

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Cube Yadkin Generation LLC

Project No. 2197-128

ORDER APPROVING SHORELINE MANAGEMENT PLAN PURSUANT TO
ARTICLE 407 AND CONDITION 13.C

(Issued February 4, 2019)

1. On September 25, 2018, Cube Yadkin Generation LLC, licensee for the Yadkin Hydroelectric Project No. 2197, filed a shoreline management plan (SMP) pursuant to Article 407 and Water Quality Certificate Condition 13.C of the project license.¹ The project is located on the Yadkin River in Davie, Davidson, Montgomery, Rowan, and Stanly counties, North Carolina. The project does not occupy federal lands.

I. Background

2. The Yadkin Project was originally licensed on May 19, 1958, and was issued a new license on September 22, 2016. The 210.51-megawatt project includes four developments along a 38-mile-long segment of the Yadkin River. From upstream to downstream, the developments are: High Rock at river mile (RM) 253, which consists of a 14,400-acre reservoir with 360 miles of shoreline; Tuckertown at RM 244.3, which consists of a 2,560-acre reservoir with 75 miles of shoreline; Narrows at RM 236.3, which consists of a 5,355-acre reservoir (i.e., Badin Lake) with 97 miles of shoreline; and Falls at RM 234, which consists of a 204-acre reservoir with 6 miles of shoreline. Except where the project boundary widens to enclose additional lands that serve project purposes (e.g., land occupied by project facilities and recreation sites, most islands, and land needed for the management and protection of wildlife and natural resources), the project boundary for each development encloses the area within the full pool elevation of the project reservoirs.

3. Article 407 of the license requires the licensee to continue to implement the SMP that was modified and approved under the prior license.² Further, within two years of issuance of the new license (i.e., by September 22, 2018), the licensee is required to file a

¹ Order Issuing New License (156 FERC ¶ 62,210), issued September 22, 2016.

² Order Amending License (93 FERC ¶ 61,152), issued November 9, 2000.

revised SMP that is consistent with Condition 13.C of the water quality certification, which is included as Appendix A of the 2016 license order. Article 407 requires the revised SMP to include the following: (1) goals and objectives; (2) a description of the project's developments, including project operations and contour elevations that are consistent with an updated Shoreline Stewardship Policy; (3) identification of the land uses and associated acres within the project boundary according to six classifications: (a) Industrial; (b) Public Recreation; (c) Commercial Recreation; (d) Private; (e) Forest; and (f) Conservation Zone; (4) maps that delineate each of the six land use classifications within the project boundary; (5) a description of each land use classification and the allowable and prohibited uses for each; (6) a description and associated maps of a vegetative shoreline buffer within the project boundary for each reservoir; (7) a description of best management practices, including bio-engineering techniques such as water willow and wetland plantings, to minimize soil erosion and sedimentation; (8) the "Procedures for Implementation of Those Portions of the Shoreline Management Relating to the Removal or Relocation of Lap Trees," previously approved by the Commission;³ (9) a provision to update the licensee's Shoreline Stewardship Policy with current licensee information and project information consistent with the SMP; a description of the licensee's permitting program for allowable structures within the project boundary, including the permit application procedures, monitoring, and a post-permitting enforcement policy; a list of native vegetation for use by adjacent property owners in landscaping and establishing a vegetated shoreline buffer; and a provision that requires the licensee to file for Commission approval any application that affects cultural resources for which the licensee has not obtained the North Carolina State Historic Preservation Office (SHPO) concurrence on measures needed to protect cultural resources; and (10) a provision to review the plan every 10 years and file a report describing whether or not an update to the plan is needed.

4. The SMP, 10-year reports, and any plan updates must be developed in consultation with the U.S. Fish and Wildlife Service (FWS), North Carolina Department of Environmental Quality (NCDEQ), North Carolina Wildlife Resources Commission (NCWRC), and SHPO, and filed with the Commission for approval. The licensee must include documentation of consultation with the entities above, and specific descriptions of how the entities' comments are accommodated. The licensee must allow a minimum of 30 days for the entities to comment and to make recommendations before filing with the Commission. If the licensee does not adopt a recommendation, the filing must include the licensee's reasons, based on project-specific information.

