

172 FERC ¶ 61,254
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and James P. Danly.

Cube Yadkin Generation LLC

Project No. 2197-135

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING AND SETTING
ASIDE PRIOR ORDER IN PART

(Issued September 17, 2020)

1. On March 12, 2020, Commission staff issued an order approving a Sedimentation and Flood Protection Plan filed by Cube Yadkin Generation LLC (Cube Yadkin), licensee for the Yadkin Hydroelectric Project No. 2197 (Yadkin Project).¹ On April 13, 2020, the City of Salisbury (City) filed a timely request for rehearing of the March 12 Order. Pursuant to *Allegheny Defense Project v. FERC*,² the rehearing request filed in this proceeding may be deemed denied by operation of law. As permitted by section 313(a) of the Federal Power Act,³ however, we are modifying the discussion in the March 12 Order and setting aside the order, in part, as discussed below.⁴

I. Background

2. The Yadkin Project is located on the Yadkin River in Davie, Davidson, Montgomery, Rowan, and Stanly Counties, North Carolina. The project has an authorized capacity of 210.51 megawatts and occupies 24,055 acres. The Yadkin Project includes four developments along a 38-mile segment of the Yadkin River. As relevant

¹ *Cube Yadkin Generation LLC*, 170 FERC ¶ 62,143 (2020) (March 12 Order).

² *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc).

³ 16 U.S.C. § 825l(a) (“Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.”).

⁴ *Allegheny Def. Project*, 964 F.3d at 16-17.

here, the High Rock Development is the most upstream development and includes a 936-foot-long, 101-foot-high dam that impounds a 14,400-acre reservoir.

3. On April 25, 2006, Alcoa Power Generating, Inc. (Alcoa Generating) filed an application for a new license to continue operation and maintenance of the Yadkin Project.⁵ On April 18, 2008, Commission staff issued a final Environmental Impact Statement (EIS) analyzing the effects of the proposed project and alternatives to it. The final EIS discussed sediment and flooding issues at High Rock Reservoir. The City of Salisbury's water intake and pump station is located on the shoreline of the upper reaches of the High Rock Reservoir, where sediment deposition has occurred since the dam was constructed in 1927.⁶ In the final EIS, staff concluded that the existence of the High Rock dam affected the City's water intake and pump station⁷ and recommended that the licensee develop a sedimentation and flood protection plan (Environmental Measure 17).⁸

4. On October 23, 2015, North Carolina Division of Environmental Quality (North Carolina DEQ) issued a water quality certification for the Yadkin Project that included 13 conditions. As relevant here, Condition 9 required the licensee to develop a sedimentation and flood protection plan to mitigate harm to the City of Salisbury's water intakes and water supply pump station.⁹ Among other things, Condition 9 requires the plan to include "[p]hysical modifications to the facilities such as a protective dike for the pump station, improved access to the pump station with the road consistent with the City of Salisbury's design or other feasible option(s) for achieving the same benefits."¹⁰

⁵ The project was originally licensed in 1958 for a 50-year term. *Carolina Aluminum Company*, 19 F.P.C. 704 (1958). The Carolina Aluminum Company changed its name to Yadkin, Inc. shortly after the license was issued. *See Yadkin, Inc.*, 22 F.P.C. 492 (1959). On July 17, 2000, the Commission approved the transfer of the license from Yadkin, Inc. to Alcoa Generating. *Yadkin, Inc. and Alcoa Power Generating, Inc.*, 92 FERC ¶ 62,029 (2000).

⁶ Final EIS at 40.

⁷ Final EIS at 51.

⁸ Final EIS at 250, Table 54, Environmental Measure 17.

⁹ License Order, 156 FERC ¶ 62,210 at Appendix A, Condition 9 (Condition 9).

