

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Appalachian Power Company

Project No. 2210-207

ORDER MODIFYING AND APPROVING UPDATED
SHORELINE MANAGEMENT PLAN

(January 30, 2014)

1. On January 3, 2011, and supplemented on February 18, 2011, and February 28, 2013, Appalachian Power Company (licensee) filed a shoreline management plan (SMP) update for the Smith Mountain Pumped Storage Project (FERC No. 2210) pursuant to license article 413.¹ The project is located on the headwaters of the Roanoke River in Bedford, Campbell, Franklin, and Pittsylvania Counties, Virginia. For the reasons discussed below, the SMP update, as modified herein, is in the public interest because it allows the licensee to comprehensively manage the project shoreline in a manner that protects the environmental and public recreation resources. Accordingly, this order approves the SMP update, as modified below.

BACKGROUND

2. The 636-MW Smith Mountain Project is a combination pumped storage and conventional hydropower project that consists of two developments: Smith Mountain and Leesville. The Smith Mountain development is a pumped storage development containing a 20,260-acre impoundment (Smith Mountain Lake) and approximately 500 miles of shoreline.² Under normal operations, Smith Mountain Lake operates at elevation 795 National Geodetic Vertical Datum (NGVD), and can fluctuate up to two feet in elevation. The project boundary around the Smith Mountain development generally follows elevation 800 feet NGVD. The Leesville development is a conventional

¹ 129 FERC ¶ 62,201 at 64,600 (2009).

² The impoundment acreages reported in the licensee's proposal for Smith Mountain Lake and Leesville Lake are inconsistent with those contained in the license. Here, we have included the acreages contained in the license.

hydropower development containing a 3,260-acre impoundment (Leesville Lake) and approximately 100 miles of shoreline. Leesville Lake typically operates at 613 feet NGVD, and can fluctuate up to 13 feet in elevation. The project boundary around the Leesville development generally follows elevation 620 feet NGVD. In general, Smith Mountain Lake has greater residential and commercial development than Leesville Lake.

3. On September 2, 2003, the licensee filed an application for approval of a SMP, which the Commission approved, with modifications, in 2005 (original SMP).³ The original SMP provided guidelines, shoreline classifications, and regulations for shoreline development of the project's reservoirs.

4. The Commission issued a new license for the Smith Mountain Pumped Storage Project on December 15, 2009. Article 413 of the license required the licensee to continue implementation of the original SMP, as amended, and file an SMP update by July 5, 2010.⁴ Article 413 required the licensee to include in the SMP update: (1) setbacks or buffers between commercial/residential and resource protection areas; and (2) an amendment to the Habitat Management Plan that (a) addresses the replacement of habitat along the shoreline removed during shoreline construction activities and (b) provides mitigation measures for habitat lost due to shoreline vegetation removal.⁵

5. Article 413 required the licensee to update the SMP in consultation with the Virginia Department of Conservation and Recreation (Virginia Recreation); Virginia Department of Environmental Quality (Virginia Environment); Virginia Department of Game and Inland Fisheries (Virginia Fisheries); Virginia Department of Historic Resources (SHPO); Virginia Department of Health; Smith Mountain Lake Association (Lake Association); Leesville Lake Association; Association of Lake Area Communities; Smith Mountain Lake Chamber of Commerce; Tri-County Lake Administrative Committee (Administrative Committee); Bedford, Franklin, Campbell, and Pittsylvania Counties; Tri-County AEP Relicensing Committee (Relicensing Committee); Smith Mountain Lake State Park; Virginia Council on Indians; Archeological Society of Virginia; and Turner's Building, Inc. (Builders).

³ 112 FERC ¶ 61,026 (2005). One of the Commission's modifications was to prohibit certain in-water construction activities during certain times of the year. In April 2006 and February 2007, the Commission amended these restrictions. *See* 115 FERC ¶ 62,071 (2006); 118 FERC ¶ 62,149 (2007).

⁴ 129 FERC ¶ 62,201 at 64,600. On April 20, 2010, Commission staff granted the licensee's request for an extension of time to file its SMP update.

⁵ *See id.* at 64,600 and 64,597-98 (Article 406).

6. Beginning in October 2009, the licensee formed a Steering Committee to guide the process for updating the SMP through an open forum. The Steering Committee held eleven meetings during the formulation of the SMP update. In addition, the licensee and Steering Committee held eight separate meetings with various stakeholders (i.e., dock builders, realtors, etc.) who would be affected by the SMP update. Further, to provide the public with information about the SMP update, the licensee created a website and held two public meetings. On November 1, 2010, the licensee distributed the draft SMP update to the Steering Committee and other entities required to be consulted by license article 413.

7. On January 3, 2011, the licensee filed the SMP update with the Commission. On March 17, 2011, the Commission issued public notice accepting the SMP update application and established April 15, 2011, as the deadline to file motions to intervene and comments.⁶ In response to the public notice, the Relicensing Committee and Mr. Bill Brush filed motions to intervene in opposition to the SMP update,⁷ and approximately 81 entities and individuals filed comments.⁸ The U.S. Department of the Interior indicated that it had no comments on the SMP update. Five individuals filed comments that are either neutral or unrelated to the SMP. Three individuals filed comments that generally support the SMP update, including comments that more shoreline vegetation should be

⁶ 76 Fed. Reg. 18,745 (April 5, 2011).

⁷ Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's rules and regulations. 18 C.F.R. § 385.214 (2013)

⁸ Comments were filed by Mark Moorman, Phillip Pool, David Motley, Preston Michael, Deanna Karafiath, Michael Pagans, Luther and Judy Mauney, William Reidenbach, Orban Gregory, Steven Johnston, Don Atkins, Tenisha Gilmore, Smith Mountain Marine Business Association, Loretta and Charles Manning, Russell Seneff, Bruce Dungan, John Barr, Robert Gilmore, Joseph Swistak, Doug Domenech, Angelique Case, Margaret Nolan, Stephaen Barry, Donald Nolen, Neil Bayley, Roger Winters, Catherine and Jerry Dalton, Greg Kuhrtz, Julia Moore, Thomas Schnabel, George Lacombe, Ronald Smith, Matthew Thompson, Automatic Boat Covers, Warren Standley, Jeff Thompson, Rita and Nick Michaelides, Herbert Miller, Peter Reinhardt, John and Bettie Mack, Reese Booth, Michael Gooden, Ribert Milligan, Marie Walker, William Wallace, Robert Matthewson, Pam Sinex, Gordon Bratz, Larry Iceman, Eleanor, Richard Donnelly, Sandra Horne, Mike Forte, Gerald and Ferne Hale, Lawrence Cox, James LaBarre, James Mills, Carmen Perri, LG Jeffcoat, Gerardo Caprario, James Moore, Michael Lobue, Sherrie Beard, Sue Gordon, Michael Kacmarcik, Leesville Lake Association, Annette Thornhill, Wayne Mize, Robert Carlberg, Ivo Fioriti, Eddie Bruce, Stanley Smith, Dollie Kinkead, and Phyllis Johnson.

planted as mitigation, and that those opposed to the SMP update are only opposed because they have violated the SMP rules and would face greater consequences under the SMP update. The Relicensing Committee, Administrative Committee, and West Piedmont Planning District Commission, (hereinafter, Counties); Lake Association; Virginia DNR; Builders; Leesville Association; and 24 individuals filed comments that either oppose the SMP update or propose changes to the SMP update. An additional 43 individuals filed form letters that generally supported the Counties' comments.

8. On May 13, 2011, the licensee filed a response to the comments in opposition to the SMP update.

9. On June 6, 2011, the Counties and Mr. Brush requested that the Commission convene a technical conference concerning the SMP update, as well as issues related to the licensee's approved Debris Management Plan. Subsequently, numerous individuals also filed requests for a technical conference.