³ Order Approving Lap Tree Supplement of the Shoreline Management Plan (95 FERC ¶ 62,105), issued May 9, 2001.

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5. Prior to filing its revised SMP as required by Article 407, the licensee filed an application to amend its SMP (i.e., Appendices E, F, and G) to incorporate certain modifications (e.g., dock size specifications, shoreline stewardship policy, etc.) contemplated in the Relicensing Settlement Agreement during the project's relicensing. Commission staff subsequently approved the amended SMP.⁴

II. Licensee's Proposal

6. The primary goals of the revised SMP are to: (1) identify and understand important shoreline resources which may warrant special consideration; (2) establish reservoir management objectives to balance shoreline development and public recreation needs with environmental and hydroelectric generation needs; (3) establish a process for permitting shoreline development activities while encouraging stewardship of environmental resources; and (4) encourage local stakeholders to understand how their actions may affect the quality of project reservoirs.

7. The revised SMP, including appendices,⁵ consists of a description of the project area and project operations, description of existing uses of project lands and waters, identification of the project's environmental resources (e.g., recreation, sensitive species and habitats, cultural resources, etc.), summary of shoreline management and shoreline stewardship policies within the project boundary (including shoreline classifications, permitting and enforcement processes, and shoreline buffer provisions), and a provision to update the SMP every 10 years if necessary.

8. The licensee established five land use classifications (i.e., Industrial, Public Recreation, Commercial Recreation, Private, and Forest and Agriculture) for the project's shorelines. In addition, the licensee defined a Conservation Zone overlay which designates areas requiring special protection because they support important environmental resources (e.g., environmentally-sensitive areas, aesthetic resources, areas that provide for nature study, and areas necessary to prevent overcrowding of partially-developed shoreline). Such designation as Conservation Zone does not necessarily

⁴ Order Amending Shoreline Management Plan (161 FERC ¶ 62,048), issued October 23, 2017.

⁵ These appendices consist of the land use classification maps (Appendix A), sensitive and natural area maps (Appendix B), cultural resources maps (Appendix C), conservation zone maps (Appendix D), specifications for private recreation facilities at High Rock and Narrows reservoirs (Appendix E), subdivision access approval, multi-use facility permitting, and industrial approval procedures (Appendix F), shoreline stewardship policy (Appendix G), summary of comments on the draft SMP (Appendix H), and a consultation record (Appendix I).

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preclude shoreline development within the project boundary but instead identifies the presence of resources near the reservoir shoreline that require additional environmental review prior to approval. If, to the licensee's and appropriate state and federal resource agencies' satisfaction, any critical resources near a proposed shoreline development would be protected or that impacts would be adequately mitigated, the licensee may approve the development within the project boundary, in accordance with the SMP. The licensee classified project shoreline lands into the above categories using the maps developed for the original SMP in 1999 as a baseline, and updated them using recent aerial photography, recent county parcel data, and recent sensitive area maps.⁶

9. Table 3-1 of the revised SMP shows the amount of shoreline (by mileage and percentage) in each of the shoreline classifications at each of the project's developments. Combining each of the four developments, the reservoir shorelines are classified as Forest and Agriculture (60.5%), Private (31.8%), Industrial (4.7%), Commercial Recreation (1.8%), and Public Recreation (1.2%). A total of 39% of combined reservoir shorelines fall under the Conservation Zone overlay which require additional environmental review prior to approval of any shoreline development.

10. While the revised SMP states that the licensee is not required to allow private access or development on project lands, the licensee allows certain private access permits at the High Rock and Narrows reservoirs⁷ if the permittees abide by the various provisions of the SMP. Additionally, the shoreline stewardship policy (Appendix G) summarizes the licensee's policies regarding third-party uses of the project lands and waters, including a requirement for docks in new (i.e., since 1999) subdivisions to maintain a 100-foot forested buffer, even if the buffer is located on lands outside the project boundary. A permittee's failure to abide by the licensee's provisions, including those in the shoreline stewardship policy, may result in the loss of such private access permits or appropriate mitigation measures. The licensee charges permit fees to help offset the cost of administering and enforcing the provisions of the SMP.

