

Carolina Partners

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License coming soon?

Interstate Lawsuit

—by CWRC Executive Coordinator Vicki Taylor



Interstate Lawsuit and Water Quality Certificate Bump into Each Other

Like the confluence of two rivers, two separate but related issues have intersected and delayed the issuance of Duke's new license. Coming from one direction is South Carolina's water quality certificate and coming from the other direction is the lawsuit between South Carolina and North Carolina over water allocation.

The Water Quality Certificate

As reported in our last newsletter, Duke's required applications for water quality certificates from North and South Carolina have met different fates. The certificate from NC has been issued. And so was the certificate from South Carolina until it wasn't.

To review: On May 15, 2009 SC Department of Health and Environmental Control (DHEC) issued its water quality certificate with terms consistent with the Comprehensive Relicensing Agreement (CRA). Their deadline to do so was June 5, 2009, which is one year from the date that Duke applied for it. However in SC, the certificate comes with a 15 day period during which a review by the DHEC Board may be requested. American Rivers (AR) and the Coastal Conservation League (CCL) made the request and a Board hearing was scheduled for July 9, 2009.

At the July 9 review, the board heard arguments from attorneys for AR and CCL. The arguments were similar to those made during stakeholder negotiations for the CRA – mainly that the mitigation for stream flows was inadequate and inappropriate and that the endangered shortnosed sturgeon was not properly accounted for or protected in the Wateree River. The Board also heard testimony from Duke, SCDHEC, and the SC Department of Natural Resources.

Also speaking at the hearing was SC Attorney General Henry McMaster. The AG was motivated to appear at the hearing because of a lawsuit he has filed on behalf of SC against NC for equitable apportionment of the water flowing from NC to SC. The case is being heard by the Supreme Court of the United States. The AG realized that if SC agrees to the flows in the CRA it would undermine its argument that SC is not receiving its fair share of the water from the Catawba River. He came to argue against the CRA and against the SC agencies who had developed it.

In his comments to the Board he said, "if you approve this submission (the water quality certification), you will be jeopardizing that case (the Supreme Court case) and the economic, cultural, social, environmental future and growth of this state. It would be a drastic mistake to do so."

After deliberating for about 45 minutes, the Board took a vote and denied the water quality certificate.

Was the certificate waived?

Duke has now taken the position that since the final determination regarding the certificate came after the one year period in which it was due – it should be deemed waived. Not surprisingly, SC has taken the opposite view saying that they acted within the one year period and that the review hearing doesn't have to occur inside that time period.

If we look to the language of the Clean Water Act it says that if the state agency "refuses or fails to act on a request for certification" within the one year period, the requirements under the section "shall be waived". SC argues that they acted on the request within the time period and therefore the requirements are not waived.

(See **Lawsuit**—Page 4)

Dear Catawba-Wateree Stakeholder:

The year 2009 marked our 10th anniversary. And even though things seem quiet on the surface, a lot has been going on while Duke Energy's license application makes its way through state and federal procedures.

- Both the Draft and the Final Environmental Impact Statements were issued by the Federal Energy Regulatory Commission. CWRC analyzed, parsed and published a summary of these 500 plus page documents to help stakeholders grapple with these complex and detailed documents.
- CWRC provided a public conference for stakeholders to learn about and discuss the implications of the Environmental Impact Statement. This led to many informed comments being filed with the FERC.
- The South Carolina Water Quality Certificate necessary for Duke's license has been denied. CWRC has continued to monitor this process and keep stakeholders informed about implications and potential actions.
- The law suit between South Carolina and North Carolina over water allocation is proceeding before the U.S. Supreme Court. CWRC is monitoring and providing analysis in order to understand how this might affect the Comprehensive Relicensing Agreement.
- CWRC board members continue in their role as members of the Final Agreement Committee dealing with matters relating to the Comprehensive Relicensing Agreement.
- CWRC continues to monitor and summarize all filings with the FERC regarding Duke Energy's new license process.
- CWRC continues its work on early implementation projects related to conservation and recreation and recently completed work with local stakeholders to design a 140 acre recreation area including trails, camping, swimming and boating.
- And we continue to monitor the work of the Water Management Group and Drought Advisory Group.