10. On December 7, 2011, the licensee and Counties, jointly, filed a request for the Commission to delay action on the SMP update while the licensee pursued settlement negotiations. On December 9, 2011, the Commission issued a notice designating two non-decisional Commission staff members to assist the negotiating entities in arriving at a settlement of the issues.⁹ On January 31, May 30, August 28, and November 14, 2012, the licensee and Counties filed joint status updates on the progress of the settlement negotiations.

11. On February 28, 2013, the licensee filed a settlement agreement that revised the licensee's proposed SMP update and resolved the Counties' and Mr. Brush's issues with the SMP update.

12. Following the settlement agreement filing, the Counties and Mr. Brush, separately, filed statements withdrawing their comments in opposition to the SMP update, and supporting Commission approval of the SMP update without material modification.

13. On March 7, 2013, the Commission issued a notice of the filing of the revised SMP update, establishing April 8, 2013, as the deadline to file comments and motions to intervene regarding the proposed revisions to the SMP update.¹⁰ Two timely motions to intervene were filed by the Smith Mountain Marine Business Association (Marine

⁹ 76 Fed. Reg. 78,631 (December 19, 2011).

¹⁰ 78 Fed. Reg. 16,489 (March 15, 2013). Although the nature of the proposed revisions to the SMP update did not require providing an additional opportunity to intervene in the SMP update proceeding, the notice nevertheless did so.

Association), and jointly by Automatic Boat Covers of VA & NC, LLC and Innovative Marine Technologies (collectively, Automatic Covers).¹¹ On April 16, 2013, the licensee filed an answer in opposition to Marine Association's and Automatic Covers' motions to intervene. On October 29, 2013, the Commission issued a notice granting Marine Association's and Automatic Covers' motions to intervene.¹²

14. In addition, Steve Hladik and Robert Adams filed comments in support of the revised SMP update; Deborah Greene, Erik Plyler, and Dave Gresham filed comments unrelated to the changes proposed in the revised SMP update (i.e., dredging and vegetation removal requirements); and Lynn and Linda Barnes and Warren Theis filed comments in support of both the Marine Association and settlement agreement. On May 8, 2013, the licensee filed a response to these comments.

15. In response to both of the Commission's notices issued on March 17, 2011, and March 7, 2013, numerous agencies and individuals filed comments in opposition to certain aspects of the proposed SMP update that were not addressed by the settlement agreement. Those comments will be addressed below.

LICENSEE'S PROPOSAL

16. License article 413 of the Smith Mountain Pumped Storage Project License requires the licensee to prepare an SMP update that includes at a minimum:

- (a) specific provisions in the *Habitat Management Plan* ... including:
 - (i) replacement of habitat along the shoreline that is removed during shoreline construction activities (e.g., shallow-water habitat that is affected by the installation of riprap or docks), and (ii) mitigation for habitat lost due to the removal of overhanging vegetation along the shoreline; and
- (b) setbacks (or buffers) between commercial/residential and resource protection areas.¹³

17. In addition to addressing the above requirements of article 413, which are described below, the SMP update also includes the following substantive changes: (1) creating a new Island Protection classification, and combining the Impact

¹¹ Marine Association's and Automatic Covers' motions to intervene in opposition did not raise any issues with the changes to the SMP proposed in the revised SMP update.

¹² See Notice Granting Intervention filed on October 29, 2013, in P-2210-207.

¹³ 129 FERC ¶ 62,201 at 64,600.

Minimization Zone and Conservation/Environmental classifications into a new Resource Protection Area classification; (2) increasing the licensee's authority to approve variances and exceptions to the SMP; (3) establishing an appeal process for the licensee's shoreline decisions; (4) establishing guidelines for unpermitted structures, clarifying the licensee's intent and definitions regarding mitigation for unpermitted structures, and reducing the amount of vegetation required to be replaced when vegetation is removed inside the project boundary; and (5) adding minimum depth requirements for docks (commercial and residential). The major changes proposed in the revised SMP update will be discussed below.

18. The SMP update also proposes several minor changes, including: (1) modifying the SMP's definitions (*e.g.*, modifying the wetland definition to state that wetlands do not have to be field-delineated); (2) adding the concept of buildable areas for dock structures; (3) specifying prohibited activities (*e.g.*, large signs, swim platforms, septic tanks, habitable structures, fire pits, geothermal loops) and allowable activities (*e.g.*, trams, boat covers, covered fishing piers, solar panels) within the project boundary; (4) increasing the maximum enclosure size at commercial marinas; (5) allowing commercial marinas to make minor slip rearrangements; (6) removing the requirement for landowners to mitigate for riprap installation; (7) revising the SMP's dredging rules to more closely conform to the U.S. Army Corps of Engineers (Corps) nationwide permits; (8) requiring annual (or as needed) consultation with a Technical Advisory Committee, consisting of the Virginia Environment, Virginia Recreation, Virginia Fisheries, county planning staffs, an area surveyor, and an area dock builder;¹⁴ and (9) proposing to review and update the SMP in ten years following Commission approval, then every five years thereafter.

Habitat Management Plan Provisions Required By License Article 413

19. As stated above, license article 413 requires the SMP update to include provisions to replace habitat along the shoreline that is removed during shoreline construction activities and mitigate habitat lost due to the removal of shoreline vegetation. To meet these requirements, the SMP update proposes that: (1) when trees and woody material along the shoreline are removed during installation of docks, piers, ramps, riprap or other structures they must be collected, bundled, and sunk along the adjacent shoreline in water no greater than 20 feet deep so as to replace fish habitat (in lieu of natural habitat, manmade habitat may be used instead, subject to the licensee's approval); (2) when wetland and scrub/shrub habitat along shorelines classified as Resource Protection Area is disturbed, the lessee must develop a plan to protect these sensitive resources in

¹⁴ The annual consultation requirement would be in addition to any consultation the licensee must perform before filing its proposed 10-year SMP update.

consultation with the appropriate regulatory agencies and the Habitat Technical Review Committee;¹⁵ and (3) any removed shoreline vegetation must be replaced according to detailed standards in the SMP.

20. Additionally, license article 413 requires the SMP update to include setbacks or buffers between commercial/residential and resources protection areas. To comply with this requirement, the licensee proposes to establish a 30-foot buffer around shoreline areas classified as Resource Protection Area.

Shoreline Classifications

21. The original SMP set forth six shoreline classifications: (1) High-Density Commercial; (2) High-Density Multi-Use; (3) Public Use; (4) Low-Density Use; (5) Impact Minimization Zone; and (6) Conservation/Environmental. As part of the settlement, the SMP update has two new classifications: Island Protection and Resource Protection Area (which combines the old Impact Minimization Zone and the Conservation/Environmental classifications). Thus, the SMP update includes six classifications: (1) High-Density Commercial; (2) High-Density Multi-Use; (3) Public Use; (4) Low-Density Use; (5) Island Protection; and (6) Resource Protection Area. The licensee states that the classifications remain inclusive from the top-down (an area classified as High-Density Commercial could be used for any other use, but not vice versa). Like the original SMP, the SMP update provides specific parameters defining each shoreline classification, including upland zoning classifications, existing shoreline facilities, boating density estimates, shape of the shoreline (i.e., presence of coves, open water, or islands), and presence of sensitive environmental areas. The classifications changed by the SMP update are described below.