¹⁰ *Id.*

Further, the licensee must consult with the City of Salisbury and the North Carolina Division of Water Resources in developing the plan.¹¹

5. On September 22, 2016, the Commission issued a new 38-year, 7-month license for the project.¹² In analyzing the water quality certification conditions, the Commission discussed sedimentation and flood control at the High Rock Development:

Construction of High Rock Dam altered the sediment transport regime in the Yadkin River so that High Rock Reservoir intercepts and traps nearly all the sediment load from upstream areas. Sediment has accumulated in the upper reaches of High Rock Reservoir and created an extensive sediment delta that causes flood waters to reach higher elevations along the shoreline. This has implications for infrastructure located along the upper reaches of High Rock Reservoir, including the City of Salisbury's water supply intake and pump station, the access road to the pump station...¹³

6. The Commission noted that “[t]he water supply intakes and pump station are the sole source of potable water for the City of Salisbury and Rowan County. Accumulated sediment can physically cover the intake gates, as well as exacerbate flooding in the area of the pump station and access road. The result is a potential loss of potable water for the city and county, as well as residents and businesses.”¹⁴ However, the Commission concluded that although “sediment accumulation in the upper reaches of High Rock Reservoir has increased the flood elevations along the shoreline,” the Commission “does not have authority to adjudicate claims for, or to require payment of damages for, project-induced adverse effects to property of others. Rather, the City of Salisbury, if it believes that its water supply intake, pump station, and access road are adversely affected by flooding caused by operation of High Rock Dam, can seek redress with Alcoa Generating in state court.”¹⁵ Therefore, the Commission did not require the Sedimentation and Flood Protection Plan, as recommended in the EIS as Environmental Measure 17. Nonetheless,

¹¹ *Id.*

¹² *Alcoa Power Generating, Inc.*, 156 FERC ¶ 62,210 (2016) (License Order). On December 13, 2016, the Commission approved a transfer of the license from Alcoa Generating to Cube Yadkin. *Alcoa Power Generating Inc.*, 157 FERC ¶ 62,188 (2016).

¹³ License Order, 156 FERC ¶ 62,210 at P 64.

¹⁴ *Id.* at note 57.

¹⁵ *Id.* P 68.

as required by the Clean Water Act, Condition 9, which requires a Sedimentation and Flood Plan, became part of the license.¹⁶

7. In its request for rehearing of the License Order, the City argued, *inter alia*, that the License Order should have adopted Environmental Measure 17.¹⁷ On rehearing, the Commission found that because that condition was effectively incorporated in the license by virtue of the water quality certification through license Article 401, “it is unnecessary and would be redundant to also incorporate Environmental Measure 17 in the license.”¹⁸ The Rehearing Order pointed out that as part of the license, the condition is enforceable unless the licensee seeks, and the Commission approves, an amendment to the license. And at that point the Commission could consider whether to impose measures to mitigate project effects on the City’s facilities.¹⁹ Pursuant to Article 401(a) of the License Order, the licensee was required to file the plan required by Condition 9 for Commission approval and to include documentation of consultation with the City and the state.²⁰

A. Cube Yadkin’s Sedimentation and Flood Plan

8. On September 18, 2018, and as supplemented on May 24, 2019, Cube Yadkin filed the Sedimentation and Flood Plan for Yadkin River Raw Water Intake and Pump Station (Plan) for approval in accordance with Article 401(a) and Condition 9 of the water quality certificate.²¹ In its cover letter, Cube Yadkin stated that it had provided a

¹⁶ 33 U.S.C. § 1341(d) (2018); License Order, 156 FERC ¶ 62,210 at P 69 and at ordering para. (D).

¹⁷ *Alcoa Power Generating Inc.*, 160 FERC ¶ 61,098, at P 21 (2017) (Rehearing Order).

¹⁸ *Id.* P 24.

¹⁹ *Id.* P 25. As we noted in the Rehearing Order, section 10(c) of the FPA allows the Commission to require mitigation when necessary to “adequately protect life, health, and property.” *See* Rehearing Order, 160 FERC ¶ 61,098 at P 32. The March 12 Order referred to the Rehearing Order’s finding that mitigation was not required for the City’s wastewater treatment plant because the safety of the community was not at risk. March 12 Order, 170 FERC ¶ 62,143 at P 27. However, Condition 9 applies only to the City’s water supply facilities. Staff’s reference to the wastewater treatment plant in paragraph 27 of the March 12 Order was in error. *See* City of Salisbury April 13, 2020 Request for Rehearing (Rehearing Request) at 34.

