

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Duncan's Point Lot Owners Association, Inc.; Docket Nos. EL05-73-000
Duncan's Point Homeowners Association, Inc.; Project No. 459-135
and Nancy A. Brunson, Juanita Brackens,
Helen Davis, and Pearl Hankins, individually

Complainants

v.

Union Electric Company d/b/a AmerenUE

Respondents

ORDER DENYING COMPLAINT

(Issued May 9, 2005)

1. On March 4, 2005, Duncan's Point Lot Owners Association, Inc., Duncan's Point Homeowners Association, Inc., Nancy A. Brunson, Juanita Brackens, Helen Davis, and Pearl Hankins (Complainants) filed a complaint against Union Electric Company, doing business as AmerenUE, licensee of the Osage Hydroelectric Project No. 459. The project is located on the Lake of the Ozarks in Missouri. Complainants allege that the licensee improperly granted permission to a developer to construct a seawall on project land without the Commission's authorization or notice and an opportunity for public comment, thus violating easements and covenants running with the land and interfering with residents' guaranteed recreational rights. Complainants also allege that the licensee improperly approved an easement for an effluent discharge pipe across project lands, allowed fill dirt to be placed in wetlands without first conducting an environmental analysis, and approved boat docks that block access to the shoreline. For the reasons discussed below, we deny the complaint, because it duplicates matters already examined and resolved informally by Commission staff. This order is in the public interest because it resolves compliance matters and clarifies actions that a licensee may take under the Commission's standard land-use article for hydroelectric projects.

Background

2. The Osage Project was originally licensed in 1926. The 176.2 megawatt project includes Bagnell Dam, which impounds Lake of the Ozarks (Lake), the project reservoir. The Lake extends 93 miles upstream from the dam and has many long branches and coves, creating a shoreline of some 1,150 miles. At its normal maximum pool elevation of 660 feet msl, the Lake covers 55,342 acres. The current license, issued in 1981, expires on February 28, 2006.¹ AmerenUE filed an application for a new license on February 24, 2004, and the relicensing proceeding is currently pending before the Commission.

3. Complainants are lot owners, homeowners, and residents of Duncan's Point resort, founded by Daniel Ralph Duncan in 1952 as an African-American resort. Duncan's Point occupies a peninsula bordered by the Lake and Lick Creek Cove, in Camden County. The resort is eligible for listing in the National Register of Historic Places (National Register). Complainants' allegations stem from the construction of the Pebble Creek development and its associated wastewater treatment facility along the shore of the Lake, near Duncan's Point resort.

4. The project boundary around the Lake is, for the most part, drawn at elevation 662 feet. At the site of the Pebble Creek development, the project boundary is at elevation 664 feet. The licensee controls only a relatively narrow strip of project land around the shoreline, which varies in horizontal length depending on the terrain. Duncan's Point and the Pebble Creek development are located outside the project boundary. As discussed in more detail below, a standard license article permits Commission licensees to make certain land-use authorizations within the project boundary without prior Commission approval. The Pebble Creek development's connection to the project arises from the licensee's authorization of the developer to construct a seawall on project land, and to place a buried effluent outfall discharge pipe from the treatment facility across project land and into the Lake. Complainants contest these actions as part of their overall concerns about the Pebble Creek development.

5. Complainants brought their concerns to Commission staff informally, and the Commission's Dispute Resolution Service attempted but was unable to assist the parties in resolving their conflicts. On September 7, 2004, staff issued a letter order determining that the licensee had authorized the developer to build a 2,332-foot long seawall without first considering whether the seawall was necessary or whether plantings or rip-rap could be used instead, and halting any further construction of the seawall. At that point, only 300 feet of seawall had been built. Staff further found that, although the licensee had issued a permit to the developer for the wastewater treatment facility's discharge pipe

¹ See *Union Electric Company*, 15 FERC ¶ 62,038 (1981).

without first notifying the Commission, the discharge pipe had been properly authorized, because the developer had obtained all necessary permits for it. Staff found that the seawall and discharge pipe had no adverse effect on the historic values of Duncan's Point resort. To ensure public access and recreational values and to address various environmental concerns, Commission staff required the licensee to file a plan to mitigate for the seawall and discharge pipe, including construction of a public walkway adjacent to the seawall, creation of a trail and shoreline access area, and development of a 2-acre park. Complainants opposed staff's findings of no adverse effect and requested that the Commission involve the Advisory Council on Historic Preservation (Advisory Council) in consultation regarding the matter. After requesting and receiving additional information from Commission staff, the Advisory Council did not respond with any comments.