We hoped the new license would be issued by the end of this year. But this has not happened mainly due to the denial of the water quality certificate by South Carolina. This may or may not be resolved in 2010 and has already been impacted by the interstate lawsuit which could go on for years. CWRC will be actively involved as this goes forward.

CWRC will continue to exist to represent stakeholder interests until a new license is issued that protects, enhances and restores the natural, cultural, recreational and economic resources of our river basin.

Please consider supporting us in our efforts. Our work has always been a grass roots effort and we rely on your help and generosity. Even if you are not able to contribute financially, please let us know any concerns you have, or any requests you have of us by emailing our Executive Coordinator Vicki Taylor: vetaaylor@roadrunner.com.

Thank you. We couldn't do it without you.

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If you would like to send a check please mail to:

Catawba-Wateree Relicensing Coalition
222 South Boulevard
Anderson, SC 29621

Attention: Beverly Reeves Childs



Mead Musings: *Can the Future be Postponed?*

—by **Tim Mead**

What does the future hold for the Catawba River and the basin through which it runs?

Some things are easily foreseen. Population trends suggest ever more persons moving into the Catawba basin. These persons will put increasing demands on the River. For one thing, we know the consumptive demands for water will increase. More persons will need drinking water. More industries will need water, particularly as the demand for electricity grows there will be an increased need to cool power plants. For another, the River will be expected to carry away more household, commercial, and industrial wastes. Recreational demand on the River – for boating, fishing, birding, and goodness know what else – will increase requiring enhanced public access.

In order to meet those demands, it is pretty clear that steps should be taken now to stay even with, if not get ahead of, the infrastructure requirements and the demands of multiple interests for the distribution of a scarce resource. The “problems” part of the future cannot be postponed.

The “solution” part of the future, it seems to me, is being postponed by key elements of our regional leadership. Why? Maybe because of the US Supreme Court suit by South Carolina against North Carolina. While I’m not privy to the decision-making by North Carolina, South Carolina, or Duke Energy, I did meet recently with , South Carolina State Senator Wes Hayes, Rick Lee, a former York County South Carolina Commissioner and South Carolina Attorney General Henry McMaster and his staff. The purpose of our meeting was to discuss possible steps to manage the Catawba River as a shared resource and work on a solution for its future use and allocation.

AG McMaster seemed wary of any agreement at this time, and I understand and accept his wariness, until the Supreme Court issues a ruling lest the interests of South Carolina be compromised. The North Carolina AG Roy Cooper seems likewise reluctant to engage in solution-seeking in light of the suit. As a result, the meeting was not nearly as productive as I had hoped. An excellent brief analysis of the suit and its consequences is printed elsewhere in this newsletter.

Nearly three years ago the legislatures of North and South Carolina appointed a Catawba-Wateree Basin Commission. Senator Hayes, Rick Lee, and I are all members of the Basin Commission. Substantive movement toward a long-term policy development by the Basin Commission is frustrated by the pending suit. The political leadership of the two states is permitting the “solution” part of the management of the Catawba River to be postponed regardless of the consequences of delay. From my perspective, as a participant in the lengthy stakeholder process that resulted in the CRA, I would hope for a more timely start on finding a solution. And this means sooner rather than later.

◆
Tim Mead (Tdmead@aol.com) is CWRC President and a well known writer.



Future Public Access at Island Point, Lake Norman.

Island Point Access Area Workgroup:

A Process Ahead of its time

—by **Mary George**



Duke Energy has not only committed in signature to the Comprehensive Relicensing Agreement (CRA), but also has committed in action by implementing several CRA tasks ahead of the issuance of its license from FERC. One task that Duke has undertaken earlier than what was contemplated in the CRA is the establishment of a focus group to develop a concept site plan for the Island Point Access Area on Lake Norman in Catawba County, North Carolina.

