [see map developed as an attachment to the *Agreement in Principle Between Tennessee Interest Groups and Resource Agencies (TIGRA) and Alcoa Power Generating Inc. (APGI)*, Permanent Easement, 200 ft buffer (Non-Project Tapoco Property)].
 - 15) In the event that the Final Jurisdictional Resolution is achieved, then within one year thereafter, the Permittee will grant and convey a permanent conservation easement ("Corridor Easement") to TNC for its non-Project lands within a corridor adjacent to the Calderwood Bypass [see map developed as an attachment to the *Agreement in Principle Between Tennessee Interest Groups and Resource Agencies (TIGRA) and Alcoa Power Generating Inc. (APGI)*, parcels P-2, P-3, P-4 and P-5] ("Corridor Lands"), less APGI's retained fee simple ownership and full use of (including the right to construct, reconstruct, replace, manage, maintain, repair and operate) all powerlines, including the property upon which the powerlines are located, and rights-of-way (collectively, "Powerline Areas") as well as properties providing access to Powerline Areas consistent with the terms of the Agreement in Principle. APGI will grant and convey to the TNC a permanent conservation easement over and upon these Powerline Areas that is acceptable to the NPS and USFS for their law enforcement and resource management purposes, subject to the use of the Powerline Areas by APGI for Project purposes and other power generation or transmission purposes.
 APGI will also grant to TNC the option to purchase the remaining fee simple interest underlying the Corridor Lands (the "Corridor Option") in accordance with the terms of the Agreement in Principle, or as subsequently modified in any final Settlement Agreement.
 - 16) So long as the Corridor Easement and the Shoreline Easement are in force, APGI will cooperate with TWRA in maintaining public access to the Corridor Lands and the property covered by the Shoreline Easement, including access for hunting on those portions of this property not required for maintaining an adequate safety buffer between hunting activity and Project operations. In the event that any of the Conditions occur, APGI's responsibilities for maintaining public access to this property will cease.
 - 17) In the event that the Final Jurisdictional Resolution is achieved, then within one year thereafter, APGI will grant and convey a conservation easement (the "Term Conservation Easement") to TNC, consistent with the terms of the Agreement in Principle, over all remaining APGI-owned non-project lands in Tennessee in the vicinity of the Project (the "Remaining APGI Lands") (see map, Term Easement) which shall be in effect for the term of the new license for the Project issued by FERC as a resolution of the currently on-going relicensing process (the "New License") provided that APGI or any successor-in-interest holds the New License.

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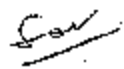
In the event that the Final Jurisdictional Resolution is achieved, then within one year thereafter, APGI will grant TNC a permanent right of first refusal to purchase some or all of the Remaining APGI Lands in accordance with the terms of the Agreement in Principle, or as subsequently modified in any final Settlement Agreement.

- 18) Construction or maintenance activities associated with project operation that are likely to release pollutants may not take place in flowing waters. Grading or excavation and fill activities shall be separated from the water column. All surface water flowing toward the grading or excavation work shall be diverted through utilization of cofferdams, berms, or temporary channels. Temporary diversion channels must be protected by non-erodible material and lined to the expected high water level. Cofferdams must be constructed of sandbags, clean rock, steel sheeting or other non-erodible material. Excavated material must be removed to a location that will prevent its reentry into the any waters of the State. All stockpiles must be temporarily seeded and separated from the waters by entrenched silt fence. The silt fence must be maintained at all times.
- 19) All work shall be carried out in such a manner as will prevent violations of water quality criteria as stated in Rule 1200-4-3.03 of the Rules of the Tennessee Department of Environment and Conservation. This includes but is not limited to the prevention of any discharge, which causes a condition in which visible solids, bottom deposits, or turbidity impairs the usefulness of waters of the State for any of the uses, designated by Rule 1200-4-4. These uses include fish and aquatic life, livestock watering and wildlife, recreation, irrigation, industrial water supply, and domestic water supply. If the division determines that such standards or laws are not being met (including the failure to sustain a designated or achieved use or to comply with any new or amended water quality standards or other appropriate requirements of State or federal law) or that State or federal law is being violated, or that further conditions are necessary to assure compliance, the division may reevaluate and modify this Certification to include conditions appropriate to assure compliance with such standards and requirements in accordance with *The Tennessee Water Quality Control Act of 1977* and any regulation promulgated thereunder. Before modifying the Certification, the division will notify the the Permittee/Licensee and FERC, provide public notice and opportunity for public hearing in accordance with the Rules of the Tennessee Water Quality Control Board. Any new or revised conditions will be provided to the Permittee/Licensee in writing, will be provided to the U.S. Army Corps of Engineers for reference in any permit issued pursuant to Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344, for the project, and shall also become conditions of the License. The conditions of this Certification are not modified or superseded by any condition or article of the License.
- 20) Appropriate steps shall be taken to ensure that petroleum products or other chemical pollutants are prevented from entering waters of the state. All spills must be reported immediately to the appropriate emergency management agency. Measures shall be taken immediately to prevent the pollution of waters of the State, including groundwater.
- 21) The applicant is responsible to convey all terms and conditions of this permit to the contractor(s). A copy of this permit along with approved plans must be present on site during all phases of construction.

This does not obviate requirements of other federal, state or local laws. The State of Tennessee reserves the right to modify or revoke this permit or to seek modification or revocation should the State determine that the activity results in more than an insignificant violation of applicable water quality criteria or violation of the Act. Failure to comply with permit terms may result in penalty in accordance with § 69-3-115 of the Act. An appeal of this action may be made to the Water Quality Control Board. In order to appeal, a petition requesting a hearing before the Board must be filed within 30 days after receipt of the permit action. In such petition, each contention should be stated in numbered paragraphs that describe how the proposed activity would be lawful and the action of the state is inappropriate. The petition must be prepared on 8½" by 11" paper, addressed to the Water Quality Control Board and filed in duplicate at the following address: Paul E. Davis, Director, Division of Water Pollution Control, 6th Floor L & C Annex, 401 Church Street, Nashville, Tennessee 37243-1534. Any hearing would be in accordance with T.C.A. §69-3-110 and 4-5-301 et seq. Questions concerning this certification should be addressed to Dan Eagar at 615/532-0708.

Alcoa Power Generating
§ 401 Water Quality Certification
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Sincerely,

A handwritten signature in black ink, appearing to read "Daniel C. Eagan". The signature is fluid and cursive, with a long horizontal line extending from the end.Handwritten initials "CD" in black ink, with a horizontal line drawn through them.

Paul E. Davis
Director

March 11, 2004

Mr. Daniel C. Eagar
Manager, Natural Resources Section
Tennessee Department of Environment & Conservation
Division of Water Pollution Control
401 Church Street
7th Floor, L & C Annex
Nashville, TN 37243-1534

Re: § 401 Water Quality Certification for the Tapoco Project, P-2169 – State of Tennessee
Application #NRS 03-055

Dear Mr. Eagar:

This is in reference to the Department of Environment & Conservation, Division of Water Pollution Control's ("the Division's") "§ 401 Water Quality Certification for the Federal Energy Regulatory Commission (FERC) Relicensing of Alcoa Power Generating Inc.'s Tapoco Hydroelectric Project" dated February 11, 2004 ("Certification"). As we discussed, certain technical corrections should be made to the Certification in order to make it consistent with and reflect the water quality-related aspects of the final Settlement Agreement negotiated for the Tapoco Project Relicensing. Indeed, as the Certification itself provides: "[i]n the event any terms in the final Settlement Agreement or FERC License differ from what is contained herein, the division will consider modifications to this Certification." Certification at 2.

In our previous discussions you indicated that the Division would consider modifications sought through written notification. Accordingly, Alcoa Power Generating Inc. ("APGI") hereby requests that the technical corrections and clarifications described in detail below be made to the Division's February 11, 2004 Certification. In the unlikely event that the modifications sought cannot be made through such informal means, APGI reserves its rights to a contested hearing pursuant to T.C.A. § 69-3-110 and 4-5-301.

The following modifications should be made to the Certification:

1. In the "Description" change "with highs of 90 cubic feet per second (CFS) in winter months" to read "with highs of 65 cubic feet per second (CFS) in winter months" in order to be consistent with the flows listed in Table 1 of the Certification.

2. In the "Description," the acreage that will be subject to easements should be revised as follows:
 - Change 188 acres to "approximately 181 acres"
 - Change 5,718 acres to "approximately 5,675 acres"
 - Change 4,119 acres to "approximately 3,964 acres"
3. In Special Condition 2, the term "fish passage" should be used consistently rather than interchangeably with "fishway" in order to avoid any confusion regarding the measures to be implemented by APCI (i.e., trapping and trucking of fish for passage as opposed to the construction of a fishway (e.g., a fish ladder)).
4. The second sentence in Special Condition 8 should be revised to reflect the language of Section 1.4.4 of the Settlement Agreement. Specifically, it provides: "The Licensee shall make available electronically (e.g., the Internet) the calculated hourly Calderwood bypass flow release data."
5. The Division's use of the word "Conditions" in the last sentence of Special Condition 16 should be clarified. Also we suggest that the first phrase of Condition 16 be revised as follows: "So long as the fee interest in the Corridor Lands is owned by APCI or the TNC, and so long as the Shoreline Easement (called Tennessee Riparian Lands Easement in the Settlement Agreement), APCI will"
6. Special Conditions 13, 14, 15, and 17 employ language from the Agreement in Principle and earlier draft Settlement Agreement concerning the timing for conveying various easements that has been revised. Accordingly, these Conditions should be updated to reflect Section 2.10 of the Settlement Agreement which provides that the conveyances should take place "[w]ithin six months from the date that the New License becomes Final and Non-Appealable...".

We appreciate your assistance in making these minor modifications to the Certification. Please contact me at the number listed above with any questions or to discuss these issues in greater detail.

Mr. Daniel C. Eagar
March 8, 2004
Page 3

Sincerely,

D. Randall Benn

Counsel for Alcoa Power Generating Inc.

B-2 Outline of Proposed Legislation Related to Jurisdictional Resolution for Project Lands Lying within the Authorized Legislative Boundary of the Park

Concurrent with the filing of this Settlement Agreement with FERC, federal legislation will be proposed by the non-federal Parties to the Settlement that would, among other things:

1. Direct the transfer of the fee interest in the flooded embayments of Abrams Creek, Chilogatee Creek, Shop Creek, and a fourth embayment of Chilhowee Reservoir (the embayment lands) from the NPS to APGI, in return for approximately 200 acres of APGI lands that are an inholding within the authorized boundary of Great Smoky Mountains National Park (GSMNP);
2. Direct the NPS to reserve a management and law enforcement easement over the embayment lands;
3. Authorize FERC to issue a new license for the Project even though the embayment lands would still be within the authorized boundary of the GSMNP; and
4. Authorize the NPS and the USFS to acquire other lands from APGI and to adjust the boundaries of the GSMNP and the Cherokee National Forest as may become necessary.

B-3 Real Estate Grant and Conveyance Documents Affecting Lands Inside and Outside of the Project Boundary

B-3.1 Permanent Conservation Easement and Declaration of Restrictive Covenants Between the Licensee and The Nature Conservancy – Bulge Lands (Tennessee)

B-3.2 Agreement for Option and Sale of Real Estate Between the Licensee and The Nature Conservancy – Bulge Lands (Tennessee)

B-3.3 Permanent Conservation Easement and Declaration of Restrictive Covenants Between the Licensee and The Nature Conservancy – Corridor Lands (Tennessee)

B-3.4 Agreement for Option and Sale of Real Estate Between the Licensee and The Nature Conservancy – Corridor Lands (Tennessee)

B-3.5 Term Conservation Easement and Declaration of Restrictive Covenants Between the Licensee and The Nature Conservancy – Remaining APGI Lands (Tennessee)

B-3.6 Agreement for Option and Sale of Real Estate Between the Licensee and The Nature Conservancy – Remaining APGI Lands (Tennessee)

B-3.7 Permanent Conservation Easement and Declaration of Restrictive Covenants Between the Licensee and The Nature Conservancy – Tennessee Riparian Lands

B-3.8 Term Conservation Easement and Declaration of Restrictive Covenants Between the Licensee and a Qualified Land Trust Acceptable to the Parties – North Carolina Riparian Lands

B-3.9 Warranty Deed from Licensee to NPS to a Tract of Land Lying North of U.S. Highway 129 between Chilhowee and Calderwood Reservoirs (Tennessee)

B-3.10 Law Enforcement and Resource Management Easement from the Licensee to NPS on Powerline Areas Retained by the Licensee (Tennessee)

B-3.11 Quitclaim Deed from NPS to Licensee to Project Lands in the Embayments of Abrams Creek, Shop Creek, Chilogatee Creek, and an Unnamed Tributary to Chilhowee Reservoir with a Reservation by the NPS of a Law Enforcement and Resource Management Easement on Same Lands (Tennessee)

**B-3.1 Permanent Conservation Easement and
Declaration of Restrictive Covenants Between the
Licensee and The Nature Conservancy – Bulge
Lands (Tennessee)**

This Instrument Prepared By:
Wayne R. Kramer, Esq.
KRAMER, RAYSON, LEAKE, RODGERS & MORGAN, LLP
P. O. Box 629
Knoxville, TN 37901-0629

**BULGE CONSERVATION EASEMENT
AND
DECLARATION OF RESTRICTIVE COVENANTS**

THIS BULGE EASEMENT AND DECLARATION OF RESTRICTIVE COVENANTS (the "Bulge Easement") is made this ____ day of _____, 200__, between **ALCOA POWER GENERATING INC.**, a corporation organized and existing under and by virtue of the laws of the State of Tennessee with offices in Knox and Blount Counties, Tennessee and addresses of _____, and _____, respectively ("Grantor"), and **THE NATURE CONSERVANCY**, a not-for-profit corporation incorporated under the laws of the District of Columbia, which is headquartered at 4245 North Fairfax Drive, Arlington, Virginia 22203-1606, and which maintains a local office at 2021 21st Avenue South, Suite C-400, Nashville, Tennessee 37212 ("Grantee").

*** * * W I T N E S S E T H * * ***

WHEREAS, Grantor is the owner in fee simple of certain real property located in Blount County, Tennessee, the general location of which is south of U.S. Highway 129 and which property lies within the current authorized legislative boundary of the Great Smoky Mountain National Park ("GSMNP"), in the vicinity of the Chilhowee Reservoir and Calderwood Village, and which consists of approximately 430 acres more or less, and is referred to as the "Bulge," (also known and referred to as Lakey Woods Knob) all as more particularly described on Exhibit A attached hereto and incorporated herein by reference (hereinafter referred to as the "Bulge Property"); and

WHEREAS, Grantor operates power generating facilities in the Little Tennessee River Valley as the licensee of the Tapoco Hydroelectric Project under a license issued by the Federal Energy Regulatory Commission ("FERC") Project No. 2169 (the "Project"); and

WHEREAS, on _____, 200__, the new license for the Project was issued to Grantor by FERC, as that license may be amended ("Project License"); and

WHEREAS, in furtherance of the Project and in compliance with that certain Final Settlement Agreement made and entered into on _____, 200__, by and between Grantor and other participants in the process for issuing a new license for the Project ("Final Settlement Agreement"), Grantor desires to grant, transfer and convey this Bulge Easement to

Grantee, and Grantee desires to receive and accept this Bulge Easement, upon and subject to certain terms and conditions; and

WHEREAS, in its present state as an undeveloped area, the Bulge Property possesses natural, scenic, open space, forest, wildlife habitat, watershed protection, historical, cultural, educational and/or recreational values (collectively, "Conservation Values") which Conservation Values are of great importance to Grantor, the people of and visitors to Blount County, and the people of and visitors to the State of Tennessee; and

WHEREAS, the characteristics of the Bulge Property, its current use and state of improvement, are described in a report entitled Baseline Report of _____, dated _____ prepared by Grantee for Grantor (the "Baseline Report"); Grantor having worked with Grantee to ensure that the report is a complete and accurate description of the Bulge Property as of the date of this Bulge Easement, with said Baseline Report to be used by Grantor and Grantee to assure that any future changes in the use of the Bulge Property will be consistent with the terms of this Bulge Easement, but which Baseline Report is not intended to preclude the use of other evidence to establish the present condition of the Bulge Property if there is a controversy over its use; and

WHEREAS, Grantor intends and Grantee acknowledges that this Bulge Easement herein granted shall at all times remain subject to all applicable provisions of the Project License, and all activities undertaken by Grantor or any Transferee in connection therewith, and any other lawful requirements of FERC, as well as all rights and obligations of Grantor or any Transferee, as they may deem necessary in their sole discretion, to maintain and operate the Project, and all power transmission lines, utility lines of any nature, communication lines, related equipment and all associated improvements (collectively "Power Lines, Equipment and Improvements") specifically including, but not limited to, access to Power Lines, Equipment and Improvements, and other Project and non-Project land areas, or otherwise, for Project, power generation, power transmission and other utility purposes provided that Grantor will make reasonable efforts to assure that its continued use of the Bulge Property will preserve, protect and promote the Conservation Values; and

WHEREAS, Grantee meets the requirements of a "qualified organization" under Section 170(h) of the Internal Revenue Code of 1986, as amended (the "Code") and is a publicly supported, tax-exempt non-profit organization under §§ 501(c)(3) and 509(a)(1) of the Code; and

WHEREAS, Grantor and Grantee desire to conserve the Conservation Values of the Bulge Property that are vital to the ecological integrity of the Southern Appalachian ecoregion; and

WHEREAS, Grantor intends that the Conservation Values of the Bulge Property be preserved and maintained by the continuation of land use patterns, including, without limitation, those relating to natural, scenic, open space, forest, wildlife habitat, watershed protection, historical, cultural, educational and/or recreational uses existing at the time of this Bulge Easement, and which allow continued management of the lands as part of the Tennessee

Wildlife Management Area, as applicable, until such time as the fee simple interest is transferred to the National Park Service ("NPS") as set forth below; and

WHEREAS, the Tennessee Conservation Easement Act of 1981, as amended through the date hereof (the "Act"), § 66-9-301, *et seq.* of the *Tennessee Code Annotated*, permits the creation of conservation easements for purposes which include retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants or wildlife and preserving the historical, architectural, archaeological, or cultural aspects of the Bulge Property; and

WHEREAS, Grantor and Grantee intend to create with this document a "conservation easement," permanent in nature, as that term is defined in the Act.

NOW, THEREFORE, in consideration of the above and the mutual covenants, terms, conditions and restrictions contained herein, Grantor hereby grants and conveys to Grantee this Bulge Easement, in and over the Bulge Property of the nature and character, and only to the extent hereinafter set forth.

1. Definitions.

(a) "Affiliates" means any other individual, corporation, partnership, association, limited liability company, joint stock company, trust or other unincorporated organization that is directly or indirectly, or through one or more intermediaries, controlled by or under the common control of Grantor.

(b) "Bulge Option " means the Agreement for Option and Sale of Bulge Property entered into between the parties and dated _____, 200____.

(c) " Reserved Rights" shall have the meaning and include all rights reserved by Grantor under Section 5 hereof.

(d) "Successor-in-Interest" shall mean the surviving entity resulting from the merger, consolidation or other corporate restructuring by or of Grantor, provided, however, that the surviving entity is the authorized licensee of the Project License.

(e) "Transferee" means Affiliates and Successors-in-Interest, and shall, for the purposes of this Bulge Easement, also include any successors, assigns or lessees of Grantor and any Project License holder.

(f) "TWRA Agreements" means that License Agreement made and entered into by and between Grantor and the Tennessee Wildlife Resources Agency ("TWRA"), on April 6, 1987, as amended by instrument dated October 23, 1996, and as supplemented by the Cooperative Agreement made and entered into by said parties on May 30, 2002, and as such may be amended, extended or replaced, from time to time.

2. **Purpose.** The purpose of this Bulge Easement is to assure that the Bulge Property will be permanently preserved predominantly in its undeveloped, natural, scenic, open space and/or forested condition, and to prevent any use of the Bulge Property that will significantly impair or interfere with the Conservation Values or interests of the Bulge Property. Grantor intends that this Bulge Easement will restrict the use of the Bulge Property to only such activities as are consistent with the purpose of this Bulge Easement; however, Grantor specifically and unconditionally reserves Reserved Rights for itself and any Transferee.

3. **Term.** This Bulge Easement, intended to be permanent in nature, shall continue in full force and effect in perpetuity, subject, however, to the terms and conditions herein.

4. **Prohibited Use.** Subject to the rights and authority of any third party as provided by law in connection with law enforcement or other emergency needs, any activity on or use of the Bulge Property inconsistent with the purpose of this Bulge Easement is prohibited. Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited on the Bulge Property, except Reserved Rights which are specifically and unconditionally retained by Grantor and any Transferee:

(a) **No Construction.** Except as necessary to ensure compliance with the terms hereof, there shall be no constructing or placing of any building or structure of whatsoever nature, recreational facility, fence, asphalt or concrete pavement, antenna, utility pole, tower, conduit, line, sodium vapor light or any other temporary or permanent structure or facility in, on or above the Bulge Property. Furthermore, no signs, billboards or other advertising displays shall be placed on the Bulge Property. Notwithstanding the foregoing, signs may be placed on the Bulge Property that (i) state the name, address or other management information pertaining to the Bulge Property, (ii) identify or regulate permitted on-site activities, (iii) identify and acknowledge the cooperation of parties involved in the preservation and protection of the Bulge Property and/or (iv) control unauthorized entry on or use of the Bulge Property, so long as such signs do not in either placement, number, or design significantly diminish the scenic character of the Bulge Property.

(b) **No Excavation.** There shall be no ditching, draining, diking, filling, excavating, dredging, mining or drilling, removal of topsoil, sand, gravel, rock, minerals or other materials, nor any building of roads or change in the topography or surface hydrology of the Bulge Property in any manner.

(c) **No Cutting or Removal.** There shall be no removal, harvesting, destruction or cutting of trees, shrubs or plants, planting of trees, shrubs or plants, use of fertilizers, plowing, grazing of domestic animals, or disturbance or change in the natural habitat in any manner, except the cutting down or removal of trees or other vegetation for the purpose of maintaining forest health and natural diversity of species and removing exotics and invasive species.

(d) **No Dumping.** There shall be no storage or dumping of ashes, trash, garbage, or other unsightly or offensive material, hazardous substance, or toxic waste, nor any

placement of underground storage tanks in, on, or under the Bulge Property; there shall be no changing of the topography through the placing of soil or other substance or material such as land fill or dredging spoils, nor shall activities be conducted on the Bulge Property that could cause erosion or siltation on the Bulge Property.

(e) **No Pollution.** There shall be no pollution, alteration, depletion or extraction of surface water, natural water courses, lakes, ponds, marshes, subsurface water or any other water bodies, nor shall activities be conducted on the Bulge Property that would be detrimental to water quality or that could alter the natural water level or quality or flow in or over the Bulge Property.

(f) **No Vehicles, Bikes, Horses.** There shall be no operation of motorized vehicles, such as snowmobiles, dune buggies, motorcycles, all-terrain or off-road vehicles, hang gliders, aircraft, or any other types of mechanized vehicles. There shall also be no operation of non-motorized bikes, or any other types of non-motorized vehicles or transportation modes on the Bulge Property. There shall also be no horses nor shall there be the introduction of any non-native species except as otherwise provided in Section 6(h) hereinbelow upon or onto the Bulge Property.

(g) **No Hunting.** Except as determined and authorized by Grantor and TWRA under the TWRA Agreements, or as may be necessary to protect the Project or the Power Lines, Equipment and Improvements, there shall be no hunting or trapping on the Bulge Property except to the extent specifically approved in writing by Grantee as necessary to keep the animal population within the numbers consistent with the ecological balance of the Bulge Property.

(h) **No Exploration.** There shall be no exploration for, or development and extraction of, minerals and hydrocarbons by any mining method or any other method.

(i) **Continuation of Current Restrictions.** This Bulge Easement and the Bulge Property shall remain subject to the terms, conditions and restrictions of the TWRA Agreements and that certain Tennessee Department of Conservation Agreement dated March 30, 1970 (to the extent applicable), as such may be amended, extended or replaced, from time to time, and that certain unrecorded License Agreement dated November 3, 1942, by and between Knoxville Power Company (now Grantor) and Southern Bell Telephone and Telegraph Company, and to all encumbrances and restrictions which are presently of record and apply to the Bulge Property or any portion thereof.

5. **Reserved Rights.** Notwithstanding any prohibition or restriction set forth herein to the contrary, and recognizing that Grantor is and shall remain the fee simple owner of the Bulge Property, Grantor hereby specifically, unconditionally and without restriction, charge or assessment of any kind or nature reserves to itself and any Transferee the following rights, powers and authorities as may be necessary, or appropriate:

(a) **Existing and Future Uses.** The right to use, and to restrict the use of, the Bulge Property for any and all purposes in connection with the Project, Project License, Power

Lines, Equipment and Improvements and the Final Settlement Agreement, including, but not limited to, (i) power generation, power transmission and other utility purposes, (ii) installation, utilization, construction, reconstruction, operation, repair and maintenance of pathways and roadways (located or to be located on the Bulge Property, non-Bulge Property or otherwise), (iii) rights-of-way management, including, but not limited to, vegetation and exotic species management and the right to utilize herbicides, in accordance with best management practices and applicable law, including aerial application, for purposes of controlling vegetation within such rights-of-way, (iv) Project recreation areas, (v) safety and security, (vi) access to or activities upon the Bulge Property due to emergency or extraordinary circumstances, including, but not limited to, fire and medical emergency, and (vii) any other encumbrances or agreements to which Grantor is bound as of the date first above written (including, without limitation, the Bulge Option), or any other lawful purposes relating to the subject of this Section 5. The Bulge Easement herein granted shall in all respects and at all times remain subject to the terms and conditions of the Project License, and Grantor's rights and obligations in connection therewith, and to any other lawful requirements of FERC. Grantor will, however, make reasonable efforts to assure that its continued use of the Bulge Property will preserve, protect and promote the Conservation Values.

(b) **Transfer.** The right to transfer, assign, convey, sell, give, mortgage, or lease the Bulge Property, provided such conveyance is subject to the terms of this Bulge Easement, and subject further, however, to the provisions of the Bulge Option.

(c) **Tree Removal.** The right, but not the obligation, to cut and/or remove fallen, threatened, damaged or diseased trees, shrubs or plants required to maintain Power Lines, Equipment and Improvements, to cut firebreaks, to construct, reconstruct, operate, repair and maintain ingress and egress pathways or roadways on the Bulge Property solely for purposes in connection with the operation of the Project, Power Lines, Equipment and Improvements and for such other Project, power generation, power transmission, or other utility purposes, including, but not limited to, reasonable removal or cutting of trees, shrubs or plants in a customary and historical manner. Notwithstanding the foregoing, in the event that Grantor must relocate existing roadways, it shall consult with Grantee, or the NPS, as applicable, prior to going forward with such relocation, but the consent of neither Grantee nor the NPS to such road relocation shall be required.

(d) **Ingress, and Egress and Project Maintenance.** The right to ingress and egress to, from and over the Bulge Property for any purpose and at any time relating to or arising from the Reserved Rights, and to access other property owned or leased by Grantor or its Transferees provided that such other property is used for purposes consistent with power generation, power transmission and other utility purposes.

6. **Grantee's Rights.** To accomplish the purpose of this Bulge Easement and subject to the other terms and conditions herein, the following rights are conveyed to Grantee:

(a) **Right to Protect.** The right to preserve and protect the Conservation Values of the Bulge Property.

(b) **Right of Entry.** The right of Grantee's staff, contractors and associated natural resource management professionals (including employees and agents of NPS) to enter the Bulge Property and cross other lands retained by Grantor, by motor vehicles on existing roads at reasonable times and with prior notice, for the purposes of: (i) inspecting the Bulge Property to determine if Grantor is complying with the covenants and purposes of this Bulge Easement; (ii) enforcing the terms of this Bulge Easement; (iii) allowing management of the Bulge Property as a Tennessee Wildlife Management Area; (iv) taking any and all actions with respect to the Bulge Property as may be necessary or appropriate, with or without order of court, to remedy or abate violations hereof; (v) making scientific and educational observations and studies and taking samples in such a manner as will not disturb the use and quiet enjoyment of the Bulge Property by Grantor or its rights, duties and obligations pertaining to any of the Reserved Rights; (vi) monitoring and management as described below; (vii) preventing any activity on or use of the Bulge Property that is inconsistent with the purpose of this Bulge Easement and requiring the restoration of such areas or pieces of the Bulge Property that may be damaged by inconsistent activity or use, pursuant to remedies set forth in Section 13; and (viii) conducting due diligence evaluations of the Bulge Property in accordance with and subject to the terms and provisions of the Bulge Option.

(c) **Hiking Trails.** Nothing herein shall prohibit the development and maintenance of hiking trails by Grantee so long as such trails do not interfere with or otherwise impair Grantor's Reserved Rights.

(d) **Monitoring and Management.** The right, but not the obligation, to monitor the natural habitats on the Bulge Property and to manage them, to the extent deemed appropriate by Grantee, to ensure their continued presence and viability on the Bulge Property. Such activities shall be in accordance with management practices of Grantee, which may include, but not be limited to, mowing, trapping, prescribed burning, or the control of exotic species, and related management activities that ensure the ecological integrity of the Bulge Property and/or removal of exotic, invasive or otherwise undesirable species.

(e) **Enforcement.** The right to prevent any activity on or use of the Bulge Property that is inconsistent with the purpose of this Bulge Easement and to require the restoration of such areas or features of the Bulge Property that may be damaged by any inconsistent activity or use, pursuant to Section 13.

(f) **Discretionary Consent.** Grantor shall not be required to acquire Grantee's consent for any purposes associated with the Project or Reserved Rights. If, owing to unforeseen or changed circumstances, any of the activities listed in Section 4 are deemed desirable by both Grantor and Grantee, Grantee may, in its sole discretion, give permission for such activities, subject to the limitations herein. Such requests from Grantor for permission, and permission for activities requiring Grantee's consent under Section 4, shall be in writing delivered to Grantee not less than thirty (30) days prior to the date Grantor intends to undertake the activity in question, and shall describe the proposed activity in sufficient detail to allow Grantee to judge the consistency of the proposed activity with the purpose of this Bulge Easement. The notice shall describe the nature, scope, design, location, time table and

any other material aspect of the proposed activity in sufficient detail to permit Grantee to make an informed judgment as to its consistency with the purpose of this Bulge Easement. Grantee may give its permission only if both Grantor and Grantee determine that such activities (i) do not violate the purpose of this Bulge Easement and (ii) either enhance or do not impair any significant conservation interests associated with the Bulge Property.

(g) **Grantee's Approval.** Grantee shall grant or withhold its approval in writing within thirty (30) days of receipt of Grantor's written request therefor. Except for extraordinary or emergency circumstances, if Grantee fails to issue a written approval or denial of a requested activity within thirty (30) days of receipt of Grantor's written request therefor, Grantee shall be deemed to have granted approval of the requested activity, and Grantor shall be expressly authorized to proceed therewith.

(h) **Biocontrol Agents.** Notwithstanding any provisions in Section 4 to the contrary, Grantee and Grantor may jointly consent to the introduction of non-native species ("Biocontrol Agents") onto the Bulge Property for the purpose of controlling exotic or invasive species. The introduction of any Biocontrol Agent shall be approved in advance in writing by Grantor and Grantee, and shall be consistent with or pursuant to a generally accepted program of introduction of a particular Biocontrol Agent approved or implemented by either the United States Department of Agriculture or the United States Department of the Interior.

7. **Release.** Although intended to be permanent in nature, should there be a termination of any of the rights and privileges granted under this Bulge Easement, Grantee or its successors or assigns, shall execute such instrument, upon the request and to the satisfaction of Grantor, as necessary to evidence said termination. Such instrument shall be in whatever form as shall be required for recordation in the appropriate Register of Deeds office.

8. **Grantee Acknowledgment.** Grantee specifically acknowledges and understands that the easements, rights, privileges and licenses herein granted are subject to all applicable terms and conditions of the Project License, and to any other lawful requirements of FERC thereunder, to the Reserved Rights, and to all other conditions set forth hereunder. By accepting the conveyance of this Bulge Easement, Grantee agrees that the easements, rights, privileges and licenses herein conveyed will not be used in any manner that would endanger health, create a nuisance or otherwise be incompatible with the overall recreational uses associated with the Project, or otherwise interfere with the Reserved Rights.

9. **Public Access.** Nothing contained in this Bulge Easement shall give Grantee or its successors or assigns the right to grant to the public a right to enter upon or to use the Bulge Property or any portion thereof if no such right existed in the public immediately prior to the execution of this Bulge Easement; however, the Bulge Property may be used by the general public as authorized by the mandate of the entity which holds the fee ownership of the Bulge Property, so long as the public use does not violate the prohibitions listed in Section 4 above. Provided further that the Bulge Property will continue to be managed as a Tennessee Wildlife Management Area so long as the TWRA Agreements continue in effect. Additionally, Grantor

and any Transferees may restrict public access to any portion of the Bulge Property for safety or security purposes, or for any other purpose deemed appropriate for the Project or power generation, power transmission or other utility purposes.

10. Costs, Liabilities, Taxes and Environmental Compliance.

(a) **Costs, Legal Requirements and Liabilities.** Grantor retains all responsibilities and shall bear all costs and liabilities which are normal and incident to its ownership and use of the Bulge Property, including the maintenance of adequate liability insurance coverage. Grantor remains solely responsible for obtaining any applicable governmental permits and approvals for any construction or other activity or use permitted by this Bulge Easement, and all such construction or other activity or use shall be undertaken in accordance with all applicable federal, state and local laws, regulations and requirements. Grantor shall keep the Bulge Property free of any liens arising out of any work performed for, materials furnished to, or obligations incurred by Grantor. Nothing contained in the Bulge Easement, however, shall be construed to entitle Grantee, or any other person or entity claiming by or through Grantee, to bring any action against Grantor for any injury to or change in the Bulge Property resulting from causes beyond the control of Grantor, including, without limitation, vandalism or illegal acts, fire, flood, storm, earth movement or any act of God, or from any prudent action taken by Grantor under emergency conditions to prevent, abate or mitigate any injury to the Bulge Property, the Project, or Power Lines, Equipment and Improvements resulting from any such causes.

(b) **Taxes.** Grantor shall pay all real estate taxes and assessments lawfully assessed against the Bulge Property and shall provide to Grantee receipted tax bills or other reasonable evidence satisfactory to Grantee within sixty (60) days of written request for same.

(c) **Control.** Nothing in this Bulge Easement shall be construed as giving rise, in the absence of a judicial decree, to any right or ability in Grantee to exercise physical or managerial control over the day-to-day operations of the Bulge Property, or any of Grantor's activities on the Bulge Property, or otherwise to become an operator with respect to the Bulge Property within the meaning of The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), and *Tenn. Code Ann.* § 68-212-101, *et seq.*

11. Mutual Release and Indemnification. Each party agrees to and hereby does release, hold harmless, defend and indemnify the other from any and all liabilities, including, but not limited to, damage to the Bulge Property, personal injury (including death), losses, damages, judgments, costs, expenses and reasonable attorneys' fees that the indemnified party may suffer or incur as a result of or arising out of the activities of the indemnifying party on the Bulge Property.

12. Title. Grantor covenants and represents that (i) Grantor is the sole owner and is seized of the Bulge Property in fee simple and has good right to grant and convey this Bulge Easement; (ii) except as set forth in Section 4(i), the Bulge Property is free and clear of any and

all liens, encumbrances, and exceptions except as are of record in the Register's Offices for Blount County, Tennessee or otherwise ascertainable by physical inspection of the Bulge Property; and (iii) Grantee shall have the use of and enjoy all of the benefits derived from and arising out of this Bulge Easement; and (iv) as of the date of this Bulge Easement and as of the date this Bulge Easement is recorded, Grantor covenants that the Bulge Property shall not be encumbered by a deed of trust, mortgage or similar monetary lien.

13. Remedies.

(a) **Notice of Violation; Corrective Action.** If either Grantor or Grantee determines that a breach of the terms of this Bulge Easement has occurred or is threatened (the "non-breaching party") by the other party (the "breaching party"), the non-breaching party shall give written notice to the breaching party of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Bulge Property resulting from any use or activity inconsistent with the purpose of this Bulge Easement, to restore the portion of the Bulge Property so injured to its prior condition in accordance with a plan agreed upon by Grantor and Grantee.

(b) **Injunctive Relief.** If the breaching party fails to cure the violation within sixty (60) days after receipt of notice thereof from the non-breaching party, or under circumstances where the violation cannot reasonably be cured within a sixty (60) day period, or fails to begin curing such violation within the sixty (60) day period, or fails to continue diligently to cure such violation until finally cured, the non-breaching party may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Bulge Easement, to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction, and to require the restoration of the Bulge Property to the condition that existed prior to any such injury.

(c) **Damages.** If there is a violation of any of the provisions of this Bulge Easement, the non-breaching party shall notify (by written instrument) the breaching party, who shall promptly cure the violation by (a) ceasing the violation, or (b) restoring the Bulge Property to its condition before the violation, or (c) both, as the case may be. The parties shall have the right, but not the obligation, to pursue legal actions or proceedings at law and equity to enforce the terms and conditions of this Bulge Easement, including, but not limited to, the right to cause such violation to be cured, and if a court of competent jurisdiction determines that a violation has occurred hereunder, the party in violation shall reimburse to the other, as applicable, for all reasonable expenses incurred, including, but not limited to, legal fees, whether in or out of court, and the cost of legal proceedings brought to cure the violation or to collect such reimbursement.

(d) **Scope of Relief.** The parties' rights under this Section 13 apply equally in the event of either actual or threatened violations of the terms of this Bulge Easement. The parties agree that their remedies at law for any violation of the terms of this Bulge Easement are inadequate and that they shall be entitled to the injunctive relief described in Section 13(b), both prohibitive and mandatory, in addition to such other relief to which they may be entitled,

including specific performance of the terms of this Bulge Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The parties' remedies described in this Section 13 shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

(e) **Costs of Enforcement.** All reasonable, actual costs incurred by the parties in enforcing the terms of this Bulge Easement, including, without limitation, actual costs and expenses of suit, actual and reasonable attorneys' fees, and any costs of restoration necessitated by any violation of the terms of this Bulge Easement shall be borne by the breaching party.

(f) **Forbearance.** Forbearance by either party to exercise its rights under this Bulge Easement in the event of any breach of any term of this Bulge Easement by Grantor or Grantee shall not be deemed or construed to be a waiver of such term or of any subsequent breach of the same or any other term of this Bulge Easement, or of any of the party's rights under this Bulge Easement. No delay or omission by the parties in the exercise of any right or remedy upon any breach by the other shall impair such right or remedy or be construed as a waiver.

(g) **Waiver of Certain Defenses.** The parties hereby waive any defenses of laches, estoppel, or prescription.

(h) **Acts Beyond Parties' Control.** Nothing contained in this Bulge Easement shall be construed to entitle a party to bring any action against the other for any injury to or change in the Bulge Property resulting from causes beyond the party's control, including, without limitation, vandalism or illegal acts, unauthorized wrongful acts of third parties, fire, flood, storm, earth movement, and acts of God, or from any prudent action taken by either party under emergency conditions to prevent, abate, or mitigate injury to the Bulge Property or the Project or Power Lines, Equipment and Improvements resulting from any such causes.

(i) **Acts of Third Parties.** Grantee may enforce such prohibition against third parties as authorized under § 66-9-307 of the Act.

14. **Parties Subject to Easement.** The covenants agreed to and the terms, conditions, and restrictions imposed by this Bulge Easement shall be binding upon Grantor and Transferees and upon Grantee, and their respective employees, agents, representatives, invitees, successors and assigns, and shall continue as a servitude running with this Bulge Easement.

15. **Subsequent Transfers.** Grantor agrees that the terms, conditions, restrictions and purposes of this grant or reference thereto will be inserted by Grantor in any subsequent deed or other legal instrument by which the Grantor divests either the fee simple title or possessory interest in the Bulge Property.

16. **Merger.** Grantor and Grantee agree that the terms of this Bulge Easement shall survive any merger of the fee and easement interest in the Bulge Property. Thus, in the event the

Bulge Property is transferred to Grantee, and thereafter by Grantee to NPS, it shall continue to be subject to (i) those rights reserved by or for the benefit of Grantor (which rights shall include the Reserved Rights of Grantor herein) and (ii) terms and conditions to preserve, protect and promote the Conversation Values, all as more particularly set forth in the deeds of conveyance attached as Exhibits B & E to the Bulge Option.

17. **Assignment.** The parties hereto recognize and agree that the benefits and burdens of this Bulge Easement are in gross and that Grantee may not transfer or assign the benefits of this Bulge Easement to any party other than to the NPS without the prior written consent of Grantor, which consent shall not be unreasonably withheld, delayed or conditioned. Grantee further hereby covenants and agrees that if it transfers or assigns the easement it holds under this indenture, any organization receiving the interest will be a "qualified organization" as that term is defined in § 170(h) of the Code, that is organized and operated primarily for one of the conservation purposes specified in §170(h)(4)(A) of the Code, and Grantee further covenants and agrees that the terms of the transfer or assignment will be such that the transferee or assignee will be required to continue to carry out the conservation purposes that the grant hereof was originally intended to advance.

18. **Extinguishment and Condemnation.**

(a) **Extinguishment.** If circumstances arise in the future that render the purpose of this Bulge Easement impossible to accomplish, this Bulge Easement can only be terminated or extinguished, either at the joint request of the Grantor and Grantee, whether in whole or in part, or by judicial proceedings in a court of competent jurisdiction. The amount of the proceeds to which Grantee shall be entitled, after the satisfaction of prior claims, from any sale, exchange, or involuntary conversion of all or any portion of the Bulge Property subsequent to such termination or extinguishment, shall be the stipulated fair market value of this Bulge Easement, or proportionate part thereof, as determined in accordance with Section 18(b) or Internal Revenue Code ("IRC") Regulation § 1.170A-14, if different.

(b) **Valuation.** This Bulge Easement constitutes a real property interest immediately vested in Grantee, which, for the purposes of Section 18(a) the parties stipulate to have a fair market value determined by multiplying (1) the fair market value of the Bulge Property unencumbered by this Bulge Easement (minus any increase in value after the date of this grant attributable to improvements) by (2) x/y, which is the ratio of the value of this Bulge Easement at the time of the grant to the value of the Bulge Property, without deduction from the value of this Bulge Easement, at the time of this grant. (The values at the time of this grant are or shall be those values used for this grant pursuant to § 170(h) of the Code. For the purposes of this section, the ratio of the value of this Bulge Easement to the value of the Bulge Property unencumbered by this Bulge Easement shall remain constant.) It is intended that this Section 18(b) be interpreted to adhere to and be consistent with Federal Regulation § 1.170A-14(g)(6)(ii). Fair Market Value shall be determined using the Uniform Appraisal Standards for Federal Land Acquisitions (2000), as may be revised from time to time.

(c) **Condemnation.** If all or any part of the Bulge Property is taken by exercise of the power of eminent domain or acquired by purchase in lieu of condemnation, whether by public, corporate or other authority, so as to terminate this Bulge Easement, in whole or in part, Grantor and Grantee shall act jointly to recover the full value of the interests in the Bulge Property subject to the taking or in lieu purchase and all direct or incidental damages resulting therefrom. All expenses reasonably incurred by Grantor and Grantee in connection with the taking or in lieu purchase shall be paid out of the amount recovered. Grantee's share of the balance of the amount recovered shall be determined by multiplying the balance by the ratio set forth in Section 18(b).

(d) **Application of Proceeds.** Grantee shall use any proceeds received under the circumstances described in this Section 18 in a manner consistent with its conservation purposes, which are exemplified by the grant of this Bulge Easement.

19. **Miscellaneous Provisions.**

(a) **Estoppel Certificates.** Upon request by Grantor, Grantee shall within twenty (20) days execute and deliver to Grantor, or to any party designated by Grantor, any document, including an estoppel certificate, which certifies, to the best of Grantee's knowledge, Grantor's compliance with any obligation of Grantor contained in this Bulge Easement or otherwise evidences the status of this Bulge Easement. Such certification shall be limited to the condition of the Bulge Property as of Grantee's most recent inspection. If Grantor requests more current documentation, Grantee shall conduct an inspection, at Grantor's expense, within thirty (30) days of receipt of Grantor's written request thereof.

(b) **Termination of Rights and Obligations.** A party's rights and obligations under this Bulge Easement terminate upon transfer of the party's interest in this Bulge Easement or Bulge Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

(c) **Severability.** If any provision of this Bulge Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this Bulge Easement and the application of such provisions to persons or circumstances other than those as to which it is found to be invalid shall not be affected thereby.

(d) **Gender; Number.** Whenever the context of this Bulge Easement so requires, references of the masculine gender shall include the feminine or neuter gender and corporate or other such entities, the singular number shall include the plural and vice versa, and reference to one or more parties hereto shall include all authorized assignees of Grantee and any Transferee.

(e) **Expenses.** Except for such costs and expenses for which either party may be liable pursuant to the provisions of Section 13 hereinabove, each of the parties shall bear its own cost and expense (including legal fees and expenses) incurred in connection with this Bulge Easement and the transactions contemplated hereby.

(f) **Entire Agreement and Amendment.** This Bulge Easement represents the final agreement between and understanding of the parties regarding the subject matter hereof and may not be changed, amended or modified except by an instrument in writing executed by the parties hereto.

(g) **Captions.** The captions herein have been inserted solely for convenience of reference and are not a part of this Bulge Easement and shall have no effect upon construction or interpretation.

(h) **Counterparts.** The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

(i) **Notices.** All notices, demands, requests, consents, approvals or communications that either party desires or is required to give to the other shall be in writing. Any such notices, demands, consents, approvals or communications may be sent to the intended recipient at the address set forth hereinbelow using registered or certified mail, return receipt requested, personal delivery, or expedited courier, but no such notice, demand, consent, approval or communication shall be deemed given unless and until it is actually received by the intended recipient. The parties may change the address to which notices, demands, consents, approvals and other communications hereunder are to be delivered by giving the other party written notice in the manner herein set forth.

If To Grantor:

If to Grantee:

(j) **Evidence of Termination of Reserved Rights.** In the event Grantor determines, in its sole discretion, that reservation of some or all of its Reserved Rights is no longer necessary, it shall notify Grantee in writing and, upon the written request of Grantee, execute in recordable form such documentation as the parties agree is appropriate to evidence the termination of said Reserved Rights or any portion thereof.

(k) **Applicable Law.** The interpretation and performance of this Bulge Easement shall be governed by Tennessee law, without regard to rules or laws governing conflicts of law.

IN WITNESS WHEREOF, the parties have executed this Bulge Easement by their duly authorized representatives the day and year first above written.

GRANTOR:

ALCOA POWER GENERATING INC.

By: _____
Its: _____

GRANTEE:

THE NATURE CONSERVANCY

By: _____
Its: _____

STATE OF _____)
)
COUNTY OF _____)

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of **ALCOA POWER GENERATING INC.**, the within named bargainor, a corporation, and that he as such _____, being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____,
200____.

Notary Public

My Commission Expires: _____

STATE OF _____)
)
COUNTY OF _____)

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of **THE NATURE CONSERVANCY**, the within named bargainor, a corporation, and that he as such _____, being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____, 200____.

Notary Public

My Commission Expires:_____

EXHIBIT LIST

*Exhibit A	Description of Bulge Property
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*To be developed prior to execution of the Bulge Easement.

B-3.2 Agreement for Option and Sale of Real Estate Between the Licensee and The Nature Conservancy – Bulge Lands (Tennessee)

This Instrument Prepared By:
Wayne R. Kramer, Esq.
KRAMER, RAYSON, LEAKE, RODGERS & MORGAN, LLP
P. O. Box 629
Knoxville, TN 37901-0629

AGREEMENT FOR OPTION AND SALE OF BULGE PROPERTY

THIS AGREEMENT FOR OPTION AND SALE OF BULGE PROPERTY ("Bulge Option") is made this _____ day of _____, 200_, ("Commencement Date") between **ALCOA POWER GENERATING INC.**, a corporation organized and existing under and by virtue of the laws of the State of Tennessee, with offices in Knox and Blount Counties, Tennessee and addresses of _____ and _____, respectively ("Optionor"), and **THE NATURE CONSERVANCY**, a not-for-profit corporation incorporated under the laws of the District of Columbia, which is headquartered at 4245 North Fairfax Drive, Arlington, Virginia 22203-1606, and which maintains a local office at 2021 21st Avenue South, Suite C-400, Nashville, Tennessee 37212 ("Optionee").

* * * W I T N E S S E T H * * *

WHEREAS, Optionor is the owner in fee simple of certain real property located in Blount County, Tennessee, the general location of which is south of U.S. Highway 129 and which property lies within the current authorized legislative boundary of the Great Smoky Mountain National Park ("GSMNP"), in the vicinity of the Chilhowee Reservoir and Calderwood Village, and which consists of approximately 430 acres, more or less, and is referred to as the "Bulge," (also known and referred to as Lakey Woods Knob) all more particularly described on Exhibit A attached hereto and incorporated herein by reference (said property or any portion thereof hereafter "Bulge Property"); and

WHEREAS, Optionor operates power generating facilities in the Little Tennessee River Valley as the licensee of the Tapoco Hydroelectric Project under a license issued by the Federal Energy Regulatory Commission ("FERC") as Project No. 2169 (the "Project"); and

WHEREAS, on _____, 200_, the new license for the Project was issued to Optionor by FERC, as that license may be amended ("Project License"); and

WHEREAS, in furtherance of the Project and in compliance with that certain Final Settlement Agreement made and entered into on _____, 200_, by and between Optionor and other participants in the process for issuing a new license for the Project ("Final Settlement Agreement"), the parties desire to execute this "Bulge Option" and to otherwise more fully define the rights and obligations of the parties in and to the Bulge Property.

NOW, THEREFORE, for and in consideration of the promises, mutual covenants and agreements of the parties, and subject to the terms, conditions and restrictions contained herein, Optionor hereby grants to Optionee, and Optionee hereby accepts this Bulge Option, subject to the following terms and conditions:

SECTION I. Option to Purchase

1. **Option Term.** This Bulge Option shall be deemed to be effective as of the Commencement Date and shall terminate as to the Bulge Property when Optionee fails to timely deliver an Exercise Notice (defined below) to Optionor or to effect the Closing (defined below), within the Closing Period (defined below) ("Option Term").

2. **Grant of Option.** Optionor hereby grants unto Optionee the exclusive right and option to purchase the Bulge Property upon the terms and conditions set forth herein.

3. **Exercise of Bulge Option.** From and after the Commencement Date, Optionee shall have eighteen (18) months to deliver written notice to Optionor in accordance with the notice provisions of Section III, Paragraph 4, of its intent to exercise the Bulge Option, together with the Deposit (defined below), which is more particularly described in Section II, Paragraph 2(d)(i) (collectively, specifically including the Deposit, "Exercise Notice").

4. **Closing.** In the event that Optionee delivers the Exercise Notice to Optionor, consummation of the transaction which conveys legal title to the Bulge Property shall occur on or before three (3) years following the Commencement Date ("Closing Period"). All the events necessary to effect the transfer and conveyance of the Bulge Property, and delivery of all documents and instruments associated therewith, are hereinafter referred to as the "Closing."

5. **Failure of Optionee to Deliver Exercise Notice or Close.** In the event that Optionee fails to timely deliver an Exercise Notice to Optionor or to effect the Closing within the Closing Period, the rights and obligations of Optionor and Optionee hereunder shall permanently lapse as to the Bulge Property ("Lapse"). Following a Lapse, Optionor shall have no further duty or obligation to Optionee and shall be entitled to freely transfer title to the Bulge Property, subject to the Bulge Conservation Easement and Declaration of Restrictive Covenants dated _____ granted by Optionor to Optionee (the "Bulge Easement"), so long as the same is in full force and effect.

6. **Access to Property for Due Diligence.** Following the Commencement Date, and prior to the Closing, Optionor grants to Optionee, Optionee's employees, agents and representatives, the right, at reasonable times during normal business hours to conduct on the Bulge Property, at Optionee's expense, all studies (including environmental studies), tests, surveys, examinations and explorations deemed necessary by Optionee to complete due diligence prior to the Closing ("Due Diligence"). It is further understood and agreed that access to the Bulge Property for purposes of conducting any such Due Diligence shall be specifically subject to and conditioned upon the provisions of Section I, Paragraph 7 hereinbelow.

7. **Due Diligence Obligations of Optionee.** Notwithstanding any other provision in this Bulge Option which might be interpreted to the contrary, Optionee's right, and the right of its agents and representatives, to enter upon the Bulge Property to conduct its Due Diligence shall be subject to the following restrictions and conditions:

(a) Optionee shall provide written notice, in accordance with Section III, Paragraph 4 hereinbelow, not less than ten (10) days prior to entry onto the Bulge Property, which notice shall provide the date, time, general location and purpose of such entry. Optionor shall be entitled, but not obligated, to have a representative present during all such entries thereon.

(b) Any Due Diligence activity conducted by Optionee on the Bulge Property shall be conducted in compliance with any and all applicable laws and regulations, and the Bulge Easement, but subject to Optionee's right to operate motor vehicles on existing roads on the Bulge Property to carry out such Due Diligence explorations.

(c) Optionee shall take any and all action and implement all protection necessary to ensure that all Due Diligence activity conducted on, and any equipment, materials and substances generated, used or brought onto, the Bulge Property by Optionee and its employees, agents, representatives and invitees pose no threat to the safety or health of persons or the environment and cause no damage to either the Bulge Property or any other person.

(d) Optionee shall be solely responsible for the security and safety of its activities, employees, agents, representatives, invitees, equipment and materials brought on the Bulge Property.

(e) Optionee shall be responsible for, and shall defend, indemnify and hold harmless Optionor from and against, any loss or damage to the Bulge Property or other property or personal injury (including death), incurred by Optionor or any person as a result of Optionee's activities hereunder, including, but not limited to, costs, expenses and reasonable attorneys' fees.

(f) Optionee shall restore the Bulge Property to substantially the same condition as prior to Optionee's entry onto the Bulge Property.

(g) Optionee shall have the right to update its Due Diligence investigations immediately prior to Closing, and in the event that the condition of the Bulge Property has materially changed during the period of time between completion of such Due Diligence investigations (a "Change in Condition"), Optionee shall provide to Optionor written notice thereof no less than ten (10) days prior to Closing with a description of the Change in Condition. Optionor shall respond in writing not later than five (5) days after receipt of such notice to state whether Optionor shall remediate, to the reasonable satisfaction of Optionee, the Change in Condition, or whether Optionor refuses to remediate the Change in Condition, which right to refuse is hereby specifically reserved. The Closing date shall be extended for a reasonable time to allow for such remediation. If Optionor refuses to remediate the Change in Condition, or in the event the condition of the Bulge Property to be conveyed materially changed within the ten (10) day period prior to Closing, then in either of such events, Optionee shall have the right to

terminate this Bulge Option upon written notice to Optionor, the Deposit shall immediately be refunded to Optionee, and neither party shall have any further duty or obligation to the other under this Bulge Option.

8. **Action in Connection with the Bulge Property.** Optionor agrees that during the Option Term, and prior to Closing if Optionee has timely delivered the Exercise Notice, Optionor shall not, without the prior written consent of Optionee, take any action that will impair the title to the Bulge Property, or grant or by failure to act, cause a lien to be lodged or filed against the Bulge Property, except as permitted in the Bulge Easement.

9. **Optionor's Environmental Analysis.** Notwithstanding any other provision in this Bulge Option to the contrary, in the event Optionee timely delivers the Exercise Notice to Optionor, then Optionor, as the owner of the Bulge Property and as a matter of corporate policy, reserves the right to perform an environmental study in connection with the Bulge Property. If, upon the completion of said study, and if said study identifies an environmental impairment such that Optionor decides not to convey a portion of the Bulge Property to Optionee ("Retained Property") (which right not to convey under such circumstances is specifically reserved to Optionor), Optionor shall notify Optionee in writing of such decision, identifying the Retained Property. The remaining portion of the Bulge Property (other than the Retained Property) shall continue to be subject to the option granted herein and Optionee may proceed with the purchase thereof pursuant to the terms and conditions of this Bulge Option with the Purchase Price (defined below) adjusted accordingly by the Appraiser (defined below). Provided further, however, that under such circumstances, the Retained Property shall not at any time thereafter be conveyed to any person or entity other than to Optionee or an Affiliate (defined below) or Successor-in-Interest (defined below) of Optionor, without first giving written notice to Optionee as provided in Section III, Paragraph 4 hereinbelow. Optionee shall then again have the right to exercise the option herein granted as to the Retained Property for a period of eighteen (18) months following said notice and an additional eighteen (18) months after the exercise of said option in which to close. In the event so exercised, said option shall in all other respects be upon the same terms and provisions as provided herein, except that the Purchase Price (defined below) for the Retained Property shall be determined as of the date such notice from Optionor to Optionee (relative to the Retained Property) is given under this Section I, Paragraph 9. A separate appraisal of the Retained Property shall be performed at the expense of Optionor following the same procedure used for the principle appraisal of the Bulge Property. The Deposit shall be applied at Closing to the purchase of the Bulge Property, less any Retained Property, and to the extent the Deposit exceeds the Purchase Price for the Bulge Property less the Retained Property, any such excess shall be refunded to Optionee at Closing.

10. **Memorandum of Bulge Option.** The parties shall, at any time, at the request of either one, and as soon as reasonably practicable, execute duplicate originals of an instrument, in recordable form, which constitutes a Memorandum of this Bulge Option, setting forth a description of the Bulge Property, Option Term and such other reasonable provisions as the parties may agree.

SECTION II

Agreement of Sale and Transfer

Upon timely delivery of the Exercise Notice to Optionor pursuant to Section I hereinabove, the parties hereto agree and intend to be legally bound as follows:

1. **Transfer and Conveyance of Title.** At Closing (as defined in Section I, Paragraph 4), Optionor shall transfer and convey to Optionee, all of Optionor's right, title and interest in and to the Bulge Property by General Warranty Deed ("Deed") subject to (a) current real estate taxes, if any, which are to be prorated as of the Closing; (b) other standard and customary title insurance exceptions applicable to transactions of the type and nature herein contemplated; (c) a reservation by Optionor of its Reserved Rights (as described in the Bulge Easement) which shall run with the land and to the extent deemed necessary by Optionor, a covenant in the Deed requiring any subsequent conveyance by Optionee of the Bulge Property or any interest therein or portion thereof to include, through deed or other appropriate documents, terms and conditions that preserve, protect and promote the Conservation Values and Optionor's Reserved Rights as contained and described in the Bulge Easement; (d) the TWRA Agreements (as defined in the Bulge Easement) and that certain Tennessee Department of Conservation Agreement dated March 30, 1970 (to the extent applicable), as such may be amended, extended or replaced, from time to time, and that certain unrecorded License Agreement dated November 3, 1942, by and between Knoxville Power Company (now Optionor) and Southern Bell Telephone and Telegraph Company, and (e) such other liens, encumbrances and exceptions as are of record in the Register's Offices for Blount County, Tennessee, as applicable to the Bulge Property conveyed, or otherwise ascertainable by physical inspection of the Bulge Property; provided that Optionor covenants that at the time of the conveyance, no portion of the Bulge Property shall be encumbered by a deed of trust, mortgage or similar monetary lien. Said Deed to Optionee as contemplated herein shall be in substantially the same form and substance as that set forth in Exhibit B attached hereto and incorporated herein by reference.

2. **Purchase Price and Payment.**

(a) The purchase price ("Purchase Price") for any transfer to Optionee under this Bulge Option shall be the fair market value ("FMV") of the Bulge Property interest to be conveyed as of the Commencement Date. The Purchase Price (which shall be included in the Exercise Notice) shall be determined by an appraiser selected by Optionor from the list of appraisers set forth on Exhibit C attached hereto and incorporated herein by reference ("Appraiser"). Within thirty (30) days following the Commencement Date, Optionor shall send written notice to the Optionee and National Park Service ("NPS") identifying said Appraiser so selected by Optionor.

(b) Once the Appraiser has been selected as provided herein, Optionor shall work with Optionee and NPS to develop the scope and terms of work for such appraisal ("Work Order") which the Appraiser will follow in connection with the preparation of the Bulge Property appraisal ("Initial Appraisal"), which Work Order shall (i) be agreed upon by Optionor, Optionee and NPS within ____ days of the notice given by Optionor identifying the Appraiser as required in Section II, Paragraph 2(a) hereinabove, (ii) include the requirement that the Bulge Property be

appraised using standard land valuation methods as set forth in the Uniform Appraisal Standards for Federal Land Acquisitions (2000), as may be revised from time to time and (iii) provide that the Bulge Property interest so appraised be the fee simple interest therein subject to the Bulge Easement and any rights proposed to be retained by Optionor pursuant to Section II, Paragraph 1(c), including, without limitation, the Reserved Rights as set forth in the Bulge Easement. Said Work Order shall be in substantially the same form and substance as Exhibit D attached hereto and incorporated herein by reference. Thereafter, Optionor shall direct that the Appraiser appraise the Bulge Property in accordance with the Work Order. In no event shall said Initial Appraisal be completed later than six (6) months from the Commencement Date unless said time period is otherwise extended by written agreement of the parties, which agreement shall not be unreasonably withheld. Within ten (10) days following completion of the Initial Appraisal, the Appraiser shall send a copy thereof to Optionor, Optionee and NPS. The cost of such Initial Appraisal shall be paid by Optionor. Upon receipt of the Initial Appraisal by Optionee and NPS, they shall have sixty (60) days to review the same and in which to object to the FMV set forth therein. In the event no objection or suggested changes are made within said sixty (60) day period, then the FMV of the Bulge Property as set forth in the Initial Appraisal shall be the Purchase Price and such Purchase Price shall be included in the Exercise Notice from Optionee to Optionor.

