

# CITIZENS' WATER ACADEMY

LEGAL AND MANAGEMENT ASPECTS

GARRY S. RICE, ESQ.

DUKE ENERGY CORPORATION

JANUARY 20, 2022



## WHO OWNS THE WATER?

- Water is a public resource, and ownership is shared.
- The federal government “owns” the energy potential in water in navigable water bodies.
- Riparian owners can make reasonable use, and thus exercise an ownership interest.
- The public trust applies to water in navigable water bodies, providing the public the right of use for transportation.
- The state regulates many uses, such as fishing, discharges into the water (pollution), water transfers out of the basin, etc.

3

## WHAT ARE RIPARIAN RIGHTS?

- Riparian rights are the rights of landowners immediately adjacent to natural rivers or streams (i.e., not man-made lakes), which are determined by state law.
- NC: right to make reasonable use of stream as it passes through land, including constructing dams. Impounder has the right to excess water.
- SC: right to make reasonable use of water, including construction of dams.

4

## WHO OWNS LAND UNDER LAKES AND RIVERS?

- If the stream is not navigable, the riparian owner generally owns to the center of the streambed.
- If it is navigable, then the sovereign generally owns the streambed.
- The lakebed belongs to the fee owner. Oftentimes, Duke Energy has purchased the fee, but sometimes it has an easement that provides necessary rights.

5

## WHAT IS FEREC AND WHAT IS ITS ROLE?

- **F**ederal **E**nergy **R**egulatory **C**ommission
- FERC licenses hydropower projects. It also regulates the interstate transmission of electricity, natural gas, and oil, and performs other functions.
- FERC's Office of Energy Projects (OEP) in Washington, DC has responsibility for hydropower projects.
- OEP reviews applications, prepares environmental documents, makes recommendations to the Commission for action on the applications, and oversees the administration of licensed projects, including dam and public safety.

## FERC'S FORMATION

- FERC's predecessor, the Federal Power Commission (FPC), began regulating hydro development in 1920 under the Federal Water Power Act of 1920.
- In 1935, the FWPA became Part I the Federal Power Act (FPA).
- The FPC became FERC in 1977 with the establishment of the Department of Energy.

## FERC'S JURISDICTION

- FERC has jurisdiction over more than 2,500 dams with approximately 55,500 MW of hydropower installed capacity.
- Part I of the FPA authorized the FPC to issue licenses to non-federal applicants when:
  - located on navigable waters of the United States;
  - located on federal lands or reservations;
  - the project uses surplus waters from a federal dam; or
  - the project is located on a non-navigable stream over which Congress has Commerce Clause jurisdiction, is constructed or enlarged after 1935, and affects interstate commerce, usually by connecting to the interstate grid.

## FERC'S HYDROPOWER LICENSES

- In 2017 FERC adopted a policy of a 40-year default license term for original and new licenses at non-federal projects.
  - Shorter or longer to coordinate with projects in same basin
  - Shorter or longer pursuant to stakeholder agreement, not inconsistent with coordination
  - Longer license term if requested and justified by measures not otherwise required and not inconsistent with coordination
- FERC seeks to balance multiple uses and interests and favors stakeholder agreements, which it refers to as comprehensive settlement agreements.



# DUKE ENERGY'S CATAWBA- WATEREE PROJECT CRA

- As discussed in detail in the previous session, the Comprehensive Relicensing Agreement (CRA) is a stakeholder agreement used in support of our application for a new license.
- The CRA was signed by 70 stakeholder parties representing the 225 river miles of Project.
- The CRA covers lake levels, drought (LIP), minimum flows, recreational flows and amenities, and much more.

## US SUPREME COURT SETTLEMENT

- On June 7, 2007, SC sued NC claiming that NC's interbasin transfers (IBT) (i.e., moving water from one river basin to another) were robbing SC of its water – sought equitable apportionment of the water in the Catawba River.
- Duke Energy and Catawba River Water Supply Project successfully intervened in the case.
- After repeated meetings with the special master and settlement discussions, the parties executed a settlement agreement on December 3, 2010.
- All parties agreed the CRA was the foundation to resolve the litigation.
- NC & SC require conservation during drought and use similar processes for IBTs (with an Environmental Impact Statement) and will update basin water supply study every at least 10 years.
- If abiding by the CRA neither state will sue for equitable apportionment.

# DUKE ENERGY'S AUTHORITY TO CONTROL WHAT HAPPENS IN, ON, AND AROUND THE LAKES

- A hydropower license authorizes a licensee to construct and operate a hydroelectric project. Those licenses require measures to protect environmental resources and ensure safe construction and operation of the project. A license gives the licensee the ability to use eminent domain to acquire the property required for project development and operation.
- Licensees must ensure that all land and water within the FERC project boundary are managed consistently with project purposes, license requirements, and operations. Project purposes may include operation and maintenance, flowage, public recreation, public access, shoreline control, and the protection of environmental resources. Additionally, licensees must have sufficient property rights to manage project lands to protect and maintain project purposes.

## WHAT DOES DUKE ENERGY CONTROL RELATIVE TO THE LAKES?

- Lake levels, discharge volumes, and timing of discharge.
- All uses within the project boundary, including permitting for the construction and maintenance of piers, discharge outfalls, water intakes, roads, utility lines and all other structures; excavation, shoreline stabilization, tree removal, etc.
- We even regulate our own work. For example, if Duke Energy wants to remove old water intakes, it must get approval from its Lake Services department.

## WHAT ARE MARINE COMMISSIONS AND WHAT IS THEIR ROLE?

- Marine commissions were created by state statutes (and interstate compact) to help manage lake issues such as public recreation, development, and boater safety. Particular marine commissions may vary in their duties and authority, but generally they work with Duke Energy on lake management issues.
- Where allowed by law, they may hire special officers to patrol and enforce the laws on the lake and shoreline area.

## THE ROLE OF NC AND SC STATE AGENCIES

- NCDEQ and SCDHEC issue water quality certifications pursuant to Section 401 of the Clean Water Act, which certifies that Duke Energy's hydropower discharges will comply with various water quality standards. NCDEQ and SCDHEC also permit wastewater discharges (e.g., thermal discharges from nuclear and coal-fired powerplants).
- NCWRC & SCDNR are natural resource agencies. They regulate activities on the lakes, such as boater safety, including requirements for boat registration, personal flotation devices, fire extinguishers, navigation lights, and flares. They set the minimum age of boat operators, and require reporting of boating accidents, among other functions.

## WHO HAS THE RIGHT TO TAKE WATER OUT OF LAKES OR RIVERS?

- In NC, Duke Energy as the impounder has the right to take the excess water out of the reservoirs that it built. Other withdrawals are subject to reasonable use.
- SC has a detailed water withdrawal regulatory scheme managed by SCDHEC which requires large surface water withdrawers to obtain a permit before withdrawing surface water. It does not displace the common law of reasonable use.
- Any water intake to be placed in the FERC Project Boundary must be approved by Duke Energy (also by FERC if one million gallons per day or greater)
- Most lake residents don't own to the water's edge. If Duke Energy only has an easement in the lakebed, then the lake resident *may* own to the water's edge. River residents are more likely to be riparian owners.
- Interbasin transfers (i.e., moving water from one river basin to another) are regulated by the states.

16

## WHO HAS THE RIGHT TO PUT WATER INTO THE LAKES OR RIVERS?

- Depends on what kind of water.
- Wastewater discharges require a wastewater permit.
- Any discharge pipe to be placed in the FERC Project Boundary must be approved by Duke Energy (also by FERC if discharging wastewater)
- Remember, rivers are different from lakes. River residents are more likely to be riparian owners.