22. The Island Protection classification includes all islands within the project boundary. The Resource Protection Area classification includes shoreline areas that have one or more of the following characteristics: (1) contains large woody debris; (2) located near known cultural sites; (3) located near the Smith Mountain Wildlife Management Area; (4) identified as scenic; (5) identified as habitat for the Roanoke logperch; (6) identified as stream beds; (7) contains wetlands or scrub-shrub habitat; (8) identified by the Virginia Natural Heritage Program as important natural communities; or (9) located near restriction zones such as boat barriers and dams. Development within Island

¹⁵ The Habitat Technical Review Committee consists of representatives from the licensee, Virginia Fisheries, Lake Association, Leesville Lake Association, Administrative Committee, and one at-large member with experience in habitat enhancement.

Protection and Resource Protection Area classifications would be limited, but possible, depending on resource agencies review and project resource mitigation.

23. The relative amount of shoreline in each proposed classification is shown below for each of the project's lakes:

Table 1. A summary of the relative amount of shoreline classified under each of the six proposed shoreline classifications for each project lake.

Shoreline Classification Area	Percent of Shoreline	
	Smith Mountain	Leesville
High-Density Commercial	4.2%	0.2%
High-Density Multi-Use	6.2%	18.4%
Public Use	5%	0.2%
Low-Density Use	73.2%	36%
Island Protection	1%	0.9%
Resource Protection Area	10.3%	44.3%

Variance, Exception, and Appeal Processes and Review of SMP Update

24. The original SMP stated that the licensee could grant four types of variances from the SMP (i.e., low density use variances, agency review variances, Impact Minimization Zone variances, and variances needing Commission approval), subject to varying levels of review and approval by natural resource agencies and the Commission. The SMP update proposes to modify the variance process in response to comments received from the Steering Committee members and settlement negotiations and in response to the SMP update's proposed changes to the shoreline classifications. The licensee would consider variances from the SMP on a case-by-case basis where an individual would otherwise be unable to install a dock or where shoreline is incorrectly classified, and any variances would be submitted to the Commission for approval.

25. A new process for "exceptions" to the SMP would apply for construction within the project boundary along shoreline classified as Resource Protection Area. Without an exception, uses and activities are prohibited along shoreline designated as Resource Protection Area. To obtain an exception for such uses along shoreline classified as Resource Protection Area, the applicant would have to contact the licensee to determine which sensitive resources are present, make an application for the use, and then submit an

application package to the licensee that identifies the mitigation effort that the applicant would undertake according to a pre-defined table (Table 3.4-1 of the SMP). The requirements are similar to those included in the original SMP but reflect the new shoreline classifications. If the shoreline was designated as Resource Protection Area for reasons other than the presence of wetlands or scrub shrub habitat, the licensee would then review the exception request, consult the appropriate resource agencies, and proceed without Commission approval. If the shoreline was classified as Resource Protection Area due to the presence of wetlands or scrub shrub habitat, the licensee would inspect the property to determine whether or not wetlands are present. Depending on the results of the licensee's inspection, the licensee would follow a specific process that would include consultation with the Habitat Technical Review Committee, a formal wetland delineation, and wetland mitigation (if necessary).

26. The original SMP did not include a process for an entity to appeal administrative decisions made by the licensee pursuant to the SMP. The SMP update adds a process whereby a property owner may appeal an administrative decision under the SMP to the licensee's Hydro Manager. If there is still a disagreement following the decision by the Hydro Manager, the property owner may contact the Commission.

27. The original SMP stated that the licensee would review the SMP every five years and update it as necessary. The SMP update proposes to extend this review process to review the SMP in ten years following Commission approval, then every five years thereafter.

Monitoring and Enforcement Procedures

28. The licensee states that it regularly monitors the project's shoreline for non-conformities to the SMP. If a structure is found to be dilapidated, not otherwise safely maintained, not constructed in accordance with its permit, or violating the conditions of the SMP, the licensee will notify the property owner and take any necessary lawful action to correct the violation. In the original SMP, such actions included cancellation of permits or removal of facilities. Although cancelling the permit remains an option for the licensee under the SMP update, the licensee now proposes an alternative option for shoreline uses not built according to a permit. In lieu of cancelling the permit, the SMP update proposes to allow the property owners to provide alternative improvements (i.e., installing vegetative plantings or fish habitat or using best management practices for stormwater management) to mitigate for structures or uses that do not conform to the SMP. Specific recommendations for revegetation are specified in the SMP update, and are intended to match the scale of the violation.

29. As a result of the settlement negotiations, the SMP update also establishes a procedure for documenting and administering permits for existing boat docks and piers. The SMP update specifies four categories of existing boat docks and the associated

permitting procedures: (1) “legacy docks,” constructed or permitted prior to implementation of the original SMP, would be issued a permit and would not be required to conform to the SMP; (2) docks constructed after implementation of the original SMP that do not have a permit must conform to the SMP in order to receive a permit; (3) docks constructed after implementation of the original SMP that have a valid permit must conform to the conditions of the permit; and (4) docks constructed at any time pursuant to the terms and conditions of a specific Commission order must conform to the conditions of that authorization.

30. If a non-conforming structure that has a permit from the licensee has been destroyed or damaged, it may be replaced provided that it satisfies certain conditions defined in the SMP (*e.g.*, the structure was safely maintained or the replacement is timely). If the licensee is concerned that a structure may be dangerous, it will work in consultation with the appropriate local authorities to repair or remove any dangerous structures. Maintenance to non-dangerous structures is encouraged as long as the maintenance does not change the overall layout of the non-conforming structure. Modifying the non-conforming structure’s layout would then require the structure to conform to the SMP.

DISCUSSION

31. Several comments focus on issues outside the scope of the SMP update, such as erosion, sedimentation, recreational improvements, and debris management. Any comments on these issues are more appropriately addressed through the existing provisions of the corresponding license articles and plans.¹⁶ Additionally, several comments refer to case-specific complaints regarding the licensee’s decisions under the original SMP, which are most appropriately addressed separately from this order. The SMP update establishes an appeals process for shoreline management decisions whereby a property owner can appeal a decision to the licensee’s Hydro Manager. This process should assist in the resolution of many of these issues.

¹⁶ The approved Erosion Monitoring Plan (article 402) and approved Sedimentation Monitoring Plan (article 403) require the licensee to complete erosion or sedimentation surveys and report on its findings in consultation with various resource agencies and technical review committees. License article 410 requires the licensee to file a Recreation Management Plan, which was filed June 28, 2010, and is currently pending before the Commission. License article 411 requires the licensee to implement a Debris Management Plan, which requires the licensee to file an annual report on activities under the plan.

Preliminary Matters

32. Prior to the settlement agreement, the Virginia DNR, Congressman Robert Hurt, and several individuals requested that the Commission extend the public comment period, hold a public meeting or technical conference regarding the SMP update. Due to the extensive history of public involvement and comment on the original SMP; the extent of public meetings, consultation, and comments included in the SMP update application; the numerous public comments submitted on the record for this proceeding; and the settlement agreement, the record of this proceeding is adequate.

33. The Lake Association and several individuals are concerned with the licensee's consultation efforts. Specifically, the commenters assert that, although the licensee consulted with the required entities, it did not adopt all of the comments and recommendations of the entities. The commenters also request clarification regarding how the Steering Committee and the Technical Advisory Committee¹⁷ will be consulted during the drafting of the next SMP update. The commenters recommend that the licensee's Technical Advisory Committee be expanded to assist the licensee in the implementation of the SMP.

34. In response, the licensee states that it made numerous changes to the original SMP at the request of various stakeholders, including changes incorporated in the SMP update.¹⁸ The licensee responds that although it is not required to consult a Technical Advisory Committee, it voluntarily proposed to do so on an annual and as-needed basis to work out technical issues.