(c) If any portion of the Initial Appraisal is objectionable to either Optionee or NPS, then a written objection shall be delivered to Optionor and Optionee or NPS, as applicable, by the entity objecting within said sixty (60) day period identifying the objections or suggested changes to the Initial Appraisal. If Optionor agrees with such objections or suggested changes, then such objections or changes shall be addressed and made, the FMV adjusted accordingly and such FMV, as adjusted, shall be the Purchase Price and such Purchase Price shall be included in the Exercise Notice from Optionee to Optionor. If Optionor, Optionee and NPS cannot agree as to the objections or suggested changes to the Initial Appraisal, then within ten (10) days of receipt of the objections or suggested changes, Optionee and NPS may collectively choose a second Appraiser from the list of Appraisers set forth on Exhibit C ("Second Appraiser") and within five (5) days thereafter send written notice to Optionor identifying said Second Appraiser so selected. Said Second Appraiser shall then appraise the property ("Second Appraisal") using the same Work Order used in the Initial Appraisal, which Second Appraisal shall be completed and delivered to Optionor, Optionee and NPS within two (2) months of such written notice identifying said Second Appraiser unless said time period is extended by agreement of the parties for reasonable cause, including the unavailability of the selected Second Appraiser. In the event two appraisals are so prepared, then the FMV of the Bulge Property as set forth in Initial Appraisal shall be compared to the FMV of the Bulge Property as set forth in the Second Appraisal. If the FMV of the Bulge Property as set forth in the Second Appraisal varies by no more than 10% from that set forth in the Initial Appraisal, the parties agree to accept the FMV as determined by the Second Appraisal as the Purchase Price and said Purchase Price shall be included in the Exercise Notice from Optionor to Optionee. If, however, the FMV of the Bulge Property as set forth in the Second Appraisal varies by more than 10% from that of the Initial Appraisal, then the Purchase Price shall be the average of the FMV of the Bulge Property as set forth in the Initial Appraisal and the Second Appraisal (*i.e.*, $\text{FMV of Bulge Property as set forth in the Initial Appraisal} + \text{FMV of Bulge Property as set forth in the Second Appraisal} \div 2 = \text{FMV of Bulge Property} = \text{Purchase Price}$), and such Purchase Price shall be included in the Exercise

Notice from Optionee to Optionor. The cost of the Second Appraisal shall be paid by either Optionee or NPS.

(d) The Purchase Price shall be payable as follows:

- (i) Ten percent (10%) of the Purchase Price shall be payable by Optionee to Optionor in cash upon delivery of the Exercise Notice as a deposit ("Deposit") to be credited toward the Purchase Price, either by cashier's check or wire transfer, at the discretion of Optionor. At Optionee's request at the time such Deposit is delivered, the Deposit shall be placed into an escrow account, to be held by a title attorney selected by Optionor, subject to the terms of this Bulge Option and a standard escrow agreement executed by the parties, which escrow agreement shall provide for the Deposit to be invested in an interest bearing account with said interest accruing to the benefit of Optionee and to become a part of the Deposit.
- (ii) The remaining ninety percent (90%) of the Purchase Price shall be paid by Optionee to Optionor in cash at Closing, either by cashier's check or wire transfer, at the discretion of Optionor.

3. **Reservation of Easement.** The parties agree that any deed conveying title to the Bulge Property to Optionee shall reserve to Optionor and any Transferee a permanent easement that contains the Reserved Rights as defined in and held by Optionor under the Bulge Easement ("Reserved Rights").

4. **Condition Precedent to Closing.** As a condition to Closing, Optionee shall develop a deed to NPS, the terms and conditions of which shall be mutually satisfactory to Optionor and Optionee, to address the management of the Bulge Property in a manner to preserve, protect, and promote the Conservation Values and Optionor's Reserved Rights as contained and described in the Bulge Easement. Said deed to NPS as contemplated herein shall be in substantially the same form and substance as that set forth in Exhibit E attached hereto and incorporated herein by reference. In the event the condition precedent herein set forth is not satisfied, then in that event, Optionor shall have the right to terminate this Bulge Option upon written notice to Optionee whereupon the Deposit shall immediately be refunded to Optionee and neither party shall have any further duty or obligation to the other under this Bulge Option.

5. **Possession.** At Closing, Optionor shall deliver to the Optionee possession of the Bulge Property.

6. **Second Conveyance to NPS.** The parties agree that the conveyance of the Bulge Property to Optionee (any such conveyance hereinafter referred to as "First Conveyance") is contingent upon Optionee's conveyance of all of its right, title and interest in and to the Bulge Property to the NPS within two (2) years of the Closing ("Second Conveyance"). This two (2) year period may only be extended with the prior written consent of Optionor, which consent shall not be unreasonably withheld, upon a showing by NPS that good

faith efforts have been made to obtain the necessary authorization and funding to complete the Second Conveyance. Optionee shall neither require nor accept any consideration from NPS greater than that paid by Optionee to Optionor, except for any interest costs, survey costs, recording fees or title charges incurred by Optionee that can be directly attributed to this transaction. In no case may Optionee accept payment or consideration in excess of the FMV of the Bulge Property transferred. Notwithstanding the foregoing, Optionee may continue to hold legal title to the Bulge Property acquired in the First Conveyance until NPS is ready and able to take title to the same; however, Optionee must manage such Bulge Property in accordance and consistent with the terms and restrictions set forth in the Bulge Easement until effectuation of the Second Conveyance. Any conveyance hereunder shall be subject to the terms and conditions as described in this Section II, Paragraph 6, and as more particularly described in the Deed. As a condition to the completion of the Second Conveyance, Optionee shall develop a deed to the NPS, the terms and conditions of which shall be satisfactory to Optionor and Optionee, to address the management of the Bulge Property in a manner to preserve, protect and promote the Conservation Values and Optionor's Reserved Rights as contained and described in the Bulge Easement. Said deed to NPS as contemplated herein shall be in substantially the same form and substance as that set forth in Exhibit E attached hereto and incorporated herein by reference.

7. Remedies of Optionor Upon Failure to Make Second Conveyance. In the event Optionee (i) fails to convey the Bulge Property to NPS within two (2) years after the later of the Closing of the First Conveyance or announcement by NPS that the necessary authorization and funding to acquire the Bulge Property has been allocated, appropriated or obtained, (ii) requires or accepts greater consideration than permitted in Section II, Paragraph 6 above, or (iii) fails to ensure full compliance with the Bulge Easement and all of the terms and conditions contained in the Deed granting fee simple ownership to Optionee, Optionor or any other party to the Final Settlement Agreement may seek a remedy at law or in equity in a court of general jurisdiction to: (i) compel the transfer of the Bulge Property to NPS, (ii) compel by specific performance enforcement by Optionee for violations of the Bulge Easement, (iii) recover costs and attorney fees from Optionee, and (iv) any other remedy or damage to which Optionor and/or any other party to the Final Settlement Agreement may be entitled. Notwithstanding the foregoing, Optionee shall in no event be responsible or liable for damages, costs, expenses or attorney fees as a result of matters over which Optionee had no control (including, without limitation, actions of third parties, acts of God, weather and fire) that result in a violation of the terms of the Bulge Easement, or inability to obtain timely funding for the Second Conveyance under this Bulge Option. Optionor may also recover any consideration paid to Optionee in excess of the consideration permitted in Section II, Paragraph 6 and seek such other remedies as set forth in the Final Settlement Agreement and related documents. All lands transferred to Optionee under the terms of this Bulge Option shall be managed by Optionee as part of the existing Tennessee Wildlife Management Area until the Second Conveyance, and Optionee shall cooperate with the Tennessee Wildlife Resources Agency to maintain public access to the Bulge Property in a manner consistent with that permitted as of the Commencement Date until the Second Conveyance.

8. Risk of Loss. The parties agree that all risk of loss from damage to the Bulge Property by any cause prior to the Closing shall be Optionor's and shall not pass to Optionee until the Closing, except such damages as may be attributable to Optionee, its

employees, agents, representatives, invitees, or licensees as a result or arising out of the activity described in Section I, Paragraphs 6 and 7 hereinabove for which damages Optionee shall be solely liable.

9. **Taxes.** To the extent any real property taxes are due in connection with the Bulge Property prior to Closing and prior to the transfer of title by Optionor to Optionee, such taxes shall be prorated between the parties. Optionee shall be responsible for any and all real property taxes from and after the date of the conveyance by Optionor to Optionee of Optionor's interest therein (*i.e.*, from and after the date of Closing). If the Bulge Property is subject to one or more Greenbelt filings pursuant to *Tenn. Code Ann. § 67-5-1001 et. seq.*, as amended, any rollback taxes that become due and payable as a result of the sale of the Bulge Property shall be paid at Closing by Optionor.

10. **Remedies.** In the event either party hereunder shall fail to perform its respective obligations under this Bulge Option, the non-defaulting party shall be entitled to pursue such remedies as may be available to it, at law or in equity, including, but not limited to, specific performance. Furthermore, and in addition to the foregoing, in the event that the default is the failure to close by Optionee by the Closing, Optionor may retain the Deposit, and may collect from Optionee the cost of the appraisal, as liquidated damages for such failure to close, which shall be Optionor's sole remedy in the event of such failure to close.

11. **Optionor's Representations.** Optionor hereby makes the following representations, warranties and covenants, as of the date hereof and which shall be true as of Closing:

(a) Due Authorization. Optionor hereby represents that this Bulge Option has been duly authorized, executed and delivered by all necessary action on the part of Optionor, constitutes the valid and binding agreement of Optionor and is enforceable in accordance with its terms.

(b) Environmental Matters. To Optionor's current actual knowledge, the Bulge Property being conveyed is not in violation of any applicable environmental or other law.

(c) Litigation. To Optionor's current actual knowledge, there are no claims, actions, suits, proceedings or investigations pending against or affecting Optionor or involving the Bulge Property at law or in equity or before any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality.

(d) Condemnation. To Optionor's current actual knowledge, Optionor has received no written notice of any condemnation proceedings against the Bulge Property, or of the desire of any public authority or other entity to take or use the Bulge Property or any part thereof.

12. **Disclaimer as to Condition of Bulge Property.** Except for the representations set forth in Section II, Paragraph 11 above, Optionee acknowledges that it has not relied upon any advice or representation of Optionor or its employees, agents or other

representatives in connection with this transaction. Furthermore, Optionee specifically acknowledges that the Bulge Property conveyed pursuant to this Bulge Option is being purchased on an "AS IS, WITH ALL FAULTS" basis and neither Optionor nor any of its employees, agents or other representatives make or imply nor have they made or implied any warranties as to the condition of the Bulge Property, including, but not limited to, the following:

(a) the quality, nature, adequacy and physical condition of the Bulge Property, or any portion thereof;

(b) the quality, nature, adequacy and physical condition of the soils, geology, and any ground water of the Bulge Property, or any portion thereof;

(c) the development potential of the Bulge Property, or any portion thereof, the Bulge Property's use, habitability, merchantability or fitness, suitability, value or adequacy for any particular purpose;

(d) the zoning or other legal status of the Bulge Property, or any portion thereof, or any other public or private restrictions on the use thereof;

(e) the compliance of the Bulge Property, or any portion thereof, with any applicable codes, laws, regulations, statutes, ordinances, covenants, conditions and restrictions of any governmental or quasi-governmental entity or of any other person or entity;

(f) the presence or removal of hazardous or toxic materials, substances or wastes in, on, under or upon or about the Bulge Property, or any portion thereof, or any adjoining or neighboring property or any other environmental matter of any nature whatsoever;

(g) the costs to preserve and maintain the Bulge Property, or any portion thereof.

SECTION III Miscellaneous

1. **Entire Agreement and Amendment.** This Bulge Option (including Section I, Section II, Section III and the Exhibits attached and other documents to be executed pursuant hereto) represents the final agreement between and understanding of the parties regarding the subject matter hereof and may not be changed, amended or modified except by an instrument in writing executed by the parties hereto.

2. **Successors and Assigns.** This Bulge Option shall be binding upon and shall inure to the benefit of the parties hereto and their authorized successors, assigns, Affiliates (defined below), Successors-in-Interest (defined below) and any Transferee (defined below). Optionee may not assign this Bulge Option or any of its rights, interests or obligations hereunder to any person or entity, without the prior written consent of Optionor. The rights, interest and obligations of Optionor hereunder may be assigned to an Affiliate (defined below), Successor-in-Interest (defined below) and any Transferee (defined below), by operation of law or by Optionor, without Optionee's prior written consent. For purposes of this Bulge Option, "Affiliates" means

any other individual, corporation, partnership, association, limited liability company, joint stock company, trust or other unincorporated organization that is directly or indirectly, or through one or more intermediaries, controlled by or under the common control of Optionor. "Transferee" means Affiliates and Successors-in-Interest (defined below), and shall, for the purposes of this Bulge Option, also include any successors, assigns or lessees of Optionor and any Project License holder. "Successor-in-Interest" shall mean the surviving entity resulting from the merger, consolidation or other corporate restructuring by or of Optionor, provided, however, that the surviving entity is the authorized licensee of the Project License.

3. **Construction.** This Bulge Option has been negotiated and prepared by the parties in accordance with the terms and provisions of the Final Settlement Agreement, and has been reviewed and approved by their respective legal counsel. Accordingly, the parties acknowledge and agree that legal or equitable principles which would require the construction of this Bulge Option or any provision of this Bulge Option against the party drafting this Bulge Option shall not apply in any construction or interpretation hereof.

4. **Notices.** All notices, demands, requests, consents, approvals or communications that either party desires or is required to give to the other (including the Exercise Notice) shall be in writing. Any such notices, demands, consents, approvals or communications may be sent to the intended recipient at the address set forth hereinbelow using registered or certified mail, return receipt requested, personal delivery, or expedited courier. Unless specifically provided otherwise herein, no such notice, demand, consent, approval or communication shall be deemed given unless and until it is actually received by the intended recipient. The parties may change the address to which notices, demands, consents, approvals and other communications hereunder are to be delivered by giving the other party written notice in the manner herein set forth.

If to Optionor:

If to Optionee:

5. **Waivers.** No waiver by any party of any default, misrepresentation, or breach of warranty or covenant hereunder, whether intentional or not, shall be deemed to extend to any prior or subsequent default, misrepresentation, or breach of warranty or covenant hereunder or affect in any way any rights arising by virtue of any prior or subsequent such occurrence.

6. **Severability.** If any provision of this Bulge Option or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of

this Bulge Option and the application of such provisions to persons or circumstances other than those as to which it is found to be invalid shall not be affected thereby.

7. **Expenses.** Each of the parties shall bear its own cost and expense (including legal fees and expenses) incurred in connection with this Bulge Option and the transactions contemplated hereby. The documentary stamp tax or transfer taxes on the conveyance to Optionee shall be the obligation of Optionee. Optionor shall pay the cost of preparation of the Deed.

8. **Captions.** The captions herein have been inserted solely for convenience of reference and are not part of this Bulge Option and shall have no effect upon construction or interpretation.

9. **Counterparts.** The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart, if any, shall be controlling.

10. **Applicable Law.** The interpretation and performance of this Bulge Option shall be governed by Tennessee law, without regard to rules or laws governing conflicts of law.

11. **Further Assurances.** The parties agree that at any time following the execution of this Bulge Option, and from time to time thereafter, they shall execute and deliver such further instruments of assurance, transfer, endorsement, direction or authorization as may be necessary or otherwise reasonably requested by the parties to fully consummate the transaction contemplated hereunder and to fully comply with any laws or regulations in connection with this transaction or otherwise.

IN WITNESS WHEREOF, the parties have executed this Bulge Option by and through their duly authorized representatives on the day and year first above written.

OPTIONOR:

ALCOA POWER GENERATING INC.

By: _____
Its: _____

OPTIONEE:

THE NATURE CONSERVANCY

By: _____
Its: _____

STATE OF _____)
)
COUNTY OF _____)

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of **ALCOA POWER GENERATING INC.**, the within named bargainor, a corporation, and that he as such _____, being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____, 20____.

Notary Public

My Commission Expires:_____

STATE OF _____)
)
COUNTY OF _____)

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of **THE NATURE CONSERVANCY**, the within named bargainor, a corporation, and that he as such _____, being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____, 20____.

Notary Public

My Commission Expires:_____

EXHIBIT LIST

*Exhibit A	Description of Bulge Property
Exhibit B	Bulge Property Deed APGI to TNC
*Exhibit C	List of Appraisers
*Exhibit D	Work Order
Exhibit E	Bulge Property Deed TNC to NPS

* To be developed prior to execution of the Bulge Option.

Appendix B-3.2

Exhibit B

THIS INSTRUMENT PREPARED BY:

Wayne R. Kramer
KRAMER, RAYSON, LEAKE,
RODGERS & MORGAN, LLP
Post Office Box 629
Knoxville, TN 37901-0629
(865) 525-5134

Map No. _____

Parcel No. _____

WARRANTY DEED

THIS INDENTURE (“Deed”), made and entered into this ____ day of _____, 200__, between **ALCOA POWER GENERATING INC.**, (formerly Tapoco, Inc.) a corporation organized and existing under and by virtue of the laws of the State of Tennessee, with offices in Blount and Knox Counties, Tennessee (“Grantor”), and **THE NATURE CONSERVANCY**, a not-for-profit corporation incorporated under the laws of the District of Columbia, which is headquartered at 4245 North Fairfax Drive, Arlington, Virginia 22203-1606, and which maintains a local office at 2021 21st Avenue South, Suite C-400, Nashville, Tennessee 37212 (“Grantee”).

W I T N E S S E T H:

WHEREAS, Grantor is the owner in fee simple of certain real property located in Blount County, Tennessee, the general location of which is south of U.S. Highway 129 and which property lies within the current authorized legislative boundary of the Great Smoky Mountain National Park (“GSMNP”), in the vicinity of the Chilhowee Reservoir and Calderwood Village, and which consists of approximately 430 acres more or less, and is referred to as the “Bulge,” (also known and referred to as the “Lakey Woods Knob”) all as more particularly described on **Exhibit A** attached hereto and incorporated herein by reference (hereinafter referred to as the “Bulge Property”); and

WHEREAS, Grantor operates power generating facilities in the Little Tennessee River Valley as the licensee of the Tapoco Hydroelectric Project under a license issued by the Federal Energy Regulatory Commission ("FERC") Project No. 2169 (the "Project"); and

WHEREAS, on _____, 200____, the new license for the Project was issued to Grantor by FERC, as that license may be amended ("Project License"); and

WHEREAS, Grantor further intends and Grantee further acknowledges that the Bulge Property shall at all times remain subject to all activities described in this Deed undertaken by Grantor or any Transferee ("Transferee" shall mean any successor or assign of Grantor, any Project License holder, their successors, assigns or lessees and shall further mean any person or entity acting through or at the request of Grantor or any Transferee) in connection with the Project, Project License, and any other lawful requirements of FERC, and all power transmission lines, utility lines of any nature, communication lines, related equipment and all associated improvements owned or utilized by Grantor or any Transferee (collectively "Power Lines, Equipment and Improvements") specifically including, access to Power Lines, Equipment and Improvements, and other Project and non-Project land areas or otherwise, for Project, power generation, power transmission and other utility purposes; and

WHEREAS, Grantor granted to Grantee a conservation easement evidenced by instrument dated _____ of record in Deed Book _____, page _____ in the Register's Office for Blount County, Tennessee ("Bulge Easement"), the purpose of which is to preserve, protect and promote certain conservation values of the Bulge Property by the continuation of land use patterns, including, without limitation, those relating to natural, scenic, open space, forest, wildlife habitat, watershed protection, historical, cultural, educational and/or

recreational uses all as more fully described and defined in said Bulge Easement (“Conservation Values”); and

WHEREAS, Grantor and Grantee are also parties to that certain Agreement for Option and Sale of Bulge Property dated the ____ day of _____, 200__ (“Bulge Option”), a memorandum of which is of record in ____ in the Register’s Office for Blount County, Tennessee, wherein Grantee was granted the option to purchase (“Option”) the Bulge Property; and

WHEREAS, Grantee has exercised said Option and thus Grantor desires to convey the Bulge Property to Grantee in a manner consistent with said Bulge Option and Grantee desires to become the titled owner thereto, and the parties otherwise desire to be bound by all other terms and conditions herein; and

NOW, THEREFORE, Grantor, for and in consideration of the sum of One Dollar (\$1.00), and other good and valuable consideration, to it in hand paid by Grantee, the receipt of which is hereby acknowledged, including the terms and conditions and other rights and obligations set forth in this Deed, to which this conveyance is specifically subject and which terms and conditions and other rights and obligations are fundamental consideration to this transaction, has granted, bargained, sold and conveyed, and does hereby grant, bargain, sell and convey to Grantee the Bulge Property located in Blount County, Tennessee, as more particularly described on **Exhibit A**, subject to the exceptions and reservations hereinabove and hereinafter set forth, with the hereditaments and appurtenances thereto appertaining, hereby releasing, if applicable, all claims of homestead and dower therein.

TO HAVE AND TO HOLD the Bulge Property herein conveyed to Grantee, its successors and assigns, forever, subject to the exceptions, reservations, limitations and covenants

and conditions hereinabove and hereinafter set forth, which exceptions, reservations, limitations and covenants and conditions are understood and acknowledged by the parties, which understanding and acknowledgement are evidenced by Grantor's execution and Grantee's acceptance and recording of this Deed:

1. Notwithstanding any term or condition set forth in this Deed to the contrary, or as set forth in the Bulge Easement or in any other agreement by and between Grantor and Grantee or otherwise, and Grantee recognizing the need for Grantor to continue to use the Bulge Property for certain purposes, Grantee understands and acknowledges that Grantor hereby specifically, unconditionally and without restriction, charge or assessment of any kind or nature reserves to itself and to any Transferee the following rights, powers and authorities as may be necessary, or appropriate ("Reserved Rights"), it being further understood and agreed that Grantor shall continue to have, reserve and maintain all of the Reserved Rights as more fully described and set forth in the Bulge Easement (other than the right to transfer the Bulge Property set forth in Section 5(b) thereof), it being intended that in all respects other than said right to transfer the Bulge Property, this Deed shall be consistent therewith:

(a) **Existing and Future Uses.** The right to use, and to restrict the use of, the Bulge Property for any and all purposes in connection with the Project, Project License, Power Lines, Equipment and Improvements and the Final Settlement Agreement, including, but not limited to, (i) power generation, power transmission and other utility purposes, (ii) installation, utilization, construction, reconstruction, operation, repair and maintenance of pathways and roadways (located or to be located on the Bulge Property, non-Bulge Property or otherwise), (iii) rights-of-way management, including, but not limited to, vegetation and exotic species management and the right to utilize herbicides, in accordance with best management practices and applicable law, including aerial application, for purposes of controlling vegetation within such rights-of-way, (iv) Project recreation areas, (v) safety and security, (vi) access to or activities upon the Bulge Property due to emergency or extraordinary circumstances, including, but not limited to, fire and medical emergency, and (vii) any other encumbrances or agreements to which Grantor is bound as of the date first above written (including, without limitation, the Bulge Option), or any other lawful purposes relating to the subject of this Section 1. The Bulge Property herein conveyed shall in all respects and at all times remain subject to the terms and conditions of the Project License, and Grantor's rights and obligations in connection therewith, and to any other lawful requirements of FERC. Grantor will, however, make reasonable efforts to assure that its continued use of the Bulge Property will preserve, protect and promote the Conservation Values.

(b) **Tree Removal.** The right, but not the obligation, to cut and/or remove fallen, threatened, damaged or diseased trees, shrubs or plants required to maintain Power Lines, Equipment and Improvements, to cut firebreaks, to construct, reconstruct, operate, repair and maintain ingress and egress pathways or roadways on the Bulge Property solely for purposes in connection with the operation of the Project, Power Lines, Equipment and

Improvements and for such other Project, power generation, power transmission, or other utility purposes, including, but not limited to, reasonable removal or cutting of trees, shrubs or plants in a customary and historical manner. Notwithstanding the foregoing, in the event that Grantor must relocate existing roadways, it shall consult with Grantee (or the National Park Service ("NPS") in the event the Bulge Property is conveyed to NPS), prior to going forward with such relocation, but the consent of neither Grantee nor NPS, as applicable, to such road relocation shall be required.

(c) **Ingress, and Egress and Project Maintenance.** The right to ingress and egress to, from and over the Bulge Property for any purpose and at any time relating to or arising from the Reserved Rights, and to access other property owned or leased by Grantor or its Transferees provided that such other property is used for purposes consistent with power generation, power transmission and other utility purposes.

2. Any and all easements, uses and/or roads, pathways and/or other rights of way or rights of access in existence as of the date hereof necessary or appropriate to maintain Power Lines, Equipment and Improvements over, upon and across the Bulge Property shall be and remain in full force and effect.

3. By acceptance and recordation of this instrument, Grantee understands and agrees that it, as the titled owner thereof, shall manage, maintain and use the Bulge Property in a manner so as to preserve, protect and promote the Conservation Values and otherwise manage, maintain and use the Bulge Property in a manner consistent with and as more fully described and defined in the Bulge Easement.

4. It is further understood and agreed that in the event either party alleges that the other has breached any of the terms and conditions of this instrument, the "non-breaching party" shall give written notice to the "breaching party" of the specific nature of such claimed breach. Said notice shall be sent to Grantor at _____ and to Grantee at _____ (unless or until such address is changed by written notice to the other) using registered or certified mail, return receipt requested, personal delivery, or expedited courier. The breaching party shall have 180 days after the receipt of said notice to cure the identified breach or otherwise resolve the same with the non-breaching party. If said breach is not cured or resolved within said 180 day period, then the non-breaching party shall have the right to pursue such injunctive relief and/or such other remedies at law or in equity as may be available to it to cure such claimed breach.

The hereinabove described terms and provisions shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns; it being the intent of the parties that said terms and provisions so long as they remain in full force and effect, shall run with the land.

And said Grantor, for itself and its successors and assigns, does hereby covenant with said Grantee, its successors and assigns, that it is lawfully seized in fee simple of the Bulge

Property herein conveyed and has full power, authority and right to convey the same, and that said Bulge Property is free from all encumbrances except (i) real property taxes for the current year, which shall be pro-rated as of the date of closing and which Grantee assumes and agrees to pay to the extent the same are due, (ii) the hereinabove described terms, covenants, conditions, rights and easements, including specifically the terms and conditions of the Bulge Easement, (iii) the TWRA Agreements (as defined in the Bulge Easement) and that certain Tennessee Department of Conservation Agreement dated March 30, 1970 (to the extent applicable), as such may be amended, extended or replaced from time to time, and that certain unrecorded License Agreement dated November 3, 1942 by and between Knoxville Power Company (now Grantor) and Southern Bell Telephone and Telegraph Company, and (iv) such other liens, encumbrances and exceptions as are of record in the Register's Office for Blount County, Tennessee, or as are otherwise ascertainable by physical inspection of the Bulge Property and that it will forever warrant and defend said Bulge Property and the title thereto against the lawful claims of all persons whomsoever.

Whenever in this instrument a pronoun is used it shall be construed to represent either singular or plural, or the masculine, feminine or neuter gender, as the case may demand.

IN WITNESS WHEREOF, Grantor has caused this instrument to be executed and its

name to be signed hereto by its duly authorized officer the day and year first above written.

ALCOA POWER GENERATING INC.

By:_____

Its: _____

STATE OF _____)

COUNTY OF _____)

Before me, the undersigned authority, Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of ALCOA POWER GENERATING INC., being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____, 200____.

Notary Public

My Commission Expires:_____

Affiant

Notary Public

THE PREPARER OF THIS INSTRUMENT MAKES NO REPRESENTATIONS NOR WARRANTIES AS TO THE STATUS OF THE TITLE TO THE PROPERTY HEREIN, NOR CONCERNING THE ACCURACY OF THE PROPERTY DESCRIPTION AND REPRESENTS THAT THIS INSTRUMENT HAS BEEN PREPARED SOLELY FROM INFORMATION FURNISHED TO THE PREPARER HEREOF.

{W0221418.1}8

EXHIBIT LIST

*Exhibit A

Description of Bulge Property

*To be developed prior to execution of the Deed.

Appendix B-3.2

Exhibit E

THIS INSTRUMENT PREPARED BY:

Map No. _____

Parcel No. _____

WARRANTY DEED

THIS INDENTURE ("Deed"), made and entered into this ____ day of _____, 200__, between **THE NATURE CONSERVANCY**, a not-for-profit corporation incorporated under the laws of the District of Columbia, which is headquartered at 4245 North Fairfax Drive, Arlington, Virginia 22203-1606, and which maintains a local office at 2021 21st Avenue South, Suite C-400, Nashville, Tennessee 37212 ("Grantor") and the **UNITED STATES OF AMERICA** and its assigns, whose address is National Park Service, Land Resources Division, 1849 "C" Street, N.W., Room 2444, Washington, D.C. 20240 ("Grantee").

.

WITNESSETH:

WHEREAS, Grantor is the owner in fee simple of certain real property located in Blount County, Tennessee, the general location of which is south of U.S. Highway 129 and which property lies within the current authorized legislative boundary of the Great Smoky Mountain National Park ("GSMNP"), in the vicinity of the Chilhowee Reservoir and Calderwood Village, and which consists of approximately 430 acres more or less, and is referred to as the "Bulge," (also known and referred to as the "Lakey Woods Knob") all as more particularly described on **Exhibit A** attached hereto and incorporated herein by reference (hereinafter referred to as the "Bulge Property"); and

WHEREAS, Grantor's immediate predecessor in title (Alcoa Power Generating Inc. ("APGI")) operates power generating facilities in the Little Tennessee River Valley as the licensee of the Tapoco Hydroelectric Project under a license issued by the Federal Energy Regulatory Commission ("FERC") Project No. 2169 (the "Project"); and

WHEREAS, on _____, 200____, the new license for the Project was issued to APGI by FERC, as that license may be amended ("Project License"); and

WHEREAS, APGI intends and Grantee further acknowledges that the Bulge Property shall at all times remain subject to all activities described in this Deed undertaken by APGI or any Transferee ("Transferee" shall mean any successor or assign of APGI, any Project License holder, their successors, assigns or lessees and shall further mean any person or entity acting through or at the request of APGI or any Transferee) in connection with the Project, Project License, and any other lawful requirements of FERC, and all power transmission lines, utility lines of any nature, communication lines, related equipment and all associated improvements owned or utilized by APGI or any Transferee (collectively "Power Lines, Equipment and Improvements") specifically including, access to Power Lines, Equipment and Improvements, and other Project and non-Project land areas or otherwise, for Project, power generation, power transmission and other utility purposes; and

WHEREAS, APGI granted to Grantor a conservation easement evidenced by instrument dated _____ of record in Deed Book _____, page _____ in the Register's Office for Blount County, Tennessee ("Bulge Easement"), the purpose of which is to preserve, protect and promote certain conservation values of the Bulge Property by the continuation of land use patterns, including, without limitation, those relating to natural, scenic, open space, forest, wildlife habitat, watershed protection, historical, cultural, educational and/or recreational

uses all as more fully described and defined in said Bulge Easement ("Conservation Values");
and

WHEREAS, APCI and Grantor are also parties to that certain Agreement for Option and Sale of Bulge Property dated the ____ day of _____, 200____ ("Bulge Option"), a memorandum of which is of record in _____ in the Register's Office for Blount County, Tennessee, wherein Grantee was granted the option to purchase ("Option") the Bulge Property;
and

WHEREAS, Grantor exercised said Option and acquired the Bulge Property from APCI as evidenced by deed dated _____ of record in Deed Book _____ Page _____ in the Register's Office for Blount County, Tennessee ("APCI Deed") and thus Grantor desires to convey the Bulge Property to Grantee in a manner consistent with and as contemplated by said Bulge Option and Grantee desires to become the titled owner thereto, and the parties otherwise desire to be bound by all other terms and conditions herein; and

NOW, THEREFORE, Grantor, for and in consideration of the sum of _____ and other good and valuable consideration, to it in hand paid by Grantee, the receipt of which is hereby acknowledged, including the terms and conditions and other rights and obligations set forth in this Deed, to which this conveyance is specifically subject and which terms and conditions and other rights and obligations are fundamental consideration to this transaction, has granted, bargained, sold and conveyed, and does hereby grant, bargain, sell and convey to Grantee the Bulge Property located in Blount County, Tennessee, as more particularly described on **Exhibit A**, subject to the exceptions and reservations hereinabove and hereinafter set forth, with the hereditaments and appurtenances thereto appertaining, hereby releasing, if applicable, all claims of homestead and dower therein.

TO HAVE AND TO HOLD the Bulge Property herein conveyed to Grantee, its successors and assigns, forever, subject to the exceptions, reservations, limitations and covenants and conditions hereinabove and hereinafter set forth, which exceptions, reservations, limitations and covenants and conditions are understood and acknowledged by the parties, which understanding and acknowledgement are evidenced by Grantor's execution and Grantee's acceptance and recording of this Deed:

1. Notwithstanding any term or condition set forth in this Deed to the contrary, or as set forth in the Bulge Easement or in any other agreement by and between APCI and Grantor or otherwise, and Grantee recognizing the need for APCI to continue to use the Bulge Property for certain purposes, Grantee understands and acknowledges that in the APCI Deed, APCI specifically, unconditionally and without restriction, charge or assessment of any kind or nature reserved in and to itself and to any Transferee the following rights, powers and authorities as may be necessary, or appropriate ("Reserved Rights"), it being further understood and agreed that APCI shall continue to have, reserve and maintain all of the Reserved Rights as more fully described and set forth in the Bulge Easement (other than the right to transfer the Bulge Property set forth in Section 5(b) thereof) and the APCI Deed, it being intended that in all respects other than said right to transfer the Bulge Property, this Deed shall be consistent therewith:

(a) **Existing and Future Uses.** The right to use, and to restrict the use of, the Bulge Property for any and all purposes in connection with the Project, Project License, Power Lines, Equipment and Improvements and the Final Settlement Agreement, including, but not limited to, (i) power generation, power transmission and other utility purposes, (ii) installation, utilization, construction, reconstruction, operation, repair and maintenance of pathways and roadways (located or to be located on the Bulge Property, non-Bulge Property or otherwise), (iii) rights-of-way management, including, but not limited to, vegetation and exotic species management and the right to utilize herbicides, in accordance with best management practices and applicable law, including aerial application, for purposes of controlling vegetation within such rights-of-way, (iv) Project recreation areas, (v) safety and security, (vi) access to or activities upon the Bulge Property due to emergency or extraordinary circumstances, including, but not limited to, fire and medical emergency, and (vii) any other encumbrances or agreements to which APCI is bound as of the date first above written (including, without limitation, the Bulge Option), or any other lawful purposes relating to the subject of this Section 1. The Bulge Property herein conveyed shall in all respects and at all times remain subject to the terms and conditions of the Project License, and APCI's rights and obligations in connection therewith, and to any other lawful requirements of FERC. APCI will, however, make reasonable efforts to assure that its continued use of the Bulge Property will preserve, protect and promote the Conservation Values.

(b) **Tree Removal.** The right, but not the obligation, to cut and/or remove fallen, threatened, damaged or diseased trees, shrubs or plants required to maintain Power Lines, Equipment and Improvements, to cut firebreaks, to construct, reconstruct, operate, repair and maintain ingress and egress pathways or roadways on the Bulge Property solely for purposes in connection with the operation of the Project, Power Lines, Equipment and Improvements and for such other Project, power generation, power transmission, or other utility purposes, including, but not limited to, reasonable removal or cutting of trees, shrubs or plants in a customary and historical manner. Notwithstanding the foregoing, in the event that APGI must relocate existing roadways, it shall consult with Grantee prior to going forward with such relocation, but the consent of Grantee to such road relocation shall not be required.

(c) **Ingress, and Egress and Project Maintenance.** The right to ingress and egress to, from and over the Bulge Property for any purpose and at any time relating to or arising from the Reserved Rights, and to access other property owned or leased by APGI or its Transferees provided that such other property is used for purposes consistent with power generation, power transmission and other utility purposes.

2. Any and all easements, uses and/or roads, pathways and/or other rights of way or rights of access in existence as of the date hereof necessary or appropriate to maintain Power Lines, Equipment and Improvements over, upon and across the Bulge Property shall be and remain in full force and effect.

3. By acceptance and recordation of this instrument, Grantee understands and agrees, that it, as the titled owner thereof, shall manage, maintain and use the Bulge Property in a manner so as to preserve, protect and promote the Conservation Values and otherwise manage, maintain and use the Bulge Property in a manner consistent with and as more fully described and defined in the Bulge Easement.

The hereinabove described terms and provisions shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns; it being the intent of the parties that said terms and provisions so long as they remain in full force and effect, shall run with the land.

And said Grantor, for itself and its successors and assigns, does hereby covenant with said Grantee, its successors and assigns, that it is lawfully seized in fee simple of the Bulge Property herein conveyed and has full power, authority and right to convey the same, and that said Bulge Property is free from all encumbrances except (i) real property taxes for the current year, which shall be pro-rated as of the date of closing and which Grantee assumes and agrees to pay to the extent the same are due, (ii) the hereinabove described terms, covenants, conditions,

rights and easements, including specifically the terms and conditions of the Bulge Easement, (iii) the TWRA Agreements (as defined in the Bulge Easement) (to the extent applicable) and that certain Tennessee Department of Conservation Agreement dated March 30, 1970 (to the extent applicable), as such may be amended, extended or replaced from time to time, and that certain unrecorded License Agreement dated November 3, 1942, by and between Knoxville Power Company (now APGI) and Southern Bell Telephone and Telegraph Company, and (iv) such other liens, encumbrances and exceptions as are of record in the Register's Office for Blount County, Tennessee, or as are otherwise ascertainable by physical inspection of the Bulge Property and that it will forever warrant and defend said Bulge Property and the title thereto against the lawful claims of all persons whomsoever.

Whenever in this instrument a pronoun is used it shall be construed to represent either singular or plural, or the masculine, feminine or neuter gender, as the case may demand.

IN WITNESS WHEREOF, Grantor has caused this instrument to be executed and its name to be signed hereto by its duly authorized officer the day and year first above written.

THE NATURE CONSERVANCY

By: _____

Its: _____

STATE OF _____)

COUNTY OF _____)

Before me, the undersigned authority, Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of THE NATURE CONSERVANCY, being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____, 200____.

Notary Public

My Commission Expires:_____

STATE OF TENNESSEE)
)
COUNTY OF _____)

This transfer is exempt from recordation tax pursuant to *Tenn. Code Ann.* § 67-4-409 (a)(5) as the Grantee is the United States of America.

Affiant

Sworn to and subscribed before me,
this ____ day of _____2004.

Notary Public

My Commission Expires:

THE PREPARER OF THIS INSTRUMENT MAKES NO REPRESENTATIONS NOR WARRANTIES AS TO THE STATUS OF THE TITLE TO THE PROPERTY HEREIN, NOR CONCERNING THE ACCURACY OF THE PROPERTY DESCRIPTION AND REPRESENTS THAT THIS INSTRUMENT HAS BEEN PREPARED SOLELY FROM INFORMATION FURNISHED TO THE PREPARER HEREOF.

EXHIBIT LIST

*Exhibit A

Description of Bulge Property

To be developed prior to execution of the Deed.

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B-3.3 Permanent Conservation Easement and Declaration of Restrictive Covenants Between the Licensee and The Nature Conservancy – Corridor Lands (Tennessee)

This Instrument Prepared By:
Wayne R. Kramer, Esq.
KRAMER, RAYSON, LEAKE, RODGERS & MORGAN, LLP
P. O. Box 629
Knoxville, TN 37901-0629

**CORRIDOR CONSERVATION EASEMENT
AND
DECLARATION OF RESTRICTIVE COVENANTS**

THIS CORRIDOR EASEMENT AND DECLARATION OF RESTRICTIVE COVENANTS (the "Corridor Easement") is made this ____ day of _____, 200__, between **ALCOA POWER GENERATING INC.**, a corporation organized and existing under and by virtue of the laws of the State of Tennessee with offices in Knox and Blount Counties, Tennessee and addresses of _____, and _____, respectively ("Grantor"), and **THE NATURE CONSERVANCY**, a not-for-profit corporation incorporated under the laws of the District of Columbia, which is headquartered at 4245 North Fairfax Drive, Arlington, Virginia 22203-1606, and which maintains a local office at 2021 21st Avenue South, Suite C-400, Nashville, Tennessee 37212 ("Grantee").

*** * * W I T N E S S E T H * * ***

WHEREAS, Grantor is the owner in fee simple of certain real property located in Blount and Monroe Counties, Tennessee, the general location of which is within a corridor adjacent to the Calderwood Bypass, in the vicinity of the Chilhowee and Calderwood Reservoirs, and which consists of approximately 5,250 acres, more or less, all as more particularly described on Exhibit A attached hereto and incorporated herein by reference (said property, or any portion thereof, hereinafter referred to as the "Corridor Lands"); and

WHEREAS, Grantor operates power generating facilities in the Little Tennessee River Valley as the licensee of the Tapoco Hydroelectric Project under a license issued by the Federal Energy Regulatory Commission ("FERC") Project No. 2169 (the "Project"); and

WHEREAS, the Corridor Lands shall specifically exclude all real property more particularly described on Exhibit B, attached hereto and incorporated herein by reference, which property is retained in fee ownership by Grantor, and is utilized for purposes which may include, but are not limited to, purposes related to the Project, utilization for corridors or rights-of-way in connection with power transmission lines, communications, distribution or utility lines of any nature, and related plant and equipment (collectively the "Power Line Areas"); and

WHEREAS, on _____, 200__, the new license for the Project was issued to Grantor by FERC, as that license may be amended ("Project License"); and

WHEREAS, in furtherance of the Project and in compliance with that certain Final Settlement Agreement made and entered into on _____, 200__, by and between Grantor and other participants in the process for issuing a new license for the Project ("Final Settlement Agreement"), Grantor desires to grant, transfer and convey this Corridor Easement to Grantee, and Grantee desires to receive and accept this Corridor Easement, upon and subject to certain terms and conditions; and

WHEREAS, in its present state as an undeveloped area, the Corridor Lands possess natural, scenic, open space, forest, wildlife habitat, watershed protection, historical, cultural, educational and/or recreational values (collectively, "Conservation Values") which Conservation Values are of great importance to Grantor, the people of and visitors to Blount and Monroe Counties, and the people of and visitors to the State of Tennessee; and

WHEREAS, the characteristics of the Corridor Lands, their current use and state of improvement, are described in a report entitled Baseline Report of _____, dated _____ prepared by Grantee for Grantor (the "Baseline Report"); Grantor having worked with Grantee to ensure that the report is a complete and accurate description of the Corridor Lands as of the date of this Corridor Easement, with said Baseline Report to be used by Grantor and Grantee to assure that any future changes in the use of the Corridor Lands will be consistent with the terms of this Corridor Easement, but which Baseline Report is not intended to preclude the use of other evidence to establish the present condition of the Corridor Lands if there is a controversy over its use; and

WHEREAS, Grantor intends and Grantee acknowledges that this Corridor Easement herein granted shall at all times remain subject to all applicable provisions of the Project License, and all activities undertaken by Grantor or any Transferee in connection therewith, and any other lawful requirements of FERC, as well as all rights and obligations of Grantor or any Transferee, as they may deem necessary in their sole discretion, to maintain and operate the Project, Power Line Areas, and all power transmission lines, utility lines of any nature, communication lines, related equipment and all associated improvements (collectively "Power Lines, Equipment and Improvements") specifically including, but not limited to, access to Power Lines, Equipment and Improvements, and other Project and non-Project land areas, Power Line Areas, or otherwise, for Project, power generation, power transmission and other utility purposes provided that Grantor will make reasonable efforts to assure that its continued use of the Corridor Lands will preserve, protect and promote the Conservation Values; and

WHEREAS, Grantee meets the requirements of a "qualified organization" under Section 170(h) of the Internal Revenue Code of 1986, as amended (the "Code") and is a publicly supported, tax-exempt non-profit organization under §§ 501(c)(3) and 509(a)(1) of the Code; and

WHEREAS, Grantor and Grantee desire to conserve the Conservation Values of the Corridor Lands that are vital to the ecological integrity of the Southern Appalachian ecoregion; and

WHEREAS, Grantor intends that the Conservation Values of the Corridor Lands be preserved and maintained by the continuation of land use patterns, including, without limitation, those relating to natural, scenic, open space, forest, wildlife habitat, watershed protection, historical, cultural, educational and/or recreational uses existing at the time of this Corridor Easement, and which allow continued management of the lands as part of the Tennessee Wildlife Management Area, as applicable, until such time as the fee simple interest may be transferred to the National Park Service ("NPS"), the United States Forest Service ("USFS"), or the Tennessee Wildlife Resources Agency ("TWRA"), as applicable, as set forth below; and

WHEREAS, the Tennessee Conservation Easement Act of 1981, as amended through the date hereof (the "Act"), § 66-9-301, *et seq.* of the *Tennessee Code Annotated*, permits the creation of conservation easements for purposes which include retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants or wildlife and preserving the historical, architectural, archaeological, or cultural aspects of the Corridor Lands; and

WHEREAS, Grantor and Grantee intend to create with this document a "conservation easement," permanent in nature, as that term is defined in the Act.

NOW, THEREFORE, in consideration of the above and the mutual covenants, terms, conditions and restrictions contained herein, Grantor hereby grants and conveys to Grantee this Corridor Easement, in and over the Corridor Lands of the nature and character, and only to the extent hereinafter set forth.

1. **Definitions.**

(a) "Affiliates" means any other individual, corporation, partnership, association, limited liability company, joint stock company, trust or other unincorporated organization that is directly or indirectly, or through one or more intermediaries, controlled by or under the common control of Grantor.

(b) "Corridor Option " means the Agreement for Option and Sale of Corridor Lands entered into between the parties and dated _____, 200____.

(c) " Reserved Rights" shall have the meaning and include all rights reserved by Grantor under Section 5 hereof.

(d) "Successor-in-Interest" shall mean the surviving entity resulting from the merger, consolidation or other corporate restructuring by or of Grantor, provided, however, that the surviving entity is the authorized licensee of the Project License.

(e) "Transferee" means Affiliates and Successors-in-Interest, and shall, for the purposes of this Corridor Easement, also include any successors, assigns or lessees of Grantor

any owner of the Power Line Areas (and any successors or assigns thereof) and any Project License holder.

(f) "TWRA Agreements" means that License Agreement made and entered into by and between Grantor and the TWRA, on April 6, 1987, as amended, by instrument dated October 23, 1996, and as supplemented by the Cooperative Agreement made and entered into by said parties on May 30, 2002, and as such may be amended, extended or replaced, from time to time.

2. **Purpose.** The purpose of this Corridor Easement is to assure that the Corridor Lands will be permanently preserved predominantly in their undeveloped, natural, scenic, open space and/or forested condition, and to prevent any use of the Corridor Lands that will significantly impair or interfere with the Conservation Values or interests of the Corridor Lands. Grantor intends that this Corridor Easement will restrict the use of the Corridor Lands to only such activities as are consistent with the purpose of this Corridor Easement; however, Grantor specifically and unconditionally reserves Reserved Rights for itself and any Transferee.

3. **Term.** This Corridor Easement, intended to be permanent in nature, shall continue in full force and effect in perpetuity, subject, however, to the terms and conditions herein.

4. **Prohibited Use.** Subject to the rights and authority of any third party as provided by law in connection with law enforcement or other emergency needs, any activity on or use of the Corridor Lands inconsistent with the purpose of this Corridor Easement is prohibited. Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited on the Corridor Lands, except Reserved Rights which are specifically and unconditionally retained by Grantor and any Transferee:

(a) **No Construction.** Except as necessary to ensure compliance with the terms hereof, there shall be no constructing or placing of any building or structure of whatsoever nature, recreational facility, fence, asphalt or concrete pavement, antenna, utility pole, tower, conduit, line, sodium vapor light or any other temporary or permanent structure or facility in, on or above the Corridor Lands. Furthermore, no signs, billboards or other advertising displays shall be placed on the Corridor Lands. Notwithstanding the foregoing, signs may be placed on the Corridor Lands that (i) state the name, address or other management information pertaining to the Corridor Lands, (ii) identify or regulate permitted on-site activities, (iii) identify and acknowledge the cooperation of parties involved in the preservation and protection of the Corridor Lands and/or (iv) control unauthorized entry on or use of the Corridor Lands, so long as such signs do not in either placement, number, or design significantly diminish the scenic character of the Corridor Lands.

(b) **No Excavation.** There shall be no ditching, draining, diking, filling, excavating, dredging, mining or drilling, removal of topsoil, sand, gravel, rock, minerals or other materials, nor any building of roads or change in the topography or surface hydrology of the Corridor Lands in any manner.

(c) **No Cutting or Removal.** There shall be no removal, harvesting, destruction or cutting of trees, shrubs or plants, planting of trees, shrubs or plants, use of fertilizers, plowing, grazing of domestic animals, or disturbance or change in the natural habitat in any manner, except the cutting down or removal of trees or other vegetation for the purpose of maintaining forest health and natural diversity of species and removing exotics and invasive species.

(d) **No Dumping.** There shall be no storage or dumping of ashes, trash, garbage, or other unsightly or offensive material, hazardous substance, or toxic waste, nor any placement of underground storage tanks in, on, or under the Corridor Lands; there shall be no changing of the topography through the placing of soil or other substance or material such as land fill or dredging spoils, nor shall activities be conducted on the Corridor Lands that could cause erosion or siltation on the Corridor Lands.

(e) **No Pollution.** There shall be no pollution, alteration, depletion or extraction of surface water, natural water courses, lakes, ponds, marshes, subsurface water or any other water bodies, nor shall activities be conducted on the Corridor Lands that would be detrimental to water quality or that could alter the natural water level or quality or flow in or over the Corridor Lands.

(f) **No Vehicles, Bikes, Horses.** There shall be no operation of motorized vehicles, such as snowmobiles, dune buggies, motorcycles, all-terrain or off-road vehicles, hang gliders, aircraft, or any other types of mechanized vehicles. There shall also be no operation of non-motorized bikes, or any other types of non-motorized vehicles or transportation modes on the Corridor Lands. There shall also be no horses nor shall there be the introduction of any non-native species except as otherwise provided in Section 6(h) hereinbelow upon or onto the Corridor Lands.

(g) **No Exploration.** There shall be no exploration for, or development and extraction of, minerals and hydrocarbons by any mining method or any other method.

(h) **Continuation of Current Restrictions.** This Corridor Easement and the Corridor Lands shall remain subject to the terms, conditions and restrictions of the TWRA Agreements and that certain Tennessee Department of Conservation Agreement dated March 30, 1970 (to the extent applicable), as such may be amended, extended or replaced, from time to time, and that certain unrecorded License Agreement dated November 3, 1942, by and between Knoxville Power Company (now Grantor) and Southern Bell Telephone and Telegraph Company, and to all encumbrances and restrictions which are presently of record and apply to the Corridor Lands or any portion thereof.

5. **Reserved Rights.** Notwithstanding any prohibition or restriction set forth herein to the contrary, and recognizing that Grantor is and shall remain the fee simple owner of the Corridor Lands, Grantor hereby specifically, unconditionally and without restriction, charge or assessment of any kind or nature reserves to itself and any Transferee the following rights, powers and authorities as may be necessary, or appropriate:

(a) **Existing and Future Uses.** The right to use, and to restrict the use of, the Corridor Lands for any and all purposes in connection with the Project, Project License, the Power Line Areas, Power Lines, Equipment and Improvements and the Final Settlement Agreement, including, but not limited to, (i) power generation, power transmission and other utility purposes, (ii) installation, utilization, construction, reconstruction, operation, repair and maintenance of pathways and roadways (located or to be located on the Corridor Lands, non-Corridor Lands or otherwise), (iii) rights-of-way management, including, but not limited to, vegetation and exotic species management and the right to utilize herbicides, in accordance with best management practices and applicable law, including aerial application, for purposes of controlling vegetation within such rights-of-way, (iv) Project recreation areas, (v) safety and security, (vi) access to or activities upon the Corridor Lands due to emergency or extraordinary circumstances, including, but not limited to, fire and medical emergency, and (vii) any other encumbrances or agreements to which Grantor is bound as of the date first above written (including, without limitation, the Corridor Option), or any other lawful purposes relating to the subject of this Section 5. The Corridor Easement herein granted shall in all respects and at all times remain subject to the terms and conditions of the Project License, and Grantor's rights and obligations in connection therewith, and to any other lawful requirements of FERC. Grantor will, however, make reasonable efforts to assure that its continued use of the Corridor Lands will preserve, protect and promote the Conservation Values.

(b) **Transfer.** The right to transfer, assign, convey, sell, give, mortgage, or lease the Corridor Lands, provided such conveyance is subject to the terms of this Corridor Easement, and subject further, however, to the provisions of the Corridor Option.

(c) **Tree Removal.** The right, but not the obligation, to cut and/or remove fallen, threatened, damaged or diseased trees, shrubs or plants required to maintain Power Line Areas, Power Lines, Equipment and Improvements, to cut firebreaks, to construct, reconstruct, operate, repair and maintain ingress and egress pathways or roadways on the Corridor Lands solely for purposes in connection with the operation of the Project, Power Line Areas, Power Lines, Equipment and Improvements and for such other Project, power generation, power transmission, or other utility purposes, including, but not limited to, reasonable removal or cutting of trees, shrubs or plants in a customary and historical manner. Notwithstanding the foregoing, in the event that Grantor must relocate existing roadways, it shall consult with Grantee, NPS, USFS and/or TWRA as applicable, prior to going forward with such relocation, but the consent of neither Grantee nor NPS, USFS or TWRA to such road relocation shall be required.

(d) **Ingress, and Egress and Project Maintenance.** The right to ingress and egress to, from and over the Corridor Lands for any purpose and at any time relating to or arising from the Reserved Rights, and to access other property owned or leased by Grantor or its Transferees provided that such other property is used for purposes consistent with power generation, power transmission and other utility purposes.

6. **Grantee's Rights.** To accomplish the purpose of this Corridor Easement and subject to the other terms and conditions herein, the following rights are conveyed to Grantee:

(a) **Right to Protect.** The right to preserve and protect the Conservation Values of the Corridor Lands.

(b) **Right of Entry.** The right of Grantee's staff, contractors and associated natural resource management professionals (including employees and agents of NPS, USFS and TWRA) to enter the Corridor Lands and cross other lands retained by Grantor, by motor vehicles on existing roads at reasonable times and with prior notice, for the purposes of: (i) inspecting the Corridor Lands to determine if Grantor is complying with the covenants and purposes of this Corridor Easement; (ii) enforcing the terms of this Corridor Easement; (iii) allowing management of the Corridor Lands as a Tennessee Wildlife Management Area; (iv) taking any and all actions with respect to the Corridor Lands as may be necessary or appropriate, with or without order of court, to remedy or abate violations hereof; (v) making scientific and educational observations and studies and taking samples in such a manner as will not disturb the use and quiet enjoyment of the Corridor Lands by Grantor or its rights, duties and obligations pertaining to any of the Reserved Rights; (vi) monitoring and management as described below; (vii) preventing any activity on or use of the Corridor Lands that is inconsistent with the purpose of this Corridor Easement and requiring the restoration of such areas or pieces of the Corridor Lands that may be damaged by inconsistent activity or use, pursuant to remedies set forth in Section 14; and (viii) conducting due diligence evaluations of the Corridor Lands in accordance with and subject to the terms and provisions of the Corridor Option.

(c) **Hiking Trails.** Nothing herein shall prohibit the development and maintenance of hiking trails by Grantee so long as such trails do not interfere with or otherwise impair Grantor's Reserved Rights.

(d) **Monitoring and Management.** The right, but not the obligation, to monitor the natural habitats on the Corridor Lands and to manage them, to the extent deemed appropriate by Grantee, to ensure their continued presence and viability on the Corridor Lands. Such activities shall be in accordance with management practices of Grantee, which may include, but not be limited to, mowing, trapping, prescribed burning, or the control of exotic species, and related management activities that ensure the ecological integrity of the Corridor Lands and/or removal of exotic, invasive or otherwise undesirable species.

(e) **Enforcement.** The right to prevent any activity on or use of the Corridor Lands that is inconsistent with the purpose of this Corridor Easement and to require the restoration of such areas or features of the Corridor Lands that may be damaged by any inconsistent activity or use, pursuant to Section 14.

(f) **Discretionary Consent.** Grantor shall not be required to acquire Grantee's consent for any purposes associated with the Project or Reserved Rights. If, owing to unforeseen or changed circumstances, any of the activities listed in Section 4 are deemed

desirable by both Grantor and Grantee, Grantee may, in its sole discretion, give permission for such activities, subject to the limitations herein. Such requests from Grantor for permission, and permission for activities requiring Grantee's consent under Section 4, shall be in writing delivered to Grantee not less than thirty (30) days prior to the date Grantor intends to undertake the activity in question, and shall describe the proposed activity in sufficient detail to allow Grantee to judge the consistency of the proposed activity with the purpose of this Corridor Easement. The notice shall describe the nature, scope, design, location, time table and any other material aspect of the proposed activity in sufficient detail to permit Grantee to make an informed judgment as to its consistency with the purpose of this Corridor Easement. Grantee may give its permission only if both Grantor and Grantee determine that such activities (i) do not violate the purpose of this Corridor Easement and (ii) either enhance or do not impair any significant conservation interests associated with the Corridor Lands.

(g) **Grantee's Approval.** Grantee shall grant or withhold its approval in writing within thirty (30) days of receipt of Grantor's written request therefor. Except for extraordinary or emergency circumstances, if Grantee fails to issue a written approval or denial of a requested activity within thirty (30) days of receipt of Grantor's written request therefor, Grantee shall be deemed to have granted approval of the requested activity, and Grantor shall be expressly authorized to proceed therewith.

(h) **Biocontrol Agents.** Notwithstanding any provisions in Section 4 to the contrary, Grantee and Grantor may jointly consent to the introduction of non-native species ("Biocontrol Agents") onto the Corridor Lands for the purpose of controlling exotic or invasive species. The introduction of any Biocontrol Agent shall be approved in advance in writing by Grantor and Grantee, and shall be consistent with or pursuant to a generally accepted program of introduction of a particular Biocontrol Agent approved or implemented by either the United States Department of Agriculture or the United States Department of the Interior.

7. **Release.** Although intended to be permanent in nature, should there be a termination of any of the rights and privileges granted under this Corridor Easement, Grantee or its successors or assigns, shall execute such instrument, upon the request and to the satisfaction of Grantor, as necessary to evidence said termination. Such instrument shall be in whatever form as shall be required for recordation in the appropriate Register of Deeds office.

8. **Grantee Acknowledgment.** Grantee specifically acknowledges and understands that the easements, rights, privileges and licenses herein granted are subject to all applicable terms and conditions of the Project License, and to any other lawful requirements of FERC thereunder, to the Reserved Rights, and to all other conditions set forth hereunder. By accepting the conveyance of this Corridor Easement, Grantee agrees that the easements, rights, privileges and licenses herein conveyed will not be used in any manner that would endanger health, create a nuisance or otherwise be incompatible with the overall recreational uses associated with the Project, or otherwise interfere with the Reserved Rights.

9. **Public Access.** Nothing contained in this Corridor Easement shall give Grantee or its successors or assigns the right to grant to the public a right to enter upon or to use the

Corridor Lands or any portion thereof if no such right existed in the public immediately prior to the execution of this Corridor Easement; however, the Corridor Lands may be used by the general public as authorized by the mandate of the entity which holds the fee ownership of the Corridor Lands, so long as the public use does not violate the prohibitions listed in Section 4 above. Provided further that the Corridor Lands will continue to be managed as a Tennessee Wildlife Management Area so long as the TWRA Agreements continue in effect. Additionally, Grantor and any Transferees may restrict public access to any portion of the Corridor Lands for safety or security purposes, or for any other purpose deemed appropriate for the Project or power generation, power transmission or other utility purposes.

10. **Hunting.** Hunting shall be permitted on the Corridor Lands only to the extent determined and authorized by TWRA under the TWRA Agreements or under other agreements to which TWRA and the fee simple owner of the Corridor Lands are parties.

11. **Costs, Liabilities, Taxes and Environmental Compliance.**

(a) **Costs, Legal Requirements and Liabilities.** Grantor retains all responsibilities and shall bear all costs and liabilities which are normal and incident to its ownership and use of the Corridor Lands, including the maintenance of adequate liability insurance coverage. Grantor remains solely responsible for obtaining any applicable governmental permits and approvals for any construction or other activity or use permitted by this Corridor Easement, and all such construction or other activity or use shall be undertaken in accordance with all applicable federal, state and local laws, regulations and requirements. Grantor shall keep the Corridor Lands free of any liens arising out of any work performed for, materials furnished to, or obligations incurred by Grantor. Nothing contained in the Corridor Easement, however, shall be construed to entitle Grantee, or any other person or entity claiming by or through Grantee, to bring any action against Grantor for any injury to or change in the Corridor Lands resulting from causes beyond the control of Grantor, including, without limitation, vandalism or illegal acts, fire, flood, storm, earth movement or any act of God, or from any prudent action taken by Grantor under emergency conditions to prevent, abate or mitigate any injury to the Corridor Lands, the Project, Power Line Areas, or Power Lines, Equipment and Improvements resulting from any such causes.

(b) **Taxes.** Grantor shall pay all real estate taxes and assessments lawfully assessed against the Corridor Lands and shall provide to Grantee receipted tax bills or other reasonable evidence satisfactory to Grantee within sixty (60) days of written request for same.