⁶ The SMP details the specific data used to update its maps, including the National Wetlands Inventory, North Carolina Natural Heritage Program rare species maps, licensee's bald eagle habitat data, cultural resource probability zone maps (part of the approved Historic Properties Management Plan), etc.

⁷ In order to protect the natural character of the Tuckertown and Falls reservoir shorelines, the SMP prohibits permitting new private access facilities on these reservoirs.

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III. Agency Consultation and Public Notice

11. The licensee began working with stakeholders⁸ on the revised SMP in April 2017. As noted above, prior to filing its revised SMP as required by Article 407, the licensee filed an application to amend portions of its SMP (i.e., Appendices E, F, and G) to incorporate certain modifications as requested by stakeholders and contemplated in the Relicensing Settlement Agreement. Commission staff subsequently approved the amended SMP in the 2017 Order. Since that time, the licensee continued consultation with stakeholders on the revised SMP, sending draft SMP sections to stakeholders until August 2018. On August 13, 2018, the licensee provided a draft revised SMP to stakeholders for a 30-day review period. Appendix I of the revised SMP contains the consultation record including the licensee's responses to the comments it received.

12. In its September 7, 2018 and September 12, 2018 comments, respectively, the NCDEQ and NCWRC expressed general support of the revised SMP and provided editorial comments that the licensee either incorporated or adequately addressed. In its September 12, 2018 comments, which were supported by Rowan County's September 17, 2018 letter, the High Rock Lake Association expressed its general lack of support for the revised SMP, which the licensee responded to point-by-point. Although the licensee has adequately responded to the High Rock Lake Association's comments, we will further discuss some of those concerns below.

13. On November 13, 2018, the Commission issued a notice of the SMP application, establishing December 13, 2018, as the deadline to file comments, motions to intervene, and protests regarding the revised SMP. No entities or agencies filed a response to the public notice.

⁸ In addition to the required agencies under Article 407 (i.e., the FWS, NCDEQ – Division of Water Resources, NCWRC, and SHPO), the licensee also consulted Alcoa Power Generating Inc., American Rivers, Badin Lake Association, Badin Museum, Catawba Indian Nation Tribal Historic Preservation Office, City of Rock River Rats, Montgomery County, North Carolina Division of Parks, Piedmont Boat Club, Rowan County, Salisbury Rowan Association of Realtors, SaveHighRockLake.org, South Carolina Coastal Conservation League, South Carolina Department of Health and Environmental Control, South Carolina Department of Natural Resources, Stanly County, The Nature Conservancy, Three River Land Trust (previously Land Trust for Central NC), Town of Badin, Trading Ford Historic District Preservation Association, U.S. Forest Service, and Uwharrie Point Community Association.

IV. Discussion and Conclusion

A. Article 407 requirements

14. As noted in the Final Environmental Impact Statement (FEIS) for relicensing and the 2017 Order that approved several changes to the SMP, all of which are also incorporated into this revised SMP, the licensee's revised SMP is designed to continue the current level of protection to the shoreline and reservoirs while providing adjoining property owners and the licensee more flexibility in considering specific shoreline development proposals and requests. The 2016 Order Issuing New License discussed the various iterations of the SMP and shoreline policies over time, described several required modifications to the SMP (e.g., the land classifications), noted the licensee's proposed changes to the SMP appendices (i.e., those approved in the 2017 Order), and noted several discrepancies in the licensee's SMP-related documents (e.g., licensee name changes, inconsistent reservoir elevation datum, etc.). Thus, Article 407 required the licensee to file a revised SMP to consolidate these modifications into one document to ease administration of the SMP. As noted above, neither the FEIS, nor the 2016 Order, nor the 2017 Order contemplated or required wholesale changes to the licensee's SMP. In general, the licensee's revised SMP meets the requirements of Article 407, with the exception of the shoreline classifications.

