

111 FERC ¶ 61,197
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Duke Energy Corporation

Project No. 2232-479

ORDER ON REHEARING AND CLARIFICATION OF ORDER ON
NON-PROJECT USE OF PROJECT LANDS

(Issued May 9, 2005)

1. On October 6, 2004, the Commission issued an order¹ granting an application filed by Duke Energy Corporation (Duke Energy), licensee for the Catawba-Wateree Project No. 2232, for authorization to lease 0.535 acres of project lands to Sunset Bay, a developer, for the construction of a residential and commercial marina on one of the project's reservoirs in Iredell County, North Carolina. The proposed marina, which consists of 14 floating boat slips, will be located within a cove on the eastern shore of Lake Norman² and will be used by off-water lot owners in an adjacent residential subdivision.

2. Timely requests for rehearing of the order were filed by the Residents of Roundstone and Farley (Roundstone), requesting clarification of certain requirements of the order and asserting that the Commission's decision to waive provisions of the project's shoreline management plan (SMP) was in error, and by Duke Energy, objecting to the order's requirement that it file revised classification maps. This order, which denies the rehearing requests and clarifies the October 6 Order, is in the public interest because it conforms to and clarifies the Commission's practice in authorizing non-project uses of project lands and waters.

¹ 109 FERC ¶ 61,016.

² The lake covers over 592 miles of shoreline in the piedmont region of south central North Carolina.

Background

3. The Catawba-Wateree Project consists of thirteen hydroelectric developments with eleven reservoirs in North and South Carolina. The project boundary is generally the normal high water elevation contour at each of the eleven project reservoirs.³ Project lands consist of those lands that lie under the project waters at all times and those lands that lie between the reservoirs' high water marks and minimum pool levels.⁴

4. Article 39 of the license for the Catawba-Wateree Project gives Duke Energy the authority, without prior Commission approval, to grant permission for certain types of non-project use and occupancy of project lands and waters.⁵ Because the proposed marina is not within the scope of uses set forth in Article 39, it can only be permitted if the Commission approves an application to allow the particular facilities and uses.

5. Duke Energy's consideration of requests for permission to use its project shoreline and waters is guided by its SMP, which was first approved in 1996,⁶ revised in 1998 to include shoreline management classification maps,⁷ and updated in 2001.⁸ The revised SMP is intended to assist the licensee in establishing future shoreline uses at the project.

6. The primary goals of the SMP are to: (1) provide for public and private access without destruction of the project's natural resources or without compromising the project's primary function, which is the production of electricity; and (2) ensure that the existing and future public recreational needs of the project are addressed. Duke Power has stated that it uses the most recent data available, including digital aerial photography, to guide decisions regarding all types of access within the project boundary and to ensure

³ 20 FPC 360, 365-67 (1958).

⁴ 67 FERC ¶ 61,061 at 61,170 (1994).

⁵ See 24 FERC ¶ 61,346 (1983 order adding the Commission's standard land use article and approving Duke Energy's requests to lease project lands and waters for private marinas and other shoreline development).

⁶ 74 FERC ¶ 62,047.

⁷ The Commission approved the classification maps in 2000. 93 FERC ¶ 62,159. Duke Energy correctly points out that comments on the revised SMP maps were filed in that proceeding and addressed in the order approving the maps. None of the comments opposed the maps on the grounds raised by Roundstone.

⁸ The Commission requires the licensee to update the SMP every five years. The Commission approved the updated and current SMP on October 15, 2003. 105 FERC ¶ 62,027.

that the SMP is a factually-based document that can be used by the licensee and the Commission for reviewing requests for utilization of the project and its resources.⁹

7. Under the approved SMP, the entire project shoreline is classified according to various existing and future use categories, and the classifications are indicated on the SMP classification maps. The maps classify the shoreline where the proposed marina is to be located as future commercial/non-residential. Under this classification, commercial marina facilities such as the one proposed are permitted. However, because the proposed marina would be located in a cove that narrows to less than 174 feet, the marina conflicts with the classification criteria of the SMP, which include a provision restricting the development of commercial and residential structures in coves that widen and then narrow to less than 200 feet.

8. In our October 6 Order granting Duke Energy authorization to lease project lands for the proposed marina, we treated Duke Energy's request to lease the project lands as a request to waive the provisions of its SMP, which we granted because, among other things, the proposed marina would have negligible impacts on environmental resources. We also required Duke Energy to file revised shoreline maps to designate the shoreline area where the proposed marina is to be located in accordance with the classification requirements in its SMP.