6. Pursuant to staff's order of September 7, 2004, AmerenUE filed a compliance plan on October 8, 2004; a copy of the effluent pipe easement and a signage proposal for public access and fishing access on November 15, 2004; and a compliance report on December 3, 2004. By letter order dated February 23, 2005, staff approved these filings and requested that the licensee notify the Commission when it has fulfilled the remaining three items specified in the letter order.²

7. On March 4, 2005, Complainants filed their complaint. The Commission issued public notice of the complaint on March 8, 2005, with a deadline of March 18, 2005, for comments, motions to intervene, and the licensee's response. The Commission subsequently granted an extension of time to and including March 24, 2005, to allow the licensee the usual 20-day response time provided in the Commission's rules.³ On April 4, 2005, Pebble Creek Development, LLC; Pebble Creek Homes Association, Inc.; and Jim Hoerl Construction Company (Pebble Creek) filed a response to the complaint, accompanied by a request for permission to make the filing. On April 12, 2005, Complainants filed a motion for an extension of time to file comments and rebuttal in response to AmerenUE's answer to the complaint. By notice issued that same day, the Commission Secretary granted an extension to and including April 19, 2005. Complainants filed their response on April 19, 2005. The next day, Complainants filed the 49 Exhibits referenced in their response.

² As specified in the letter order, AmerenUE is required to notify the Commission when it has: obtained and placed in the project boundary all property below the 664-foot contour line within the Pebble Creek Development; obtained a determination from the U.S. Army Corps of Engineers of whether any part of that property is or was a wetland; and included the history of Duncan's Point in the shoreline management plan and Wilmore Lodge Museum.

³ See 18 C.F.R. § 385.206(f) (2004).

Discussion

A. Preliminary Matters

8. Unless otherwise ordered by the decisional authority, Commission regulations do not permit the filing of an answer to an answer.⁴ Therefore, the Commission does not generally allow further filings in response to a licensee's answer to a complaint. In this case, Complainants argue that they need to file a rebuttal to allegations in the licensee's answer and Pebble Creek's comments, suggesting a possibility of factual disputes. Therefore, to ensure that the record is complete, we will consider Complainants' response.

9. As noted, Pebble Creek filed a motion for an extension of time to file a response and a response to the complaint. Ordinarily, a motion for an extension of time must be filed before the expiration of the period prescribed for taking a particular action.⁵ If the motion is made after the expiration of a specified time period, the movant must show extraordinary circumstances sufficient to justify the failure to act in a timely manner.⁶ Pebble Creek asserts that an extension is justified because Pebble Creek was not included in the complaint and did not receive a copy of it until March 23, 2005. Commission regulations require that any person filing a complaint must serve a copy of the complaint on persons who the complainant reasonably knows may be expected to be affected by the complaint.⁷ Pebble Creek previously filed comments on the matters at issue in the complaint, and clearly has an interest in the complaint as owner of the development, owner/applicant of the waste water treatment center, and builder of homes on the property. Thus, Complainants were required to serve Pebble Creek with a copy of the complaint, and the extension is justified. To ensure that the record is complete, we grant the extension and consider Pebble Creek's response.

⁴ See 18 C.F.R. § 385.213(a)(2). In their motion for an extension of time to respond, Complainants suggest that Commission regulations provide them with 20 days in which to file a response to AmerenUe's answer to the complaint. This is incorrect. The 20-day response period applies to the complaint; section 385.213(a)(2) prohibits any further response to the licensee's answer unless otherwise ordered.

⁵ See 18 C.F.R. §385.2008(a).

⁶ *Id.* at § 385.2008(b).

⁷ See 18 C.F.R. § 385.206(c).

B. The March 4, 2005 Complaint

10. Complainants assert that, several years ago, the Pebble Creek developer “purchased approximately 38 acres of land, and without notice to the residents commenced plans to build a gated community of 35 beachfront homes within the boundaries of our [Duncan’s Point] resort.”⁸ They maintain that the planned development and methods of construction adversely affect “the natural and physical environment and the interrelated social, ecological, aesthetic, historic, cultural, economic and health [aspects] of an existing African American resort community.”⁹ They allege that the developer’s activities “have been conducted largely without full public disclosure and for the most part without the appropriate permits,” and that the developer was “allowed, if not encouraged to violate federal, state and local laws and regulations, in addition to the Constitutional rights of residents.”¹⁰ The Complaint alleges that 17 violations “have occurred and are continuing.” These are considered below, grouped according to their subject matter. As will be seen, most of these alleged violations concern matters that are outside the Commission’s jurisdiction, and those that are within our jurisdiction have already been adequately resolved by Commission staff.