²⁰ License Order, 156 FERC ¶ 62,210 at ordering para. (G).

²¹ The due date for filing the plan was within 18 months of license issuance. Rehearing Order, 160 FERC ¶ 61,098 at P 34. However, Commission staff granted Cube

draft Plan to the City, North Carolina DEQ, and the North Carolina Wildlife Resources Commission (North Carolina WRC) prior to filing and included in the filing documentation of consultation with those entities.²² Cube Yadkin also noted that because the City continues to rely on a 2011 Final Mitigation Assessment Report prepared by Black and Veatch (2011 Black & Veatch Report), the Plan included recommendations from the report as alternatives.²³

9. Cube Yadkin's Plan includes measures for: (1) dredging to address sedimentation at the raw water intakes;²⁴ (2) modifications to the pump station; and (3) access to pump station during flood events. The Plan also includes cost estimates and implementation schedules.

10. With regard to modifications to the pump station, Cube Yadkin proposes physical modifications to raise critical equipment (i.e. pumps and electrical equipment) to or above elevation 652.3 feet National Geodetic Vertical Datum 29 (NGVD29), which is 3.6 feet above the 100-year flood water surface elevation.²⁵ Cube Yadkin states that the improvements to the pump station will depend on the structural analysis of the building,

Yadkin two extensions of time, requiring the plan to be filed by September 18, 2018. Order Granting Extension of Time to File Sedimentation and Flood Protection Plan Pursuant to Article 401(a) (March 15, 2018); Order Granting Second Extension of Time to File Sedimentation and Flood Protection Plan Pursuant to Article 401(a) (July 16, 2018).

²² Cube Yadkin's September 18, 2018 Plan at Attachment 4 (consultation record) and Attachment 5 (summary of response to comments on the Plan).

²³ Cube Yadkin's September 18, 2018 Plan, Cover Letter at 4. The City filed the 2011 Black & Veatch Report with the Commission on May 17, 2019.

²⁴ On rehearing, the City does not contest the proposed Plan as it relates to the sediment dredging, so this part of the Plan will not be discussed further.

²⁵ The highest flood elevation of record was in March 2003 at 640.7 feet NGVD29. The North Carolina Code for flood design refers to Section R322 of the International Residential Code, which references the American Society of Civil Engineers (ASCE) 24. ASCE 24 specifies that loads must be in accordance with ASCE 7, Minimum Design Loads for Buildings and Other Structures, which specifies a Base Flood Elevation (100-year flood event elevation) plus 2 to 3 feet for essential structures.

but could include adding a mezzanine inside the existing pump station or reconstructing the pump station.²⁶

11. Cube Yadkin's plan to address access to the pump station during flood events relies on automating operations to avoid the need for access during flood events.²⁷ The licensee states that it will improve the City's remote operations or redundancy in order to avoid the need for access during flood events. This includes upgrading the City's Supervisory Control and Data Acquisition (SCADA) software, along with a back-up redundant system in place, and raising the electrical controls in the pump station above flood elevation to allow for full remote operation control. Cube Yadkin also proposes to provide the City with an amphibious vehicle for access during minor flood events, which would allow access when the road is covered with water up to 18 inches deep.²⁸ The licensee estimates that the physical modifications to the pump station and proposed access improvements would total approximately \$2,825,000 (in 2018 dollars).

12. Cube Yadkin states that implementation of its Plan will require the City's cooperation, as the City's pump station is outside the Yadkin project boundary and on property not owned by the licensee. The licensee anticipates that it will need one year to design and permit the pump station physical modifications and three years to complete construction (which is it currently estimates completing by 2023).