(c) **Control.** Nothing in this Corridor Easement shall be construed as giving rise, in the absence of a judicial decree, to any right or ability in Grantee to exercise physical or managerial control over the day-to-day operations of the Corridor Lands, or any of Grantor's activities on the Corridor Lands, or otherwise to become an operator with respect to the Corridor Lands within the meaning of The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), and *Tenn. Code Ann.* § 68-212-101, *et seq.*

12. **Mutual Release and Indemnification.** Each party agrees to and hereby does release, hold harmless, defend and indemnify the other from any and all liabilities, including, but not limited to, damage to the Corridor Lands, personal injury (including death), losses, damages, judgments, costs, expenses and reasonable attorneys' fees that the indemnified party may suffer or incur as a result of or arising out of the activities of the indemnifying party on the Corridor Lands.

13. **Title.** Grantor covenants and represents that (i) Grantor is the sole owner and is seized of the Corridor Lands in fee simple and has good right to grant and convey this Corridor Easement; (ii) except as set forth in Section 4(h), the Corridor Lands are free and clear of any and all liens, encumbrances, and exceptions except as are of record in the Register's Offices for Blount and Monroe Counties, Tennessee, as applicable, or otherwise ascertainable by physical inspection of the Corridor Lands, and (iii) Grantee shall have the use of and enjoy all of the benefits derived from and arising out of this Corridor Easement, and (iv) as of the date of this Corridor Easement and as of the date this Corridor Easement is recorded, Grantor covenants that the Corridor Lands shall not be encumbered by a deed of trust, mortgage or similar monetary lien.

14. **Remedies.**

(a) **Notice of Violation; Corrective Action.** If either Grantor or Grantee determines that a breach of the terms of this Corridor Easement has occurred or is threatened (the "non-breaching party") by the other party (the "breaching party"), the non-breaching party shall give written notice to the breaching party of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Corridor Lands resulting from any use or activity inconsistent with the purpose of this Corridor Easement, to restore the portion of the Corridor Lands so injured to its prior condition in accordance with a plan agreed upon by Grantor and Grantee.

(b) **Injunctive Relief.** If the breaching party fails to cure the violation within sixty (60) days after receipt of notice thereof from the non-breaching party, or under circumstances where the violation cannot reasonably be cured within a sixty (60) day period, or fails to begin curing such violation within the sixty (60) day period, or fails to continue diligently to cure such violation until finally cured, the non-breaching party may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Corridor Easement, to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction, and to require the restoration of the Corridor Lands to the condition that existed prior to any such injury.

(c) **Damages.** If there is a violation of any of the provisions of this Corridor Easement, the non-breaching party shall notify (by written instrument) the breaching party, who shall promptly cure the violation by (a) ceasing the violation, or (b) restoring the Corridor Lands to their condition before the violation, or (c) both, as the case may be. The parties shall have the right, but not the obligation, to pursue legal actions or proceedings at law and equity to enforce the terms and conditions of this Corridor Easement, including, but not limited to,

the right to cause such violation to be cured, and if a court of competent jurisdiction determines that a violation has occurred hereunder, the party in violation shall reimburse to the other, as applicable, for all reasonable expenses incurred, including, but not limited to, legal fees, whether in or out of court, and the cost of legal proceedings brought to cure the violation or to collect such reimbursement.

(d) **Scope of Relief.** The parties' rights under this Section 14 apply equally in the event of either actual or threatened violations of the terms of this Corridor Easement. The parties agree that their remedies at law for any violation of the terms of this Corridor Easement are inadequate and that they shall be entitled to the injunctive relief described in Section 14(b), both prohibitive and mandatory, in addition to such other relief to which they may be entitled, including specific performance of the terms of this Corridor Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The parties' remedies described in this Section 14 shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

(e) **Costs of Enforcement.** All reasonable, actual costs incurred by the parties in enforcing the terms of this Corridor Easement, including, without limitation, actual costs and expenses of suit, actual and reasonable attorneys' fees, and any costs of restoration necessitated by any violation of the terms of this Corridor Easement shall be borne by the breaching party.

(f) **Forbearance.** Forbearance by either party to exercise its rights under this Corridor Easement in the event of any breach of any term of this Corridor Easement by Grantor or Grantee shall not be deemed or construed to be a waiver of such term or of any subsequent breach of the same or any other term of this Corridor Easement, or of any of the party's rights under this Corridor Easement. No delay or omission by the parties in the exercise of any right or remedy upon any breach by the other shall impair such right or remedy or be construed as a waiver.

(g) **Waiver of Certain Defenses.** The parties hereby waive any defenses of laches, estoppel, or prescription.

(h) **Acts Beyond Parties' Control.** Nothing contained in this Corridor Easement shall be construed to entitle a party to bring any action against the other for any injury to or change in the Corridor Lands resulting from causes beyond the party's control, including, without limitation, vandalism or illegal acts, unauthorized wrongful acts of third parties, fire, flood, storm, earth movement, and acts of God, or from any prudent action taken by either party under emergency conditions to prevent, abate, or mitigate injury to the Corridor Lands or the Project or Power Lines, Equipment and Improvements resulting from any such causes.

(i) **Acts of Third Parties.** Grantee may enforce such prohibition against third parties as authorized under § 66-9-307 of the Act.

15. **Parties Subject to Easement.** The covenants agreed to and the terms, conditions, and restrictions imposed by this Corridor Easement shall be binding upon Grantor and Transferees and upon Grantee, and their respective employees, agents, representatives, invitees, successors and assigns, and shall continue as a servitude running with this Corridor Easement.

16. **Subsequent Transfers.** Grantor agrees that the terms, conditions, restrictions and purposes of this grant or reference thereto will be inserted by Grantor in any subsequent deed or other legal instrument by which the Grantor divests either the fee simple title or possessory interest in the Corridor Lands.

17. **Merger.** Grantor and Grantee agree that the terms of this Corridor Easement shall survive any merger of the fee and easement interest in the Corridor Lands through appropriate documentation depending upon the identity of the entity to which the Corridor Lands or any interest therein is transferred. Notwithstanding the foregoing, in the event that all or any portion of the Corridor Lands is conveyed to the NPS, USFS, or TWRA (each a "Government Agency"), Grantee shall be permitted to convey or assign this Corridor Easement to such Government Agency pursuant and subject to the terms and provisions of the Corridor Option, in which event the fee simple interest and the Corridor Easement may merge, and the Corridor Lands shall then be subject only to (i) those rights reserved by or for the benefit of Grantor (which rights shall include, the Reserved Rights of Grantor herein) and (ii) terms and conditions to preserve, protect and promote the Conservation Values, as set forth in the deed of conveyance of the fee simple interest to Grantee, and/or in a deed, memorandum of understanding or similar agreement to or with a Government Agency, as applicable.

18. **Assignment.** The parties hereto recognize and agree that the benefits and burdens of this Corridor Easement are in gross and that Grantee may not transfer or assign the benefits of this Corridor Easement to any party other than to a Government Agency without the prior written consent of Grantor, which consent shall not be unreasonably withheld, delayed or conditioned. Grantee further hereby covenants and agrees that if it transfers or assigns the easement it holds under this indenture, any organization receiving the interest will be a "qualified organization" as that term is defined in § 170(h) of the Code, that is organized and operated primarily for one of the conservation purposes specified in §170(h)(4)(A) of the Code, and Grantee further covenants and agrees that the terms of the transfer or assignment will be such that the transferee or assignee will be required to continue to carry out the conservation purposes that the grant hereof was originally intended to advance.

19. **Extinguishment and Condemnation.**

(a) **Extinguishment.** If circumstances arise in the future that render the purpose of this Corridor Easement impossible to accomplish, this Corridor Easement can only be terminated or extinguished, either at the joint request of the Grantor and Grantee, whether in whole or in part, or by judicial proceedings in a court of competent jurisdiction. The amount of the proceeds to which Grantee shall be entitled, after the satisfaction of prior claims, from any sale, exchange, or involuntary conversion of all or any portion of the

Corridor Lands subsequent to such termination or extinguishment, shall be the stipulated fair market value of this Corridor Easement, or proportionate part thereof, as determined in accordance with Section 19(b) or Internal Revenue Code ("IRC") Regulation § 1.170A-14, if different.

(b) **Valuation.** This Corridor Easement constitutes a real property interest immediately vested in Grantee, which, for the purposes of Section 19(a) the parties stipulate to have a fair market value determined by multiplying (1) the fair market value of the Corridor Lands unencumbered by this Corridor Easement (minus any increase in value after the date of this grant attributable to improvements) by (2) x/y, which is the ratio of the value of this Corridor Easement at the time of the grant to the value of the Corridor Lands, without deduction from the value of this Corridor Easement, at the time of this grant. (The values at the time of this grant are or shall be those values used for this grant pursuant to § 170(h) of the Code. For the purposes of this section, the ratio of the value of this Corridor Easement to the value of the Corridor Lands unencumbered by this Corridor Easement shall remain constant.) It is intended that this Section 19(b) be interpreted to adhere to and be consistent with Federal Regulation § 1.170A-14(g)(6)(ii). Fair Market Value shall be determined using the Uniform Appraisal Standards for Federal Land Acquisitions (2000), as may be revised from time to time.

(c) **Condemnation.** If all or any part of the Corridor Lands are taken by exercise of the power of eminent domain or acquired by purchase in lieu of condemnation, whether by public, corporate or other authority, so as to terminate this Corridor Easement, in whole or in part, Grantor and Grantee shall act jointly to recover the full value of the interests in the Corridor Lands subject to the taking or in lieu purchase and all direct or incidental damages resulting therefrom. All expenses reasonably incurred by Grantor and Grantee in connection with the taking or in lieu purchase shall be paid out of the amount recovered. Grantee's share of the balance of the amount recovered shall be determined by multiplying the balance by the ratio set forth in Section 19.

(d) **Application of Proceeds.** Grantee shall use any proceeds received under the circumstances described in this Section 19 in a manner consistent with its conservation purposes, which are exemplified by the grant of this Corridor Easement.

20. **Miscellaneous Provisions .**

(a) **Estoppel Certificates.** Upon request by Grantor, Grantee shall within twenty (20) days execute and deliver to Grantor, or to any party designated by Grantor, any document, including an estoppel certificate, which certifies, to the best of Grantee's knowledge, Grantor's compliance with any obligation of Grantor contained in this Corridor Easement or otherwise evidences the status of this Corridor Easement. Such certification shall be limited to the condition of the Corridor Lands as of Grantee's most recent inspection. If Grantor requests more current documentation, Grantee shall conduct an inspection, at Grantor's expense, within thirty (30) days of receipt of Grantor's written request thereof.

(b) **Termination of Rights and Obligations.** A party's rights and obligations under this Corridor Easement terminate upon transfer of the party's interest in this Corridor Easement or Corridor Lands, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

(c) **Severability.** If any provision of this Corridor Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this Corridor Easement and the application of such provisions to persons or circumstances other than those as to which it is found to be invalid shall not be affected thereby.

(d) **Gender; Number.** Whenever the context of this Corridor Easement so requires, references of the masculine gender shall include the feminine or neuter gender and corporate or other such entities, the singular number shall include the plural and vice versa, and reference to one or more parties hereto shall include all authorized assignees of Grantee and any Transferee.

(e) **Expenses.** Except for such costs and expenses for which either party may be liable pursuant to the provisions of Section 14 hereinabove, each of the parties shall bear its own cost and expense (including legal fees and expenses) incurred in connection with this Corridor Easement and the transactions contemplated hereby.

(f) **Entire Agreement and Amendment.** This Corridor Easement represents the final agreement between and understanding of the parties regarding the subject matter hereof and may not be changed, amended or modified except by an instrument in writing executed by the parties hereto.

(g) **Captions.** The captions herein have been inserted solely for convenience of reference and are not a part of this Corridor Easement and shall have no effect upon construction or interpretation.

(h) **Counterparts.** The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

(i) **Notices.** All notices, demands, requests, consents, approvals or communications that either party desires or is required to give to the other shall be in writing. Any such notices, demands, consents, approvals or communications may be sent to the intended recipient at the address set forth hereinbelow using registered or certified mail, return receipt requested, personal delivery, or expedited courier, but no such notice, demand, consent, approval or communication shall be deemed given unless and until it is actually received by the intended recipient. The parties may change the address to which notices, demands, consents, approvals and other communications hereunder are to be delivered by giving the other party written notice in the manner herein set forth.

If To Grantor:

If to Grantee:

(j) **Evidence of Termination of Reserved Rights.** In the event Grantor determines, in its sole discretion, that reservation of some or all of its Reserved Rights is no longer necessary, it shall notify Grantee in writing and, upon the written request of Grantee, execute in recordable form such documentation as the parties agree is appropriate to evidence the termination of said Reserved Rights or any portion thereof.

(k) **Applicable Law.** The interpretation and performance of this Corridor Easement shall be governed by Tennessee law, without regard to rules or laws governing conflicts of law.

IN WITNESS WHEREOF, the parties have executed this Corridor Easement by their duly authorized representatives the day and year first above written.

GRANTOR:

ALCOA POWER GENERATING INC.

By: _____
Its: _____

GRANTEE:

THE NATURE CONSERVANCY

By: _____
Its: _____

STATE OF _____)
)
COUNTY OF _____)

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of **ALCOA POWER GENERATING INC.**, the within named bargainor, a corporation, and that he as such _____, being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____, 200____.

Notary Public

My Commission Expires:_____

STATE OF _____)
)
COUNTY OF _____)

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of **THE NATURE CONSERVANCY**, the within named bargainor, a corporation, and that he as such _____, being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____, 200____.

Notary Public

My Commission Expires:_____

EXHIBIT LIST

*Exhibit A	Description of Corridor Lands
*Exhibit B	Description of Property Not Included in Corridor Lands

* To be developed prior to execution of the Corridor Easement.

B-3.4 Agreement for Option and Sale of Real Estate Between the Licensee and The Nature Conservancy – Corridor Lands (Tennessee)

This Instrument Prepared By:
 Wayne R. Kramer, Esq.
 KRAMER, RAYSON, LEAKE, RODGERS & MORGAN, LLP
 P. O. Box 629
 Knoxville, TN 37901-0629

AGREEMENT FOR OPTION AND SALE OF CORRIDOR LANDS

THIS AGREEMENT FOR OPTION AND SALE OF CORRIDOR LANDS ("Corridor Option") is made this _____ day of _____, 200_ ("Commencement Date"), between **ALCOA POWER GENERATING INC.**, a corporation organized and existing under and by virtue of the laws of the State of Tennessee, with offices in Knox and Blount Counties, Tennessee and addresses of _____ and _____, respectively ("Optionor"), and **THE NATURE CONSERVANCY**, a not-for-profit corporation incorporated under the laws of the District of Columbia, which is headquartered at 4245 North Fairfax Drive, Arlington, Virginia 22203-1606, and which maintains a local office at 2021 21st Avenue South, Suite C-400, Nashville, Tennessee 37212 ("Optionee").

* * * W I T N E S S E T H * * *

WHEREAS, Optionor is the owner in fee simple of certain real property located in Blount and Monroe Counties, Tennessee, the general location of which is within a corridor adjacent to the Calderwood Bypass, in the vicinity of the Chilhowee and Calderwood Reservoirs, and which consists of approximately 5,250 acres, more or less, all as more particularly described on Exhibit A attached hereto and incorporated herein by reference (said property, or any portion thereof, hereinafter referred to as the "Corridor Lands"); and

WHEREAS, Optionor operates power generating facilities in the Little Tennessee River Valley as the licensee of the Tapoco Hydroelectric Project under a license issued by the Federal Energy Regulatory Commission ("FERC") as Project No. 2169 (the "Project"); and

WHEREAS, the Corridor Lands shall specifically exclude all real property more particularly described on Exhibit B, attached hereto and incorporated herein by reference, which property is retained in fee ownership by Optionor, and is utilized for purposes which may include, but are not limited to, purposes related to the Project, utilization for corridors or rights-of-way in connection with power transmission lines, communications, distribution or utility lines of any nature, and related plant and equipment (collectively the "Power Line Areas"); and

WHEREAS, on _____, 200____, the new license for the Project was issued to Optionor by FERC, as that license may be amended ("Project License"); and

WHEREAS, in furtherance of the Project and in compliance with that certain Final Settlement Agreement made and entered into on _____, 200____, by and between Optionor and other participants in the process for issuing a new license for the Project ("Final Settlement Agreement"), the parties desire to execute this Corridor Option and to otherwise more fully define the rights and obligations of the parties in and to the Corridor Lands.

NOW, THEREFORE, for and in consideration of the promises, mutual covenants and agreements of the parties, and subject to the terms, conditions and restrictions contained herein, Optionor hereby grants to Optionee, and Optionee hereby accepts this Corridor Option, subject to the following terms and conditions:

SECTION I. Option to Purchase

1. **Option Term.** This Corridor Option shall be deemed to be effective as of the Commencement Date and shall terminate as to the Corridor Lands when Optionee fails to timely deliver an Exercise Notice (defined below) to Optionor or to effect the Closing (defined below), within the Closing Period (defined below) ("Option Term").
2. **Grant of Option.** Optionor hereby grants unto Optionee the exclusive right and option to purchase the Corridor Lands, upon the terms and conditions set forth herein.
3. **Exercise of Corridor Option.** From and after the Commencement Date, Optionee shall have eighteen (18) months to deliver written notice to Optionor in accordance with the notice provisions of Section III, Paragraph 4, of its intent to exercise the Corridor Option, together with the Deposit (defined below), which is more particularly described in Section II, Paragraph 2(d)(i) (collectively, specifically including the Deposit, "Exercise Notice").
4. **Closing.** In the event that Optionee delivers the Exercise Notice to Optionor, consummation of the transaction which conveys legal title to the Corridor Lands shall occur on or before three (3) years following the Commencement Date ("Closing Period"). All the events necessary to effect the transfer and conveyance of the Corridor Lands, and delivery of all documents and instruments associated therewith, are hereinafter referred to as the "Closing."
5. **Failure of Optionee to Deliver Exercise Notice or Close.** In the event that Optionee fails to timely deliver an Exercise Notice to Optionor or to effect the Closing within the Closing Period, the rights and obligations of Optionor and Optionee hereunder shall permanently lapse as to the Corridor Lands ("Lapse"). Following a Lapse, Optionor shall have no further duty or obligation to Optionee and shall be entitled to freely transfer title to the Corridor Lands, subject to the Corridor Conservation Easement and Declaration of Restrictive Covenants dated _____ granted by Optionor to Optionee (the "Corridor Easement"), so long as the same is in full force and effect.
6. **Access to Property for Due Diligence.** Following the Commencement Date, and prior to the Closing, Optionor grants to Optionee, Optionee's employees, agents and representatives, the right, at reasonable times during normal business hours to conduct on the Corridor Lands, at Optionee's expense, all studies (including environmental studies), tests, surveys, examinations and explorations deemed necessary by Optionee to complete due diligence prior to the Closing ("Due Diligence"). It is further understood and agreed that access to the Corridor Lands for purposes of conducting any such Due Diligence shall be specifically subject to and conditioned upon the provisions of Section I, Paragraph 7 hereinbelow.

7. **Due Diligence Obligations of Optionee.** Notwithstanding any other provision in this Corridor Option which might be interpreted to the contrary, Optionee's right, and the right of its agents and representatives, to enter upon the Corridor Lands to conduct its Due Diligence shall be subject to the following restrictions and conditions:

- (a) Optionee shall provide written notice, in accordance with Section III, Paragraph 4 hereinbelow, not less than ten (10) days prior to entry onto the Corridor Lands, which notice shall provide the date, time, general location and purpose of such entry. Optionor shall be entitled, but not obligated, to have a representative present during all such entries thereon.
- (b) Any Due Diligence activity conducted by Optionee on the Corridor Lands shall be conducted in compliance with any and all applicable laws and regulations, and the Corridor Easement, but subject to Optionee's right to operate motor vehicles on existing roads on the Corridor Lands to carry out such Due Diligence explorations.
- (c) Optionee shall take any and all action and implement all protection necessary to ensure that all Due Diligence activity conducted on, and any equipment, materials and substances generated, used or brought onto, the Corridor Lands by Optionee and its employees, agents, representatives and invitees pose no threat to the safety or health of persons or the environment and cause no damage to either the Corridor Lands or any other person.
- (d) Optionee shall be solely responsible for the security and safety of its activities, employees, agents, representatives, invitees, equipment and materials brought on the Corridor Lands.
- (e) Optionee shall be responsible for, and shall defend, indemnify and hold harmless Optionor from and against, any loss or damage to the Corridor Lands or other property or personal injury (including death), incurred by Optionor or any person as a result of Optionee's activities hereunder, including, but not limited to, costs, expenses and reasonable attorneys' fees.
- (f) Optionee shall restore the Corridor Lands to substantially the same condition as prior to Optionee's entry onto the Corridor Lands.
- (g) Optionee shall have the right to update its Due Diligence investigations immediately prior to Closing, and in the event that the condition of the Corridor Lands has materially changed during the period of time between completion of such Due Diligence investigations (a "Change in Condition"), Optionee shall provide to Optionor written notice thereof no less than ten (10) days prior to Closing with a description of the Change in Condition. Optionor shall respond in writing not later than five (5) days after receipt of such notice to state whether Optionor shall remediate, to the reasonable satisfaction of Optionee, the Change in Condition, or whether Optionor refuses to remediate the Change in Condition, which right to refuse is hereby specifically reserved. The Closing date shall be extended for a reasonable time to allow for such remediation. If Optionor refuses to remediate the Change in Condition, or in the event the condition of the Corridor Lands to be conveyed materially changed within the ten

(10) day period prior to Closing, then, in either of such events, Optionee shall have the right to terminate this Corridor Option upon written notice to Optionor, the Deposit shall immediately be refunded to Optionee, and neither party shall have any further duty or obligation to the other under this Corridor Option.

8. **Action in Connection with the Corridor Lands.** Optionor agrees that during the Option Term, and prior to Closing if Optionee has timely delivered the Exercise Notice, Optionor shall not, without the prior written consent of Optionee, take any action that will impair the title to the Corridor Lands, or grant or by failure to act, cause a lien to be lodged or filed against the Corridor Lands, except as permitted in the Corridor Easement.

9. **Optionor's Environmental Analysis.** Notwithstanding any other provision in this Corridor Option to the contrary, in the event Optionee timely delivers the Exercise Notice to Optionor, then Optionor, as the owner of the Corridor Lands and as a matter of corporate policy, reserves the right to perform an environmental study in connection with the Corridor Lands. If, upon the completion of said study, and if said study identifies an environmental impairment such that Optionor decides not to convey a portion of the Corridor Lands to Optionee ("Retained Property") (which right not to convey under such circumstances is specifically reserved to Optionor), Optionor shall notify Optionee in writing of such decision, identifying the Retained Property. The remaining portion of the Corridor Lands (other than the Retained Property) shall continue to be subject to the option granted herein and Optionee may proceed with the purchase thereof pursuant to the terms and conditions of this Corridor Option, with the Purchase Price (defined below) adjusted accordingly by the Appraiser (defined below). Provided further, however, that under such circumstances, the Retained Property shall not at any time thereafter be conveyed to any person or entity other than to Optionee or an Affiliate (defined below) or Successor-in-Interest (defined below) of Optionor without first giving written notice to Optionee as provided in Section III, Paragraph 4 hereinbelow. Optionee shall then again have the right to exercise the option herein granted as to the Retained Property for a period of eighteen (18) months following said notice and an additional eighteen (18) months after the exercise of said option in which to close. In the event so exercised, said option shall in all other respects be upon the same terms and provisions as provided herein, except that the Purchase Price (defined below) for the Retained Property shall be determined as of the date such notice from Optionor to Optionee (relative to the Retained Property) is given under this Section I, Paragraph 9. A separate appraisal of the Retained Property shall be performed at the expense of Optionor following the same procedure used for the principle appraisal of the Corridor Lands. The Deposit shall be applied at Closing to the purchase of the Corridor Lands, less any Retained Property, and to the extent the Deposit exceeds the Purchase Price for the Corridor Lands less the Retained Property, any such excess shall be refunded to Optionee at Closing.

10. **Memorandum of Corridor Option.** The parties shall, at any time, at the request of either one, and as soon as reasonably practicable, execute duplicate originals of an instrument, in recordable form, which constitutes a Memorandum of this Corridor Option, setting forth a description of the Corridor Lands, Option Term and such other reasonable provisions as the parties may agree.

SECTION II

Agreement of Sale and Transfer

Upon timely delivery of the Exercise Notice to Optionor pursuant to Section I hereinabove, the parties hereto agree and intend to be legally bound as follows:

1. Transfer and Conveyance of Title. At Closing (as defined in Section I, Paragraph 4), Optionor shall transfer and convey to Optionee, all of Optionor's right, title and interest in and to the Corridor Lands by General Warranty Deed ("Deed") subject to (a) current real estate taxes, if any, which are to be prorated as of the Closing; (b) other standard and customary title insurance exceptions applicable to transactions of the type and nature herein contemplated; (c) a reservation by Optionor of its Reserved Rights (as described in the Corridor Easement) which shall run with the land and to the extent deemed necessary by Optionor, a covenant in the Deed requiring any subsequent conveyance by Optionee of the Corridor Lands or any interest therein or portion thereof to include, through deed or other appropriate documents, terms and conditions that preserve, protect and promote the Conservation Values and Optionor's Reserved Rights as contained and described in the Corridor Easement; (d) the TWRA Agreements (as defined in the Corridor Easement) and that certain Tennessee Department of Conservation Agreement dated March 30, 1970 (to the extent applicable), as such may be amended, extended or replaced, from time to time, and that certain unrecorded License Agreement dated November 3, 1942, by and between Knoxville Power Company (now Optionor) and Southern Bell Telephone and Telegraph Company; and (e) such other liens, encumbrances and exceptions as are of record in the Register's Offices for Blount and Monroe Counties, Tennessee, as applicable to the Corridor Lands conveyed, or otherwise ascertainable by physical inspection of the Corridor Lands; provided that Optionor covenants that at the time of the conveyance, no portion of the Corridor Lands shall be encumbered by a deed of trust, mortgage or similar monetary lien. Said Deed to Optionee as contemplated herein shall be in substantially the same form and substance as that set forth in Exhibit C, attached hereto and incorporated herein by reference.

2. Purchase Price and Payment.

2. Purchase Price and Payment.

(a) The purchase price ("Purchase Price") for any transfer to Optionee under this Corridor Option shall be the fair market value ("FMV") of the Corridor Lands interest to be conveyed as of the Commencement Date. The Purchase Price (which shall be included in the Exercise Notice) shall be determined by an appraiser selected by Optionor from the list of appraisers set forth on Exhibit D attached hereto and incorporated herein by reference ("Appraiser"). Within thirty (30) days following the Commencement Date, Optionor shall send written notice to the Optionee, National Park Service ("NPS"), the United States Forest Service ("USFS"), and the Tennessee Wildlife Resources Agency ("TWRA") identifying said Appraiser so selected by Optionor.

(b) Once the Appraiser has been selected as provided herein, Optionor shall work with Optionee, NPS, USFS, and TWRA to develop the scope and terms of work for such appraisal ("Work Order") which the Appraiser will follow in connection with the preparation of

the Corridor Lands appraisal ("Initial Appraisal"), which Work Order shall (i) be agreed upon by Optionor, Optionee, NPS, USFS and TWRA within _____ days of the notice given by Optionor identifying the Appraiser as required in Section II, Paragraph 2(a) hereinabove, (ii) include the requirement that the Corridor Lands be appraised using standard land valuation methods as set forth in the Uniform Appraisal Standards for Federal Land Acquisitions (2000), as may be revised from time to time and (iii) provide that the Corridor Lands interest so appraised be the fee simple interest therein subject to the Corridor Easement and any rights proposed to be retained by Optionor pursuant to Section II, Paragraph 1(c), including, without limitation, the Reserved Rights as set forth in the Corridor Easement. Said Work Order shall be in substantially the same form and substance as Exhibit E attached hereto and incorporated herein by reference. Thereafter, Optionor shall direct that the Appraiser appraise the Corridor Lands in accordance with the Work Order. In no event shall said Initial Appraisal be completed later than six (6) months from the Commencement Date unless said time period is otherwise extended by written agreement of the parties, which agreement shall not be unreasonably withheld. Within ten (10) days following completion of the Initial Appraisal, the Appraiser shall send a copy thereof to Optionor, Optionee, NPS, USFS and TWRA. The cost of such Initial Appraisal shall be paid by Optionor. Upon receipt of the Initial Appraisal by Optionee, NPS, USFS, and TWRA they shall have sixty (60) days to review the same and in which to object to the FMV set forth therein. In the event no objection or suggested changes are made within said sixty (60) day period, then the FMV of the Corridor Lands as set forth in the Initial Appraisal shall be the Purchase Price and such Purchase Price shall be included in the Exercise Notice from Optionee to Optionor.

(c) If any portion of the Initial Appraisal is objectionable to either Optionee, NPS, USFS or TWRA then a written objection shall be delivered to Optionor and NPS, USFS or TWRA, as applicable, by the entity objecting within said sixty (60) day period identifying the objections or suggested changes to the Initial Appraisal. If Optionor agrees with such objections or suggested changes, then such objections or changes shall be addressed and made, the FMV adjusted accordingly and such FMV, as adjusted, shall be the Purchase Price and such Purchase Price shall be included in the Exercise Notice from Optionee to Optionor. If Optionor, Optionee, NPS, USFS and TWRA cannot agree as to the objections or suggested changes to the Initial Appraisal, then within ten (10) days of receipt of the objections or suggested changes, Optionee, NPS, USFS and TWRA may collectively choose a second Appraiser from the list of Appraisers set forth on Exhibit D ("Second Appraiser") and within five (5) days thereafter send written notice to Optionor identifying said Second Appraiser so selected. Said Second Appraiser shall then appraise the property ("Second Appraisal") using the same Work Order used in the Initial Appraisal, which Second Appraisal shall be completed and delivered to Optionor, Optionee, NPS, USFS, and TWRA within two (2) months of such written notice identifying said Second Appraiser unless said time period is extended by agreement of the parties for reasonable cause, including the unavailability of the selected Second Appraiser. In the event two appraisals are so prepared, then the FMV of the Corridor Lands as set forth in Initial Appraisal shall be compared to the FMV of the Corridor Lands as set forth in the Second Appraisal. If the FMV of the Corridor Lands as set forth in the Second Appraisal varies by no more than 10% from that set forth in the Initial Appraisal, the parties agree to accept the FMV as determined by the Second Appraisal as the Purchase Price and said Purchase Price shall be included in the Exercise Notice from Optionor to Optionee. If, however, the FMV of the Corridor Lands as set forth in the Second Appraisal varies by more than 10% from that of the Initial Appraisal, then the Purchase

Price shall be the average of the FMV of the Corridor Lands as set forth in the Initial Appraisal and the Second Appraisal (*i.e.*, FMV of the Corridor Lands as set forth in the Initial Appraisal + FMV of the Corridor Lands as set forth in the Second Appraisal \div 2 = FMV of Corridor Lands = Purchase Price), and such Purchase Price shall be included in the Exercise Notice from Optionee to Optionor. The cost of the Second Appraisal shall be paid by either Optionee, NPS, USFS or TWRA.

(d) The Purchase Price shall be payable as follows:

- (i) Ten percent (10%) of the Purchase Price shall be payable by Optionee to Optionor in cash upon delivery of the Exercise Notice as a deposit ("Deposit") to be credited toward the Purchase Price, either by cashier's check or wire transfer, at the discretion of Optionor. At Optionee's request at the time such Deposit is delivered, the Deposit shall be placed into an escrow account, to be held by a title attorney selected by Optionor, subject to the terms of this Corridor Option and a standard escrow agreement executed by the parties, which escrow agreement shall provide for the Deposit to be invested in an interest bearing account with said interest accruing to the benefit of Optionee and to become a part of the Deposit.
- (ii) The remaining ninety percent (90%) of the Purchase Price shall be paid by Optionee to Optionor in cash at Closing, either by cashier's check or wire transfer, at the discretion of Optionor.

3. Reservation of Easement. The parties agree that any deed conveying title to the Corridor Lands to Optionee shall reserve to Optionor and any Transferee a permanent easement that contains the Reserved Rights as defined in and held by Optionor under the Corridor Easement ("Reserved Rights").

4. Condition Precedent to Closing. As a condition to Closing, Optionee shall develop a memorandum of understanding ("Memorandum of Understanding") or similar agreement with USFS or a deed to or Memorandum of Understanding or similar agreement with NPS or TWRA, as applicable, the terms and conditions of which shall be mutually satisfactory to Optionor, Optionee, NPS, USFS or TWRA, as applicable, to address the management of the Corridor Lands, in a manner to preserve, protect, and promote the Conservation Values and Optionor's Reserved Rights as contained and described in the Corridor Easement. Said deed to NPS, USFS, or TWRA, as appropriate, as contemplated herein shall be in substantially the same form and substance as that set forth in Exhibit F attached hereto and incorporated herein by reference. In the event the condition precedent herein set forth is not satisfied, then in that event, Optionor shall have the right to terminate this Corridor Option upon written notice to Optionee whereupon the Deposit shall immediately be refunded to Optionee and neither party shall have any further duty or obligation to the other under this Corridor Option.

5. Possession. At Closing, Optionor shall deliver to Optionee possession of the Corridor Lands.

6. Second Conveyances to NPS, USFS or TWRA. The parties agree that the conveyance of the Corridor Lands to Optionee (any such conveyance hereinafter referred to as "First Conveyance") is contingent upon Optionee's conveyance of all of its right, title and interest in and to the Corridor Lands to NPS, USFS or TWRA, (each a "Government Agency") as deemed appropriate based on consultation with these agencies, within two (2) years of the Closing ("Second Conveyance"). This two (2) year period may only be extended with the prior written consent of Optionor, which consent shall not be unreasonably withheld, upon a showing by one or all of these agencies that good faith efforts have been made to obtain the necessary authorization and funding to complete the Second Conveyance. Optionee shall neither require nor accept any consideration from a Government Agency greater than that paid by Optionee to Optionor, except for any interest costs, survey costs, recording fees or title charges incurred by Optionee that can be directly attributed to this transaction. In no case may Optionee accept payment or consideration in excess of the FMV of the Corridor Lands transferred. Notwithstanding the foregoing, Optionee may continue to hold legal title to the Corridor Lands acquired in the First Conveyance until either NPS, USFS or TWRA is ready and able to take title to the same; however, Optionee must manage such Corridor Lands in accordance and consistent with the terms and restrictions set forth in the Corridor Easement until effectuation of the Second Conveyance. Any conveyance hereunder shall be subject to the terms and conditions as described in this Section II, Paragraph 6, and as more particularly described in the Deed. As a condition to the completion of the Second Conveyance, Optionee shall develop a Memorandum of Understanding or similar agreement with USFS, or a deed, Memorandum of Understanding or similar agreement to or with NPS or TWRA, as applicable, the terms and conditions of which shall be satisfactory to Optionor and Optionee, to address the management of the Corridor Lands, in a manner to preserve, protect and promote the Conservation Values and Optionor's Reserved Rights as contained and described in the Corridor Easement. Said Memorandum of Understanding (or similar agreement) with USFS as contemplated herein and in Section II, Paragraph 4 above, shall be in substantially the same form and substance as that set forth in Exhibit G, attached hereto and incorporated herein by reference.

7. Remedies of Optionor Upon Failure to Make Second Conveyances. In the event Optionee (i) fails to convey the Corridor Lands to a Government Agency within two (2) years after the later of the Closing of the First Conveyance, or announcement by NPS, USFS, or TWRA that the necessary authorization and funding to acquire the Corridor Lands has been allocated, appropriated or obtained, (ii) requires or accepts greater consideration than permitted in Section II, Paragraph 6 above, or (iii) fails to ensure full compliance with the Corridor Easement and all of the terms and conditions contained in the Deed granting fee simple ownership to Optionee, Optionor or any other party to the Final Settlement Agreement may seek a remedy at law or in equity in a court of general jurisdiction to: (i) compel the transfer of the Corridor Lands to NPS, USFS, or TWRA, as appropriate, (ii) compel by specific performance enforcement by Optionee for violations of the Corridor Easement, (iii) recover costs and attorney fees from Optionee, and (iv) any other remedy or damage to which Optionor and/or any other party to the Final Settlement Agreement may be entitled. Notwithstanding the foregoing, Optionee shall in no event be responsible or liable for damages, costs, expenses or attorney fees as a result of matters over which Optionee had no control (including, without limitation, actions of third parties, acts of God, weather and fire) that result in a violation of the terms of the Corridor Easement, or inability to obtain timely funding for the Second Conveyance under this

Corridor Option. Optionor may also recover any consideration paid to Optionee in excess of the consideration permitted in Section II, Paragraph 6 and seek such other remedies as set forth in the Final Settlement Agreement and related documents. All lands transferred to Optionee under the terms of this Corridor Option shall be managed by Optionee as part of the existing Tennessee Wildlife Management Area until the Second Conveyance, and Optionee shall cooperate with the Tennessee Wildlife Resources Agency to maintain public access to the Corridor Lands in a manner consistent with that permitted as of the Commencement Date until the Second Conveyance.

8. **Risk of Loss.** The parties agree that all risk of loss from damage to the Corridor Lands by any cause prior to the Closing shall be Optionor's and shall not pass to Optionee until the Closing, except such damages as may be attributable to Optionee, its employees, agents, representatives, invitees, or licensees as a result or arising out of the activity described in Section I, Paragraphs 6 and 7 hereinabove for which damages Optionee shall be solely liable.

9. **Taxes.** To the extent any real property taxes are due in connection with the Corridor Lands prior to Closing and prior to the transfer of title by Optionor to Optionee, such taxes shall be prorated between the parties. Optionee shall be responsible for any and all real property taxes from and after the date of the conveyance by Optionor to Optionee of Optionor's interest therein (*i.e.*, from and after the date of Closing). If the Corridor Lands are subject to one or more Greenbelt filings pursuant to *Tenn. Code Ann. § 67-5-1001 et. seq.*, as amended, any rollback taxes that become due and payable as a result of the sale of the Corridor Lands shall be paid at Closing by Optionor.

10. **Remedies.** In the event either party hereunder shall fail to perform its respective obligations under this Corridor Option, the non-defaulting party shall be entitled to pursue such remedies as may be available to it, at law or in equity, including, but not limited to, specific performance. Furthermore, and in addition to the foregoing, in the event that the default is the failure to close by Optionee by the Closing, Optionor may retain the Deposit, and may collect from Optionee the cost of the appraisal, as liquidated damages for such failure to close, which shall be Optionor's sole remedy in the event of such failure to close.

11. **Optionor's Representations.** Optionor hereby makes the following representations, warranties and covenants, as of the date hereof and which shall be true as of Closing:

(a) Due Authorization. Optionor hereby represents that this Corridor Option has been duly authorized, executed and delivered by all necessary action on the part of Optionor, constitutes the valid and binding agreement of Optionor and is enforceable in accordance with its terms.

(b) Environmental Matters. To Optionor's current actual knowledge, the Corridor Lands being conveyed are not in violation of any applicable environmental or other law.

(c) Litigation. To Optionor's current actual knowledge, there are no claims, actions, suits, proceedings or investigations pending against or affecting Optionor or involving

the Corridor Lands at law or in equity or before any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality.

(d) Condemnation. To Optionor's current actual knowledge, Optionor has received no written notice of any condemnation proceedings against the Corridor Lands, or of the desire of any public authority or other entity to take or use the Corridor Lands or any part thereof.

12. Disclaimer as to Condition of Corridor Lands. Except for the representations set forth in Section II, Paragraph 11 above, Optionee acknowledges that it has not relied upon any advice or representation of Optionor or its employees, agents or other representatives in connection with this transaction. Furthermore, Optionee specifically acknowledges that the Corridor Lands conveyed pursuant to this Corridor Option are being purchased on an "AS IS, WITH ALL FAULTS" basis and neither Optionor nor any of its employees, agents or other representatives make or imply nor have they made or implied any warranties as to the condition of the Corridor Lands, including, but not limited to, the following:

(a) the quality, nature, adequacy and physical condition of the Corridor Lands, or any portion thereof;

(b) the quality, nature, adequacy and physical condition of the soils, geology, and any ground water of the Corridor Lands, or any portion thereof;

(c) the development potential of the Corridor Lands, or any portion thereof, the Corridor Land's use, habitability, merchantability or fitness, suitability, value or adequacy for any particular purpose;

(d) the zoning or other legal status of the Corridor Lands, or any portion thereof, or any other public or private restrictions on the use thereof;

(e) the compliance of the Corridor Lands, or any portion thereof, with any applicable codes, laws, regulations, statutes, ordinances, covenants, conditions and restrictions of any governmental or quasi-governmental entity or of any other person or entity;

(f) the presence or removal of hazardous or toxic materials, substances or wastes in, on, under or upon or about the Corridor Lands, or any portion thereof, or any adjoining or neighboring property or any other environmental matter of any nature whatsoever;

(g) the costs to preserve and maintain the Corridor Lands, or any portion thereof.

SECTION III Miscellaneous

1. Entire Agreement and Amendment. This Corridor Option (including Section I, Section II, Section III and the Exhibits attached and other documents to be executed pursuant hereto) represents the final agreement between and understanding of the parties regarding the

subject matter hereof and may not be changed, amended or modified except by an instrument in writing executed by the parties hereto.

2. **Successors and Assigns.** This Corridor Option shall be binding upon and shall inure to the benefit of the parties hereto and their authorized successors, assigns, Affiliates (defined below), Successors-in-Interest (defined below) and any Transferee (defined below). Optionee may not assign this Corridor Option or any of its rights, interests or obligations hereunder to any person or entity, without the prior written consent of Optionor. The rights, interest and obligations of Optionor hereunder may be assigned to an Affiliate (defined below), Successor-in-Interest (defined below) and any Transferee (defined below), by operation of law or by Optionor, without Optionee's prior written consent. For purposes of this Corridor Option, "Affiliates" means any other individual, corporation, partnership, association, limited liability company, joint stock company, trust or other unincorporated organization that is directly or indirectly, or through one or more intermediaries, controlled by or under the common control of Optionor. "Transferee" means Affiliates and Successors-in-Interest (defined below), and shall, for the purposes of this Corridor Option, also include any successors, assigns or lessees of Optionor, any owner of the Power Line Areas (and any successors or assigns thereof) and any Project License holder. "Successor-in-Interest" shall mean the surviving entity resulting from the merger, consolidation or other corporate restructuring by or of Optionor, provided, however, that the surviving entity is the authorized licensee of the Project License.

3. **Construction.** This Corridor Option has been negotiated and prepared by the parties in accordance with the terms and provisions of the Final Settlement Agreement, and has been reviewed and approved by their respective legal counsel. Accordingly, the parties acknowledge and agree that legal or equitable principles which would require the construction of this Corridor Option or any provision of this Corridor Option against the party drafting this Corridor Option shall not apply in any construction or interpretation hereof.

4. **Notices.** All notices, demands, requests, consents, approvals or communications that either party desires or is required to give to the other (including the Exercise Notice) shall be in writing. Any such notices, demands, consents, approvals or communications may be sent to the intended recipient at the address set forth hereinbelow using registered or certified mail, return receipt requested, personal delivery, or expedited courier. Unless specifically provided otherwise herein, no such notice, demand, consent, approval or communication shall be deemed given unless and until it is actually received by the intended recipient. The parties may change the address to which notices, demands, consents, approvals and other communications hereunder are to be delivered by giving the other party written notice in the manner herein set forth.

If to Optionor:

If to Optionee:

5. **Waivers.** No waiver by any party of any default, misrepresentation, or breach of warranty or covenant hereunder, whether intentional or not, shall be deemed to extend to any prior or subsequent default, misrepresentation, or breach of warranty or covenant hereunder or affect in any way any rights arising by virtue of any prior or subsequent such occurrence.

6. **Severability.** If any provision of this Corridor Option or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this Corridor Option and the application of such provisions to persons or circumstances other than those as to which it is found to be invalid shall not be affected thereby.

7. **Expenses.** Each of the parties shall bear its own cost and expense (including legal fees and expenses) incurred in connection with this Corridor Option and the transactions contemplated hereby. The documentary stamp tax or transfer taxes on the conveyance to Optionee shall be the obligation of Optionee. Optionor shall pay the cost of preparation of the Deed.

8. **Captions.** The captions herein have been inserted solely for convenience of reference and are not part of this Corridor Option and shall have no effect upon construction or interpretation.

9. **Counterparts.** The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart, if any, shall be controlling.

10. **Applicable Law.** The interpretation and performance of this Corridor Option shall be governed by Tennessee law, without regard to rules or laws governing conflicts of law.

11. **Further Assurances.** The parties agree that at any time following the execution of this Corridor Option, and from time to time thereafter, they shall execute and deliver such further instruments of assurance, transfer, endorsement, direction or authorization as may be necessary or otherwise reasonably requested by the parties to fully consummate the transaction contemplated hereunder and to fully comply with any laws or regulations in connection with this transaction or otherwise.

IN WITNESS WHEREOF, the parties have executed this Corridor Option by and through their duly authorized representatives on the day and year first above written.

OPTIONOR:

ALCOA POWER GENERATING INC.

By: _____
Its: _____

OPTIONEE:

THE NATURE CONSERVANCY

By: _____
Its: _____

STATE OF _____)
)
COUNTY OF _____)

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of **ALCOA POWER GENERATING INC.**, the within named bargainor, a corporation, and that he as such _____, being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____. 20____.

Notary Public

My Commission Expires: _____

STATE OF _____)
)
COUNTY OF _____)

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of **THE NATURE CONSERVANCY**, the within named bargainor, a corporation, and that he as such _____, being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____, 20____.

Notary Public

My Commission Expires:_____

EXHIBIT LIST

*Exhibit A	Description of Corridor Lands
*Exhibit B	Description of Property Not Included in Corridor Lands
Exhibit C	Corridor Lands Deed APGI to TNC
*Exhibit D	List of Appraisers
*Exhibit E	Work Order
*Exhibit F	Corridor Lands Deed TNC to NPS
*Exhibit G	Memorandum of Understanding with USFS

* To be developed prior to execution of the Corridor Option.

Appendix B-3.4

Exhibit C

THIS INSTRUMENT PREPARED BY:

Wayne R. Kramer
KRAMER, RAYSON, LEAKE,
RODGERS & MORGAN, LLP
Post Office Box 629
Knoxville, TN 37901-0629
(865) 525-5134

Map No. _____

Parcel No. _____

WARRANTY DEED

THIS INDENTURE ("Deed"), made and entered into this ____ day of _____, 200__, between **ALCOA POWER GENERATING INC.**, (formerly Tapoco, Inc.) a corporation organized and existing under and by virtue of the laws of the State of Tennessee, with offices in Blount and Knox Counties, Tennessee ("Grantor"), and **THE NATURE CONSERVANCY**, a not-for-profit corporation incorporated under the laws of the District of Columbia, which is headquartered at 4245 North Fairfax Drive, Arlington, Virginia 22203-1606, and which maintains a local office at 2021 21st Avenue South, Suite C-400, Nashville, Tennessee 37212 ("Grantee").

W I T N E S S E T H:

WHEREAS, Grantor is the owner in fee simple of certain real property located in Blount and Monroe Counties, Tennessee, the general location of which is within a corridor adjacent to the Calderwood Bypass, in the vicinity of the Chilhowee and Calderwood Reservoirs, and which consists of approximately 5,250 acres, more or less, all as more particularly described on **Exhibit A** attached hereto and incorporated herein by reference (hereinafter referred to as the "Corridor Lands"); and

WHEREAS, Grantor operates power generating facilities in the Little Tennessee River Valley as the licensee of the Tapoco Hydroelectric Project under a license issued by the Federal Energy Regulatory Commission ("FERC") Project No. 2169 (the "Project"); and

WHEREAS, the Corridor Lands specifically exclude all real property more particularly described on **Exhibit B**, attached hereto and incorporated herein by reference, which property is retained in fee ownership by Grantor, and is utilized for purposes which may include, but are not limited to, purposes related to the Project, utilization for corridors or rights-of-way in connection with power transmission lines, communications, distribution or utility lines of any nature, and related plant and equipment (collectively the "Power Line Areas"); and

WHEREAS, on _____, 200____, the new license for the Project was issued to Grantor by FERC, as that license may be amended ("Project License"); and

WHEREAS, Grantor further intends and Grantee further acknowledges that the Corridor Lands shall at all times remain subject to all activities described in this Deed undertaken by Grantor or any Transferee ("Transferee" shall mean any successor or assign of Grantor, any Project License holder, their successors, assigns or lessees and shall further mean any person or entity acting through or at the request of Grantor or any Transferee) in connection with the Project, Power Line Areas, Project License, and any other lawful requirements of FERC, and all power transmission lines, utility lines of any nature, communication lines, related equipment and all associated improvements owned or utilized by Grantor or any Transferee (collectively "Power Lines, Equipment and Improvements") specifically including, access to Power Lines, Equipment and Improvements, and other Project and non-Project land areas, Power Line Areas, or otherwise, for Project, power generation, power transmission and other utility purposes; and

WHEREAS, Grantor granted to Grantee a conservation easement evidenced by instrument dated _____ of record in Deed Book _____, page _____ in the Register's Office for Blount County, Tennessee, and of record in Deed Book _____, page _____ in the Register's Office for Monroe County, Tennessee (collectively the "Corridor Easement"), the purpose of which is to preserve, protect and promote certain conservation values of the Corridor Lands by the continuation of land use patterns, including, without limitation, those relating to natural, scenic, open space, forest, wildlife habitat, watershed protection, historical, cultural, educational and/or recreational uses all as more fully described and defined in said Corridor Easement ("Conservation Values"); and

WHEREAS, Grantor and Grantee are also parties to that certain Agreement for Option and Sale of Corridor Lands dated the ____ day of _____, 200____ ("Corridor Option"), a memorandum of which is of record in _____ in the Register's Office for Blount County, Tennessee, and in _____ in the Register's Office for Monroe County, Tennessee, wherein Grantee was granted the option to purchase ("Option") the Corridor Lands; and

WHEREAS, Grantee has exercised said Option and thus Grantor desires to convey the Corridor Lands to Grantee in a manner consistent with said Corridor Option and Grantee desires to become the titled owner thereto, and the parties otherwise desire to be bound by all other terms and conditions herein; and

NOW, THEREFORE, Grantor, for and in consideration of the sum of One Dollar (\$1.00), and other good and valuable consideration, to it in hand paid by Grantee, the receipt of which is hereby acknowledged, including the terms and conditions and other rights and obligations set forth in this Deed, to which this conveyance is specifically subject and which terms and conditions and other rights and obligations are fundamental consideration to this

transaction, has granted, bargained, sold and conveyed, and does hereby grant, bargain, sell and convey to Grantee the Corridor Lands located in Blount and Monroe Counties, Tennessee, as more particularly described on **Exhibit A**, subject to the exceptions and reservations hereinabove and hereinafter set forth, with the hereditaments and appurtenances thereto appertaining, hereby releasing, if applicable, all claims of homestead and dower therein.

TO HAVE AND TO HOLD the Corridor Lands herein conveyed to Grantee, its successors and assigns, forever, subject to the exceptions, reservations, limitations and covenants and conditions hereinabove and hereinafter set forth, which exceptions, reservations, limitations and covenants and conditions are understood and acknowledged by the parties, which understanding and acknowledgement are evidenced by Grantor's execution and Grantee's acceptance and recording of this Deed:

1. Notwithstanding any term or condition set forth in this Deed to the contrary, or as set forth in the Corridor Easement or in any other agreement by and between Grantor and Grantee or otherwise, and Grantee recognizing the need for Grantor to continue to use the Corridor Lands for certain purposes, Grantee understands and acknowledges that Grantor hereby specifically, unconditionally and without restriction, charge or assessment of any kind or nature reserves to itself and to any Transferee the following rights, powers and authorities as may be necessary, or appropriate ("Reserved Rights"), it being further understood and agreed that Grantor shall continue to have, reserve and maintain all of the Reserved Rights as more fully described and set forth in the Corridor Easement (other than the right to transfer the Corridor Lands set forth in Section 5(b) thereof), it being intended that in all respects other than said right to transfer the Corridor Lands, this Deed shall be consistent therewith:

(a) **Existing and Future Uses.** The right to use, and to restrict the use of, the Corridor Lands for any and all purposes in connection with the Project, Project License, Power Line Areas, Power Lines, Equipment and Improvements and the Final Settlement Agreement, including, but not limited to, (i) power generation, power transmission and other utility purposes, (ii) installation, utilization, construction, reconstruction, operation, repair and maintenance of pathways and roadways (located or to be located on the Corridor Lands, non-Corridor Lands or otherwise), (iii) rights-of-way management, including, but not limited to, vegetation and exotic species management and the right to utilize herbicides, in accordance with best management practices and applicable law, including aerial application, for purposes of controlling vegetation within such rights-of-way, (iv) Project recreation areas, (v) safety and security, (vi) access to or activities upon the Corridor Lands due to emergency or extraordinary

circumstances, including, but not limited to, fire and medical emergency, and (vii) any other encumbrances or agreements to which Grantor is bound as of the date first above written (including, without limitation, the Corridor Option), or any other lawful purposes relating to the subject of this Section 1. The Corridor Lands herein conveyed shall in all respects and at all times remain subject to the terms and conditions of the Project License, and Grantor's rights and obligations in connection therewith, and to any other lawful requirements of FERC. Grantor will, however, make reasonable efforts to assure that its continued use of the Corridor Lands will preserve, protect and promote the Conservation Values.

(b) **Tree Removal.** The right, but not the obligation, to cut and/or remove fallen, threatened, damaged or diseased trees, shrubs or plants required to maintain Power Line Areas, Power Lines, Equipment and Improvements, to cut firebreaks, to construct, reconstruct, operate, repair and maintain ingress and egress pathways or roadways on the Corridor Lands solely for purposes in connection with the operation of the Project, Power Line Areas, Power Lines, Equipment and Improvements and for such other Project, power generation, power transmission, or other utility purposes, including, but not limited to, reasonable removal or cutting of trees, shrubs or plants in a customary and historical manner. Notwithstanding the foregoing, in the event that Grantor must relocate existing roadways, it shall consult with Grantee, the National Park Service ("NPS"), the United States Forest Service ("USFS") and/or the Tennessee Wildlife Resources Agency ("TWRA"), as applicable, prior to going forward with such relocation, but the consent of neither Grantee nor NPS, USFS or TWRA, as applicable, to such road relocation shall be required.

(c) **Ingress, and Egress and Project Maintenance.** The right to ingress and egress to, from and over the Corridor Lands for any purpose and at any time relating to or arising from the Reserved Rights, and to access other property owned or leased by Grantor or its Transferees provided that such other property is used for purposes consistent with power generation, power transmission and other utility purposes.

2. Any and all easements, uses and/or roads, pathways and/or other rights of way or rights of access in existence as of the date hereof necessary or appropriate to maintain Power Line Areas and Power Lines, Equipment and Improvements over, upon and across the Corridor Lands shall be and remain in full force and effect.

3. By acceptance and recordation of this instrument, Grantee understands and agrees that it, as the titled owner thereof, shall manage, maintain and use the Corridor Lands in a manner so as to preserve, protect and promote the Conservation Values and otherwise manage, maintain and use the Corridor Lands in a manner consistent with and as more fully described and defined in the Corridor Easement.

4. It is further understood and agreed that in the event either party alleges that the other has breached any of the terms and conditions of this instrument, the "non-breaching party" shall give written notice to the "breaching party" of the specific nature of such claimed breach. Said notice shall be sent to Grantor at _____ and to Grantee at _____ (unless or until such address is changed by written notice to the other) using registered or certified mail, return receipt requested, personal delivery, or expedited courier. The breaching party shall have 180 days after the receipt of said notice to cure the

identified breach or otherwise resolve the same with the non-breaching party. If said breach is not cured or resolved within said 180 day period, then the non-breaching party shall have the right to pursue such injunctive relief and/or such other remedies at law or in equity as may be available to it to cure such claimed breach.

The hereinabove described terms and provisions shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns; it being the intent of the parties that said terms and provisions so long as they remain in full force and effect, shall run with the land.

And said Grantor, for itself and its successors and assigns, does hereby covenant with said Grantee, its successors and assigns, that it is lawfully seized in fee simple of the Corridor Lands herein conveyed and has full power, authority and right to convey the same, and that said Corridor Lands are free from all encumbrances except (i) real property taxes for the current year, which shall be pro-rated as of the date of closing and which Grantee assumes and agrees to pay to the extent the same are due, (ii) the hereinabove described terms, covenants, conditions, rights and easements, including specifically the terms and conditions of the Corridor Easement, (iii) the TWRA Agreements (as defined in the Corridor Easement) and that certain Tennessee Department of Conservation Agreement dated March 30, 1970 (to the extent applicable), as such may be amended, extended or replaced from time to time, and that certain unrecorded License Agreement dated November 3, 1942, by and between Knoxville Power Company (now Grantor) and Southern Bell Telephone and Telegraph Company, and (iv) such other liens, encumbrances and exceptions as are of record in the Register's Offices for Blount and Monroe Counties, Tennessee, or as are otherwise ascertainable by physical inspection of the Corridor Lands and that it will forever warrant and defend said Corridor Lands and the title thereto against the lawful claims of all persons whomsoever.

Whenever in this instrument a pronoun is used it shall be construed to represent either singular or plural, or the masculine, feminine or neuter gender, as the case may demand.

IN WITNESS WHEREOF, Grantor has caused this instrument to be executed and its name to be signed hereto by its duly authorized officer the day and year first above written.

ALCOA POWER GENERATING INC.

By:_____

Its: _____

STATE OF _____)

COUNTY OF _____)

Before me, the undersigned authority, Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of ALCOA POWER GENERATING INC., being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____, 200_____.

Notary Public

My Commission Expires:_____

Affiant

Notary Public

My Commission Expires:

{W0221420.1}8

EXHIBIT LIST

*Exhibit A	Description of Corridor Lands
*Exhibit B	Description of Property Not Included in Corridor Lands

*To be developed prior to execution of the Deed.

**B-3.5 Term Conservation Easement and
Declaration of Restrictive Covenants Between the
Licensee and The Nature Conservancy –
Remaining APGI Lands (Tennessee)**

This Instrument Prepared By:
Wayne R. Kramer, Esq.
KRAMER, RAYSON, LEAKE, RODGERS & MORGAN, LLP
P. O. Box 629
Knoxville, TN 37901-0629

**TERM CONSERVATION EASEMENT
AND
DECLARATION OF RESTRICTIVE COVENANTS**

THIS TERM CONSERVATION EASEMENT AND DECLARATION OF RESTRICTIVE COVENANTS (the "Conservation Easement") is made this ____ day of _____, 200__, between **ALCOA POWER GENERATING INC.**, a corporation organized and existing under and by virtue of the laws of the State of Tennessee with offices in Knox and Blount Counties, Tennessee and addresses of _____, and _____, respectively ("Grantor"), and **THE NATURE CONSERVANCY**, a not-for-profit corporation incorporated under the laws of the District of Columbia, which is headquartered at 4245 North Fairfax Drive, Arlington, Virginia 22203-1606, and which maintains a local office at 2021 21st Avenue South, Suite C-400, Nashville, Tennessee 37212 ("Grantee").

*** * * W I T N E S S E T H * * ***

WHEREAS, Grantor is the owner in fee simple of certain real property located in Blount and Monroe Counties, Tennessee, the general location of which is in the vicinity of the Chilhowee and Calderwood Reservoirs, and consisting of approximately 3,900 acres, more or less, as more particularly described on Exhibit A attached hereto and incorporated herein by reference (hereinafter referred to as the "Protected Property"); and

WHEREAS, Grantor operates power generating facilities in the Little Tennessee River Valley as the licensee of the Tapoco Hydroelectric Project under a license issued by the Federal Energy Regulatory Commission ("FERC") Project No. 2169 (the "Project"); and

WHEREAS, the Protected Property shall specifically exclude all real property more particularly described on Exhibit B attached hereto and incorporated herein by reference, which property is retained in fee ownership by Grantor, and is utilized for purposes which may include, but are not limited to, purposes related to the Project, utilization for corridors or rights-of-way in connection with power transmission lines, communications, distribution or utility lines of any nature and related plant and equipment (collectively the "Power Line Areas"); and

WHEREAS, on _____, 200__, the new license for the Project was issued to Grantor by FERC, as that license may be amended ("Project License"); and

WHEREAS, in furtherance of the Project and in compliance with that certain Final Settlement Agreement made and entered into on _____, 200__, by and between Grantor and other participants in the process for issuing a new license for the Project ("Final Settlement Agreement"), Grantor desires to grant, transfer and convey this Conservation Easement to Grantee, and Grantee desires to receive and accept this Conservation Easement, upon and subject to certain terms and conditions; and

WHEREAS, in its present state as a very large, undeveloped area, the Protected Property possesses natural, scenic, open space, forest, wildlife habitat, watershed protection, historical, cultural, educational and/or recreational values (collectively, "Conservation Values") which Conservation Values are of great importance to Grantor, the people of and visitors to Blount and Monroe Counties, and the people of and visitors to the State of Tennessee; and

WHEREAS, the characteristics of the Corridor Lands, their current use and state of improvement, are described in a report entitled Baseline Report of _____, dated _____ prepared by Grantee for Grantor (the "Baseline Report"); Grantor having worked with Grantee to ensure that the report is a complete and accurate description of the Corridor Lands as of the date of this Corridor Easement, with said Baseline Report to be used by Grantor and Grantee to assure that any future changes in the use of the Corridor Lands will be consistent with the terms of this Corridor Easement, but which Baseline Report is not intended to preclude the use of other evidence to establish the present condition of the Corridor Lands if there is a controversy over its use; and

WHEREAS, Grantor intends and Grantee acknowledges that this Conservation Easement herein granted shall at all times remain subject to all applicable provisions of the Project License, and all activities undertaken by Grantor or any Transferee in connection therewith, and any other lawful requirements of FERC, as well as all rights and obligations of Grantor or any Transferee, as they may deem necessary in their sole discretion, to maintain and operate the Project, Power Line Areas and all power transmission lines, utility lines of any nature, communication lines, related equipment and all associated improvements (collectively "Power Lines, Equipment and Improvements") specifically including, but not limited to, access to Power Lines, Equipment and Improvements, and other Project and non-Project land areas, Power Line Areas, or otherwise, for Project, power generation, power transmission and other utility purposes provided that Grantor will make reasonable efforts to assure that its continued use of the Protected Property will preserve, protect and promote the Conservation Values; and

WHEREAS, Grantee meets the requirements of a "qualified organization" under Section 170(h) of the Internal Revenue Code of 1986, as amended (the "Code") and is a publicly supported, tax-exempt non-profit organization under §§ 501(c)(3) and 509(a)(1) of the Code; and

WHEREAS, Grantor and Grantee desire to conserve the Conservation Values of the Protected Property that are vital to the ecological integrity of the Southern Appalachian ecoregion; and

WHEREAS, Grantor intends that the Conservation Values of the Protected Property be preserved and maintained by the continuation of land use patterns, including, without limitation, those relating to natural, scenic, open space, forest, wildlife habitat, watershed protection, historical, cultural, educational and/or recreational uses existing at the time of this Conservation Easement, and which allow continued management of the lands as part of the Tennessee Wildlife Management Area, as applicable; and

WHEREAS, the Tennessee Conservation Easement Act of 1981, as amended through the date hereof (the "Act"), § 66-9-301, *et seq.* of the *Tennessee Code Annotated*, permits the creation of conservation easements for purposes which include retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants or wildlife and preserving the historical, architectural, archaeological, or cultural aspects of the Protected Property; and

WHEREAS, Grantor and Grantee intend to create with this document a "conservation easement" as that term is defined in the Act.