15. Article 407 required the revised SMP to use the following six classifications: (a) Industrial; (b) Public Recreation; (c) Commercial Recreation; (d) Private; (e) Forest; and (f) Conservation Zone. Instead, the licensee modified the Forest classification to be Forest and Agriculture and changed the Conservation Zone to be an overlay instead of a separate classification. As justification, the licensee noted that the six categories required by Article 407 did not include agriculture, and it determined that this large land use type is most appropriately classified with Forest. Additionally, instead of creating a sixth classification type of "Conservation Zone", the licensee instead considers the "Conservation Zones" as overlays that require special consideration or protection from shoreline development. The Conservation Zone overlay provides that development within the project boundary, regardless of classification (e.g., Private, Commercial Recreation, Forest, etc.), requires careful review to ensure that the environmental or cultural resources of the area are protected. The High Rock Lake Association noted this discrepancy in its comments, but did not provide reasons why the licensee's approach would not meet the needs of the project. As noted in the 2016 Order, the Conservation Zone classification was intended to protect environmentally sensitive areas including areas where rare, threatened, and endangered species occur at the project, which is a similar purpose as the licensee's proposed overlay in the revised SMP. Thus, we find that the licensee's reorganization of the required land classifications is reasonable, consistent with past versions of the SMP, and meets the intent of Article 407.

B. High Rock Lake Association comments

16. In its September 12, 2018 comments, the High Rock Lake Association expressed a lack of support for the revised SMP and provided numerous comments for the licensee to consider. In its September 17, 2018 comments, Rowan County expressed its support of the High Rock Lake Association's comments. In Appendix H of the revised SMP, the licensee responded to each comment point-by-point. The licensee made some minor revisions to the revised SMP to accommodate the High Rock Lake Association's comments, but for the most part, the licensee did not make substantial revisions to the plan, citing project-specific reasons and general Commission policies as justification for not making revisions. Although we generally concur with the licensee's reasons and interpretations of Commission policy, we will respond to some of the High Rock Lake Association's major objections here.

1. Overall SMP performance and competing uses

17. The High Rock Lake Association states that the current SMP is not working, is overly restrictive (e.g., boat ramps and boat houses should be permissible) and is an obstacle to economic development (i.e., specifically Appendix F – Subdivision Access Approval, Multi-Use Facility Permitting, and Industrial Approval Procedures), and should be rewritten to be less complex. The licensee disagrees with such claims, cites its extensive stakeholder outreach efforts and general consensus and support from consulting agencies, expresses its belief that the SMP is working to allow appropriate non-project development while protecting project purposes, and references Commission policies to support its positions. Specifically, the licensee quotes: (a) its responsibility to supervise and control shoreline development to ensure that it is not inconsistent with project purposes, including protection and enhancement of the project's scenic, recreational, and environmental values; (b) that the Commission does not allow private recreation interests and development, such as residential or commercial boat docks or marinas, to override the general public's recreation use and enjoyment of project lands and waters; and (c) that while the presence of a project reservoir may attract residential development and indirectly benefit the local economy, such economic benefits do not represent a licensed project purpose and should not be allowed to override designated project purposes.

18. We concur with the licensee's responses to the High Rock Lake Association's comments. The licensee has correctly identified its general responsibilities with regards to shoreline management at the project and the Commission's policies regarding shoreline management, and has filed a plan that meets the intent of Article 407 (i.e., a revised SMP that consolidates several modifications into one document to ease administration of the SMP). As with prior versions of the SMP, we find that the revised SMP strikes an appropriate balance among various competing interests (e.g., public access to the project, protection of environmental resources, and allowing limited private access). Finally, it is important to emphasize that the licensee is correct in its assertion that private, non-project access and docking facilities are typically privileges that the

licensee has the discretion to approve or deny, subject to Commission review if necessary. This issue was addressed in the 2000 Order approving the initial SMP, where the Commission stated, “while licenses require the licensees to maximize opportunities for public recreational access to project lands and waters, private access, e.g., for adjacent property owners, is a privilege that licensees have the discretion to grant or deny, subject to Commission review.”