13. On October 29, 2018, the City filed an engineering review of the licensee's Plan, as well as a statement of its concerns. The engineering review found, *inter alia*, that the Plan was not consistent with Condition 9 or with North Carolina regulations.²⁹ The City also raised concerns that the Plan made several mischaracterizations, including the following: misstating the base flood level, inaccurately representing the requirements of Condition 9(B), and making an inadequate comparison of environmental impacts between the Plan and alternatives.³⁰ The City requested that the Commission reject the licensee's Plan and require Cube Yadkin to complete technical and engineering work to respond to the concerns raised in the engineering review conducted for the City by Black & Veatch.

²⁶ Cube Yadkin's September 18, 2018 Plan at 14-17.

²⁷ *Id.*

²⁸ *Id.* at 13.

²⁹ City of Salisbury October 29, 2018 Filing at Enclosure 1.

³⁰ *Id.* at Enclosure 2.

14. On November 13, 2018, the licensee filed a response to the City's engineering review, asserting that its Plan is complete and meets the requirements of the project license and water quality certification.

B. March 12 Order

15. On March 12, 2020, Commission staff approved Cube Yadkin's Plan. The March 12 Order found that the Plan complied with the requirements of Condition 9, including the consultation requirement. Commission staff concluded that:

The licensee's proposed alternative to elevate the pump station to 3.6 feet above the 100-year flood water surface elevation is also reasonable and provides physical modifications to the facilities and improved access to the pump station to achieve similar benefit to address this requirement. While Commission staff understands the City of Salisbury's preference for a new pump station, the alternative presented by the licensee achieves similar results and is significantly less expensive (\$16,375,000 to \$23,925,000 for the three new pump station alternatives in the 2011 Report versus \$2,825,000 for the licensee's proposed alternative). Furthermore, the licensee's alternative would not disturb new areas and avoids in-water, wetland, and forest disturbance. The licensee's proposed alternative would also avoid erosion impacts that result with new construction activity in undeveloped areas.³¹

C. Request for Rehearing

16. On April 13, 2020, the City filed a request for rehearing of the March 12 Order, arguing that Commission staff's decision to approve Cube's Sedimentation and Flood Protection Plan was arbitrary and capricious, unsupported by substantial evidence, and legally erroneous.³² Specifically, the City argues that: (1) if implemented, the Plan

³¹ March 12 Order, 170 FERC ¶ 62,143 at P 31.

³² On April 28, 2020, the City filed a "Corrected Request for Rehearing," which corrected some minor errors present in the April 13, 2020 Request for Rehearing. The corrections were not substantive. Pursuant to section 313(a) of the FPA, an aggrieved party must file a request for rehearing within 30 days after the issuance of the Commission's order. 16 U.S.C. § 825l. Under the Commission's regulations, read in conjunction with section 313(a), the deadline to seek rehearing was 5:00 p.m. U.S. Eastern Time, April 13, 2020. *Id.*; 18 C.F.R. § 385.713 (2020). The City of Salisbury's "Corrected Rehearing Requested" failed to meet this deadline. Because the 30-day rehearing deadline is statutorily based, it cannot be waived or extended, and the request must be rejected as untimely. *See City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) (holding that the 30-day time requirement to file a request for rehearing in the

would not achieve compliance with Condition 9 of the water quality certification; (2) the Plan cannot be lawfully implemented since it violates siting and design standards for water supply stations; and (3) the Plan is not based on sound and prudent engineering as required by 18 C.F.R § 12.5 (2020).³³

17. On April 15, 2020, the City submitted a letter from the North Carolina DEQ to the City and Rowan County to be considered alongside its rehearing request.³⁴ The letter is an untimely supplement to the city's rehearing request and will not be considered.³⁵

II. Discussion

18. On rehearing, the City argues that the Commission improperly approved the Plan, without modification, even though the Plan: (1) does not comply with condition 9; (2) cannot be implemented because it violates design standards for water supply stations; and (3) is not based on sound engineering principles. The City requests that the Commission: modify the March 12 Order to correct the design flaws of the Plan; require Cube Yadkin to obtain all necessary permits for implementation of a modified Plan by December 30, 2020, which is consistent with industry standards for pump stations and is reasonably likely to achieve compliance with Condition 9; and require completion of construction by June 30, 2022.

