

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellingshoff.

Union Electric Company d/b/a AmerenUE

Project No. 459-163

ORDER GRANTING APPLICATION
FOR NON-PROJECT USE OF PROJECT LANDS

(Issued April 20, 2007)

1. In this order, we grant an application filed by AmerenUE, licensee for the Osage Hydroelectric Project No. 459, for non-project use of project lands. The application is opposed by Duncan's Point Lot Owners Association, Inc.; Duncan's Point Homeowners Association, Inc.; and Nancy A. Brunson and Pearl Hankins, individually (Duncan's Point Owners). The applicant seeks approval to allow the use of approximately 160 square feet of project lands for construction of part of a deck at a residence which (except for a portion of the proposed deck) is located outside the project boundary. For the reasons discussed below, we grant the application.

Background

2. The 176.2-megawatt Osage Project is located on the Osage River in south central Missouri. The Project reservoir, Lake of the Ozarks, extends 93 miles upstream from the dam and covers more than 55,000 acres, with a shoreline of some 1,150 miles. On March 30, 2007, in a separate proceeding, Commission staff issued a new 40-year license to AmerenUE for continued operation and maintenance of the project.¹

3. The application at issue relates to construction of the Pebble Creek development, a private development of lake-front homes located outside the project boundary and in or near Duncan's Point resort. Commission staff has reviewed several allegations

¹ See *Union Electric Co.*, 118 FERC ¶ 62,247 (2007).

concerning construction activity within the project boundary in connection with the Pebble Creek development. In 2004, staff reviewed an allegation of unauthorized construction of a seawall and wastewater discharge pipe. In a September 7, 2004 letter, staff found the licensee in violation of article 41 of the license and required the licensee to file a compliance plan and a public access plan.² As discussed in more detail in several of our previous orders, Duncan's Point Owners subsequently filed a complaint concerning those matters, which we denied.³ In 2005, Commission staff investigated an allegation of unauthorized construction of a residence and a porch on lot 15 of the Pebble Creek development. Staff found that the residence was located outside the project boundary, but a corner of the porch encroached on the boundary. The licensee filed an application for non-project use of project lands to authorize the porch, which Commission staff granted on April 4, 2006.⁴ In 2006, Commission staff investigated an allegation of unauthorized fill and vegetation removal. Staff conducted a site visit on January 9, 2006, to document the shoreline issues raised by Duncan's Point residents.⁵ In a February 1, 2006 letter, staff found the licensee in violation of article 41 of the license for failure to properly permit and control uses of project lands and waters, and

² See letter to David Fitzgerald, AmerenUE, from John Estep, FERC (September 7, 2004).

³ See *Duncan's Point Lot Owners Association, et al. v. Union Electric Co.*, 111 FERC ¶ 61,190 (2005) (order denying complaint), *reh'g denied*, 112 FERC ¶ 61,289 (2005); *Union Electric Co.*, 114 FERC ¶ 61,038 (2006) (order denying rehearing); *Union Electric Co.*, 116 FERC ¶ 61,045 (2006) (order denying rehearing). Judicial review of these decisions is pending. See *Duncan's Point Lot Owners Ass'n v. FERC*, No. 05-1421 (D.C. Cir. filed November 10, 2005), No. 06-1157 (D.C. Cir. filed May 1, 2006), and No. 06-1325 (D.C. Cir. filed September 18, 2006). The cases have been consolidated under Docket No. 05-1421. The present application involves a matter that was not at issue in our earlier orders.

⁴ See *Union Electric Co.*, 115 FERC ¶ 62,008 (2006).

⁵ See Memo to files from Lorance Yates, FERC (filed January 9, 2006). As described in the memo, the site visit included observation of the public access sites and stone walkway along the shoreline of the Pebble Creek development, which had been the subject of earlier complaints. It also addressed new allegations of unauthorized construction and related actions within the project boundary.

article 19 of the license for failure to take reasonable precautions to prevent soil erosion.⁶ Staff subsequently advised the licensee to carefully review all non-project uses of project land and waters to determine if these uses are consistent with the license and the Commission's regulations.⁷

4. On July 14, 2006, AmerenUE filed the application for which it now seeks approval; to allow the use of approximately 160 square feet of project lands for the construction of part of a deck associated with a residence located outside the project boundary on lot 10 of the Pebble Creek development. The licensee stated that the encroachment of the deck would not affect any project purposes.