NOW, THEREFORE, in consideration of the above and the mutual covenants, terms, conditions and restrictions contained herein, Grantor hereby grants and conveys to Grantee this Conservation Easement, for a period of time not to exceed the Term (defined below) of the Project License as issued by FERC, in and over the Protected Property of the nature and character, and only to the extent hereinafter set forth.

1. Definitions.

(a) "Affiliates" means any other individual, corporation, partnership, association, limited liability company, joint stock company, trust or other unincorporated organization that is directly or indirectly, or through one or more intermediaries, controlled by or under the common control of Grantor.

(b) "Option Agreement" means the Agreement for Option and Sale of Real Estate entered into between the parties and dated _____, 200____.

(c) "Reserved Rights" shall have the meaning and include all rights reserved by Grantor under Section 5 hereof.

(d) "Successor-in-Interest" shall mean the surviving entity resulting from the merger, consolidation or other corporate restructuring by or of Grantor, provided, however, that the surviving entity is the authorized licensee of the Project License.

(e) "Transferee" means Affiliates and Successors-in-Interest, and shall, for the purposes of this Conservation Easement, also include any successors, assigns or lessees of Grantor, any owner of the Power Line Areas (and any successors or assigns thereof) and any Project License holder.

(f) "TWRA Agreements" means that License Agreement made and entered into by and between Grantor and the Tennessee Wildlife Resources Agency ("TWRA"), on April 6, 1987, as amended by instrument dated October 23, 1996, and as supplemented by the Cooperative Agreement made and entered into by said parties on May 30, 2002, and as such may be amended, extended or replaced, from time to time.

2. **Purpose.** The purpose of this Conservation Easement is to assure that the Protected Property will be preserved predominantly in its undeveloped, natural, scenic, open space and/or forested condition during the Term of this Conservation Easement, and to prevent any use of the Protected Property that will significantly impair or interfere with the Conservation Values or interests of the Protected Property. Grantor intends that this Conservation Easement will restrict the use of the Protected Property to only such activities as are consistent with the purpose of this Conservation Easement; however, Grantor specifically and unconditionally reserves Reserved Rights for itself and any Transferee.

3. **Term.** This Conservation Easement shall continue in full force and effect for the duration of the Project License stated therein as _____ years, ("Term"); however, notwithstanding the foregoing, this Conservation Easement will terminate immediately in the event that Grantor, its Affiliates or any of its Successors-in-Interest, shall cease to be the Project License holder.

4. **Prohibited Use.** Subject to the rights and authority of any third party as provided by law in connection with law enforcement or other emergency needs, any activity on or use of the Protected Property inconsistent with the purpose of this Conservation Easement is prohibited. Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited on the Protected Property, except Reserved Rights which are specifically and unconditionally retained by Grantor and any Transferee:

(a) **No Construction.** Except as necessary to ensure compliance with the terms hereof, there shall be no constructing or placing of any building or structure of whatsoever nature, recreational facility, fence, asphalt or concrete pavement, antenna, utility pole, tower, conduit, line, sodium vapor light or any other temporary or permanent structure or facility in, on or above the Protected Property. Furthermore, no signs, billboards or other advertising displays shall be placed on the Protected Property. Notwithstanding the foregoing, signs may be placed on the Protected Property that (i) state the name, address or other management information pertaining to the Protected Property, (ii) identify or regulate permitted on-site activities, (iii) identify and acknowledge the cooperation of parties involved in the preservation and protection of the Protected Property and/or (iv) control unauthorized entry on or use of the Protected Property, so long as such signs do not in either placement, number, or design significantly diminish the scenic character of the Protected Property.

(b) **No Excavation.** There shall be no ditching, draining, diking, filling, excavating, dredging, mining or drilling, removal of topsoil, sand, gravel, rock, minerals or other materials, nor any building of roads or change in the topography or surface hydrology of the Protected Property in any manner.

(c) **No Cutting or Removal.** There shall be no removal, harvesting, destruction or cutting of trees, shrubs or plants, planting of trees, shrubs or plants, use of fertilizers, plowing, grazing of domestic animals, or disturbance or change in the natural habitat in any manner, except the cutting down or removal of trees or other vegetation for the purpose of maintaining forest health and natural diversity of species and removing exotics and invasive species.

(d) **No Dumping.** There shall be no storage or dumping of ashes, trash, garbage, or other unsightly or offensive material, hazardous substance, or toxic waste, nor any placement of underground storage tanks in, on, or under the Protected Property; there shall be no changing of the topography through the placing of soil or other substance or material such as land fill or dredging spoils, nor shall activities be conducted on the Protected Property that could cause erosion or siltation on the Protected Property.

(e) **No Pollution.** There shall be no pollution, alteration, depletion or extraction of surface water, natural water courses, lakes, ponds, marshes, subsurface water or any other water bodies, nor shall activities be conducted on the Protected Property that would be detrimental to water quality or that could alter the natural water level or quality or flow in or over the Protected Property.

(f) **No Vehicles, Bikes, Horses.** There shall be no operation of motorized vehicles, such as snowmobiles, dune buggies, motorcycles, all-terrain or off-road vehicles, hang gliders, aircraft, or any other types of mechanized vehicles. There shall also be no operation of non-motorized bikes, or any other types of non-motorized vehicles or transportation modes on the Protected Property. There shall also be no horses nor shall there be the introduction of any non-native species except as otherwise provided in Section 6(h) hereinbelow upon or onto the Protected Property.

(g) **No Exploration.** There shall be no exploration for, or development and extraction of, minerals and hydrocarbons by any mining method or any other method.

(h) **Continuation of Current Restrictions.** This Conservation Easement and the Protected Property shall remain subject to the terms, conditions and restrictions of the TWRA Agreements, that certain Tennessee Department of Conservation Agreement dated March 30, 1970 (to the extent applicable), as such may be amended, extended or replaced, from time to time, and to all encumbrances and restrictions which are presently of record and apply to the Protected Property or any portion thereof.

5. **Reserved Rights.** Notwithstanding any prohibition or restriction set forth herein to the contrary, and recognizing that Grantor is and shall remain the fee simple owner of the Protected Property, Grantor hereby specifically, unconditionally and without restriction, charge or assessment of any kind or nature reserves to itself and any Transferee the following rights, powers and authorities as may be necessary, or appropriate:

(a) **Existing and Future Uses.** The right to use, and to restrict the use of, the Protected Property for any and all purposes in connection with the Project, Project License, the

Power Line Areas, Power Lines, Equipment and Improvements and the Final Settlement Agreement, including, but not limited to, (i) power generation, power transmission and other utility purposes, (ii) installation, utilization, construction, reconstruction, operation, repair and maintenance of pathways and roadways (located or to be located on the Protected Property, non-Protected Property or otherwise), (iii) rights-of-way management, including, but not limited to, vegetation and exotic species management and the right to utilize herbicides, in accordance with best management practices and applicable law, including aerial application, for purposes of controlling vegetation within such rights-of-way, (iv) Project recreation areas, (v) safety and security, (vi) access to or activities upon the Protected Property due to emergency or extraordinary circumstances, including, but not limited to, fire and medical emergency, and (vii) any other encumbrances or agreements to which Grantor is bound as of the date first above written (including, without limitation, the Option Agreement), or any other lawful purposes relating to the subject of this Section 5. The Conservation Easement herein granted shall in all respects and at all times remain subject to the terms and conditions of the Project License, and Grantor's rights and obligations in connection therewith, and to any other lawful requirements of FERC. Grantor will, however, make reasonable efforts to assure that its continued use of the Protected Property will preserve, protect and promote the Conservation Values.

(b) **Transfer.** The right to transfer, assign, convey, sell, give, mortgage, or lease the Protected Property, provided such conveyance is subject to the terms of this Conservation Easement, and subject further, however, to the provisions of the Option Agreement.

(c) **Tree Removal.** The right, but not the obligation, to cut and/or remove fallen, threatened, damaged or diseased trees, shrubs or plants required to maintain Power Line Areas, Power Lines, Equipment and Improvements, to cut firebreaks, to construct, reconstruct, operate, repair and maintain ingress and egress pathways or roadways on the Protected Property solely for purposes in connection with the operation of the Project, Power Line Areas, Power Lines, Equipment and Improvements and for such other Project, power generation, power transmission, or other utility purposes, including, but not limited to, reasonable removal or cutting of trees, shrubs or plants in a customary and historical manner. Notwithstanding the foregoing, in the event that Grantor must relocate existing roadways, it shall consult with Grantee, National Park Service ("NPS") and/or the United States Forest Service ("USFS"), as applicable, prior to going forward with such relocation, but the consent of Grantee, NPS and/or USFS to such road relocation shall not be required.

(d) **Ingress, and Egress and Project Maintenance.** The right to ingress and egress to, from and over the Protected Property for any purpose and at any time relating to or arising from the Reserved Rights, and to access other property owned or leased by Grantor or its Transferees provided that such other property is used for purposes consistent with power generation, power transmission and other utility purposes.

6. **Grantee's Rights.** To accomplish the purpose of this Conservation Easement and subject to the other terms and conditions herein, the following rights are conveyed to Grantee:

(a) **Right to Protect.** The right to preserve and protect the Conservation Values of the Protected Property.

(b) **Right of Entry.** The right of Grantee's staff, contractors and associated natural resource management professionals (including employees and agents of NPS, USFS and TWRA) to enter the Protected Property and cross other lands retained by Grantor, by motor vehicles on existing roads at reasonable times and with prior notice, for the purposes of: (i) inspecting the Protected Property to determine if Grantor is complying with the covenants and purposes of this Conservation Easement; (ii) enforcing the terms of this Conservation Easement; (iii) allowing management of the Protected Property as a Tennessee Wildlife Management Area; (iv) taking any and all actions with respect to the Protected Property as may be necessary or appropriate, with or without order of court, to remedy or abate violations hereof; (v) making scientific and educational observations and studies and taking samples in such a manner as will not disturb the use and quiet enjoyment of the Protected Property by Grantor or its rights, duties and obligations pertaining to any of the Reserved Rights; (vi) monitoring and management as described below; (vii) preventing any activity on or use of the Protected Property that is inconsistent with the purpose of this Conservation Easement and requiring the restoration of such areas or pieces of the Protected Property that may be damaged by inconsistent activity or use, pursuant to remedies set forth in Section 14; and (viii) conducting due diligence evaluations of the Protected Property in accordance with and subject to the terms and provisions of the Option Agreement.

(c) **Hiking Trails.** Nothing herein shall prohibit the development and maintenance of hiking trails by Grantee so long as such trails do not interfere with or otherwise impair Grantor's Reserved Rights.

(d) **Monitoring and Management.** The right, but not the obligation, to monitor the natural habitats on the Protected Property and to manage them, to the extent deemed appropriate by Grantee, to ensure their continued presence and viability on the Protected Property. Such activities shall be in accordance with management practices of Grantee, which may include, but not be limited to, mowing, trapping, prescribed burning, or the control of exotic species, and related management activities that ensure the ecological integrity of the Protected Property and/or removal of exotic, invasive or otherwise undesirable species.

(e) **Enforcement.** The right to prevent any activity on or use of the Protected Property that is inconsistent with the purpose of this Conservation Easement and to require the restoration of such areas or features of the Protected Property that may be damaged by any inconsistent activity or use, pursuant to Section 14.

(f) **Discretionary Consent.** Grantor shall not be required to acquire Grantee's consent for any purposes associated with the Project or Reserved Rights. If, owing to unforeseen or changed circumstances, any of the activities listed in Section 4 are deemed desirable by both Grantor and Grantee, Grantee may, in its sole discretion, give permission for such activities, subject to the limitations herein. Such requests from Grantor for permission, and permission for activities requiring Grantee's consent under Section 4, shall be in writing

delivered to Grantee not less than thirty (30) days prior to the date Grantor intends to undertake the activity in question, and shall describe the proposed activity in sufficient detail to allow Grantee to judge the consistency of the proposed activity with the purpose of this Conservation Easement. The notice shall describe the nature, scope, design, location, time table and any other material aspect of the proposed activity in sufficient detail to permit Grantee to make an informed judgment as to its consistency with the purpose of this Conservation Easement. Grantee may give its permission only if both Grantor and Grantee determine that such activities (i) do not violate the purpose of this Conservation Easement and (ii) either enhance or do not impair any significant conservation interests associated with the Protected Property.

(g) **Grantee's Approval.** Grantee shall grant or withhold its approval in writing within thirty (30) days of receipt of Grantor's written request therefor. Except for extraordinary or emergency circumstances, if Grantee fails to issue a written approval or denial of a requested activity within thirty (30) days of receipt of Grantor's written request therefor, Grantee shall be deemed to have granted approval of the requested activity, and Grantor shall be expressly authorized to proceed therewith.

(h) **Biocontrol Agents.** Notwithstanding any provisions in Section 4 to the contrary, Grantee and Grantor may jointly consent to the introduction of non-native species ("Biocontrol Agents") onto the Protected Property for the purpose of controlling exotic or invasive species. The introduction of any Biocontrol Agent shall be approved in advance in writing by Grantor and Grantee, and shall be consistent with or pursuant to a generally accepted program of introduction of a particular Biocontrol Agent approved or implemented by either the United States Department of Agriculture or the United States Department of the Interior.

7. **Release.** Upon termination of any of the rights and privileges granted under this Conservation Easement, Grantee or its successors or assigns, shall execute such instrument, upon the request and to the satisfaction of Grantor, as necessary to evidence said termination. Such instrument shall be in whatever form as shall be required for recordation in the appropriate Register of Deeds office.

8. **Grantee Acknowledgment.** Grantee specifically acknowledges and understands that the easements, rights, privileges and licenses herein granted are subject to all applicable terms and conditions of the Project License, and to any other lawful requirements of FERC thereunder, to the Reserved Rights, and to all other conditions set forth hereunder. By accepting the conveyance of this Conservation Easement, Grantee agrees that the easements, rights, privileges and licenses herein conveyed will not be used in any manner that would endanger health, create a nuisance or otherwise be incompatible with the overall recreational uses associated with the Project, or otherwise interfere with the Reserved Rights.

9. **Public Access.** Nothing contained in this Conservation Easement shall give Grantee or its successors or assigns the right to grant to the public a right to enter upon or to use the Protected Property or any portion thereof if no such right existed in the public immediately prior to the execution of this Conservation Easement; however, the Protected Property may be used by the general public as authorized by the mandate of the entity which holds the fee

ownership of the Protected Property, so long as the public use does not violate the prohibitions listed in Section 4 above. Provided further that the Protected Property will continue to be managed as a Tennessee Wildlife Management Area so long as the TWRA Agreements continue in effect. Additionally, Grantor and any Transferees may restrict public access to any portion of the Protected Property for safety or security purposes, or for any other purpose deemed appropriate for the Project or power generation, power transmission or other utility purposes.

10. **Hunting.** Hunting shall be permitted on the Protected Property only to the extent determined and authorized by TWRA under the TWRA Agreements or under other agreements to which TWRA and the fee simple owner of the Protected Property are parties.

11. **Costs, Liabilities, Taxes and Environmental Compliance.**

(a) **Costs, Legal Requirements and Liabilities.** Grantor retains all responsibilities and shall bear all costs and liabilities which are normal and incident to its ownership and use of the Protected Property, including the maintenance of adequate liability insurance coverage. Grantor remains solely responsible for obtaining any applicable governmental permits and approvals for any construction or other activity or use permitted by this Conservation Easement, and all such construction or other activity or use shall be undertaken in accordance with all applicable federal, state and local laws, regulations and requirements. Grantor shall keep the Protected Property free of any liens arising out of any work performed for, materials furnished to, or obligations incurred by Grantor. Nothing contained in the Conservation Easement, however, shall be construed to entitle Grantee, or any other person or entity claiming by or through Grantee, to bring any action against Grantor for any injury to or change in the Protected Property resulting from causes beyond the control of Grantor, including, without limitation, vandalism or illegal acts, fire, flood, storm, earth movement or any act of God, or from any prudent action taken by Grantor under emergency conditions to prevent, abate or mitigate any injury to the Protected Property, the Project, Power Line Areas, or Power Lines, Equipment and Improvements resulting from any such causes.

(b) **Taxes.** Grantor shall pay all real estate taxes and assessments lawfully assessed against the Protected Property and shall provide to Grantee receipted tax bills or other reasonable evidence satisfactory to Grantee within sixty (60) days of written request for same.

(c) **Control.** Nothing in this Conservation Easement shall be construed as giving rise, in the absence of a judicial decree, to any right or ability in Grantee to exercise physical or managerial control over the day-to-day operations of the Protected Property, or any of Grantor's activities on the Protected Property, or otherwise to become an operator with respect to the Protected Property within the meaning of The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), and *Tenn. Code Ann.* § 68-212-101, *et seq.*

12. **Mutual Release and Indemnification.** Each party agrees to and hereby does release, hold harmless, defend and indemnify the other from any and all liabilities, including, but not limited to, damage to the Protected Property, personal injury (including death), losses,

damages, judgments, costs, expenses and reasonable attorneys' fees that the indemnified party may suffer or incur as a result of or arising out of the activities of the indemnifying party on the Protected Property.

13. **Title.** Grantor covenants and represents that (i) Grantor is the sole owner and is seized of the Protected Property in fee simple and has good right to grant and convey this Conservation Easement; (ii) except as set forth in Section 4(h), the Protected Property is free and clear of any and all liens, encumbrances, and exceptions except as are of record in the Register's Offices for Blount and Monroe Counties, Tennessee, as applicable, or otherwise ascertainable by physical inspection of the Protected Property, (iii) Grantee shall have the use of and enjoy all of the benefits derived from and arising out of this Conservation Easement; and (iv) as of the date of this Conservation Easement and as of the date this Conservation Easement is recorded, the Protected Property shall not be encumbered by a deed of trust, mortgage or similar monetary lien.

14. **Remedies.**

(a) **Notice of Violation; Corrective Action.** If either Grantor or Grantee determines that a breach of the terms of this Conservation Easement has occurred or is threatened (the "non-breaching party") by the other party (the "breaching party"), the non-breaching party shall give written notice to the breaching party of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Protected Property resulting from any use or activity inconsistent with the purpose of this Conservation Easement, to restore the portion of the Protected Property so injured to its prior condition in accordance with a plan agreed upon by Grantor and Grantee.

(b) **Injunctive Relief.** If the breaching party fails to cure the violation within sixty (60) days after receipt of notice thereof from the non-breaching party, or under circumstances where the violation cannot reasonably be cured within a sixty (60) day period, or fails to begin curing such violation within the sixty (60) day period, or fails to continue diligently to cure such violation until finally cured, the non-breaching party may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Conservation Easement, to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction, and to require the restoration of the Protected Property to the condition that existed prior to any such injury.

(c) **Damages.** If there is a violation of any of the provisions of this Conservation Easement, the non-breaching party shall notify (by written instrument) the breaching party, who shall promptly cure the violation by (a) ceasing the violation, or (b) restoring the Protected Property to its condition before the violation, or (c) both, as the case may be. The parties shall have the right, but not the obligation, to pursue legal actions or proceedings at law and equity to enforce the terms and conditions of this Conservation Easement, including, but not limited to, the right to cause such violation to be cured, and if a court of competent jurisdiction determines that a violation has occurred hereunder, the party in violation shall reimburse to the other, as applicable, for all reasonable expenses incurred, including, but not

limited to, legal fees, whether in or out of court, and the cost of legal proceedings brought to cure the violation or to collect such reimbursement.

(d) **Scope of Relief.** The parties' rights under this Section 14 apply equally in the event of either actual or threatened violations of the terms of this Conservation Easement. The parties agree that their remedies at law for any violation of the terms of this Conservation Easement are inadequate and that they shall be entitled to the injunctive relief described in Section 14(b), both prohibitive and mandatory, in addition to such other relief to which they may be entitled, including specific performance of the terms of this Conservation Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The parties' remedies described in this Section 14 shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

(e) **Costs of Enforcement.** All reasonable, actual costs incurred by the parties in enforcing the terms of this Conservation Easement, including, without limitation, actual costs and expenses of suit, actual and reasonable attorneys' fees, and any costs of restoration necessitated by any violation of the terms of this Conservation Easement shall be borne by the breaching party.

(f) **Forbearance.** Forbearance by either party to exercise its rights under this Conservation Easement in the event of any breach of any term of this Conservation Easement by Grantor or Grantee shall not be deemed or construed to be a waiver of such term or of any subsequent breach of the same or any other term of this Conservation Easement, or of any of the party's rights under this Conservation Easement. No delay or omission by the parties in the exercise of any right or remedy upon any breach by the other shall impair such right or remedy or be construed as a waiver.

(g) **Waiver of Certain Defenses.** The parties hereby waive any defenses of laches, estoppel, or prescription.

(h) **Acts Beyond Parties' Control.** Nothing contained in this Conservation Easement shall be construed to entitle a party to bring any action against the other for any injury to or change in the Protected Property resulting from causes beyond the party's control, including, without limitation, vandalism or illegal acts, unauthorized wrongful acts of third parties, fire, flood, storm, earth movement, and acts of God, or from any prudent action taken by either party under emergency conditions to prevent, abate, or mitigate injury to the Protected Property or the Project, or Power Lines, Equipment and Improvements resulting from any such causes.

(i) **Acts of Third Parties.** Grantee may enforce such prohibition against third parties as authorized under § 66-9-307 of the Act.

15. **Parties Subject to Easement.** The covenants agreed to and the terms, conditions, and restrictions imposed by this Conservation Easement shall be binding upon Grantor and Transferees and upon Grantee, and their respective employees, agents, representatives, invitees, successors and assigns, and shall continue as a servitude running

concurrently with the Term of this Conservation Easement, as provided in Section 3 and in perpetuity if this Conservation Easement is converted to a permanent Conservation Easement under Section 20.

16. **Subsequent Transfers.** Grantor agrees that the terms, conditions, restrictions and purposes of this grant or reference thereto will be inserted by Grantor in any subsequent deed or other legal instrument by which Grantor divests either the fee simple title or possessory interest in the Protected Property.

17. **Merger.** Grantor and Grantee agree that the terms of this Conservation Easement shall survive any merger of the fee and easement interest in the Protected Property through appropriate documentation depending upon the identity of the entity to which the Protected Property or any interest therein is transferred. Notwithstanding the foregoing, in the event that all or any portion of the Protected Property is conveyed to the USFS, NPS or TWRA (each a "Government Agency"), Grantee shall be permitted to convey or assign this Conservation Easement to such Government Agency pursuant and subject to the terms and provisions of the Option Agreement, in which event the fee simple interest and the Conservation Easement may merge, and the Protected Property shall then be subject only to (i) those rights reserved by or for the benefit of Grantor (which rights shall include, but not be limited to, the Reserved Rights of Grantor herein) and (ii) terms and conditions to preserve, protect and promote the Conservation Values, as set forth in the deed of conveyance of the fee simple interest to Grantee, and/or in a deed, memorandum of understanding or similar agreement to or with a Government Agency, as applicable.

18. **Assignment.** The parties hereto recognize and agree that the benefits and burdens of this Conservation Easement are in gross and that Grantee may not transfer or assign the benefits of this Conservation Easement to any party other than to a Government Agency without the prior written consent of Grantor, which consent shall not be unreasonably withheld, delayed or conditioned. Grantee further hereby covenants and agrees that if it transfers or assigns the easement it holds under this indenture, any organization receiving the interest will be a "qualified organization" as that term is defined in § 170(h) of the Code, that is organized and operated primarily for one of the conservation purposes specified in §170(h)(4)(A) of the Code, and Grantee further covenants and agrees that the terms of the transfer or assignment will be such that the transferee or assignee will be required to continue to carry out for the Term of this Conservation Easement the conservation purposes that the grant hereof was originally intended to advance.

19. **Extinguishment and Condemnation.**

(a) **Extinguishment.** If circumstances arise in the future during the Term of this Conservation Easement that render the purpose of this Conservation Easement impossible to accomplish, this Conservation Easement can only be terminated or extinguished, either at the joint request of Grantor and Grantee, whether in whole or in part, or by judicial proceedings in a court of competent jurisdiction. The amount of the proceeds to which Grantee shall be entitled, after the satisfaction of prior claims, from any sale, exchange, or involuntary conversion of all or

any portion of the Protected Property subsequent to such termination or extinguishment, shall be the stipulated fair market value of this Conservation Easement, or proportionate part thereof, as determined in accordance with Section 19(b) or Internal Revenue Code ("IRC") Regulation § 1.170A-14, if different.

(b) **Valuation.** This Conservation Easement constitutes a real property interest immediately vested in Grantee, which, for the purposes of Section 19(a) the parties stipulate to have a fair market value determined by multiplying (1) the fair market value of the Protected Property unencumbered by this Conservation Easement (minus any increase in value after the date of this grant attributable to improvements) by (2) x/y, which is the ratio of the value of this Conservation Easement at the time of the grant to the value of the Protected Property, without deduction from the value of this Conservation Easement, at the time of this grant. (The values at the time of this grant are or shall be those values used for this grant pursuant to § 170(h) of the Code. For the purposes of this section, the ratio of the value of this Conservation Easement to the value of the Protected Property unencumbered by this Conservation Easement shall remain constant.) It is intended that this Section 19(b) be interpreted to adhere to and be consistent with IRC Regulation § 1.170A-14(g)(6)(ii). Fair Market Value shall be determined using the Uniform Appraisals Standards for Federal Land Acquisitions (2000), as may be revised from time to time.

(c) **Condemnation.** If all or any part of the Protected Property is taken by exercise of the power of eminent domain or acquired by purchase in lieu of condemnation, whether by public, corporate or other authority, so as to terminate this Conservation Easement, in whole or in part, Grantor and Grantee shall act jointly to recover the full value of the interests in the Protected Property subject to the taking or in lieu purchase and all direct or incidental damages resulting therefrom. All expenses reasonably incurred by Grantor and Grantee in connection with the taking or in lieu purchase shall be paid out of the amount recovered. Grantee's share of the balance of the amount recovered shall be determined by multiplying the balance by the ratio set forth in Section 19(b).

(d) **Application of Proceeds.** Grantee shall use any proceeds received under the circumstances described in this Section 19 in a manner consistent with its conservation purposes, which are exemplified by the grant of this Conservation Easement.

20. **Conversion to Permanent Conservation Easement.** In the event that the option granted in the Option Agreement is exercised by Grantee, this Conservation Easement shall become a Permanent Conservation Easement as to the portion of the Protected Property conveyed to Grantee pursuant thereto and shall continue in perpetuity, never merging with the underlying fee, subject to the merger of this Conservation Easement with the underlying fee simple interest in the event that this Conservation Easement and the underlying fee simple interest are both conveyed to a Government Agency, as described in Section 17 hereof. In any event, said deed conveying such underlying fee simple interest shall be subject to the Reserved Rights in favor of Grantor and any Transferee.

21. **Miscellaneous Provisions .**

(a) **Estoppel Certificates.** Upon request by Grantor, Grantee shall within twenty (20) days execute and deliver to Grantor, or to any party designated by Grantor, any document, including an estoppel certificate, which certifies, to the best of Grantee's knowledge, Grantor's compliance with any obligation of Grantor contained in this Conservation Easement or otherwise evidences the status of this Conservation Easement. Such certification shall be limited to the condition of the Protected Property as of Grantee's most recent inspection. If Grantor requests more current documentation, Grantee shall conduct an inspection, at Grantor's expense, within thirty (30) days of receipt of Grantor's written request thereof.

(b) **Termination of Rights and Obligations.** A party's rights and obligations under this Conservation Easement terminate upon transfer of the party's interest in this Conservation Easement or Protected Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

(c) **Severability.** If any provision of this Conservation Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this Conservation Easement and the application of such provisions to persons or circumstances other than those as to which it is found to be invalid shall not be affected thereby.

(d) **Gender; Number.** Whenever the context of this Conservation Easement so requires, references of the masculine gender shall include the feminine or neuter gender and corporate or other such entities, the singular number shall include the plural and vice versa, and reference to one or more parties hereto shall include all authorized assignees of Grantee and any Transferee.

(e) **Expenses.** Except for such costs and expenses for which either party may be liable pursuant to the provisions of Section 14 hereinabove, each of the parties shall bear its own cost and expense (including legal fees and expenses) incurred in connection with this Conservation Easement and the transactions contemplated hereby.

(f) **Entire Agreement and Amendment.** This Conservation Easement represents the final agreement between and understanding of the parties regarding the subject matter hereof and may not be changed, amended or modified except by an instrument in writing executed by the parties hereto.

(g) **Captions.** The captions herein have been inserted solely for convenience of reference and are not a part of this Conservation Easement and shall have no effect upon construction or interpretation.

(h) **Counterparts.** The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any discrepancy between the counterparts produced, the recorded counterpart shall be controlling.

(i) **Notices.** All notices, demands, requests, consents, approvals or communications that either party desires or is required to give to the other shall be in writing. Any such notices, demands, consents, approvals or communications may be sent to the intended recipient at the address set forth hereinbelow using registered or certified mail, return receipt requested, personal delivery, or expedited courier, but no such notice, demand, consent, approval or communication shall be deemed given unless and until it is actually received by the intended recipient. The parties may change the address to which notices, demands, consents, approvals and other communications hereunder are to be delivered by giving the other party written notice in the manner herein set forth.

If To Grantor:

If to Grantee:

(j) **Evidence of Termination of Reserved Rights.** In the event Grantor determines, in its sole discretion, that reservation of some or all of its Reserved Rights is no longer necessary, it shall notify Grantee in writing and, upon the written request of Grantee, execute in recordable form such documentation as the parties agree is appropriate to evidence the termination of said Reserved Rights or any portion thereof.

(k) **Applicable Law.** The interpretation and performance of this Conservation Easement shall be governed by Tennessee law, without regard to rules or laws governing conflicts of law.

IN WITNESS WHEREOF, the parties have executed this Conservation Easement by their duly authorized representatives the day and year first above written.

GRANTOR:

ALCOA POWER GENERATING INC.

By: _____
Its: _____

GRANTEE:

THE NATURE CONSERVANCY

By: _____
Its: _____

STATE OF _____)
)
COUNTY OF _____)

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of **ALCOA POWER GENERATING INC.**, the within named bargainor, a corporation, and that he as such _____, being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____,
200____.

Notary Public

My Commission Expires: _____

STATE OF _____)
)
COUNTY OF _____)

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of **THE NATURE CONSERVANCY**, the within named bargainor, a corporation, and that he as such _____, being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____, 200____.

Notary Public

My Commission Expires: _____

EXHIBIT LIST

*Exhibit A	Description of Protected Property
*Exhibit B	Description of Property Not Included in Protected Property

*To be developed prior to execution of the Conservation Easement

B-3.6 Agreement for Option and Sale of Real Estate Between the Licensee and The Nature Conservancy – Remaining APGI Lands (Tennessee)

This Instrument Prepared By:
Wayne R. Kramer, Esq.
KRAMER, RAYSON, LEAKE, RODGERS & MORGAN, LLP
P. O. Box 629
Knoxville, TN 37901-0629

AGREEMENT FOR OPTION AND SALE OF REAL ESTATE

THIS AGREEMENT FOR OPTION AND SALE OF REAL ESTATE ("Option Agreement") is made this _____ day of _____, 200_ ("Commencement Date"), between **ALCOA POWER GENERATING INC.**, a corporation organized and existing under and by virtue of the laws of the State of Tennessee, with offices in Knox and Blount Counties, Tennessee and addresses of _____ and _____, respectively ("Optionor"), and **THE NATURE CONSERVANCY**, a not-for-profit corporation incorporated under the laws of the District of Columbia, which is headquartered at 4245 North Fairfax Drive, Arlington, Virginia 22203-1606, and which maintains a local office at 2021 21st Avenue South, Suite C-400, Nashville, Tennessee 37212 ("Optionee").

*** * * W I T N E S S E T H * * ***

WHEREAS, Optionor is the owner in fee simple of certain real property located in Blount and Monroe Counties, Tennessee, the general location of which is in the vicinity of the Chilhowee and Calderwood Reservoirs, and consisting of approximately 3,900 acres, more or less, as more particularly described on Exhibit A attached hereto and incorporated herein by reference (the "Protected Property"); and

WHEREAS, Optionor operates power generating facilities in the Little Tennessee River Valley as the licensee of the Tapoco Hydroelectric Project under a license issued by the Federal Energy Regulatory Commission ("FERC") as Project No. 2169 (the "Project"); and

WHEREAS, the Protected Property shall specifically exclude all real property more particularly described on Exhibit B, attached hereto and incorporated herein by reference, which property is retained in fee ownership by Optionor, and is utilized for purposes which may include, but are not limited to, purposes related to the Project, utilization for corridors or rights-of-way in connection with power transmission lines, communications, distribution or utility lines of any nature, and related plant and equipment (collectively the "Power Line Areas"); and

WHEREAS, on _____, 200____, the new license for the Project was issued to Optionor by FERC, as that license may be amended ("Project License"); and

WHEREAS, in furtherance of the Project and in compliance with that certain Final Settlement Agreement made and entered into on _____, 200____, by and between Optionor and other participants in the process for issuing a new license for the Project ("Final Settlement Agreement"), the parties desire to execute this Option Agreement and to otherwise more fully define the rights and obligations of the parties in and to the Protected Property.

NOW, THEREFORE, for and in consideration of the promises, mutual covenants and agreements of the parties, and subject to the terms, conditions and restrictions contained herein, Optionor hereby grants to Optionee, and Optionee hereby accepts this Option Agreement, subject to the following terms and conditions:

SECTION I. Option to Purchase

1. **Option Term.** This Option Agreement shall begin on the Commencement Date and shall terminate as to the Protected Property or such portion thereof when Optionee fails to timely deliver an Exercise Notice (defined below) to Optionor or to effect the Closing (defined below), within the Closing Period (defined below) ("Option Term").

2. **Grant of Option.** Optionor hereby grants unto Optionee the exclusive right and option to purchase the Protected Property, or any portion thereof, as applicable, upon the terms and conditions set forth herein, if, during the Option Term, Optionor: (i) elects to convey all of its right, title and interest in and to the Project to a third-party which is not an Affiliate or a Successor-in-Interest of Optionor; or (ii) Optionor elects to divest itself of fee ownership of any portion or all of the Protected Property (and this provision 2(ii) shall run with the Protected Property, and apply each time or times Optionor elects to divest itself of fee ownership of any portion of the Protected Property provided a Lapse (defined below) has not occurred); or (iii) the Project is decommissioned as defined under the Federal Power Act, 16 U.S.C. §791a, *et seq.*, and its implementing regulations (collectively, the "Option Rights"). "Affiliates" means any other individual, corporation, partnership, association, limited liability company, joint stock company, trust or other unincorporated organization that is directly or indirectly, or through one or more intermediaries, controlled by or under the common control of Optionor. "Transferee" means Affiliates and Successors-in-Interest, and shall, for the purposes of this Option Agreement, also include any successors, assigns or lessees of Optionor any owner of the Power Line Areas (and any successors or assigns thereof) and any Project License holder. "Successor-in-Interest" shall mean the surviving entity resulting from the merger, consolidation or other corporate restructuring by or of Optionor, provided, however, that the surviving entity is the authorized licensee of the Project License.

3. **Notice of Option Rights to Optionee; Exercise of Option.** Optionor shall deliver written notice of the Option Rights to Optionee in accordance with the notice provisions of Section III, Paragraph 4, which notice shall describe in detail the Protected Property to be divested pursuant to Section I, Paragraph 2(i) or (ii) above, or upon receipt by Optionor of notice that the Project has been decommissioned, as required by Section I, Paragraph 2(iii) and in all cases such notice shall contain the Purchase Price at which such property shall be sold as determined according to Section II, Paragraph 2, together with a complete copy of the appraisal prepared pursuant thereto ("Option Notice"). From and after the date of receipt of the Option Notice, Optionee shall have eighteen (18) months to deliver to Optionor written notice of its intent to exercise the Option Rights set forth in the Option Notice, together with the Deposit (defined below), which is more particularly described in Section II, Paragraph 2(c)(i) (collectively, specifically including the Deposit, "Exercise Notice").

4. **Closing.** In the event that Optionee delivers the Exercise Notice to Optionor, consummation of the transaction which conveys legal title to that portion (or all) of the Protected Property which is the subject of the Option Notice shall occur on or before the expiration of eighteen (18) months following Optionee's delivery of the Exercise Notice ("Closing Period"). All the events necessary to effect the transfer and conveyance of the Protected Property, and delivery of all documents and instruments associated therewith, are hereinafter referred to as the "Closing."

5. **Failure of Optionee to Respond or Close.** In the event that Optionee fails to timely deliver an Exercise Notice to Optionor or to effect the Closing within the Closing Period, the rights and obligations of Optionor and Optionee hereunder shall permanently lapse as to that portion of the Protected Property which is described in the Option Notice ("Lapse"), and such portion affected by the Lapse shall no longer be Protected Property hereunder ("Lapsed Property"). Following a Lapse, Optionor shall have no further duty or obligation to Optionee and shall be entitled to freely transfer title to the Lapsed Property, subject to the Term Conservation Easement and Declaration of Restrictive Covenants dated _____ granted by Optionor to Optionee (the "Conservation Easement"), so long as the same is in full force and effect.

6. **Access to Property for Due Diligence.** Following delivery of the Option Notice, and prior to the Closing, Optionor grants to Optionee, Optionee's employees, agents and representatives, the right, at reasonable times during normal business hours to conduct on the Protected Property, at Optionee's expense, all studies (including environmental studies), tests, surveys, examinations and explorations deemed necessary by Optionee to complete due diligence prior to the Closing ("Due Diligence"). It is further understood and agreed that access to the Protected Property for purposes of conducting any such Due Diligence shall be specifically subject to and conditioned upon the provisions of Section I, Paragraph 7 hereinbelow.

7. **Due Diligence Obligations of Optionee.** Notwithstanding any other provision in this Option Agreement which might be interpreted to the contrary, Optionee's right, and the right of its agents and representatives, to enter upon the Protected Property to conduct its Due Diligence shall be subject to the following restrictions and conditions:

(a) Optionee shall provide written notice, in accordance with Section III, Paragraph 4 hereinbelow, not less than ten (10) days prior to entry onto the Protected Property, which notice provides the date, time, general location and purpose of such entry. Optionor shall be entitled, but not obligated, to have a representative present during all such entries thereon.

(b) Any Due Diligence activity conducted by Optionee shall be conducted on the Protected Property which is the subject of the Option Notice and shall be conducted in compliance with any and all applicable laws and regulations, and the Conservation Easement, but subject to Optionee's right to operate motor vehicles on existing roads on the Protected Property to carry out such Due Diligence explorations.

(c) Optionee shall take any and all action and implement all protection necessary to ensure that all Due Diligence activity conducted on, and any equipment, materials

and substances generated, used or brought onto, the Protected Property by Optionee and its employees, agents, representatives and invitees pose no threat to the safety or health of persons or the environment and cause no damage to either the Protected Property or any other person.

(d) Optionee shall be solely responsible for the security and safety of its activities, employees, agents, representatives, invitees, equipment and materials brought on the Protected Property.

(e) Optionee shall be responsible for, and shall defend, indemnify and hold harmless Optionor from and against, any loss or damage to the Protected Property or other property or personal injury (including death), incurred by Optionor or any person as a result of Optionee's activities hereunder, including, but not limited to, costs, expenses and reasonable attorneys' fees.

(f) Optionee shall restore the Protected Property to substantially the same condition as prior to Optionee's entry onto the Protected Property.

(g) Optionee shall have the right to update its Due Diligence investigations immediately prior to Closing, and in the event that the condition of the Protected Property has materially changed during the period of time between completion of such Due Diligence investigations (a "Change in Condition"), Optionee shall provide to Optionor written notice thereof no less than ten (10) days prior to Closing with a description of the Change in Condition. Optionor shall respond in writing not later than five (5) days after receipt of such notice to state whether Optionor shall remediate, to the reasonable satisfaction of Optionee, the Change in Condition, or whether Optionor refuses to remediate the Change in Condition, which right to refuse is hereby specifically reserved. The Closing date shall be extended for a reasonable time to allow for such remediation. If Optionor refuses to remediate the Change in Condition, or in the event the condition of the Protected Property to be conveyed materially changed within the ten (10) day period prior to Closing, then, in either of such events, Optionee shall have the right to terminate this Option Agreement upon written notice to Optionor, the Deposit shall immediately be refunded to Optionee, and neither party shall have any further duty or obligation to the other under this Option Agreement.

8. **Action in Connection with the Protected Property.** Optionor agrees that during the Option Term, and prior to Closing if Optionee has timely delivered the Exercise Notice, Optionor shall not, without the prior written consent of Optionee, take any action that will impair the title to the Protected Property, or grant or by failure to act cause a lien to be lodged or filed against the Protected Property, except as permitted in the Conservation Easement.

9. **Optionor's Environmental Analysis.** Notwithstanding any other provision in this Option Agreement to the contrary, in the event Optionee timely delivers the Exercise Notice to Optionor, then Optionor, as the owner of the Protected Property and as a matter of corporate policy, reserves the right to perform an environmental study in connection with the Protected Property. If, upon the completion of said study and if said study identifies an environmental impairment such that Optionor decides not to convey a portion of the Protected Property to Optionee ("Retained Property") (which right not to convey under such circumstances is

specifically reserved to Optionor), Optionor shall notify Optionee in writing of such decision, identifying the Retained Property. The remaining portion of the Protected Property (other than the Retained Property) shall continue to be subject to the option granted herein and Optionee may proceed with the purchase thereof pursuant to the terms and conditions of this Option Agreement with the Purchase Price (defined below) adjusted accordingly by the Appraiser (defined below). Provided further, however, that under such circumstances, the Retained Property shall not at any time thereafter be conveyed to any person or entity other than to Optionee or an Affiliate (defined below) or Successor-in-Interest (defined below) of Optionor, without first giving written notice to Optionee as provided in Section III, Paragraph 4 hereinbelow. Optionee shall then again have the right to exercise the option herein granted as to the Retained Property for a period of eighteen (18) months following said notice and an additional eighteen (18) months after the exercise of said option in which to close. In the event so exercised, said option shall in all other respects be upon the same terms and provisions as provided herein, except that the Purchase Price (defined below) for the Retained Property shall be determined as of the date such notice from Optionor to Optionee (relative to the Retained Property) is given under this Section I, Paragraph 9. A separate appraisal of the Retained Property shall be performed at the expense of Optionor following the same procedure used for the principle appraisal of the Protected Property. The Deposit shall be applied at Closing to the purchase of the Protected Property, less any Retained Property, and to the extent the Deposit exceeds the Purchase Price for the Protected Property less the Retained Property, any such excess shall be refunded to Optionee at Closing.

10. **Memorandum of Option Agreement.** The parties shall, at any time, at the request of either one, and as soon as reasonably practicable, execute duplicate originals of an instrument, in recordable form, which constitutes a Memorandum of this Option Agreement, setting forth a description of the Protected Property, Option Term and such other reasonable provisions as the parties may agree.

SECTION II

Agreement of Sale and Transfer

Upon timely delivery of the Exercise Notice to Optionor pursuant to Section I hereinabove, the parties hereto agree and intend to be legally bound as follows:

1. **Transfer and Conveyance of Title.** At Closing (as defined in Section I, Paragraph 4), Optionor shall transfer and convey to Optionee, all of Optionor's right, title and interest in and to the portion of the Protected Property which is described in the Option Notice by General Warranty Deed ("Deed") subject to (a) current real estate taxes, if any, which are to be prorated as of the Closing; (b) other standard and customary title insurance exceptions applicable to transactions of the type and nature herein contemplated; (c) a reservation by Optionor of its Reserved Rights (as described in the Conservation Easement) which shall run with the land and to the extent deemed necessary by Optionor, a covenant in the Deed requiring any subsequent conveyance by Optionee of the Protected Property or any interest therein or portion thereof to include, through deed or other appropriate documents, terms and conditions that preserve, protect and promote the Conservation Values and Optionor's Reserved Rights as contained and described in the Conservation Easement; (d) the TWRA Agreements (as defined in the

Conservation Easement) and that certain Tennessee Department of Conservation Agreement dated March 30, 1970 (to the extent applicable), as such may be amended, extended or replaced, from time to time; and (e) such other liens, encumbrances and exceptions as are of record in the Register's Offices for Blount and Monroe Counties, Tennessee, as applicable to the specific portion of the Protected Property conveyed, or otherwise ascertainable by physical inspection of the Protected Property, provided that Optionor covenants that at the time of the conveyance, no portion of the Protected Property shall be encumbered by a deed of trust, mortgage or similar monetary lien.

2. Purchase Price and Payment.

(a) The purchase price ("Purchase Price") for any transfer contemplated under this Option Agreement shall be the fair market value ("FMV") of the portion of the Protected Property which is the subject of the Option Notice. The Purchase Price (which shall be included in the Option Notice) shall be determined by an appraiser selected by Optionor. Prior to sending the Option Notice and prior to having the appraisal performed, Optionor shall send a notice ("Initial Notice") to Optionee that it intends to send the Option Notice. Upon receipt of said Initial Notice, Optionee may consult or otherwise work with the United States Forest Service ("USFS"), National Park Service ("NPS") and the Tennessee Wildlife Resources Agency ("TWRA") (collectively "Government Agencies") and shall supply to Optionor a list of no fewer than five (5) appraisers; said list of appraisers to be delivered to Optionor within sixty (60) days of the date Optionor notifies Optionee of its intent to send the Option Notice. Optionor shall then select an appraiser from such list of appraisers ("Appraiser") and shall send a notice to Optionee identifying said Appraiser so selected by Optionor. If such a list of appraisers is not delivered to Optionor within said sixty (60) day period, Optionor shall have the right to select any appraiser it deems appropriate (also referred to hereinafter as "Appraiser").

(b) Once the Appraiser has been selected as provided herein, Optionor shall work with Optionee and the Government Agencies to develop the scope and terms of work for such appraisal ("Work Order") which the Appraiser will follow in connection with the preparation of the appraisal of that portion of the Protected Property intended for sale ("Appraisal"). Said Work Order shall (i) be agreed upon by Optionor and the Government Agencies within ____ days of the notice given by Optionor identifying the Appraiser as required in Section II, Paragraph 2(a) hereinabove, (ii) include the requirement that the portion of the Protected Property to be appraised shall be appraised using standard land valuation methods as set forth in the Uniform Appraisal Standards for Federal Land Acquisitions (2000) as may be revised from time to time and (iii) provide that the interest in the portion of the Protected Property so appraised be the fee simple interest therein subject to the Conservation Easement and any rights proposed to be retained by Optionor pursuant to Section II, Paragraph 1(c), including, without limitation, the Reserved Rights as set forth in the Conservation Easement. Thereafter, Optionor shall direct that the Appraiser appraise the portion of the Protected Property intended for sale in accordance with the Work Order. The cost of such Appraisal shall be paid by Optionor and said Appraisal shall be completed no later than six (6) months after the notice identifying the Appraiser is sent by Optionor. The FMV of the portion of the Protected Property appraised as set forth in the Appraisal shall be the Purchase Price and such Purchase Price shall be included in the Option Notice from Optionor to Optionee.

(c) The Purchase Price shall be payable as follows:

- (i) Ten percent (10%) of the Purchase Price shall be payable by Optionee to Optionor in cash upon delivery of the Exercise Notice as a deposit ("Deposit") to be credited toward the Purchase Price, either by cashier's check or wire transfer, at the discretion of Optionor. At Optionee's request at the time such Deposit is delivered, the Deposit shall be placed into an escrow account, to be held by a title attorney selected by Optionor, subject to the terms of this Option Agreement and a standard escrow agreement executed by the parties, which escrow agreement shall provide for the Deposit to be invested in an interest bearing account with said interest accruing to the benefit of Optionee and to become a part of the Deposit.
- (ii) The remaining ninety percent (90%) of the Purchase Price shall be paid by Optionee to Optionor in cash at Closing, either by cashier's check or wire transfer, at the discretion of Optionor.

3. Reservation of Easement. The parties agree that any deed conveying title to any portion of the Protected Property to Optionee shall reserve to Optionor and any Transferee a permanent easement that contains the Reserved Rights as defined in and held by Optionor under the Conservation Easement ("Reserved Rights").

4. Condition Precedent to Closing. In addition to all other terms and conditions of this Option Agreement, and as a condition precedent to Closing, Optionee must agree to and execute for recording an amendment to the Conservation Easement, which shall state that the Conservation Easement shall be permanent and run with the Protected Property described in the Option Notice, never merging with the underlying fee, except in the event that the Protected Property described in the Option Notice, together with Optionee's interest in the Conservation Easement, is conveyed by Optionee to the USFS, NPS or TWRA (each a "Government Agency"). In the event of such transfer of the fee simple interest and Optionee's rights under the Conservation Easement in such Protected Property described in the Option Notice, the Conservation Easement as to the Protected Property described in the Option Notice may merge (subject to Optionor's Reserved Rights) with the underlying fee. Additionally, and as a condition to Closing, Optionee shall develop a memorandum of understanding ("Memorandum of Understanding") or similar agreement with the USFS or a deed to or Memorandum of Understanding or similar agreement with the NPS or TWRA, as applicable, the terms and conditions of which shall be mutually agreeable to Optionor, Optionee, USFS, NPS or TWRA, as applicable, to address the management of the Protected Property, or the portion thereof which is described in the Option Notice, in a manner to preserve, protect, and promote the Conservation Values and Optionor's Reserved Rights as contained and described in the Conservation Easement. In the event the condition precedent herein set forth is not satisfied, then in that event, Optionor shall have the right to terminate this Option Agreement upon written notice to Optionee

whereupon the Deposit shall immediately be refunded to Optionee and neither party shall have any further duty or obligation to the other under this Option Agreement.

5. Possession. At Closing, Optionor shall deliver to Optionee possession of the Protected Property.

6. Second Conveyance to USFS, NPS or TWRA. The parties agree that the conveyance of any portion of the Protected Property to Optionee (each such conveyance hereinafter referred to separately as a "First Conveyance") is contingent upon Optionee's conveyance of all of its right, title and interest in and to said portion of the Protected Property to the USFS, NPS or TWRA, as deemed appropriate based on consultation with these agencies, within two (2) years of the Closing ("Second Conveyance"). This two (2) year period may only be extended with the prior written consent of Optionor, which consent shall not be unreasonably withheld, upon a showing by one or all of these agencies that good faith efforts have been made to obtain the necessary authorization and funding to complete the Second Conveyance. Legal title for any portion of the Protected Property north of the Little Tennessee River, if both TWRA and USFS decline to take title, may be transferred to the NPS if authorized by the United States Congress. Optionee shall neither require nor accept any consideration from a Government Agency greater than that paid by Optionee to Optionor, except for any interest costs, survey costs, recording fees or title charges incurred by Optionee that can be directly attributed to this transaction. In no case may Optionee accept payment or consideration in excess of the FMV of the property interests transferred. Notwithstanding the foregoing, Optionee may continue to hold legal title to the Protected Property acquired in the First Conveyance until either USFS, NPS, or TWRA is ready and able to take title to the same; however, Optionee must manage such Protected Property in accordance and consistent with the terms and restrictions set forth in the Conservation Easement until effectuation of the Second Conveyance. Any conveyance hereunder shall be subject to the terms and conditions as described in this Section II, Paragraph 6, and as more particularly described in the Deed. As a condition to the completion of the Second Conveyance, Optionee shall develop a memorandum of understanding or similar agreement with the USFS or a deed, Memorandum of Understanding or similar agreement to or with the NPS or TWRA, as applicable, the terms and conditions of which shall be satisfactory to Optionor, to address the management of the Protected Property, or the portion thereof which is described in the Option Notice, in a manner to preserve, protect and promote of the Conservation Values and Optionor's Reserved Rights as contained and described in the Conservation Easement. Said Memorandum of Understanding (or similar agreement) with the USFS as contemplated herein and in Section II, Paragraph 4 above, shall be in substantially the same form and substance as that set forth in Exhibit C attached hereto and incorporated herein by reference.

7. Remedies of Optionor Upon Failure to Make Second Conveyance. In the event Optionee (i) fails to convey the Protected Property to a Government Agency within two (2) years after the later of the Closing of the First Conveyance, or announcement by USFS, NPS, or TWRA that the necessary authorization and funding to acquire the portion of the Protected Property has been allocated, appropriated or obtained, (ii) requires or accepts greater consideration than permitted in Section II, Paragraph 6 above, or (iii) fails to ensure full compliance with the Conservation Easement and all of the terms and conditions contained in the Deed granting fee simple ownership to Optionee, Optionor or any other party to the Final

Settlement Agreement may seek a remedy at law or in equity in a court of general jurisdiction to: (i) compel the transfer of the subject Protected Property to USFS, NPS, or TWRA, as appropriate, (ii) compel by specific performance enforcement by Optionee for violations of the Conservation Easement, (iii) recover costs and attorney fees from Optionee, and (iv) any other remedy or damage to which Optionor and/or any other party to the Final Settlement Agreement may be entitled. Notwithstanding the foregoing, Optionee shall in no event be responsible or liable for damages, costs, expenses or attorney fees as a result of matters over which Optionee had no control (including, without limitation, actions of third parties, acts of God, weather and fire) that result in a violation of the terms of the Conservation Easement, or inability to obtain timely funding for the Second Conveyance under this Option Agreement. Optionor may also recover any consideration paid to Optionee in excess of the consideration permitted in Section II, Paragraph 6 and seek such other remedies as set forth in the Final Settlement Agreement and related documents. Either by deed, Memorandum of Understanding, or similar agreement, all lands transferred to Optionee, USFS, NPS or TWRA, to the extent reasonably practicable, under the terms of this Option Agreement or Section II, Paragraph 6 above, shall be managed by the title holder as undeveloped, natural areas, except that any Protected Property transferred to TWRA shall remain part of the existing wildlife management areas and available for public hunting and fishing.

8. Risk of Loss. The parties agree that all risk of loss from damage to the Protected Property by any cause prior to the Closing shall be Optionor's and shall not pass to Optionee until the Closing, except such damages as may be attributable to Optionee, its employees, agents, representatives, invitees, or licensees as a result or arising out of the activity described in Section I, Paragraphs 6 and 7 hereinabove for which damages Optionee shall be solely liable.

9. Taxes. To the extent any real property taxes are due in connection with the Protected Property prior to Closing and prior to the transfer of title by Optionor to Optionee, such taxes shall be prorated between the parties. Optionee shall be responsible for any and all real property taxes from and after the date of the conveyance by Optionor to Optionee of Optionor's interest therein (*i.e.*, from and after the date of Closing). If the Protected Property is subject to one or more Greenbelt filings pursuant to *Tenn. Code Ann. § 67-5-1001 et. seq.*, as amended, any rollback taxes that become due and payable as a result of the sale of the Protected Property shall be paid at Closing by Optionor.

10. Remedies. In the event either party hereunder shall fail to perform its respective obligations under this Option Agreement, the non-defaulting party shall be entitled to pursue such remedies as may be available to it, at law or in equity, including, but not limited to, specific performance. Furthermore, and in addition to the foregoing, in the event that the default is the failure to close by Optionee by the Closing, Optionor may retain the Deposit, and may collect from Optionee the cost of the appraisal, as liquidated damages for such failure to close, which shall be Optionor's sole remedy in the event of such failure to close.

11. Optionor's Representations. Optionor hereby makes the following representations, warranties and covenants, as of the date hereof and which shall be true as of Closing:

(a) Due Authorization. Optionor hereby represents that this Option Agreement has been duly authorized, executed and delivered by all necessary action on the part of Optionor, constitutes the valid and binding agreement of Optionor and is enforceable in accordance with its terms.

(b) Environmental Matters. To Optionor's current actual knowledge, the Protected Property being conveyed is not in violation of any applicable environmental or other law.

(c) Litigation. To Optionor's current actual knowledge, there are no claims, actions, suits, proceedings or investigations pending against or affecting Optionor or involving the Protected Property at law or in equity or before any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality.

(d) Condemnation. To Optionor's current actual knowledge, Optionor has received no written notice of any condemnation proceedings against the Protected Property, or of the desire of any public authority or other entity to take or use the Protected Property or any part thereof.

12. Disclaimer as to Condition of Protected Property. Except for the representations set forth in Section II, Paragraph 11 above, Optionee acknowledges that it has not relied upon any advice or representation of Optionor or its employees, agents or other representatives in connection with this transaction. Furthermore, Optionee specifically acknowledges that any portion of the Protected Property conveyed pursuant to this Option Agreement is being purchased on an "AS IS, WITH ALL FAULTS" basis and neither Optionor nor any of its employees, agents or other representatives make or imply nor have they made or implied any warranties as to the condition of the Protected Property, including, but not limited to, the following:

(a) the quality, nature, adequacy and physical condition of the Protected Property, or any portion thereof;

(b) the quality, nature, adequacy and physical condition of the soils, geology, and any ground water of the Protected Property, or any portion thereof;

(c) the development potential of the Protected Property, or any portion thereof, the Protected Property's use, habitability, merchantability or fitness, suitability, value or adequacy for any particular purpose;

(d) the zoning or other legal status of the Protected Property, or any portion thereof, or any other public or private restrictions on the use thereof;

(e) the compliance of the Protected Property, or any portion thereof, with any applicable codes, laws, regulations, statutes, ordinances, covenants, conditions and restrictions of any governmental or quasi-governmental entity or of any other person or entity;

(f) the presence or removal of hazardous or toxic materials, substances or wastes in, on, under or upon or about the Protected Property, or any portion thereof, or any adjoining or neighboring property or any other environmental matter of any nature whatsoever;

(g) the costs to preserve and maintain the Protected Property, or any portion thereof.

SECTION III Miscellaneous

1. **Entire Agreement and Amendment.** This Option Agreement (including Section I, Section II, Section III and the Exhibits attached and other documents to be executed pursuant hereto) represents the final agreement between and understanding of the parties regarding the subject matter hereof and may not be changed, amended or modified except by an instrument in writing executed by the parties hereto.

2. **Successors and Assigns.** This Option Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their authorized successors, assigns, Affiliates, Successors-in-Interest and any Transferee. Optionee may not assign this Option Agreement or any of its rights, interests or obligations hereunder to any person or entity, without the prior written consent of Optionor. The rights, interest and obligations of Optionor hereunder may be assigned to an Affiliate, Successor-in-Interest and any Transferee, by operation of law or by Optionor, without Optionee's prior written consent.

3. **Construction.** This Option Agreement has been negotiated and prepared by the parties in accordance with the terms and provisions of the Final Settlement Agreement, and has been reviewed and approved by their respective legal counsel. Accordingly, the parties acknowledge and agree that legal or equitable principles which would require the construction of this Option Agreement or any provision of this Option Agreement against the party drafting this Option Agreement shall not apply in any construction or interpretation hereof.

4. **Notices.** All notices, demands, requests, consents, approvals or communications that either party desires or is required to give to the other (including the Option Notice and Exercise Notice) shall be in writing. Any such notices, demands, consents, approvals or communications may be sent to the intended recipient at the address set forth hereinbelow using registered or certified mail, return receipt requested, personal delivery, or expedited courier. Unless specifically provided otherwise herein, no such notice, demand, consent, approval or communication shall be deemed given unless and until it is actually received by the intended recipient. The parties may change the address to which notices, demands, consents, approvals and other communications hereunder are to be delivered by giving the other party written notice in the manner herein set forth.

If to Optionor:

If to Optionee:

5. **Waivers.** No waiver by any party of any default, misrepresentation, or breach of warranty or covenant hereunder, whether intentional or not, shall be deemed to extend to any prior or subsequent default, misrepresentation, or breach of warranty or covenant hereunder or affect in any way any rights arising by virtue of any prior or subsequent such occurrence.

