

130 FERC ¶ 61,115
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Virginia Electric and Power Company

Project No. 2009-128

ORDER MODIFYING AND APPROVING
NON-PROJECT USE OF PROJECT LANDS AND WATERS

(Issued February 18, 2010)

1. On November 28, 2008, Virginia Electric and Power Company (Virginia Electric), licensee for the Roanoke Rapids and Gaston Hydroelectric Project No. 2009, filed an application for non-project use of project lands and waters. The licensee requests Commission authorization to permit East Oaks, LLC (East Oaks) to construct a boat forklift pad with three attached docking piers on East Oaks' existing commercial marina on Lake Gaston, one of the project's reservoirs. As discussed below, we are granting the application with certain modifications and conditions.

Background

2. The 324-megawatt Roanoke Rapids and Gaston Hydroelectric Project¹ is located on the Roanoke River in Brunswick and Mecklenburg Counties, Virginia, and Halifax, Warren, and Northampton Counties, North Carolina.

3. The project boundary around Lake Gaston includes a strip of licensee-owned land varying in width from 10 to more than 200 feet from the shoreline. Private individuals and corporations own most of the land adjacent to this strip of land. The strip of project land between the lake shoreline and the project boundary at the site of the proposed facilities is approximately ten to thirty feet in width.

¹ The Commission issued Virginia Electric a new license for the project in 2004. See *Virginia Electric and Power Co.*, 106 FERC ¶ 62,245 (2004). The original license was issued on January 24, 1951. See *Virginia Electric and Power Co.*, 10 FPC 1 (1951).

4. On the southern shoreline of Lake Gaston is a cove where two marinas are located: East Oaks' commercial marina on the western side of the cove and Morningstar Properties LLC's (Morningstar) commercial marina on the eastern side.² The width of the cove gradually narrows moving north to south away from the mouth. At the mouth of the cove, the distance between the eastern and western shorelines is 301 feet. At the northern end of East Oaks' wet slips several feet south from the mouth of the cove, the distance between the shorelines is 220 feet. At the narrowest point of the cove, farthest away from the mouth, the distance is 110 feet.

5. The Morningstar Marina is equipped with a boat launch ramp, a boat forklift pad that serves a dry-dock facility with 340 dry rack spaces,³ a fueling dock, a restaurant and store, and a picnic area. The marina also includes 10-12 public wet slips at the far north end of the cove and opening onto the lake, 4 slips at the fuel dock, and another 6-8 slips just south of the fuel dock and near the boat launch ramp.

6. The East Oaks Marina currently consists of a dry-dock facility that stores approximately 200 boats, a public pump station, an office building, a dock manager's residence, and 26 wet slips. Boats at the East Oaks Marina, however, do not have direct launching access to the lake. Currently, boats stored at East Oaks Marina are launched by being taken by trailer to Salmon's Landing on Big Stonehouse Creek, a public boat ramp facility about 1.5 miles away.

East Oaks' Proposal

7. In order to provide direct access to Lake Gaston from East Oaks' dry-dock facility, East Oaks proposes to construct a new boat forklift pad along a 60-foot section of shoreline at the mouth of the cove, at the northern tip of the East Oaks Marina, just north of the marina's 26 wet slips.

8. The forklift pad will measure approximately 55 by 72 feet, with three 26-foot-long, 4-foot-wide piers. About two thirds of the pad's area will be on land along the shore, and the rest will be built in the water. Once the construction of the proposed facilities is completed, at the narrowest point there will be 119 feet of open water

² The real property on which the two marinas are located was once one marina, Eaton Ferry Marina, which was subdivided in 2007.

³ Dry-dock marinas stack boats on indoor racks, and launch and stow them with specially designed forklifts. A concrete pad near the edge of the water allows the forklift to transport boats from dry storage and lower them into the lake, and retrieve them from the water and return them to dry storage after use.

between the end of the docking slip on the forklift pad and the end of the fueling dock at Morningstar Marina.⁴

9. To construct the boat forklift, East Oaks proposes to undertake the following activities on project lands: (1) remove four trees ranging from 9 inches to 14 inches in diameter where the forklift pad will be located and plant six pine trees adjacent to the marina; (2) remove existing rip rap along the shoreline; (3) build two retaining walls to stabilize shoreline slopes; (4) install a metal bulkhead along the perimeter of the boat forklift pad; and (5) fill the 3,942-square-foot forklift pad with compacted earthen fill and pave it with concrete.