5. On August 14, 2006, Duncan's Point Owners filed a motion to intervene with comments and objections to the application.⁸ Among other things, they stated that the proposal impacts access to the shoreline, recreational use, cultural resources, and historic preservation, and objected to the licensee's and the Commission's failure to provide public notice of the application or service to Duncan's Point residents.

6. On October 19, 2006, Commission staff issued public notice of the application, establishing a deadline of November 20, 2006, for the filing of comments, motions to intervene, and protests. As discussed in more detail below, comments were received from the homeowners in question and the company that built the residence.⁹ Duncan's Point Owners filed a second motion to intervene with comments, recommendations for

⁶ See letter to Gary Rainwater, AmerenUE, from John Estep; FERC (issued February 1, 2006).

⁷ See letter from John Estep, FERC, to Gary Rainwater, AmerenUE (filed June 6, 2006).

⁸ See Duncan's Point Owners' first motion to intervene (filed August 14, 2006).

⁹ See letter from Mike and Vickie Stephens (owners) to Magalie Salas, FERC (filed November 16, 2006); letter from James Maher (co-owner) to Magalie Salas, FERC (filed November 17, 2006); and letter from Dustie Barns, Lakeside Quality Homes, Inc. to Magalie Salas, FERC (filed November 20, 2006).

terms and conditions, and a protest.¹⁰ The U.S. Department of the Interior filed a letter indicating that it had reviewed the application and had no comments.¹¹

Discussion

7. As a general matter, the project boundary must include all lands necessary for operation and maintenance of the project and for other project purposes, such as recreation, public access, shoreline control, flowage, or protection of environmental resources.¹² Existing residential, commercial, or other structures may be included in the project boundary only to the extent that underlying lands are needed for project purposes.¹³ Conversely, construction of residential structures within the project boundary is not consistent with the Commission's regulations, and the Commission has the authority, in appropriate cases, to order that such structures be removed, or that the underlying lands be excluded from the project boundary.¹⁴

¹⁰ See Duncan's Point Owners' second motion to intervene (hereafter, Duncan's Point Owners' comments) (filed November 20, 2006).

¹¹ See letter from Robert Stewart, Interior, to Magalie Salas, FERC (filed November 16, 2006).

¹² See 18 C.F.R. § 4.41(h) (2006); see generally 18 C.F.R. §§ 4.51(h), 4.61(f), 5.18(a)(5), and 16.9(b), all of which require applicants to file an Exhibit G that is consistent with § 4.41(h) (2006).

¹³ *Id.* at § 4.41(h)(2) (2006).

¹⁴ See, e.g., *East Bay Municipal Irrigation District*, 64 FERC ¶ 61,043 (1993), *on reh'g*, 66 FERC ¶ 61,199 (1994) (requiring the exclusion from the project of all long-term tenants, either by relocating residential structures, such as privately-owned mobile homes and recreational vehicles, to an area outside the project boundary, or by redrawing the project boundary to exclude lands on which permanent mobile-home parks were located); *Public Utility District No. 2 of Grant County, Washington*, 88 FERC ¶ 61,012 (1999), *reh'g denied*, 89 FERC ¶ 61,177 (1999), *aff'd sub nom. Crescent Bar Homeowners Ass'n v. FERC*, 248 F.3d 1170 (9th Cir. 2001) (affirming without published opinion Commission's decision not to remove from the project boundary lands underlying a condominium complex located on a island within the project reservoir without first undertaking a comprehensive investigation into whether the underlying lands were needed for project purposes); *Brazos River Authority*, 11 FERC ¶ 61,345 (1980) (requiring a minimum 25-foot-wide horizontal shoreline control strip for

(continued)

