

109 FERC ¶ 61,016
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. 2232-449

ORDER ON NON-PROJECT USE OF PROJECT LANDS

(Issued October 6, 2004)

1. Duke Energy Corporation (Duke Energy), licensee for the Catawba-Wateree Hydroelectric Project No. 2232, filed on November 25, 2002, and supplemented on December 18, 2003, an application for Commission authorization to lease 0.535 acres of project lands, mostly underlying Lake Norman,¹ to The Sunset Bay at Lake Norman, LLC, Inc. (Sunset Bay), for the construction of a commercial and residential marina in Iredell County, North Carolina. The proposed marina, which consists of 14 floating boat slips, would be used by water-front owners in the Sunset Bay subdivision, a residential development on the eastern side of the lake.
2. On February 14, 2003, the Citizens of Roundstone and Farley (Roundstone), a group of residents who own property and private boat slips across from the proposed marina, filed a timely motion to intervene, opposing Sunset Bay's proposal. This order, which addresses the intervenors' concerns and grants with certain modifications and conditions Duke Energy's application, is in the public interest because it provides for the enhancement of recreation resources and results in only minor environmental impacts.

¹The lake is one of eleven reservoirs of the 294.72-megawatt Catawba-Wateree Project. Because the project boundary is the normal high elevation contour at all the project's reservoirs, 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. 67 FERC ¶ 61,061 at 61,170.

Background

3. Lake Norman is located in the piedmont region of south central North Carolina. The lake is a highly-developed reservoir with over 592 miles of shoreline and a surface area of 31,984 acres. The greatest amount of development is residential, covering 310.9 miles of the lake's shoreline. Recreational development comprises 2.6 miles of Lake Norman's shoreline, with 15 public marinas and 8,100 private piers. Approximately 144 miles of Lake Norman's shoreline is undeveloped.

4. The Commission issued a 50-year license for the Catawba-Wateree Project in 1958.² The Catawba-Wateree license includes a standard provision (Article 39) authorizing the licensee to grant permission for certain types of non-project use and occupancy of project lands and waters without prior Commission approval.³ However, the marina facilities proposed by Sunset Bay are not within the scope of uses set forth in the standard article, and thus can only be permitted if the Commission approves an application to amend the license to allow the facilities and uses in question.

5. On February 2, 1996, the Commission approved a shoreline management plan (SMP) for the project.⁴ In 1998, with a supplement in 1999, Duke Energy amended its SMP to include shoreline management classification maps,⁵ which the Commission approved in 2000.⁶ In 2003, the Commission approved the current SMP for managing

² 20 FPC 360.

³ 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).

⁴ 74 FERC ¶ 62,047. The Commission required that the SMP be updated every five years. Duke Energy filed an updated SMP on July 30, 2001.

⁵ The Commission issued public notice of the revised classification maps and allowed time for the public to review and comment on the maps between November 27 and December 26, 1998. The Commission also issued a second notice with a comment period extending from August 7 through September 7, 1999. No comments opposing the maps were filed. Staff prepared and issued draft and final environmental assessments evaluating the allowable uses established in the maps on June 19, 2000, and December 1, 2000, respectively.

⁶ 93 FERC ¶ 62,159.

the use and development of the shoreline within the project.⁷ The SMP classifies shoreline development as either project-related, which includes shoreline areas designated for project operations and recreational uses or non-project-related, which includes, among other categories, shoreline areas designated as commercial/non-residential, commercial/residential, and residential. The SMP's land use classification maps classify the shoreline area where the proposed marina would be located as future commercial/non-residential. The proposed marina comports with this classification.⁸

Description Of The Proposal

6. The proposed floating marina would be located within a cove on the eastern shore of the lake on waters within the project boundary, adjacent to the Sunset Bay residential subdivision. The boat slips would be 10 feet wide and 20 feet long, with wooden decks and steel frames. The proposed marina and the existing pier on the cove's opposite side would be 71.36 feet apart.