11. Pebble Creek states that it will be building only 15 houses, its plans never called for a gated community, and it has obtained all necessary permits and authorizations.¹¹ Pebble Creek also submitted evidence, which Complainants dispute, that the lands now comprising the Pebble Creek Development have never been a part of Duncan’s Point.¹² We need not decide whether this is correct, because, as explained in more detail below, our authority in this case is limited to actions take or authorized by the licensee, pursuant to the license and within the project boundary.

C. Historic Status of Duncan’s Point

12. Allegation 1 of the complaint states that AmerenUE, after being advised that Duncan’s Point was eligible for historic status, authorized the developer to construct a 2,338-foot seawall without public notice, consultation, or opportunity for public comment, and failed to assess the effects of its actions on a historic property under

⁸ Complaint at 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See* filings of November 4, 2004, and February 9, 2005, by Mark H. Epstein, Roe & Epstein, LLP, on behalf of the developer.

¹² *Id.*; *see* Complainants’ Rebuttal at 1-2 (filed April 19, 2005).

section 106 of the National Historic Preservation Act (NHPA). Allegation 2 states that the licensee failed to comply with cultural and historic requirements as provided in Executive Order 11593.¹³ Because that executive order applies to federal agencies, not to licensees, and does not impose any requirements on the Commission not already encompassed in section 106 and its implementing regulations, we need not consider it further.

13. The Missouri State Historic Preservation Officer (Missouri SHPO) determined that Duncan's Point is eligible for listing in the National Register.¹⁴ The Missouri SHPO further determined that the Pebble Creek development would have an adverse effect on the "historic fabric" of Duncan's Point.¹⁵ Under section 106 of the NHPA, federal licensing and permitting agencies must take into account the effects of their actions on historic properties, and provide the Advisory Council with a reasonable opportunity to comment.¹⁶ For purposes of section 106 of the NHPA, historic properties include not only those that are listed on the National Register, but also those that are determined to be eligible for listing. However, section 106 does not directly prohibit adverse effects on historic properties, or require that all adverse effects be avoided or mitigated. Rather, section 106 and its implementing regulations provide for a consultation process that is designed to lead to such avoidance or mitigation, to the extent possible.¹⁷

14. More importantly for our purposes, section 106 does not expand the Commission's jurisdiction beyond the confines of the Federal Power Act (FPA). Thus, although the Missouri SHPO determined that the Pebble Creek development will adversely affect Duncan's Point, the Commission has no jurisdiction over Pebble Creek or the activities of its developer. Our jurisdiction is limited to AmerenUE, our licensee, and the licensee's activities under the license and within the project boundary. Therefore, we have no ability or authority to regulate the actions of Pebble Creek or its developer.

15. In recognition of this limitation, Commission staff undertook to determine, in consultation with the Missouri SHPO, whether any actions of the licensee that are subject

¹³ Complaint at 4; *see* Executive Order 11593, "Protection and Enhancement of the Cultural Environment," 36 Fed. Reg. 8921 (1971).

¹⁴ *See* Letter from Mark A. Miles, Missouri State Historic Preservation Office, to Deborah M. Osborne, FERC (dated March 28, 2003, and placed in the record for the project by Ms. Osborne's filing of April 17, 2003).

¹⁵ *Id.*

¹⁶ 16 U.S.C. § 470f.

¹⁷ *See* 36 C.F.R. Part 800 (§§ 800.1 through 800.16).

to the Commission's jurisdiction could adversely affect the historic values of Duncan's Point. Specifically, staff focused on the licensee's authorization of Pebble Creek's seawall and wastewater effluent pipe. By letter dated July 1, 2004, staff contacted the Missouri SHPO, requesting information about Duncan's Point and recommendations for mitigation measures to address any adverse effects that may have resulted from the seawall and discharge pipe.¹⁸ Staff sent a copy of the letter to the Advisory Council. Neither agency submitted a response.

16. After visiting the site, on September 7, 2004, staff issued a letter order concluding, among other things, that construction of the 300-foot seawall and installation of the discharge pipe had no adverse effect on the historic values of Duncan's Point.¹⁹ On October 7, 2004, Complainants filed a letter opposing staff's conclusion of no adverse effect and requesting that staff involve the Advisory Council in the consultation.²⁰ By letter dated November 17, 2004, Commission staff requested the Advisory Council's review and comments on the finding of no adverse effect.²¹ The Advisory Council responded with a request for additional information.²² In response to Commission's staff's letter of November 17, 2004, requesting comments, the Advisory Council requested additional information. After staff provided the requested information by letter dated January 6, 2005,²³ the Advisory Council did not file a response.

