

**UNITED STATES OF AMERICA**  
**FEDERAL ENERGY REGULATORY COMMISSION**

RE: Metro Hydroelectric Company, LLC	)	FERC No. P-12484-003
Application for Preliminary Permit	)	
For Metro Hydroelectric Project on	)	
The Cuyahoga River	)	
	)	<b>NOTICE OF INTERVENTION/</b>
	)	<b>MOTION TO INTERVENE OF</b>
	)	<b>THE OHIO ENVIRONMENTAL</b>
	)	<b>PROTECTION AGENCY</b>
	)	

**I. Introduction**

Metro Hydroelectric Company, LLC is seeking to reopen its permit application for the hydroelectric dam in Gorge Metro Park. The Federal Energy Regulatory Commission (“FERC”), provided notice on April 8, 2008 of the date for filing interventions and protests. The Ohio Environmental Protection Agency, (“Ohio EPA”), hereby files this Notice of Intervention pursuant to 18 C.F.R. §385.214(a)(2). In the event that the Notice of Intervention is considered in some manner defective and FERC does not confer party status on Ohio EPA under 18 C.F.R. §385.214(a)(2), Ohio EPA in the alternative moves the FERC to intervene under 18 C.F.R. §385.214 in the above permit application.

**II. Statement of Interest of Ohio EPA**

Ohio EPA is the agency of the State of Ohio, created pursuant to Ohio Revised Code Section 3745.01, which administers the laws of Ohio which pertain to the prevention, control, and abatement of water pollution, public water supply and

comprehensive resource management. These laws include Ohio Revised Code (“O.R.C.”) Chapter 6111. Pursuant to O.R.C. §§6111.12 and 6111.041 Ohio EPA has adopted state water quality standards rules consistent with the requirements of Section 303 of the Clean Water Act, 33 U.S.C. §1313. Ohio’s Water Quality Standards, which appear in Ohio Administrative Code (“O.A.C.”) Chapter 3745-1, include designated uses for the section of the Cuyahoga River where the proposed project is to be located and other requirements which require the protection of designated and/or existing water body uses. Ohio EPA has also adopted rules, O.A.C. Chapter 3745-32, governing the water quality certifications which applicants for Federal permits such as the permit at issue here are required to obtain from Ohio EPA pursuant to Section 401 of the Clean Water Act, 33 U.S.C. §1341. Ohio EPA is the agency of the State of Ohio with the authority to issue a water quality certification. This pleading is filed within the time period established by FERC in the April 8, 2008 notice issued pursuant to 18 C.F.R. §385.210(b). Therefore, Ohio EPA is a party to this proceeding by the filing of this Notice of Intervention.

### **III. Grounds For Intervention**

Even if Ohio EPA’s intervention in this matter is measured against the standards set forth in 18 C.F.R. §385.214(b), Ohio EPA should be allowed to intervene pursuant to 18 C.F.R. §385.214(b)(2), because Ohio EPA has a right to participate conferred by FERC rule, Ohio EPA has an interest in protection of the designated uses of this portion of the Cuyahoga River and the administration of Ohio’s Water Quality Standards and Ohio’s Water Quality Certification Program which may be directly affected by the outcome of the proceeding, and such intervention is in the public interest. Further no other party in the proceeding administers Ohio’s Water Quality Certification Program or

is specifically charged as a matter of law with protection of the designated and/or existing stream uses and the prevention, control and abatement of water pollution.

#### **IV. Statement of Position**

Although not required by 18 C.F.R. §385.214 (a)(2), Ohio EPA provides the following statement of position as currently known.

Ohio EPA is opposed to FERC proceeding with substantive review of this permit application. On June 14, 2007, FERC terminated the previous Integrated Licensing Process proceeding for this project because Metro Hydroelectric Company (“MHC”) could not complete required studies for development of a license application in accordance with the previously established schedule, noting that access to the site was denied by order of the U.S. Court of Appeals for the Sixth Circuit on May 25, 2007 decision. On October 18, 2007 FERC issued an order denying rehearing which noted that MHC was in no position to conduct the required studies within the timeline established. When discussing the denial of MHC’s request to extend the study schedule or hold the ILP in abeyance, FERC specifically stated “Metro Hydro may re-apply for the ILP when the validity of the easement is determined.” On March 3, 2008, MHC filed what it termed a Renewal Application for Preliminary Permit. However, as of the filing of the Renewal Application the legal issues related to the validity of the easement continued to be in litigation. These issues have not yet been finally determined by any court. Further, MHC has not conducted the needed studies and appropriately updated the application for this project. It is therefore premature for MHC to file this application and for FERC to proceed with substantive review of the application.