Comments On The Proposal

7. The Commission issued public notice of Duke Energy's application for approval of the proposed marina on January 14, 2003. In response, the U.S. Department of the Interior (Interior) filed comments and recommendations, and Roundstone intervened and filed comments opposing the proposal.⁹ Interior expressed concern that development of the shoreline area could contribute to cumulative adverse impacts on fish and wildlife habitat and adversely affect tribal resources. Roundstone asserted that the proposed marina would pose navigational safety hazards, would cause potential property damage, and would violate Duke Energy's shoreline management guidelines. The Commission's staff prepared an environmental assessment (EA) analyzing the potential impacts of

⁷ 105 FERC ¶ 62,027.

⁸ See Duke Energy's revised SMP, Volume I at 23 (classification matrix chart of suitable future shoreline uses), filed on July 30, 2001.

⁹ Roundstone's motion was timely and unopposed, and, therefore, automatically granted pursuant to Rule 214(c)(1) of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(c)(1) (2004). Roundstone filed comments on February 28, 2003, July 20, 2003, and January 5, 2004.

constructing and using the proposed marina. The EA, which is attached to this order, recommends approval of Sunset Bay's proposal and concludes that construction of the marina would increase recreational opportunities and would cause only minor adverse impacts.

Discussion

8. We have reviewed Duke Energy's application pursuant to the Federal Power Act's (FPA) comprehensive development and public interest standard, as informed by the SMP, relevant license terms, public and agency comments, and the EA.

A. Location of the Marina

9. Roundstone contends that the location of the proposed marina will create a navigational hazard to residents, swimmers, fishermen, and boats and cause increased wave action, gasoline spillage, and potential damage to the property of its members.

10. While boating densities in the lake and cove continue to increase, we agree with the EA's finding that the proposed marina would impede navigation only slightly. Near the first one or two boat slips from the inside of the cove, boaters would have to negotiate a relatively narrow 71.36-foot-wide channel, but east and west of this point of constriction, navigation would improve, as the channel widens. One third of the cove's width would remain available for navigation at all times. To accommodate increasing numbers of boats in the cove, Duke Energy has established boat-traffic control lanes to lessen conflicts between smaller and larger boats and has imposed speed limits within these lanes. We conclude that, with the enforcement of the speed limits and a state law requiring a "no-wake zone," the navigational channel should be sufficient for safe passage and the impact of boats entering and leaving the marina should not be a significant navigational safety concern.¹⁰

¹⁰ See EA, Section F.

B. Duke Energy's SMP

11. Roundstone also challenges the accuracy of Duke Energy's classification for the area where the proposed marina would be located.¹¹ Given the width of the cove at the point of constriction, Roundstone opposes the proposal on the ground that it violates Duke Energy's SMP, which precludes development in a cove area with a constriction point of less than 200 feet.¹²

12. In fact, the proposal is inconsistent with the criteria used to establish shoreline classifications in the SMP. The SMP includes a prohibition against the development of commercial and residential structures in coves that widen and then narrow to less than 200 feet. Since the cove within which the proposed marina would be located narrows to less than 174 feet, the proposed marina is precluded under the SMP.¹³ However, the

¹¹ The SMP allows property owners who propose shoreline construction on project land adjacent to private property to challenge the accuracy of Duke Energy's shoreline classifications in areas where development would occur. *See* Appendix O of the revised SMP, filed July 30, 2001, and approved by order issued October 15, 2003 (105 FERC ¶ 62,027). Representing owners of property situated across from the proposed development, Roundstone does not have standing to challenge the classification under this provision. However, in considering whether, or under what circumstances, to authorize a non-project use of project lands or waters that Duke Energy lacks the delegated authority to approve, we are not bound by the terms of the SMP.

¹² Roundstone also objected to the marina because it exceeded the limits established in Duke Energy's shoreline management guidelines requiring marinas to extend no more than one-third the width of the cove. On December 18, 2003, Duke Energy filed revised maps which relocated the proposed marina several feet west, toward the mouth of the cove, to ensure that the facility would not exceed the one-third cove distance limit.