Discussion

A. Waiver

9. In reaching our decision in this case, we treated Duke Energy's application as a request to waive the inconsistent provisions of its SMP. Roundstone agrees that Duke Energy's application is inconsistent with the SMP, but it does not agree that the application should be treated as a request for waiver and granted. Roundstone contends that there is no compelling reason for granting the waiver and not enforcing the provisions of the SMP, particularly since Duke Energy, believing that the proposal complies with the SMP, did not request a waiver.

10. In the October 6 Order, we cited *Grand River Dam Authority*¹⁰ for the proposition that land use requirements under the SMP are planning criteria, which are subject to

⁹ See Duke Energy's 2001 revised SMP, Volume I at 3.

¹⁰ 105 FERC ¶ 61,100 (2003) (approving expansion of proposed marina that exceeded limits established in reservoir regulations and noting that the Commission may consider proposal's consistency with licensee's reservoir regulations, but is not bound by them).

revision and which are not binding on the Commission.¹¹ Roundstone points out that the reservoir management regulations that we considered non-binding and subject to waiver in *Grand River* were neither part of an approved SMP nor part of an issued license. Roundstone suggests therefore, that because the regulations in this case form part of an approved SMP and issued license, they cannot be waived.

11. While Roundstone is correct that Duke Energy's SMP is a condition of its license, which was not the case in *Grand River*, this does not prevent the Commission from waiving those requirements in appropriate cases. Both the order approving the SMP and the license reserve the Commission's right to require changes to the SMP. Inherent in that authority and in the Commission's jurisdiction over the licensed project is the authority to grant a waiver of provisions that affect the operation and maintenance of the licensed project. We continue to find that good cause exists for the waiver. As described above, one of the stated goals of the SMP is to provide for private and public access without destroying the project's natural resources, and without compromising the project's primary function of electric production. The proposed marina would fulfill this goal, inasmuch as it provides for private access to the reservoir without significant impacts on environmental resources. In the circumstances of this case, waiver of the SMP provisions is a reasonable vehicle for allowing a facility that does not compromise the SMP's ongoing objective of protecting shoreline resources.

B. Recreational Opportunities

12. Roundstone contends that the Commission erred in finding that the proposed marina would increase recreational opportunities, because the marina would not be public and would solely benefit the 14 private property owners in the residential subdivision.

13. Public access to project lands and waters for recreation is an important project purpose.¹² However, it is appropriate for us to authorize licensees to permit private recreation facilities where, as here, there is no dispute that the public has sufficient access to recreation at a project and where the private facilities do not unduly interfere with any other project purposes.

¹¹ 109 FERC ¶ 61,016 at 61,078.

¹² It is the Commission's policy with respect to recreational development at licensed projects to "seek, within its authority, the ultimate development of [recreational resources], consistent with the needs of the area to the extent that such development is not inconsistent with the primary purpose of the project." 18 C.F.R. § 2.7 (2004). This statement of policy was promulgated by Order No. 313, 34 FPC 1546 (1965).

C. Safety of Boaters and Other Recreationists

14. On rehearing, Roundstone and the licensee ask for clarification regarding our statement in the October 6 Order that the impact of boats entering and leaving the marina should not be a significant navigational safety concern, given a state law that establishes a no-wake zone and the licensee's enforcement of boat lane and speed limit requirements.¹³ Duke Energy notes that it has not established boat-traffic control lanes or speed limits, and does not enforce a no-wake-zone requirement. Rather, it states, the Lake Norman Marine Commission (Lake Commission) has established no-wake-zone requirements (which will limit boat speeds) applicable to the cove.¹⁴

15. The Lake Commission was established pursuant to 1969 legislation by the State of North Carolina.¹⁵ That legislation gives the Lake Commission the authority to make and enforce "regulations applicable to Lake Norman and its shoreline area concerning all matters relating to or affecting public recreation and water safety." The Lake Commission has established procedures for no-wake zones in narrow coves. Moreover, North Carolina's Boating Safety Act specifically prohibits the operation of vessels (boats, jet skis, etc.) "at greater than no-wake speed within 50 yards of a boat launching area, bridge, dock, pier, marina, boat storage structure, or boat service area on the waters of Lake Norman."¹⁶ All marina users, and other boaters, must comply with these requirements. While we are not aware whether the Lake Commission has established boat-traffic control lanes in the cove, it has the authority to do so.

16. To ensure that our grant of a waiver to authorize Duke Energy to permit construction of the Sunset Marina does not result in adverse impacts on boating safety, we will require Duke Energy, prior to issuing the permit, to consult with the Lake Commission and to thereafter condition any permit on Sunset Bay's implementing safety measures (which may include, but are not limited to, the designation and marking of boat traffic control lanes and no-wake zones) recommended by the Lake Commission, and to file the record of the consultation with the Commission, for informational purposes.

