

# Carolina Partners

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## Will there be a SC Water Quality Certificate?

—by CWRC Executive Coordinator *Vicki Taylor*

### Latest chapter: yes, no, maybe...



In our last newsletter I told the story of how the South Carolina Water Quality Certificate had been issued, then denied, then challenged. The story continues:

First recall that the board of the South Carolina Department of Health and Environmental Control (DHEC) voted to deny the water quality certificate that had previously been recommended by its staff. At the July 9, 2009 hearing, American Rivers and the Coastal Conservation League argued that the staff decision did not require adequate flows to protect environmental values including the federally endangered shortnose sturgeon. The South Carolina attorney general also made a plea against the certificate stating that approval would adversely impact South Carolina's lawsuit against North Carolina before the United States Supreme Court. Subsequently, on August 6, 2009, the review board issued a Final Agency Decision which reversed the DHEC staff decision and denied the certificate, finding that the conditions of the certificate failed to provide reasonable assurance that water quality standards would be met.

Then, in September, Duke requested a hearing before the South Carolina Administrative Law Court seeking issuance of the certificate as originally recommended by staff. American Rivers and the Coastal Conservation League intervened. In January 2010, Duke filed motions for summary judgment and declaratory judgment stating that there were no real contested issues – that on the face of it, South Carolina had failed to follow state law regarding permits and therefore had waived the issuance of the certificate.

Duke's argument is based on South Carolina law requiring the state to act within a reasonable period of time after an application is submitted which cannot exceed one year. In addition to acting within one year, the state must issue a proposed decision within six months of the application. Either one of these requirements can be suspended under certain conditions. While it is arguable whether South Carolina issued, denied or waived the application within the one year time frame, it seems apparent that they did not adhere to the requirement of issuing a proposed decision within the six month time frame.

DHEC, American Rivers and Coastal Conservation League argued that the time frame was suspended due to various requests for additional information.

(See [Water Quality Certificate](#)—Page 2)

## Update on Recreational Flow Releases

—by *Maurice Blackburn*



The Comprehensive Agreement signed in August 2006 lists the recreational releases for the various river sections of the Catawba and Wateree, which were agreed to between Duke Energy and the various Stakeholders. While Duke is not legally required to provide these releases until after the new license is issued, Duke indicated that they intended to try to implement these earlier, at all locations except Great Falls. Great Falls releases require engineering modifications to the dam as well as the building of suitable access areas. Duke said that they were not prepared to make these capital investments until after the new license is issued.

Attempts to follow the prescribed flow regime began in 2007, but were quickly terminated because the drought resulted in water falling below the Low Inflow Protocol cutoff levels. The drought, as we all remember, continued through 2008, which meant that there were no scheduled recreational flows that year too. With the end of the drought, 2009 however provided us with the first full season of recreational flows. Duke was able to maintain appropriate flows at Oxford, Wylie and Wateree. Bridgewater was slightly less consistent due to dam modifications, but Duke was able to keep us informed whenever changed had to be made.

Duke also upgraded the public information procedures including their Internet Web page – see <http://www.duke-energy.com/lakes/scheduled-flow-releases.asp>. This lists projected generating release schedules as well as the recreational releases.

(See [Flow Releases](#)—Page 4)



Board Member Jerry Brown practices his paddling skills at Landsford Canal State Park. **Photo: Jab Brown.**

In May, the SC Attorney General withdrew from the case saying he had “settled” with Duke and that Duke would begin minimum environmental flows earlier than agreed in the CRA. That left American Rivers, the Coastal Conservation League and DHEC to argue that the certificate had in fact been denied, not waived.

On June 10, 2010 the Administrative Court ruled in Duke’s favor granting their motions. This means the contested case may not be heard. The crux of the ruling seems to be that DHEC failed to notify Duke that it was suspending the time limit for producing a proposed decision. Therefore, the time limit was not suspended, even though DHEC had asked Duke for additional information. And, since it was not suspended, DHEC failed to meet the time limit for issuing the proposed decision. The Court agreed with Duke that this means DHEC waived issuing the certificate.

On June 21, DHEC, American Rivers and the Coastal Conservation League requested reconsideration by the Court. They argue that there are indeed issues of material fact and that the discovery process has been cut short by granting the motion for summary judgment.

DHEC, American Rivers and the Coastal Conservation League have also filed notices of appeal with SC Court of Appeals.

Duke has now filed a motion with the FERC to add the June 10 ruling to the record hoping that this will satisfy their requirements under the Clean Water Act. They argue that the FERC should find that SC waived the 401 certificate under federal law and should not wait until the appeal(s) are resolved in state court.

What does this mean for the stakeholders and the CRA? As of now, the CRA is intact and Duke is providing early implementation of environmental flows as agreed in the settlement with the SC Attorney General.