¹³ The SMP states, in pertinent part, "(s)horeline areas that widened from the head toward the mouth, but then reduced down to a width of less than 200' had the shoreline from the head of the cove through the point of constriction classified (in the classification maps) to preclude future Commercial/Non-Residential and Commercial/Residential development." SMP, Volume I at 17. The revised application maps filed by Duke Energy on December 18, 2003, indicate that the cove widens from its head and then narrows along a portion of the marina site to less than 174 feet wide.

revised shoreline classification maps that the Commission approved in 2000¹⁴ classified the shoreline area where the proposed marina would be located as future commercial and non-residential, thereby making the proposed marina an allowable shoreline use.¹⁵

13. Roundstone argues that, while the proposal is consistent with the maps, the maps are inconsistent with the SMP and should be corrected to conform to the SMP criteria for classifying allowable shoreline uses. Roundstone further argues that the proposed marina should be moved out of the cove to an area where the width is 200 feet or more, consistent with the SMP classification.

14. Duke Energy argues that the SMP maps' current classification for the marina site should not be changed, even though site-specific surveys and measurements that it recently completed confirm that the cove is too narrow to permit commercial/non-residential and commercial/residential development under the applicable SMP criteria. Duke Energy believes that measurements and site-specific surveys, which may in some cases provide more accuracy than the digital aerial photography it initially used to prepare the classification maps, should not be allowed to override the shoreline use classification for coves and other shoreline areas at the project. To do so, argues the company, could remove the ability of all parties to use the SMP maps as a reliable planning tool and could leave it vulnerable to attack by entities seeking to use site-specific surveys as a means of overturning established classifications.¹⁶

15. The classification maps form an integral part of the SMP and serve as a significant aid to the licensee in establishing future shoreline uses at the project. These maps are supported by field testing and studies to improve their accuracy, and when approved by the Commission, delimit present and future land uses. The licensee and the Commission rely on both the SMP and maps as baseline information in evaluating specific development proposals and recreation needs at the project with the goal of protecting and enhancing the resource values of the project.

¹⁴ 93 FERC ¶ 62,159.

¹⁵ See Duke Energy's classification maps, filed September 30, 1998, and supplemented on May 28, 1999, and its revised SMP, Volume I at 23 (classification matrix chart of suitable future shoreline uses), filed July 30, 2001.

¹⁶ Duke Energy suggests, for example, that a prospective developer might attempt to override an existing shoreline classification, for a cove area where a constriction point has been identified, by submitting a site-specific survey to refute the existence of the constriction point.

16. We acknowledged in our order approving the classification maps that the extensive project shoreline makes it likely that inaccuracies and inconsistencies will be found in the SMP maps.¹⁷ However, such errors do not necessarily preclude approval of a development proposal that would have minor adverse impacts on environmental resources and would not interfere with licensed project purposes. Land use requirements under the SMP 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.¹⁸ The Commission retains authority to require changes to the plan and to waive SMP provisions.

17. Duke Energy's request to lease project lands for construction of the proposed marina is essentially a request to waive the provisions of its SMP. Duke Energy established the cove use restriction for the purpose of ensuring navigational safety,¹⁹ and based on the environmental analysis of the proposed marina, we have found that, with the safety measures described above in place, the constriction of the cove and the proposed location of the marina within the cove will not pose a navigational hazard. Moreover, the developer has agreed to adhere to appropriate mitigation measures recommended or required by federal, state, and local government agencies. While development is underway, the licensee has the responsibility of supervising and controlling development activities on project lands, and has authority to take action to ensure protection of environmental resources.

18. The Commission finds that, under the limited circumstances of this case, good cause exists for granting the request for waiver. As previously stated, the proposed marina would increase recreational opportunities and would have negligible impacts on environmental resources. No prejudice has been shown to result from granting the requested waiver. Notwithstanding our decision to waive the SMP requirements for this

¹⁷ 93 FERC at 64,261.