As most are aware, the CRA includes a number of recreational enhancements to the project which will be completed over a 20-year period of time after the issuance of the license. One of the areas scheduled for enhancements is the Island Point Access Area on Lake Norman. The enhancements are scheduled to be provided during the third five-year period after FERC’s approval of the Recreation Management Plan that will be filed within one year of issuance of the new license. The license articles in the application indicate that Duke will provide trails, bank and/or pier fishing, picnic facilities, a swimming area, boating access facilities, and restrooms. In addition the contractual CRA allows Duke to market the site to commercial operators as an AAll lease for development and management of a multi-use recreation area including, but not limited to, trails, bank and/or pier fishing, picnic facilities, swimming, RV camping with bathhouse and dump station, boating access facilities, restrooms and marine pump-out. During the development of the terms of the CRA, Catawba County had expressed its concerns over some of the proposed activities in the multi-use recreation area and requested that language also include a provision for a small workgroup of parties that represent the public interest at this area to participate in developing a site plan.

After Duke’s filing of the CRA in 2006, several property owners in the Island Point Road area became aware of the recreational amenities being proposed for the Island Point Road Access Area. In February 2008, a number of residents in the neighborhoods adjacent to the Island Point Access Area signed a petition which was presented to the Catawba County Board of Commissioners. The petition raised a number of issues regarding the proposed enhancements at the site. In April 2008, a public forum was held for area residents, Catawba County representatives and Duke Energy representatives. In August 2008, a local property owner raised additional issues and filed those along with the original petition with the FERC. In response to these neighborhood concerns, Catawba County requested that Duke consider initiating the focus group process early in order to alleviate some of the neighborhood’s concerns. To their credit, Duke agreed and hired someone very familiar to us all, Victoria Taylor Consulting Services Group, in order to facilitate the workgroup.

A workgroup was then established comprising twelve individuals representing various interests including the adjoining neighborhoods, travel/tourism, local schools, Catawba County and Duke Energy. The workgroup met twelve times for regular meetings and had two site visits and a larger group meeting with other individuals from the area. The goal of the workgroup was to develop a conceptual site plan which met the conditions of the CRA and also addressed the interests of the community as represented by the stakeholders.

The process began rather tenuously as many individuals were not aware of the relicensing process and did not understand that the property had been reserved for a future public access site. Many believed that this was a commercial activity that should not be allowed in their neighborhood. As the process moved along, many of the stakeholders who originally opposed several components of the site began to understand that this facility was being developed for the community as a whole and that many amenities were needed on the lake for those who were not fortunate enough to have lake access. It was heartening to see the growth of these individuals to the point that they actually presented the final concept site plan to their own communities and explained the rationale for their decisions.

(See **Island Point**—Page 3



A Fish Story:

Shortnose Sturgeon, Dam Relicensings and the Endangered Species Act

—by *Gerrit Jöbsis*

Getting ready to write this article reminded me of the children's song *Dem Dry Bones*. You know it I'm sure. It goes:

The toe bone connected to the heel bone,
The heel bone connected to the foot bone,
The foot bone connected to the leg bone...

But for this writing I'm thinking geography instead of anatomy and knowing how our rivers are connected is important for understanding a rare fish species - the shortnose sturgeon. So sing along...

The Catawba River connected to the Wateree River,
The Wateree River connected to the Santee River,
The Santee River connected to the Atlantic Ocean.

These connections are important to shortnose sturgeon and other "anadromous" fish – species that spend most of their lives in the ocean or coastal waters but migrate up our rivers to spawn and rear their young in fresh-water. Historic records show that "sturgeon", (the records do not distinguish between the shortnose and its much larger relative the Atlantic sturgeon), migrated up the Santee and Wateree rivers to at least as far as Fairfield County, SC, a section of river which is now part of Lake Wateree.

Sturgeon are now much more rare than in historic times and the shortnose sturgeon is so rare that it is listed as an endangered species under the federal Endangered Species Act. The species is said to be "prehistoric" because it is believed to have been around for about 70 million years. It is a long-lived fish with females exceeding 60 years in age and males somewhat less. Because it is an endangered species, the shortnose sturgeon and how the presence and operation of Duke's dams may affect its survival are important to the Catawba-Wateree relicensing.