8. In post-licensing compliance matters such as this, the Commission will generally entertain motions to intervene and requests for rehearing only when the filing or order entails a material change in the plan of project development or in the terms of the license, or would adversely affect the rights of a property holder in a manner not contemplated by the license.¹⁵ Although the subject matter of the application in this case is one that might not ordinarily require prior notice, in this case, in view of Duncan's Point Owners' repeated expressions of concern regarding the Pebble Creek development and its effects on their property interests in Duncan's Point resort, Commission staff determined that public notice of the application was appropriate.¹⁶

9. In their comments in response to the notice, Mike and Vicki Stephens and James Maher, co-owners of the residence in question, request Commission approval to construct the deck that their home was designed to include. They state that the deck will not restrict access to the shoreline or interfere with recreational use at the project. They add that the deck as proposed would still allow over thirty feet of clearance from its end to the water's edge when the lake is at its normal elevation of 660 feet.¹⁷

10. Dustie Barns, whose company built the residence, filed comments asserting that when construction began on this home, "permits were being issued to build decks and

protection of reservoir and shoreline, despite the location within the strip of several hundred private residences).

¹⁵ See *Kings River Conservation District*, 36 FERC ¶ 61,365 (1986). The Commission will also entertain interventions and requests for rehearing in proceedings commenced pursuant to a license article if the entity seeking intervention is specifically given a consultation role in the license article. See *Pacific Gas & Electric Co.*, 40 FERC ¶ 61,035 (1987).

¹⁶ Duncan's Point Owners take issue with the fact that, initially, the applicant did not serve copies of its application, and the Commission did not issue notice of it. Each post-license compliance filing is a separate matter. Nothing in our rules or the license required the licensee to serve copies of its amendment request. Given that Duncan's Point Owners have intervened in this proceeding, their procedural arguments are moot.

¹⁷ See letter from Mike and Vicki Stephens to Magalie Salas, FERC (filed November 17, 2006), and Letter from James Maher to Magalie Salas, FERC (filed November 17, 2006).

patios below the 664' level.”¹⁸ He adds that he never received notice from AmerenUE or the Commission that AmerenUE had been requested to stop issuing permits for this type of use. He further maintains that, if this one permit is granted, “all other homes will be set back far enough, so this issue will not come up again.”¹⁹

11. Duncan’s Point Owners raise numerous objections to the application and urge us to deny it. They assert that allowing this non-project use will block access to the shoreline, affect recreational uses, and interfere with the historic and environmental integrity of their property, and that it is “but a continuation of the licensee’s efforts in collusion with the developer to undermine the integrity of the Duncan’s Point resort.”²⁰

12. We find no basis for concluding that allowing a portion of this deck to be constructed on project lands will block access to the shoreline or affect recreational uses. As discussed in our previous orders, to mitigate for the construction of a 330-foot section of seawall on project land adjacent to the Pebble Creek development, and to ensure continued public access to the shoreline for recreational use, the Commission required AmerenUE to construct and maintain a walkway along the shoreline near the seawall. The use of this parcel of land for part of a deck will not interfere with the walkway because the walkway is not in front of the residence in question. This use also will not impede public access for recreational use of the shoreline.

13. Similarly, we find no basis for concluding that the presence of this portion of a deck on project lands will adversely affect the historic or environmental integrity of Duncan’s Point resort. The amount of land to be occupied is small in relation to the entire Pebble Creek development, and the addition of approximately 160-square feet of decking to one of the houses will not significantly affect the overall appearance of the Pebble Creek development, or alter in any meaningful way the effects of that development on the Duncan’s Point resort. Duncan’s Point Owners do not explain their argument, nor can we determine how allowing the deck to be added to an existing house could in significant way affect the historic or environmental integrity of Duncan’s Point.²¹

¹⁸ Letter from Dustie Barns, Lakeside Quality Homes, Inc., to Magalie Salas, FERC (filed November 20, 2006).

¹⁹ *Id.*

²⁰ Duncan’s Point Owners’ comments at 2 (filed November 20, 2006).