6. **Severability.** If any provision of this Option Agreement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this Option Agreement and the application of such provisions to persons or circumstances other than those as to which it is found to be invalid shall not be affected thereby.

7. **Expenses.** Each of the parties shall bear its own cost and expense (including legal fees and expenses) incurred in connection with this Option Agreement and the transactions contemplated hereby. The documentary stamp tax or transfer taxes on the conveyance to Optionee shall be the obligation of Optionee. Optionor shall pay the cost of preparation of the Deed.

8. **Captions.** The captions herein have been inserted solely for convenience of reference and are not part of this Option Agreement and shall have no effect upon construction or interpretation.

9. **Counterparts.** The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart, if any, shall be controlling.

10. **Applicable Law.** The interpretation and performance of this Option Agreement shall be governed by Tennessee law, without regard to rules or laws governing conflicts of law.

11. **Further Assurances.** The parties agree that at any time following the execution of this Option Agreement, and from time to time thereafter, they shall execute and deliver such further instruments of assurance, transfer, endorsement, direction or authorization as may be necessary or otherwise reasonably requested by the parties to fully consummate the transaction contemplated hereunder and to fully comply with any laws or regulations in connection with this transaction or otherwise.

IN WITNESS WHEREOF, the parties have executed this Option Agreement by and through their duly authorized representatives on the day and year first above written.

OPTIONOR:

ALCOA POWER GENERATING INC.

By: _____
Its: _____

OPTIONEE:

THE NATURE CONSERVANCY

By: _____
Its: _____

STATE OF _____)
)
COUNTY OF _____)

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of **ALCOA POWER GENERATING INC.**, the within named bargainor, a corporation, and that he as such _____, being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____. 20____.

Notary Public

My Commission Expires: _____

STATE OF _____)
)
 COUNTY OF _____)

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of **THE NATURE CONSERVANCY**, the within named bargainor, a corporation, and that he as such _____, being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____, 20____.

 Notary Public

My Commission Expires:_____

EXHIBIT LIST

*Exhibit A	Description of Protected Property
*Exhibit B	Description of Property Not Included in Protected Property
Exhibit C	Memorandum of Understanding with USFS

* To be developed prior to execution of the Option Agreement.

Appendix B-3.6

Exhibit C

March 17, 2004

MEMORANDUM OF UNDERSTANDING
between
ALCOA POWER GENERATING INC.,
THE NATURE CONSERVANCY,
TENNESSEE WILDLIFE RESOURCES AGENCY,

and the
UNITED STATES FOREST SERVICE
for the
DISPOSITION AND MANAGEMENT OF PROPERTIES OWNED BY ALCOA POWER
GENERATING INC.

BLOUNT AND MONROE COUNTIES, TENNESSEE
Agreement No. 00-CO-11080400XX-XXX

The purpose of this Memorandum is to establish and record agreed-upon policies and procedures by and among Alcoa Power Generating Inc., a corporation organized and existing under and by virtue of the laws of the State of Tennessee, (hereinafter "APGI"), The Nature Conservancy, a not-for-profit corporation organized under the laws of the District of Columbia, (hereinafter "TNC"), the Tennessee Wildlife Resources Agency, an agency of the State of Tennessee ("TWRA"), and the U.S. Department of Agriculture, Forest Service (hereinafter "Forest Service") to govern the management of land located in Blount and Monroe Counties, Tennessee upon fee acquisition by the United States of America for inclusion in the Cherokee National Forest as noted in the Agreement for Option and Sale of Real Estate ("Option") dated 200____, attached to and made part of this Memorandum. The subject land is called herein the "Protected Property."

The Protected Property will be maintained for its conservation values in accordance with this Memorandum subject to APGI's "Reserved Rights," which rights will run with the land and which rights are described and identified in that certain Term Conservation Easement and Declaration of Restrictive Covenants between APGI and TNC dated 200____ ("Conservation Easement") and as further identified in and reserved under that certain deed from APGI to TNC dated 200____ of record in _____ ("Deed"). To the extent allowed under federal law, the United States of America will hold the Protected Property in perpetuity as part of the Cherokee National Forest.

This Memorandum is intended to establish the responsibility of each party and provide for the long-term management objectives of the Protected Property titled in the United States of America for management by the Forest Service and will be subject to the following overall policies:

1. APGI, TNC, TWRA and the Forest Service will cooperatively plan the maintenance, use and management of the Protected Property. Such cooperative planning will

begin upon final acquisition of the Protected Property by the United States of America for inclusion in the Cherokee National Forest and managed under the Cherokee National Forest Land and Resources Management Plan (hereinafter the "Forest Plan").

2. Long-term management of the Protected Property will include land uses and practices that are consistent with the objectives of this Memorandum. This includes, but is not limited to, the protection of the natural, scenic, open space, forest, wildlife habitat, watershed, historical, cultural, educational and recreational values of the Protected Property that are vital to the ecological integrity of the Southern Appalachian eco-region.

3. The Forest Service will take the necessary steps to designate the Protected Property with the appropriate management prescription as defined in the Forest Plan as developed in accordance with the National Forest Management Act of 1976 (P.L. 94-579, 90 Stat. 2743). This designation will specifically outline the long-term management practices that are compatible with the management objectives of the Protected Property.

4. Typical objectives in the prescription shall include actions that would not change the overall characteristic of the Protected Property. This shall include, but is not limited to, the following:

(a) **No Construction.** Except as necessary to ensure compliance with the terms of this Memorandum, there shall be no constructing or placing of any building or structure of whatsoever nature, recreational facility, fence, asphalt or concrete pavement, antenna, utility pole, tower, conduit, line, sodium vapor light or any other temporary or permanent structure or facility in, on or above the Protected Property, provided, however, that hiking trails, associated trail heads and primitive camp sites, including shelters, may be developed and designated within the Protected Property. Furthermore, no signs, billboards or other advertising displays shall be placed on the Protected Property. Notwithstanding the foregoing, signs may be placed on the Protected Property that (i) state the name, address or other management information pertaining to the Protected Property, (ii) identify or regulate permitted on-site activities, including trail and camp site use, (iii) identify and acknowledge the cooperation of parties involved in the preservation and protection of the Protected Property, (iv) control unauthorized entry on or use of the Protected Property, and/or marking and posting boundaries, so long as such signs do not in either placement, number, or design significantly diminish the scenic character of the Protected Property.

(b) **No Excavation.** There shall be no ditching, draining, diking, filling, excavating, dredging, mining or drilling, removal of topsoil, sand, gravel, rock, minerals or other materials, nor any building of roads or change in the topography or surface hydrology of the Protected Property in any manner, except as may be needed in trail and primitive camp site construction.

(c) **No Cutting or Removal.** There shall be no removal, harvesting, destruction or cutting of trees, shrubs or plants, planting of trees, shrubs or plants, use of fertilizers, plowing, grazing of domestic animals, or disturbance or change in the natural habitat in any manner, except the cutting down or removal of trees or other vegetation for the purpose of maintaining forest health and natural diversity of species, removing

exotics and invasive species, and developing and maintaining hiking trails and trail heads, including primitive camping sites and/or shelters.

(d) **No Dumping.** There shall be no storage or dumping of ashes, trash, garbage, or other unsightly or offensive material, hazardous substance, or toxic waste, nor any placement of underground storage tanks in, on, or under the Protected Property; there shall be no changing of the topography through the placing of soil or other substance or material such as land fill or dredging spoils, nor shall activities be conducted on the Protected Property that could cause erosion or siltation on the Protected Property.

(e) **No Pollution.** There shall be no pollution, alteration, depletion or extraction of surface water, natural water courses, lakes, ponds, marshes, subsurface water or any other water bodies, nor shall activities be conducted on the Protected Property that would be detrimental to water quality or that could alter the natural water level or quality or flow in or over the Protected Property.

(f) **No Vehicles, Bikes, Horses.** Except as may be needed for administrative access by the Forest Service or TWRA and their authorized agents, there shall be no operation of motorized vehicles, such as snowmobiles, dune buggies, motorcycles, all-terrain or off-road vehicles, hang gliders, aircraft, or any other types of mechanized vehicles. Except as may be necessary for access to the Protected Property by the Forest Service or TWRA, there shall also be no operation of non-motorized bikes, or any other types of non-motorized vehicles or transportation modes on the Protected Property nor shall there be horses allowed or introduced upon or onto the Protected Property. Furthermore, there shall be no introduction of any non-native species upon or onto the Protected Property except for biocontrol purposes as deemed necessary by the Forest Service under the Forest Plan.

(g) **No Exploration.** There shall be no exploration for, or development and extraction of, minerals and hydrocarbons by any mining method or any other method.

(h) **Continuation of Current Restrictions.** This Memorandum and the Protected Property shall remain subject to the terms, conditions and restrictions of the TWRA Agreements (as defined in the Conservation Easement) (it being the intent of the parties that TWRA continue to manage the Protected Property to the extent possible), that certain Tennessee Department of Conservation Agreement dated March 30, 1970 (to the extent applicable) and to all encumbrances and restrictions which are presently of record, or are otherwise ascertainable by physical inspection of the Protected Property, and apply to the Protected Property or any portion thereof.

5. Hunting shall be permitted on the Protected Property only to the extent determined and authorized by TWRA under the TWRA Agreements or under other agreements to which TWRA and the fee simple owner of the Protected Property are parties.

6. TNC will transfer title to the Protected Property in accordance with the Option, regulations contained 36 CFR 254, Forest Service Manual 5400 and the Uniform Appraisal Standards for Federal Land Acquisitions.

7. Any final conveyance of the Protected Property to the United States of America by TNC may effect a merger of the fee simple interest and the Conservation Easement, and the Protected Property shall then be subject only to those rights reserved by APGI in the prior deed of conveyance of the fee simple interest to TNC, including the Reserved Rights as described in the Conservation Easement; the Forest Service specifically acknowledging that the Protected Property is subject to and encumbered by said Reserved Rights and the Forest Service shall not take or permit any action that interferes therewith.

8. This instrument is executed as of the date of the last signature and shall be reviewed by the parties every five years. This Memorandum shall expire upon designation of a management prescription in the Cherokee National Forest Land and Resource Management Plan. Expiration shall occur by operation of law and shall not require notice, any decision document, or any environmental analysis or other documentation. Termination of this Memorandum shall not affect APGI's Reserved Rights, which rights shall specifically survive any such termination.

9. Any information furnished to the Forest Service under this instrument is subject to the Freedom of Information Act (5 U.S.C. 552).

10. This instrument in no way restricts APGI, TNC, TWRA or the Forest Service from participating in similar activities with other public or private agencies, organizations, and individuals.

11. The principal contacts for this instrument are:

Forest Service:

Fire and Land Staff Officer (or its successor)
Cherokee National Forest
P.O. Box 2010
Cleveland, Tennessee 37320
(423) 476-9700

APGI:

Vice President of Hydro Operations (or its successor)
Alcoa Power Generating Inc.
300 N. Hall Road
Alcoa, Tennessee 37701-2516
(865) 977-3334

TNC:

Tennessee State Director (or its successor)
The Nature Conservancy
2021 21st Avenue South
Suite C-400
Nashville, Tennessee 37212
(615)383-9909

TWRA:

() _____

Any notices given hereunder shall be sent to the individual and address set forth hereinabove using registered or certified mail, return receipt requested, personal delivery, or expedited courier. The parties may change the individual to whom notice is given and/or the address identifying the location to which notice is sent by giving the other parties written notice in the manner herein set forth.

12. Nothing in this Memorandum shall obligate either the Forest Service, APCI or TNC to obligate or transfer any funds. Specific work projects or activities that involve the transfer of funds, services, or property among the various agencies and offices of the Forest Service and any parties to this Memorandum will require execution of separate agreements and be contingent upon the availability of appropriated funds. Such activities must be independently authorized by appropriate statutory authority. This Memorandum does not provide such authority. Negotiation, execution, and administration of each such agreement must comply with all applicable statutes and regulations.

13. Nothing in this instrument shall affect the rights and obligations of either APCI or TNC as set forth in the Conservation Easement and the Option.

14. Modifications within the scope of this instrument can be made by mutual consent of the parties, by the issuance of a written modification, signed and dated by all parties, prior to any changes being performed.

15. In exercising its Reserved Rights, which exercise shall be without restriction, charge or assessment of any kind or nature, APCI (and any Transferee as defined in the Conservation Easement), its invitees, licensees, contractors and agents shall:

(a) take all reasonable precaution to prevent wild fires upon the Protected Property and lands adjacent thereto and shall not be liable for any fires resulting from causes beyond their reasonable control including, but not limited to, acts of God and third parties outside their direction;

(b) not use the Protected Property nor authorize the Protected Property to be used for any purpose or purposes other than in furtherance of the Reserved Rights;

(c) maintain the Protected Property and the improvements placed thereon by APCI from time to time, if any, in proper repair and in a safe and sanitary condition;

(d) permit the Forest Service and its agents and employees to inspect the Protected Property at all reasonable times and as often as deemed necessary in the performance of Forest Service official duties so long as such activities are subordinate to and do not interfere with APCI's Reserved Rights, provided however, that in the event said access or inspection requires the Forest Service or its agents and employees to go upon or cross lands owned by APCI, neither the Forest Service nor its agents nor employees shall go upon or cross said lands without APCI's prior consent;

(e) dispose of brush and refuse resulting from the exercise of APGI's Reserved Rights in such manner or method as APGI has historically and customarily utilized, provided, however, APGI shall utilize best management practices to control or limit soil erosion when constructing new projects, and;

(f) not open borrow pits outside of the immediate graded section nor relocate existing roadways without consulting with the Forest Service. Provided, however, that nothing in this section shall require obtaining the consent of the Forest Service to either open a borrow pit or relocate existing roadways.

(g) make a good faith effort to cooperate with the Forest Service and make reasonable efforts to preserve, protect and promote the conservation values of the Protected Property.

IN WITNESS WHEREOF, the parties hereto have executed this Memorandum as of the last written date below:

Forest Supervisor
Cherokee National Forest

Date

<<NAME>>
<<TITLE>>
Alcoa Power Generating Inc.

Date

<<NAME>>
<<TITLE>>
The Nature Conservancy

Date

<<NAME>>
<<TITLE>>
Tennessee Wildlife Resources Agency

Date

This instrument has been reviewed and
approved for format and authority.

FS Agreements Specialist

Date

**B-3.7 Permanent Conservation Easement and
Declaration of Restrictive Covenants Between the
Licensee and The Nature Conservancy –
Tennessee Riparian Lands**

This Instrument Prepared By:
Wayne R. Kramer, Esq.
KRAMER, RAYSON, LEAKE, RODGERS & MORGAN, LLP
P. O. Box 629
Knoxville, TN 37901-0629

**TENNESSEE RIPARIAN LANDS CONSERVATION EASEMENT
AND
DECLARATION OF RESTRICTIVE COVENANTS**

THIS TENNESSEE RIPARIAN LANDS CONSERVATION EASEMENT AND DECLARATION OF RESTRICTIVE COVENANTS (the "Tennessee Riparian Easement") is made this ____ day of _____, 200_, between **ALCOA POWER GENERATING INC.**, a corporation organized and existing under and by virtue of the laws of the State of Tennessee with offices in Knox and Blount Counties, Tennessee and addresses of _____, and _____, respectively ("Grantor"), and **THE NATURE CONSERVANCY**, a not-for-profit corporation incorporated under the laws of the District of Columbia, which is headquartered at 4245 North Fairfax Drive, Arlington, Virginia 22203-1606, and which maintains a local office at 2021 21st Avenue South, Suite C-400, Nashville, Tennessee 37212 ("Grantee").

*** * * W I T N E S S E T H * * ***

WHEREAS, Grantor is the owner in fee simple of certain real property located in Blount and Monroe Counties, Tennessee, which borders the Little Tennessee River as it flows through the Chilhowee and Calderwood Reservoirs, as more particularly described on Exhibit A attached hereto and incorporated herein by reference (hereinafter referred to as the "Tennessee Riparian Property"); and

WHEREAS, Grantor operates power generating facilities in the Little Tennessee River Valley as the licensee of the Tapoco Hydroelectric Project under a license issued by the Federal Energy Regulatory Commission ("FERC") Project No. 2169 (the "Project"); and

WHEREAS, the Tennessee Riparian Property shall specifically exclude all real property more particularly described on Exhibit B, attached hereto and incorporated herein by reference, which property is retained in fee ownership by Grantor, and is utilized for purposes which may include, but are not limited to, purposes related to the Project, utilization for corridors or rights-of-way in connection with power transmission lines, communications, distribution or utility lines of any nature and related plant and equipment (collectively the "Power Line Areas"); and

WHEREAS, on _____, 200__, the new license for the Project was issued to Grantor by FERC, as that license may be amended ("Project License"); and

WHEREAS, in furtherance of the Project and in compliance with that certain Final Settlement Agreement made and entered into on _____, 200__, by and between Grantor and other participants in the process for issuing a new license for the Project ("Final Settlement Agreement"), Grantor desires to grant, transfer and convey this Tennessee Riparian Easement to Grantee, and Grantee desires to receive and accept this Tennessee Riparian Easement, upon and subject to certain terms and conditions set forth herein; and

WHEREAS, in its present state as an undeveloped area, the Tennessee Riparian Property possesses natural, scenic, open space, forest, wildlife habitat, watershed protection, historical, cultural, educational and/or recreational values (collectively, "Conservation Values") which Conservation Values are of great importance to Grantor, the people of and visitors to Blount and Monroe Counties, and the people of and visitors to the State of Tennessee; and

WHEREAS, the characteristics of the Tennessee Riparian Property, its current use and state of improvement, are described in a report entitled Baseline Report of _____, dated _____ prepared by Grantee for the Grantor (the "Baseline Report"); Grantor having worked with the Grantee to ensure that the report is a complete and accurate description of the Tennessee Riparian Property as of the date of this Tennessee Riparian Easement, with said Baseline Report to be used by Grantor and Grantee to assure that any future changes in the use of the Tennessee Riparian Property will be consistent with the terms of this Tennessee Riparian Easement, but which Baseline Report is not intended to preclude the use of other evidence to establish the present condition of the Tennessee Riparian Property if there is a controversy over its use; and

WHEREAS, Grantor intends and Grantee acknowledges that this Tennessee Riparian Easement herein granted shall at all times remain subject to all applicable provisions of the Project License, and all activities undertaken by Grantor or any Transferee in connection therewith, and any other lawful requirements of FERC, as well as all rights and obligations of Grantor or any Transferee, as they may deem necessary in their sole discretion, to maintain and operate the Project, Power Line Areas and all power transmission lines, utility lines of any nature, communication lines, related equipment and all associated improvements (collectively "Power Lines, Equipment and Improvements") specifically including, but not limited to, access to Power Lines, Equipment and Improvements, and other Project and non-Project land areas, Power Line Areas, or otherwise, for Project, power generation, power transmission and other utility purposes provided that Grantor will make reasonable efforts to assure that its continued use of the Tennessee Riparian Property will preserve, protect and promote the Conservation Values; and

WHEREAS, Grantee meets the requirements of a "qualified organization" under Section 170(h) of the Internal Revenue Code of 1986, as amended (the "Code") and is a publicly supported, tax-exempt non-profit organization under §§ 501(c)(3) and 509(a)(1) of the Code; and

WHEREAS, Grantor and Grantee desire to conserve the Conservation Values of the Tennessee Riparian Property that are vital to the ecological integrity of the Southern Appalachian ecoregion; and

WHEREAS, Grantor intends that the Conservation Values of the Tennessee Riparian Property be preserved and maintained by the continuation of land use patterns, including, without limitation, those relating to natural, scenic, open space, forest, wildlife habitat, watershed protection, historical, cultural, educational and/or recreational uses existing at the time of this Tennessee Riparian Easement, and which allow continued management of the lands as part of the Tennessee Wildlife Management Area, as applicable; and

WHEREAS, the Tennessee Conservation Easement Act of 1981, as amended through the date hereof (the "Act"), § 66-9-301, *et seq.* of the *Tennessee Code Annotated*, permits the creation of conservation easements for purposes which include retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants or wildlife and preserving the historical, architectural, archaeological, or cultural aspects of the Tennessee Riparian Property; and

WHEREAS, Grantor and Grantee intend to create with this document a "conservation easement," permanent in nature, as that term is defined in the Act.

NOW, THEREFORE, in consideration of the above and the mutual covenants, terms, conditions and restrictions contained herein, Grantor hereby grants and conveys to Grantee this permanent Tennessee Riparian Easement, in and over the Tennessee Riparian Property of the nature and character, and only to the extent hereinafter set forth.

1. Definitions.

(a) "Affiliates" means any other individual, corporation, partnership, association, limited liability company, joint stock company, trust or other unincorporated organization that is directly or indirectly, or through one or more intermediaries, controlled by or under the common control of Grantor.

(b) "FERC Project Boundary" shall mean the boundary of the Project as defined in the Project License

(c) "Reserved Rights" shall have the meaning and include all rights reserved by Grantor under Section 5 hereof.

(d) "Successor-in-Interest" shall mean the surviving entity resulting from the merger, consolidation or other corporate restructuring by or of Grantor, provided, however, that the surviving entity is the authorized licensee of the Project License.

(e) "Transferee" means Affiliates and Successors-in-Interest, and shall, for the purposes of this Tennessee Riparian Easement, also include any successors, assigns or lessees

of Grantor, any owner of the Power Line Areas (and any successors or assigns thereof) and any Project License holder.

(f) "TWRA Agreements" means that License Agreement made and entered into by and between Grantor and the Tennessee Wildlife Resources Agency ("TWRA"), on April 6, 1987, as amended by instrument dated October 23, 1996, and as supplemented by the Cooperative Agreement made and entered into by said parties on May 30, 2002, and as such may be amended, extended or replaced, from time to time.

2. **Purpose.** The purpose of this Tennessee Riparian Easement is (a) to grant and convey a permanent conservation easement to Grantee on certain of Grantor's riparian, non-Project lands such that the lands subject to this Tennessee Riparian Easement, combined with other lands of Grantor that are protected either through (i) inclusion within the Project boundary, (ii) the Permanent Conservation Easement and Declaration of Restrictive Covenants for Corridor Lands dated _____ from Grantor to Grantee, or (iii) the Permanent Conservation Easement and Declaration of Restrictive Covenants for Bulge Property (Lakey Woods Knob) dated _____ from Grantor to Grantee will create up to a total of 200 feet of protection based on a horizontal projection as measured from the normal full pool reservoir elevation of the Chilhowee (elevation 874') and Calderwood (elevation 1087.8') Reservoirs, and (b) to assure that said lands, as more particularly described in Exhibit A, will be preserved predominantly in their undeveloped, natural, scenic, open space and/or forested condition. Grantee specifically acknowledges that the water level along the Tennessee Riparian Property will be subject to variations and may rise and fall as operation of the Project facilities may make necessary or desirable within the constraints of the Project License.

3. **Term.** This Tennessee Riparian Easement is intended to be permanent in nature, and shall continue in full force and effect in perpetuity, subject, however, to the terms and conditions herein.

4. **Prohibited Use.** Subject to the rights and authority of any third party as provided by law in connection with law enforcement or other emergency needs, any activity on or use of the Tennessee Riparian Property inconsistent with the purpose of this Tennessee Riparian Easement is prohibited. Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited on the Tennessee Riparian Property, except Reserved Rights which are specifically and unconditionally retained by Grantor and any Transferee:

(a) **No Construction.** Except as necessary to ensure compliance with the terms hereof, there shall be no constructing or placing of any building or structure of whatsoever nature, recreational facility, fence, asphalt or concrete pavement, antenna, utility pole, tower, conduit, line, sodium vapor light or any other temporary or permanent structure or facility in, on or above the Tennessee Riparian Property. Furthermore, no signs, billboards or other advertising displays shall be placed on the Tennessee Riparian Property. Notwithstanding the foregoing, signs may be placed on the Tennessee Riparian Property that (i) state the name, address or other management information pertaining to the Tennessee Riparian Property, (ii) identify or regulate permitted on-site activities, (iii) identify and acknowledge the cooperation

of parties involved in the preservation and protection of the Tennessee Riparian Property and/or (iv) control unauthorized entry on or use of the Tennessee Riparian Property, so long as such signs do not in either placement, number, or design significantly diminish the scenic character of the Tennessee Riparian Property.

(b) **No Excavation.** There shall be no ditching, draining, diking, filling, excavating, dredging, mining or drilling, removal of topsoil, sand, gravel, rock, minerals or other materials, nor any building of roads or change in the topography or surface hydrology of the Tennessee Riparian Property in any manner.

(c) **No Cutting or Removal.** There shall be no removal, harvesting, destruction or cutting of trees, shrubs or plants, planting of trees, shrubs or plants, use of fertilizers, plowing, grazing of domestic animals, or disturbance or change in the natural habitat in any manner, except the cutting down or removal of trees or other vegetation for the purpose of maintaining forest health and natural diversity of species and removing exotics and invasive species.

(d) **No Dumping.** There shall be no storage or dumping of ashes, trash, garbage, or other unsightly or offensive material, hazardous substance, or toxic waste, nor any placement of underground storage tanks in, on, or under the Tennessee Riparian Property; there shall be no changing of the topography through the placing of soil or other substance or material such as land fill or dredging spoils, nor shall activities be conducted on the Tennessee Riparian Property that could cause erosion or siltation on the Tennessee Riparian Property.

(e) **No Pollution.** There shall be no pollution, alteration, depletion or extraction of surface water, natural water courses, lakes, ponds, marshes, subsurface water or any other water bodies, nor shall activities be conducted on the Tennessee Riparian Property that would be detrimental to water quality or that could alter the natural water level or quality or flow in or over the Tennessee Riparian Property.

(f) **No Vehicles, Bikes, Horses.** There shall be no operation of motorized vehicles, such as snowmobiles, dune buggies, motorcycles, all-terrain or off-road vehicles, hang gliders, aircraft, or any other types of mechanized vehicles. There shall also be no operation of non-motorized bikes, or any other types of non-motorized vehicles or transportation modes on the Tennessee Riparian Property. There shall also be no horses nor shall there be the introduction of any non-native species except as otherwise provided in Section 6(h) hereinbelow upon or onto the Tennessee Riparian Property.

(g) **No Exploration.** There shall be no exploration for, or development and extraction of, minerals and hydrocarbons by any mining method or any other method.

(h) **Continuation of Current Restrictions.** This Tennessee Riparian Easement and the Tennessee Riparian Property shall remain subject to the terms, conditions and restrictions of the TWRA Agreements, that certain Tennessee Department of Conservation Agreement dated March 30, 1970 (to the extent applicable), as such may be amended, extended

or replaced, from time to time, and to all encumbrances and restrictions which are presently of record and apply to the Tennessee Riparian Property or any portion thereof.

5. **Reserved Rights.** Notwithstanding any prohibition or restriction set forth herein to the contrary, and recognizing that Grantor is and shall remain the fee simple owner of the Tennessee Riparian Property, Grantor hereby specifically, unconditionally and without restriction, charge or assessment of any kind or nature reserves to itself and any Transferee the following rights, powers and authorities as may be necessary, or appropriate:

(a) **Existing and Future Uses.** The right to use, and to restrict the use of, the Tennessee Riparian Property and to vary the water level along same when necessary or desirable for any and all purposes in connection with the Project, Project License, the Power Line Areas, Power Lines, Equipment and Improvements and the Final Settlement Agreement, including, but not limited to, (i) power generation, power transmission and other utility purposes, (ii) installation, utilization, construction, reconstruction, operation, repair and maintenance of pathways and roadways (located or to be located on the Tennessee Riparian Property, non-Tennessee Riparian Property or otherwise), (iii) rights-of-way management, including, but not limited to, vegetation and exotic species management and the right to utilize herbicides, in accordance with best management practices and applicable law, including aerial application, for purposes of controlling vegetation within such rights-of-way, (iv) Project recreation areas, (v) safety and security, (vi) access to or activities upon the Tennessee Riparian Property due to emergency or extraordinary circumstances, including, but not limited to, fire and medical emergency, and (vii) any other encumbrances or agreements to which Grantor is bound as of the date first above written, or any other lawful purposes relating to the subject of this Section 5. The Tennessee Riparian Easement herein granted shall in all respects and at all times remain subject to the terms and conditions of the Project License, and Grantor's rights and obligations in connection therewith, and to any other lawful requirements of FERC.

(b) **Transfer.** The right to transfer, assign, convey, sell, give, mortgage, lease or otherwise transfer or convey the Tennessee Riparian Property, provided such conveyance is subject to the terms of this Tennessee Riparian Easement.

(c) **Tree Removal.** The right, but not the obligation, to cut and/or remove fallen, threatened, damaged or diseased trees, shrubs or plants required to maintain Power Line Areas, Power Lines, Equipment and Improvements, to cut firebreaks, to construct, reconstruct, operate, repair and maintain ingress and egress pathways or roadways on the Tennessee Riparian Property solely for purposes in connection with the operation of the Project, Power Line Areas, Power Lines, Equipment and Improvements and for such other Project, power generation, power transmission, or other utility purposes, including, but not limited to, reasonable removal or cutting of trees, shrubs or plants in a customary and historical manner.

(d) **Ingress, and Egress and Project Maintenance.** The right to ingress and egress to, from and over the Tennessee Riparian Property for any purpose and at any time relating to or arising from the Reserved Rights, and to access other property owned or leased by

Grantor or its Transferees provided that such other property is used for purposes consistent with power generation, power transmission and other utility purposes.

6. **Grantee's Rights.** To accomplish the purpose of this Tennessee Riparian Easement and subject to the other terms and conditions herein, the following rights are conveyed to Grantee:

(a) **Right to Protect.** The right to preserve and protect the Conservation Values of the Tennessee Riparian Property.

(b) **Right of Entry.** The right of Grantee's staff, contractors and associated natural resource management professionals to enter the Tennessee Riparian Property and cross other lands retained by Grantor, by motor vehicles on existing roads at reasonable times and with prior notice, for the purposes of: (i) inspecting the Tennessee Riparian Property to determine if Grantor is complying with the covenants and purposes of this Tennessee Riparian Easement; (ii) enforcing the terms of this Tennessee Riparian Easement; (iii) allowing management of the Tennessee Riparian Property as a Tennessee Wildlife Management Area; (iv) taking any and all actions with respect to the Tennessee Riparian Property as may be necessary or appropriate, with or without order of court, to remedy or abate violations hereof; (v) making scientific and educational observations and studies and taking samples in such a manner as will not disturb the use and quiet enjoyment of the Tennessee Riparian Property by Grantor or its rights, duties and obligations pertaining to any of the Reserved Rights; (vi) monitoring and management as described below; and (vii) preventing any activity on or use of the Tennessee Riparian Property that is inconsistent with the purpose of this Tennessee Riparian Easement and requiring the restoration of such areas or pieces of the Tennessee Riparian Property that may be damaged by inconsistent activity or use, pursuant to remedies set forth in Section 14.

(c) **Hiking Trails.** Nothing herein shall prohibit the development and maintenance of hiking trails by Grantee so long as such trails do not interfere with or otherwise impair Grantor's Reserved Rights.

(d) **Monitoring and Management.** The right, but not the obligation, to monitor the natural habitats on the Tennessee Riparian Property and to manage them, to the extent deemed appropriate by Grantee, to ensure their continued presence and viability on the Tennessee Riparian Property. Such activities shall be in accordance with management practices of Grantee, which may include, but not be limited to, mowing, trapping, prescribed burning, or the control of exotic species, and related management activities that ensure the ecological integrity of the Tennessee Riparian Property and/or removal of exotic, invasive or otherwise undesirable species.

(e) **Enforcement.** The right to prevent any activity on or use of the Tennessee Riparian Property that is inconsistent with the purpose of this Tennessee Riparian Easement and to require the restoration of such areas or features of the Tennessee Riparian Property that may be damaged by any inconsistent activity or use, pursuant to Section 14.

(f) **Discretionary Consent.** Grantor shall not be required to acquire Grantee's consent for any purposes associated with the Project or Reserved Rights. If, owing to unforeseen or changed circumstances, any of the activities listed in Section 4 are deemed desirable by both Grantor and Grantee, Grantee may, in its sole discretion, give permission for such activities, subject to the limitations herein. Such requests from Grantor for permission, and permission for activities requiring Grantee's consent under Section 4, shall be in writing delivered to Grantee not less than thirty (30) days prior to the date Grantor intends to undertake the activity in question, and shall describe the proposed activity in sufficient detail to allow Grantee to judge the consistency of the proposed activity with the purpose of this Tennessee Riparian Easement. The notice shall describe the nature, scope, design, location, time table and any other material aspect of the proposed activity in sufficient detail to permit Grantee to make an informed judgment as to its consistency with the purpose of this Tennessee Riparian Easement. Grantee may give its permission only if both Grantor and Grantee determine that such activities (i) do not violate the purpose of this Tennessee Riparian Easement and (ii) either enhance or do not impair any significant conservation interests associated with the Tennessee Riparian Property.

(g) **Grantee's Approval.** Grantee shall grant or withhold its approval in writing within thirty (30) days of receipt of Grantor's written request therefor. Except for extraordinary or emergency circumstances, if Grantee fails to issue a written approval or denial of a requested activity within thirty (30) days of receipt of Grantor's written request therefor, Grantee shall be deemed to have granted approval of the requested activity, and Grantor shall be expressly authorized to proceed therewith.

(h) **Biocontrol Agents.** Notwithstanding any provisions in Section 4 to the contrary Grantee and Grantor may jointly consent to the introduction of non-native plants or animals ("Biocontrol Agents") onto the Protected Property for the purpose of controlling exotic or invasive species of plants and animals. The introduction of any Biocontrol Agent shall be approved in advance in writing by Grantor and Grantee, and shall be consistent with or pursuant to a generally accepted program of introduction of a particular Biocontrol Agent approved or implemented by either the United States Department of Agriculture or the United States Department of the Interior.

7. **Release.** Although intended to be permanent in nature, should there be a termination of any of the rights and privileges granted under this Tennessee Riparian Easement, Grantee or its successors or assigns, shall execute such instrument, upon the request and to the satisfaction of Grantor, as necessary to evidence said termination. Such instrument shall be in whatever form as shall be required for recordation in the appropriate Register of Deeds office.

8. **Grantee Acknowledgment.** Grantee specifically acknowledges and understands that the easements, rights, privileges and licenses herein granted are subject to all applicable terms and conditions of the Project License, and to any other lawful requirements of FERC thereunder, to the Reserved Rights, and to all other conditions set forth hereunder. By accepting the conveyance of this Tennessee Riparian Easement, Grantee agrees that the easements, rights, privileges and licenses herein conveyed will not be used in any manner that would endanger

health, create a nuisance or otherwise be incompatible with the overall recreational uses associated with the Project, or otherwise interfere with the Reserved Rights.

9. **Public Access.** Nothing contained in this Tennessee Riparian Easement shall give Grantee or its successors or assigns the right to grant to the public a right to enter upon or to use the Tennessee Riparian Property or any portion thereof if no such right existed in the public immediately prior to the execution of this Tennessee Riparian Easement; however, the Tennessee Riparian Property may be used by the general public as authorized by the mandate of the entity which holds the fee ownership of the Tennessee Riparian Property, so long as the public use does not violate the prohibitions listed in Section 4 above. Provided further that the Tennessee Riparian Property will continue to be managed as a Tennessee Wildlife Management Area so long as the TWRA Agreements continue in effect. Additionally, Grantor and any Transferees may restrict public access to any portion of the Tennessee Riparian Property for safety or security purposes, or for any other purpose deemed appropriate for the Project or power generation, power transmission or other utility purposes.

10. **Hunting.** Hunting shall be permitted on the Tennessee Riparian Property only to the extent determined and authorized by TWRA under the TWRA Agreements or under other agreements to which TWRA and the fee simple owner of the Tennessee Riparian Property are parties.

11. **Costs, Liabilities, Taxes and Environmental Compliance.**

(a) **Costs, Legal Requirements and Liabilities.** Grantor retains all responsibilities and shall bear all costs and liabilities which are normal and incident to its ownership and use of the Tennessee Riparian Property, including the maintenance of adequate liability insurance coverage. Grantor remains solely responsible for obtaining any applicable governmental permits and approvals for any construction or other activity or use permitted by this Tennessee Riparian Easement, and all such construction or other activity or use shall be undertaken in accordance with all applicable federal, state and local laws, regulations and requirements. Grantor shall keep the Tennessee Riparian Property free of any liens arising out of any work performed for, materials furnished to, or obligations incurred by Grantor. Nothing contained in the Tennessee Riparian Easement, however, shall be construed to entitle Grantee, or any other person or entity claiming by or through Grantee, to bring any action against Grantor for any injury to or change in the Tennessee Riparian Property resulting from causes beyond the control of Grantor, including, without limitation, vandalism or illegal acts, fire, flood, storm, earth movement or any act of God, or from any prudent action taken by Grantor under emergency conditions to prevent, abate or mitigate any injury to the Tennessee Riparian Property, the Project, Power Line Areas, or Power Lines, Equipment and Improvements resulting from any such causes.

(b) **Taxes.** Grantor shall pay all real estate taxes and assessments lawfully assessed against the Tennessee Riparian Property and shall provide to Grantee receipted tax bills or other reasonable evidence satisfactory to Grantee within sixty (60) days of written request for same.

(c) **Control.** Nothing in this Tennessee Riparian Easement shall be construed as giving rise, in the absence of a judicial decree, to any right or ability in Grantee to exercise physical or managerial control over the day-to-day operations of the Tennessee Riparian Property, or any of Grantor's activities on the Tennessee Riparian Property, or otherwise to become an operator with respect to the Tennessee Riparian Property within the meaning of The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), and *Tenn. Code Ann.* § 68-212-101, *et seq.*

12. **Mutual Release and Indemnification.** Each party agrees to and does hereby release, hold harmless, defend and indemnify the other from any and all liabilities, including, but not limited to, damage to the Tennessee Riparian Property, personal injury (including death), losses, damages, judgments, costs, expenses and reasonable attorneys' fees that the indemnified party may suffer or incur as a result of or arising out of the activities of the indemnifying party on the Tennessee Riparian Property.

13. **Title.** Grantor covenants and represents that (i) Grantor is the sole owner and is seized of the Tennessee Riparian Property in fee simple and has good right to grant and convey this Tennessee Riparian Easement; (ii) except as set forth in Section 4(h), the Tennessee Riparian Property is free and clear of any and all liens, encumbrances, and exceptions except as are of record in the Register's Offices for Blount and Monroe Counties, Tennessee, as applicable, or otherwise ascertainable by physical inspection of the Tennessee Riparian Property, and (iii) Grantee shall have the use of and enjoy all of the benefits derived from and arising out of this Tennessee Riparian Easement; and (iv) as of the date of this Tennessee Riparian Easement and as of the date this Tennessee Riparian Easement is recorded, Grantor covenants that the Tennessee Riparian Property shall not be encumbered by a deed of trust, mortgage or similar monetary lien.

14. **Remedies.**

(a) **Notice of Violation; Corrective Action.** If either Grantor or Grantee determines that a breach of the terms of this Tennessee Riparian Easement has occurred or is threatened (the "non-breaching party") by the other party (the "breaching party"), the non-breaching party shall give written notice to the breaching party of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Tennessee Riparian Property resulting from any use or activity inconsistent with the purpose of this Tennessee Riparian Easement, to restore the portion of the Tennessee Riparian Property so injured to its prior condition in accordance with a plan agreed upon by Grantor and Grantee.

(b) **Injunctive Relief.** If the breaching party fails to cure the violation within sixty (60) days after receipt of notice thereof from the non-breaching party, or under circumstances where the violation cannot reasonably be cured within a sixty (60) day period, or fails to begin curing such violation within the sixty (60) day period, or fails to continue diligently to cure such violation until finally cured, the non-breaching party may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Tennessee Riparian Easement, to enjoin the violation, *ex parte* as necessary, by temporary or permanent

injunction, and to require the restoration of the Tennessee Riparian Property to the condition that existed prior to any such injury.

(c) **Damages.** If there is a violation of any of the provisions of this Tennessee Riparian Easement, the non-breaching party shall notify (by written instrument) the breaching party, who shall promptly cure the violation by (a) ceasing the violation, or (b) restoring the Tennessee Riparian Property to its condition before the violation, or (c) both, as the case may be. The parties shall have the right, but not the obligation, to pursue legal actions or proceedings at law and equity to enforce the terms and conditions of this Tennessee Riparian Easement, including, but not limited to, the right to cause such violation to be cured, and if a court of competent jurisdiction determines that a violation has occurred hereunder, the party in violation shall reimburse to the other, as applicable, for all reasonable expenses incurred, including, but not limited to, legal fees, whether in or out of court, and the cost of legal proceedings brought to cure the violation or to collect such reimbursement.

(d) **Scope of Relief.** The parties' rights under this Section 14 apply equally in the event of either actual or threatened violations of the terms of this Tennessee Riparian Easement. The parties agree that their remedies at law for any violation of the terms of this Tennessee Riparian Easement are inadequate and that they shall be entitled to the injunctive relief described in Section 14(b), both prohibitive and mandatory, in addition to such other relief to which they may be entitled, including specific performance of the terms of this Tennessee Riparian Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The parties' remedies described in this Section 14 shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

(e) **Costs of Enforcement.** All reasonable, actual costs incurred by the parties in enforcing the terms of this Tennessee Riparian Easement, including, without limitation, actual costs and expenses of suit, actual and reasonable attorneys' fees, and any costs of restoration necessitated by any violation of the terms of this Tennessee Riparian Easement shall be borne by the breaching party.

(f) **Forbearance.** Forbearance by either party to exercise its rights under this Tennessee Riparian Easement in the event of any breach of any term of this Tennessee Riparian Easement by Grantor or Grantee shall not be deemed or construed to be a waiver of such term or of any subsequent breach of the same or any other term of this Tennessee Riparian Easement, or of any of the party's rights under this Tennessee Riparian Easement. No delay or omission by the parties in the exercise of any right or remedy upon any breach by the other shall impair such right or remedy or be construed as a waiver.

(g) **Waiver of Certain Defenses.** The parties hereby waive any defenses of laches, estoppel, or prescription.

(h) **Acts Beyond Parties' Control.** Nothing contained in this Tennessee Riparian Easement shall be construed to entitle a party to bring any action against the other for

any injury to or change in the Tennessee Riparian Property resulting from causes beyond the party's control, including, without limitation, vandalism or illegal acts, unauthorized wrongful acts of third parties, fire, flood, storm, earth movement, and acts of God, or from any prudent action taken by either party under emergency conditions to prevent, abate, or mitigate injury to the Tennessee Riparian Property or the Project or Power Lines, Equipment and Improvements resulting from any such causes.

(i) **Acts of Third Parties.** Grantee may enforce such prohibition against third parties as authorized under § 66-9-307 of the Act.

15. **Parties Subject to Easement.** The covenants agreed to and the terms, conditions, and restrictions imposed by this Tennessee Riparian Easement shall be binding upon Grantor and Transferees and upon Grantee, and their respective employees, agents, representatives, invitees, successors and assigns, and shall continue as a servitude running with this Tennessee Riparian Easement.

16. **Subsequent Transfers.** Grantor agrees that the terms, conditions, restrictions and purposes of this grant or reference thereto will be inserted by Grantor in any subsequent deed or other legal instrument by which Grantor divests either the fee simple title or possessory interest in the Tennessee Riparian Property.

17. **Assignment.** The parties hereto recognize and agree that the benefits and burdens of this Tennessee Riparian Easement are in gross and that Grantee may not transfer or assign the benefits of this Tennessee Riparian Easement to any party without the prior written consent of Grantor, which consent shall not be unreasonably withheld, delayed or conditioned. Provided, however, in the event that either the United States Forest Service ("USFS"), the National Park Service ("NPS") or TWRA becomes the fee simple owner of property immediately adjacent to all or a portion of the Tennessee Riparian Property ("Adjacent Governmental Agency Owner") protected by this Tennessee Riparian Easement ("Adjacent Tennessee Riparian Property"), Grantee may assign this Tennessee Riparian Easement or a portion thereof to the appropriate Adjacent Governmental Agency Owner as it relates to such Adjacent Tennessee Riparian Property. In the event of such assignment, Grantee shall notify Grantor in writing at least fifteen (15) days prior to such assignment. Grantee further hereby covenants and agrees that if it transfers or assigns the easement it holds under this indenture, any organization receiving the interest will be a "qualified organization" as that term is defined in § 170(h) of the Code, that is organized and operated primarily for one of the conservation purposes specified in §170(h)(4)(A) of the Code, and Grantee further covenants and agrees that the terms of the transfer or assignment will be such that the transferee or assignee will be required to continue to carry out the conservation purposes that the grant hereof was originally intended to advance.

18. **Extinguishment and Condemnation.**

(a) **Extinguishment.** If circumstances arise in the future that render the purpose of this Tennessee Riparian Easement impossible to accomplish, this Tennessee Riparian Easement can only be terminated or extinguished, either at the joint request of Grantor

and Grantee, whether in whole or in part, or by judicial proceedings in a court of competent jurisdiction. The amount of the proceeds to which Grantee shall be entitled, after the satisfaction of prior claims, from any sale, exchange, or involuntary conversion of all or any portion of the Tennessee Riparian Property subsequent to such termination or extinguishment, shall be the stipulated fair market value of this Tennessee Riparian Easement, or proportionate part thereof, as determined in accordance with Section 18(b) or Internal Revenue Code ("IRC") Regulation § 1.170A-14, if different.

(b) **Valuation.** This Tennessee Riparian Easement constitutes a real property interest immediately vested in Grantee, which, for the purposes of Section 18(a) the parties stipulate to have a fair market value determined by multiplying (1) the fair market value of the Tennessee Riparian Property unencumbered by this Tennessee Riparian Easement (minus any increase in value after the date of this grant attributable to improvements) by (2) x/y , which is the ratio of the value of this Tennessee Riparian Easement at the time of the grant to the value of the Tennessee Riparian Property, without deduction from the value of this Tennessee Riparian Easement, at the time of this grant. (The values at the time of this grant are or shall be those values used for this grant pursuant to § 170(h) of the Code. For the purposes of this section, the ratio of the value of this Tennessee Riparian Easement to the value of the Tennessee Riparian Property unencumbered by this Tennessee Riparian Easement shall remain constant.) It is intended that this Section 18(b) be interpreted to adhere to and be consistent with IRC Regulation § 1.170A-14(g)(6)(ii). Fair market value shall be determined using the Uniform Appraisal Standards for Federal Land Acquisitions (2000) as may be revised from time to time.

(c) **Condemnation.** If all or any part of the Tennessee Riparian Property is taken by exercise of the power of eminent domain or acquired by purchase in lieu of condemnation, whether by public, corporate or other authority, so as to terminate this Tennessee Riparian Easement, in whole or in part, Grantor and Grantee shall act jointly to recover the full value of the interests in the Tennessee Riparian Property subject to the taking or in lieu purchase and all direct or incidental damages resulting therefrom. All expenses reasonably incurred by Grantor and Grantee in connection with the taking or in lieu purchase shall be paid out of the amount recovered. Grantee's share of the balance of the amount recovered shall be determined by multiplying the balance by the ratio set forth in Section 18(b).

(d) **Application of Proceeds.** Grantee shall use any proceeds received under the circumstances described in this Section 18 in a manner consistent with its conservation purposes, which are exemplified by the grant of this Tennessee Riparian Easement.

19. Miscellaneous Provisions.

(a) **Estoppel Certificates.** Upon request by Grantor, Grantee shall within twenty (20) days execute and deliver to Grantor, or to any party designated by Grantor, any document, including an estoppel certificate, which certifies, to the best of Grantee's knowledge, Grantor's compliance with any obligation of Grantor contained in this Tennessee Riparian Easement or otherwise evidences the status of this Tennessee Riparian Easement. Such

certification shall be limited to the condition of the Tennessee Riparian Property as of Grantee's most recent inspection. If Grantor requests more current documentation, Grantee shall conduct an inspection, at Grantor's expense, within thirty (30) days of receipt of Grantor's written request thereof.

(b) **Termination of Rights and Obligations.** A party's rights and obligations under this Tennessee Riparian Easement terminate upon transfer of the party's interest in this Tennessee Riparian Easement or Tennessee Riparian Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

(c) **Severability.** If any provision of this Tennessee Riparian Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this Tennessee Riparian Easement and the application of such provisions to persons or circumstances other than those as to which it is found to be invalid shall not be affected thereby.

(d) **Gender; Number.** Whenever the context of this Tennessee Riparian Easement so requires, references of the masculine gender shall include the feminine or neuter gender and corporate or other such entities, the singular number shall include the plural and vice versa, and reference to one or more parties hereto shall include all authorized assignees of Grantee and any Transferee.

(e) **Expenses.** Except for such costs and expenses for which either party may be liable pursuant to the provisions of Section 14 hereinabove, each of the parties shall bear its own cost and expense (including legal fees and expenses) incurred in connection with this Tennessee Riparian Easement and the transactions contemplated hereby.

(f) **Entire Agreement and Amendment.** This Tennessee Riparian Easement represents the final agreement between and understanding of the parties regarding the subject matter hereof and may not be changed, amended or modified except by an instrument in writing executed by the parties hereto.

(g) **Captions.** The captions herein have been inserted solely for convenience of reference and are not a part of this Tennessee Riparian Easement and shall have no effect upon construction or interpretation.

(h) **Counterparts.** The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

(i) **Notices.** All notices, demands, requests, consents, approvals or communications that either party desires or is required to give to the other shall be in writing. Any such notices, demands, consents, approvals or communications may be sent to the intended recipient at the address set forth hereinbelow using registered or certified mail, return receipt requested, personal delivery, or expedited courier, but no such notice, demand, consent,

approval or communication shall be deemed given unless and until it is actually received by the intended recipient. The parties may change the address to which notices, demands, consents, approvals and other communications hereunder are to be delivered by giving the other party written notice in the manner herein set forth.

If To Grantor:

If to Grantee:

(j) **Evidence of Termination of Reserved Rights.** In the event Grantor determines, in its sole discretion, that reservation of some or all of its Reserved Rights is no longer necessary, it shall notify Grantee in writing and, upon the written request of the Grantee, execute in recordable form such documentation as the parties agree is appropriate to evidence the termination of said Reserved Rights or any portion thereof.

(k) **Applicable Law.** The interpretation and performance of this Tennessee Riparian Easement shall be governed by Tennessee law, without regard to rules or laws governing conflicts of law.

IN WITNESS WHEREOF, the parties have executed this Tennessee Riparian Easement by their duly authorized representatives the day and year first above written.

GRANTOR:

ALCOA POWER GENERATING INC.

By: _____
Its: _____

GRANTEE:

THE NATURE CONSERVANCY

By: _____
Its: _____

STATE OF _____)
)
COUNTY OF _____)

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of **ALCOA POWER GENERATING INC.**, the within named bargainor, a corporation, and that he as such _____, being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____, 200____.

Notary Public

My Commission Expires:_____

STATE OF _____)
)
COUNTY OF _____)

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of **THE NATURE CONSERVANCY**, the within named bargainor, a corporation, and that he as such _____, being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____, 200____.

Notary Public

My Commission Expires:_____

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EXHIBIT LIST

*Exhibit A	Description of Tennessee Riparian Property
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*Exhibit B	Description of Property Not Included in Tennessee Riparian Property
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* To be developed prior to execution of the Tennessee Riparian Easement

**B-3.8 Term Conservation Easement and
Declaration of Restrictive Covenants Between the
Licensee and a Qualified Land Trust Acceptable
to the Parties – North Carolina Riparian Lands**

**NORTH CAROLINA RIPARIAN LANDS CONSERVATION EASEMENT
AND
DECLARATION OF RESTRICTIVE COVENANTS**

Prepared By and Mail to:
Wayne R. Kramer, Esq.
KRAMER, RAYSON, LEAKE, RODGERS & MORGAN, LLP
P. O. Box 629
Knoxville, TN 37901-0629

THIS NORTH CAROLINA RIPARIAN LANDS CONSERVATION EASEMENT AND DECLARATION OF RESTRICTIVE COVENANTS (the "North Carolina Riparian Easement") is made this ____ day of _____, 200__, between **ALCOA POWER GENERATING INC.**, a corporation organized and existing under and by virtue of the laws of the State of Tennessee with offices in Knox and Blount Counties, Tennessee and addresses of _____, and _____, respectively ("Grantor"), and _____, a _____ corporation incorporated under the laws of the _____, which is headquartered at _____, and which maintains a local office at _____ ("Grantee").

* * * W I T N E S S E T H * * *

WHEREAS, Grantor is the owner in fee simple of certain real property located in Graham and Swain Counties, North Carolina, in the vicinity of Santeetlah, Cheoah and Calderwood Reservoirs, the Cheoah River and Yellow Creek, as more particularly described on Exhibit A attached hereto and incorporated herein by reference (hereinafter referred to as the "North Carolina Riparian Property"); and

WHEREAS, Grantor operates power generating facilities in the Little Tennessee River Valley as the licensee of the Tapoco Hydroelectric Project under a license issued by the Federal Energy Regulatory Commission ("FERC") Project No. 2169 (the "Project"); and

WHEREAS, the North Carolina Riparian Property shall specifically exclude all real property more particularly described on Exhibit B, attached hereto and incorporated herein by reference, which property is retained in fee ownership by Grantor, and is utilized for purposes which may include, but are not limited to, purposes related to the Project, utilization for corridors or rights-of-way in connection with power transmission lines, communications, distribution or utility lines of any nature and related plant and equipment (collectively the "Power Line Areas"); and

WHEREAS, on _____, 200__, the new license for the Project was issued to Grantor by FERC, as that license may be amended ("Project License"); and

WHEREAS, in furtherance of the Project and in compliance with that certain Final Settlement Agreement made and entered into on _____, 200__, by and between Grantor and other participants in the process for issuing a new license for the Project ("Final Settlement Agreement"), Grantor desires to grant, transfer and convey this North Carolina Riparian Easement to Grantee, and Grantee desires to receive and accept this North Carolina Riparian Easement, upon and subject to certain terms and conditions set forth herein; and

WHEREAS, in its present state as an undeveloped area, the North Carolina Riparian Property possesses natural, scenic, open space, forest, wildlife habitat, watershed protection, historical, cultural, educational and/or recreational values (collectively, "Conservation Values") which Conservation Values are of great importance to Grantor, the people of and visitors to Graham and Swain Counties, and the people of and visitors to the State of North Carolina; and

WHEREAS, Grantor intends and Grantee acknowledges that this North Carolina Riparian Easement herein granted shall at all times remain subject to all applicable provisions of the Project License, and all activities undertaken by Grantor or any Transferee in connection therewith, and any other lawful requirements of FERC, as well as all rights and obligations of Grantor or any Transferee, as they may deem necessary in their sole discretion, to maintain and operate the Project, Power Line Areas and all power transmission lines, utility lines of any nature, communication lines, related equipment and all associated improvements (collectively "Power Lines, Equipment and Improvements") specifically including, but not limited to, access to Power Lines, Equipment and Improvements, and other Project and non-Project land areas, Power Line Areas, or otherwise, for Project, power generation, power transmission and other utility purposes provided that Grantor will make reasonable efforts to assure that its continued use of the North Carolina Riparian Property will preserve, protect and promote the Conservation Values; and

WHEREAS, Grantee meets the requirements of a "qualified organization" under Section 170(h) of the Internal Revenue Code of 1986, as amended (the "Code") and is a publicly supported, tax-exempt non-profit organization under §§ 501(c)(3) and 509(a)(1) of the Code; and

WHEREAS, Grantor and Grantee desire to conserve the Conservation Values of the North Carolina Riparian Property that are vital to the ecological integrity of the Southern Appalachian ecoregion; and

WHEREAS, Grantor intends that the Conservation Values of the North Carolina Riparian Property be preserved and maintained by the continuation of land use patterns, including, without limitation, those relating to natural, scenic, open space, forest, fish and wildlife habitat, watershed protection, historical, cultural, educational and/or recreational uses existing at the time of this North Carolina Riparian Easement, and which allow continued fish and wildlife management action by the North Carolina Wildlife Resources Commission ("NCWRC"), the United States Forest Service ("USFS") and the United States Fish and Wildlife Service ("USFWS"), as applicable; and

WHEREAS, §121-34, *et seq.* of the *North Carolina General Statutes* ("NCGS") permits the creation of conservation easements for purposes which include retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants or wildlife and preserving the historical, architectural, archaeological, or cultural aspects of the North Carolina Riparian Property; and

WHEREAS, Grantor and Grantee intend to create with this document a "conservation agreement," as that term is defined in NCGS §121-35(1).

NOW, THEREFORE, in consideration of the above and the mutual covenants, terms, conditions and restrictions contained herein, Grantor hereby grants and conveys to Grantee this North Carolina Riparian Easement, in and over the North Carolina Riparian Property of the nature and character, and only to the extent hereinafter set forth.

1. Definitions.

(a) "Affiliates" means any other individual, corporation, partnership, association, limited liability company, joint stock company, trust or other unincorporated organization that is directly or indirectly, or through one or more intermediaries, controlled by or under the common control of Grantor.

(b) "FERC Project Boundary" shall mean the boundary of the Project as defined in the Project License.

(c) "Grantee" shall mean _____ and, if approved pursuant to Section 17 hereof, shall also mean any successor holder of this North Carolina Riparian Easement, including, but not limited to, any other individual, corporation, partnership,

association, limited liability company, joint stock company, trust or other unincorporated organization that is directly or indirectly, or through one or more intermediaries, controlled by or under the common control of _____, or any surviving entity resulting from the merger, consolidation or other restructuring of _____.

(d) "Reserved Rights" shall have the meaning and include all rights reserved by Grantor under Section 5 hereof.

(e) "State" shall mean the State of North Carolina.

(f) "Successor-in-Interest" shall mean the surviving entity resulting from the merger, consolidation or other corporate restructuring by or of Grantor, provided, however, that the surviving entity is the authorized licensee of the Project License.

(g) "Transferee" means Affiliates and Successors-in-Interest, and shall, for the purposes of this North Carolina Riparian Easement, also include any successors, assigns, permittees, or lessees of Grantor, any owner of the Power Line Areas (and any successors or assigns thereof) and any Project License holder.

2. **Purpose.** The purpose of this North Carolina Riparian Easement is to assure that portion of the North Carolina Riparian Property which is located between the FERC Project waters and up to a 200 foot horizontal offset projection from the normal full reservoir elevation contour at 1,276.8 foot elevation for the Cheoah Reservoir, at the 1,087.8 foot elevation for the Calderwood Reservoir, at the 1,940.9 foot elevation for the Santeetlah Reservoir, and up to a 200 foot horizontal offset projection from the water's edge along the Cheoah River and other blue-line streams, and up to a 100 foot horizontal offset projection from the water's edge on six perennial streams that are tributaries to Yellow Creek (exclusive of the Santeetlah Pipeline/Tunnel Corridor), if and where Grantor owns the contiguous property, all as reflected on Exhibit A, will be preserved predominantly in its undeveloped, natural, scenic, open space and/or forested condition. Grantee specifically acknowledges that the water level along the North Carolina Riparian Property will be subject to variations and may rise and fall as operation of the Project facilities may make necessary or desirable within the constraints of the provisions of the Project License.

3. **Term.** This North Carolina Riparian Easement shall continue in full force and effect for the duration of the Project License stated therein as _____ years ("Term"); however, notwithstanding the foregoing, this North Carolina Riparian Easement will terminate immediately in the event that Grantor, its Affiliates or any of its Successors-in-Interest, shall cease to be the Project License holder.

4. **Prohibited Use.** Subject to the rights and authority of any third party as provided by law in connection with law enforcement or other emergency needs, any activity on or use of the North Carolina Riparian Property inconsistent with the purpose of this North Carolina Riparian Easement is prohibited. Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited on the North Carolina Riparian Property,

except Reserved Rights which are specifically and unconditionally retained by Grantor and any Transferee:

(a) **No Construction.** Except as necessary to ensure compliance with the terms hereof, there shall be no constructing or placing of any building or structure of whatsoever nature, recreational facility, fence, asphalt or concrete pavement, antenna, utility pole, tower, conduit, line, sodium vapor light or any other temporary or permanent structure or facility in, on or above the North Carolina Riparian Property. Furthermore, no signs, billboards or other advertising displays shall be placed on the North Carolina Riparian Property. Notwithstanding the foregoing, signs may be placed on the North Carolina Riparian Property that (i) state the name, address or other management information pertaining to the North Carolina Riparian Property, (ii) identify or regulate permitted on-site activities, (iii) identify and acknowledge the cooperation of parties involved in the preservation and protection of the North Carolina Riparian Property and/or (iv) control unauthorized entry on or use of the North Carolina Riparian Property, so long as such signs do not in either placement, number, or design significantly diminish the scenic character of the North Carolina Riparian Property.

(b) **No Excavation.** There shall be no ditching, draining, diking, filling, excavating, dredging, mining or drilling, removal of topsoil, sand, gravel, rock, minerals or other materials, nor any building of roads or change in the topography or surface hydrology of the North Carolina Riparian Property in any manner.

(c) **No Cutting or Removal.** There shall be no removal, harvesting, destruction or cutting of trees, shrubs or plants, planting of trees, shrubs or plants, use of fertilizers, plowing, grazing of domestic animals, or disturbance or change in the natural habitat in any manner, except the cutting down, removal or planting of trees or other vegetation for the purpose of maintaining forest health and natural diversity of species, riparian restoration, creating or enhancing habitat for native and desired non-native fish and wildlife species as approved by Grantor and NCWRC, USFS or USFWS, as applicable, and removing exotics and invasive vegetation species.