The Catawba and Wateree rivers are part of the Santee River Basin which covers about 15,000 square miles and is among the largest watersheds on the East Coast. In addition to the Catawba-Wateree, there are two other major Federal Energy Regulatory Commission (FERC) relicensings going on in the basin – the Saluda Dam near Columbia, SC, and the Santee-Cooper dams near Charleston, SC and the ocean. The Santee-Cooper dams are especially important to sturgeon and other migratory fish because any fish trying to get from the ocean to the Catawba and Wateree Rivers must first find their way past these dams. Also, it is thought that a landlocked (or rather dam-locked) population of shortnose sturgeon live in Lake Marion, the 100,000 acre reservoir impounded by the Santee Dam.

Because it is a federally endangered species and it is known to be present in the Santee, Congaree and Wateree rivers, formal consultation is required under the Endangered Species Act and is being conducted for all three ongoing relicensings in the Santee Basin. The Endangered Species Act requires that any federal agency that may affect an endangered species or critical habitat through an action must enter what is known as Section 7 consultation with the federal agency charged with managing that species. In the case of these hydropower relicensings, FERC is the federal agency that may affect the species by the action of issuing a new license for the operation of those dams and the National Marine Fisheries Service (NMFS) is the federal management agency charged with managing the species and with which FERC must consult.

Without getting into too much detail, the consultation process relies on two important documents. FERC issues a Biological Assessment in which it states how it thinks the relicensing may affect the shortnose sturgeon. NMFS then responds to the Biological Assessment with its Biological Opinion or BiOp in which it provides its analysis of the information FERC provided and any other relevant information it has gathered. NMFS can issue one of two decisions –

that the new license either will or will not put the species in jeopardy of extinction. If the BiOp concludes the license would put the species in jeopardy, then the document lays out steps that must be taken to avoid or minimize those affects. The goal of the BiOp is to avoid or minimize the affects of the new license on an endangered species. The goal of the Endangered Species Act is the recovery of the species.



As for the Catawba-Wateree relicensing, NMFS has stated that it will complete it's BiOp for the Santee

-Cooper dams before it completes consultation regarding Duke's dams on the Catawba-Wateree. Because the Catawba, Wateree and Santee rivers are connected, the Santee-Cooper BiOp will contain essential analysis for the Catawba- Wateree BiOp. At the time of this writing, the Santee-Cooper BiOp is said to be undergoing final review and will be ready for release soon. Completion of formal consultation at Catawba-Wateree could easily take several months or more after the Santee-Cooper BiOp is released. Completion of consultation for the endangered shortnose sturgeon will very likely be one of the last steps in the Catawba-Wateree relicensing. ♣

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(Island Point—Continued from Page 2)

The final site plan consists of two tiers: Tier 1 with the six elements of the license articles anticipated from the FERC and Tier 2 with the additional provisions being offered to a commercial operator. One of the key negotiation points was the allowance of a limited number of campsites and a size restriction for camping vehicles. The citizens in the area were concerned about the traffic implications of larger recreational vehicles on Island Point Road and long-term camping potential associated with motorhomes. The final site plan included a camping area allowing up to 24 total camp sites. In addition, the workgroup agreed to refine a set of rules and conditions related to camping to address concerns, including a 32-foot length restriction for campers. An additional point of contention in developing the site plan was the location of the boat ramp relative to the adjoining neighborhood. With the site being located on a quiet cove off the main channel of Lake Norman, most stakeholders believed that it would be best to keep the boat ramp on the outer edge of the site to allow for the internal quiet water to be used for the swimming beach and canoe/kayaking opportunities.

The final concept site plan and the camping rules, facility design standards, conditions and additional provisions will be filed with the FERC as part of the Recreation Management Plan. Even though this facility is not scheduled to be developed for at least 10 years, Duke took the initiative to conduct the focus group process to address concerns of citizens in the area today. Duke is to be commended for their dedication to the CRA by implementing this process ahead of time and offering additional considerations that were outside of the original proposal. In the long run this access area facility will be a better community amenity due to the dedicated efforts of the workgroup members and Duke Energy's staff.

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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:

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Eric Jenkins—Burke County

Susie Hamrick Jones—NC Foothills Conservancy

"Squeak" Smith—Trout Unlimited

MIDDLE

Maurice Blackburn—Carolina Canoe Club

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Tim Mead—Fisherman

Kirk Otey—Trout Unlimited

Vicki Taylor—Lake Norman Covekeeper

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"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.