²¹ Duncan’s Point Owners argue that the application provides inadequate

14. Duncan's Point Owners contend that much of the house on lot 10 is also within the project boundary, and that the licensee has already illegally authorized other houses, a seawall, decking, and boat dock moorings. They maintain that these structures block public access to the shoreline, in violation of articles 19 and 41 of the license. Duncan's Point Owners provide no support for their allegation regarding the house on lot 10. The July 14, 2006 amendment application includes a drawing that depicts the location of the existing home and proposed deck in relation to the project boundary. It clearly shows that the only structure on lot 10 that is proposed to be located within the project boundary is the deck portion that is the subject of this amendment application. We disposed of issues concerning the seawall in our previous orders, and we need not revisit them here.²² Duncan's Point Owners provide no basis for their allegations regarding other structures.

15. Duncan's Point Owners also argue that the application is deceptive because it seeks after-the-fact approval for a land use that already exists. In support, they cite the report of Commission staff's site visit conducted on January 9, 2006, during which staff observed that a porch, part of a new residence, was located partly within the project boundary, and that a section of shoreline for two new home lots had soil and stone placed within the project boundary and below the Lake Osage full pool level.²³ Duncan's Point

information, because it fails to mention that "Pebble Creek is within the boundaries of a historic Duncan's Point community." Duncan's Point Owners' comments at 4. As noted in our previous orders, Duncan's Point was founded by Daniel Ralph Duncan in 1952 as an African-American resort, and it is eligible for listing in the National Register of Historic Places. In support of their argument here, Duncan's Point Owners cite a letter from John Estep, FERC, to John Fowler, Advisory Council on Historic Preservation, which they identify as being dated January 6, 2006, but which is actually dated one year earlier (January 6, 2005). This letter does not pertain to the application now before us. Rather, it provides additional information and requests the Advisory Council's comments on staff's earlier conclusion that the seawall and discharge pipe were not adverse effects on the historic integrity of Duncan's Point. Duncan's Point Owners seem to be suggesting that we should deny this application because it will adversely affect their historic community. To the contrary, we find that allowing this deck portion to be built will not adversely affect the historic values of Duncan's Point.

²² See *Duncan's Point Lot Owners' Association, et al. v. Union Electric Co.*, 111 FERC ¶ 61,190 at P 12-31, 44 (2005), *reh'g denied*, 112 FERC ¶ 61,289 at P 6, 8, 11-13, 19-21 (2005).

²³ See Memo to files from Lorance Yates, FERC, at 1 (filed January 9, 2006).

Owners maintain that this report shows that the house on lot 10 was already in existence and that the porch shown in the accompanying photograph had already encroached on the project boundary. Duncan's Point Owners have confused two different findings of the report. The porch discussed in the report is part of the residence on lot 15, and was the subject of Commission staff's April 4, 2006 order authorizing the non-project use. The two lots on which soil and stone were placed are at a different location altogether. There is no evidence to suggest that the deck proposed for the house on lot 10 has already been constructed.²⁴

16. Duncan's Point Owners argue that the application is a violation of the licensee's regulations that forbid habitable structures within the project boundary. They further maintain that the application is inconsistent with the license, the standard land use article, and the licensee's shoreline management plan.²⁵ As discussed above, our regulations

²⁴ The porch and residence are shown in photographs 1 through 3 of the report, whereas the soil and stones that were placed in front of two lots (one vacant, and one with a house under construction) are shown in photographs 4 through 6. A map accompanying the report shows that these two sets of photographs were taken at two different locations. *Id.* at 4-6. Duncan's Point Owners further maintain that the licensee filed a deceptive response to Commission staff's letter of January 5, 2006, which requested information concerning an allegation of unauthorized construction within the project boundary. *See* letter to Warren Witt, AmerenUE, from John Estep, FERC (filed January 5, 2006); and letter from Mark Jordan, AmerenUE, to Magalie Salas, FERC (filed January 20, 2006). Specifically, Duncan's Point Owners argue that the licensee did not provide a photograph as requested, and they allege that a GIS image submitted with the response appears to have part of the project boundary line in front of lot 10 removed. As noted above in the background section of this order, Commission staff reviewed the licensee's response in its letters of February 1, 2006, and June 6, 2006, and did not request any additional information. *See* letters to Gary Rainwater, AmerenUE, from John Estep, FERC (filed February 1, 2006, and June 6, 2006). The licensee filed the application that is now before us on July 14, 2006. Duncan's Point Owners may not use their comments on this application to seek to challenge the adequacy of a filing made nearly six months earlier in a separate proceeding. In any event, they do not explain why the earlier filing should cause us to deny the application.