19. As an initial matter, some points made in previous orders in these proceedings bear repeating. The City's water intake and supply station are non-project facilities located on non-project lands.³⁶ The Commission staff was required to include in the license the conditions of the water quality certification, regardless of whether the Commission considers those conditions to be required by the public interest.³⁷ However, as discussed below, in the case of unclear provisions, the Commission is entitled to interpret them and to receive deference in doing so.

FPA "is as much a part of the jurisdictional threshold as the mandate to file for a rehearing.").

³³ Rehearing Request at 2.

³⁴ City of Salisbury April 15, 2020 Filing.

³⁵ See n. 32, *supra*.

³⁶ For a description of the project facilities and project boundary, see License Order, 156 FERC ¶ 62,210 at PP 17, 22.

³⁷ *Id.* P 69; *see also* Rehearing Order, 160 FERC ¶ 61,098 at PP 24-25.

A. Compliance with Condition 9

20. Condition 9 requires the licensee to develop a Sedimentation and Flood Plan to mitigate harm to the City's water intake and water supply pump station. At issue here is Condition 9's requirement in subpart (B) to provide "physical modifications to the facilities such as a protective dike for the pump station, improved access to the pump station with the road consistent with the City of Salisbury's design or other feasible option(s) for achieving the same benefits." The condition, which includes the terms "such as," "consistent with," and "other feasible alternatives," neither requires specific measures nor establishes a standard for determining what options would satisfy the condition. Given this lack of clarity, implementing the condition is a matter within the Commission's discretion.

21. Although Condition 9 is unclear as to specifics, we can discern that its purpose is to provide a certain level of flood protection for the City's water supply facilities developed by the licensee in consultation with the City and state, and we will consider the issues here in that light.

22. The City argues that the Plan is not consistent with Condition 9(B) of the water quality certification because the Plan does not provide the same benefits as the protective dike and improved access road that were included in the City's design.³⁸ The City's interpretation of Condition 9(B) focuses on the phrases *consistent with the City of Salisbury's design* and *achieving the same benefits*.³⁹ The City claims that the "City of Salisbury's" design is the "Black & Veatch cost-effective pump station relocation design alternative presented in the 2011 Black & Veatch report."⁴⁰ But it concedes that "Condition 9 does not restrict the licensee to adopting Salisbury's pump station relocation design; but it does require the licensee to implement a plan that will achieve the same benefits as the City of Salisbury's design."⁴¹

23. The City looks to the flood protection plans that were in the record at the time that North Carolina issued its water quality certification and argues that "all three designs share common elements and provide common benefits."⁴² In 2007, the City retained consultants to assess alternative approaches to mitigate the sedimentation impacts of the

³⁸ Rehearing Request at 19-31.

³⁹ *See infra* at PP 25-26.

⁴⁰ *Id.* at 19.

⁴¹ *Id.* at 26.

⁴² *Id.* at 20.

Yadkin Project on the pump station: the Willis Report analyzed relocating the pump house and access road to a non-flood hazard location and the McGill Report's preferred alternative for mitigation in-place included installation of a flood wall around the perimeter of the pump house and raising the access road.⁴³ In 2011, after issuance of the Final EIS and before filing of the water quality certification, the licensee contracted with Black & Veatch to assess options for mitigation of the sedimentation and flooding effects at the City's facilities, which focused on relocation of the pump station.⁴⁴

24. The City argues that all three designs share common features and benefits,⁴⁵ including a dry pump station and dry access road during a 100-year flood. It asserts that since Cube Yadkin's Plan would allow for a flooded pump house and a flooded access road during a 100-year flood it is not compliant with Condition 9.⁴⁶ The City further notes that using a boat to access the pump station and flooding of the pump station were the problems that the mitigation measures were supposed to solve. It states that "[b]oat access is dangerous and the amphibious equipment is even worse. According to the City, the Plan does nothing to improve access to the pump station during flooding and does almost nothing to improve 'redundancy' of pump station equipment."⁴⁷