17. Under the Advisory Council's regulations, if a party objects to a federal agency's finding of no adverse effect, the agency must either consult with the objecting party to resolve the disagreement or request the Council to review the finding.²⁴ If the agency

¹⁸ See Letter to Mark A. Miles, Missouri SHPO, from John E. Estep, FERC (July 1, 2004).

¹⁹ See Letter to David Fitzgerald, AmerenUE, from John E. Estep, FERC (September 7, 2004).

²⁰ See letter to Magalie R. Salas, FERC, from Nancy A. Brunson on behalf of Complainants (filed October 7, 2004).

²¹ See letter to John Fowler, Advisory Council, from John E. Estep, FERC (November 17, 2004).

²² See letter to Magalie R. Salas, FERC, from Don L. Klima, Advisory Council (filed December 20, 2004).

²³ See letter to John Fowler, Advisory Council, from John E. Estep, FERC (January 6, 2005).

²⁴ See 36 C.F.R. § 800.5(c)(2)(i).

requests a review, the Advisory Council must notify the agency of its determination as to whether the criteria of adverse effect were correctly applied within 15 days of receiving the agency's documented finding. If the Advisory Council does not respond within 15 days of receipt of the finding, the agency may assume concurrence with its finding and proceed accordingly.²⁵ Implementation of the undertaking in accordance with the agency's documented findings fulfills the agency's responsibilities under section 106 of the NHPA.²⁶ Thus, the Commission has fully complied with section 106, and no further action is required.

D. The Seawall and Public Access

18. Allegation 3 of the complaint states that the licensee approved the seawall on project boundaries without prior permission from the Commission, in violation of license Article 18. Allegations 4 and 5 state that the licensee authorized the seawall and two boat docks, all of which block access to the shoreline for Duncan Point residents and interfere with the guaranteed recreational rights of all residents, in violation of Article 41 and easements and covenants running with the land.

19. Article 18 of the Osage Project license is a standard article that directs the licensee "to allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes."²⁷ Article 41 is the Commission's standard land use article, which delegates to the licensee authority to grant permission for certain use and occupancy of project property, including permits for construction of retaining walls, docks, and similar structures. Article 41 also authorizes the licensee, after notice to the Commission, to grant easements for effluent lines that discharge into project waters. The licensee may exercise the authority delegated in Article 41 "only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project."²⁸

²⁵ See 36 C.F.R. § 800.5(c)(3).

²⁶ See 36 C.F.R. § 800.5(d)(1).

²⁷ See Form L-3 (revised October 1975), published at 54 FPC 1817 (1975), incorporated by reference in the Osage Project license, 15 FERC ¶ 62,038 at 63,046, ordering paragraph D.

²⁸ See 15 FERC ¶ 62,038 at 63,048.

20. Article 41(b) requires that, before granting permission for construction of bulkheads or retaining walls, the licensee must inspect the site of the proposed construction, consider whether planting vegetation or using rip-rap would be adequate to control erosion at the site, and determine that the proposed construction is needed and would not change the basic contour of the reservoir shoreline. As Commission staff notes in its letter order of September 7, 2004, AmerenUE's website summarizes these requirements and states that bank stabilization "will be constructed for erosion control only. Planting of vegetation or placement of rip-rap are the preferred methods for bank stabilization."²⁹

21. Commission staff reviewed the same allegations concerning the seawall that are raised in the complaint and made findings with respect to them in its September 7, 2004 Letter Order.³⁰ Staff found that the seawall may have adversely affected public access to the Lake, in violation of Article 18 of the license. Staff further found that AmerenUE did not fully comply with the requirements of Article 41 or its own stated policy with respect to granting a permit for the seawall, because it appeared that the licensee did not consider alternatives to a seawall such as plantings or rip rap, or that a seawall may not have been necessary at the site.

22. Based on these findings, staff directed AmerenUE to file a compliance plan setting forth steps it has taken, and will take in the future, to ensure that its procedures for issuing permits fully comply with the requirements of Article 41. Staff further required the licensee to submit compliance reports every four months for one year providing information on applications received and permits granted for construction of retaining walls and placement of rip-rap. As mitigation for impacts to public access, staff required that the licensee file a plan for public access, including development of a trail and shoreline access area toward the back of Lick Creek Cove, construction of a paved walkway at the seawall location to provide contiguous access to the shoreline, and

²⁹ See www.ameren.com/Environment/adc_ev_bankstab.asp.