10. Moreover, to promote boater safety, East Oaks proposes to install permanent boating signage and to supply boater safety literature. Also, East Oaks proposes to provide a facility to the Lake Gaston Water Safety Council for the Council to conduct a boater safety education course.

11. Article 426 of Virginia Electric's license identifies the non-project uses of project lands and waters and leases of project lands that the licensee may authorize without prior Commission approval.⁵ East Oaks' proposal, because it involves a commercial marina with more than 10 boat slips, requires prior Commission approval.

12. The Commission issued public notice of Virginia Electric's application on January 6, 2009, thereafter published in the *Federal Register* on January 12, 2009 (74 Fed. Reg. 1204). The notice established February 6, 2009 as the deadline for submitting comments and motions to intervene.

13. Morningstar filed a timely motion to intervene and comments in opposition to East Oaks' proposal. In addition, the Commission received numerous comments, some in opposition, others in support.⁶ Those opposing East Oaks' proposal are concerned that the additional boats in the cove resulting from the boat forklift will cause congestion and unsafe conditions. Supporters of the proposal argue that another marina with direct access to the water is needed in the area and that opponents' safety concerns are not supported by the evidence and instead are merely a pretext to retain Morningstar's market power.

⁴ See East Oaks' Application, Appendix C, Sheet 3 of 5.

⁵ *Virginia Electric and Power Co.*, 106 FERC ¶ 62,245 at 64,515-16.

⁶ See Environmental Assessment, Sept. 29, 2009, at 6-8 for a detailed description of the commenters. The U.S. Department of the Interior responded that it has no comments on the application.

14. In addition, Morningstar argues that the proposal does not meet the American Society of Civil Engineers' (ASCE) guidelines for the amount of area needed for the proposed facility and that the project's Shoreline Management Plan (SMP)⁷ does not adequately promote responsible development and foster safe boating waters. East Oaks responds that the ASCE guidelines are not industry standard.

15. On April 9, 2009, Commission staff conducted a site visit of the area, and on September 29, 2009, staff issued for public comment an Environmental Assessment (EA) of the proposed action. The deadline for filing comments was October 29, 2009. The EA recommended approval of East Oaks' proposal with some minor additional staff-recommended requirements relating to filings, deadlines, and cultural resources.

16. The United Keetoowah Band of Cherokee Indians in Oklahoma (Keetoowah Band) filed comments on the EA, asking that, if any tribal remains, artifacts, or other items are inadvertently discovered, construction cease and they be contacted. North Carolina Department of Administration submitted comments from North Carolina Department of Environment and Natural Resources (North Carolina Natural Resources) and North Carolina Department of Crime Control and Public Safety (North Carolina Public Safety). North Carolina Natural Resources identified two permits that East Oaks may be required to obtain prior to project construction. North Carolina Public Safety stated that land-disturbing activity is likely to impact a Special Flood Hazard Area, and that a Floodplain Development Permit and either a no-rise certification or a Conditional Letter of Map Revision may be required prior to construction.

Discussion

17. We have reviewed the application pursuant to the Federal Power Act's comprehensive development/public interest standard, as informed by the project's SMP,⁸ public and agency comments on the proposed non-project use, and the EA. As discussed below, the record indicates that, with certain modifications to the proposal, constructing and operating the proposed facilities, with the conditions set forth in this order, would

⁷ See *Shoreline Management Plan for the Roanoke Rapids and Gaston Hydropower Project FERC Project Number 2009* (SMP), March 2005; *Virginia Electric and Power Co.*, 115 FERC ¶ 62,111 (2006) (order approving and modifying the SMP).