¹³ Roundstone also argues that the Commission did not fully consider the safety and recreation impacts on swimmers and anglers who use the cove, but does not offer any information to support its contention.

¹⁴ See Duke Energy's Request for Rehearing at 4, n.4. The Lake Norman Marine Commission website is www.lnmc.org.

¹⁵ 1969 N.C. Sess. Laws 1089.

¹⁶ N.C. Gen. Stat. § 75A-14.13.3, Art. 1 Boating Safety Act (2004). See 18 C.F.R. § 2.7(f) (2004).

D. State and Local Regulation

17. Roundstone argues that the Commission has erred by not requiring that the proposal for the marina meet the conditions imposed by the Lake Commission. According to Roundstone, a January 23, 2002 letter from the Lake Commission to Roundstone states that the Lake Commission approved the Sunset proposal subject to a yet unfulfilled condition that the 14 slips be moved out of the cove to a location where the width is at least 200 feet.

18. Our October 6 Order determined that the proposed marina will not interfere with licensed project purposes, and its construction will result in only minor environmental impacts. The order accordingly authorized (but did not require) the licensee to let the developer use project lands and waters for the proposed non-project use. Such an authorization to allow an entity's non-project use of project lands and waters in no way affects that entity's need to comply with any federal, state, and local permitting requirements. In consequence, the developer will have to meet all applicable permitting requirements.

E. Conditions of Commission Authorization

19. Roundstone points to a statement in the October 6 order that Duke Energy has proposed and the Commission is requiring a number of mitigative measures, and it asks that the October 6 Order be amended to explicitly require Duke Energy to comply with these requirements. The measures would require Duke Energy to (1) enforce a no-wake zone in the immediate vicinity of the proposed facilities; (2) comply with the resource-protection conditions of all required permits; (3) maintain a vegetative buffer along the shoreline adjacent to the proposed facilities; (4) replace and supplement native riparian habitat displaced by the proposed facilities; and (5) construct a clustered, multi-slip facility instead of individual docks and piers along the shoreline. Roundstone also seeks clarification regarding the Commission's statement that installation of the boat slips will not require any dredging or land-disturbing activity. Roundstone is concerned that dredging may occur because a sand shelf protrudes from the area designated for the proposed marina. Roundstone therefore requests that the Commission make it a requirement and condition of final approval of the marina that no dredging or land-disturbing activity will occur.

20. There is no need to explicitly condition our approval as requested by Roundstone.¹⁷ We have already addressed the no-wake zone and the developer's need to comply with all permitting requirements. With respect to a vegetative buffer on lands

¹⁷ A review of the record indicates that in fact Duke Energy did not propose these measures.

adjacent to the marina, the project's boundary around Lake Norman is generally the normal high water elevation contour. Thus, lands adjacent to the marina would be outside the project boundary, i.e., not under the licensee's control. These lands are however subject to state and local regulations, which require landowners to maintain a 30-foot natural buffer around the reservoir.¹⁸ As to any riparian habitat affected by marina construction and the construction of a clustered, multi-slip facility without the need for dredging, our October 6 authorization is premised on a marina proposal that provides for the developer to revegetate riparian areas, and to construct a clustered, multi-slip facility¹⁹ without dredging. If Sunset Bay materially changes the marina proposal (e.g., reconfigures or moves the marina to a different location, or proposes dredging), the licensee would of course have to seek an amendment to our authorization.

21. Moreover, Duke Energy has continuing responsibility under its license to supervise and control the use and occupancy for which it grants permission to the developer, and to ensure the developer's compliance with the conditions in the permit. If a permitted use and occupancy violates any applicable law or regulation, or any condition imposed by the licensee, for the protection and enhancement of the project's scenic, recreational, or other environmental values, or if a condition of the conveyance is violated, Duke Energy will take any action necessary to correct the violation (including, if necessary, canceling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities).

F. Revised Classification Maps

22. The cove is presently classified as "future commercial/non-residential" (under which marina development is allowed), based on information (digital aerial photography, realigned project boundary information, visual survey, and measurements) available to Duke Energy at that time the classification map was developed. Under that classification, the cove must be at least 200 feet wide. Had the information shown the actual width of the cove (i.e., 174 feet), Duke Energy would have classified it as "future residential," a category that precludes multi-slip marina developments.²⁰

23. The October 6 order requires Duke Energy to file corrected maps to reconcile the classification of this area of shoreline with the requirements of the SMP. Duke Energy

¹⁸ See EA at 9.

¹⁹ Roundstone seeks clarification as to whether, by authorizing this multi-slip dock, we are requiring the removal of nearby existing individual docks and piers and prohibiting their construction in the future. The proposed marina neither affects existing docks and piers, nor precludes their future development, which may be authorized in accordance with the guidelines in the SMP.