Beyond that, the FERC could agree with Duke and proceed with issuing the license without a water quality certificate in which case the CRA is unlikely to be affected; or, the FERC could decide to wait until the matter is settled in state court (or beyond) in which case the CRA could be affected; or, the parties could settle and the CRA may or may not be implicated.

We await the next chapter. ♦

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## Mead Musings:

### *Can the Future be Postponed?*

—by *Tim Mead*



Over the last 20 or so years, I’ve played lots of different roles re the Catawba River – Chair of the Bi-State Catawba River Task Force, Chair of the Lake Norman Fisheries Advisory Committee, member of the Stakeholders Group in the development of Duke Energy’s relicensing application, member of the Catawba-Wataree Basin Commission, in addition to my role with CWRC. While I speak for none of these groups here, those experiences have given me a perspective on what ought to be done to assume that the Catawba is able to meet the diverse demands on it.

First, there ought to be an interstate compact, authorized by Congress as required by the United States Constitution, between North and South Carolina. An inter-state compact is more appropriate than a memorandum of agreement as a compact would be more durable. As we have recently seen, it is too easy for one of the two states to take steps which might cancel a memorandum of agreement. A candidate for governor or attorney general might get elected on a campaign of abrogating such an agreement. But an interstate compact would endure.

Second, a politically accountable commission should be created under the compact. Managing the Catawba as a shared resource is too important a task to be delegated to officials – however competent and well-meaning – who are not responsible to elected officials. Both North and South Carolina should have equal numbers on the commission and members should be appointed by governors, state legislators, and local elected officials. Terms of the commission members should be of a length to make possible appointment or re-appointment as elected officials rotate in office.

Third, the jurisdiction of the commission should include making recommendations relative to land use, shoreline management, and possible pollution impacts as they affect the Catawba. While the recommendations of the commission would not be binding on decision-makers at the various levels, those decision-makers who chose not to follow the commission recommendations would be required to state in writing why they chose not to do so.

Details, details, details. The devil is in the details, I know. If any would like to get my take on the details, send an e-mail to [Tdmead@aol.com](mailto:Tdmead@aol.com).

And, note in particular, here I speak only for myself and not for anyone else or any group.

*Tim Mead* ([Tdmead@aol.com](mailto:Tdmead@aol.com)) is CWRC President and a well known writer.

# Collaboration in the Santee River Basin

*The following article is based on notes from, and conversations with, Prescott Brownell, fisheries biologist from the Atlantic branch of NOAA.*

The mid 1990's brought a number of hydropower relicensings to our region. Back then the typical approach by power companies was to focus on relatively narrow, project specific environmental and water resource issues. At the time, state and federal resource agencies also tended to work on site-specific considerations giving first priority to land and other protections at specific sites rather than addressing the broader basin-wide aquatic resource issues. The need for cross-agency and cross-power company interaction and collaboration was not a primary concern.

However as far back as 1993, the US Fish and Wildlife Service, National Marine Fisheries Service and SC Department of Natural Resources had begun discussing a basin-wide diadromous fish restoration plan early in the licensing process at the Lockhart and Neal Shoals hydro-power projects on the Broad River sub-basin.

Then in 1995 the Columbia hydro project began its relicensing process and the need to develop the Santee Basin Diadromous Fish Passage Restoration Plan gained momentum. Fish passage was prescribed by the agencies and constructed by 2006.

Shortly thereafter, the relicensing processes for the Santee-Cooper, Catawba-Wateree and Saluda Projects began setting the stage for a new era of basin-wide coordination among agencies and power companies.

Regardless of how agencies or companies historically had addressed issues in project specific ways, the implications of all these projects on the entire watershed demanded a much broader approach.

By 2000, a number of non-profit groups, CWRC among them, were on the scene making the case for a broad stakeholder based collaborative process. The restoration and management of the basin's ecosystem could not be successful without it. The number of voices and the diversity of perspectives grew and the necessary "messiness" of an interest based collaborative process followed. The hard work and commitment was worth it.

During 2005-8, the Santee Accord was created intensifying and reflecting increased communication and understanding among power companies, resource

agencies, and non-profit NGOs. This Accord now serves to inform management in the overall basin and affects all the contributing projects.

But we are not without litigation with North Carolina and South Carolina in the middle of a law suit before the United States Supreme court over equitable allocation of water flowing from one state to the other. In addition, the SC water quality certificate is unresolved (more information on this elsewhere in this newsletter). Ironically both these adversarial procedures have continued to draw attention to the interconnectedness of our waters and ecosystems.

Another factor in completing the processes is the consultation required under the Endangered Species Act for the various project licenses. These consultations began in 2005 for shortnose sturgeon and the recommendations related to the Santee-Cooper project will come soon. Again, management for the health of these fish can only be done collaboratively and continues to bring resource agencies and power companies together. It is likely that a continuous adaptive management approach will be necessary to resolve water resource, ecological and specific species protection and recovery needs.