Ohio EPA has through comments filed on August 14, 2006 in the docket of the earlier ILP proceeding, Docket # P-12484-001, and identified in that docket as item 20060815-0261, provided extensive comments generally outlining a number of the concerns that Ohio EPA has with this project. Those comments incorporated earlier comments from Ohio EPA dated August 29, 2005, January 3, 2006, February 22, 2006 and April 13, 2006. The same issues previously identified in the August 14, 2006 comments and its attachments continue to be of concern to Ohio EPA with regard to the instant application.

The first and foremost concern is that the Ohio EPA has designated the section of the Cuyahoga River where the proposed project is to be located as warm water habitat aquatic life use (WWH), industrial and agricultural water supply use , primary contact recreation use (PCR) and state resource water (SRW). See O.A.C. 3745-1-26. Ohio EPA has concerns about the potential loss of the designated uses as a result of the proposed project in two segments of the river. The first segment is between the existing Ohio Edison (FirstEnergy) dam and the proposed power house, and would be partially dewatered by the proposed project. The other segment is the impounded river behind the dam. Ohio's Water Quality Standards include antidegradation requirements which *inter alia* prohibit degradation of water quality which could cause or contribute to the elimination or impairment of the existing designated uses. See Ohio's Antidegradation Rule, O.A.C. 3745-1-05.

Ohio's antidegradation rule, O.A.C. 3745-1-05, is applicable to the consideration of any water quality certificate for the instant project. As Ohio EPA has noted in its comments in the earlier proceeding, the antidegradation review process requires that

MHC consider, develop, and propose alternatives to minimize and eliminate the need to lower water quality. This means that, in the context of this project, there is a requirement for a dam removal feasibility study as a prerequisite to MHC's developing a complete application. Further, Ohio's plan for implementation of the total maximum daily load ("TMDL") developed pursuant to Section 303 of the Clean Water Act, 33 U.S.C. § 1313 calls for evaluation of the remaining dams in the section of the Cuyahoga River where the project will have impact. This Lower Cuyahoga River Watershed TMDL has been approved by U.S.EPA. In the Lower Cuyahoga River Watershed TMDL implementation plan, at page 91, Ohio EPA specifically called for evaluation of all dams in the Lower Cuyahoga River TMDL area for removal, noting the benefits to both the biological communities and recreational use. Ohio EPA has previously explained that in the absence of a dam removal evaluation study the Director of Ohio EPA cannot approve a Section 401 water quality certification because it would violate the TMDL implementation plan and the Ohio rule on water quality certifications, O.A.C. 3745-32-05(A)(2). Further, such study is required to be provided as part of the required alternatives analysis in any request that MHC files with Ohio EPA for the Section 401 certification. In the absence of more studies, including evaluation of dam removal, MHC has not developed the alternatives analysis and other information required for a complete application for a Section 401 certification, and therefore a Section 401 water quality certification cannot be issued. FERC cannot issue a license for MHC's project without such a 401 certification.

## V. Conclusion

The Ohio EPA should be granted party status pursuant to 18 C.F.R. 385.214(a)(2), because Ohio EPA is the agency of the State of Ohio which administers Ohio's Water Quality Certification Program and which has the authority to issue a water quality certification. Further, no other party in the proceeding is specifically charged as a matter of law with protection of the designated and/or existing stream uses and the prevention, control and abatement of water pollution and granting party status to the Ohio EPA is in the public interest.

Respectfully submitted,  
NANCY H. ROGERS  
ATTORNEY GENERAL OF OHIO

/s/ Margaret A. Malone  
MARGARET A MALONE (0021770)  
Assistant Attorney General (F#174484)  
Environmental Enforcement Section  
30 East Broad Street, 25<sup>th</sup> Floor  
Columbus, Ohio 43215-3400  
(614) 466-2766  
Fax (614) 644-1926  
mmalone@ag.state.oh.us  
Attorney for the Ohio Environmental  
Protection Agency

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of this Notice of Intervention/Motion to Intervene, by first class mail or electronically, as appropriate, upon each person designated on the official service list compiled by the Commission in the above-captioned proceeding.

Dated this 6<sup>th</sup> day of June, 2008

Respectfully submitted,  
NANCY H. ROGERS  
ATTORNEY GENERAL OF OHIO

/s/ Margaret A. Malone  
MARGARET A MALONE (0021770)  
Assistant Attorney General (F# 174484)  
Environmental Enforcement Section  
30 East Broad Street, 25<sup>th</sup> Floor  
Columbus, Ohio 43215-3400  
(614) 466-2766  
Fax (614) 644-1926  
mmalone@ag.state.oh.us  
Attorney for the Ohio Environmental  
Protection Agency