²⁰ See Duke Energy's Request for Rehearing at 3.

objects to this requirement, reiterating its earlier argument that the area where the marina is proposed to be located was properly classified based on the data, albeit incorrect, that were available to Duke Energy at that time, and that allowing later, site-specific surveys to override the SMP map classifications would destroy the certainty and ability of all parties to use the SMP maps as a reliable planning tool.²¹

24. It is clear that the maps in question classify this shoreline area to allow development of commercial marinas like the one proposed by Sunset Bay. It is equally clear that this classification was made using general information and estimated measurements, and that subsequent site surveys show the measurements to be off by almost thirteen percent. As we explained in our October 6 Order, land use requirements are planning criteria, not absolute standards. As such, they are subject to revision, and, like the regulations that licensees establish to govern reservoir activities, are not binding on the Commission. The key here is not that Roundstone's surveys showed the maps to be inaccurate, but rather that the inaccuracy resulted in an erroneous classification under the SMP. That SMP classification maps may from time to time require revisions to cure material inaccuracies so that a particular classification conforms to the SMP does not diminish the usefulness of the SMP maps as a reliable planning tool.²² The SMP itself contains procedures that allow for challenges to classifications under certain circumstances.

25. Roundstone requests clarification as to whether the requirement for revised maps applies only to the shoreline along the Sunset Bay development or to the entire project shoreline. Roundstone urges the Commission to require Duke Energy to correct all erroneous classifications in narrow coves to help prevent uncertainties in future applications. Our decision to require the corrections was based on the specific inconsistency in this case. Since Duke Energy is required to file an updated SMP in 2006, it would be appropriate for Duke Energy to correct any classifications at that time, unless a particular case warrants an earlier correction.

²¹ Roundstone argues that Duke Energy cannot have it both ways and cites to other Commission proceedings where Duke Energy has revised its shoreline classification maps (so as to allow for development) when field surveys showed the maps were in error. Roundstone asserts the developer, which Roundstone alleges opposed any reclassification in this proceeding, has in another Commission proceeding supported a reclassification that would allow for development. *See* Roundstone's Request for Rehearing at 3-4.

²² Duke Energy contends that it should not have to revise the SMP classification maps to conform to the classification considerations in the SMP because the cove area would merely be reclassified as "future residential," and that would not affect construction of this marina. Reclassification of the cove will not affect construction of this marina (*see* the discussion on our waiver, *supra*), but it will preclude future construction of multi-slip marinas in the cove.

G. Other Matters

26. Duke Energy and Roundstone note certain editorial errors and clarifications in the October 6 Order and the Environmental Assessment (EA) attached to the order. We summarize the corrections and clarifications below.

27. Duke Energy points out that the Memorandum of Agreement referenced in footnote 21 of the order was signed by the state fish and wildlife agencies, not by the Department of Interior.²³ It also clarifies that the Programmatic Agreement (PA) referenced in paragraph 25 of the order provides for Duke Energy to conduct a database search along the project shorelines in North and South Carolina, not throughout the entire states; and does not include use of the predictive model, because Duke Energy and the State Historic Preservation Officer have concluded that model development should not be conducted while archaeological survey activities are underway.

28. Roundstone argues that the EA (at page 11) mischaracterizes two statements in its motion to intervene and that these misunderstandings led to a flawed conclusion in the EA. Roundstone states that it asserted that under the SMP the narrowness of the cove precludes future development of commercial marinas, not *all* development. Similarly, with regard to shoreline development, Roundstone asserted that the developer has an insufficient amount of shoreline footage for the appropriate commercial classification, not for all development classifications. We duly note these clarifications of Roundstone's positions, but the discussion in the EA is not inconsistent with them, and they do not dictate a different outcome in this case.

The Commission orders:

(A) The requests for rehearing filed in this proceeding on November 4, 2004, by Duke Energy Corporation and by the Residents of Roundstone and Farley are denied.

(B) Prior to issuing a permit allowing construction of the Sunset Marina, Duke Energy Corporation shall consult with the Lake Norman Marine Commission (Lake Commission), and shall condition any permit on the implementation by the marina developer of safety measures (which may include, but are not limited to, the designation and marking of boat traffic control lanes and no-wake zones) recommended by the Lake Commission. Further, Duke Energy shall file with the Commission, for informational purposes, copies of its consultation request to, and any written responses it receives from, the Lake Commission.

²³ See Duke Energy's filing of July 31, 2002, supplementing the 2001 update for the SMP.

(C) The October 6, 2004 Order in this proceeding is clarified to the extent set forth in this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.