(d) **No Dumping.** There shall be no storage or dumping of ashes, trash, garbage, or other unsightly or offensive material, hazardous substance, or toxic waste, nor any placement of underground storage tanks in, on, or under the North Carolina Riparian Property; there shall be no changing of the topography through the placing of soil or other substance or material such as land fill or dredging spoils, nor shall activities be conducted on the North Carolina Riparian Property that could cause erosion or siltation on the North Carolina Riparian Property.

(e) **No Pollution.** There shall be no pollution, alteration, depletion or extraction of surface water, natural water courses, lakes, ponds, marshes, subsurface water or any other water bodies, nor shall activities be conducted on the North Carolina Riparian Property that would be detrimental to water quality or that could alter the natural water level or quality or flow in or over the North Carolina Riparian Property.

(f) **No Vehicles, Bikes, Horses.** There shall be no operation of motorized vehicles, such as snowmobiles, dune buggies, motorcycles, all-terrain or off-road vehicles, hang gliders, aircraft, or any other types of mechanized vehicles. There shall also be no operation of non-motorized bikes, or any other types of non-motorized vehicles or transportation modes on the North Carolina Riparian Property. There shall also be no horses nor shall there be the introduction of any non-native species except as otherwise provided in Section 6(h) and Section 6(i)hereinbelow upon or onto the North Carolina Riparian Property.

(g) **No Exploration.** There shall be no exploration for, or development and extraction of, minerals and hydrocarbons by any mining method or any other method.

(h) **Continuation of Current Restrictions.** This North Carolina Riparian Easement and the North Carolina Riparian Property shall remain subject to encumbrances and restrictions which are presently of record and apply to the North Carolina Riparian Property or any portion thereof.

5. **Reserved Rights.** Notwithstanding any prohibition or restriction set forth herein to the contrary, and recognizing that Grantor is and shall remain the fee simple owner of the North Carolina Riparian Property, Grantor hereby specifically, unconditionally and without restriction, charge or assessment of any kind or nature reserves to itself and any Transferee the following rights, powers and authorities as may be necessary, or appropriate:

(a) **Existing and Future Uses.** The right to use, and to restrict the use of, the North Carolina Riparian Property and to vary the water level along same when necessary or desirable for any and all purposes in connection with the Project, Project License, the Power Line Areas, Power Lines, Equipment and Improvements and the Final Settlement Agreement, including, but not limited to, (i) power generation, power transmission and other utility purposes, (ii) installation, utilization, construction, reconstruction, operation, repair and maintenance of pathways and roadways (located or to be located on the North Carolina Riparian Property, non-North Carolina Riparian Property or otherwise), (iii) rights-of-way management, including, but not limited to, vegetation and exotic species management and the right to utilize herbicides, in accordance with best management practices and applicable law, including aerial application, for purposes of controlling vegetation within such rights-of-way, (iv) Project recreation areas, (v) safety and security, (vi) access to or activities upon the North Carolina Riparian Property due to emergency or extraordinary circumstances, including, but not limited to, fire and medical emergency, and (vii) any other encumbrances or agreements to which Grantor is bound as of the date first above written, or any other lawful purposes relating to the subject of this Section 5. The North Carolina Riparian Easement herein granted shall in all respects and at all times remain subject to the terms and conditions of the Project License, and Grantor's rights and obligations in connection therewith, and to any other lawful requirements of FERC.

(b) **Transfer.** The right to transfer, assign, convey, sell, give, mortgage, or lease the North Carolina Riparian Property, provided such conveyance is subject to the terms of this North Carolina Riparian Easement.

(c) **Tree Removal.** The right, but not the obligation, to cut and/or remove fallen, threatened, damaged or diseased trees, shrubs or plants required to maintain Power Line Areas, Power Lines, Equipment and Improvements, to cut firebreaks, to construct, reconstruct, operate, repair and maintain ingress and egress pathways or roadways on the North Carolina Riparian Property solely for purposes in connection with the operation of the Project, Power Line Areas, Power Lines, Equipment and Improvements and for such other Project, power generation, power transmission, or other utility purposes, including, but not limited to, reasonable removal or cutting of trees, shrubs or plants in a customary and historical manner.

(d) **Ingress, and Egress and Project Maintenance.** The right to ingress and egress to, from and over the North Carolina Riparian Property for any purpose and at any time relating to or arising from the Reserved Rights, and to access other property owned or leased by Grantor or its Transferees provided that such other property is used for purposes consistent with power generation, power transmission and other utility purposes.

6. **Grantee's Rights.** To accomplish the purpose of this North Carolina Riparian Easement and subject to the other terms and conditions herein, the following rights are conveyed to Grantee:

(a) **Right to Protect.** The right to preserve and protect the Conservation Values of the North Carolina Riparian Property.

(b) **Right of Entry.** The right of Grantee's staff, contractors and associated natural resource management professionals to enter, without prior notice, the North Carolina Riparian Property and to cross other lands retained by Grantor, by motor vehicles on existing roads at reasonable times, for the purposes of: (i) inspecting the North Carolina Riparian Property to determine if Grantor is complying with the covenants and purposes of this North Carolina Riparian Easement; (ii) enforcing the terms of this North Carolina Riparian Easement; (iii) taking any and all actions with respect to the North Carolina Riparian Property as may be necessary or appropriate, with or without order of court, to remedy or abate violations hereof; (iv) making scientific and educational observations and studies and taking samples in such a manner as will not disturb the use and quiet enjoyment of the North Carolina Riparian Property by Grantor or its rights, duties and obligations pertaining to any of the Reserved Rights; (v) monitoring and management as described below; and (vi) preventing any activity on or use of the North Carolina Riparian Property that is inconsistent with the purpose of this North Carolina Riparian Easement and requiring the restoration of such areas or pieces of the North Carolina Riparian Property that may be damaged by inconsistent activity or use, pursuant to remedies set forth in Section 14.

(c) **Hiking Trails.** The development and maintenance of hiking trails by Grantee or with Grantee's consent shall be permitted, provided that such trails are developed and maintained in consultation with and approved by Grantor and appropriate State and federal resource agencies and so long as such trails do not interfere with or otherwise impair Grantor's Reserved Rights.

(d) **Monitoring and Management.** The right, but not the obligation, to monitor the natural habitats on the North Carolina Riparian Property and to manage them, to the extent deemed appropriate by Grantee, to ensure their continued presence and viability on the North Carolina Riparian Property. Such activities shall be in accordance with management practices of Grantee, which may include, but not be limited to, mowing, trapping, prescribed burning, or the control of exotic species, and related management activities that ensure the ecological integrity of the North Carolina Riparian Property and/or removal of exotic, invasive or otherwise undesirable species.

(e) **Enforcement.** The right to prevent any activity on or use of the North Carolina Riparian Property that is inconsistent with the purpose of this North Carolina Riparian Easement and to require the restoration of such areas or features of the North Carolina Riparian Property that may be damaged by any inconsistent activity or use, pursuant to Section 14.

(f) **Discretionary Consent.** Grantor shall not be required to acquire Grantee's consent for any purposes associated with the Project or Reserved Rights. If, owing to unforeseen or changed circumstances, any of the activities listed in Section 4 are deemed desirable by both Grantor and Grantee, Grantee may, in its sole discretion, give permission for such activities, subject to the limitations herein. Such requests from Grantor for permission, and permission for activities requiring Grantee's consent under Section 4, shall be in writing delivered to Grantee not less than thirty (30) days prior to the date Grantor intends to undertake the activity in question, and shall describe the proposed activity in sufficient detail to allow Grantee to judge the consistency of the proposed activity with the purpose of this North Carolina Riparian Easement. The notice shall describe the nature, scope, design, location, time table and any other material aspect of the proposed activity in sufficient detail to permit Grantee to make an informed judgment as to its consistency with the purpose of this North Carolina Riparian Easement. Grantee may give its permission only if both Grantor and Grantee determine that such activities (i) do not violate the purpose of this North Carolina Riparian Easement and (ii) either enhance or do not impair any significant conservation interests associated with the North Carolina Riparian Property.

(g) **Grantee's Approval.** Grantee shall either grant or withhold its approval, or shall request a fifteen (15) day extension of this deadline, in writing within thirty (30) days of receipt of Grantor's written request for approval. Except for extraordinary or emergency circumstances, if Grantee fails to issue a written approval or denial of a requested activity within thirty (30) days of receipt of Grantor's written request for approval, or in the case of a timely filed extension, within forty-five (45) days of receipt of Grantor's written request for approval, Grantee shall be deemed to have granted approval of the requested activity, and Grantor shall be expressly authorized to proceed therewith.

(h) **Biocontrol Agents.** Notwithstanding any provisions in Section 4 to the contrary, Grantee and Grantor may jointly consent to the introduction of non-native species ("Biocontrol Agents") onto the Protected Property for the purpose of controlling exotic or invasive species or as part of a fish and wildlife management action by the NCWRC, USFS or USFWS. The introduction of any Biocontrol Agent shall be approved in advance in writing by

Grantor and Grantee, and shall be consistent with or pursuant to a generally accepted program of introduction of a particular Biocontrol Agent approved or implemented by either the United States Department of Agriculture or the United States Department of the Interior.

(i) **Introduction of Native and Desired Non-Native Species.** Nothing in this North Carolina Riparian Easement shall be construed as otherwise limiting the ability of State and federal resource agencies to introduce native and desired non-native fish and wildlife species into waters within the Project or onto the North Carolina Riparian Property.

(j) **Consultation Request.** Upon written request by Grantee, Grantor shall consult with Grantee as to any proposed action to be undertaken by Grantee pursuant to this Section 6 that Grantee is concerned might cause Grantor to violate its Project License. Following the conclusion of such consultation and within such time as may be agreed upon by the parties, Grantor shall deliver to Grantee a written statement, which states, to the best of Grantor's knowledge, whether Grantee's proposed action would cause Grantor to be in violation of its Project License. Such statement shall be based upon the information provided to Grantor by Grantee as to the proposed action and, if applicable, shall be limited to the condition of the North Carolina Riparian Property as of Grantor's most recent inspection.

7. **Release.** Upon termination of any of the rights and privileges granted under this North Carolina Riparian Easement, Grantee or its successors or assigns, shall execute such instrument, upon the request and to the satisfaction of Grantor, as necessary to evidence said termination. Such instrument shall be in whatever form as shall be required for recordation in the appropriate Register of Deeds office.

8. **Grantee Acknowledgment.** Grantee specifically acknowledges and understands that the easements, rights, privileges and licenses herein granted are subject to all applicable terms and conditions of the Project License, and to any other lawful requirements of FERC thereunder, to the Reserved Rights, and to all other conditions set forth hereunder. By accepting the conveyance of this North Carolina Riparian Easement, Grantee agrees that the easements, rights, privileges and licenses herein conveyed will not be used in any manner that would endanger health, create a nuisance or otherwise be incompatible with the overall recreational uses associated with the Project, or otherwise interfere with the Reserved Rights.

9. **Public Access.** Notwithstanding anything in this North Carolina Riparian Easement to the contrary, to the extent such right existed in the public immediately prior to the execution of this North Carolina Riparian Easement, the North Carolina Riparian Property may be used by the general public for ingress and egress to and from adjoining properties and water or for recreational purposes including lawful hunting, fishing and hiking (including footpaths that develop over time from the public's use of the North Carolina Riparian Property), so long as said use does not violate the prohibitions listed in Section 4 above and so long as said use does not interfere with or otherwise impair Grantor's Reserved Rights or violate any of the terms and conditions of the Project License or any other lawful requirements of FERC. Additionally, Grantor and any Transferees may restrict public access to any portion of the North Carolina Riparian Property for safety or security purposes, or for any other purpose

deemed appropriate for the Project or power generation, power transmission or other utility purposes.

10. Construction, Use, Maintenance and Repair of Rights-of-Ways and Roads in Yellow Creek Area. Notwithstanding anything in this North Carolina Riparian Easement to the contrary, and without limiting Grantor's Reserved Rights:

(a) Grantor, any Transferee and any other subsequent owner of property in the Yellow Creek Area as shown on Exhibit C attached hereto and incorporated herein by reference ("Yellow Creek Area") shall also have the following rights in the event that residential or commercial development is planned in the Yellow Creek Area:

- (i) the right to use existing rights-of-way (for roads, utility purposes, etc.) and roads, paved or unpaved, that are passable in a four-wheel drive vehicle without cutting live trees (thus excluding log skid roads that are re-grown in trees); and
- (ii) the right to construct, use, maintain and repair new roads and utility lines or improve, use, maintain and repair existing roads or utility lines located within the Yellow Creek Area in order to provide access to landlocked parcels as may be identified through field verification of roads and tributary locations, provided however, the ability to construct new roads and utility lines or improve existing roads and utility lines upon the Yellow Creek Area is limited to said construction being within a single right-of-way to each landlocked parcel.

(b) Furthermore, in the event that residential or commercial development is planned in the Yellow Creek Area that includes the construction of new or improvement of existing roads or utility lines, the individual or entity intending to so develop ("Developer") shall engage in consultation in accordance with the following process:

- (i) Developer must meet with Grantee a minimum of ninety (90) days prior to commencement of construction or improvement of any roads within the Yellow Creek Area.
- (ii) Developer shall bring to the meeting: (a) maps or sketches showing the location of proposed new or improved roads and utility lines within the Yellow Creek Area, (b) general information on the proposed development, (c) a schedule for construction of proposed new or improved roads and utility lines, (d) design standards for the proposed construction or improvements, (e) proposed construction techniques for the new or improved roads and utility lines and (f) proposed protection, mitigation or restoration measures intended to avoid, minimize or mitigate impacts to the Yellow Creek Area, resulting from the proposed road and utility lines construction or improvement.

- (iii) At the meeting, Developer will review with Grantee the information provided in order to confirm that the proposed road and utility lines construction or improvement meets best management practices and incorporates design standards intended to (a) minimize shoreline and stream bank erosion and fragmentation of habitat and (b) otherwise minimize and mitigate impacts to the Conservation Values stated in this North Carolina Riparian Easement.
- (iv) Subsequent to the meeting with Grantee, Developer may revise its proposed road and utility lines plans taking into consideration the comments of Grantee. At least sixty (60) days prior to proposed construction, Developer shall submit to the following entities, for review and comment for a thirty (30) day period, Developer's proposed road and utility lines:
 - a. North Carolina Division of Water Quality
 - b. North Carolina Wildlife Resources Commission
 - c. North Carolina Department of Cultural Resources
 - d. U.S. Fish and Wildlife Service
 - e. U.S. Forest Service
 - f. Graham County
 - g. Eastern Band of Cherokee Indians
 - h. Grantee, and
 - i. Grantor.
- (v) Developer shall incorporate the recommendations of the aforementioned entities into its proposed plans for new or improved roads and utility lines located within the Yellow Creek Area. To the extent any recommendations of the entities are in conflict, the comments of Grantee shall govern, except to the extent that a state or federal agency shows that it has jurisdiction to prescribe a result under substantive law.

11. Costs, Liabilities, Taxes and Environmental Compliance.

(a) **Costs, Legal Requirements and Liabilities.** Grantor retains all responsibilities and shall bear all costs and liabilities which are normal and incident to its ownership and use of the North Carolina Riparian Property, including the maintenance of adequate liability insurance coverage. Grantor remains solely responsible for obtaining any applicable governmental permits and approvals for any construction or other activity or use permitted by this North Carolina Riparian Easement, and all such construction or other activity or use shall be undertaken in accordance with all applicable federal, state and local laws, regulations and requirements. Grantor shall keep the North Carolina Riparian Property free of any liens arising out of any work performed for, materials furnished to, or obligations incurred by Grantor. Nothing contained in the North Carolina Riparian Easement, however, shall be construed to entitle Grantee, or any other person or entity claiming by or through Grantee, to

bring any action against Grantor for any injury to or change in the North Carolina Riparian Property resulting from causes beyond the control of Grantor, including, without limitation, vandalism or illegal acts, fire, flood, storm, earth movement or any act of God, or from any prudent action taken by Grantor under emergency conditions to prevent, abate or mitigate any injury to the North Carolina Riparian Property, the Project, Power Line Areas, or Power Lines, Equipment and Improvements resulting from any such causes.

(b) **Taxes.** Grantor shall pay all real estate taxes and assessments lawfully assessed against the North Carolina Riparian Property and shall provide to Grantee receipted tax bills or other reasonable evidence satisfactory to Grantee within sixty (60) days of written request for same.

(c) **Control.** Nothing in this North Carolina Riparian Easement shall be construed as giving rise, in the absence of a judicial decree, to any right or ability in Grantee to exercise physical or managerial control over the day-to-day operations of the North Carolina Riparian Property, or any of Grantor's activities on the North Carolina Riparian Property, or otherwise to become an operator with respect to the North Carolina Riparian Property within the meaning of The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), and NCGS §130A-310.

12. **Mutual Release and Indemnification.** Each party agrees to and does hereby release, hold harmless, defend and indemnify the other from any and all liabilities, including, but not limited to, damage to the North Carolina Riparian Property, personal injury (including death), losses, damages, judgments, costs, expenses and reasonable attorneys' fees that the indemnified party may suffer or incur as a result of or arising out of the activities of the indemnifying party on the North Carolina Riparian Property.

13. **Title.** Grantor covenants and represents that (i) Grantor is the sole owner and is seized of the North Carolina Riparian Property in fee simple and has good right to grant and convey this North Carolina Riparian Easement; (ii) except as set forth in Section 4(h), the North Carolina Riparian Property is free and clear of any and all liens, encumbrances, and exceptions except as are of record in the Register's Offices for Graham and Swain Counties, North Carolina, as applicable, or otherwise ascertainable by physical inspection of the North Carolina Riparian Property, and (iii) Grantee shall have the use of and enjoy all of the benefits derived from and arising out of this North Carolina Riparian Easement; and (iv) as of the date of this North Carolina Riparian Easement and as of the date this North Carolina Riparian Easement is recorded, Grantor covenants that the North Carolina Riparian Property shall not be encumbered by a deed of trust, mortgage or similar monetary lien.

14. **Remedies.**

(a) **Notice of Violation; Corrective Action.** If either Grantor or Grantee determines that a breach of the terms of this North Carolina Riparian Easement has occurred or is threatened (the "non-breaching party") by the other party (the "breaching party"), the non-breaching party shall give written notice to the breaching party of such violation and demand

corrective action sufficient to cure the violation and, where the violation involves injury to the North Carolina Riparian Property resulting from any use or activity inconsistent with the purpose of this North Carolina Riparian Easement, to restore the portion of the North Carolina Riparian Property so injured to its prior condition in accordance with a plan agreed upon by Grantor and Grantee. If, because of subsequent transfers of all or part of the North Carolina Riparian Property or the assignment of this North Carolina Riparian Easement, either the breaching party or the non-breaching party under this Section 14(a) is not the original Grantor (including Affiliates and Successors-in-Interest) or Grantee, then no written notice of violation shall be required prior to bringing an action to enforce the terms of this North Carolina Riparian Easement.

(b) **Injunctive Relief.** If the breaching party fails to cure the violation within sixty (60) days after receipt of notice thereof from the non-breaching party, or under circumstances where the violation cannot reasonably be cured within a sixty (60) day period, or fails to begin curing such violation within the sixty (60) day period, or fails to continue diligently to cure such violation until finally cured, the non-breaching party may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this North Carolina Riparian Easement, to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction, and to require the restoration of the North Carolina Riparian Property to the condition that existed prior to any such injury.

(c) **Damages.** If there is a violation of any of the provisions of this North Carolina Riparian Easement, the non-breaching party shall notify (by written instrument) the breaching party, who shall promptly cure the violation by (a) ceasing the violation, or (b) restoring the North Carolina Riparian Property to its condition before the violation, or (c) both, as the case may be. The parties shall have the right, but not the obligation, to pursue legal actions or proceedings at law and equity to enforce the terms and conditions of this North Carolina Riparian Easement, including, but not limited to, the right to cause such violation to be cured, and if a court of competent jurisdiction determines that a violation has occurred hereunder, the party in violation shall reimburse to the other, as applicable, for all reasonable expenses incurred, including, but not limited to, legal fees, (without giving effect to any statutory presumption regarding the amount of legal fees), whether in or out of court, and the cost of legal proceedings brought to cure the violation or to collect such reimbursement.

(d) **Scope of Relief.** The parties' rights under this Section 14 apply equally in the event of either actual or threatened violations of the terms of this North Carolina Riparian Easement. The parties agree that their remedies at law for any violation of the terms of this North Carolina Riparian Easement are inadequate and that they shall be entitled to the injunctive relief described in Section 14(b), both prohibitive and mandatory, in addition to such other relief to which they may be entitled, including specific performance of the terms of this North Carolina Riparian Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The parties' remedies described in this Section 14 shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

(e) **Costs of Enforcement.** All reasonable, actual costs incurred by the parties in enforcing the terms of this North Carolina Riparian Easement, including, without limitation, actual costs and expenses of suit, actual and reasonable attorneys' fees (without giving effect to any statutory presumption regarding the amount of legal fees), and any costs of restoration necessitated by any violation of the terms of this North Carolina Riparian Easement shall be borne by the breaching party.

(f) **Forbearance.** Forbearance by either party to exercise its rights under this North Carolina Riparian Easement in the event of any breach of any term of this North Carolina Riparian Easement by Grantor or Grantee shall not be deemed or construed to be a waiver of such term or of any subsequent breach of the same or any other term of this North Carolina Riparian Easement, or of any of the party's rights under this North Carolina Riparian Easement. No delay or omission by the parties in the exercise of any right or remedy upon any breach by the other shall impair such right or remedy or be construed as a waiver.

(g) **Waiver of Certain Defenses.** The parties hereby waive any defenses of laches, estoppel, or prescription.

(h) **Acts Beyond Parties' Control.** Nothing contained in this North Carolina Riparian Easement shall be construed to entitle a party to bring any action against the other for any injury to or change in the North Carolina Riparian Property resulting from causes beyond the party's control, including, without limitation, vandalism or illegal acts, unauthorized wrongful acts of third parties, fire, flood, storm, earth movement, and acts of God, or from any prudent action taken by either party under emergency conditions to prevent, abate, or mitigate injury to the North Carolina Riparian Property or the Project or Power Lines, Equipment and Improvements resulting from any such causes.

(i) **Acts of Third Parties.** Grantee may enforce such prohibition against third parties as may be authorized under North Carolina law.

15. **Parties Subject to Easement.** The covenants agreed to and the terms, conditions, and restrictions imposed by this North Carolina Riparian Easement shall be binding upon Grantor and Transferees and upon Grantee, and their respective employees, agents, representatives, invitees, successors and assigns, and shall continue as a servitude running concurrently with the Term of this North Carolina Riparian Easement, as provided in Section 3.

16. **Subsequent Transfers.** Grantor agrees that the terms, conditions, restrictions and purposes of this grant or reference thereto will be inserted by Grantor in any subsequent deed or other legal instrument by which Grantor divests either the fee simple title or possessory interest in the North Carolina Riparian Property.

17. **Assignment.** The parties hereto recognize and agree that the benefits and burdens of this North Carolina Riparian Easement are in gross and that Grantee may not transfer or assign the benefits of this North Carolina Riparian Easement to any party without the prior written consent of Grantor, which consent shall not be unreasonably withheld, delayed or

conditioned. Grantee further hereby covenants and agrees that if it transfers or assigns the easement it holds under this indenture, any organization receiving the interest will be a "qualified organization" as that term is defined in § 170(h) of the Code, that is organized and operated primarily for one of the conservation purposes specified in §170(h)(4)(A) of the Code, and Grantee further covenants and agrees that the terms of the transfer or assignment will be such that the transferee or assignee will be required to continue to carry out the conservation purposes that the grant hereof was originally intended to advance.

18. **Extinguishment and Condemnation.**

(a) **Extinguishment.** If circumstances arise in the future during the Term of this North Carolina Riparian Easement that render the purpose of this North Carolina Riparian Easement impossible to accomplish, this North Carolina Riparian Easement can only be terminated or extinguished, either at the joint request of Grantor and Grantee, whether in whole or in part, or by judicial proceedings in a court of competent jurisdiction. The amount of the proceeds to which Grantee shall be entitled, after the satisfaction of prior claims, from any sale, exchange, or involuntary conversion of all or any portion of the North Carolina Riparian Property subsequent to such termination or extinguishment, shall be the stipulated fair market value of this North Carolina Riparian Easement, or proportionate part thereof, as determined in accordance with Section 18(b) or Internal Revenue Code ("IRC") Regulation § 1.170A-14, if different.

(b) **Valuation.** This North Carolina Riparian Easement constitutes a real property interest immediately vested in Grantee, which, for the purposes of Section 18(a) the parties stipulate to have a fair market value determined by multiplying (1) the fair market value of the North Carolina Riparian Property unencumbered by this North Carolina Riparian Easement (minus any increase in value after the date of this grant attributable to improvements) by (2) x/y , which is the ratio of the value of this North Carolina Riparian Easement at the time of the grant to the value of the North Carolina Riparian Property, without deduction from the value of this North Carolina Riparian Easement, at the time of this grant. (The values at the time of this grant are or shall be those values used for this grant pursuant to § 170(h) of the Code. For the purposes of this section, the ratio of the value of this North Carolina Riparian Easement to the value of the North Carolina Riparian Property unencumbered by this North Carolina Riparian Easement shall remain constant.) It is intended that this Section 18(b) be interpreted to adhere to and be consistent with IRC Regulation § 1.170A-14(g)(6)(ii). Fair market value shall be determined using the Uniform Appraisal Standards for Federal Land Acquisitions (2000) as may be revised from time to time.

(c) **Condemnation.** If all or any part of the North Carolina Riparian Property is taken by exercise of the power of eminent domain or acquired by purchase in lieu of condemnation, whether by public, corporate or other authority, so as to terminate this North Carolina Riparian Easement, in whole or in part, Grantor and Grantee shall act jointly to recover the full value of the interests in the North Carolina Riparian Property subject to the taking or in lieu purchase and all direct or incidental damages resulting therefrom. All expenses reasonably incurred by Grantor and Grantee in connection with the taking or in lieu purchase shall be paid

out of the amount recovered. Grantee's share of the balance of the amount recovered shall be determined by multiplying the balance by the ratio set forth in Section 18(b).

(d) **Application of Proceeds.** Grantee shall use any proceeds received under the circumstances described in this Section 18 in a manner consistent with its conservation purposes, which are exemplified by the grant of this North Carolina Riparian Easement.

19. **Miscellaneous Provisions.**

(a) **Estoppel Certificates.** Upon request by Grantor, Grantee shall within twenty (20) days execute and deliver to Grantor, or to any party designated by Grantor, any document, including an estoppel certificate, which certifies, to the best of Grantee's knowledge, Grantor's compliance with any obligation of Grantor contained in this North Carolina Riparian Easement or otherwise evidences the status of this North Carolina Riparian Easement. Such certification shall be limited to the condition of the North Carolina Riparian Property as of Grantee's most recent inspection. If Grantor requests more current documentation, Grantee shall conduct an inspection, at Grantor's expense, within thirty (30) days of receipt of Grantor's written request thereof.

(b) **Termination of Rights and Obligations.** A party's rights and obligations under this North Carolina Riparian Easement terminate upon transfer of the party's interest in this North Carolina Riparian Easement or North Carolina Riparian Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

(c) **Severability.** If any provision of this North Carolina Riparian Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this North Carolina Riparian Easement and the application of such provisions to persons or circumstances other than those as to which it is found to be invalid shall not be affected thereby.

(d) **Gender; Number.** Whenever the context of this North Carolina Riparian Easement so requires, references of the masculine gender shall include the feminine or neuter gender and corporate or other such entities, the singular number shall include the plural and vice versa, and reference to one or more parties hereto shall include all authorized assignees of Grantee and any Transferee.

(e) **Expenses.** Except for such costs and expenses for which either party may be liable pursuant to the provisions of Section 14 hereinabove, each of the parties shall bear its own cost and expense (including legal fees and expenses) incurred in connection with this North Carolina Riparian Easement and the transactions contemplated hereby.

(f) **Entire Agreement and Amendment.** This North Carolina Riparian Easement represents the final agreement between and understanding of the parties regarding the subject matter hereof and may not be changed, amended or modified except by an instrument in writing in recordable form executed by the parties hereto.

(g) **Captions.** The captions herein have been inserted solely for convenience of reference and are not a part of this North Carolina Riparian Easement and shall have no effect upon construction or interpretation.

(h) **Counterparts.** The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

(i) **Notices.** All notices, demands, requests, consents, approvals or communications that either party desires or is required to give to the other shall be in writing. Any such notices, demands, consents, approvals or communications may be sent to the intended recipient at the address set forth hereinbelow using registered or certified mail, return receipt requested, personal delivery, or expedited courier, but no such notice, demand, consent, approval or communication shall be deemed given unless and until it is actually received by the intended recipient. The parties may change the address to which notices, demands, consents, approvals and other communications hereunder are to be delivered by giving the other party written notice in the manner herein set forth.

If To Grantor:

If to Grantee:

(j) **Evidence of Termination of Reserved Rights.** In the event Grantor determines, in its sole discretion, that reservation of some or all of its Reserved Rights is no longer necessary, it shall notify Grantee in writing and, upon the written request of the Grantee, execute in recordable form such documentation as the parties agree is appropriate to evidence the termination of said Reserved Rights or any portion thereof.

(k) **Applicable Law.** The interpretation and performance of this North Carolina Riparian Easement shall be governed by North Carolina law, without regard to rules or laws governing conflicts of law.

IN WITNESS WHEREOF, the parties have executed this North Carolina Riparian Easement by their duly authorized representatives the day and year first above written.

GRANTOR:

ALCOA POWER GENERATING INC.

By: _____
Its: _____

GRANTEE:

By: _____
Its: _____

STATE OF _____)
COUNTY OF _____)

I, _____, a Notary Public of the County and State aforesaid, certify that _____ personally came before me this day and acknowledged that he is _____ President of ALCOA POWER GENERATING INC., a Tennessee corporation, and that he, as _____ President being authorized to do so, executed the foregoing on behalf of the corporation. And the said _____ President acknowledged the said writing to be the act and deed of said corporation.

Witness my hand and official stamp or seal, this the _____, 2004.

My Commission Expires: _____
Notary Public

STATE OF _____

COUNTY OF _____

I, _____, a Notary Public of the County and State aforesaid, certify that _____ personally came before me this day and acknowledged that he is _____ President of _____, a _____ corporation, and that he, as _____ President, being authorized to do so, executed the foregoing on behalf of the corporation. And the said _____ President acknowledged the said writing to be the act and deed of said corporation.

Witness my hand and official stamp or seal, this the ____ day of _____, 2004.

My Commission Expires: _____

Notary Public

EXHIBIT LIST

- | | |
|------------|---|
| *Exhibit A | Description of North Carolina
Riparian Property and Verification of
Property Ownership by Grantor |
| *Exhibit B | Description of Property Not Included
in North Carolina Riparian Property |
| *Exhibit C | Map of Yellow Creek Area
(NPT-3), excerpt from TP621, Issue
No. 9, dated _____ |

*To be developed prior to execution of the North Carolina Riparian Easement.

**B-3.9 Warranty Deed from Licensee to NPS to a
Tract of Land Lying North of U.S. Highway 129
between Chilhowee and Calderwood Reservoirs
(Tennessee)**

THIS INSTRUMENT PREPARED BY:

Wayne R. Kramer
KRAMER, RAYSON, LEAKE,
RODGERS & MORGAN, LLP
Post Office Box 629
Knoxville, TN 37901-0629
(865) 525-5134

Map No. ____
Parcel No. ____

3/17/04

WARRANTY DEED

THIS INDENTURE (“Deed”), made and entered into this ____ day of _____, 200__, between **ALCOA POWER GENERATING INC.**, (formerly Tapoco, Inc.) a corporation organized and existing under and by virtue of the laws of the State of Tennessee, with offices in Blount and Knox Counties, Tennessee (“Grantor”), and the **UNITED STATES OF AMERICA** and its assigns, whose address is National Park Service, Land Resources Division, 1849 “C” Street, N.W., Room 2444, Washington, D.C. 20240 (“Grantee”).

W I T N E S S E T H:

WHEREAS, Grantor is the owner in fee simple of certain real property located in Blount County, Tennessee, consisting of 260 acres, more or less, the general location of which is north of U.S. Highway 129 between the Chilhowee and Calderwood Reservoirs all as more particularly described on **Exhibit A** attached hereto and incorporated herein by reference (“Complete Tract”); and

WHEREAS, Grantor operates power generating facilities in the Little Tennessee River Valley as the Licensee of the Tapoco Hydroelectric Project under a license (“Project License”) issued by the Federal Energy Regulatory Commission (“FERC”) as Project No. 2169 (the “Project”); and

WHEREAS, Grantor, in furtherance of the Project, agreed to convey a portion of the Complete Tract to Grantee, which property consists of three (3) tracts containing 185 acres, more or less, and is more particularly described on **Exhibit B** attached hereto and made a part hereof (“NPS Tracts”), subject to certain terms, conditions, and rights reserved to Grantor, including but not limited to the right to use the NPS Tracts for access to the Reserved Tract (as hereinafter defined); and

WHEREAS, this conveyance is intended to specifically exclude conveyance of title in and to a portion of the Complete Tract which Grantor shall continue to use for any purposes including, but not limited to, those specifically referenced hereinbelow; said portion of the Complete Tract to which title is specifically retained by Grantor is referred to hereinafter as the “Reserved Tract,” which Reserved Tract contains 75 acres, more or less, and is more fully described on **Exhibit C** attached hereto and made a part hereof; and

WHEREAS, Grantor further intends and Grantee further acknowledges that the NPS Tracts shall at all times remain subject to all activities described in this Deed undertaken by Grantor or any Transferee (“Transferee” shall mean any successor or assign of Grantor, any owner of the Reserved Tract and any Project License holder, their successors, assigns or lessees and shall further mean any person or entity acting through or at the request of Grantor or any Transferee) in connection with the Project, Project License, any other lawful requirements of FERC, and all power transmission lines, utility lines of any nature, communication lines, related equipment and all associated improvements owned or utilized by Grantor or any Transferee (collectively “Power Lines, Equipment and Improvements”) specifically including access to Power Lines, Equipment and Improvements, and other Project and non-Project land areas; and

WHEREAS, Grantor desires to convey the NPS Tracts to Grantee and Grantee desires to become the titled owner thereto, subject to the terms and conditions set forth herein and the parties otherwise desire to be bound by all other terms and conditions herein;

NOW, THEREFORE, Grantor, for and in consideration of the sum of One Dollar (\$1.00), and other good and valuable consideration, to it in hand paid by Grantee, the receipt of which is hereby acknowledged, including (i) the transfer by Grantee to Grantor of four (4) other tracts of land owned by Grantee and also located in Blount County, Tennessee, generally located north and east of U.S. Highway 129 as evidenced by deed of even date herewith of record in Deed Book _____, Page _____ in the Register's Office for Blount County, Tennessee and (ii) the terms and conditions and other rights and obligations set forth in this Deed, to which this conveyance is specifically subject and which terms and conditions and other rights and obligations are fundamental consideration to this transaction, has granted, bargained, sold and conveyed, and does hereby grant, bargain, sell and convey to Grantee the NPS Tracts located in Blount County, Tennessee, as more particularly described on **Exhibit B**, which NPS Tracts shall be a part of the Great Smoky Mountains National Park, subject to the exceptions and reservations hereinabove and hereinafter set forth, with the hereditaments and appurtenances thereto appertaining, hereby releasing, if applicable, all claims of homestead and dower therein.

TO HAVE AND TO HOLD the NPS Tracts herein conveyed to Grantee, its successors and assigns, forever, subject to the exceptions, reservations, limitations and covenants and conditions hereinabove and hereinafter set forth, which exceptions, reservations, limitations and covenants and conditions are understood and acknowledged by the parties, which understanding and acknowledgement are evidenced by Grantor's execution and Grantee's acceptance and recording of this Deed:

1. It is specifically understood by both Grantor and Grantee that Grantor shall and does hereby retain title to the Reserved Tract and which Reserved Tract is, and will continue to be, utilized by Grantor for any and all purposes set forth in this Deed, and Grantee shall not interfere with any such uses or purposes of Grantor.

2. It is further understood and acknowledged by Grantee that the NPS Tracts being conveyed herewith, while not within the Project boundary, shall be subject to, and Grantee shall not otherwise interfere with nor restrict, the right of the Grantor or any Transferee to use the NPS Tracts for any and all purposes in connection with or related to the Project, Project License, any other lawful requirements of FERC, and the Power Lines, Equipment and Improvements, as may be necessary or appropriate including, but not limited to, (i) installation, utilization, construction, reconstruction, operation, repair and maintenance of pathways and roadways (located or to be located on either the NPS Tracts or the Reserved Tract or otherwise), (ii) rights of way management, including, but not limited to, vegetation and exotic species management and the right to utilize herbicides in accordance with best management practices and applicable law, including aerial application, for purposes of controlling vegetation, (iii) safety and security, and (iv) any and all other encumbrances or agreements to which Grantor is bound as of the date first above written, or any other lawful purposes relating to the subject of this Deed.

3. Any and all easements, uses and/or roads, pathways and/or other rights of way and rights of access necessary or appropriate to maintain Power Lines, Equipment and Improvements over, upon and across either the NPS Tracts or the Reserved Tract, shall be and remain in full force and effect.

4. To the extent allowed under federal law, Grantee shall hold title to the NPS Tracts in perpetuity as part of national park lands and Grantee covenants and agrees that the NPS Tracts shall be managed as park lands in accordance with national park standards. In the event federal law prohibits Grantee from continuing to hold the NPS Tracts in perpetuity as part of national park lands and as a result thereof, Grantee intends to sell, transfer or assign all or any portion of the NPS Tracts, or any rights, obligations or interests therein, it shall first notify Grantor in writing of such intent. Said notice shall be sent to Grantor at 300 N. Hall Road, Alcoa, Tennessee 37701-2516 (unless or until such address is changed by written notice to Grantee) using registered or certified mail, return receipt requested, personal delivery, or expedited courier.

5. Upon execution of this Deed, Grantor and Grantee shall enter into an easement agreement for the purpose of law enforcement and resource management ("Management Easement") of the Reserved Tract as further described in the Management Easement.

6. It is further understood and agreed that in the event Grantor alleges that Grantee has breached any of the terms and conditions of this instrument, Grantor shall give written notice to Grantee of the specific nature of such breach. Said notice shall be sent to Grantee at National Park Service, Land Resources Division, 1849 "C" Street, N.W., Room 2444, Washington, D.C. 20240 and to the Superintendent, Great Smoky Mountains National Park, 107 Park Headquarters Road, Gatlinburg, Tennessee 37738 (unless or until such address is changed by written notice to Grantor) using registered or certified mail, return receipt requested, personal delivery, or expedited courier. Grantee shall have 180 days after the receipt of said notice to cure the identified breach or otherwise resolve the same with Grantor. If said breach is not cured or

resolved within said 180 day period, then Grantor shall have the right to pursue such injunctive relief and/or such other remedies at law or in equity as may be available to it to cure such breach.

The hereinabove described terms, covenants and restrictions shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns; it being the intent of the parties that said terms, covenants and restrictions, so long as they remain in full force and effect, shall run with the land.

And said Grantor, for itself and its successors and assigns, does hereby covenant with said Grantee, its successors and assigns, that it is lawfully seized in fee simple of the NPS Tracts herein conveyed and has full power, authority and right to convey the same, and that said NPS Tracts are free from all encumbrances except (i) real property taxes for the current year, which shall be pro-rated as of the date of closing and which Grantee assumes and agrees to pay to the extent the same are due, (ii) the hereinabove described terms, covenants, conditions, restrictions and easements, and (iii) such other liens or encumbrances as are of record in the Register's Office for Blount County, Tennessee, or as are otherwise ascertainable by physical inspection of the NPS Tracts and that it will forever warrant and defend said NPS Tracts and the title thereto against the lawful claims of all persons whomsoever.

Whenever in this instrument a pronoun is used it shall be construed to represent either singular or plural, or the masculine, feminine or neuter gender, as the case may demand.

IN WITNESS WHEREOF, Grantor has caused this instrument to be executed and its name to be signed hereto by its duly authorized officer the day and year first above written.

ALCOA POWER GENERATING INC.

By: _____

Its: _____

STATE OF _____)

COUNTY OF _____

Before me, the undersigned authority, Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of ALCOA POWER GENERATING INC., being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as _____.

Witness my hand and seal at office this _____ day of _____, 200____.

Notary Public

My Commission Expires: _____

This transfer is exempt from recordation tax pursuant to *Tenn. Code Ann.* §67-4-409(a)(5) as the Grantee is the United States of America.

THE PREPARER OF THIS INSTRUMENT MAKES NO REPRESENTATIONS NOR WARRANTIES AS TO THE STATUS OF THE TITLE TO THE PROPERTY HEREIN, NOR CONCERNING THE ACCURACY OF THE PROPERTY DESCRIPTION AND REPRESENTS THAT THIS INSTRUMENT HAS BEEN PREPARED SOLELY FROM INFORMATION FURNISHED TO THE PREPARER HEREOF.

EXHIBIT A

***DESCRIPTION OF COMPLETE TRACT**

*To be developed prior to execution of the Deed.

EXHIBIT B

***DESCRIPTION OF NPS TRACTS**

*To be developed prior to execution of the Deed.

EXHIBIT C

***DESCRIPTION OF RESERVED TRACT**

*To be developed prior to execution of the Deed.

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**B-3.10 Law Enforcement and Resource
Management Easement from the Licensee to NPS
on Powerline Areas Retained by the Licensee
(Tennessee)**

This Instrument Prepared By:
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LAW ENFORCEMENT AND RESOURCE MANAGEMENT EASEMENT

THIS LAW ENFORCEMENT AND RESOURCE MANAGEMENT EASEMENT ("Management Easement") is made this ____ day of _____, 200_, between **ALCOA POWER GENERATING INC.**, (formerly Tapoco, Inc.) a corporation organized and existing under and by virtue of the laws of the State of Tennessee, with offices in Blount and Knox County, Tennessee ("Grantor"), and the **UNITED STATES OF AMERICA**, and its assigns, acting through the National Park Service, U.S. Department of the Interior, whose address is National Park Service, Land Resources Division, 1849 "C" Street, N.W., Room 2444, Washington, D.C. 20240 ("Grantee").

WITNESSETH:

WHEREAS, Grantor was the owner in fee simple of certain real property located in Blount County, Tennessee, consisting of 260 acres, more or less, the general location of which is north and east of U.S. Highway 129 between the Chilhowee and Calderwood Reservoirs all as more particularly described on **Exhibit A** attached hereto and incorporated herein by reference ("Complete Tract"); and

WHEREAS, Grantor operates power generating facilities in the Little Tennessee River Valley as the Licensee of the Tapoco Hydroelectric Project under a license ("Project License") issued by the Federal Energy Regulatory Commission ("FERC") as Project No. 2169 (the "Project"); and

WHEREAS, Grantor, in furtherance of the Project, agreed to convey a portion of the Complete Tract to Grantee, which property consists of three (3) tracts containing 185 acres, more or less, and is more particularly described on **Exhibit B** attached hereto and incorporated herein by reference ("NPS Tract"), subject to certain terms, conditions, and rights reserved to Grantor, including but not limited to the right to use the NPS Tract for access to the Reserved Tract and the Tabcat Tract (both as hereinafter defined); and

WHEREAS, said conveyance of the NPS Tract is evidenced by Warranty Deed dated _____, 200_, of record in Deed Book ____, Page ____, in the Register's Office for Blount County, Tennessee ("Deed"); and

WHEREAS, Grantor retained title to a portion of the Complete Tract, containing 75 acres, more or less, and which retained portion is more particularly described on **Exhibit C** attached hereto and incorporated herein by reference ("Reserved Tract"); and

WHEREAS, Grantor has retained title to other property which is adjacent to the Reserved Tract containing _____ acres, more or less, and which other property is more particularly described on **Exhibit D** attached hereto and incorporated herein by reference (“Tabcat Tract”); and

WHEREAS, Grantor, in furtherance of the Project, agreed to grant to Grantee this Management Easement for law enforcement and resource management purposes over and upon the Reserved Tract and the Tabcat Tract in accordance with the authority of Grantee as set forth in 16 U.S.C. §§ 1-403k-3 and 36 C.F.R. Parts 1-7, as amended from time to time; and

WHEREAS, Grantor intends and Grantee acknowledges that this Management Easement herein granted shall at all times remain subject to all applicable provisions of the Project License, and all activities undertaken by Grantor or any Transferee in connection therewith, and any other lawful requirements of FERC, as well as all rights and obligations of Grantor or any Transferee, as they may deem necessary in their sole discretion, to maintain and operate the Project, the Reserved Tract, the Tabcat Tract and all power transmission lines, utility lines of any nature, communication lines, related equipment and all associated improvements (“Power Lines, Equipment and Improvements”) specifically including, but not limited to, access to Power Lines, Equipment and Improvements, and other Project and non-Project land areas, or otherwise, for Project, power generation, power transmission and other utility purposes.

NOW, THEREFORE, in consideration of the above and the mutual covenants, terms, conditions and restrictions contained herein, Grantor hereby grants and conveys to Grantee this Management Easement, in, over and upon the Reserved Tract and the Tabcat Tract for law enforcement and resource management purposes of the nature and character, and only to the extent hereinafter set forth.

By acceptance of this instrument, Grantee understands and agrees that the easement, rights, privileges and obligations herein granted and/or assumed are subject to the following reservations, limitations, covenants and conditions which shall run with and be binding upon said easement, rights, privileges and obligations as long as the same are in force and effect.

1. Definitions.

(a) “Affiliates” means any other individual, corporation, partnership, association, limited liability company, joint stock company, trust or other unincorporated organization that is directly or indirectly, or through one or more intermediaries, controlled by or under the common control of Grantor.

(b) “Final Settlement Agreement” means that certain Final Settlement Agreement made and entered into on _____, 200__, by and between Grantor and other participants in the process for issuing a new license for the Project.

(c) “Reserved Rights” shall have the meaning and include all rights reserved by Grantor under Section 4 hereof.

(d) “Successor-in-Interest” shall mean the surviving entity resulting from the merger, consolidation or other corporate restructuring by or of the Grantor, provided, however, that the surviving entity is the authorized licensee of the Project License.

(e) “Transferee” means Affiliates and Successors-in-Interest, and shall, for the purposes of this Management Easement, also include any successors, assigns or lessees of Grantor, any owner of the Reserved Tract, Tabcat Tract, or any portion thereof (and any successors and assigns thereof), and any Project License holder.

2. **Purpose.** The purpose of this Management Easement is to permit Grantee, which permission is hereby granted, to provide, and Grantee shall provide, law enforcement and resource management in, over and upon the Reserved Tract and the Tabcat Tract in a manner consistent with the duties and responsibilities set forth and in accordance with the authority of Grantee as specified in 16 U.S.C. §§ 1-403k and 36 C.F.R. Parts 1-7, as amended from time to time; said duties and responsibilities as described therein being hereby specifically assumed by Grantee, including, but not limited to the “protection of persons, property, and natural and cultural resources.” In that regard, Grantee specifically assumes the authority to monitor and protect the Reserved Tract and the Tabcat Tract from trespassing, vandalism, illegal use of weapons, and any other activity that threatens or endangers persons, property, and natural and cultural resources in, over and upon the Reserved Tract and the Tabcat Tract.

3. **Term.** This Management Easement is effective as of the date first above written and shall be permanent and run with the land, subject, however, to the terms and conditions herein.

4. **Reserved Rights.** Grantee agrees that the easement, rights, privileges and obligations herein granted and/or assumed in, over and upon the Reserved Tract and the Tabcat Tract, shall be subject to Grantor’s continued use of said Reserved Tract and Tabcat Tract. In that regard and notwithstanding any prohibition or restriction set forth herein to the contrary, and recognizing that Grantor is and shall remain the fee simple owner of the Reserved Tract and the Tabcat Tract, Grantor hereby specifically, unconditionally and without restriction, charge or assessment of any kind or nature reserves to itself and any Transferee the following rights, powers and authorities as may be necessary or appropriate:

(a) **Existing and Future Uses.** The right to use, and to restrict the use of, the Reserved Tract and the Tabcat Tract for any and all purposes in connection with the Project, Project License, the Reserved Tract, the Tabcat Tract, the Power Lines, Equipment and Improvements and the Final Settlement Agreement, including, but not limited to, (i) power generation, power transmission and other utility purposes, (ii) installation, utilization, construction, reconstruction, operation, repair and maintenance of pathways and roadways (located or to be located on the Reserved Tract, the Tabcat Tract, or otherwise), (iii) rights-of-way management, including, but not limited to, vegetation and exotic species management

and the right to utilize herbicides, in accordance with best management practices and applicable law, including aerial application, for purposes of controlling vegetation within such rights-of-way, (iv) Project recreation areas, (v) safety and security, (vi) access to or activities upon the Reserved Tract or the Tabcat Tract due to emergency or extraordinary circumstances, including, but not limited to, fire and medical emergency, and (vii) any other encumbrances or agreements to which Grantor is bound as of the date first above written or any other lawful purposes relating to the subject of this Section 4. The Management Easement herein granted shall in all respects and at all times remain subject to the terms and conditions of the Project License, and Grantor's rights and obligations in connection therewith, and to any other lawful requirements of FERC.

(b) **Transfer.** The right to transfer, assign, convey, sell, give, mortgage, or lease the Reserved Tract and the Tabcat Tract, provided such conveyance is subject to the terms of this Management Easement.

(c) **Tree Removal.** The right, but not the obligation, to cut and/or remove fallen, threatened, damaged or diseased trees, shrubs or plants required to maintain the Reserved Tract, the Tabcat Tract and Power Lines, Equipment and Improvements, to cut firebreaks, to construct, reconstruct, operate, repair and maintain ingress and egress pathways or roadways on the Reserved Tract and the Tabcat Tract for purposes in connection with the operation of the Project, the Reserved Tract, the Tabcat Tract, Power Lines, Equipment and Improvements and for such other Project, power generation, power transmission, or other utility purposes, including, but not limited to, reasonable removal or cutting of trees, shrubs or plants in a customary and historical manner.

(d) **Ingress, and Egress and Project Maintenance.** The right to ingress and egress to, from and over the Reserved Tract and the Tabcat Tract for any purposes and at any time relating to or arising from the Reserved Rights, and to access other property owned or leased by Grantor or its Transferees, provided that such other property is used for purposes consistent with power generation, power transmission and other utility purposes.

5. **Grantee Acknowledgment.** Grantee specifically acknowledges and understands that the easements, rights, privileges, obligations and licenses herein granted are subject to all applicable terms and conditions of the Project License, and to any other lawful requirements of FERC thereunder, to the Reserved Rights, and to all other conditions set forth hereunder. By accepting the conveyance of this Management Easement, Grantee agrees that the easements, rights, privileges, obligations and licenses herein conveyed will not be used in any manner that would endanger health, create a nuisance or otherwise be incompatible with the overall recreational uses associated with the Project, or otherwise interfere with the Reserved Rights.

6. **Public Access.** Nothing contained in this Management Easement shall give Grantee or its successors or assigns the right to grant to the public a right to enter upon or to use the Reserved Tract, the Tabcat Tract or any portion thereof if no such right existed in the public immediately prior to the execution of this Management Easement. Additionally, Grantor and any Transferees may restrict public access to any portion of the Reserved Tract and the Tabcat Tract for safety or security purposes, or for any other purpose deemed

appropriate for the Project or power generation, power transmission or other utility purposes. To the extent Grantee permits the public continued access to the Reserved Tract, the Tabcat Tract or any portion thereof, such access shall be subject and subordinate to Grantor's Reserved Rights.

7. Costs, Liabilities and Taxes.

(a) **Costs, Legal Requirements and Liabilities.** Grantor retains all responsibilities and shall bear all costs and liabilities that are normal and incident to its ownership and use of the Reserved Tract and the Tabcat Tract, including the maintenance of adequate liability insurance coverage. Grantor remains solely responsible for obtaining any applicable governmental permits and approvals for any construction or other activity or use permitted by this Management Easement, and all such construction or other activity or use shall be undertaken in accordance with all applicable federal, state and local laws, regulations and requirements. Nothing contained in the Management Easement, however, shall be construed to entitle Grantee, or any other person or entity claiming by or through Grantee, to bring any action against Grantor for any injury to or change in either the Reserved Tract or the Tabcat Tract resulting from causes beyond the control of Grantor, including, without limitation, vandalism or illegal acts, fire, flood, storm, earth movement or any act of God, or from any prudent action taken by Grantor under emergency conditions to prevent, abate or mitigate any injury to the Reserved Tract, the Tabcat Tract, the Project, or Power Lines, Equipment and Improvements resulting from any such causes.

(b) **Taxes.** Grantor shall pay all real estate taxes and assessments lawfully assessed against the Reserved Tract and the Tabcat Tract.

8. Mutual Release and Indemnification. To the extent authorized by law, each party agrees to and hereby does release, hold harmless, defend and indemnify the other from any and all liabilities, including, but not limited to, damage to the Reserved Tract and the Tabcat Tract, personal injury (including death), losses, damages, judgments, costs, expenses and reasonable attorneys' fees that the indemnified party may suffer or incur as a result of or arising out of the activities of the indemnifying party on the Reserved Tract and the Tabcat Tract. Provided, specifically, that Grantee shall only be liable for any and all claims or demands for loss or damage to property or for personal injury or death to any person while in, upon or about the Reserved Tract and the Tabcat Tract in accordance with and to the extent provided in the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2671-80, as may be amended from time to time.

9. Title. Grantor covenants and represents that (i) Grantor is the sole owner and is seized of the Reserved Tract and the Tabcat Tract in fee simple and has good right to grant and convey this Management Easement; (ii) the Reserved Tract and the Tabcat Tract are free and clear of any and all liens, encumbrances, and exceptions except such exceptions as are of record in the Register's Offices for Blount County, Tennessee, as applicable, or otherwise ascertainable by physical inspection of the Reserved Tract and the Tabcat Tract; and (iii) Grantee shall have both the duties and responsibilities described herein and the use of and enjoyment of all the benefits derived from and arising out of this Management Easement.

10. Remedies.

(a) **Notice of Violation; Corrective Action.** If either Grantor or Grantee (the “non-breaching party”) determines that a breach of the terms of this Management Easement has occurred or is threatened by the other party (the “breaching party”), the non-breaching party shall give written notice to the breaching party of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to either the Reserved Tract or the Tabcat Tract resulting from any use or activity inconsistent with the purpose of this Management Easement, to restore the portion of the Reserved Tract or Tabcat Tract so injured to its prior condition in accordance with a plan agreed upon by Grantor and Grantee.

(b) **Injunctive Relief.** If the breaching party fails to cure the violation within ninety (90) days after receipt of notice thereof from the non-breaching party, or under circumstances where the violation cannot reasonably be cured within a ninety (90) day period, or fails to begin curing such violation within the ninety (90) day period, or fails to continue diligently to cure such violation until finally cured, the non-breaching party may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Management Easement, to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction, and to require the restoration of either the Reserved Tract or the Tabcat Tract, as applicable, to the condition that existed prior to any such injury; provided, that this paragraph does not purport to grant any jurisdiction to any court nor to waive any defenses enjoyed by Grantor or Grantee.

(c) **Damages.** If there is a violation of any of the provisions of this Management Easement, the non-breaching party shall notify (by written instrument) the breaching party, who shall promptly cure the violation by (a) ceasing the violation, or (b) restoring either the Reserved Tract or the Tabcat Tract, as applicable, to its condition before the violation, or (c) both, as the case may be. The parties shall have the right, but not the obligation, to pursue legal actions or proceedings at law and equity to enforce the terms and conditions of this Management Easement, including, but not limited to, the right to cause such violation to be cured, and if a court of competent jurisdiction determines that a violation has occurred hereunder, the party in violation shall reimburse to the other, as applicable, for all reasonable expenses incurred, including, but not limited to, legal fees, whether in or out of court, and the cost of legal proceedings brought to cure the violation or to collect such reimbursement.

(d) **Scope of Relief.** The parties’ rights under this Section 10 apply equally in the event of either actual or threatened violations of the terms of this Management Easement. The parties agree that their remedies at law for any violation of the terms of this Management Easement are inadequate and that they shall be entitled to the injunctive relief described in Section 10(b), both prohibitive and mandatory, in addition to such other relief to which they may be entitled, including specific performance of the terms of this Management Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The parties’ remedies described in this Section 10 shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

(e) **Costs of Enforcement.** All reasonable, actual costs incurred by the parties in enforcing the terms of this Management Easement, including, without limitation, actual costs and expenses of suit, actual and reasonable attorneys' fees, and any costs of restoration necessitated by any violation of the terms of this Management Easement shall be borne by the breaching party; provided, as to Grantee, any costs, expenses and attorney's fees shall be awarded only to the extent authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412.

(f) **Forbearance.** Forbearance by either party to exercise its rights under this Management Easement in the event of any breach of any term of this Management Easement by Grantor or Grantee shall not be deemed or construed to be a waiver of such term or of any subsequent breach of the same or any other term of this Management Easement, or of any of the party's rights under this Management Easement. No delay or omission by the parties in the exercise of any right or remedy upon any breach by the other shall impair such right or remedy or be construed as a waiver.

(g) **Waiver of Certain Defenses.** To the extent authorized by law, the parties hereby waive any defenses of laches or estoppel.

(h) **Acts Beyond Parties' Control.** Nothing contained in this Management Easement shall be construed to entitle a party to bring any action against the other for any injury to or change in either the Reserved Tract or the Tabcat Tract resulting from causes beyond the party's control, including, without limitation, vandalism or illegal acts, unauthorized wrongful acts of third parties, fire, flood, storm, earth movement, and acts of God, or from any prudent action taken by either party under emergency conditions to prevent, abate, or mitigate injury to the Reserved Tract, the Tabcat Tract, or the Project or Power Lines, Equipment and Improvements resulting from any such causes.

11. **Parties Subject to Easement.** The covenants agreed to and the terms, conditions, and restrictions imposed by this Management Easement shall be binding upon Grantor and Transferees and upon Grantee, and their respective employees, agents, representatives, invitees, successors and assigns, and all other successors.

12. **Subsequent Transfers.** Grantor agrees that the terms, conditions, restrictions and purposes of this grant or reference thereto will be inserted by Grantor in any subsequent deed or other legal instrument by which the Grantor divests either the fee simple title or possessory interest in either the Reserved Tract or the Tabcat Tract.

13. **Miscellaneous Provisions.**

(a) **Termination of Rights and Obligations.** A party's rights and obligations under this Management Easement terminate upon transfer of the party's interest in this Management Easement, the Reserved Tract or the Tabcat Tract, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

(b) **Severability.** If any provision of this Management Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this Management Easement and the application of such provisions to persons or

circumstances other than those as to which it is found to be invalid shall not be affected thereby.

(c) **Gender; Number.** Whenever the context of this Management Easement so requires, references of the masculine gender shall include the feminine or neuter gender and corporate or other such entities, the singular number shall include the plural and vice versa, and reference to one or more parties hereto shall include all authorized assignees of Grantee and any Transferee.

(d) **Expenses.** Except for such costs and expenses for which either party may be liable pursuant to the provisions of Section 10 hereinabove, each of the parties shall bear its own cost and expense (including legal fees and expenses) incurred in connection with this Management Easement and the transactions contemplated hereby.

(e) **Entire Agreement and Amendment.** This Management Easement represents the final agreement between and understanding of the parties regarding the subject matter hereof and may not be changed, amended or modified except by an instrument in writing executed by the parties hereto.

(f) **Binding Effect.** This Management Easement shall be binding upon and inure to the benefit of the parties hereto, and their respective successors and assigns.

(g) **Captions.** The captions herein have been inserted solely for convenience of reference and are not a part of this Management Easement and shall have no effect upon construction or interpretation.

(h) **Counterparts.** The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

(i) **Notices.** All notices, demands, requests, consents, approvals or communications that either party desires or is required to give to the other shall be in writing. Any such notices, demands, consents, approvals or communications may be sent to the intended recipient at the address set forth hereinbelow using registered or certified mail, return receipt requested, personal delivery, or expedited courier, but no such notice, demand, consent, approval or communication shall be deemed given unless and until it is actually received by the intended recipient. The parties may change the address to which notices, demands, consents, approvals and other communications hereunder are to be delivered by giving the other party written notice in the manner herein set forth.

If To Grantor:

If to Grantee:

Superintendent
Great Smoky Mountains National Park
107 Park Headquarters Road
Gatlinburg, TN 37738

(j) **Applicable Law.** Unless otherwise preempted by Federal law, the interpretation and performance of this Management Easement shall be governed by Tennessee law without regard to rules or laws governing conflicts of law.

IN WITNESS WHEREOF, the parties have executed this Management Easement by their duly authorized representatives the day and year first above written.

ALCOA POWER GENERATING INC.

By: _____

Its: _____

UNITED STATES OF AMERICA

By: _____

Its: _____

STATE OF _____)

COUNTY OF _____)

Before me, the undersigned authority, Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of ALCOA POWER GENERATING INC., being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as

_____.

Witness my hand and seal at office this _____ day of _____, 200____.

Notary Public

My Commission Expires:_____

STATE OF _____)

COUNTY OF _____)

Before me, the undersigned authority, Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of the UNITED STATES OF AMERICA, being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing in his/her official capacity.

Witness my hand and seal at office this _____ day of _____, 200____.

Notary Public

My Commission Expires:_____

EXHIBIT LIST

*Exhibit A	Description of Complete Tract
*Exhibit B	Description of NPS Tract
*Exhibit C	Description of Reserved Tract
*Exhibit D	Description of Tabcat Tract

*To be developed prior to execution of the Management Easement.