⁸ The primary goals of the SMP, which the Commission approved on May 1, 2006, are to: manage the shorelines to make them safe for the public; protect and enhance the natural resources of the lakes and shorelines; provide public recreational access; and maintain water quality while allowing controlled use of Virginia Electric shoreline by nearby property owners. See SMP, *supra* note 7, at 4-2; *Virginia Electric and Power Co.*, 115 FERC ¶ 62,111 (2006) (order approving and modifying the SMP).

only have a minor environmental impact and would not interfere with licensed project purposes, including public safety and recreation.

A. Environmental Impacts

18. Virginia Electric states that it has reviewed East Oaks' proposal and determined that the proposal meets all the requirements of the SMP and the Construction and Use Procedures (Construction Requirements) that it has developed for issuing construction permits.⁹ Under the SMP, the area where the proposed facilities would be located is classified as a General Development Area, as are about 60 percent (or 276.7 miles) of the lands along the Lake Gaston shoreline.¹⁰ On project lands within a General Development Area, "the reasonable construction of certain structures, or the performance of certain activities, is compatible with or will have little or no detrimental impact upon the current environmental conditions and habitat."¹¹

19. As explained in the EA, construction of the forklift pad and associated structures would not result in any long-term adverse impacts to fish and wildlife resources and water quality.¹² In addition, even though construction of the concrete pad is not likely to affect any archaeological resources, we are requiring that Virginia Electric include in any permit it issues to East Oaks a provision that, if any archeological (including tribal) materials are discovered during construction, East Oaks must immediately cease all work at the site and contact Virginia Electric.¹³

B. Public Safety

20. Morningstar and the other commenters who oppose the application argue that the proposed facilities would create hazardous boating conditions in the cove because they would result in more boats being put in the water in what commenters allege is an already heavily congested and narrow area. Morningstar asserts that on weekends boats "stack up" and circle in the water waiting for their chance to access the fuel dock, the slips for

⁹ The Construction Requirements are contained in Appendix C to the SMP, *supra* note 7.

¹⁰ *See* SMP, *supra* note 7, at 5-1.

¹¹ *See* Construction Requirements at 10. The SMP does not define "certain structures" or "certain activities."

¹² *See* EA at 13-14.

¹³ The licensee would then consult with the North Carolina Historic Preservation Officer and, where appropriate, the Keetoowah Band, to determine appropriate action.

the restaurant, or the boat launch ramp or forklift pad. According to Morningstar, these current access points already “swamp this small cove.”¹⁴

21. Morningstar further argues that, even if there would be no significant increase in boat traffic in the cove, to create a new ingress/egress point opposite an existing one in a narrow space is dangerous and shows little or no understanding of how boat traffic works. Morningstar submitted a boat traffic study to support its contentions (Morningstar Study).¹⁵

22. In response, East Oaks contends that the cove can safely handle the relatively small increase in boat traffic that would result from its proposed forklift pad. It states that the pad will be located 119 feet across the cove from the existing fuel dock and that it expects to launch only 20 to 30 boats daily, an approximate 10 percent increase over existing conditions.¹⁶ Moreover, it states that the forklift pad will extend no more than one fourth of the way into the cove, as required by Virginia Electric’s Construction Requirements.¹⁷ East Oaks submitted a navigation study in support of its position (East Oaks Study).¹⁸

23. We have reviewed the information in the record, including the studies provided by Morningstar and East Oaks, and conclude that construction of the East Oaks’ forklift pad and associated structures should not result in hazardous boating conditions in the cove.

24. Virginia Electric’s Construction Requirements establish minimum requirements that must be met in order to apply for a construction permit. These include rules relating to the size of the proposed structure and its distance from other structures and adjacent

¹⁴ See Morningstar’s January 21, 2009 filing at 2.

¹⁵ See ARCADIS “Report of Boat Traffic Study, Eaton Ferry Marina,” attached to Morningstar’s February 6, 2009 filing.

¹⁶ The Morningstar and East Oaks Studies each estimate in the range of 300 vessels (e.g., boats, jet skis) use the cove on a typical weekend day. See Morningstar Study at 6; East Oaks Study, *infra* note 18, at 4.

¹⁷ The Construction Requirements provide that “structures shall not extend further into the water than necessary for ingress/egress of motorized crafts, up to a maximum of ¼ the width of a cove or creek.” Construction Requirements at 4.