¹⁸ See, e.g., *Grand River Dam Authority*, 105 FERC ¶ 61,100 (2003)(approving expansion of proposed marina exceeding 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).

¹⁹ In classifying this and the remaining shoreline areas, Duke Energy states in the SMP that it applied specific lake constraints to ensure that future development could occur without destruction of the natural resources or infringement on the recreational or aesthetic values of the project. See SMP, Volume I, at 16-17.

development, we are requiring Duke Energy to file revised maps correcting the shoreline classification. Reconciling the maps with the SMP should ensure that the most accurate information is in the record and is available to all interested parties.

C. Potential Adverse Impacts

19. In a letter filed February 14, 2003, Interior expressed concern that construction of the proposed marina would contribute to the deterioration and degradation of the project shoreline and its fish and wildlife habitats, and would have an adverse effect on undisturbed shoreline that provides an important resource of woody debris, vegetation, and other shoreline cover for the aquatic and terrestrial wildlife that live within the project's boundaries. Interior recommended that the shoreline be managed in a way that protects fish and wildlife resources and that Duke Energy adopt the following measures to minimize the effects of the proposed project on fish and wildlife resources: place boat slips so as not to impede fish and wildlife access; use fish-friendly pier construction practices; ensure that shoreline vegetation remains intact to the extent possible; and mitigate unavoidable impacts to fish and wildlife resources through the ongoing, combined efforts of Duke Energy and resource agencies.

20. Interior collaborated with Duke Energy in developing the SMP to ensure that resources are protected, and Sunset Bay's current proposal for the marina includes many of the recommendations made by Interior earlier in the proceeding. As explained in the EA, the proposed facilities will have only minimal environmental impact. Installation of the boat slips will not require any dredging or land-disturbing activity, and only minimal shoreline disturbance will occur during construction. Construction of the marina would affect some shallow habitat and temporarily displace some fish, but overall, the proposed marina would have only minor adverse impacts on fish and wildlife and their habitat.²⁰ Duke Energy's obligation to carry out the terms of the SMP, particularly with respect to shoreline uses, and to comply with other relevant conditions of its license, should ensure that any adverse impacts are mitigated and fish and wildlife resources are protected.²¹

²⁰ See EA at 10-11.

²¹ The classification maps for the project identify fish and wildlife habitats of importance, and development in those areas is limited or prohibited. Duke Energy is required under Article 32 of the license to maintain specified minimum flows for the protection of fish and wildlife resources, and it has also entered into a Memorandum of Agreement with Interior, under which it is obligated to establish a program supporting fish and wildlife habitat enhancement and protection.

D. Cumulative Impacts

21. Interior asserts that, while applications for Commission approval of non-project uses may have a small impact on a project's shoreline when viewed individually, they may have a significant impact when viewed in the aggregate. Interior therefore urges the Commission to include cumulative impacts in its evaluation of Duke Energy's application.

22. Staff considered the potential cumulative impacts associated with Duke Energy's application in the attached EA and found that the minor adverse impacts of the proposed marina on water quality, fish and wildlife habitats, boat traffic and navigation safety, and landscape aesthetics would incrementally add to the cumulative environmental impacts of other shoreline development activities at the project. As explained in the EA, however, implementing the following measures that Duke Energy proposed and that we are requiring, would minimize and compensate for these incremental cumulative effects: (1) maintaining a vegetative buffer along the shoreline adjacent to the proposed facilities; (2) replacing and supplementing native riparian habitat displaced by the proposed facilities; (3) enforcing a no-wake zone in the immediate vicinity of the proposed facilities; (4) complying with the resource-protection conditions of all required permits; and (5) constructing a clustered, multi-slip facility instead of individual docks and piers along the shoreline.²²

23. Duke Energy has also implemented measures to address Interior's concern through the approved SMP and associated classification maps, which identify the shoreline attributes of the project. The SMP outlines a comprehensive plan for managing the many resources of the project area and also attempts to balance shoreline development on a project-wide basis. The Shallow Water Fish Habitat Study, conducted by Duke Energy, defines the various shoreline attributes and classifies the shoreline for specified uses to protect some areas and allow development in areas not considered as valuable to fish and wildlife resources. The proposed marina site was not identified as having significant fish and wildlife habitat.