³⁰ It appears that the allegations in the complaint concerning the two boat docks are new. During its inspection of the site, staff noted that there are several seawalls and boat docks in the area and along the shoreline that have not affected the eligibility of Duncan's Point for listing in the National Register. See staff's November 17, 2004 Letter to the Advisory Council at 4. The two boat docks mentioned in the complaint, which are located near one end of the seawall, will not present an obstacle to shoreline access, because the walkway that staff required to be built along the seawall will allow the public "to walk along the shoreline of Lake of the Ozarks as it could prior to the seawall construction." *Id.* See also Appendix I to AmerenUE's Answer to Complaint (filed March 24, 2005), which is a photograph of the three Pebble Creek houses that are closest to Duncan's point, showing the two docks in question and a part of the seawall, where public access is required.

development and maintenance of a public park at the crossroads of the Pebble Creek development and Duncan's Point, to be named in honor of Daniel R. Duncan, founder of Duncan's Point. Staff further required removal of all signage references to no fishing on Pebble Creek.

23. In short, Commission staff has already addressed the licensee's compliance with Articles 18 and 41 in connection with construction of the seawall and public access concerns, and has prescribed appropriate mitigation for the minor violations that it found. In our view, nothing further is required with respect to these allegations.

24. As noted, allegations 4 and 5 of the complaint also state that AmerenUE's authorization of the seawall and boat docks is in violation of "easements and covenants running with the land."³¹ Allegation 14 reiterates the assertion that the two boat docks block access to the shoreline in violation of these easements and covenants, and adds that the blocked access is in violation of Article 41 of the license. Although not further explained in the complaint, these allegations are apparently in reference to Article 41(e) of the license, as well as to certain covenants and restrictions imposed in connection with the founding of Duncan's Point.

25. Article 41(e) provides that any instrument of conveyance of interests in project lands under subsections (c) and (d) of Article 41 must include covenants running with the land to ensure that the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; and that the construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project. As AmerenUE correctly points out, subsections (c) and (d) are concerned with a licensee's conveyance of fee title to, easements or rights-of-way across, or leases of project lands. The grant of a permit to construct the seawall was not such a conveyance. Rather, it was a permit for the use and occupancy of project lands and waters under subparagraph (b) of Article 41. Accordingly, the seawall permit does not involve any covenants running with the land as contemplated in Article 41(e).

26. Complainants' second assertion is that in founding Duncan's Point in 1952, Daniel R. Duncan imposed certain covenants and restrictions on the land, and that the seawall is in violation of some of these covenants and restrictions. Although not further discussed in the complaint, these covenants and restrictions were apparently designed to preserve public access to the shoreline and to prevent environmental harm through the discharge of effluent to the Lake.³² Counsel for Pebble Creek provided evidence to suggest that the

³¹ Complaint at 4.

³² See Complainants' filing of October 7, 2004, at 3-4.

Pebble Creek development is not, and has never been, a part of Duncan's Point resort.³³ AmerenUE therefore argues that these covenants and restrictions are not applicable to the seawall. Complainants dispute this, maintaining that the property that is now Pebble Creek was originally part of Duncan's Point, and was sold in 1975 to the Jameseks, who then sold it to the developer in 2001.³⁴

27. Regardless of whether this is true, it is beyond our authority to investigate and enforce these covenants and restrictions. Our authority is limited to the licensee and its compliance with the terms of the license. As noted, there are other docks and seawalls in Duncan's Point that have not affected the historic status of the resort, and that apparently are not of concern to Complainants. Moreover, Commission staff has already required adequate mitigation for any possible restriction of public access to the shoreline by requiring that the license build a walkway along the seawall. Any further claims regarding possible violations of covenants and restrictions running with the land in Duncan's Point are outside our jurisdiction and must be addressed to the appropriate state or local court.

28. Allegations 9 and 16 of the complaint, which are essentially the same, state that the licensee allowed the developer to backfill materials along the completed 300-foot seawall on project boundaries, and then wrongfully claimed the added land to its deed and filed it with the Register of Deeds Office at the Camden County courthouse. Allegation 17 states that the licensee is continuing to allow building on project boundaries, in violation of Commission staff's letter order of September 7, 2004, and has not required the developer to return any land below the 664-foot contour line to the licensee.