35. Under license article 413, the licensee was required to consult with sixteen agencies and stakeholders for the SMP update, document that consultation, and describe either how the consulted entities' recommendations were accommodated or why they were not. The licensee is not required to include every recommendation made by these entities, but it is required to provide a reason why a recommendation is not adopted. The licensee considered the recommendations, implemented some but not all of the recommendations, and gave its reasons for not implementing specific recommendations.

¹⁷ The Technical Advisory Committee includes Virginia Environment, Virginia Fisheries, Virginia Recreation, county planning staffs, an area surveyor, and an area dock builder.

¹⁸ In its May 13, 2011 response to comments, the licensee provides a list of changes to the original SMP (*e.g.*, concerning classifications, setbacks, dredging restrictions, etc.) that it has proposed in the SMP update, including changes requested by the counties, Steering Committee, citizens and other stakeholders, as well as proposed changes as a result of the licensee's experience implementing the SMP.

The licensee's consultation efforts meet the requirements of article 413. Consulted entities' recommendations, and the licensee's responses, are discussed further, below.

36. The SMP update proposes that the consulted entities required by article 413 would be consulted again as part of the licensee's periodic review of the SMP. In addition, the SMP update proposes regular consultation with a Technical Advisory Committee in between SMP updates, which would benefit the licensee's implementation of the SMP. As the Commission has previously stated, the licensee is solely responsible for the administration of the SMP and is the sole entity that is subject to the Commission's jurisdiction.¹⁹

Balance Between Competing Interests

37. The SMP seeks to balance local economic interests with the protection of environmental and recreational resources. Many individuals assert that elements of the original SMP, as well as the SMP update, do not strike an appropriate balance among competing interests at the project. Some commentors allege that the SMP over-regulates and restricts shoreline development, resulting in property devaluation and tax base reductions. Specific restrictions cited to by commentors include: (1) the proposed 30-foot setback requirement for structures constructed adjacent to shoreline classified as Resource Protection Area; (2) the use of boating density estimates as a parameter used in classifying shoreline; (3) combining the Impact Minimization Zone and Resource Protection Area classifications from the original SMP into one classification in the SMP update; (4) incorrectly classifying lands as wetlands when they have not been officially delineated; and (5) not classifying all parts of all campgrounds as High-Density Commercial, thus limiting dock size and development possibilities.

38. The Builders and several individuals object to a number of regulations in the original SMP, as well as several proposed updates, that they believe to be over-regulation, too costly, overly burdensome on shoreline landowners, or intended to solve undocumented problems. Examples of such regulations include requirements in the SMP for: (1) adherence to boat ramp construction standards; (2) replacement of vegetation and limitations on vegetation clearing; (3) seasonal in-water construction prohibitions in Resource Protection Area zones; (4) restrictions on non-water-dependent activities (i.e., food service) within the project boundary; (5) limitations on woody debris removal and requirements for bundling woody debris for fish habitat; (6) minimum water depth requirements for docks; and (7) continuing the time-of-year restrictions on dredging. In general, the commentors seek to limit the licensee's efforts to protect the environmental

¹⁹ 112 FERC ¶ 61,026 at P 79.

resources at the project by demanding that the licensee demonstrate examples of environmental harm before prescribing a remedy or regulation.

39. The licensee responds that the Commission found the original SMP to contain reasonable restrictions on development, and was a reasonable compromise between protecting the project's scenic, recreational, and environmental values and providing opportunities for shoreline development. Further, the licensee states that the SMP update does nothing to upset that compromise.

40. The shoreline at the project, particularly around Smith Mountain Lake, is highly developed.²⁰ Like the original SMP, the SMP update is a reasonable compromise between protecting the project's environmental values and providing adequate opportunities for development at the lakes. For example, approximately 88.7 percent of shoreline at Smith Mountain Lake is available for shoreline uses within the project boundary within the confines of the SMP. Through the SMP, the licensee uses commonly-held ecological principles (i.e., the ecological importance of riparian vegetation, coarse woody debris, and nearshore sediment stability) and project specific information (i.e., the potential for flooding to release contaminants into project waters if food service facilities were allowed) as reasons supporting regulations in the SMP. We find no reason to further limit the licensee's ability to protect project resources, especially when development of the reservoir has in the past occurred at a high rate.

41. In addition to the above comments, the Marine Association and several individuals state that public access to project waters is limited by the time-of-year restrictions on dredging requested by the U.S. Fish and Wildlife Service and Virginia Fisheries during formation of the original SMP. The commenters have not provided any compelling reasons why the licensee's regulations would harm project operations or project purposes, or would unduly restrict public access to project waters, and as such, we find no reason to restrict the licensee's efforts to protect and enhance the environmental values of the project.

42. The licensee indicates that it added minimum depth requirements for residential and commercial docks as a result of its experience implementing the original SMP. The placement of boat docks in shallow water, and the resultant boating activity that would occur around such docks, would have the potential to adversely impact water quality and shallow water aquatic resources, and would increase the likelihood of such dock owners

²⁰ The licensee indicates that only 11.3 percent of the shoreline at Smith Mountain Lake is classified as Resource Protection Area or Island Protection, and development along these areas of shoreline would be limited, but possible, depending on the review of resource agencies and potential mitigation options.

wanting to dredge the area. In addition, the licensee utilizes up to a 2-foot drawdown in Smith Mountain Lake and a 13-foot drawdown in Leesville Lake to operate the project. Thus, we find the licensee's proposed minimum water depth requirements to be reasonable in this case.

Licensee's Authority to Administer the SMP

43. The Lake Association and several individuals question the licensee's authority and ability to administer the SMP and, as such, have made associated recommendations, including: (1) denying the SMP update and appointing a neutral third-party to govern the SMP update process; and (2) developing a process for appealing the licensee's decisions under the SMP. Several commenters do not like the proposed appeals process and the lack of dispute resolution.

44. As the Commission explained in the original SMP proceeding, it only has jurisdiction over the licensee and it is the licensee's and Commission's responsibility to ensure that the project is operated consistent with the public interest standards required under the Federal Power Act.²¹ Licensees have a responsibility to ensure that shoreline development activities that occur within project boundaries are consistent with project license requirements, purposes, and operations. Shoreline management plans can be a valuable tool to assist the licensee in meeting its license responsibilities throughout the license term.

45. In general, project reservoirs and associated shoreline are available for public use; however, licensees are allowed to grant permits authorizing non-project uses of project lands for construction of docks or other structures to landowners adjacent to the shoreline, so long as those uses do not infringe on project purposes.

46. Several individuals question whether having a dock in the project boundary is a right or a privilege. As the Commission explained under the original SMP proceeding, private access and docking facilities are privileges that the licensee has the discretion to approve or deny, subject to Commission review if necessary.²² If an individual's deed gives them that right, they could take it up in court.²³

²¹ 112 FERC ¶ 61,026 at P 79.

²² 112 FERC ¶ 61,026 at P 78. *See* Article 415 of the license, 129 FERC ¶ 62,201 at 64,601-02.

²³ At the Smith Mountain Project, it appears that several adjacent landowners own shoreline property with certain deeded rights that allow the landowner to access the reservoir for recreational purposes, and that such uses are to be made under a revocable

(continued)

47. In comparison with the original SMP, the SMP update states that, in lieu of cancelling permits and removing non-compliant structures or activities within the project boundary, the property owners may now be allowed to provide alternative improvements (i.e., mitigation) to lessen the impact of such offenses. The Lake Association and several individuals state that the licensee should not have the authority to impose penalties and mitigation, and that mitigation should not be used as punishment. These commenters seem to believe that upon finding an offense, the licensee should only require correction of that offense, and that additional mitigation would constitute an inappropriate punishment, penalty, or fine. We cannot find reason to restrict the licensee's options for offering alternatives to removing structures or cancelling permits, so long as those options conform to any applicable laws. Further, because the mitigation proposed in the SMP update includes actions that constitute environmental benefits (i.e., vegetative plantings, fish habitat, and best management practices for stormwater management) and address adverse resource impacts caused by the unauthorized use, the licensee's strategy will serve to protect and enhance the project's environmental values while saving the landowner from making potentially costly modifications to a non-conforming structure.