B-3.11 Quitclaim Deed from NPS to Licensee to Project Lands in the Embayments of Abrams Creek, Shop Creek, Chilogatee Creek, and an Unnamed Tributary to Chilhowee Reservoir with a Reservation by the NPS of a Law Enforcement and Resource Management Easement on Same Lands (Tennessee)

THIS INSTRUMENT PREPARED BY:

Wayne R. Kramer
KRAMER, RAYSON, LEAKE,
RODGERS & MORGAN, LLP
Post Office Box 629
Knoxville, TN 37901-0629
(865) 525-5134

Map No. ____
Parcel No. ____

Revised draft 3-17-04

QUIT CLAIM DEED

THIS INDENTURE (“Deed”), made and entered into this ____ day of _____, 200____, between the **UNITED STATES OF AMERICA**, and assigns, acting by and through the Land Resources Division, National Park Service, Department of the Interior, whose address is National Park Service, Land Resources Division, 1849 “C” Street, N.W., Room 2444, Washington, D.C. 20240 (“Grantor”), and the **ALCOA POWER GENERATING INC.** (formerly Tapoco, Inc.), a corporation organized and existing under and by virtue of the laws of the State of Tennessee, with offices in Blount and Knox Counties, Tennessee (“Grantee”).

W I T N E S S E T H:

WHEREAS, Grantor is the owner in fee simple of certain real property located in Blount County, Tennessee, consisting of four separate tracts totaling approximately 100 acres, more or less, the general location of which is along or in the vicinity of U.S. Highway 129 and which property is within the boundary of the Project as hereinbelow defined and in the embayments of Abrams, Shop, and Chilogatee creeks and an unnamed tributary to Chilhowee Reservoir, all as more particularly described on **Exhibit A** attached hereto and incorporated herein by reference (“Transfer Lands”); and

WHEREAS, Grantee operates power generating facilities in the Little Tennessee River Valley as the Licensee of the Tapoco Hydroelectric Project under a license (“Project License”)

issued by the Federal Energy Regulatory Commission (“FERC”) as Project No. 2169 (the “Project”); and

WHEREAS, it is understood that the Transfer Lands being conveyed herein to Grantee are within the Project boundary and thus Grantee further intends and Grantor further acknowledges that the same shall at all times remain subject to all activities undertaken by Grantee or any Transferee (“Transferee” shall mean any successor or assign of Grantee, any owner of the Transfer Lands and any Project License holder, their successors, assigns or lessees and shall further mean any person or entity acting through or at the request of Grantee or any Transferee) in connection with the Project, Project License, any other lawful requirements of FERC, as well as all rights and obligations of Grantee or any Transferee, as may be necessary or appropriate, to maintain and operate the Project (including all rights and obligations as licensee of the Project); and

WHEREAS, Grantor, in furtherance of the Project, agreed to convey the Transfer Lands to Grantee, subject to certain terms and conditions, including the reservation of an easement by Grantor for law enforcement and resource management purposes for the protection and management of Great Smoky Mountains National Park, (“Management Easement”) subject, however, to the rights of Grantee, as the fee owner thereof, to use the Transfer Lands for any and all purposes in connection with the Project and Project License, as hereinafter set forth; and

WHEREAS, Grantee is agreeable to accept the reservations, terms and conditions reflected in the Management Easement reserved by Grantor herein; and

WHEREAS, the Congress has authorized this land exchange pursuant to **[insert either 16 U.S.C. 460 l-22(b) or the new statute proposed under the Settlement Agreement]**; and

WHEREAS, Grantor desires to convey the Transfer Lands to Grantee and Grantee desires to become the titled owner thereto, subject to the reservations, terms and conditions set forth herein, and the parties otherwise desire to be bound by all other terms and conditions herein in connection with the Transfer Lands and the Management Easement;

NOW, THEREFORE, Grantor, for and in consideration of the sum of One Dollar (\$1.00), and other good and valuable consideration, to it in hand paid by Grantee, the receipt of which is hereby acknowledged, including (i) the transfer by Grantee to Grantor of other lands owned by Grantee and also located in Blount County, Tennessee generally along or in the vicinity of U.S. Highway 129 adjacent to the Chilhowee Reservoir, as evidenced by deed of even date herewith of record in Deed Book ____, Page ____ in the Register's Office for Blount County, Tennessee and (ii) terms and conditions, rights and obligations set forth in this Quit Claim Deed, to which this conveyance is specifically subject and which are fundamental consideration to this transaction, does hereby, QUITCLAIM and convey to said Grantee, its successors and assigns, the Transfer Lands described more particularly in **Exhibit A**, located in Blount County, Tennessee, and all of Grantor's right, title and interest in and to the Transfer Lands, subject to the reservations, exceptions, limitations, covenants and conditions herein, which exceptions, reservations, limitations, covenants and conditions are understood and acknowledged by the Parties, which understanding and acknowledgement are evidenced by Grantor's execution and Grantee's acceptance and recording of this Deed:

1. It is specifically understood by both Grantor and Grantee that the Transfer Lands will be utilized by Grantee, as the fee owner thereof, for any and all purposes set forth in Paragraph 2 hereinbelow, and Grantor shall not interfere with any such uses or purposes of Grantee.

2. It is further understood and acknowledged by Grantor, that the Transfer Lands being conveyed herewith, are within the Project boundary and shall be subject to, and Grantor shall not otherwise interfere with nor restrict, the right of the Grantee or any Transferee to use

the Transfer Lands for any and all purposes in connection with the Project, the Project License and all other lawful requirements of FERC, as may be necessary or appropriate, including, but not limited to, (i) utilization, reconstruction, operation, repair and maintenance of any existing pathways and roadways (located on the Transfer Lands herein conveyed), (ii) rights of way management, including, but not limited to, vegetation and exotic species management and the right to utilize herbicides, in accordance with best management practices and applicable law for purposes of controlling vegetation, (iii) Project recreation areas, (iv) safety and security, and (v) any and all other encumbrances or agreements to which Grantee is bound as of the date first above written, or any other lawful purposes relating to the subject of this Deed.

3. Grantor reserves unto itself a Management Easement as more particularly set forth on **Exhibit B** attached hereto and incorporated herein by reference, for the purposes of law enforcement and resource management of the Transfer Lands to the extent not inconsistent with Grantee's rights and obligations under the Project, Project License and any other lawful requirements of FERC and any other rights of Grantee set forth in this deed.

4. Grantor further reserves unto itself an easement over and upon that portion of the Transfer Lands currently covered by, and for the sole purpose of fulfilling its rights and obligation under, that certain unrecorded Right of Way Permit RW 5461-01-001, dated June 26, 2001 ("Permit") granted by Grantor in favor of the Tennessee Valley Authority ("TVA") in connection with maintaining currently existing TVA power lines (*i.e.*, an easement area approximately 310 feet in width, as more fully described in said Permit) which easement shall remain in full force and effect so long as said Permit, as may be amended, renewed or extended from time to time, remains in full force and effect. In the event said Permit is terminated for any reason, then the easement reserved pursuant to this paragraph shall likewise terminate and Grantor shall execute such document or documents as may be reasonably requested by Grantee, in recordable form, evidencing said termination. Provided further, that in the event said Permit is to be amended, renewed, extended or terminated, Grantor shall send written notice to Grantee no less than ninety (90) days prior to such amendment, renewal, extension or termination, with said notice to be given in the same manner as set forth in paragraph 5 herein.

5. It is further understood and agreed that, in the event the Chilhowee Reservoir ceases to exist as a result of either the entry of a final FERC Order from which no further appeal may be taken or Federal legislation, ordering the surrender in decommissioning of the Project License, the Grantee shall, within 60 days of said decommissioning, notify Grantor of such event by written notice to Grantor at Superintendent, Great Smoky Mountains National Park, 107 Park Headquarters Road, Gatlinburg, Tennessee 37738 and National Park Service, Land Resources Division, 1849 "C" Street, N.W., Room 2444, Washington, D.C. 20240, which notice shall include a copy of this Deed. For a period of 360 days after receipt of said notice, Grantor shall have the right and option to request that Grantee reconvey the Transfer Lands to Grantor, which right and option shall be exercised by written notice sent to Grantee at Property Manager, 300 North Hall Road, Alcoa, Tennessee 37701 (unless and until Grantor is notified in writing by Grantee of a change of address) within such 360-day period. If Grantor fails to exercise its right and option to request a reconveyance of the Transfer Lands within said 360-day period, such right and option shall lapse and title thereto shall remain in Grantee.

6. In the event Grantee alleges that Grantor has breached any of the terms and provisions of this instrument, Grantee shall give written notice to Grantor of the specific nature

of such breach. Any notices hereunder shall be sent to Grantor at the addresses stated above in paragraph 5 (unless or until such address is changed by written notice to Grantee). Grantor shall have 180 days after receipt of said notice to cure the identified breach or otherwise resolve the same with Grantee. If said breach is not cured or resolved within said 180-day period, then Grantee shall have the right to pursue such injunctive relief and/or such other remedies at law or in equity as may be available to it to cure such breach. Any notice under this Paragraph shall be given using registered or certified mail return receipt requested, personal delivery or expedited courier.

The hereinabove described reservations, terms, covenants and restrictions shall be binding upon and inure to benefit of the parties hereto, their successors and assigns; it being the intent of the parties that said reservations, terms, covenants and restrictions, so long as they remain in full force and effect, shall run with the land.

Whenever in this instrument a pronoun is used it shall be construed to represent either singular or plural, or the masculine, feminine or neuter gender, as the case may demand.

IN WITNESS WHEREOF, Grantor has caused this instrument to be executed and its name to be signed hereto by its duly authorized officer the day and year first above written.

UNITED STATES OF AMERICA

By: _____

Its: _____

STATE OF _____)

COUNTY OF _____)

Before me, the undersigned authority, Notary Public in and for said County and State, personally appeared _____, with whom I am personally acquainted, or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself to be the _____ of the UNITED STATES OF AMERICA, being authorized to do so, executed the foregoing instrument for the purpose therein contained, by signing in his/her official capacity.

Witness my hand and seal at office this _____ day of _____, 200____.

Notary Public

My Commission Expires:_____

I swear and affirm that the actual consideration for this transfer was \$ 0 .

Affiant

Sworn to and subscribed before me,

this ____ day of _____, 200____.

Notary Public

My Commission Expires:

Responsible Taxpayer:

Alcoa Power Generating Inc.

THE PREPARER OF THIS INSTRUMENT MAKES NO REPRESENTATIONS NOR WARRANTIES AS TO THE STATUS OF THE TITLE TO THE PROPERTY HEREIN, NOR CONCERNING THE ACCURACY OF THE PROPERTY DESCRIPTION AND REPRESENTS THAT THIS INSTRUMENT HAS BEEN PREPARED SOLELY FROM INFORMATION FURNISHED TO THE PREPARER HEREOF.

EXHIBIT A
DESCRIPTION OF TRANSFER LANDS

EXHIBIT B

TERMS AND CONDITIONS OF MANAGEMENT EASEMENT RESERVED BY GRANTOR

Grantor hereby reserves the following rights, powers and authorities as may be necessary or appropriate in connection with law enforcement and resource management of the Transfer Lands being transferred to Grantee herein of the nature and character and only to the extent hereinafter set forth.

1. **Definitions:** For purposes of this Management Easement the listed terms shall have the following meanings:

(a) “Affiliates” means any other individual, corporation, partnership, association, limited liability company, joint stock company, trust or other unincorporated organization that is directly or indirectly, or through one or more intermediaries, controlled by or under the common control of Grantee.

(b) “Final Settlement Agreement” means that certain Final Settlement Agreement made and entered into on _____, 200__, by and between Grantee and other participants in the process for issuing a new license for the Project.

(c) “Grantee’s Reserved Rights” shall have the meaning and include all rights reserved by Grantee under Section 4 hereof.

(d) “Successor-in-Interest” shall mean the surviving entity resulting from the merger, consolidation or other corporate restructuring by or of the Grantee, provided, however, that the surviving entity is the authorized licensee of the Project License.

(e) “Transferee” means Affiliates and Successors-in-Interest, and shall, for the purposes of this Management Easement, also include any successors, assigns or lessees of Grantee, any owner of the Transfer Lands, or any portion thereof (and any successors and assigns thereof), and any Project License holder.

2. **Purpose.** The purpose of this Management Easement is to retain in Grantor the authority to provide, and Grantor shall provide, law enforcement and resource management in, over and upon the Transfer Lands in a manner consistent with the duties and responsibilities set forth and in accordance with the authority of Grantor as specified in 16 U.S.C. §§ 1-403k-3 and 36 C.F.R. Parts 1-7, as amended from time to time, and in accordance with the General Management Plan of Great Smoky Mountains National Park, as amended from time to time; said duties and responsibilities as described therein being hereby specifically assumed by Grantor, including, but not limited to, the protection of persons, property, and natural and cultural resources. In that regard, Grantor specifically assumes the authority to monitor and protect the Transfer Lands from trespassing, vandalism, illegal use of weapons, and any other activity that

threatens or endangers persons, property, and natural and cultural resources in, over and upon the Transfer Lands.

3. **Term.** This Management Easement is effective as of the date of this Deed and shall be permanent and run with the land, subject, however, to the terms and conditions herein.

4. **Grantee's Reserved Rights.** Grantor agrees that the easement, rights, privileges and obligations herein reserved by Grantor in, over and upon the Transfer Lands shall be subject to Grantee's use of said Transfer Lands. In that regard and notwithstanding any prohibition or restriction set forth in this Deed or Management Easement to the contrary, and recognizing that Grantee as a result of this transfer, is and shall remain the fee simple owner of the Transfer Lands, Grantee hereby specifically, unconditionally and without restriction, charge or assessment of any kind or nature, reserves to itself and any Transferee the following rights, powers and authorities as may be necessary or appropriate:

(a) **Existing and Future Uses.** The right to use, and to restrict the use of, the Transfer Lands for any and all purposes in connection with the Project, Project License, the Transfer Lands, and the Final Settlement Agreement, including, but not limited to, (i) utilization, reconstruction, operation, repair and maintenance of existing pathways and roadways (located on the Transfer Lands, or otherwise), (ii) rights-of-way management, including, but not limited to, vegetation and exotic species management and the right to utilize herbicides, in accordance with best management practices and applicable law, for purposes of controlling vegetation within such rights-of-way, (iii) Project recreation areas, (iv) safety and security, and (v) any other encumbrances or agreements to which Grantee is bound as of the date first above written or any other lawful purposes relating to the subject of this Section 4. The Management Easement herein reserved shall in all respects and at all times remain subject to the terms and conditions of the Project License, and Grantee's rights and obligations in connection therewith, and to any other lawful requirements of FERC.

(b) **Transfer.** The right to transfer, assign, convey, sell, give, mortgage, or lease the Transfer Lands, provided such conveyance is subject to the terms of this Management Easement.

(c) **Tree Removal.** The right, but not the obligation, to cut and/or remove fallen, threatened, damaged or diseased trees, shrubs or plants required to maintain the Transfer Lands, to cut firebreaks, to construct, reconstruct, operate, repair and maintain ingress and egress pathways or roadways on the Transfer Lands for purposes in connection with the operation of the Project, the Transfer Lands, and for such other Project, power generation, power transmission, or other utility purposes, including, but not limited to, reasonable removal or cutting of trees, shrubs or plants in a customary and historical manner.

(d) **Ingress, and Egress and Project Maintenance.** The right to ingress and egress to, from and over the Transfer Lands for any purposes and at any time relating to or arising from Grantee's Reserved Rights, and to access other property owned or leased by Grantor or its Transferees, provided that such other property is used for purposes consistent with power generation, power transmission and other utility purposes.

5. **Grantor Acknowledgment.** Grantor specifically acknowledges and understands that the easements, rights, privileges, obligations and licenses herein reserved are subject to all applicable terms and conditions of the Project License, and to any other lawful requirements of FERC thereunder, to Grantee's Reserved Rights, and to all other conditions set forth hereunder. By execution of this Deed, Grantor agrees that the easements, rights, privileges, obligations and licenses herein reserved will not be used in any manner that would endanger health, create a nuisance or otherwise be incompatible with the overall recreational uses associated with the Project, or otherwise interfere with the Grantee's Reserved Rights.

6. **Public Access.** This Management Easement shall give Grantor or its successors or assigns the right to continue to grant to the public a right to enter upon or to use the Transfer Lands or any portion thereof to the extent such right existed in the public immediately prior to the execution of this Management Easement. However, Grantee and any Transferees may restrict public access to any portion of the Transfer Lands for safety or security purposes, or for any other purpose deemed appropriate for the Project or power generation, power transmission or other utility purposes. To the extent Grantor permits the public continued access to the Transfer Lands or any portion thereof, such access shall be subject and subordinate to Grantee's Reserved Rights.

7. **Costs, Liabilities and Taxes.**

(a) **Costs, Legal Requirements and Liabilities.** Grantee retains all responsibilities and shall bear all costs and liabilities that are normal and incident to its ownership and use of the Transfer Lands, including the maintenance of adequate liability insurance coverage. Grantee remains solely responsible for obtaining any applicable governmental permits and approvals for any construction or other activity or use permitted by its ownership of the fee interest of the Transfer Lands, this Management Easement, and all such construction or other activity or use shall be undertaken in accordance with all applicable federal, state and local laws, regulations and requirements. Nothing contained in the Management Easement, however, shall be construed to entitle Grantor, or any other person or entity claiming by or through Grantor, to bring any action against Grantee for any injury to or change in the Transfer Lands resulting from causes beyond the control of Grantee, including, without limitation, vandalism or illegal acts, fire, flood, storm, earth movement or any act of God, or from any prudent action taken by Grantee under emergency conditions to prevent, abate or mitigate any injury to the Transfer Lands, the Project, or Power Lines, Equipment and Improvements resulting from any such causes.

(b) **Taxes.** Grantee shall pay all real estate taxes and assessments lawfully assessed against the Transfer Lands.

8. **Mutual Release and Indemnification.** To the extent authorized by law, each party agrees to and hereby does release, hold harmless, defend and indemnify the other from any and all liabilities, including, but not limited to, damage to the Transfer Lands, personal injury (including death), losses, damages, judgments, costs, expenses and reasonable attorneys' fees that the indemnified party may suffer or incur as a result of or arising out of the activities of the indemnifying party on the Transfer Lands. Provided, specifically, that Grantor shall only be liable for any and all claims or demands for loss or damage to property or for personal injury or death to any person while in, upon or about the Transfer Lands in accordance with and to the

extent provided in the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2671-80, as may be amended from time to time.

9. Remedies.

(a) **Notice of Violation; Corrective Action.** If either Grantor or Grantee (the “non-breaching party”) determines that a breach of the terms of this Management Easement has occurred or is threatened by the other party (the “breaching party”), the non-breaching party shall give written notice to the breaching party of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Transfer Lands resulting from any use or activity inconsistent with the purpose of this Management Easement, to restore the portion of the Transfer Lands so injured to its prior condition in accordance with a plan agreed upon by Grantor and Grantee.

(b) **Injunctive Relief.** If the breaching party fails to cure the violation within ninety (90) days after receipt of notice thereof from the non-breaching party, or under circumstances where the violation cannot reasonably be cured within a ninety (90) day period, or fails to begin curing such violation within the ninety (90) day period, or fails to continue diligently to cure such violation until finally cured, the non-breaching party may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Management Easement, to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction, and to require the restoration of the Transfer Lands to the condition that existed prior to any such injury; provided, that this paragraph does not purport to grant any jurisdiction to any court where none shall have been provided by Congress.

(c) **Damages.** If there is a violation of any of the provisions of this Management Easement, the non-breaching party shall notify (by written instrument) the breaching party, who shall promptly cure the violation by (a) ceasing the violation, or (b) restoring the Transfer Lands to its condition before the violation, or (c) both, as the case may be. The parties shall have the right, but not the obligation, to pursue legal actions or proceedings at law and equity to enforce the terms and conditions of this Management Easement, including, but not limited to, the right to cause such violation to be cured, and if a court of competent jurisdiction determines that a violation has occurred hereunder, the party in violation shall reimburse to the other, as applicable, for all reasonable expenses incurred, including, but not limited to, legal fees, whether in or out of court, and the cost of legal proceedings brought to cure the violation or to collect such reimbursement; provided that the parties recognize that these remedies apply against Grantor only to the extent authorized by law.

(d) **Scope of Relief.** The parties’ rights under this Section 9 apply equally in the event of either actual or threatened violations of the terms of this Management Easement. The parties agree that their remedies at law for any violation of the terms of this Management Easement are inadequate and that they shall be entitled to the injunctive relief described in Section 9(b), both prohibitive and mandatory, in addition to such other relief to which they may be entitled, including specific performance of the terms of this Management Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The parties’ remedies described in this Section 9 shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

(e) **Costs of Enforcement.** All reasonable, actual costs incurred by the parties in enforcing the terms of this Management Easement, including, without limitation, actual costs and expenses of suit, actual and reasonable attorneys' fees, and any costs of restoration necessitated by any violation of the terms of this Management Easement shall be borne by the breaching party; provided, as to Grantor, any costs, expenses and attorney's fees shall be awarded only to the extent authorized by the Equal Access to Justice Act, 28 USC § 2412.

(f) **Forbearance.** Forbearance by either party to exercise its rights under this Management Easement in the event of any breach of any term of this Management Easement by Grantor or Grantee shall not be deemed or construed to be a waiver of such term or of any subsequent breach of the same or any other term of this Management Easement, or of any of the party's rights under this Management Easement. No delay or omission by the parties in the exercise of any right or remedy upon any breach by the other shall impair such right or remedy or be construed as a waiver.

(g) **Waiver of Certain Defenses.** To the extent authorized by law, the parties hereby waive any defenses of laches or estoppel.

(h) **Acts Beyond Parties' Control.** Nothing contained in this Management Easement shall be construed to entitle a party to bring any action against the other for any injury to or change in Transfer Lands resulting from causes beyond the party's control, including, without limitation, vandalism or illegal acts, unauthorized wrongful acts of third parties, fire, flood, storm, earth movement, and acts of God, or from any prudent action taken by either party under emergency conditions to prevent, abate, or mitigate injury to the Transfer Lands, or the Project resulting from any such causes.

10. **Parties Subject to Easement.** The covenants agreed to and the terms, conditions, and restrictions imposed by this Management Easement shall be binding upon Grantor and upon Grantee and any Transferee, and their respective employees, agents, representatives, invitees, successors and assigns.

11. **Subsequent Transfers.** Grantee agrees that the terms, conditions, restrictions and purposes of this Management Easement will be inserted by Grantee in any subsequent deed or other legal instrument by which the Grantee divests either the fee simple title or possessory interest in Transfer Lands.

12. **Miscellaneous Provisions.**

(a) **Termination of Rights and Obligations.** A party's rights and obligations under this Management Easement terminate upon transfer of the party's interest in this Management Easement or the Transfer Lands except that liability for acts or omissions occurring prior to transfer shall survive transfer.

(b) **Severability.** If any provision of this Management Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this Management Easement and the application of such provisions to persons or circumstances other than those as to which it is found to be invalid shall not be affected thereby.

(c) **Gender; Number.** Whenever the context of this Management Easement so requires, references of the masculine gender shall include the feminine or neuter gender and corporate or other such entities, the singular number shall include the plural and vice versa, and reference to one or more parties hereto shall include all authorized assignees of Grantor and any Transferee.

(d) **Expenses.** Except for such costs and expenses for which either party may be liable pursuant to the provisions of Section 9 hereinabove, each of the parties shall bear its own cost and expense (including legal fees and expenses) incurred in connection with this Management Easement and the transactions contemplated hereby.

(e) **Entire Agreement and Amendment.** This Management Easement represents the final agreement between and understanding of the parties regarding the subject matter hereof and may not be changed, amended or modified except by an instrument in writing executed by the parties hereto.

(f) **Binding Effect.** This Management Easement shall be binding upon and inure to the benefit of the parties hereto, and their respective successors and assigns.

(g) **Captions.** The captions in this Management Easement have been inserted solely for convenience of reference and are not a part of this Management Easement and shall have no effect upon construction or interpretation.

(h) **Counterparts.** The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

(i) **Notices.** All notices, demands, requests, consents, approvals or communications that either party desires or is required to give to the other shall be in writing. Any such notices, demands, consents, approvals or communications may be sent to the intended recipient at the address set forth hereinbelow using registered or certified mail, return receipt requested, personal delivery, or expedited courier, but no such notice, demand, consent, approval or communication shall be deemed given unless and until it is actually received by the intended recipient. The parties may change the address to which notices, demands, consents, approvals and other communications hereunder are to be delivered by giving the other party written notice in the manner herein set forth.

If To Grantor:

Superintendent
Great Smoky Mountains National Park
107 Park Headquarters Road
Gatlinburg, TN 37738

If to Grantee:

(j) **Applicable Law.** Unless otherwise preempted by federal law, the interpretation and performance of this Management Easement shall be governed by Tennessee law, without regard to rules or laws governing conflicts of law.

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B-4 Funding Agreement(s)

B-4.1 North Carolina Resource Management and Enhancement Fund Agreement

B-4.2 Tallasse Fund Agreement

Appendix B-4.1 - The North Carolina Resource Management and Enhancement Fund Agreement

I. Purpose of Fund

The North Carolina Resource Management and Enhancement Fund (the “Fund”) will be established by Alcoa Power Generating Inc. (APGI) pursuant to the Settlement Agreement for the relicensing of the Tapoco Project (Project) to be used for 1) monitoring of biotic and abiotic parameters, 2) addition of large woody debris, gravel and vegetation management in the Cheoah River below Santeetlah Dam, and 3) for other natural resource stewardship activities, including, but not limited to, a) threatened and endangered species recovery efforts, b) control of exotic species and c) environmental outreach and education, directly related to those Cheoah River and Little Tennessee River basin resources affected by ongoing Project operations, in particular the Santeetlah and Cheoah developments, and the portion of the Calderwood Development in North Carolina.

Use of any monies in the Fund for activities not directly related to ongoing Project operations will require unanimous consent of the North Carolina Resource Management and Enhancement Fund Board (Board), as defined herein and APGI.

II. Establishment of Fund

- A. Within 6 months after the FERC order issuing a New License for the Project becomes effective, APGI shall make its first annual contribution to the Fund by payment to the fiduciary entity specified by the Board.
- B. The Fund will be structured to accommodate any restrictions on how funds intended for use by or on behalf of the federal agencies must be handled and shall, to the extent allowed by law, be managed by agreement of the North Carolina Wildlife Resources Commission, North Carolina Department of Environment and Natural Resources, U. S. Forest Service, U. S. Fish and Wildlife Service, and the Eastern Band of Cherokee Indians.
- C. Once the Fund has been established, payments, and any interest earned thereon, shall be the exclusive property of the Fund, to be disbursed and spent according to this Fund Agreement, and APGI shall have no further responsibility therefore. The North Carolina Fund Board, and the members thereof, to the extent allowable by law, shall indemnify APGI and save APGI harmless in any litigation, save litigation initiated by APGI, in which the expenditures from the Fund are at issue.

III. Use of Funds

- A. Decisions on the use of the Fund including any accrued interest shall solely be made by the Board. The Board may solicit proposals from non-profit organizations, educational institutions, and government or Tribal agencies for projects that address any of the above stated purposes. The Board may target a specified portion of the Fund to specific natural resource stewardship objectives, or specific areas encompassed within the purposes and geographic scope defined above.
- B. A primary objective of the Board will be to use the Fund to leverage other funding (for example, through matching requirements) to expand the benefits of the combined funding in the Cheoah River and Little Tennessee River watershed.
- C. Funding proposals and other Fund business shall be approved by consensus of the full membership of the Board.
- D. The Board shall hold an annual planning meeting during the 4th quarter of each year during which annual funding priorities for the subsequent calendar year will be discussed with APCI and decisions regarding funding priorities for the subsequent year will be made.

IV. Membership of the Board

The Board shall be comprised of one representative each from U.S. Fish and Wildlife Service, U. S. Forest Service, North Carolina Department of Environment and Natural Resources, North Carolina Wildlife Resources Commission, and the Eastern Band of Cherokee Indians (collectively “Members”).

V. Advisors

Representatives of interested non-governmental organizations signatory to the Settlement Agreement and APCI will serve as advisors to the Board. Advisors will be given the opportunity to review and provide individual comments to the Board on funding proposals, to participate in any meetings held by the Board regarding the use of the Fund, and to review and comment individually on the annual report. The advisors will not be asked to provide consensus recommendations to the Board.

VI. Fund Administration

- A. The Board shall develop and adopt bylaws and/or Memoranda of Agreement as necessary to share decision-making and fiduciary responsibilities among the members. These bylaws and/or Memoranda of Agreement must be adopted by the Board prior to any disbursements from the Fund.

- B. The Board shall annually review the implementation and status of funding proposals approved pursuant to this Fund agreement. The Board will ensure that a written report is prepared annually that reflects the amount of payments deposited into and disbursed from the Fund and the specific activities undertaken with monies from the Fund. This annual report shall be prepared and distributed to the members of the Board and the advisors, in the 1st quarter of each year covering activity in the previous calendar year. The Board shall deliver the final report to APCI by June 15 of each year to enable APCI to file a copy of the report with FERC prior to June 30.
- C. The cost of all reasonable administrative, legal, and overhead costs associated with the management of the Fund account shall be borne by the Fund.
- D. The Board may choose to conduct an independent review of Fund activities at any time. The cost of an independent review shall be borne by the Fund. At its expense, APCI can also request that an independent review of Fund activities be conducted to ensure that the Fund is being administered properly to achieve the purposes of the Settlement Agreement.
- E. Consensus by the Board, with regard to funding proposals and other Fund business contemplated by this agreement, is considered reached when: 1) the majority of the Board “like” the outcome or proposal being made; 2) all Board members can “live with” the outcome or proposal being made; and 3) all Board members will advocate the decision with others outside of the Board.
- F. Meetings of the Board shall be held annually, or whenever requested by two or more members of the Board. Any Member requesting a meeting shall provide notice of the request for a meeting to other Members. By unanimous agreement of the Board, the annual or special meetings may be held wholly or in part by telephone.
- G. The Board will be chaired by a member of the Board on an annual rotating basis. Duties of the Chair will include chairing any meetings of the Board and providing administrative support for the Board, including preparation of meeting minutes, preparation of the annual report, and other related duties.
- H. All costs of participation by individual members of the Board and advisors shall be covered by their respective organizations.
- I. The Board will collaborate on development of any public information to communicate the benefits of the activities completed under the auspices of the Fund.
- J. In the event that any dispute arises pursuant to this North Carolina Resource Management and Enhancement Fund Agreement, the Board agrees to engage in good faith negotiations for a period of at least 90 days, if necessary, in an effort to resolve the dispute, said negotiations to be initiated by the aggrieved party. A minimum of one meeting shall be held to attempt to resolve the dispute during the 90-day period. In the event that resolution cannot be reached by the Board within the 90-day negotiating period, the

dispute may be referred to the Parties to the Settlement Agreement (Parties), and handled pursuant to the dispute resolution provisions contained therein.

- K. Notwithstanding a decision by the Board, all projects funded by the Fund are subject to the approval of any agency with permitting authority and/or jurisdiction over the site of the project. All requisite approvals for a project must be obtained prior to the disbursement of monies from the Fund.
- L. Any actions by the Fund must conform with (i) applicable law and (ii) any legal requirements applicable to the respective Parties, and does not eliminate any separate legal requirements that the Parties or recipients of Fund grants may have pursuant to federal, state, or local law.

VII. FERC Jurisdiction

The Parties intend that the Fund shall be approved by FERC in any order issuing a New License for the Project, therefore the funding of the Fund will be a License obligation, and thus enforceable by the FERC under the provisions of Section 31 of the Federal Power Act, 18 CFR 385.1501, et seq.

VIII. Assignment

This Fund Agreement may be assigned to any entity or entities that are approved by FERC as transferee of the Project license and such transferee will replace APGI as a party to this Fund agreement.

Appendix B-4.2 - The Tallassee Fund

I. Purpose of Fund

The Tallassee Fund (the “Fund”) will be established by Alcoa Power Generating Inc. (APGI) pursuant to the Settlement Agreement for the relicensing of the Tapoco Project (Project) to be used for natural resource stewardship activities including, but not limited to, 1) threatened and endangered species recovery efforts, 2) ecosystem enhancements and restoration, 3) management and control of exotic species and 4) environmental outreach and education directly related to the Project and non-Project lands in Tennessee currently owned by APGI to mitigate the continuing environmental and social impacts associated with the Project’s operations.

Use of any monies in the Fund for activities not directly related to these Project and non-Project lands will require unanimous consent of the Tallassee Fund Board (Board), as defined herein and APGI.

II. Establishment of Fund

- A. Within 6 months after the FERC order issuing a New License for the Project becomes effective, APGI shall make its first annual contribution to the Fund by payment to the fiduciary entity specified by the Board.
- B. The Fund will be structured to accommodate any restrictions on how funds intended for use by or on behalf of the federal agencies must be handled and shall, to the extent allowed by law, be managed by agreement of the Board.
- C. Once the Fund has been established, payments, and any interest earned thereon, shall be the exclusive property of the Fund, to be disbursed and spent according to this Fund Agreement, and APGI shall have no further responsibility therefore. The Board, and the members thereof, to the extent allowable by law, shall indemnify APGI and save APGI harmless in any litigation, save litigation initiated by APGI, in which the expenditures from the Fund are at issue.

III. Use of Funds

- A. Decisions on the use of the Fund including any accrued interest shall solely be made by the Board. The Board may solicit proposals from non-profit organizations, educational institutions, and government or Tribal agencies for projects that address any of the above stated purposes. The Board may target a specified portion of the Fund to specific natural resource stewardship objectives, or specific areas encompassed within the purposes and geographic scope defined above.

- B. A primary objective of the Board will be to use the Fund to leverage state and federal funding or other grant opportunities to expand the benefits of the combined funding in the greater Lower Little Tennessee River Valley.
- C. Funding proposals and other Fund business shall be approved by consensus of the full membership of the Board.
- D. The Board shall hold an annual planning meeting during the 4th quarter of each year during which annual funding priorities for the subsequent calendar year will be discussed with APGI and decisions regarding funding priorities for the subsequent year will be made.

IV. Membership of the Board

The Board shall be comprised of one representative each from U.S. Fish and Wildlife Service, U. S. Forest Service, Great Smoky Mountains National Park, Tennessee Department of Environment and Conservation, Tennessee Wildlife Resources Agency, Eastern Band of Cherokee Indians, The Nature Conservancy of Tennessee, National Parks Conservation Association, Tennessee Clean Water Network, and American Rivers (collectively “Members”).

APGI will serve as an advisory member to the Board. APGI will be given the opportunity to review and provide comments to the Board on funding proposals, participate in any meeting held by the Board regarding the use of the Fund, and review and comment on annual reports.

V. Fund Administration

- A. The Board shall develop and adopt bylaws and/or Memoranda of Agreement as necessary to share decision-making and fiduciary responsibilities among the members. These bylaws and/or Memoranda of Agreement must be adopted by the Board prior to any disbursement from the Fund.
- B. The Board shall annually review the implementation and status of funding proposals approved pursuant to this Fund agreement. The Board will ensure that a written report is prepared annually that reflects the amount of payments deposited into and disbursed from the Fund and the specific activities undertaken with monies from the Fund. This annual report shall be prepared and distributed to the Members of the Board and APGI in the 1st quarter of each year covering activity in the previous calendar year. The Board shall deliver the final report to APGI by June 15 of each year to enable APGI to file a copy of the report with FERC prior to June 30.
- C. The cost of all reasonable administrative, legal, and overhead costs associated with the management of the Fund shall be borne by the Fund.
- D. The Board may choose to conduct an independent review of Fund activities at any time. The cost of an independent review shall be borne by the Fund. At its expense, APGI can also request that an independent review of Fund activities be conducted to ensure that the Fund is being administered properly to achieve the intent of the Settlement Agreement.

- E. Consensus by the Board, with regard to funding proposals and other Fund business contemplated by this agreement, is considered reached when: 1) the majority of the Board “like” the outcome or proposal being made; 2) all Board members can “live with” the outcome or proposal being made; and 3) all Board members will advocate the decision with others outside of the Board.
- F. Meetings of the Board shall be held annually, or whenever requested by two or more members of the Board. Any Member requesting a meeting shall provide notice of the request for a meeting to other Members. By unanimous agreement of the Board, the annual or special meetings may be held wholly or in part by telephone.
- G. The Board will be chaired by a member of the Board appointed by the Board on an annual basis. Duties of the Chair will include chairing any meetings of the Board and providing administrative support for the Board, preparation of meeting minutes, preparation of the annual report, and other related duties.
- H. All costs of participation by individual members of the Board and APGI shall be covered by their respective organizations.
- I. The Board will collaborate on development of any public information to communicate the benefits of the activities completed under the auspices of the Fund.
- J. In the event that any dispute arises pursuant to this Tallassee Fund Agreement, the members of the Board agree to engage in good faith negotiations for a period of at least 90 days, if necessary, in an effort to resolve the dispute, said negotiations to be initiated by the aggrieved party. A minimum of one meeting shall be held to attempt to resolve the dispute during the 90-day period. In the event that resolution cannot be reached by the Board within the 90-day negotiating period, the dispute may be referred to the Parties to the Settlement Agreement (Parties), and handled pursuant to the dispute resolution provisions contained therein.
- K. Notwithstanding a decision by the Board, all projects funded by the Fund are subject to the approval of any agency with permitting authority and/or jurisdiction over the site of the project. All requisite approvals for a project must be obtained prior to the disbursement of monies from the Fund.
- L. Any actions by the Fund must conform with (i) applicable law and (ii) any legal requirement applicable to the respective Parties, and does not eliminate any separate legal requirements that the Parties or recipients of the Fund grants may have pursuant to federal, state, or local law.

VII. FERC Jurisdiction

The Parties intend that the Fund shall be approved by FERC in any order issuing a New License for the Project, therefore the funding of the Fund will be a License obligation, and thus enforceable by the FERC under the provisions of Section 31 of the Federal Power Act, 18 CFR 385.1501, et seq.

VIII. Assignment

This Fund agreement may be assigned to any entity or entities that are approved by FERC as transferee of the Project license and such transferee will replace APGI as a party to this Fund agreement.

B-5 Maps Showing the Proposed Protection of Licensee-Owned Lands in Tennessee and North Carolina

B-6 ESA Biological Assessment

Biological Assessment For Tapoco Settlement Agreement

1. Introduction

The issues addressed in this biological assessment are the potential effects of the continued operation and maintenance of the Tapoco Hydroelectric Project (Project) under a new license to be issued by the Federal Energy Regulatory Commission (FERC or Commission) on threatened and endangered species. This biological assessment specifically evaluates the proposed settlement agreement (SA) developed by Alcoa Power Generating Incorporated (APGI or Licensee), and other parties for the Project, located in Graham and Swain Counties, North Carolina, and Blount and Monroe Counties, Tennessee. There are some areas of potential concern for listed species while balancing the ongoing operation of the project with restoration, management and monitoring of rare, threatened, and endangered species.

Since the parties considered the needs of the listed species in the Tapoco project area while developing the proposed settlement agreement, it inherently serves to protect and conserve the species and their habitats.

Need for a Biological Assessment

By regulation, a biological assessment is prepared for "major construction activities" considered to be Federal actions significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.). A major construction activity is a construction project or other undertaking having similar physical impacts, which qualify under NEPA as a major federal action. Major construction activities include dams, buildings, pipelines, roads, water resource developments, channel improvements, and other such projects that modify the physical environment and that constitute major Federal actions. Though the Project is already constructed, its continued operation under a new license for the next 40 years, along with associated improvements, recreational facilities, operational modifications, and maintenance are considered in this biological assessment.

A biological assessment is required if listed species or critical habitat may be present in the action area. The contents of the assessment are discretionary, but generally include results of on-site inspections determining the presence of listed or proposed species, and an analysis of the likely effects of the action on the species or habitat based on biological studies, review of the literature, and the views of species experts. The assessment also describes any known unrelated future non-Federal activities ("cumulative effects") reasonably certain to occur within the action area that are likely to affect the species. Much information from previous draft environmental analysis documents and the license application have been used in part or their entirety, and/or modified to produce the assessment. The biological assessment addresses all listed and proposed species found in the action area, not just those listed and proposed species that are likely to be affected. One of the purposes of the biological assessment is to help make the determination of whether the proposed action is "likely to adversely affect" listed species and critical

habitat. To make such a determination, all species have been addressed. Such an assessment may help determine the need for conference as well as formal consultation. Sometimes, biological assessments are confused with environmental assessments. The contents of biological assessments prepared pursuant to the Endangered Species Act are largely at the discretion of the action agency(s) although the regulations provide recommended contents (50 CFR §402.12(f)). Biological assessments are not required to analyze alternatives to proposed actions – this biological assessment analyzes the effects of the preferred alternative, the settlement agreement (SA). Environmental assessments are prepared pursuant to the National Environmental Policy Act.

Determination of Effect

The analysis based on our review of all potential effects, direct and indirect, results in a determination of effect. If the nature of the effects cannot be determined, benefit of the doubt is given to the species. After evaluating the potential for effect, one of the following determinations is made:

Listed species/designated critical habitat

- o **No effect** - the appropriate conclusion when the action agency determines its proposed action will not affect listed species or critical habitat.
- o **Is not likely to adversely affect** - the appropriate conclusion when effects on listed species are expected to be discountable, or insignificant, or completely beneficial. **Beneficial effects** are contemporaneous positive effects without any adverse effects to the species. **Insignificant effects** relate to the size of the impact and should never reach the scale where take occurs. **Discountable effects** are those extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur.
- o **Is likely to adversely affect** - the appropriate conclusion if any adverse effect to listed species may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions, and the effect is not discountable, insignificant, or beneficial (see definition of “is not likely to adversely affect”). In the event the overall effect of the proposed action is beneficial to the listed species, but also is likely to cause some adverse effects, then the proposed action "is likely to adversely affect" the listed species or critical habitat. An "is likely to adversely affect" determination requires formal section 7 consultation.

2. Description of the Action

Actions Likely to Result From the Settlement Agreement. Under the SA, APGI will 1) provide minimum flows in the Cheoah River downstream of Santeetlah Dam and the Little Tennessee River downstream of Calderwood Dam; 2) reduce drawdowns and maintain more stable water levels in Santeetlah reservoir; 3) establish two Resource Enhancement Funds (one in North Carolina and one in Tennessee) whose objectives include monitoring of biotic and abiotic parameters, addition of woody debris, gravel and vegetation management, threatened and endangered species recovery, control of exotic species and environmental outreach and education; 4) provide fish passage for four listed species and perform presence/status evaluations for other fish species; 5) implement a Low Inflow Protocol; 6) implement Maintenance and Emergency Protocol; 7) provide boatable high flow events in the Cheoah River; and 8) provide recreational enhancements at the project's four developments. Each of these actions that may affect biological communities is described below.

Stream flow improvement in the Cheoah River below Santeetlah Dam and the Little Tennessee River below Calderwood Dam.

Cheoah River Flow Regime

The SA proposes license articles for an integrated flow regime that will provide sustained base flows ranging from 40 to 100 cubic feet per second (cfs) (Table OR-2.1) and 19 to 20 days of high flows annually, averaging approximately 1000 cfs (Table OR-2.3).

The aquatic base flow for each month will be determined by calculating the average daily inflow (ADI) value for the three preceding months. The ADI will be calculated using recorded measures of daily change in reservoir elevation and total discharge (generation flows, instream flow releases, high flow events, and flood discharge flows). If the ADI is greater than the historic 25th percentile average flow for that month (Table OR-2.2.), flows will be released according to Tier A and if the ADI is less than or equal to the historic 25th percentile average flow for that month, flows will be released according to Tier B.

Table OR-2.2 Historic 25th Percentile Average Flows Based on 31-year Period of Record (1971-2001)

Month	Threshold Flow (cfs)
Jan	256
Feb	446
Mar	484
Apr	615
May	617
Jun	526
Jul	403
Aug	289
Sep	208
Oct	141

Nov	116
Dec	148

In order to allow state and federal agencies to complete the collection of three full years of baseline data in the Cheoah River below Santeetlah Dam, aquatic base flows will be released beginning September 1, 2005, or in the month after the effective date of the new license if FERC has not issued a new license by September 1, 2005.

Table OR-2.1 Aquatic Base Flows

Month	Tier A Flowrate (cfs)	Tier B Flowrate (cfs)
January	50	50
February	100	90
March	100	90
April	100	90
May	90	80
June	60	60
July	60	50
August	50	40
September	50	40
October	50	40
November	50	40
December	60	50

High flow events, which follow a repeating five-year schedule for the term of the License are scheduled to approximately represent high flow patterns in regional reference streams as well as the duration, frequency, and magnitude of Cheoah River high flow events prior to impoundment.

As with base flows, high flows are scheduled to begin after the completion of baseline sampling in late summer, 2005 or in the month after the effective date of a new license if FERC hasn't issued the new license before September 1, 2005.

Measures designed to benefit aquatic biological communities during high flow releases include ramping flows at a rate not to exceed two inches per hour while going from base flows up to 100 cfs, extending some high flows into multiple day events, and tailing high flows off for extended periods during some events. The five-year repeating schedule is shown in Table OR-2.3.

Table OR-2.3 High Flow Events – 5-year Repeating Schedule

High Flows	Year 1		Year 2		Year 3		Year 4		Year 5		Magnitude (cfs) ³		
	Events	Total Days Per Month	Events	Total Days Per Month	Events	Total Days Per Month	Events	Total Days Per Month	Events	Total Days Per Month	Day 1	Day 2	Day 3
January													
February	1	2	1	2	1	2	1	2	1	2	1000	Var ¹	
March	1	3	1	3	1	3	1	3	1	3	1000	600 ²	300
April	2	5	3	6	2	5	2	5	3	6	1000	850	300
May	2	4	2	4	3	6	3	6	3	6	1000	850	
June	1	2	1	2					1	2	1000	850	
July					1	2					1000	850	
August							1	1			1000		
September	1	1			1	1					1000		
October	1	1	1	1			1	1			1000		
November	1	1	1	1	1	1	1	1	1	1	1000		
December													
Total Per Year:	10	19	10	19	10	20	10	19	10	20			
¹ 600 cfs from hour 15 to hour 19; 400 cfs from hour 20 to hour 34; 200 cfs from hour 35 to hour 47; 100 cfs for hour 48 ² 600 cfs from hour 16 to hour 36; 300 cfs from hour 37 to hour 48 ³ 12:00 a.m. (midnight) shall be the starting point for determining the appropriate time for initiating and changing flow releases													

Flow in the Little Tennessee River below Calderwood Dam

Minimum flows ranging from 20 cfs to 65 cfs and varying by month and among years (Table OR-4.1) will be released from Calderwood Reservoir into the approximately one mile bypassed Little Tennessee River channel between Calderwood Dam and Powerhouse. Water will be released from the base of the gate, down approximately 6-ft from normal full pond elevation of 1087.8 feet USGS datum.

The Licensee shall make the determination to release minimum instream flows in the Calderwood Bypass according to Scenario A, B or C for each calendar year, so long as the required frequency of each of these scenarios is met within each ten-year period.

Table OR-4.1 Calderwood Bypass Instream Flows

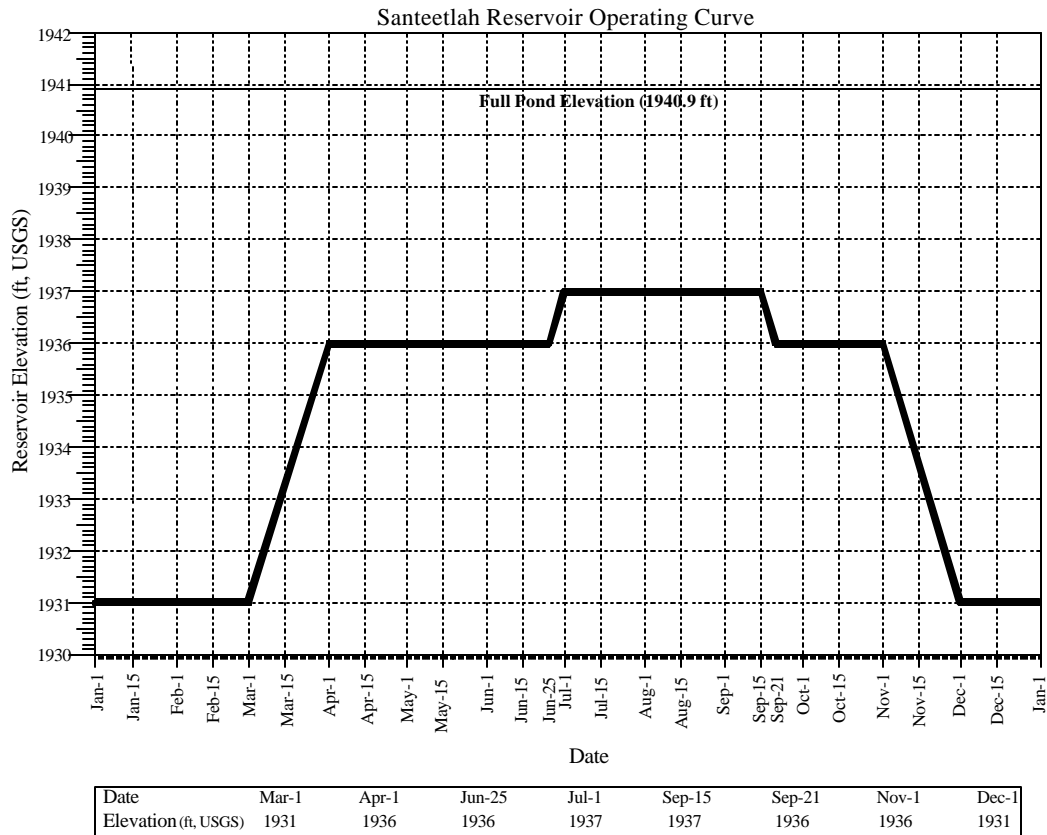
Scenario	A	B	C
January	45	50	55
February	40	50	60
March	35	50	65
April	20	40	60
May	30	40	50
June	25	30	35
July	30	30	30
August	20	25	30
September	25	25	25
October	35	30	25
November	45	40	25
December	40	40	40
Average Annual Flow	32.5 cfs	37.5 cfs	41.5 cfs
Frequency	3/10 years	5/10 years	2/10 years

In order to reduce the potential for thermal impacts on stream biota, during the normally hot and dry months of July – September, flows in Table OR-4.1 for each month will be viewed as target flows. The Licensee may exceed target flows if water is released upstream or inflows exceed the turbine capacity of the Calderwood Powerhouse or as necessary to pass trash at the dam. Except under these circumstances, target flows are not to be exceeded by more than 50 cfs or reduced by more than 5cfs.

Santeetlah Reservoir Water Level Management

Under terms of the SA, Santeetlah Reservoir will be operated at or above the minimum levels as depicted on the Santeetlah Reservoir Operating Curve (Figure OR-1.1). During normal operations the Licensee will adjust generation to maintain Santeetlah Reservoir elevations at or above the Santeetlah Reservoir Operating Curve.

Figure OR-1.1 Santeetlah Reservoir Operating Curve



Cheoah River Substrate Enhancement

Because the Cheoah River below Santeetlah Dam has less sand and gravel sized substrate materials than upstream tributaries and selected reference streams, the U.S. Fish and Wildlife Service, the North Carolina Wildlife Resources Commission, the U.S. Forest Service, and the North Carolina Department of Environment and Natural Resources will experimentally attempt to improve substrate quality in the upper Cheoah River reaches. The introduced materials will be deposited at the river edge at selected locations in the upper reaches below Santeetlah Dam with the expectation that high flows resulting from Santeetlah Reservoir spills will distribute the materials downstream. Substrate composition of the Cheoah River was measured in the summers of 2002 and 2003 and will be sampled again in the summer of 2004. This information combined with baseline sampling of fish, mollusk, and crayfish populations conducted by these agencies will constitute a basis for evaluation of the benefits of the substrate enhancement experiment and the value of continued substrate supplementation by these agencies.

Fish Passage

Within six months of the effective date of the new license for the Project, the Licensee will develop and file with the Commission a plan for fish passage at the Chilhowee Development. The plan will be prepared in consultation with the U.S. Fish and Wildlife Service and will provide for fish passage at the Chilhowee Development for four target fish species, the Spotfin chub (*Erimonax monachus*), Yellowfin madtom (*Noturus flavipinnis*), Smoky madtom (*Noturus baileyi*) and Duskytail darter (*Etheostoma percnurum*).

Fish passage will entail annual funding by the Licensee estimated to be no more than \$10,000 per year for trapping and relocation of certain numbers of each target fish species, each season. Actual numbers of each species to be trapped and relocated will be determined annually in consultation with the U.S. Fish and Wildlife Service. Annual funding will be used first to accomplish the primary fish passage objective of moving a certain number of each of the target fish species between Abrams Creek and Citico Creek, and between Abrams Creek and the Tellico River. Funding will be used secondarily to conduct associated sampling, marking and genetics testing to help demonstrate that the USFWS's goal of genetic mixing between the sub-populations of the four fish species is being met. Funding can also be used to trap and transport fish between the Tellico River and Citico Creek, to the extent that such efforts may also enhance the overall genetic health of the Abrams Creek populations.

The populations to be passed are those occurring at the tributaries to the Little Tennessee River, including Abrams Creek (tributary at Little Tennessee River River Mile 37), Citico Creek (tributary at Little Tennessee River River Mile 31.8), and the Tellico River (tributary at Little Tennessee River River Mile 19.2). The population of Spotfin chub at the Little Tennessee River (Little Tennessee River River Mile 88.5) is also a source for augmentation of the populations.

The design population to be “passed” between each of the three designated tributaries for each of the target species is:

Target Species	Fishway Exchange
Spotfin chub	100 per generation
Yellowfin madtom	1 effective genome/generation
Smoky madtom	1 effective genome/generation
Duskytail darter	1 effective genome/generation

At this time, the best information available for rate of exchange indicates that naturally a few individuals per decade moved successfully between these populations. Movement of individuals probably comprised young-of-year dispersal movements during fall and winter, therefore, translocations scheduled during this same timeframe (August-May) would most closely mimic natural dispersal. The fishway will be fully operational as soon as possible, but no later than six months after the effective date of this License.

Within one year of the effective date of the new license, the Licensee will develop and file with the Commission a study plan for evaluating the presence and status of important

potamodromous and diadromous fishes (including but not limited to American eel (*Anguilla rostrata*), Lake sturgeon (*Acipenser fulvescens*), Black buffalo (*Ictiobus niger*), Smallmouth buffalo (*Ictiobus bubalus*), Sauger (*Sander canadense*), and River herring (*Moxostoma carinatum*) in the upper end of Tellico Reservoir in the vicinity of the Chilhowee Dam tailrace. The plan will require initial monitoring within five years of the effective date of the new license, with additional monitoring to be conducted in year 10 and year 20 of the new license.

The need for fishways for these additional species will be determined by the USFWS when certain conditions of populations or congregations, outlined in the study plan, occur. Presence of the target species at the base of Chilhowee Dam will be a condition precedent to the requirement of additional fishways at the Chilhowee Development. The U.S. Fish and Wildlife Service will require no additional structural fishway for the passage of these species before the twentieth year of the new FERC license. Subject to this limitation, the Secretary of the Department of Interior reserves the right to require fishways at the Chilhowee Development.

Vegetation Management

Plans for vegetation management are inherent in resource management plans of the Great Smoky Mountains National Park, the U.S. Fish and Wildlife Service, and the U.S. Forest Service. To the extent that additional vegetation management activities related to the Project are needed, objectives for action can be placed before the board(s) of the Tallassee Resource Enhancement Fund, or the North Carolina Resource Enhancement Fund during annual project planning sessions for prioritization relative to other proposals. Examples of vegetation management activities include limited, selective removal of vegetation from within the channel of the Cheoah River in order to improve boating safety, herbicide treatment of invasive exotic plants, and habitat improvement for rare plant species.

Low Inflow Protocol

If inflow is not adequate to provide high flow releases and maintain required reservoir levels while maintaining instream flows, then equitable reductions in Santeetlah Reservoir water levels, and high flow releases to the Cheoah River will be made as follows. If the water available for the planning period is less than the water requirement with no generation for the scheduling period the following low flow stages will be implemented. The low flow stage will remain in effect until the next planning period when the water requirement is compared to the water available. If the water available is less than the water requirement, the next stage will be implemented. If the water available is greater than the water requirement the previous stage will be implemented or normal operations if at Stage 1. If the actual inflow is appreciably different than the projected inflow the Licensee may make adjustments to the low flow stage during the planning period.

Stage 1: Reduce high flow duration by 25% (2 hours for each day of the high flow event). Elevation minimum decreased by 0.25 feet below the operating curve.

Stage 2: Reduce high flow duration by 50% (4 hours for each day of the high flow event). Elevation minimum decreased by 0.50 feet below the operating curve.

Stage 3: Reduce high flow duration by 100%. Elevation minimum decreased by 0.75 feet below the operating curve.

Stage 4: Elevation minimum decreased by 1.0 feet below the operating curve. If continuous discharge is at Tier A reduce continuous discharge from Tier A to Tier B level.

Stage 5: Continue releasing Tier B continuous discharge through spillway gates until elevation reaches bottom of the spillway gates (or valve).

Stage 6: Reduce continuous discharge to inflow.

It is important to note that base flow conditions will never be less than the base flows prescribed in Table OR-2.1 above unless reservoir inflow is less than those amounts. Based on actual experience, the Licensee may consult with state and federal agencies to modify the Low Inflow Protocol.

Maintenance and Emergency Protocols

The following table (Table OR-7.1) identifies 1) the assumed most likely emergency, unplanned maintenance (e.g. equipment failure), and maintenance situations when certain license conditions may be impacted and 2) the potential actions to be taken by the Licensee for each situation. The Licensee will determine the specific details of actions to be taken on a case-by-case basis, however, the Licensee will place the highest priority on maintaining and restoring minimum flows in the bypass channels.

Table OR-7.1 Maintenance and Emergency Situations

		Potentially Impacted License Conditions		
Situation	Indications	Minimum Flows in Bypass Channels	High Flow Releases from Santeetlah Dam into the Cheoah River	Normal Operating Range for Reservoir Levels
		Potential Actions to be Taken		
Outage of Tainter gate(s) at Santeetlah Dam	Maintenance or equipment failure prevents opening or closing one or more gates		Notify using High Flow Event Notification Procedure (HFENP). Release from alternate gate, delay start of event or reschedule, lower flow for event	Repair gate or operating mechanism to close gate ¹
Outage of aquatic flow gate(s)	Maintenance will require one or more aquatic flow gates to be inoperable	Release flow from Tainter gate		
Outage of gate control system	Maintenance or failure of control system	Control gate manually, release flow from Tainter gate	Notify using the HFENP. Open gate manually, release from alternate gate, delay start of event or reschedule, lower flow for event	
Voltage or capacity emergency (typically less than 24 hours in duration)	TVA curtails delivery of power to Alcoa Inc. TN Operations, voltage or capacity conditions in the TVA system or larger regional electric system failure has occurred or is imminent, or releases from Fontana are	Reduce Cheoah River continuous flow to 40 cfs. Increase to Tier A or B when normal operations resume	Notify using HFENP. Reduce generation and resume event when normal operations resume	Reduce generation to allow reservoir to refill when normal operations resume

	reduced or curtailed.			
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¹For notification procedures see Section 1.7.2 Notification Guidance

Resource Enhancement Funds

Tallassee Fund

Within six months of the effective date of the new license, the Tallassee Fund will be established by the Licensee pursuant to the SA to be used by the U. S. Forest Service, U. S. Fish and Wildlife Service, Great Smoky Mountains National Park, Tennessee Department of Environment and Conservation, Tennessee Wildlife Resources Agency, Eastern Band of Cherokee Indians and The Nature Conservancy of Tennessee for purposes within the scope of subject matter of the Fish and Wildlife Coordination Act, the Endangered Species Act, and Section 10 of the Federal Power Act including, but not limited to, 1) threatened and endangered species recovery efforts, 2) ecosystem enhancements and restoration, 3) management and control of exotic species, and 4) environmental outreach and education directly related to the Project and non-Project lands in Tennessee currently owned by the Licensee to mitigate the continuing environmental impacts associated with the Project's operations.

Monies in the Fund shall be held and managed by an entity unanimously agreed to by the beneficiary agencies listed above and the Licensee. The Fund shall be available to receive contributions from other sources to match or exceed contributions by the Licensee and the Fund shall remain available for its intended purposes until expended, even if the life of the Fund shall exceed the term of the new license.

At the time of fund establishment, the Licensee shall deposit an initial payment of \$100,000, subject to the escalation provisions in the SA. Thereafter for the duration of the new license, the Licensee shall deposit annually an additional \$100,000, by no later than January 31, subject to the escalation provisions in the SA. The funds shall be deposited with the fiduciary entity specified by unanimous agreement of the beneficiary entities and the Licensee for management and disbursement of the funds. Any interest accrued by the Tallassee Fund shall be reinvested in the Tallassee Fund to be used for the purposes described above.

North Carolina Resource Management and Enhancement Fund

Within six months of the effective date of the new license, the North Carolina Resource Management and Enhancement Fund will be established by Licensee pursuant to the SA to be used by the North Carolina Wildlife Resources Commission, North Carolina Department of Environment and Natural Resources, U.S. Forest Service, Eastern Band of Cherokee Indians, and U.S. Fish and Wildlife Service for purposes within the scope of subject matter of the Fish and Wildlife Coordination Act, the Endangered Species Act, and Section 10 of the Federal Power Act including, but not limited to, 1) monitoring of biotic and abiotic parameters, 2) addition of large woody debris, gravel and vegetation management in the Cheoah River below Santeetlah Dam, and 3) for other natural

resource stewardship activities, including, but not limited to, a) threatened and endangered species recovery efforts, b) control of exotic species and c) environmental outreach and education, directly related to those Cheoah River and Little Tennessee River basin resources affected by ongoing Project operations, in particular the Santeetlah and Cheoah developments, and the portion of the Calderwood Development in North Carolina.