2. Applicability of the revised SMP

19. In several places, the revised SMP clearly states that it only applies to lands located inside the project boundary. In general, but with some exceptions, the project boundary follows the normal full-pool elevation of each development’s reservoir. However, the High Rock Lake Association states several times that the revised SMP should be limited only to lands inside the project boundary. It believes that the following SMP provisions unnecessarily extend outside the project boundary: (1) the shoreline classification maps relate to uses outside the project boundary; (2) landowners in new subdivisions (i.e., since 1999) must maintain a 100-foot forested setback outside the project boundary in order to maintain eligibility for a private dock; (3) the area of potential effect (APE) for cultural resources extends outside the project boundary; and (4) private access for adjacent subdivisions located outside the project boundary require consultation with the licensee. In response, the licensee states that the revised SMP, including the shoreline classifications (like prior versions of the SMP), applies only to the lands inside the project boundary, but that it has the authority to grant and revoke private access privileges that may be conditional on the land use on adjoining lands, including those outside the project boundary. Regarding the APE for cultural resources, the licensee correctly references the Programmatic Agreement and Historic Properties Management Plan for the project which define the APE.⁹ Regarding its policies about subdivision access plans, the licensee states that it reviews such plans in advance to provide the developer assurances which lots are eligible for private piers but that it does not approve the plans.

20. To further clarify this issue, we emphasize that the revised SMP appropriately considers lands adjacent to, but outside of, the project boundary, but it does not apply to any lands outside the project boundary. The land outside the project boundary is not subject to the SMP, but rather the licensee’s policies of granting revocable dock privileges on project property take into account land use and characteristics of adjacent

⁹ Article 408 requires the licensee to implement the Programmatic Agreement and file an HPMP for the project. The licensee filed its HPMP on September 22, 2017, and it is currently pending before the Commission. The revised SMP also describes how the cultural resource probability zones were updated as part of the HPMP revision as well as how the licensee takes them into account when reviewing shoreline development proposals.

lands. At this project, in the 2000 Order approving the initial SMP, the Commission previously stated that, “[the buffer zone policy] entails a reasonable limitation on the exercise of private property rights in exchange for permission to enter and construct on project lands and waters, which, pursuant to the license, are managed on behalf of the broader public interest...” We have found no evidence here to reverse this approach now.

3. Other issues

21. The High Rock Lake Association does not believe the licensee should have different or more restrictive dock building standards than those contained in the North Carolina Building Code. The licensee responds that, although all applicable local and state building codes still apply as applicable, it expects structures that it permits on project lands to comply with the dock specifications that were specifically developed for the project. We concur with the licensee that, regardless of other standards and codes, the licensee may impose more restrictive conditions for use and occupancy of project property that it deems appropriate to protect project resources, and thus it may have more restrictive building standards than those required by local governments.

22. The High Rock Lake Association disagrees with language in the revised SMP stating that prevention of severe erosion is the responsibility of the adjacent property owner and regarding the licensee’s responsibility to dispose of dead trees from the reservoirs. Specifically, it states that standard Article 19 requires the licensee to prevent soil erosion on lands adjacent to project waters whereas standard Article 20 requires the licensee to remove dead trees from the reservoir. In response, the licensee states its interpretation that it is responsible under Article 19 to control erosion resulting from project operations and responsible under Article 20 to remove dead trees that pose a hazard to project operations, navigation, or safety, rather than dead trees that benefit fish and wildlife. The licensee is correct that under standard Article 19, the Commission requires its licensees to control erosion caused by the construction of project features or their subsequent operation or maintenance, but it does not require licensees to control erosion resulting from the existence of the project or natural phenomena (e.g., wave action from wind or boat wakes) associated with project reservoirs. Under standard Article 20, which concerns a licensee’s responsibility to remove timber, brush, dying trees, etc., the licensee’s approach is reasonable to remove dead trees that pose a hazard rather than removing all dead trees along a reservoir. The licensee’s Procedures for Implementation of Those Portions of the Shoreline Management Relating to the Removal or Relocation of Lap Trees have been previously approved by Commission staff, and were specifically required to be included in the revised SMP under Article 407. Thus, we will not require any changes to the revised SMP regarding the licensee’s responsibilities over erosion and tree removal.