¹⁸ See Waterway Surveys and Engineering, Ltd. “Navigation Investigation, East Oaks Marina,” attached to March 16, 2009 filing by Kerr Environmental Services Corp. on behalf of East Oaks. The study assumed that East Oaks could launch up to 50 boats per day. East Oaks states, however, that it plans to launch to 20 to 30 a day.

landowners' property. In addition, an applicant must obtain all necessary approvals from the U.S. Army Corps of Engineers, local county officials and/or property owner associations, and other agencies that require permits particular to the location or situation.¹⁹ Moreover, for commercial docks and marinas, Virginia Electric reviews applications on a case-by-case basis.²⁰

25. Virginia Electric reviewed the East Oaks proposal, determined that it complies with the project's Construction Requirements, and approved the construction. We concur.

26. The cove's width from shore to shore at the location of the proposed boat forklift pad is about 240 feet. Currently, there is about 170 feet of open water from the East Oaks side of the cove to the end of the Morningstar fuel dock on the opposite shore. As noted, after construction of the proposed facility, there will be 119 feet of water between the end of the proposed forklift pad and the fueling dock on the opposite shore.²¹ Morningstar currently launches about seventy boats per day during the weekends.²² East Oaks estimates that the proposed facility will launch about twenty to thirty boats per day.²³ The majority of the 300 or so vessels using the cove (for fueling, launching, sightseeing, etc.) are relatively small (i.e., less than 22 feet long).²⁴

27. The 119 feet of open water between the end of the proposed forklift pad and the fueling dock on the opposite shore would provide ample room for boats and jet skis to maneuver. While certain times of the day may be more congested than others, neither Morningstar's nor East Oaks' Study concludes that present conditions have made the

¹⁹ See Construction Requirements at 1, 3.

²⁰ See *id.* at 5.

²¹ See EA at 15.

²² See Morningstar's Study at 6; Kerr Environmental Services Corp.'s Response on March 16, 2009 at 3 (relying on Morningstar's estimate).

²³ In addition, East Oaks proposes to place a dry rack on non-project lands near the forklift pad, to be used as a temporary staging area for boats in the event they need to be removed from the water quickly.

²⁴ See Morningstar's Study at 10; East Oaks' Study at 3-4.

cove unsafe or hazardous.²⁵ The mouth of the cove should be able to safely accommodate the small projected increase in traffic of up to ten percent that would result from the East Oaks forklift pad.²⁶ If congestion at certain times of the day reaches a point of inconvenience for boaters, they are able to adjust the timing of their entry or egress from the cove and their use of the cove's facilities.

28. As for Morningstar's contention that creating a new ingress/egress point opposite an existing one in a narrow space is dangerous, the new forklift pad is opposite a fuel dock and not Morningstar's forklift pad. In fact, Morningstar's pad is about 150 feet farther into, and in a much narrower part of, the cove.²⁷ Moreover, the cove is a designated no-wake zone, so boats in the cove must operate at slow speed. Thus, while there is boating activity in the area of the fuel dock, the 119 feet of water between the facilities and the no-wake zone requirement should be sufficient to allow boats to safely maneuver into and out of the boating lanes from East Oaks' forklift pad as well as from Morningstar's fuel dock.²⁸

²⁵ In the last ten years only two Safety Incident Reports have been filed with the Commission that involved serious motorized boats accidents near the cove, one in 2001 and the other in 2005. *See* Safety Incident Report No. 01-02, filed on Aug. 1, 2001; and Safety Incident Report No. 2005-01, filed on Sept. 8, 2005.

²⁶ As the Morningstar Study notes, any increase would be over levels from 2007 to present. Prior to 2007, Morningstar and East Oaks operated as one marina using what is now Morningstar's forklift pad.

²⁷ The shortest distance from the end of Morningstar's forklift pad to the boat slips on the opposite shore is about 75 feet.