29. As AmerenUE points out, Pebble Creek denies that this occurred, and states that its recorded deeds to the development do not include any land below the 664-foot contour.³⁵ To resolve this issue, Commission staff's letter order of September 7, 2004, required the licensee to obtain all property below the 664-foot contour line and include it within the project boundary, and to notify the Commission that it has done so within 30 days of obtaining such property. AmerenUE is in the process of complying with this directive. Therefore, the matter has already been adequately addressed, and no further remedy is required.

³³ See letters from Pebble Creek's counsel (filed November 4, 2004, and February 9, 2005), both included as Appendix D to AmerenUE's Response to Complaint (filed March 24, 2005).

³⁴ See Complainants' Rebuttal at 1-2 (filed April 19, 2005).

³⁵ See Pebble Creek's filing of February 9, 2005, at 4, item 9.

30. Allegation 6 of the complaint states that the licensee authorized the seawall and discharge pipe easement on project boundaries and allowed fill dirt to be placed in a wetland area without the necessary impact assessment, in violation of the National Environmental Policy Act (NEPA) and the Clean Water Act.³⁶ As explained earlier, Article 41 authorizes the licensee to grant certain easements and permits without prior Commission approval, and without the need for an environmental assessment. Moreover, NEPA applies only to federal agency actions, and does not apply to the actions of private entities.

31. The Clean Water Act contains provisions that apply to private entities as well as federal agencies. However, AmerenUE states that neither the seawall nor the discharge pipe is located on wetlands, and the company is not aware of any other construction work or placing of fill-dirt on project lands along the Pebble Creek development.³⁷ In its letter order of September 7, 2004, Commission staff directed the licensee to request that the U.S. Army Corps of Engineers determine whether any property owned by Pebble Creek is, or was at the time of purchase, wetland area. If such wetland is identified, it must be designated in the Lake of the Ozarks' shoreline management plan. AmerenUE is in the process of fulfilling these requirements, and no further measures are required.

E. The Effluent Discharge Pipe

32. Allegation 8 of the complaint states that, before granting an easement for the discharge to cross project lands, the licensee failed to do an environmental assessment to determine the direct effects of the effluent, including the discharge of excess phosphorous, nitrogen, chlorine, and pathogens, on recreation, fish, and wildlife at Lick Creek Cove, in violation of Executive Order 12962 ("Recreational Fisheries"), the Clean Water Act, and section 10(a)(1) of the FPA. Allegation 15 states that the licensee approved the easement for the discharge pipe and allowed fill dirt to be placed in a wetland area within project boundaries without the necessary impact statement, in violation of NEPA and Executive Order 11990 ("Protection of Wetlands").

33. If all requisite permits have been obtained, Article 41 of the license authorizes the licensee, after notice to the Commission, to grant easements for effluent lines that discharge into project waters. No environmental assessment is required for the use of this authority. NEPA and the cited executive orders apply to federal agencies, not private entities. The Commission has no authority with respect to the issuance of wastewater

³⁶ Complaint at 5. The remainder of the allegation concerns the discharge pipe and is discussed in the next section.

³⁷ AmerenUE's Response at 12.

treatment discharge permits under the Clean Water Act. Complainants do not attempt to explain their FPA claim. As long as the discharge pipe is properly permitted, we do not see how the granting of an easement for it could in any way violate the comprehensive development standard of section 10(a) (1) of the FPA.

34. In its letter order of September 7, 2004, Commission staff found that the licensee had issued a permit for the discharge pipe without first notifying the Commission, as required by Article 41. However, staff further found that the discharge pipe had been properly authorized, because the developer had obtained the necessary permits from federal, state, and local authorities. Staff therefore directed the licensee to file a copy of the easement issued for the effluent pipe, which the company did on November 15, 2004. Staff approved the filing by letter order dated February 23, 2005.

35. Allegation 12 of the complaint states that the staff's letter of September 7, 2004 mandated that AmerenUE withhold approval of an easement for the discharge pipe until all federal, state, and local permits had been obtained, and that the company has neglected to advise the Commission that the permits in question are under appeal and have not been fully adjudicated. The licensee states that although the permits may be under appeal, they have not been stayed and are in effect and valid. In their response of April 20, 2005, Complainants state that a hearing officer issued a "recommended stay decision" on May 3, 2004.³⁸

36. It appears that Complainants are referring to the hearing officer's recommendation for a preliminary stay of issuance of an operating permit for the wastewater treatment facility pending a full hearing on the stay motion, which the Clean Water Commission subsequently denied on April 15, 2004. An operating permit for the facility has since been issued and, although the permit is under appeal, no stay is in effect.³⁹ If the permit is modified on appeal, the Commission will consider whether any further action may be required with respect to the easement for the discharge pipe.