C. Conclusion

23. We have reviewed the licensee's revised SMP and find that it provides a reasonable plan to protect the project's shoreline resources while allowing for reasonable shoreline development in a manner consistent with its license obligations and project purposes. The revised SMP adequately identifies allowable shoreline uses in the project boundary and the rules governing those uses, and it meets the requirements of Article 407 and Water Quality Certificate Condition 13.C. Finally, the licensee developed the revised SMP in consultation with numerous agencies and entities and, with the exception of the High Rock Lake Association and Rowan County, is supported by these consulted parties. For these reasons, we are approving the licensee's revised SMP. Section 9.1 of the revised SMP includes provisions for the licensee to review the SMP every ten years (starting in 2028), in consultation with the FWS, NCDEQ, NCWRC, and SHPO, and file a report describing whether or not an update to the plan is needed. The licensee is reminded that this report is due September 22, 2028, and every ten years thereafter.

24. The licensee is required to file GIS data regarding the reservoir area and shoreline management classifications. This will allow detailed tracking of shoreline resources and uses, and facilitate future reviews. Ordering Paragraph (B) contains the details and filing specifications for the GIS data required by the Commission.

The Director orders:

(A) Cube Yadkin Generation LLC's shoreline management plan, filed September 25, 2018, pursuant to Article 407 and Water Quality Certificate Condition 13.C of the license for the Yadkin Hydroelectric Project No. 2197, is approved.

(B) Within 90 days of the date of this order, the licensee must file two separate sets of GIS data in a georeferenced electronic file format (such as ArcView shape files, GeoMedia files, MapInfo files, or a similar GIS format) with the Secretary of the Commission, ATTN: OEP/DHAC. The data must include a) polygon files of the project reservoir(s) surface area including a separate polygon for the tailrace area, and b) polyline file of the shoreline management classifications. The filing must be in CD or diskette format and shall include polygon data that represents the surface area of each reservoir/tailrace, as shown on the project boundary exhibits, and polyline data that represents the linear extent of each shoreline classification segment as shown on maps in the shoreline management plan.

A polygon GIS data file is required for the reservoir(s)/tailrace; with each reservoir separately identified. The attribute table for each reservoir/tailrace must include at least the reservoir name, water elevation, and elevation reference datum. A polyline GIS data file is required for the shoreline classifications associated with each reservoir.

The attribute table for each reservoir must include at least the reservoir name and management classification description for each polyline, consistent with the shoreline management plan.

All GIS data must be positionally accurate to ± 40 feet in order to comply with National Map Accuracy Standards for maps at a 1:24,000 scale. The file name(s) shall include: FERC Project Number, data description, date of this order, and file extension in the following format [P-2197, reservoir name polygon/or reservoir name shoreline polyline data, MM-DD-YYYY.SHP]. The filing must be accompanied by a separate text file describing the spatial reference for the georeferenced data: map projection used (i.e., UTM, State Plane, Decimal Degrees, etc.), the map datum (i.e., North American 27, North American 83, etc.), and the units of measurement (i.e., feet, meters, miles, etc.). The text file name shall include: FERC Project Number, data description, date of this order, and file extension in the following format [P-2197, project reservoir/or shoreline classification metadata, MM-DD-YYYY.TXT].

(C) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 8251 (2012), and the Commission's regulations at 18 C.F.R. § 385.713 (2018). The filing of a request for rehearing does not operate as a stay of the effective date of this order, or of any other date specified in this order. The licensee's failure to file a request for rehearing shall constitute acceptance of this order.

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