SMP's Conformance with Other Regulations and Standards

48. The Virginia DNR, Lake Association, Builders, and several individuals note instances in which the original SMP and certain elements of the SMP update do not conform to applicable federal (i.e., wetlands), state (i.e., vested rights and non-conforming uses, septic tanks, etc.), and local (i.e., erosion control, stormwater management, building codes, zoning and land use, etc.) regulations, standards, and norms. For the most part, these commenters believe that the SMP's regulations are more restrictive than is needed.

49. In response, the licensee contends that neither the Federal Power Act nor the project license requires the licensee to survey all state and local land use laws and either conform to those laws or show why such laws are inadequate. The licensee also states that state and local land use laws (i.e., county zoning regulations) are varied and contradictory. Finally, the licensee cites to a previous Commission finding that: "the Commission's obligation under the Federal Power Act is to ensure that the project is operated and maintained in such a way as to balance the public interest, which includes

license from the licensee. The licensee is required by standard article 5 to acquire and retain all rights necessary to carry out project purposes, and any questions concerning specific property rights would best be resolved in a court of appropriate jurisdiction. 112 FERC ¶ 61,026 at P 89.

protecting the fishery, water quality, and scenic values of the project. We cannot cede this responsibility to local entities.”²⁴

50. The licensee is correct in its assertion that it is not required to survey all land use laws and regulations to either conform or show their inadequacy; rather, the SMP update must meet the public interest standards set forth in the Federal Power Act. This order will, in any event, address comments concerning the SMP update’s departures from other laws and standards.

51. The Virginia DNR, Lake Association, and several individuals comment that the SMP does not comply with, and in fact is often more restrictive than, various state and local laws, codes, and regulations. Some examples of more restrictive regulations in the SMP update include: (1) prohibiting the rebuilding of septic systems in the project boundary; (2) requiring replacement of shoreline vegetation when removed for dock construction, or when constructing shoreline armoring, bulkheads, or riprap in Resource Protection Area zones; (3) dredging restrictions near wetlands; and (4) shoreline classification differences relative to local zoning regulations.

52. As we have already stated, we must review the SMP update in light of the public interest standard, which includes protecting the environmental values of the project, and we cannot cede this responsibility to other entities. As Commission staff observed in several instances on a past site visit, lands adjacent to and upland of the shoreline of Smith Mountain Lake had been cleared and installed silt fences were not functional, which demonstrates that local regulations may not always be sufficient to prevent environmental impacts at the project.²⁵ Thus, the licensee may implement stricter regulations than state or local laws if those regulations would protect project purposes.

53. In general, the four examples above represent requirements of the SMP that would protect and enhance the project’s environmental resources. Prohibiting septic tanks in the project boundary, and limiting bulkheads, riprap, and dredging in Resource Protection Area zones would help to protect these sensitive environmental resources, and we agree with the licensee that these actions should be prohibited unless extenuating circumstances exist. The Commission has recognized the many environmental benefits provided by shoreline vegetation and buffer strips, and there is no reason to restrict the licensee’s efforts to maintain and enhance such features.²⁶ Although, the licensee is encouraged to cooperate with local zoning authorities, SMP classifications are based upon different

²⁴ 112 FERC ¶ 61,026 at P 74.

²⁵ 112 FERC ¶ 61,026 at P 86.

²⁶ 112 FERC ¶ 61,026 at P 85.

criteria than the counties' zoning and land use planning decisions. That is, upland uses may change in areas where it is not appropriate for shoreline classifications to change unless the associated project purposes have changed.

54. Regarding wetlands, several commenters contend that the SMP update defines wetlands incorrectly and does not properly classify wetlands using the Corps' 1987 Wetland Delineation Manual. The licensee used a water- and land-based survey approach to characterize shoreline habitat types and identify wetlands, instead of using formal wetland field delineations. The result of these surveys determined the shoreline classifications in the original SMP. The licensee did not alter this methodology in the SMP update. As the licensee explains, the definition of wetlands in the SMP is consistent with federal and state definitions of wetlands, and all lands that meet the defined criteria for wetlands are considered wetlands regardless of whether or not they have been formally delineated.²⁷ Moreover, the Corps' Wetland Delineation Manual defines exact wetland boundaries for the purposes of issuing permits under federal (i.e., Section 404 of the Clean Water Act) and state (i.e., Virginia Environment Water Protection Permit Program) laws, but neither the licensee nor the Commission is required to follow any specific federal or state definition of wetlands. Finally, as the licensee notes, any shoreline classification can be challenged by following the process set forth in the SMP update (i.e., Section 2.2.1 Mapping Revision Process).

55. In its May 13, 2011 response to comments on the SMP update, the licensee states that it employed experienced consultants to conduct its shoreline habitat assessments (including wetlands classification), and that it did not rely solely on National Wetlands Inventory maps for its classification.²⁸ Thus, it is unclear the exact methods used to determine the boundaries of wetland areas classified as Resource Protection Area. The commenters suggest that the licensee formally delineate all wetlands along the shoreline of both lakes; however, such an effort would be very costly for the licensee, and we have

²⁷ The SMP update defines wetlands and wetland areas as, "Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Areas meeting the criteria are wetlands regardless of being formally field-delineated in accordance with federal or state law and regulations. Activities in wetlands may require federal and/or state permits in addition to any permits that may be required by Appalachian Power Company."

²⁸ In the 2009 re-license order, the Commission notes that project wetlands were identified and categorized using National Wetlands Inventory maps of the area. *See* 129 FERC ¶ 62,201, n. 80.

no reason to believe that the additional data would protect or enhance the environmental values of the project.

56. The licensee contends that significant efforts were undertaken to properly classify these areas. Following settlement negotiations, the licensee's SMP update proposes a new process for determining, on a case-by-case basis, whether wetlands are present in an area along which an applicant seeks to conduct shoreline disturbance. This provides a clear process for applicants to perform a wetlands delineation to prove the presence or absence of wetlands, as well as providing for adequate consultation from the appropriate natural resource agencies.

57. Neither the licensee nor the Commission is required to follow any specific definition or method for identifying wetlands for the purpose of shoreline classification; the licensee's definition is consistent with the common definition used by other state and federal agencies. Further, we find the licensee's proposed process for challenging the shoreline classifications is sufficient.²⁹

Shoreline Classifications

58. The SMP update provides special protections for areas of shoreline classified as Island Protection and Resource Protection Area. Island Protection areas are project lands surrounded on all sides by water, whereas Resource Protection Area areas are areas with specific environmental resources that the licensee identified as needing special protection. These classifications are different than those in the original SMP, which classified lands as Impact Minimization Zone or Resource Protection Area, as is shown in Table 2, below.

²⁹ In considering any potential requests to re-classify shoreline, the licensee should conduct thorough investigations of such requests in order to ensure that tampering with sensitive habitats would not result in re-classifications.

Table 2. A comparison between certain shoreline classifications in the original SMP and the SMP update.