²⁵ The licensee does not currently have an approved shoreline management plan, but is operating under its shoreline management guidelines. Article 417 of the new license requires the licensee to file its shoreline management plan for Commission review and approval within one year of license issuance. *See Union Electric Co.*, 118 FERC ¶ 62,247 at P 60 (2007).

provide that residential structures should not be included within the project boundary unless the underlying lands are needed for project purposes. However, this does not preclude a licensee from requesting, or the Commission from authorizing, some non-project use of project lands, provided that it will not significantly interfere with project purposes. Here, the lands are needed for flowage and shoreline management, so removal of them from the project boundary would not be appropriate. However, allowing this non-project use will allow the homeowners to complete their residence as planned, without significantly affecting these project purposes.²⁶

17. Duncan's Point Owners maintain that the application is contrary to the licensee's assurance, in correspondence regarding its relicense application, that the project boundary at the Pebble Creek development would not change and would remain at the 664-foot elevation contour.²⁷ This argument is not correct. The amendment application does not include a proposal to change the project boundary. Therefore, granting it would not change the project boundary in any way. Rather, it would allow a non-project use of some project lands within the project boundary.

18. Duncan's Point Owners recommend that, "because of the proposed drastic change in land use in combination with residential construction within and on project land," an

²⁶ Duncan's Point Owners also argue that the land to be conveyed has recreational and cultural value, would create a nuisance, and would unduly restrict public access. Duncan's Point Owners' comments at 4. No land will be conveyed as a result of granting this application. The land will remain within the project boundary and will not change ownership. Only the non-project use will be authorized. In view of the small amount of land that is involved, its recreational and cultural value is not significant. As we have found, public access to the shoreline will continue to be ensured, and should improve as a result of the additional measures that we require in this order.

²⁷ See letter from Mark Jordan, AmerenUE, to Magalie Salas, FERC, at 4 (filed June 20, 2006). The letter provides additional information and clarification of the licensee's proposal to amend some parts of the project boundary as part of its relicense application. Among other things, the letter clarifies that the licensee is not requesting any changes to the elevation contour-based portion of the project boundary. Commission staff recently granted AmerenUE's application for a new license, but found that the licensee had not provided sufficient information to justify its proposal to remove some lands from the project boundary. See *Union Electric Co.*, 118 FERC ¶ 62,247 at P 95 (2007). Therefore, any future proposals to remove land from the project boundary will require a license amendment.

environmental assessment (EA) should be prepared for this application.²⁸ We disagree. Under section 380.4(19) of our regulations, an EA is not required for approval of proposals to authorize the use of project lands or waters for “piers, landings, boat docks, or similar structures and facilities.”²⁹ A deck is similar in structure to a boat dock and its construction involves a similar level of environmental effects. Therefore, we conclude that a deck is a “similar structure” that is categorically excluded from the requirement to prepare an EA under this regulation.

19. Duncan’s Point Owners further recommend that, because the licensee filed this application for a proposed land use “after the fact” and previously authorized construction of another residence within the project boundary on lot 15, the Commission should assess civil penalties.³⁰ As explained earlier, there is nothing in the record to support the allegation that the deck proposed for the house on lot 10 has already been constructed. Moreover, only a portion of the porch for the residence on lot 15 was constructed within the project boundary, and Commission staff subsequently approved the non-project use. We do not believe that these circumstances would warrant the imposition of civil penalties. As explained below, however, we will require additional measures to ensure that public access to the shoreline is maintained and improved, and to prevent any further residential structures at the Pebble Creek development from encroaching on the project boundary.

20. Finally, Duncan’s Point Owners recommend that, in light of AmerenUE’s past and present compliance history, the licensee should be required to develop a hydropower compliance management program. This is a requirement of article 501 of the new license that staff recently issued for the project. However, as discussed in more detail below, we will also require a compliance management plan that is specific to the shoreline area at the Pebble Creek development.