Lawsuit—Continued from Page 1)

However the regulations that FERC uses in interpreting the CWA say that a state has waived its right to certify if the certifying agency has "not denied or granted" certification within the one year period. Duke is relying on this language.

To further complicate matters, FERC staff wrote a letter in 2004 that says that the FERC will treat SC's actions prior to a review hearing by the Board as final and as satisfying the one year requirement. Duke argues that SC's process has changed since then and that this letter is not binding.

Duke has requested the FERC to determine the water quality certificate is waived and to get on with issuing the license. No word from FERC yet.

The SC-NC lawsuit

In 2007 SC sued NC for equitable apportionment of water. The lawsuit was prompted by the threat that large interbasin transfers in NC take water out of the Catawba Basin and out of the path of SC development that depends on water. The lawsuit alleges that interbasin transfers and other NC consumptive uses deprive SC of its equitable share of water from the Catawba River.

In cases between states such as this, the US Supreme Court has original jurisdiction. That is, unlike their more common role as the ultimate appeals court, they are the original trial court.

The Supreme Court appointed a Special Master to hear certain arguments and make recommendations. After hearing their arguments, she recommended that Duke Energy, the City of Charlotte and a joint venture called the Catawba River Water Supply be allowed to join the suit as interveners. This would be uncommon to allow private parties into an original jurisdiction case in front of the Supreme Court.

On October 13, 2009 the full Supreme Court heard arguments from SC, NC, Duke and the US Solicitor General's office regarding the Special Master's recommendation to allow the interveners. The questioning was sometimes intense and showed that the Justices understood the underlying issues of the case very well. The issue of whether any or all of these potential interveners should be allowed may seem like an arcane pretrial procedure, but it is just these kinds of things that can make a huge difference in what a court hears and how it decides a case. We will get a ruling on the interventions next year.

What did the NC lawyer mean?

It was at this hearing before the Supreme Court that the attorney representing NC stated in response to Justice Sotomayor questioning that it is not in NC's interest to support the CRA and that NC would request the Special Master to undo its obligations under the CRA. Subsequently the NC Attorney General's office and NC DENR have said that NC does not want to get out of the CRA. It is possible that what the NC lawyer meant was that if SC wins a greater amount of water as a result of equitable apportionment from the lawsuit, then NC will seek to withdraw from the CRA because the actions of a jurisdictional body have significantly increased its burdens or decreased its benefits under the CRA. The withdrawal process is provided for and detailed in the General Agreements and Procedures section of the CRA. But as of now, NC remains in support of the CRA.

So now what?

Duke has appealed the denial of the water quality certificate in SC Administrative law court. The hearing date is set for May, 2010.

Duke also could apply again to SC for the water quality certificate. SC could add additional requirements to be consistent with the AG's arguments in the Supreme Court case. If they do that the requirements are likely to be construed as an "inconsistent act by a jurisdictional body" that could trigger withdrawals from the CRA.

Or, FERC may agree with Duke that SC certification has been waived, and then the license could be issued consistent with the CRA. But this would likely be challenged by SC and the EPA.

In any case, the issuance of the license is not dependent on the Supreme Court case. However, the outcome of the Supreme Court case could result in a flow regime different from the CRA which could also trigger withdrawals from the CRA. The FERC license itself is subject to licensees and states having the necessary rights to water use and could be amended if the equitable apportionment case results in flows different from the license terms.

And, one more thing

The National Marine Fisheries Service is now working on its "Biological Opinion" under Section 7 of the Endangered Species Act. A draft is due December 31, 2009 and the final report by February 14, 2010. They may recommend flows to protect the shortnosed sturgeon that differ from those in the CRA. The FERC is likely to include their recommendations in the new license.

So, the clear path to a license entirely consistent with the CRA is being muddied from a number of directions. Whether the CRA and license will ultimately be better or worse is not clear, but we all must continue to work to ensure the entire process balances interests in the most sustainable and fair way.

♦ *Vicki Taylor* vtaylor@roadrunner.com is a CWRC Board member and a consultant serving as Executive Coordinator for the Coalition during the relicensing process.