	Impact Minimization Zone	Resource Protection Area	Island Protection
Original SMP	smaller wetlands	larger wetlands	
	Smith Mountain Wildlife Management Area	Virginia Natural Heritage Program natural communities	
	woody debris	designated restriction zones for project operations	
	scenic areas		
	undeveloped islands		
cultural resources			
Updated SMP		woody debris	all islands
		Wetlands	
		scrub shrub habitat	
		scenic areas	
		Roanoke logperch habitat	
		stream beds	
		cultural resources	
		Smith Mountain Wildlife Management Area	
		Virginia Natural Heritage Program natural communities	
		designated restriction zones for project operations	

59. This proposed change in the SMP update would result in more lands (i.e., 10.3 percent rather than 3.7 percent for Smith Mountain Lake; 44.3 percent rather than 18.4 percent for Leesville Lake) classified as Resource Protection Area; the classification most restrictive towards development. This is a result of the Resource Protection Area and Impact Minimization Zone classifications being largely combined, with the exception of islands, and the inclusion of some new sensitive areas in the Resource Protection Area classification (i.e., new cultural sites discovered during re-licensing, Roanoke logperch habitat, streambeds, and scrub shrub habitat). Development of shoreline classified as Resource Protection Area is prohibited unless the licensee (and in cases where wetlands

are present, the Commission) grants an exception for the proposed work; whereas development within the Island Protection classification would be allowed depending on the review and comments by appropriate resource agencies and any mitigation for impacts to project resources; and would be subject to slightly stricter conditions than other classifications. The proposed classifications, including the increase in lands protected from shoreline development, are well-supported by the licensee. The parameters for shoreline to be classified as Resource Protection Area are inclusive of those shoreline areas that warrant special protection, while providing the flexibility for landowners to build structures in Resource Protection Area zones, as long as proper precautions are taken to not upset the sensitive environmental resources present. As stated earlier, the SMP update is a reasonable compromise between protecting the project's environmental values and providing adequate opportunities for development at the lakes.

60. Under the original SMP, Commission review and approval was required for all variances, including shoreline development in Impact Minimization Zone (including islands) and Resource Protection Area areas, and the licensee was required to file an annual report detailing all requested variances. In addition to the variance provisions, the SMP update has provisions for a Resource Protection Area exception which allows the licensee to grant exceptions on a case-by-case basis if certain mitigation requirements are met, and agency concurrence is received. Such exceptions would not require Commission approval. The exception process was conceived during settlement negotiations, and presents a compromise among the entities regarding the amount of Commission oversight needed over development activities in shoreline areas classified as Resource Protection Area. Because of the specificity of measures in Table 3.4-1 (i.e., developing specific mitigation plans in consultation with appropriate state and federal natural resource agencies) to mitigate for disturbance in these sensitive shoreline areas, we concur with the licensee's proposal to handle SMP exceptions (except in cases where the presence of wetlands is in dispute) without further Commission approval.

Shoreline Guidelines

61. The SMP update provides detailed guidelines for activities within the project boundary, such as: allowable activities, uses, and structures; maximum dimensions for dock structures; and minimum distances between slips for multi-slip docks. Many of the guidelines remain unchanged from the original SMP.

62. Several individuals suggest changes to these guidelines, including: (1) increasing the size of certain allowable uses (i.e., service dock enclosures) to allow for shoreline business commerce (e.g., food service) and allow certain additional uses (e.g., geothermal loops); (2) changing various definitions (e.g., definitions of structures, boat covers, and boat slips); (3) increasing the maximum size of docks for single-family residential lots;

- (4) reducing the minimum distances between slips for multi-slip docks; and
- (5) encouraging riprap instead of bioengineering techniques for shoreline stabilization.

63. First, the licensee states that it does not support shoreline uses that are not water-dependent. Therefore, it does not support allowing additional uses such as large storage buildings, eating establishments, geothermal loops, etc., within the project boundary. Although these uses are prohibited within the project boundary, the licensee states that they can be located outside of the project boundary.

64. The licensee has a responsibility to ensure public safety, provide reasonable public access, and protect environmental resources at the project. Allowing additional non-water dependent uses would hinder the licensee's abilities to ensure that these project purposes are fulfilled. As previously stated, the licensee has the discretion (subject to Commission review, if appropriate) to approve or deny the privileges of private access and docking facilities around the project shoreline. Because it is the licensee's responsibility to manage the project's shoreline, and because these rules would not hinder recreation or public access at the project, we find no reason to require the licensee to allow uses that are not water-dependent.³⁰

65. Next, the SMP update's definition of structure includes an "automatic boat cover." As stated above, Automatic Boat Covers request that the licensee exclude the term "automatic boat cover" as an example of items considered as part of a structure. We find no reason to require the licensee to change the SMP's definitions of structures and docks. Because automatic boat covers are permanent fixtures and may extend past the dock footprint, it is reasonable for the licensee to include them in the definition of structure.

66. Lastly, the licensee encourages alternatives to riprap for shoreline stabilization, but does not require them. We see no reason to restrict all shoreline stabilization efforts at the project to the use of riprap, especially when bioengineering techniques (*e.g.*, vegetative plantings, live staking, coconut fiber rolls, etc.) would be more environmentally-beneficial.

Permitting, Inspection, and Enforcement

67. The Lake Association and several individuals call into question the licensee's practices in administering its permitting program, and suggest several business-related recommendations to improve the licensee's allegedly poor customer service, including

³⁰ We note that the licensee proposes in its revised SMP update to allow commercial marinas more flexibility (*i.e.*, a choice of a 48-square-foot enclosure per service dock or one 200-square-foot dock enclosure per marina) in installing enclosures for retail activities.

requiring the licensee to: (1) answer telephone calls and issue permits in a timely manner; (2) retain reasonable office hours for walk-ins rather than requiring appointments; (3) improve its training and guidance program for employees; (4) improve its education program to shoreline stakeholders; and (5) provide shoreline classification maps to the counties to increase public awareness of the SMP requirements.

68. The licensee concurs with the commentors that it needs to improve communication and employee education. Regarding its education efforts, the licensee proposes to conduct stakeholder workshops to help with SMP compliance, and has established a website that will host pertinent information regarding the project. However, regarding the other business-related recommendations, the licensee states that its shoreline office does hold regular office hours, and states that requiring appointments rather than walk-ins has allowed for staff to more effectively and efficiently respond to individual needs without interruptions.

69. Although we do not find it appropriate to dictate the licensee's standards for its day-to-day operations (i.e., timelines, office hours, internal training programs, etc.), the licensee must strive for high customer service satisfaction in dealing with its shoreline stakeholders. The licensee is encouraged to work closely with the nearby counties to make the SMP maps available, which would enhance communications and education of shoreline stakeholders.

70. Several commenters complain that the licensee determines a permitted facility's compliance with the SMP based on a substantial conformance to conceptual diagrams rather than just conformance to the SMP requirements themselves. The licensee states that it issues permits in response to property owner proposals, and the owner has the responsibility to build structures as permitted. Further, the licensee has agreed to conduct annual meetings with dock builders and similar stakeholders regarding the SMP rules.

71. The licensee's inspection methods requiring substantial conformance to the permitted design are adequate. We recognize that this rule requires advanced planning by those planning to build docks, but such advanced planning and permitting would likely help ensure that dock structures do not adversely affect project resources and meet applicable SMP requirements. Any alternative would likely result in dock structures varying widely based on an individual's interpretation of the rules or what constitutes substantial conformance with the SMP, and would likely result in an increase in future disputes. In its SMP update, the licensee proposes to allow commercial marinas to make minor rearrangements to slips within a marina, as long as it does not create a navigation, safety, or environmental concern or increase the overall number of slips. Because license article 415(d) (standard land use article) grants the licensee the authority to permit private or public marinas as determined under the SMP, any rearrangements to commercial marinas should be submitted to the Commission according to the guidelines in article 415(d) (i.e., 45-day notice).