37. Allegation 13 of the complaint states that the licensee granted an easement for a waste water treatment plant effluent discharge pipe to cross project boundaries before obtaining prior approval from the Commission, in violation of covenants and restrictions running with the land to forbid the discharge of sewage into the Lake. As noted,

³⁸ See Complainants' Rebuttal at 5 (filed April 19, 2005) and Complainants' Exhibits 13 and 14 (filed April 20, 2005).

³⁹ See Complaint at 6; AmerenUE's Response at 4 n. 9, 12; and Pebble Creek's filing of February 9, 2005, at 5-6. Copies of the permits and the Clean Water Commission's denial of Complainants' stay motion are attached to AmerenUE's filing of November 11, 2004, in this proceeding.

Commission staff found that the discharge pipe was properly authorized, and the licensee has since filed a copy of the easement with the Commission. Furthermore, as discussed above, arguments regarding the applicability of Duncan's Point covenants to the Pebble Creek development are beyond the Commission's jurisdiction and must be addressed to the appropriate state or local court.

F. Other Laws and Executive Orders

38. Allegation 7 of the complaint states, without elaboration, that AmerenUE has proposed the placement of a park in a flood plain/wetland area without assessing the short- or long-term adverse effects, in violation of NEPA, Executive Order 11988 ("Floodplain Management"), and the Clean Water Act. Allegation 11 states that, "because of a litany of inaccurate, misleading drawings, maps and other documents presented by the licensee to FERC, it appears that the location of the proposed park and other aspects of the alleged [section] 106 process are being biased in favor of the licensee and the developer by such obvious inaccuracies."⁴⁰

39. AmerenUE responds that any man-made aspects of the park – the parking area and trail – will not occupy wetlands, and categorically rejects Complainants' unspecified assertions regarding inaccurate documents.⁴¹ As explained earlier, NEPA and the executive order apply to federal agencies and not to private entities, and the Commission has no authority to enforce the Clean Water Act in the circumstances presented here. Complainants have not indicated any specific problems with the location of the proposed park, and we find no evidence of bias in the section 106 process discussed above.

⁴⁰ Complaint at 6.

⁴¹ In their response, Complainants state that the plat of a survey filed with Pebble Creek's application to construct the seawall shows the Duncan Road out of alignment, with a proposed realignment that had not occurred. *See* Complainants' Rebuttal at 10; *see also* Complainants' Exhibit 32 (filed April 20, 2005). They further state, without elaboration, that this had the potential of biasing AmerenUE and Commission decisions on the seawall, discharge pipe, access point, the park, and the entire mitigation plan. It is difficult to understand how this might be the case. Complainants also mention Exhibit 49 of their April 20, 2005 Filing, which they state shows an AmerenUE representative pointing out a red marker designating project boundaries only inches from the lake front of the developer's house. However, the lake is not visible in the photograph, and Complainants do not otherwise explain how this demonstrates any inaccuracies in the maps presented by the developer or the licensee. In any event, AmerenUE has until September 7, 2006, to determine whether any property within the Pebble Creek development is below the 664-foot contour line and, if so, to include it within the project boundary. *See* staff's letter order of September 7, 2004, at 4.

40. Finally, Allegation 10 of the complaint states that the licensee's failure to honor its contractual obligations with the Commission relative to the project boundaries continues "to deny African American residents access to the shoreline in their own historic district" and has "subjected residents to posted 'no trespass signs' on project boundaries, racial slurs, intimidation and attempts of wrongful prosecution, all in violation of Article 18 of the [license] and or Title VI of the Civil Rights Act."⁴² In response, AmerenUE "categorically rejects the reckless charge that it has violated the Civil Rights Act, which the Commission has no jurisdiction to administer or enforce."⁴³

41. As discussed above, Commission staff has directed the construction of a public walkway adjacent to the seawall to ensure public access to the shoreline, as required by license Article 18. In addition, staff directed the immediate removal of all signage references to no-fishing on Pebble Creek. Although it appears from some of the documents attached to the complaint that Complainants may have had some difficulties with the developer and the licensee, we have no authority to address these allegations, because the Supreme Court has held that the Commission has no authority under the FPA to prohibit or enforce alleged civil rights violations by its licensees.⁴⁴

G. The Request for Relief

42. Complainants make ten specific requests for relief. These are summarized and addressed below.

43. First, Complainants request that we require the licensee to produce an accurate survey of project boundaries. The Commission has already required this.⁴⁵

⁴² Complaint at 6.