25. The City mischaracterizes the Condition 9(B) requirements. The City claims that, "Condition 9 . . . require[s] the licensee to implement a plan that will *achieve the same benefits as the City of Salisbury's design*."⁴⁸ However, the structure of the text ties *the City of Salisbury's design* only to the access road—"improved access to the pump station with the road consistent with the City of Salisbury's design"—and not to "other feasible options for achieving the same benefits." Given the text of the Condition, the only possible referent for "same benefits" is the two items preceding it in the series—i.e., (1) the protective dike; and (2) improved access road consistent with the City of Salisbury's design. We conclude that, in this context, *same benefits* means achieving a level (not specifically defined in Condition 9) of flood protection for the City of

⁴³ The McGill and Willis Reports were reviewed by staff for the Final EIS but Environmental Measure 17 did not recommend implementation of either plan.

⁴⁴ The licensee at that time, Alcoa Generating, had agreed with the City that only relocation alternatives would be considered. Rehearing Request at 16-17.

⁴⁵ Rehearing Request at 20-25 (providing a list of common features and benefits that are common to all the designs).

⁴⁶ See e.g. *id.* at 31 and 42.

⁴⁷ *Id.* at 41.

⁴⁸ *Id.* at 26.

Salisbury's water supply facilities. To the extent that the March 12 Order applies a different legal standard from that discussed herein, it is set aside. As further discussed below, we conclude, and all parties agree, that the benefit sought to be achieved is continued operation during a 100-year flood event.

26. Additionally, Condition 9 does not specify what is meant by *the City of Salisbury's design*. The City argues that the phrase refers to the 2011 Black & Veatch Report that recommends relocation of the pump house. The City argues that at the time North Carolina issued the water quality certification in 2015, North Carolina understood the 2011 Black & Veatch report to be the City's preferred design.⁴⁹ However, the water quality certification itself does not support this conclusion. The state could have required adoption of the recommendations in the Black & Veatch report or of any of the other extant plans yet did not do so. Given these facts, the condition's acceptance of other feasible alternatives leaves us substantial flexibility. At the same time, in attempting to give meaning to Condition 9, we find it is appropriate to note that all of the designs in the record at the time that Condition 9 was issued (i.e., the McGill Report, the Willis Report, and the 2011 Black & Veatch Report) called for raising the access road such that improved access to the pump station is provided during a 100-year flood. Therefore, we find that the language of Condition 9 supports requiring a plan providing improved access to the pump station via the road during a 100-year flood.

27. With regard to the access, the Plan proposes to rely on remote access or by providing an amphibious vehicle for access to the pump station during minor flood events.⁵⁰ Cube Yadkin relies on its proposal to upgrade the SCADA system and provide redundancy to avoid the need to access the pump station during a flood.⁵¹ The March 12 Order found that provision of an amphibious vehicle in combination with improvements to the SCADA system would provide improved access consistent with Condition 9. In its rehearing request, the City argues that because the Plan does not provide for dry access to the pump station via the road during a 100-year flood, it therefore does not meet the requirements of Condition 9.⁵² The City states that a fully operational SCADA system is already installed and in use at the pump station, which the City already uses to remotely

⁴⁹ In its Rehearing Request, the City notes that Black & Veatch met with representatives of North Carolina Department of Environment and Natural Resources (now North Carolina Department of Environmental Quality) to present the report and obtain input. *See* Rehearing Request at 18-19.

⁵⁰ Cube Yadkin September 18, 2018 Plan at 13.

⁵¹ *Id.* at 13-16.