72. The original SMP contained an ambiguous rule to handle pre-existing docks that do not conform to the SMP requirements.³¹ Specifically, the original SMP contained a “50 percent rebuild rule,” which specified that maintenance on non-conforming docks is encouraged, but if maintenance requires replacement of greater than 50 percent of the physical structure, excluding the pilings, then the structure must then conform to the current SMP.

73. Several commenters state that this 50 percent rebuild rule for grandfathered docks is not fairly enforced, discourages maintenance, or is not fair for those who did not submit documentation of their non-conforming dock during the allotted time.³² As a result of the settlement negotiations, the licensee proposes in the SMP update to delete the 50 percent rebuild rule and replace it with provisions that, in general, allow structures to be maintained as permitted as long as they are maintained in a safe manner. These new provisions encourage maintenance of existing structures, establish clear guidelines for determining when a structure may be considered dangerous, set forth the licensee’s responsibilities for monitoring dangerous structures, and would not require immediate, significant investments by owners of non-conforming docks to comply with the SMP unless structures are deemed to be dangerous. These new provisions fulfill the requirement of ordering paragraph (E) of the Commission’s October 20, 2011 order requiring the licensee to revise the 50 percent rebuild rule.

74. Like the original SMP, the SMP update prohibits docks from blocking the visibility of navigational aids and prohibits docks from being located closer than 30 feet to any lateral mark or navigational aid. Several individuals are concerned that some navigational markers have been located within 30 feet of existing docks, and that the owners of such docks should not be penalized for the actions of the agencies or entities that placed the markers. We are not aware of any actions taken by the licensee to require changes for docks that are located near navigational markers, nor are we aware of any accidents or incidents that have occurred in recent years as a result of docks blocking the view of navigational markers. However, we find the SMP update to be unclear regarding the licensee’s intentions for inspecting docks pursuant to this rule and the expected outcome for docks that fail to comply with this rule. Thus, the licensee must file, for Commission approval, a plan for enforcing the rules for navigational aids, including its

³¹ See 137 FERC ¶ 61,065 (2011).

³² The original SMP, as well as the licensee’s proposed SMP update prior to the February 28, 2013 modifications (i.e., settlement agreement), required owners to file documentation with the licensee that their structures existed prior to implementation of the original SMP.

intended course of action for existing docks located near navigational aids and policies for modifying, replacing, or expanding such docks in the future.

75. Upon a private entity's sale of property along the shoreline and adjacent to the project boundary, and which has an associated dock permit, the SMP update provides that the licensee would re-assign the corresponding dock permit to the new property owner, provided that the dock was constructed according to its permit and the proper forms and recording fees are collected. The Lake Association and several individuals believe that the SMP should require dock permits to transfer with real estate closings, and that the absence of such a requirement causes delays and losses of sales, reduced home values, etc. In response, the licensee states that dock permits represent a privilege to the permittee to enter project lands, build a structure, and occupy and use the land, but that such permits do not confer on the permittee any interest in that property. Thus, the licensee does not see fit that dock permits should run with the land.

76. We agree with the licensee. It appears that problems arise when dock structures were not built according to their permit, or when dock modifications have been made without a permit. It is not appropriate that docks not conforming to a permit be automatically transferred to a new unsuspecting property owner. It would be better for dock owners to ensure that their docks conform to a permit, in which case the licensee will re-assign permits to new property owners. Given the need for increased communication and outreach between the licensee and shoreline stakeholders, as discussed above, this process of re-assigning permits to new property owners presents an opportunity for new property owners to understand the dock permitting process.

77. One individual states that the licensee must maintain shoreline trees and vegetation, and remove dead or dying trees as required by standard license article 20.³³ In response, the licensee states that license article 20 does not require it to remove all dead trees but rather dead trees that pose hazards to project operations, navigation, or public safety. Further, according to its Habitat Management Plan under article 406 of its

³³ Standard article 20 states, "The Licensee shall clear and keep clear to an adequate width lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which results from the clearing of lands or from the maintenance or alteration of the project works. In addition, all trees along the periphery of project reservoirs which may die during operations of the project shall be removed. All clearing of the lands and disposal of the unnecessary material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations."

project license, the licensee states that it must leave woody debris in place to provide fish habitat.³⁴

78. The licensee is correct in its interpretation of license articles 20 and 406 that it should not remove all dead trees from the shoreline. Woody debris provides beneficial habitat for fish and other aquatic organisms, and need not be removed unless it poses a hazard to public safety or other project purposes. We note that the approved Debris Management Plan requires the licensee to remove debris that creates safety hazards, interferes with public access to public recreation facilities, or results in adverse aesthetic impacts.

Encroachments and Unpermitted Dock Structures

79. The licensee is responsible for ensuring the project lands are protected and maintained for their designated project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control. The licensee must also monitor project property to ensure that no unauthorized uses and occupancies occur within the project boundary. Such uses may adversely impact project purposes and the project's scenic, recreational, and environmental values.

80. The SMP update states that the licensee regularly monitors its shoreline, and that any use of or change in the features or vegetation on project lands and waters without specific authorization from the licensee is prohibited and considered to be an encroachment. The SMP update proposes a clear process to allow owners of unpermitted structures to apply for a permit. Depending on when the structure was built, the structure may or may not be required to conform to the SMP guidelines (*e.g.*, structures built prior to approval of the original SMP would be grandfathered, whereas newer structures must conform to the SMP). The SMP update also contains specific provisions for unpermitted dock structures (*e.g.*, removing offending structures, requiring mitigation, or cancelling permits) and lists certain prohibited occupancies and activities on project lands (*e.g.*, habitable structures, permanent fire pits). The licensee's shoreline monitoring efforts, rules for bringing structures under a permit or into conformance with the SMP, and provisions for resolving any encroachments are adequate to ensure that project resources are protected.

Other Issues

81. Several comments focus on issues outside the scope of the SMP update, such as erosion, sedimentation, recreational improvements, and debris management. Any

³⁴ See 129 FERC ¶ 62,201 at article 406 (requiring the licensee to implement the Habitat Management Plan).

comments on these issues are more appropriately addressed through the existing provisions of the corresponding license articles and plans.³⁵ Additionally, several comments refer to case-specific complaints regarding the licensee's decisions under the original SMP, which are most appropriately addressed separately from this order. The SMP update establishes an appeals process for shoreline management decisions whereby a property owner can appeal a decision to the licensee's Hydro Manager. This process should assist in the resolution of many of these issues.

82. Ordering paragraph (H) of the original SMP order required the licensee to file annual reports on five different topics: (1) dredging activities; (2) vegetation removal; (3) complaints, compliance, and enforcement actions; (4) status and numbers of permit applications; and (5) variances. The Commission reserved its right to modify the SMP for any reason, including as a result of analyzing the information contained in the annual reports. Over the last several years that the licensee has filed its annual reports, we have reviewed the reports, and have not taken any action. Further, the SMP update contains provisions to improve the licensee's permitting processes for dredging and vegetation removal, as well as for responding to complaints. The licensee collects information on dredging, vegetation removal, complaints, and numbers of permit applications for the administration of its shoreline program; therefore, the licensee no longer needs to file annual reports on dredging, vegetation removal, complaints, and numbers of permit applications. However, the licensee should continue to collect this information and be able to provide it to Commission staff upon request. The SMP update's provisions for handling variances and exceptions grants the licensee additional authority to act without prior Commission approval. Although we are approving the licensee's proposal in this order, the licensee should continue to file annual reports on variances and exceptions in order for the Commission to review the licensee's activities under its expanded authority. The annual report should include a short description of each variance and exception requested, including information concerning when requests were received, why and when they were granted or denied or any action taken to process the request, what environmental resources made a variance or exception necessary, and what type of mitigation was required.