²⁸ We find Morningstar's argument that the proposed facility does not meet the guidelines published by the ASCE for small craft harbors, "Planning and Design Guidelines for Small Craft Harbors," to be without merit. Morningstar states, for example, that the guidelines recommend 1 acre of surface water for every 15 to 25 boats to give the boats room to safely navigate. According to Morningstar, the area in question is 0.74 acres. *See* Morningstar's July 2, 2009 filing at 1-2. In approving Virginia Electric's SMP, the Commission did not require that marinas meet the ASCE guidelines, and Morningstar has not made a case for doing otherwise. Instead, as explained in this order, Virginia Electric's Construction Requirements of the SMP establish minimum requirements (including obtaining any required local, state, or federal permits) that must be met in order to apply for a construction permit, and then Virginia Electric performs a case-by-case review of applications for commercial docks and marinas. Moreover, it may be that a state or local permitting entity considers these guidelines in deciding whether to issue a permit for marinas. We note in any event that, from the information

(continued...)

29. For the above reasons, we conclude that the proposed non-project use of project lands and waters would be consistent with project purposes and is approved.

The Commission orders:

(A) Virginia Electric and Power Company's application, filed on November 28, 2008, requesting Commission approval to authorize East Oaks to expand an existing public marina on Lake Gaston, as modified by Ordering Paragraphs (B), (C), (D), and (E) below, is approved.

(B) Within 45 days of the date of this order the licensee shall file location point data representative of the marina. The location point must be positionally accurate to comply, at a minimum, with National Map Accuracy Standards for maps at a 1:24,000 scale. The location point must include latitude/longitude in decimal degrees based on the horizontal reference datum of the North American Datum of 1983 (NAD 83).

(C) To ensure that any non-project uses and occupancies of project lands and waters it authorizes are not inconsistent with the purposes of the project, including public recreation and resource protection, the licensee shall include in any permit issued for these facilities a condition requiring: (1) the permittee's use and occupancy of project lands and waters shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; and (2) the permittee shall take all reasonable precautions so that the construction, operation, and maintenance of the permitted facilities will occur in a manner that protects the scenic, recreational, and other environmental values of the project.

(D) The licensee shall include a provision in the permit that if any historic properties, including archeological or historic remains are discovered during construction of the docks, East Oaks must immediately cease all work at the site and contact the

submitted by Morningstar, it appears that its own marina does not comply with the ASCE guidelines.

Morningstar also argues that the SMP's guidelines for waterfront development "are not detailed or stringent enough to adequately promote responsible development and foster safe boating waters." *Id.* at 1. The Commission approved and modified Virginia Electric's SMP on May 1, 2006. *See Virginia Electric and Power Co.*, 115 FERC ¶ 62,111 (2006). The opportunity to object to the adequacy of the SMP through a request for rehearing has long passed. *See* 16 U.S.C. § 8251(a) (2006) (establishing a 30-day deadline to file a request for rehearing); 18 C.F.R. § 385.713(b) (2009) (providing the procedures for rehearing).

licensee. The licensee will then consult with the North Carolina State Historic Preservation Officer and any tribes, including the United Keetoowah Band of Cherokee Indians in Oklahoma, that might attach religious or cultural significance to the discovered materials to determine what steps need to be taken to evaluate the discovery and, if found to be eligible for National Register of Historic Properties listing, to mitigate any adverse effects. The licensee should file with the Commission, for approval, a report on any discoveries determined to be eligible and adversely affected, along with proposed mitigation.

(E) The proposed facilities shall be constructed as approved in this order in a timely manner to ensure that they do not result in new or different impacts than anticipated, due to unauthorized changes to the facilities or changes in the surrounding environment over time. In order to keep the Commission apprised of the progress towards completing the proposed facilities and to ensure the facilities are built as approved, the licensee shall file within two years of the date of this order, documentation, including photographs, showing the type and location of the proposed facilities. The filing should also include verification that the licensee inspected the proposed facilities to ensure they have been constructed as approved in this order. If the facilities are partially completed or construction has not begun, the licensee shall include in its filing, for Commission approval, a schedule for completing construction of the proposed facilities and a description of the key factors considered in the development of the schedule.

(F) This order constitutes final agency action. Any party to this proceeding 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 (2006), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2009). 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.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.