²⁸ Duncan’s Point Owners’ comments at 5-6.

²⁹ *Id.*

³⁰ *Id.* at 6. Duncan’s Point Owners further request that the application be denied, “with full restoration and removal to insure that Duncan’s Point residents and the public [have] continuous and full access to the shoreline along the entire Pebble Creek area of Duncan’s Point resort.” *Id.* As noted, the proposed deck has not yet been constructed, so there is nothing to remove. Continued public access to the shoreline can be assured without denying the application.

21. As discussed in our previous orders, nearly all of the Pebble Creek development is located outside the project boundary and is therefore beyond our jurisdiction to regulate. Our primary concern is with the repeated encroachment onto project lands of residential and other structures associated with the Pebble Creek subdivision. As noted, Commission staff previously required the licensee to mitigate the impacts of the concrete seawall by installing a public access path along the seawall and developing public access points at two locations within the vicinity of the Pebble Creek subdivision. With this order, we are requiring additional measures to mitigate the impacts of this proposal, to offset any cumulative impacts to public access resulting from the previous residential encroachment on lot 15, and to ensure that no further encroachment will occur.

22. We are requiring the licensee to improve the public access area located at the crossroads of the Pebble Creek development and Duncan's Point resort. Specifically, we will require that the licensee surface a portion of the access area from the road to the water to ensure all-weather access. In addition, we are requiring the licensee to construct a removable courtesy dock at the end of this access path. In order to minimize potential environmental impacts associated with asphalt and other conventional road surfaces, the licensee should use permeable pavement or other appropriate materials. The licensee should also ensure that the final design does not affect the existing roadway or ingress to the public access area. The licensee must complete this improvement within 60 days of this order.

23. Further, to prevent future impacts to public access along the remaining shoreline at the Pebble Creek subdivision, we will require that the licensee develop and implement a compliance management and monitoring plan for the shoreline at the Pebble Creek development.³¹ The plan should include measures to ensure that all future construction at the Pebble Creek development does not encroach into the project boundary, including meetings with all Pebble Creek lot owners to identify the project boundary, site inspections with the developer prior to any future construction, a schedule for monitoring construction within the project boundary at Pebble Creek, and a plan for inspection of the area once construction has been completed. The plan should also include measures to ensure that all disturbed land within the project boundary is properly revegetated and public access retained. The licensee must file its plan for Commission review and approval within 60 days of this order.

³¹ This plan for the Pebble Creek shoreline area is in addition to the hydropower compliance management plan and program that are required by article 501 of the new license. See *Union Electric Co.*, 118 FERC ¶ 62,247 at P 112 (2007).

The Commission orders:

(A) The application for non-project use of project lands, filed by AmerenUE on July 14, 2006, is granted.

(B) The licensee shall improve the public access area at the crossroads of the Pebble Creek subdivision and Duncan's Point resort. The licensee shall surface a portion of the access area from the road to the lake to ensure all-weather access. In addition, the licensee shall construct a removable courtesy dock at the end of this access path. In order to minimize potential environmental impacts associated with asphalt and other conventional road surfaces, the licensee should use permeable pavement or other appropriate materials. The licensee should also ensure that the final design does not affect the existing roadway or ingress to the public access area. The licensee shall complete the improvement within 60 days of this order. Within 15 days of completing construction, the licensee must file photographic documentation of the completed improvements, including photographs taken prior to the surfacing of the parking area.

(C) To prevent future impacts to public access along the remaining shoreline at the Pebble Creek subdivision, the licensee shall develop a compliance management and monitoring plan for the shoreline at the Pebble Creek development. The plan shall include:

(1) Measures to ensure that future construction at the Pebble Creek subdivision does not encroach into the project boundary, including meetings with all Pebble Creek lot owners to identify the project boundary, site inspections with the developer prior to any future construction, a schedule for monitoring the shoreline construction, and a plan to inspect the area once construction has been completed.

(2) Measures to ensure that all disturbed land within the project boundary is properly revegetated and public access retained.

The licensee shall file a copy of the plan for Commission review and approval within 60 days of this order.

By the Commission.

(S E A L)

Kimberly D. Bose
Secretary