It is possible that periodic small-scale removal of scattered trees and shrubs from within the main channel of the Cheoah River to improve habitat conditions while at the same time reducing hazards to whitewater recreationists will also be undertaken as an activity under the North Carolina Fund.

Monies in the Fund shall be held and managed by an entity unanimously agreed to by the beneficiary agencies listed above and the Licensee. The Fund shall be available to receive contributions from other sources to match or exceed contributions by the Licensee and the Fund shall remain available for its intended purposes until expended, even if the life of the Fund shall exceed the term of the new license.

The Licensee will provide \$100,000 subject to the escalation provisions in the SA, for the North Carolina Resource Management and Enhancement Fund in the first year of the new license and \$25,000 subject to the escalation provisions in the SA, annually thereafter for the term of the new license, except that no funds will be provided during the last three years of the new license. The funds shall be deposited with the fiduciary entity specified by unanimous agreement of the beneficiary entities and the Licensee for management and disbursement of the funds. Any interest accrued by the North Carolina Fund shall be reinvested in the North Carolina Fund to be used for the purposes described above.

Management of Tallassee and North Carolina Resource Enhancement Funds (Funds)

Decisions on the use of the Funds shall solely be made by the Boards of the Funds. The Board will hold an annual planning meeting during the 4th quarter of each year during which annual funding priorities for the subsequent calendar year will be discussed with the Licensee and decisions regarding funding priorities for the subsequent year will be made. Decisions on the activities to be undertaken with Fund monies will be approved by consensus of the full membership of the Board, except that use of any monies in the Funds for activities not related to the Project or Licensee's non-Project lands requires the unanimous consent of the full membership of the Board and the Licensee.

The Board for the North Carolina Fund will be comprised of one representative each from U.S. Fish and Wildlife Service, U.S. Forest Service, North Carolina Department of Environment and Natural Resources, North Carolina Wildlife Resources Commission and Eastern Band of Cherokee Indians. Representatives of interested non-governmental organizations and Licensee will serve as advisors to the Board.

The Board for the Tallassee Fund will be comprised of one representative each from U.S. Fish and Wildlife Service, U.S. Forest Service, Eastern Band of Cherokee Indians, Great Smoky Mountains National Park, Tennessee Department of Environment and Conservation, Tennessee Wildlife Resources Agency, The Nature Conservancy of Tennessee, National Parks Conservation Association, Tennessee Clean Water Network and American Rivers. The Licensee will serve as an advisor to the Board.

The Board will ensure that a written report is prepared annually that reflects the amount of payments deposited into and disbursed from the Funds and describes the specific activities undertaken with monies from the Funds. As an advisory member, Licensee may review and comment on funding proposals, participate in annual meetings, and review and comment on annual reports. Licensee will also file the annual report with FERC each year.

Recreation Related Actions

Actions agreed to in the SA in support of recreation opportunities include both new construction and maintenance and upgrades to existing facilities. Specific activities, estimated costs, and Licensee's funding commitment for each of those activities are listed in Table RF-1.1.

Table RF-1.1 Recreation Facilities Funding Commitments

New and/or Upgraded Recreation Facilities	Total Cost Estimate	Licensee Funding Commitment
Santeetlah Reservoir		
Expand/Improve Massey Branch Boat Launch	\$228,541	\$66,277
Cheoah Point Access Improvements	\$60,600	\$17,574
Cheoah Point Campground new construction and replacements	\$1,810,000	\$787,350
Dispersed campsite improvements	\$80,500	\$35,000
Avey Branch Boat Launch improvements	\$92,445	\$26,809
Bank fishing improvements	\$48,000	\$20,880
Subtotal Santeetlah	\$2,320,086	\$953,890
Cheoah River		
US 129 Access Areas – Phase 1	\$225,000	\$97,875
US 129 Access Areas – Phase 2	\$96,000	\$41,760
Two additional gravel lots on 129	\$23,001	\$6,667
Trail along Cheoah River	\$206,900	\$90,000
Accessible fishing pier	\$50,000	\$25,000
Boater put-in facilities	\$565,000	
Boater take-out facilities	\$210,000	
Subtotal Cheoah River	\$1,375,901	\$261,302
Cheoah Reservoir		
Canoe portage around dam	\$100,000	\$100,000
Improved bank fishing facilities	\$10,000	\$10,000
Relocate Panel Branch Boat Access	\$150,000	\$75,000

Calderwood Reservoir		
Five primitive campsites	\$15,700	\$15,700
Canoe/kayak take-out	\$75,000	\$75,000
Fish delivery chute	\$10,000	\$10,000
Chilhowee Reservoir		
Canoe portage	\$25,000	\$25,000
Two accessible fishing piers	\$100,000	\$50,000
Improve day-use areas	\$10,000	\$10,000
Subtotal Mainstem Reservoirs	\$495,700	\$370,700
Total Facility Cost Commitment	\$4,191,687	\$1,585,892
Recreation Related Annual O&M		
USFS recreation facilities	\$161,500	\$34,000 ¹
Licensee recreation facilities	\$31,000	\$26,000 ²
Additional cleanup/maintenance of 129 day-use areas	\$15,000	\$15,000
Recreational fish stocking in Calderwood Reservoir	\$20,000	\$10,000
Total Annual O&M Cost Commitment	\$227,500	\$85,000

¹ The USFS will operate and maintain the public boating access areas located on National Forest System lands on Santeetlah Reservoir and use a portion of the funding for this purpose in accordance with the agreement between the USFS and the NCWRC.

² Of this total, \$5,000 is committed to cost share boating facility operations and maintenance with the NCWRC for the new Llewellyn Branch boating access site and the existing Calderwood Reservoir boating access site.

3. Covered Species

- Appalachian elktoe
- Virginia spiraea
- Indiana bat
- Spotfin chub
- Yellowfin Madtom
- Smoky madtom
- Duskytail Darter
- Snail Darter
- Red-cockaded woodpecker
- American bald eagle
- Critical habitat for Appalachian elktoe

Two federally listed species (Appalachian elktoe and Virginia spiraea) are known to occur within the Project boundary at Cheoah River. Another species (Indiana bat) has been found in areas adjacent to the Project and may occur within the Project boundary. Four federally listed fish species; the spotfin chub, yellowfin madtom, smoky madtom, and duskytail darter have been reintroduced into Abrams Creek, and therefore may occur within the Project boundary.

There are two species, the Junaluska salamander and the Southern Appalachian woodrat listed as Federal Species of Concern. Because of the interest in the Junaluska salamander it will be discussed in this section, even though it is not a candidate species at this time meaning there is not enough information on the species for listing on the Federal endangered species list.

Finally several listed species will also be discussed but there will be no effect from the continued operation and maintenance of the project on these species.

Appalachian Elktoe

The Appalachian elktoe (*Alasmidonta raveneliana*) was listed as endangered on the Federal List of Endangered and Threatened Wildlife and Plants on November 23, 1994. The Appalachian elktoe is endemic only to the upper Tennessee River system, although the complete historical range of the Appalachian elktoe is unknown. Currently, the Appalachian elktoe exists in fragmented and relic populations in pockets of suitable habitat in the Pigeon River system, the French Broad River system, the Nolichucky River system, and the Little Tennessee River system.

In September 2002, the USFWS designated critical habitat for the Appalachian elktoe under the ESA (Federal Register, Vol. 67, No 188: September 27, 2002). The final rule became effective on October 28, 2002. Critical habitat is defined as the area(s) essential to the conservation of a listed species that may require special management consideration or protection.

The areas designated as critical habitat for the Appalachian elktoe total approximately 144 miles of various segments of rivers in North Carolina and one river in Tennessee. The Cheoah River from the Santeetlah Dam downstream to its confluence with the Little Tennessee River (9.1 miles) is designated as critical habitat for the Appalachian elktoe. The basis for the designation was that the Cheoah River is currently occupied by the species and provides the physical and biological habitat elements necessary for the life cycle need of the species.

In August 1996, the USFWS approved and published an Appalachian Elktoe Recovery Plan. The immediate goal of the recovery plan is to maintain the only known surviving populations of the species and to protect its remaining habitat from present and foreseeable threats. The intermediate goal of the plan is to restore and maintain the species throughout a significant portion of its historic range and to down list the species from endangered to threatened status. The plan outlines seven recovery actions:

- 1) Maintain the existing populations and habitat of the Appalachian elktoe;
- 2) Determine threats to the species; conduct research necessary for the species' management and recovery, and implement management where needed;
- 3) Search for additional populations and/or habitat suitable for reintroduction efforts;
- 4) Determine the feasibility of augmenting extant populations and re-establishing populations within the species' historic range and reintroduce where feasible;
- 5) Develop and implement cryogenic techniques to preserve the species' genetic material until such a time as conditions are suitable for reintroduction;
- 6) Develop and implement a program to monitor population levels and habitat conditions of existing populations, as well as newly discovered, introduced, or expanding populations; and
- 7) Annually assess the overall success of the recovery program and recommend action (changes in recovery objectives, delist, continue to protect, implement new measures, other studies etc.).

The Appalachian elktoe is a rare freshwater mussel that is native to streams and rivers of the southern Appalachian region. The Appalachian elktoe has a thin, but not fragile, kidney-shaped shell, reaching up to about 3.2 inches in length and 1.4 inches in height. Little is known about its habitat requirements, though the species has been reported from relatively shallow, medium sized creeks and rivers with cool, clean, well-oxygenated, moderate-to-fast flowing water.

The species is most often found in riffles, runs, and shallow flowing pools with stable, relatively silt free, coarse sand and gravel substrate associated with cobble, boulders, and/or bedrock.

According to the USFWS, the species is seldom found in stream reaches with accumulations of silt or shifting sand, gravel, or cobble. Like other freshwater mussels, the Appalachian elktoe feeds by filtering food particles from the water column. The reproductive cycle is similar to that of other freshwater mussels, and requires a host fish species to complete the cycle. In the case of the Appalachian elktoe, the banded sculpin (*Cottus carolinae*) and mottled sculpin (*Cottus bairdi*) have been identified as the most suitable host fish species (USFWS 2001).

Virginia Spiraea

The USFWS listed Virginia spiraea as threatened on June 15, 1990. In November 1992, the USFWS approved and published a management recovery plan for the Virginia spiraea. The recovery objective is to delist the species. To be considered for delisting, certain recovery criteria must be met. Delisting will be considered when: 1) three stable populations are permanently protected in each drainage where populations are currently known; 2) stable populations are established on protected sites in each drainage where documented vouchers have been collected; 3) potential habitat in the states with present or past collections has been searched for additional populations; and 4) representatives of each genotype are cultivated in a permanent collection.

The USFWS recovery strategy for the Virginia spiraea is sequential: preserve, understand, extend knowledge, manage, and monitor.

The recovery plan outlines nine recovery tasks:

- 1) Protect existing populations and essential habitat;
- 2) Conduct range-wide searches in areas of suitable habitat for additional populations;
- 3) Conduct site-specific manipulation to maintain existing populations;
- 4) Distinguish between sexual and asexual individuals;
- 5) Maintain representative material from each known genotype in permanent cultivation;
- 6) Investigate the species' environmental tolerances and habitat characteristics;
- 7) As appropriate, reintroduce Virginia spiraea in additional drainage systems within the species historical range;

- 8) Develop an information packet for landowners and land managers; and
- 9) Evaluate the effectiveness of protection and management programs and redirect efforts as necessary.

Under existing Project operations, flows in the Cheoah River are limited to 1-2 cfs of leakage flow at Santeetlah Dam and contributions from downstream tributaries. For the period 1971-2000, the median daily flow of the Cheoah River was 84 cfs. Spill events from Santeetlah Dam which create high flows in the Cheoah River are infrequent under current operations, and do not occur every year.

Virginia spiraea (*Spiraea virginiana*) is a fragile, branching shrub with cream-colored flowers. The shrubby plant grows from two to ten feet tall and has arching upright stems. Its leaves are alternate and of different shapes and sizes, making it difficult to identify when not in flower. Flowering occurs in June and July.

Virginia spiraea is typically found in disturbed areas along rivers and streams. Flood scouring is essential to this plant's survival because flooding inhibits arboreal competition and washes away many competing herbs and vines. Virginia spiraea can also be found along slow changing, dependable riparian areas such as meander scrolls and point bars, natural levees, and braided features of lower stream reaches. The plant prefers open areas with direct sunlight.

Competition from surrounding vegetation, inundation, construction, and extensive clearing are major threats to this species. The plant reproduces sexually and asexually. Additional populations are typically established when portions of the root mass become fragmented by flooding and erosion and are carried downstream to suitable habitats.

Indiana bat

The Indiana bat was listed as an endangered species on March 11, 1967 by the USFWS. However, the Indiana bat did not receive protection until enactment of the ESA in 1973 (Public Law 93-205), as amended. Several years following its listing, an Indiana bat recovery plan was developed, which outlines habitat requirements, critical habitat, potential causes for declines, and recovery objectives. The recovery plan was reviewed and published by the USFWS in 1983. Currently, the Indiana bat recovery team is revising the recovery plan. Although most of the hibernacula that contain large populations of Indiana bats have been protected, the species still appears to continue a 5% decline in range-wide population every two years.

During the winter, Indiana bats require roost sites in caves or mines that maintain temperatures between 37°F and 43°F. During the summer, Indiana bats roost and forage in floodplain and riparian forests. The suitability of a tree as a roost site is determined by its condition (dead or alive), the quantity of loose bark, the tree's solar exposure and location in relation to other trees, and the tree's spatial relationship to water sources and foraging areas. Twelve tree species have been listed in the Habitat Suitability Index

Model as primary species (class 1 trees). The trees include silver maple, shagbark hickory, shellbark hickory, bitternut hickory, green ash, white ash, eastern cottonwood, red oak, post oak, white oak, slippery elm, and American elm. Trees normally used as primary roosts are dead and have a diameter at breast height (dbh) greater than 12 inches.

Indiana bats forage primarily in forested habitats but they will also forage in edges of forests and croplands, fallow fields, and areas of impounded water. It has been documented that Indiana bats may travel up to three miles from their summer roosts to summer foraging areas and will visit these same areas each night.

The Indiana bat's range includes most of the eastern United States. It occurs in the Midwest and eastern United States from the western edge of the Ozark region in Oklahoma, to southern Wisconsin, east to Vermont, and as far south as northern Florida. The majority (85%) of the range-wide population hibernates in nine Priority 1 hibernacula (sites that contain more than 30,000 individuals), which are located in Indiana, Kentucky, and Missouri. White Oak Blowhole Cave, located in the GSMNP, is the only cave in Tennessee that has been designated as critical habitat for the Indiana bat.

Spotfin Chub

The spotfin chub, also known as turquoise shiner, was federally listed as threatened by the USFWS (September 9, 1977). At the time the species was listed as threatened in 1977, the USFWS also designated a portion of the Little Tennessee River in Macon and Swain counties, from the backwaters of Fontana Reservoir upstream to the North Carolina-Georgia state line as critical habitat. The USFWS published a Spotfin Chub Recovery Plan for the species, approved in November 1983. The goal of the Recovery Plan is to restore viable populations of spotfin chub to a significant portion of its historic range and remove it from the federal endangered species list.

The plan outlines six major recovery actions:

- 1) Preserve populations and presently used habitat of the spotfin chub;
- 2) Determine the feasibility of re-establishing the species back into its historic range and introduce where feasible and necessary to meet recovery objectives;
- 3) Conduct life history studies, i.e. age and growth, reproductive biology, longevity, natural mortality factors, and population dynamics;
- 4) Investigate the necessity for habitat improvement and, if feasible and necessary to meet recovery, develop techniques and sites for habitat improvement and implement;
- 5) Develop and implement a program to monitor population levels and habitat conditions of presently established populations as well as introduced and expanding populations; and

- 6) Annually assess overall success of recovery program and recommend action (e.g., delist, continued protection, implement new measures, other studies, etc.).

The turquoise shiner (*Erimonax monachus*), also known as the spotfin chub, is a small freshwater fish with large, dark spots at the base of the caudal fin, dark streaks on dorsal fin, silver sides and a gray or green upper body. The fish has a slightly compressed, elongated body ranging in standard length from about 20 mm early in the first year to about 85 mm in the third year of growth. The species matures at age one or two. The largest adult will grow to 110 mm (4.3 inches). The species is an insectivore, feeding diurnally presumably by both sight and taste in benthic areas of slow to swift current over various substrates (sand, gravel, boulder, and bedrock) with little siltation. Spawning occurs mid-May to mid-August in water around 26° or 27°C.

This species is native to the Tennessee River drainage and has recently been found in tributaries to the mainstem Little Tennessee River in both North Carolina and Tennessee (including Citico Creek, a tributary to the Little Tennessee River downstream of the Tapoco Project).

The fish was also likely historically present in the Cheoah River due to suitability of habitat (personal communication, Wayne C. Starnes, November 2001) and could possibly still exist there today. Anthropogenic stresses, such as sedimentation, pollution, inundation, temperature depression, and channelization, are the likely cause of the species' decline throughout its range.

Yellowfin Madtom

The yellowfin madtom is federally listed as threatened (September 9, 1977) and is considered endangered in Tennessee. Concurrent with the federal listing, critical habitat was also designated in Claiborne and Hancock counties, Tennessee in the main channel of the Powell River from the backwaters of Norris Lake upstream to the Tennessee-Virginia state line.

Portions of the Powell River in Virginia were also designated as critical habitat. Citico Creek, although essential to the species, is not listed as critical habitat. The USFWS published a Yellowfin Madtom Recovery Plan for the species, approved in June 1983. The goal of the Recovery Plan is to restore viable populations of the yellowfin madtom to a significant portion of its historic range and remove it from the federal endangered species list.

The plan outlines six major recovery actions:

- 1) Preserve populations and currently occupied habitat of the yellowfin madtom;

- 2) Determine the feasibility of re-establishing the species in rivers within its historic range and introduce where feasible and necessary to meet recovery objectives;
- 3) Conduct life history studies, i.e. age and growth, reproductive biology, longevity, natural mortality factors, and population dynamics;
- 4) Investigate the necessity for habitat improvement and, if feasible and necessary to meet recovery, develop techniques and sites for habitat improvement and implement;
- 5) Develop and implement a program to monitor population levels and habitat conditions of presently established populations as well as introduced and expanding populations; and
- 6) Annually assess overall success of recovery program and recommend action (e.g., delist, continued protection, implement new measures, other studies, etc.).

The yellowfin madtom (*Noturus flavipinnis*) is a small freshwater catfish with a bold black and yellow color pattern. The moderately elongated madtom has a depressed head, large eyes, and a truncate to slightly round caudal fin. With the exception of the breeding season, they are diurnally associated with cover, presumably near the stream bank beneath bedrock ledges or tree roots. During spring, summer, and fall, the adult madtoms are nocturnally associated with open benthic areas or under cover during their nighttime forages.

Adults become increasingly scarce in open benthic areas as the water temperature drops in late fall, and it is presumed that very little adult activity occurs during the winter months. The young appear to prefer benthic gravel or sand and gravel mixed, as opposed to the cobble, slab rocks, and bedrock substrates that adults seem to prefer. Young-of-year (YOY) madtoms also appear to remain active longer in the late fall or winter than adults. The yellowfin madtom spawns in late spring or early summer and deposits eggs on the underside of stones in higher gradient stream sections than they normally occupy.

The yellowfin madtom is an inhabitant of pools and backwaters of small to moderate-sized streams in the upper Tennessee River drainage. The madtom has been collected from six streams in the Tennessee River Basin: Chickamauga Creek, Hines Creek, North Fork Holston River, Copper Creek, Powell River, and Citico Creek. The extirpation of the species from several of these streams is related to anthropogenic stresses, such as pollution, impoundments, and habitat modification.

Smoky Madtom

The USFWS listed the smoky madtom as an endangered species on October 26, 1984. Concurrent with this listing, the USFWS also designated Citico Creek from the Cherokee

National Forest boundary at upper Citico Creek Bridge on Mountain Settlement Road upstream to the confluence of Citico Creek with Barkcamp Branch as critical habitat.

The USFWS published a Smoky Madtom Recovery Plan for the species, approved in August 1985. The goal of the Recovery Plan is to restore four viable populations of the smoky madtom and to protect the species and its habitat to such a degree that the species no longer qualifies for protection under the ESA.

The plan outlines five major recovery actions:

- 1) Preserve Citico Creek population and presently used habitat of the smoky madtom;
- 2) Search for additional populations;
- 3) Determine the feasibility of re-establishing the smoky madtom back into its historic habitat in Abrams Creek, GSMNP, and to other suitable stream reaches that are determined to have been historic habitat;
- 4) Assist the lead land management agency for each population in developing and implementing a program to manage the smoky madtom and monitor population levels and habitat conditions of the presently established population as well as introduced populations; and
- 5) Annually assess overall success of the recovery program and recommend action (delist, continue to protect, implement new measures, other studies etc.).

The smoky madtom (*Noturus baileyi*) is a small catfish (about 2.5–3 inches), olive brown with lighter areas of pale yellow except for the belly, which is white. Its head is relatively large and rounded, the eyes are small, and the mouth is subterminal with very short barbels. The pectoral spines are only slightly curved and have fine anterior serral and moderately large posterior serral. The dorsal spine is short and is marked with four small saddles located on top of the head, beneath the front of the dorsal fin, between the dorsal fin and adipose fin, and beneath the adipose fin. Typically, from late May through early November, the smoky madtom is found in riffle areas under slab rocks. From late November through early May, the fish is found in shallow pool areas again, under slab rocks. Reproduction occurs from about mid-May to mid-August.

The smoky madtom was present historically in the Little Tennessee River at Calderwood bypass. Currently, it occurs in Citico Creek, which joins the Little Tennessee River downstream of the Project, where from late May to early November it inhabits transitional areas between pools and riffles with gravel substrates mixed with rounded cobbles and small boulders. The fish is also being reintroduced to the free-flowing portion of Abrams Creek, upstream of the Project, where it also occurred historically.

The fish was likely extirpated from Abrams Creek as a result of the 1957 Rotenone treatment, aimed at improving fishing for the introduced rainbow trout. Over the past 16 years, Conservation Fisheries, UT, USFWS, TWRA, GSMNP, and the NCWRC have moved more than 2,500 smoky madtoms (captive propagated) into Abrams Creek. During the past five years, Conservation Fisheries has noted regular nesting and good juvenile recruitment of smoky madtoms.

Duskytail Darter

The duskytail darter was listed as endangered by the USFWS on April 27, 1993. The USFWS published a Duskytail Darter Recovery Plan for the species, approved in March 1994. The goal of the Recovery Plan is to restore viable populations of the duskytail darter to a significant portion of its historic range and remove the species from the Federal List of Endangered and Threatened Wildlife and Plants.

The plan outlines five major recovery actions:

- 1) Preserve present populations and presently used habitat;
- 2) Search for additional populations and/or habitat suitable for reintroduction efforts;
- 3) Determine the feasibility of re-establishing the duskytail darter into historic habitat and reintroduce where feasible;
- 4) Develop and implement a program to monitor population levels and habitat conditions of presently established populations as well as newly discovered, introduced, or expanding populations; and
- 5) Annually assess overall success of the recovery program and recommend action (changes in recovery objectives, delisting, implement new measures, other studies, etc.).

The duskytail darter (*Etheostoma percnurum*) is a small freshwater fish that inhabits the edges of gently flowing shallow pools, eddy areas, and slow runs in usually clear water of large creeks and moderately large rivers. This fish has a straw to olive colored body, the top of its head is medium to dark gray, and its belly is white to pale gray. The duskytail has an apparent preference for a mixture of various substrate sizes from gravel, cobble, slab rock, to boulders

This species is rarely found in heavily silted areas. The fish is primarily an insectivore, but it sometimes feeds on fish eggs. Duskytail darters typically begin to spawn in late April or early May and end in June in water temperatures between 17.5°C and 24°C. The fish can spawn as at one-year.

Historically, the duskytail was likely widespread in the middle reaches of the Cumberland River and the upper reaches of the Tennessee River. However, it presently has a very fragmented distribution. Populations of this species have been fragmented by habitat alteration and existing habitats are threatened by deteriorated water quality. The fish was likely extirpated from Abrams Creek of Blount County, Tennessee as a result of the 1957 Rotenone treatment, aimed at improving fishing for the introduced rainbow trout.

Junaluska Salamander

In 1998, the USFWS was petitioned to list the Junaluska salamander as an endangered species and designate critical habitat under the ESA. Based on the best available scientific and commercial information, the USFWS found that the listing of the Junaluska salamander as endangered or threatened was not warranted (July 1999). At the time of their finding, the number of Junaluska salamander populations was twice the number previously known to exist. The Junaluska salamander remains a Federal Species of Concern.

The Junaluska salamander (*Eurycea junaluska*) is an aquatic to semi-aquatic, small (7-10 cm), dull, yellow-brown salamander, with a wavy black stripe extending along the length of its body. The species is rare and is known only from eastern Tennessee and western North Carolina. The species is known from several locations within the Little Tennessee River Basin including the Cheoah River drainage in North Carolina (Tulula Creek, Santeetlah Creek, and Cheoah River) and from several drainages in Tennessee including the Tellico River, Tallassee Creek, and Fighting Creek. The Junaluska salamander was first reported from the Cheoah River by Sevier in 1976 and then by Bruce and Ryan in 1995.

The Junaluska salamander inhabits the waters and riparian habitats of lower elevation streams with sand-gravel substrates and numerous large rocks that serve as refugia and brooding sites. The salamanders are characteristic of streams that are subject to periodic flooding and scouring events. The breeding season for the species is not known precisely but probably runs through fall, winter, and early spring, with juvenile salamanders inhabiting stream waters during the spring and early summer. The USFWS has identified the period April through early July as critical life stages for the Junaluska salamander in the Cheoah River (for egg laying and larvae).

Red-Cockaded Woodpecker

The red-cockaded woodpecker is listed as endangered and was placed on the federal list in 1970. Red-cockaded woodpeckers have been virtually extirpated north of North Carolina and in all interior states except Arkansas. The dependence of this species on old-growth pine forest is the single most critical factor leading to its endangered status. Overall, only 2.5% of the current pine acreage in the southeastern United States is considered suitable nesting habitat, and most of this habitat exists on public lands. The loss in both quality and quantity of suitable habitat is due primarily to a universal change

in two timber management strategies: the shift to short-term rotation timber management and the removal of fire as a management tool.

The red-cockaded woodpecker (*Picoides borealis*) is a small black and white woodpecker, so named for the tiny sliver of red hidden on the males between their broad white cheek patch and black crown. The red-cockaded woodpecker has a strong preference for larger, old growth pine trees (typically Shortleaf, Pitch, and Virginia pines) in the southeastern Piedmont and Coastal Plain for nesting and as foraging habitat. The pine trees are typically situated near openings, or thinned areas within the stands, or on ridge tops. There have been published reports of the red-cockaded woodpecker in Tennessee since the mid-1880s. Most recently, the bird was located in GSMNP, less than one kilometer from the Project. The species was last observed at this site in the late 1980s.

Red-cockaded woodpeckers have a complex social structure characterized by family “groups”, which comprise a breeding pair as well as up to several young from previous years which serve as “helpers” in the brood rearing process. Each bird requires its own cavity in which to roost year round, and the collection of roost trees that harbor a group is referred to as a “cluster”. Red-cockaded woodpecker cavity trees are identified by their candled appearance, created by dried resin flowing from small wells in the bark. The birds spend time creating and maintaining resin wells around their cavities because the sticky resin serves to impede or inhibit potential nest predators.

Red-cockaded woodpeckers forage almost solely in pine trees, routinely within one kilometer of their cavity trees. Foraging areas can be identified by the reddish bark on commonly visited trees. The birds have a habit of prying off bark plates, which reveal a reddish unweathered plate beneath.

Bald eagle

Bald eagles have nested along the lower Little Tennessee River, downstream from Chilhowee Dam for more than a decade and have been observed foraging on Chilhowee Reservoir. Many white pine and hemlocks near or adjacent to the open waters of Chilhowee Reservoir provide suitable nesting habitat for the bald eagle on Project lands, and it is likely that the species may nest along the reservoir in the near future.

Endangered Species Management

The Tapoco Project is somewhat unique in that it is surrounded by large tracts of undeveloped forest, which are owned and managed by a number of different public and private entities including the USFS, the National Park Service (NPS), and APGI. However, most of the habitat for the RTE and “special concern species” lies outside the Project boundary. Nonetheless, Project lands and waters may be integral to a species’ overall habitat requirements and should be considered as part of a regional management effort. While not insignificant, APGI’s ownership is dwarfed by the surrounding national forest and national park lands.

Currently, individual property owners and/or land managers manage RTE species and habitats on the lands surrounding the Project. While there is some coordination among these owners and managers, there is no formal organized effort to protect RTE species or their habitats. Under the SA, coordination of RTE species management activities and any associated actions deemed necessary to ensure that potential adverse impacts to RTE species, species of special concern and their habitats are avoided or minimized will be initiated and funded through the North Carolina and Tallasse Fund. Additionally, annual meetings of the Boards of the Funds and the review of funding proposals can include other property owners and or wildlife managers, including APGI, the USFS, the GSMNP, the USFWS, NCWRC, TWRA and the North Carolina and Tennessee Natural Heritage Programs to emphasize the coordination of land and watershed management activities as they relate to protection of RTE species.

Monies from the Funds could also be used to identify RTE habitat for protection and conservation within the Project and elsewhere in the Project vicinity. Once habitat areas have been prioritized for protection and/or enhancement, APGI and the other cooperating property owners would be able to identify ways to protect and/or enhance habitat and identify site-specific management actions for the conservation and survival of an identified species. The annual planning meetings of the Funds’ Boards, would guide development of appropriate management actions consistent with FWS recovery plans for individual species, and potentially assist in the recovery of the species. Management actions on APGI’s lands approved by the Boards would be funded with monies from the Funds.

Monies from the Funds could also be used to establish monitoring efforts for RTE species. Monitoring RTE species within the Project boundary would help to determine the effectiveness of any specific habitat protection and/or enhancement efforts completed by APGI on Project lands or waters, but would provide only a narrow view of the overall health of the species.

Incorporating an “adaptive management” aspect in RTE species management under the purview of the Funds would address management actions to be approved by the Boards of the Funds and undertaken with monies from the Funds if there is a change in status of a federally listed RTE species after a new FERC license is issued for the Project. For example, a new species may become federally listed, a species’ status may change, or

new information may become available indicating a potential project effect on a listed species or critical habitat.

Implementation of activities undertaken pursuant to the North Carolina and Tennessee Resource Enhancement Funds that are designed to ensure that potential adverse impacts to RTE species, species of special concern and their habitats are avoided or minimized, and to otherwise protect and enhance RTE species within the Project and Project vicinity would not be expected to have any adverse impact on water quality, aquatic habitat, or terrestrial resources. There is the potential for minor impacts to existing recreation uses at the Project, if it is determined that protection of a species or its habitat required such actions as closing a portion of the Project to certain types of recreational use, or closing or relocating recreation facilities. However, at this time, it is not anticipated that any such effect would occur as a result of implementing RTE species management activities. Similarly, it is not anticipated that implementing RTE species management activities for the Project would result in any adverse impacts to cultural resources.

4. Analysis of the potential effects of the action on the species and habitat

- Analysis
- Determinations (species by species)
- Non-listed species that may benefit from conservation actions
- Proposed measures to offset
- Proposed monitoring/reporting

Appalachian elktoe

The Appalachian elktoe (*Alasmidonta raveneliana*) is a federally listed endangered freshwater mussel known to inhabit the Cheoah River downstream of Santeetlah Dam. Relatively little is known about the habitat preferences of this mussel species. However, like many freshwater mussels the elktoe has a complex life history that involves several intermediate growth stages and a fish host. In the case of the elktoe, known fish hosts are the banded sculpin and the mottled sculpin, the latter of which also inhabits the Cheoah River. Because of the complex relationship between freshwater mussels and their fish hosts, the fish host is generally considered critical to the survival of a freshwater mussel population.

The decline of the species throughout its range has been attributed to several factors, including siltation resulting from past logging, mining, agricultural, and construction activities; runoff and discharge of organic and inorganic pollutants from industrial, municipal, agricultural, and other point and nonpoint sources; habitat alterations associated with impoundments, channelization, and dredging; and other natural and human-related factors that adversely modify the aquatic environment. The most immediate threats to the remaining elktoe populations are associated with heavy silt loads and other pollutants (e.g., fertilizers, pesticides, heavy metals, etc.) from nonpoint sources associated with residential and industrial developments, road and highway construction/maintenance projects, and other land disturbing activities.

To assure the long-term survival of the Appalachian elktoe, the USFWS aims to, among other things, protect the existing water and habitat quality of the reaches of the Little Tennessee, Tuckasegee, Cheoah, Pigeon, Little and Nolichucky River systems where the species persists.

Paddlers state that recreational flow impacts on the Appalachian Elktoe are unknown, and that the only significant impact would be impacts of summer high flows on reproduction. Paddlers cite other areas with critical habitat with high flows. Paddlers state the persistence of the Appalachian Elktoe in these very different whitewater rivers indicates that it is tolerant to the effects of significant flow modification. Adoption of measures under the North Carolina and Tennessee Resource Enhancement Funds to monitor the Cheoah River bypassed reach would reduce the impacts to the Appalachian elktoe, and other ecologically sensitive species, as a result of implementing the base minimum base flow regime and the high flow disturbance regime proposed in the SA.

The higher base flows proposed will result in somewhat more habitat for sculpins, particularly in the upper river reaches, but the shallow to moderate depth and high velocity habitat preferred by the sculpin is in great abundance in all river reaches under the proposed base flows, therefore will not limit sculpin or elktoe populations.

Because of its complex life history, relatively little is known about the effects of river hydrology on the reproductive and juvenile stages of this mussel. Adult freshwater mussels are known to be susceptible to the forces of sheer stress and could be dislodged and dislocated as a result of high flow conditions. The ability of mussels to withstand high velocities is dependent upon the availability of appropriate substrate and cover, which can provide adequate velocity refuges. Timing, magnitude, and duration of high flow events are also critical factors that could determine the overall effect of boating flows on the Appalachian elktoe and its habitat.

The aquatic base flow regimes being proposed as part of the SA are based on the concept of restoring more natural flow conditions in the Cheoah River and the regimes are expected to enhance habitat conditions for the elktoe by increasing the amount of habitat that is available to the species. The resource agencies conclude that flows that are designed to provide a more natural river condition would likely be beneficial to all species that were native to the river, including the Appalachian elktoe.

Boating flow releases scheduled in the warmer months when mussels are more active are anticipated to have an adverse impact on the Appalachian elktoe, due to disruption of the reproductive cycle of the species. According to the USFWS, the Appalachian elktoe probably spawns sometime in July, August or September. During spawning, females deposit eggs in their gills and males release sperm into the water. The eggs then hatch in the females' gills sometime, and most mature females would be brooding glochidia by October. The glochidia are brooded over the winter and released in the spring, probably from late March to May. Female Appalachian elktoes have been observed gravid (with fertilized eggs) during the winter (December – early April), and apparently release glochidia as water temperatures warm during March, April and May.

The parasitic phase likely lasts up to three weeks, thus juveniles could be expected to be settling to the substrate from April to June. The fish host for the Appalachian elktoe has been identified as the mottled sculpin (*Cottus bairdi*) and the banded sculpin (*Cottus carolinae*). Healthy populations of sculpins are crucial to recruitment of the Appalachian elktoe.

The life history events that are most likely to adversely affect mussels during high flows are as follows:

- 1) Fertilization of eggs – High flows in late summer during spawning may dilute sperm and reduce fertilization of eggs.
- 2) Release of glochidia and parasitization of host-fishes – High flows during April and May could reduce the probability of glochidia coming into contact with a host fish. However, in many regions, this time period is naturally characterized by fairly

frequent high water events. Many mussel species spawn during this period, suggesting that mechanisms exist to cope with spring floods. Most mussel species do not release all glochidia at once, rather, they release their brood in smaller quantities over a period of a month or more; this behavior may increase the likelihood that some glochidia are released under conditions favorable for transmission to hosts.

3) Juvenile survival – juveniles probably drop off the hosts and settle to the substrate in spring and early summer. This is a critical period in mussel life history and mortality is likely high during the first few months of benthic life. Normally, this stage is passed during summer low-flow periods that present a relatively non-stressful physical environment and the highest concentrations of particulate organic carbon (food for mussels) found in streams during the year. Frequent high flow events during this period may increase juvenile mortality due to substrate scouring and food reduction. High water events caused by rainfall can produce elevated levels of organic matter contributed to the stream from the riparian zone. In contrast, high water events caused by dam release only would likely result in a drop in instream nutrients due to flushing and dilution.

In general, unnatural, frequent high flows in summer may have a negative effect on mussel recruitment. Summer high water events occur naturally, but the effect of these episodic events on mussel recruitment or survival is unknown. Even in healthy streams, strong mussel recruitment may not occur every year due to irregular, chance events like floods or droughts. Freshwater mussels are long-lived animals and during the life of any individual it is likely that at least a few good recruitment years will occur. This life history strategy allows mussels to withstand infrequent years of poor recruitment. Summer floods do not naturally occur every year and certainly floods do not occur every weekend. If regular summer high water events have a negative impact on recruitment, it is unlikely that, over time, the Appalachian elktoe population would persist.

Based on our analysis, we conclude that continued operation and maintenance of the Tapoco Project, under the provisions of the SA, would **not likely adversely affect** the Appalachian elktoe. Adoption of certain resource management measures and activities to be undertaken and funded through the Funds, such as monitoring and periodic replenishment of sand – gravel particles in the Cheoah River should have a **beneficial effect** for the Appalachian elktoe and its critical habitat.

Virginia Spiraea

The Virginia spiraea (*Spiraea virginiana*) is known to inhabit the banks of the Cheoah River downstream of Santeetlah Dam. As discussed, the habitat requirements of Virginia spiraea are maintained by periodic “disturbance” events that reduce vegetative competition and promote clonal distribution. On the Cheoah River, periodic, short-term high flow events provide such disturbances. However, constant inundation of the plants will cause die-off.

In July 2000, APGI conducted a controlled flow recreation study in the Cheoah River below Santeetlah Dam. Prior to conducting this study it was necessary to cut and remove vegetation in and along the Cheoah River (between river miles 7 and 2). Since Virginia

spiraea, a federally threatened species, historically occurred along the river, a ground survey along U.S. Highway 129 and the Cheoah River was conducted to determine if any remnant populations still existed. The survey in May and June of 2000 was along the entire length of the Cheoah River downstream of Santeetlah Dam including the river edge, road bank, and the islands.

The Cheoah River flow study compared the elevation of existing Virginia spiraea clumps to a mapped water surface elevation of the river at a flow of 1,130 cfs. Of the seven clumps identified, at eight sites, only one was located at an elevation that appeared to be submerged at 1,130 cfs. Based on this information it does not appear that the existing occurrences of Virginia spiraea would be adversely impacted by the flow regime proposed in the Cheoah River bypassed reach.

Periodic disturbance flows proposed under the SA may have some impact on the species, but the impact would likely be marginal. Under the SA, peak disturbance flows released from the dam would be 1,000 cfs. At that flow level, none of the existing plant occurrences would be inundated by these flows. If disturbance flow releases from the dam coincided with large tributary inflows, it is possible that the combined flow might be enough to inundate some of the plant occurrences. Such events would likely be infrequent, and would generally be viewed as beneficial to the plants.

The greatest impact to the Virginia spiraea resulting from future operation of the Project is likely to come from periodic uncontrolled spill events at Santeetlah Dam. Currently, these events occur infrequently and are believed to have benefited the spiraea by producing certain “scouring” effects that enhance the species by eliminating competition and increasing vegetative reproduction and clonal spread. To provide beneficial scouring effects, river flows must be sufficient to topple larger, heavier trees and wash out competing herbs and vines, without being so extreme as to wash out the plant’s fine fibrous root mass or heavy lateral rhizome. Although scour is needed to control competition, the riverine sites where plants occur are not usually sites of maximum erosion. Rather, plants seem to favor sites where deposition occurs after high water flows.

Cheoah River flows undoubtedly play a critical role in the continued survival of this plant population. Three critical aspects of the plant's life history and habitat requirements are: 1) proximity to water; 2) periodic disturbance to eliminate shading and competition; and 3) periodic scouring. These elements are needed to encourage asexual propagation and are directly correlated with the Cheoah River flows, and the operation of the Project.

Periodic uncontrolled spills from Santeetlah Dam will continue to occur. The implementation of the modified guide curve at Santeetlah is expected to result in some increase in the frequency of uncontrolled spill events, as a result of the generally higher reservoir levels, particularly in the winter and early spring. It is unlikely that the modest increase in uncontrolled spill events expected as a result of implementing the modified Santeetlah guide curve would adversely impact the Virginia spiraea.

Based on our analysis, we conclude that continued operation and maintenance of the Tapoco Project, under the provisions of the SA, would **not likely adversely affect** the Virginia spiraea or its habitat. Adoption of certain resource management measures and activities to be undertaken and funded through the Funds such as monitoring and periodic replenishment of sand – gravel particles in the Cheoah River should have a **beneficial effect** on Virginia spiraea and its habitat.

Indiana Bat

The Indiana bat (*Myotis sodalis*) is a federally listed endangered bat species that is known to occur within the Project boundary. Bat studies conducted at the Project did not demonstrate that the species occupies the Santeetlah Development area, but given the presence of the species in the Nantahala National Forest, Great Smoky Mountains National Park (GSMNP) and elsewhere at the Project, it is likely to occur around Santeetlah.

Two roost trees were located during the bat study. The first roost tree was a 6-in. dbh scarlet oak snag about 20 feet tall with 30% bark cover. The second roost tree was a 16-in. dbh tuliptree. This is a live tree with a dead branch in the canopy about 40 feet above ground. The tree, about 60 feet tall with 100% bark cover, is well exposed to direct sunlight. Chilhowee Dam and Powerhouse, Calderwood Dam and Powerhouse, Cheoah Dam and Powerhouse, Santeetlah Dam, Powerhouse, and Surge Tank were also visually inspected and evaluated for their potential as bat habitat. The Cheoah Dam, Calderwood Powerhouse, and the Santeetlah Surge Tank provide the best roosting habitat for bats, although no Indiana bats were found using the Project structures.

The habitat of most concern for the Indiana bat, at the Project is potential roost trees. These trees can be of any species or age, but tend to have loose, flaky bark beneath which the bats roost. While it is unknown whether there are any roost trees located around Santeetlah Reservoir or the Cheoah River, none of the operational alternatives being considered for the Santeetlah Development would be expected to adversely impact any trees of a size that are likely to be used by the Indiana bat.

Based on our analysis, we conclude that continued operation and maintenance of the Tapoco Project, under the provisions of the proposed SA, would **not likely adversely affect** the Indiana bat or its habitat.

Spotfin Chub

In 1999, a survey conducted by experts searched Project waters for the spotfin chub. No spotfin chub were found during these searches. Additionally, Project tail waters and reservoirs, including Abrams Creek and Chilhowee Reservoir were searched during the spring of 2001 and no spotfin chub were captured.

The spotfin chub (*Erimonax monachus*) is a federally listed endangered fish species that historically occurred in Abrams Creek, a tributary to the Project. The species was

eradicated from Abrams Creek in the 1950s, but efforts are underway to reintroduce the species to Abrams Creek. Currently reintroduced fish are known to inhabit the free-flowing portion of Abrams Creek, including a portion of the creek that falls within the current Project boundary.

It is likely that the spotfin chub once inhabited other portions of the Tapoco Project, including the Cheoah River. There is no evidence to suggest that the species currently exists in the Cheoah River, but the USFWS has indicated that the species may be a candidate for reintroduction into the river.

The only habitat within the Project that is suitable to support the spotfin chub is a short stretch of the free-flowing portion of Abrams Creek and possibly the Cheoah River downstream of Santeetlah Dam. Modification of the flow regime in the Cheoah River downstream of Santeetlah Dam may provide habitat enhancement for the spotfin chub, if indeed it still exists there.

Habitat Preferences of the Spotfin Chub

Life Stage	Habitat Preference
Adult	Deep-Fast (> 3 ft, > 1 ft/sec)
Spawning	Medium-Fast (1.5-3 ft, > 1 ft/sec)
Early	Shallow-Slow (< 1.5 ft, < 1 ft/sec)
Juvenile	Shallow-Fast (< 1.5 ft, > 1 ft/sec)

The deep fast habitats preferred by adult spotfin chub are concentrated in the lower river reaches and occur in greatest abundance at flows greater than 150 cfs. However, the shallow and medium fast habitat preferred for spawning and juveniles are located throughout the river and generally occur in most abundance at flows of 50-150 cfs. Based on this evaluation it would appear that the base flow conditions set forth in the SA would ensure the existence of habitat to support a possible reintroduction of this species.

In addition, the SA requires the Licensee to develop a plan for fish passage and annual funding at the Chilhowee development as described above. The Plan shall provide for the fish passage for four target RTE fish species, including the Spotfin chub. Annual funding will be used to trap and relocate the target species and to conduct associated sampling, marking and genetic testing. The provision of fish passage at Chilhowee would help support possible reintroduction of this species.

Based on our analysis, we conclude that continued operation and maintenance of the Tapoco Project, under the provisions of the proposed SA, would **not likely adversely affect** the spotfin chub or its habitat.

Yellowfin madtom

Conservation Fisheries, in cooperation with the FWS, the TWRA, GSMNP, and the NCWRC initiated a reintroduction of the yellowfin madtom into Abrams Creek, a

tributary to Chilhowee Reservoir, almost 16 years ago. To date, Conservation Fisheries et al. has stocked more than 1,000 yellowfin madtoms into Abrams Creek. In-stream spawned yellowfin madtoms have been located in Abrams Creek; however, they are not as abundant as the smoky madtom. Similarly, the yellowfin madtoms in Citico Creek are far less abundant than smoky madtoms.

Because the yellowfin madtom is native to the Tennessee River drainage and has recently been found in tributaries to the mainstem Little Tennessee River in both North Carolina and Tennessee and is being reintroduced into Abrams Creek, the species is considered as “possibly occurring” on Project waters. However, potential habitat for this species within the Project boundary is very limited. Only a short stretch of the free-flowing portion of Abrams Creek and the Cheoah River downstream of Santeetlah Dam may provide habitat suitable for the yellowfin madtom.

The SA requires the Licensee to develop a plan for fish passage and annual funding at the Chilhowee development as described above. The Plan shall provide for the fish passage for four target RTE fish species, including the yellowfin madtom. Annual funding will be used to trap and relocate the target species and to conduct associated sampling, marking and genetic testing. The provision of fish passage at Chilhowee would assist in the continued reintroduction of this species.

Based on our analysis, we conclude that continued operation and maintenance of the Tapoco Project, under the provisions of the proposed SA would **not likely adversely affect** the yellowfin madtom or its habitat.

Smoky Madtom

As with the yellow madtom, the smoky madtom is native to the Tennessee River drainage, is known to inhabit Citico Creek, a tributary to the Little Tennessee River, and is being reintroduced into Abrams Creek, the species is considered as “possibly occurring” in Project waters. However, potential habitat for this species within the Project boundary is very limited. Only a portion of the free-flowing Abrams Creek and the Cheoah River downstream of Santeetlah Dam provide habitat that may be suitable for the smoky madtom.

The SA requires the Licensee to develop a plan for fish passage and annual funding at the Chilhowee development as described above. The Plan shall provide for the fish passage for four target RTE fish species, including the smoky madtom. Annual funding will be used to trap and relocate the target species and to conduct associated sampling, marking and genetic testing. The provision of fish passage at Chilhowee would help support continued reintroduction of possible reintroduction of this species.

Based on our analysis, we conclude that continued operation and maintenance of the Tapoco Project, under the provisions of the proposed SA, would **not likely adversely affect** the smoky madtom or its habitat.

Duskytail Darter

In 1993, Conservation Fisheries, the FWS, TWRA, GSMNP, and the NCWRC began stocking captive propagated duskytail darters into Abrams Creek (more than 1,700 duskytail darters have been stocked to date). During the past five years, Conservation Fisheries has noted regular nesting and good juvenile recruitment of duskytail darters. The species is also found in the Little River of Blount County, Tennessee; Citico Creek in Monroe County, Tennessee; Copper Creek in Scott County, Virginia; and Station Camp Creek in Scott County, Tennessee.

In 1999 and 2001 surveys no duskytail darters were found in Project waters. However, the duskytail darter is a reintroduced species that could inhabit the waters within the Project boundary.

Because the duskytail darter is native to the Tennessee River drainage and is known to inhabit Citico Creek, a tributary to the Little Tennessee River, and is being reintroduced into Abrams Creek, the species is considered as “possibly occurring” on Project lands/waters. However, potential habitat for this species within the Project boundary is limited to a portion of the free flowing Abrams Creek and possibly the Cheoah River downstream of Santeetlah Dam.

The SA requires the Licensee to develop a plan for fish passage and annual funding at the Chilhowee development as described above. The Plan shall provide for the fish passage for four target RTE fish species, including the duskytail darter. Annual funding will be used to trap and relocate the target species and to conduct associated sampling, marking and genetic testing. The provision of fish passage at Chilhowee would help continued reintroduction of this species.

Based on our analysis, we conclude that continued operation and maintenance of the Tapoco Project, under the provisions of the proposed SA, would **not likely adversely affect** the duskytail darter or its habitat.

Junaluska Salamander

In 1999, the TNC surveyed Project lands and waters for the Junaluska salamander. The Junaluska salamander was located within the study area along Tallassee Creek, where the mouth of the creek drains into Chilhowee Reservoir and roadside, along the Cheoah River. Additional surveys in 2000-2001, within the Cheoah River bypassed reach, focusing on in the upper portion of the bypassed reach where the Junaluska salamander had previously been found, found no specimens.

However, in the spring of 2000 the Junaluska salamander was observed at several locations off of U.S. Highway 129 along the Cheoah River within one mile upstream and downstream from the Tapoco Lodge. A genetic comparison of the populations of Junaluska salamander in North Carolina and Tennessee to compare inter and intra

specific differences among populations concluded that the genetic relatedness among the various populations relates more to watershed than to state of origin (i.e., there is no evidence that North Carolina salamanders are a unique subspecies compared to Tennessee salamanders).

Based on survey results, the Junaluska salamander most likely inhabits the Cheoah River bypassed reach, but may no longer inhabit the upper reach (near Santeetlah Dam) where they were found historically. The changing habitat conditions, sedimentation, and subsequent foliage buildup within the area is a likely reason for this change in distribution within the river.

State and federal fishery agencies conclude that flows that are designed to provide a more natural river condition would likely be beneficial to all species that were native to the river, including the Junaluska salamander.

In this regard the base flows and high flows associated with the SA are likely to benefit this species and its habitat. The high disturbance flows associated with the SA are scheduled to occur during months of “natural” high flow events and would be expected to benefit the species, by reducing sedimentation, improving habitat conditions and possibly reducing predation pressure on Junaluska salamander eggs and larvae.

The Junaluska salamander has evolved in an environment subject to fairly high flow rates and to periodic flooding and scouring events. The species has modified its breeding/egg laying and larval behavior in response to these events. Larva subjected to heavy flows (or some other disturbances) will quickly “burrow” into the substrate, thus reducing the likelihood of being swept downstream in flooding events. Young can withstand fairly large temporary sediment loads that could clog the gills and have detrimental effects on many other species. Based on these considerations, we conclude that high flow releases in the Cheoah River (670-1,130 cfs) would not be harmful to Junaluska salamanders except during the period from April to early July when juvenile salamanders would be present in the river. Similarly, state and federal resource agencies have identified the periods from late April through early May and June through early July as critical life stages for the Junaluska salamander (egg laying and larvae stages respectively).

Red-cockaded woodpecker

The Red-cockaded woodpecker (*Picoides borealis*) is a federally listed endangered bird species that was known to occur historically in the GSMNP. The bird has been absent from the GSMNP since the late 1980s and there is no data to suggest that the bird currently exists in the park or within the Project boundary. A 2001 survey for the species found no Red-cockaded woodpeckers, cavity trees or other evidence of the species.

There is some potential habitat (mature pine stands) for the Red-cockaded woodpecker located near the Project, but none of these areas would be impacted by the operation of the project as proposed in the SA.

While it is highly unlikely that Red-cockaded woodpeckers nest on Project lands, potential habitat for the species may exist in pine forests surrounding the Project and could be affected by Project operations. Vegetation management along the Tapoco transmission line corridors (within one kilometer of the transmission line) could affect foraging habitat for the Red-cockaded woodpecker however this transmission line is not part of the project. Based on our analysis, we conclude that continued operation and maintenance of the Tapoco Project, under the provisions of the SA would have no effect on the red-cockaded woodpecker or its habitat.

Wide scale mortality of old growth pine trees from beetle infestation and unmanaged mid-story hardwood appear to be the most likely causes of the species' disappearance in the southern Appalachians. Given the limited amount and fractured nature of suitable habitat, the absence of the Red-cockaded woodpecker from the Project area is not surprising. What were formally suitable older stands for cavity trees are predominantly dead or dying from pine beetle infestation. Where older trees still exist, they are typically in association with lower, more hardwood dominated sites with dense mid-story habitats that would not be suitable for woodpeckers. We conclude that the continued operation of the Project would have **no effect** on the Red-cockaded woodpecker or its habitat

Bald Eagle

The bald eagle (*Haliaeetus leucocephalus*) is a federally listed threatened species that is known to occur periodically within the Project boundary. Transitory bald eagles have been observed using Chilhowee Reservoir, and there is documented evidence of at least one nesting attempt along Chilhowee Reservoir. Currently no bald eagles are known to be using Santeetlah Reservoir or the Cheoah River for nesting, or as a permanent residence. Based on our analysis, we conclude that continued operation and maintenance of the Tapoco Project, under the provisions of the SA would have **no effect** on the bald eagle or its habitat. In fact the provisions for riparian easements should provide continued availability of potential nest trees and protect roost and perches around the project waters.

C. Licensee's Request to Amend Project Boundary

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Alcoa Power Generating Inc.

)

Project No. 2169- _____

**APPLICATION FOR NON-CAPACITY RELATED AMENDMENT
TO PROJECT LICENSE
AND REQUEST FOR WAIVER**

Pursuant to Sections 4.200 and 4.201 of the Regulations of the Federal Energy Regulatory Commission ("FERC" or "the Commission"), 18 C.F.R. §§ 4.200 and 4.201, the Tapoco Division of Alcoa Power Generating Inc. ("APGI"), licensee for the Tapoco Project, P-2169 (the "Project"), hereby applies to amend the license for the Project in order to include within the project boundary five additional parcels of land owned by APGI and located adjacent to the project.

In support of this application, APGI respectfully shows as follows:

I. Initial Statement

The exact name, business address, and telephone number of the applicant are:

Alcoa Power Generating Inc.
Tapoco Division
300 North Hall Road
Alcoa, Tennessee 37701-2516
(865) 977-3334 (Walter Brockway)

APGI is a domestic corporation incorporated under the laws of Tennessee, and the licensee for the water power project, designated as Project No. 2169 in the records of the Federal Energy Regulatory Commission, issued on the 17th day of March 1955.

Pursuant to Section 4.201(a)(5) of the Commission's Regulations, APGI states that since all of the requested changes relate only to the inclusion of adjacent parcels of land within the licensed Project, none of which contain any streams or other bodies of water, there are no

statutory or regulatory requirements of the States of North Carolina or Tennessee that affect the amendment as proposed with respect to beds and banks and to the appropriation, diversion and use of water for power purposes.

II. Background and Description of License Amendment Proposed

The Tapoco Project consists of the Santeetlah, Cheoah, Calderwood and Chilhowee Developments, the first two of which are located in North Carolina and the remain two of which are located in Tennessee. The project is located approximately 15 miles south of Knoxville, TN and approximately 90 miles northeast of Chattanooga, TN. This location represents the western portion of the Little Tennessee Watershed on the Little Tennessee and Cheoah Rivers in Graham, Swain, Blount and Monroe Counties in North Carolina and Tennessee.

The project's original fifty year license expires on February 28, 2005. On February 9, 1999, the Commission approved APGI's request to employ the Alternative Licensing Process set forth in FERC regulations, and shortly thereafter APGI convened a large group of interested relicensing stakeholders. Although APGI filed an application for a new license with the Commission on February 21, 2003, it continued negotiating with the relicensing stakeholders and recently reached consensus on a comprehensive Relicensing Settlement Agreement setting forth proposed terms and conditions for any new Project license issued by the Commission. That Relicensing Settlement Agreement currently is being executed by each of the parties to the agreement and will be filed with the Commission in due course.

The license amendment sought herein by APGI would adjust the current project boundary in order to clean up land issues under the existing license, as well as to facilitate the execution of certain land exchanges and conservation easements proposed as part of the Relicensing Settlement Agreement for a new license. Specifically, the amendment sought would include as part of the licensed project the five parcels of land identified in Exhibit A attached hereto. These

five parcels total 147 acres in size, are located adjacent to the current project boundary, and are owned in fee simple by APGI. Two of the parcels would add strips of land to the existing project, while three of the parcels are small inholdings of non-project lands surrounded by project lands. Each parcel is described in more detail below.

- **Parcel 1** is a 3 acre inholding bounded by Tabcat Creek and a corridor of transmission lines.
- **Parcel 2** is a 110 acre tract of land located east of Chilhowee Reservoir and directly south of a tract of land upon which a conservation easement would be placed under the terms of the Relicensing Settlement Agreement.
- **Parcel 3** is a 1 acre piece of non-project land that was once the location of Blount County School, and is surrounded on all sides by project lands.
- **Parcel 4** is a 23 acre tract of land located between the existing Project boundary and U.S. Route 129.
- **Parcel 5** totals 10 acres, and is a 100 feet wide strip of land running the length of a large parcel upon which a conservation easement would be placed under the terms of the Relicensing Settlement Agreement.

III. Adjustment of the Project Boundary to Include the Five Parcels is Necessary or Appropriate for the Operation and Maintenance of the Project and for Other Project Purposes

The Commission should amend the project license by adjusting the Project boundary to include the five parcels of non-Project lands identified above because the inclusion of the parcels would enhance APGI's management and maintenance of the project, while having no negative effects on Project resources. According to Section 3(11) of the Federal Power Act ("FPA"), 16 U.S.C. § 796(11), a licensed "project" means the "complete unit of improvement or development," including, in relevant part, "all water rights, rights-of-way, ditches, dams,

reservoirs, lands, or interests in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit. . ." 16 U.S.C. § 796(11) (emphasis added); see also Fort James Operating Co., PP&L Great Works, LLC, 89 FERC ¶ 62,248 (1999). As demonstrated below, the five parcels meet this definition and, thus, should be included as part of the licensed Project for the remainder of the current license term, as well as under any new license issued by the Commission.

Parcels 1, 3, 4 and 5 are all geographic discontinuities to the extent that they are either surrounded by other Project land, or are located between the Project and other natural or man-made barriers that render them otherwise incapable of being developed for other purposes. Parcel 2 contains a road and a dock on Chilhowee Reservoir that experience has demonstrated is used and is necessary for Project operations.

Adjusting the Project boundary to include these parcels would improve the geographic continuity of the Project and, as a result, enhance APGI's access to and management of several parts of the Project for safety, security, and maintenance purposes. In addition, inclusion of the five parcels within a revised Project boundary would also make the lands subject to the provisions of the current Project license, as well as the terms and conditions of any new license issued by the Commission. The protections afforded by the original and/or new Tapoco Project license will in turn help to ensure that the license amendment will have no negative impact on the environmental, recreational, or cultural resources of the Project. Furthermore, to the extent it helps facilitate the transfer of environmentally valuable lands and conservation easements to environmental groups as proposed under the Relicensing Settlement Agreement for a new license, the amendment in fact would only enhance the benefits of those Project resources. Finally, the amendment should be granted because it would have no negative effect on Project operations in any way, nor would it result in any changes in ownership rights, land uses, or

occupancies of the five parcels in question. See 89 FERC ¶ 62,248; Erie Boulevard Hydropower, 90 FERC ¶ 62,147 (2000).

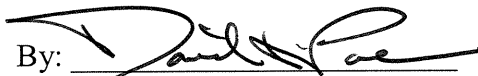
IV. Request for Waiver

APGI respectfully submits that the information set forth on the map included as Exhibit A is sufficient to demonstrate the nature of the Project amendment being requested in this application, and respectfully requests waiver of any other requirements for the application. However, recognizing that Exhibit K of the present Project license and Exhibit G of the pending license application will have to be revised if the license amendment requested herein is granted, APGI further respectfully requests that it be given 60 days after any Commission action with regard to this application to submit revised Exhibit K and G drawings that conform to the Commission's regulations.

V. Conclusion

For the foregoing reasons, APGI respectfully requests that the Commission amend the Tapoco Project license to include the parcels of land identified herein as part of the licensed Project. Please direct all inquiries regarding this application to the undersigned.

Respectfully submitted,

By: 

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1875 Connecticut Ave., N.W. Suite 1200
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Counsel for Alcoa Power Generating Inc.

Dated: May 6, 2004

Exhibit A

See Map No. TP616 Issue No. 15
in the Tapoco Project Relicensing Settlement Agreement Appendix B-5

D. List of Parties and Primary Contacts

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