The primary document from these consultations is called the "biological opinion". The biological opinion for shortnose sturgeon for the Santee-Cooper project is due anytime and may affect the Santee Basin Accord and requirements at both Saluda and the Catawba-Wateree projects.

As noted by Mr. Brownell, NOAA Fisheries is working in close coordination with the power companies in the region in order to agree the best long term strategic plan for the protection and recovery of the sturgeon in the Santee River Basin. He noted that this high level of agreement and collaboration now coming to fruition is "amazing".

We are optimistic that this collaborative engagement with long term basin wide goals in mind will yield results we can be proud of in decades to come. ♦



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#### MISSION STATEMENT

The mission of the CWRC is to facilitate a process to protect, enhance and restore the natural, cultural, recreational and economic resources of the Catawba-Wataree River Basin during the relicensing of Duke Energy's 13 hydroelectric facilities.

#### BOARD OF DIRECTORS

The CWRC board consists of 15 seats divided evenly among the three geographical sub-basin regions: upper, middle, and lower. Board members for 2009 are:

##### UPPER

Mary K. George—Catawba County  
Eric Jenkins—Burke County  
Susie Hamrick Jones—NC Foothills Conservancy  
"Squeak" Smith—Trout Unlimited

##### MIDDLE

Maurice Blackburn—Carolina Canoe Club  
Jan Brown—River Guide  
Tim Mead—Fisherman  
Kirk Otey—Trout Unlimited  
Vicki Taylor—Lake Norman Covekeeper

##### LOWER

Will Close—Springs Close Foundation  
Gary Faulkenberry—Lake Wataree Association  
Shirley Greene—Non Boating Fishermen  
Gerrit Jöbsis—American Rivers  
David Merryman—Catawba Riverkeeper

#### 2009 OFFICERS

President—Tim Mead  
Vice President—Mary George  
Secretary & Treasurer—Squeak Smith  
Vicki Taylor  
Executive Coordinator  
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(See Flow Releases—Page 4)

Apart from providing water for paddling, this early implementation of the recreational flows is allowing Duke to gain experience meeting these flow requirements and also for the paddling community to assess the suitability of these flows. One thing became quickly apparent. The summer releases from Wylie require a 6000 cfs release. Experience has shown that if the flows are held back to 3000 cfs, the level is better suited to a wider range of skill levels. As our objective is to maximize paddling opportunities, Duke was requested not to exceed 3000 cfs for the summer flows, unless of course it was necessary to increase the flows due to high electrical demand or to move water downstream after heavy rains.

We will continue this policy this year too. It may be necessary at some later date to modify the Settlement Agreement, if we need to make this change permanent.

As far as we can see, the flows at the other locations have worked well. It is difficult for us to monitor how well these recreational flows are being used. We would welcome any feed-back from our readers on this subject.

2010 recreational flows are well underway. Although we have recently had a dry period, Duke believes that we are in reasonable shape for the moment, however a protracted lack of rain might cause some problems later in the season.

In May, in an agreement with South Carolina Attorney General, Duke began pulsing releases around the clock, to meet the water quality enhancement provisions of the current Comprehensive Relicensing Agreement at Wylie Hydro. This means that the average water levels below Wylie during non-generating periods will be higher than in the past. This should allow boating below Wylie most of the time – it could be a bit scrapey, but it should nevertheless be paddlable.

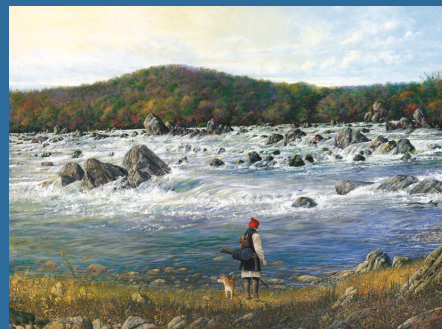
One thing paddlers should remember. The recreational flows are minimum releases. Duke always has the option to increase the flows should conditions demand it. Always check the Duke Website for flow information.

Please let us know if you have comments concerning these recreational releases. ♠

*Maurice Blackburn is a CWRC and Carolina Canoe Club Board member. He and his wife Motty are avid paddlers. You can contact him via e-mail: mblackburn1@carolina.rr.com*

### "The Great Falls of the Catawba"

By: W. Louis Jones



"The Great Falls of the Catawba" print is still available exclusively through CWRC. Each 24" X 30" print is signed and numbered by the artist W. Louis Jones in a limited edition of 500. You can obtain the print for a donation of \$90 to CWRC which includes shipping. All proceeds benefit CWRC.