E. Cultural Resources

24. Interior expresses concern about the potential effects of non-project uses on tribal resources, including significant religious and culturally important areas. The North Carolina State Historic Preservation Officer (SHPO) has reviewed the proposal. By letter dated July 19, 2001, the SHPO indicated that it had no comment on the proposal. The

²² See EA at 12.

Commission also notified the Eastern Band of Cherokee Indians (Band), by letter dated February 23, 2004, that the licensee's proposal was pending and requested the Band's comments and recommendations. No response has been received. Thus, it appears that the entities directly affected by the proposal do not share Interior's concern.

25. In addition, on March 29, 2001, Duke Energy executed a Programmatic Agreement (PA), which should be instrumental in avoiding and minimizing potential site-specific and cumulative adverse impacts on cultural resources at the project.²³ The PA requires the licensee to complete a database search of all known historical and archeological resources in North and South Carolina and to develop a predictive model indicating areas in the project that have high, medium, and low probability for the existence of cultural resources. This information will be used to analyze any proposals for ground-disturbing activities within the project boundary. If Duke Energy determines that the proposed action could adversely affect historic properties, Duke Energy will comply with the procedures in Stipulation V of the PA, which requires that Duke Energy order the developer to stop all work, consult with the SHPO on appropriate treatment, and implement the agreed upon treatment to protect the historic properties.²⁴

Conclusion

26. We conclude that construction and operation of the proposed marina will not constitute a major federal action significantly affecting the quality of the human environment, will not interfere with licensed project purposes, and will be consistent with the project's recreation plan and the statutory standards by which we regulate hydropower projects. Accordingly, we will approve, with conditions, Duke Energy's application to permit the proposed use of project lands and waters.

The Commission orders:

(A) Duke Energy Corporation is granted a waiver of the cove use restriction provisions of its updated shoreline management plan (set forth at page 17 thereof), for the Catawba-Wateree Project No. 2232 and its application for authorization to permit non-project use of project lands and waters of the project, filed on November 25, 2002, and supplemented on December 18, 2003, is approved as modified herein.

²³ The PA was required by the Commission's 1996 order approving the first SMP for the project.

²⁴ See PA at 6.

(B) Within 60 days of the date of issuance of this order, Duke Energy Corporation shall file revised classification maps reclassifying the shoreline area where the proposed Sunset Bay marina would be located to conform to the classification in its shoreline management plan, approved October 15, 2003.

(C) The licensee shall include the following conditions in its commercial and residential use permit issued to The Sunset Bay at Lake Norman, LLC, Inc., as approved in Ordering Paragraph (A) above:

(1) Upon discovery of any archaeological materials during construction of the marina facilities covered by the permit, permittee shall immediately stop construction activities and contact Duke Energy Corporation (Duke Energy or licensee), the North Carolina State Historic Preservation Officer (SHPO), and any Native American tribes/groups that may have an interest in the discovery. Permittee shall allow the notified parties a reasonable amount of time to: (1) examine the discovered materials to evaluate their significance; and (2) provide the results of their evaluations to Duke Energy. The licensee shall take any SHPO or tribal comments and recommendations into consideration in deciding how to proceed pursuant to license Article 409. Permittee shall implement any measures prescribed by the licensee to protect or mitigate adverse impacts to any significant resource discoveries. Any disputes that may arise between the licensee and permittee regarding such discoveries shall be submitted to the Commission for resolution.

(2) Permittee's use and occupancy of project lands and waters shall not endanger health, create a nuisance, or otherwise be incompatible with the project's overall purposes, including public recreation and resource protection.

(3) Permittee shall take all reasonable precautions to ensure that its permitted use and occupancy of project lands and waters shall occur in a manner that will protect the scenic, recreational, and other environmental values of the project.

(D) This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to 18 C.F.R. § 385.713 (2004).

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.