³⁵ The approved Erosion Monitoring Plan (article 402) and approved Sedimentation Monitoring Plan (article 403) require the licensee to complete erosion or sedimentation surveys and report on its findings in consultation with various resource agencies and technical review committees. License article 410 requires the licensee to file a Recreation Management Plan, which was filed June 28, 2010, and is currently pending before the Commission. License article 411 requires the licensee to implement a Debris Management Plan, which requires the licensee to file an annual report on activities under the plan.

83. Ordering paragraph (I) of the original SMP order requires the licensee to file revised maps when they are modified. In order to keep the Commission's and public records up to date, this requirement should remain in place. Additionally, the licensee is reminded of its responsibilities in following the procedures in the approved historic properties management plan (HPMP) with regards to ground disturbing activities along the shoreline, including consulting the Virginia State Historic Preservation Officer regarding the effects of ground disturbing activities on historic properties according to the HPMP.³⁶

84. The original SMP required the licensee to update the SMP every five years. As a result of settlement negotiations, the licensee now proposes to update the SMP every ten years. Because of the extensive public and agency input into the formulation of this SMP update, the extensive annual reporting and consultation required of the licensee, and the Commission's reservation of its rights to modify the SMP at any time, it is appropriate to extend the period between future SMP updates to ten years rather than five.

CONCLUSION

85. Much of the debate during this proceeding concerns the question of who controls the project lakes. Several adjacent landowners, local government organizations, and other stakeholders want more control over activities and regulations at the project. As the Commission has stated and as previously discussed in this order, the Smith Mountain Pumped Storage Project is a federally-licensed hydropower project that must be operated consistent with its license, granted under the public interest standards required by the Federal Power Act. The licensee is solely responsible to the Commission for complying with its license and maintaining and operating the project for its stated purposes, including, public recreation, public access, and preservation of environmental values. The licensee has the discretion to approve or deny the privilege of private access and docking facilities to individuals, subject to Commission review and approval. Although the Commission has required the licensee to consult various agencies, entities, and stakeholders in carrying out plans to more effectively manage the project, the licensee – not the consulted entities – is responsible for the operation and maintenance of the lands and waters within the project boundary, in accordance with its license conditions. It is important for the licensee's responsibilities to be clearly understood so that the licensee and consulted entities may better cooperate for shoreline management and other purposes in the future and for the remainder of the license term.

³⁶ See 142 FERC ¶ 62,084 (2013) (Order Approving Historic Management Plan Pursuant to Article 414).

86. We have reviewed the licensee's SMP update, as well as the public and agency comments. The record indicates that, with the modifications discussed above, the SMP update provides a reasonable plan to identify allowable shoreline uses in the project boundary, provides rules governing those uses, and protects project resources. Further, implementation of the SMP will not interfere with project purposes, such as public safety, public recreation, and the protection of environmental values. The SMP update meets the requirements of license article 413 and is consistent with the statutory standards by which the Commission regulates hydropower projects. Accordingly, the licensee's SMP update is approved, as modified above.

87. We will require the licensee to file GIS data regarding the reservoir area and shoreline management classifications. This will allow detailed tracking of shoreline resources and uses, and facilitate future reviews. Ordering Paragraph (G) contains the details and filing specifications for the GIS data required by the Commission. With the approval of the licensee's proposal to change some of the shoreline classifications (i.e., a new Resource Protection Area classification replaces the old Conservation/Environmental classification), the licensee must file an updated copy of its shoreline classification maps for the Commission's records and for public reference.

The Director orders:

(A) Appalachian Power Company's shoreline management plan update, filed on January 3, 2011, and supplemented on February 18, 2011, and February 28, 2013, for the Smith Mountain Pumped Storage Project, as modified by paragraphs (B) through (G), is approved.

(B) Within 60 days of this order, the licensee shall file for Commission approval a plan for enforcing the shoreline management plan's (SMP) rules regarding navigational aids, including its intended course of action for existing docks located near navigational aids and policies for modifying, replacing, or expanding such docks in the future. Prior to filing the plan, the licensee shall provide a draft copy to the Tri-County Lake Administrative Committee and Tri-County AEP Relicensing Committee for a 30-day comment period. The plan shall include documentation of consultation, and specific descriptions of how the consulted entities' comments were accommodated in the plan. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on site-specific considerations. The Commission reserves the right to require changes to the plan update based on the results of the consultation.

(C) The licensee shall compile and file with the Commission an annual report by January 31 of each year, beginning in 2014, that briefly describes each variance and exception requested, including information concerning when requests were received, why and when they were granted or denied or any action taken to process the request, what

environmental resources made a variance or exception necessary, and what type of mitigation was required.

(D) Within 10 years from the date of this order, and every 5 years thereafter, the licensee shall file with the Commission a report describing whether or not an update to the SMP is needed. If the licensee determines that no update to the SMP is needed, then the report shall include the licensee's reasons for making that determination. If the licensee determines that an update to the SMP is needed, the licensee shall include in its report a plan and schedule for completing the SMP update. The report shall include documentation of consultation with the parties identified in license article 413, and specific descriptions of how the consulted entities' comments were accommodated in the report. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on site-specific considerations. The Commission reserves the right to require changes to the SMP based on the results of the report.

(E) The Commission reserves the right to revisit and modify the SMP at any time, if evidence warrants a change.

(F) Within 90 days of the date of this order, the licensee shall file revised shoreline classification maps reflecting the current shoreline classifications (i.e., including Resource Protection Areas) for the Commission's records and for public reference. Additionally, the licensee shall file revised shoreline maps whenever the classifications are modified in the future.

(G) Within 90 days of the date of this order, the licensee shall file two separate sets of GIS data in a georeferenced electronic file format (such as ArcView shape files, GeoMedia files, MapInfo files, or a similar GIS format) with the Secretary of the Commission, ATTN: OEP/DHAC. The data shall include a) polygon files of the project reservoir(s) surface area including a separate polygon for the tailrace area, and b) polyline file of the shoreline management classifications. The filing must be in CD or diskette format and shall include polygon data that represents the surface area of each reservoir/tailrace, as shown on the project boundary exhibits, and polyline data that represents the linear extent of each shoreline classification segment as shown on maps in the shoreline management plan.

A polygon GIS data file is required for the reservoir(s)/tailrace; with each reservoir separately identified. The attribute table for each reservoir/tailrace must include at least the reservoir name, water elevation, and elevation reference datum. A polyline GIS data file is required for the shoreline classifications associated with each reservoir. The attribute table for each reservoir must include at least the reservoir name and management classification description for each polyline, consistent with the shoreline management plan.

All GIS data must be positionally accurate to ± 40 feet in order to comply with National Map Accuracy Standards for maps at a 1:24,000 scale. The file name(s) shall include: FERC Project Number, data description, date of this order, and file extension in the following format [P-2210, *reservoir name* polygon/or *reservoir name* shoreline polyline data, MM-DD-YYYY.SHP]. The filing must be accompanied by a separate text file describing the spatial reference for the georeferenced data: map projection used (i.e., UTM, State Plane, Decimal Degrees, etc), the map datum (i.e., North American 27, North American 83, etc.), and the units of measurement (i.e., feet, meters, miles, etc.). The text file name shall include: FERC Project Number, data description, date of this order, and file extension in the following format [P-2210, project reservoir/or shoreline classification metadata, MM-DD-YYYY.TXT].

(H) This order constitutes final agency action. Any party 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 FPA, 16 U.S.C. § 825l (2012), and the Commission's regulations at 18 C.F.R. § 385.713 (2013). 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. The licensee's failure to file a request for rehearing shall constitute acceptance of this order.

Robert J. Fletcher
Chief, Land Resources Branch
Division of Hydropower
Administration and Compliance