⁴³ AmerenUE's Response at 12.

⁴⁴ See *NAACP v. FERC*, 425 U.S. 662 (1976)(Commission has no authority under the FPA to prohibit discriminatory employment practices or to enforce alleged violations of the Civil Rights Act, but may consider the economic effects of such discrimination as part of its ratemaking authority under the Natural Gas Act).

⁴⁵ See request for additional information from Edward A. Abrams, FERC, Schedule A at 10, item 12, which directs AmerenUE to provide, in accordance with recently-revised filing requirements, a GIS electronic file that shows the project boundary as a continuous closed polygon with 72 reference points (October 5, 2004).

44. Second, Complainants request that we order the licensee to immediately cease authorizing the building of structures within project boundaries, and to remove such structures in the Pebble Creek development; specifically, the seawall, the two boat docks, and the effluent discharge pipe. As noted, Commission staff has directed the licensee to file a compliance plan and to file compliance reports every four months for one year. This should be sufficient to ensure that the licensee's permitting procedures fully comply with license Article 41. Construction of the walkway along the seawall will ensure adequate public access to the shoreline. There are other seawalls and boat docks in Duncan's Point, and we find no basis for requiring the removal of the seawall, boat docks, or discharge pipe.

45. Third, Complainants request that we order the licensee to retrieve project land acquired by the developer through backfilling. If the developer has acquired any land below the 664-foot contour, Commission staff's letter order of September 7, 2004, requires the licensee to obtain it and place it in the project boundary.

46. Fourth, Complainants request that we order the licensee to remove any and all fill dirt from wetland areas. As discussed above, AmerenUE is consulting with the Corps regarding whether there are any wetlands within the project boundary. If the results of that consultation indicate a need for further action, we will consider what action may be appropriate.

47. Fifth, Complainants request that we order the licensee to comply with federal requirements of the Clean Water Act, NEPA, FPA and NHPA. As discussed above, Complainants have not shown that the licensee has violated any requirements of the Clean Water Act or the FPA. NEPA and the NHPA apply to federal agencies, not private entities.

48. Sixth, Complainants request that we order the licensee to include public participation in all aspects of development that impact the "historic, ecological, environmental, and property rights of residents of Duncan's Point."⁴⁶ The record of this proceeding demonstrates that there have been numerous opportunities for public involvement, not only in the section 106 process of the Commission and the Corps, but also in connection with the Environmental Protection Agency's consideration of

⁴⁶ Complaint at 13.

Complainants' environmental justice complaint (which EPA denied)⁴⁷ and the state's process for issuance and appeal of permits for the wastewater treatment facility. We find no basis for ordering any further public participation with respect to the subject matter of this proceeding.

49. Seventh, Complainants request that we order the licensee to cease granting discharge easements for "sand filter" waste water treatment plants. The Commission has no jurisdiction over the authorization of such wastewater treatment facilities outside of licensed project boundaries, and Article 41 of the license authorizes the licensee to grant easements for them after notifying the Commission. Commission staff found that the discharge pipe easement would not adversely affect Duncan's Point. We find no basis for granting the requested relief.

50. Eighth, Complainants request that we order the licensee to stop presenting misleading and inaccurate drawings and documents that would tend to distort or bias any mitigation plans against the residents of Duncan's Point. As discussed above, we have difficulty understanding this allegation, and find no basis for granting this request.

51. Ninth, Complainants request that we order the licensee to cease all construction of parks, walkways, etc., until the residents are included in the plan or a fair and impartial hearing is held. Tenth, Complainants request that we order the licensee to cease all efforts to establish a public access point in Duncan's Point resort. These measures were required by Commission staff's mitigation plan, and Complainants have not indicated why they might be unacceptable or unfair. We find no basis for ordering that these measures be discontinued.

⁴⁷ See EPA Environmental Justice Determination and Report at 13 (December 18, 2003), which states: "EPA has concluded that though there is a significant minority population which resides in the Duncan's Point Resort community, there is no evidence of disproportionate environmental burden upon this community resulting from the proposed wastewater treatment plant." A copy of the report is provided as Appendix C to AmerenUE's answer to the complaint (filed March 24, 2005).

The Commission orders:

The complaint filed on March 24, 2005, by Duncan's Point Lot Owners Association, Inc.; Duncan's Point Homeowners Association, Inc.; and Nancy A. Brunson, Juanita Brackens, Helen Davis, and Pearl Hankins, individually, is denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.