⁵² *See e.g.* Rehearing Request at 30.

operate the pump station during floods.⁵³ Further, the City presents additional evidence that even with the use of the SCADA system, it still needs to access the pump station during floods in order to assure that the station remains operational.⁵⁴

28. We are persuaded by the City's arguments on rehearing that the current use of a SCADA system and the dangers faced by operators who currently access the pump station from a boat necessitate an improved access road.⁵⁵ The City argues that the Plan does not "eliminate the need for direct operator observation during extreme conditions like floods and does not protect against predictable situations that will require Salisbury personnel to travel to and enter the pump station (often with heavy tools, parts, and equipment) to keep the pump station in operation."⁵⁶ While much of Condition 9 is less than pellucid, North Carolina did specify improved road access in Condition 9, and providing an amphibious vehicle that will allow access only in limited circumstances does not appear to meet this requirement. Therefore, this order sets aside the March 12

⁵³ See *e.g. id.*, Attachment 1, at 14-16.

⁵⁴ The City discusses in some detail its experience with a flood which occurred in February 2020, during which it "utilized its current robust redundancy and SCADA systems for remote operation . . . but was still forced to access the station three times by boat to maintain reliable station operations." Rehearing Request, Attachment 1, at 16. Access is needed to "assess[] station damage from floating debris that impacted the station or to warn off vandals or to address roof leakage that could damage operating electrical equipment or to reset a tripped breaker or to repair a failed control device or to simply start/stop pumps when the communication link between the treatment plant and station is lost or interrupted momentarily." *Id.* The City states that these problems are common during severe weather and cannot be controlled or affected by SCADA. *Id.*

⁵⁵ The access road to the pump station is at elevation 628.3 feet, and thus is flooded intermittently. Final EIS at 42. However, the pump station is at elevation 630 and is designed so that flood water can surround the lower part of the station but not impact the pumps and electronic components, which are at elevation 643 feet. *Id.* Therefore, when the road is flooded, the pump station operators access the pump station by boat.

⁵⁶ Rehearing Request at 40. Further, the City notes that "The proposed 8-wheeled [amphibious] vehicle rated load capacity on water is 900 pounds, including personnel, fuel, and any equipment, tools, or materials. The capacity is not adequate. Based on the vehicle's rated speed of four feet per second, if flood waters exceed a velocity of four feet per second, the vehicle and personnel would be swept away. . . . During even minor flooding, the required travel distance along a flooded road would be about 2,400 feet or just short of a half mile to access the pump station." City of Salisbury October 29, 2018 Filing, Enclosure 1, at 5-6.

Order's approval of that part of the Plan and requires Cube Yadkin to modify the plan as discussed.

29. As to City's argument that the licensee should be required to construct a new pump station, Cube Yadkin's Plan would raise critical equipment in the existing pump house to make it functional during a 100-year flood. The City claims that because one version of the proposed modifications would allow for the pump house floor to flood, it does not provide the "same benefits" as any of the other designs in the record, including the protective dike. Some of the benefits that the City identifies include the fact that a "[d]ry pump station is easier to work within than a wet and flooded station," "[w]orking in dry space is safer than working in water or submerged spaces," and a "[d]ry station means interior faces or doors, roll-up door, louvers, dampers and other wall devices stay dry and results in less corrosion and better performance." Nonetheless, Cube Yadkin's Plan is designed to ensure that the station can operate during flood events and the City does not claim that the pump station would not be able to function during a 100-year flood under the proposed Plan. For example, Cube's Plan would elevate the pumps and all electrical equipment to a location above 652.3 feet, except for those controls that require submergence which would be rated for submersible conditions. The Plan also includes installation of new switchgear and electrical panels and specifies that HVAC, lighting and other items will be modified to be fully functional during floods. Finally, Cube Yadkin proposes to work with the City to construct a workable design to place necessary equipment above flood waters and to ensure a safe working environment. Accordingly, we continue to find that the Plan's modifications to the pump station are a feasible alternative to other proposals and meet the requirements of Condition 9, as indicated in staff's March 12 Order.

30. Finally, the City argues that the March 12 Order's favorable discussion of the environmental impacts of Cube's Plan was arbitrary.⁵⁷ Because we find that the Plan does not provide improved road access consistent with Condition 9, Cube Yadkin is required to file a revised Plan, including addressing environmental impacts of the Plan. It would be premature to consider the environmental impacts of Cube Yadkin's conceptual plans at this stage, when we do not have before us fully fleshed-out plans that are susceptible to analysis. The Commission staff will perform any necessary analysis when it is presented with the revised plans.

⁵⁷ Rehearing Request at 7 and 37; *see also* March 12 Order, 170 FERC ¶ 62,143 at P 31 (noting that "the licensee's alternative would not disturb new areas and avoids in-water, wetland, and forest disturbance. The licensee's proposed alternative would also avoid erosion impacts that result with new construction activity in undeveloped areas.").

B. Siting and Design Standards

31. The City alleges that the Plan violates North Carolina siting, design, and water quality standards for water supply facilities and therefore should not be approved.⁵⁸

32. As an initial matter, while we encourage our licensees to comply with local requirements, where feasible, the Commission is under no obligation to require compliance with state regulations. In any case, we note that the City's arguments are premature at the conceptual design phase. The Plan contemplates the City's involvement in project design and construction at which time design issues can be addressed.

C. Sound and Prudent Engineering

33. The City argues that the Plan should be rejected because it "is not based on sound and prudent engineering, as required by 18 CFR 12.5."⁵⁹

34. We disagree. Commission regulations state that, "[a] licensee or applicant must use sound and prudent engineering practices in any action relating to the design, construction, operation, maintenance, use, repair, or modification of a water power project or project works."⁶⁰ Here, the City's water supply facilities are neither a water power project nor a project work.⁶¹ Therefore, Rule 12.5 does not apply.

35. The City also points to cost as an indicator that the Plan is inadequate: the Commission estimated the cost of a flood protection plan to be \$11,410,000 (in 2007 dollars) and Cube's Plan is estimated to cost \$2,825,000 (in 2018 dollars).⁶² The City fails to explain the relevance of cost to either sound and prudent engineering or compliance with Condition 9. Accordingly, we find that the lesser cost of the proposed Plan does not require rejection of the Plan.

D. Conclusion

36. We continue to find that the Plan's modifications to the pump station meet the minimum threshold required by Condition 9 of North Carolina's water quality certification. However, we conclude that the Plan should be revised to better address safe

⁵⁸ Rehearing Request at 10-12; *see also id.*, Attachment 1, at 4-7.

⁵⁹ *Id.* at 31.

⁶⁰ 18 C.F.R. § 12.5 (2020).

⁶¹ *See supra* P 19, note 36.

⁶² Rehearing Request at 31-33.

road access to the pump station. Cube Yadkin is required to revise its Plan in accordance with the discussion above and file a revised Sedimentation and Flood Plan, for Commission approval, within **90 days** of issuance of this order. Cube Yadkin must continue to consult with the City and North Carolina DEQ and the revised plan should include documentation of such consultation. If the licensee does not adopt a recommendation, the filing must include the licensee's reasons, based on project-specific information. Finally, because we are requiring Cube Yadkin to file a revised plan for Commission approval, we decline to impose deadlines for Cube Yadkin to obtain all necessary permits or for completion of construction, as requested by the City.

37. The Commission notes that implementation of any Sedimentation and Flood Plan requires the City's agreement. Because the pump station and access road are outside of the project boundary, the Commission cannot grant access to the City's water supply facilities. Should additional advice from our staff or the services of our Dispute Resolution Service prove useful to the parties in resolving remaining issues, those resources are available to them.

The Commission orders:

(A) In response to the City of Salisbury's request for rehearing, the March 12 Order is hereby modified and set aside, in part, as discussed in the body of this order.

(B) Cube Yadkin must file a revised Sedimentation and Flood Protection Plan, for Commission approval, within 90 days of issuance of this order, with the approved modifications to the pump station and revisions to better address safe road access, consistent with this order. Cube Yadkin must continue to consult with the City and North Carolina DEQ and the revised plan should include documentation of such consultation. If the licensee does not adopt a recommendation, the filing must include the licensee's reasons, based on project-specific information.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.