



## **Background**

2. As described in our May 9 Order, the 176.2 megawatt Osage Project is currently undergoing relicensing. The project reservoir, Lake of the Ozarks (Lake), extends 93 miles upstream from the dam and covers more than 55,000 acres, and its many long branches and coves create a shoreline of some 1,150 miles. The complaint at issue here concerns matters related to the Pebble Creek development, a private development of lake-front homes located outside the project boundary and in or near Duncan's Point resort, founded by Daniel Ralph Duncan in 1952 as an African-American resort.<sup>2</sup> Duncan's Point occupies a peninsula bordered by the Lake and Lick Creek Cove, in Camden County, and is eligible for listing in the National Register of Historic Places (National Register).

3. Complainants first brought their concerns about the Pebble Creek development to Commission staff informally. 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 making certain compliance findings regarding the licensee's authorization of the developer to construct a seawall and effluent discharge pipe in connection with the Pebble Creek development. At that time, staff ordered the licensee to make compliance filings and take actions designed to ensure public access to the shoreline. Complainants did not seek rehearing of staff's September 7, 2004 Order. Instead, on October 7, 2004, Complainants filed comments in opposition to staff's letter order. AmerenUE made filings in response to the September 7, 2004 Letter Order on October 8, 2004, November 15, 2004, and December 3, 2004. On February 23, 2005, staff issued a letter order making certain findings regarding the adequacy of the licensee's filings in response to staff's September 7, 2004 Order. Again, Complainants did not seek rehearing of staff's letter order. Instead, on March 4, 2005, they filed a formal complaint against the licensee. On May 9, 2005, we denied the complaint on the grounds that it duplicated matters already examined and resolved by Commission staff.<sup>3</sup> Complainants now seek rehearing of that order.

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<sup>2</sup> As discussed in our order of May 9, 2005, Complainants and the developer of Pebble Creek disagree with respect to whether the Pebble Creek development is or was ever part of Duncan's Point resort. We found no need to decide this issue, because these developments are outside the project boundary and our authority is limited to the licensee and its compliance with the terms of the license. See 111 FERC ¶ 61,190 at PP 26-27.

<sup>3</sup> 111 FERC ¶ 61,190 (2005).

## Discussion

### A. Preliminary Matters

4. Under section 206 of the Commission's regulations, any person may file a complaint against any other person alleged to be in violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.<sup>4</sup> However, a complaint may not be used to circumvent the Commission's rules regarding intervention and rehearing in post-licensing compliance matters.<sup>5</sup> If Complainants were not satisfied with the findings and directives of staff's letter orders of September 7, 2004, and February 23, 2005, they should have sought rehearing of those decisions. Instead, they elected to file a complaint. Thus, to the extent that Complainants now seek review of completed staff actions as set forth in those letter orders, their request is untimely and must be rejected. On rehearing of our order of May 9, 2005, Complainants may challenge our disposition of their complaint, but they may not now seek rehearing of completed staff actions regarding the issues disposed of in staff's earlier, and now final, letter orders.

5. Complainants argue that our order denying their complaint was a "rush [to] judgment based on controverted facts, untruths and biased evidence which is unfairly favoring the Licensee and the developer."<sup>6</sup> They add that "the facts are so grossly in dispute that the Order has not met the most minimal requirements of procedural due process."<sup>7</sup> In support, they maintain that the order finds no fault on the part of the

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<sup>4</sup> See 18 C.F.R. § 385.206(a).

<sup>5</sup> See 18 C.F.R. §§ 385.214 (intervention) and 385.713 (request for rehearing). As a general matter, in proceedings on compliance matters arising after issuance of a license, the Commission will 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. 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).

<sup>6</sup> Request for rehearing at 1.

<sup>7</sup> *Id.*

licensee or the developer, and omits “staff complicity with the Licensee against the [Duncan’s Point] residents, in addition to staff’s promotion of a totally flawed and unfair mitigation plan over the repeated objections of [Duncan’s Point] residents.”<sup>8</sup>

6. As recited in the background section of our May 9 Order, Complainants brought their concerns to the attention of Commission staff years ago, and staff attempted to resolve those concerns informally. The record shows that Complainants have had numerous opportunities to bring their concerns to the Commission’s attention. Staff’s letter orders reflect a careful review of the facts and include mitigation measures designed to address the effects of the 300-foot seawall on public access to the lake. The fact that staff was unable to resolve Complainants’ concern does not suggest a rush to judgment or denial of due process.

7. Complainants argue that our order finds no fault on the part of the developer or the licensee in creating the situation discussed in the complaint. They maintain that the licensee has known from the outset that the developer wanted to build a seawall to establish a beach-front shoreline for the Pebble Creek development, and that the licensee acted in bad faith in granting a permit for a seawall that was not needed for erosion control. Complainants further argue that the licensee’s bad faith, deceit, and untruthfulness have misled the Commission and violated the constitutional rights of Duncan’s Point residents. They assert that the only way to attain the truth and protect their constitutional rights is for the Commission to refer this case to an Administrative Law Judge for a full evidentiary hearing.

8. In our May 9 Order, we reviewed staff’s findings that the licensee’s authorization of the seawall did not fully comply with the requirements of its license, because the licensee did not consider alternatives to a seawall or whether a seawall was necessary. We also reviewed staff’s findings that the licensee did not provide notice to the Commission before granting an easement for the effluent discharge pipe. Thus, our order considered the licensee’s actions and staff’s response to Complainants’ allegations. It also reviewed staff’s findings concerning the licensee’s compliance with the terms of its license. These facts are not in dispute. No purpose would be served by conducting an evidentiary hearing on the possible motivation of the licensee or the developer in this case.

9. Complainants next argue that Commission staff has been compliant and supportive of the licensee’s bad faith and untruthfulness. They maintain that the Commission’s “repeated avoidance of jurisdiction over most of the activities of the Licensee and the

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<sup>8</sup> *Id.*

Developer shows a calculated indifference and a perpetuation of the bias toward the industry.”<sup>9</sup> They also complain that various staff members have delayed taking action on their informal complaints, impeded the involvement of Duncan’s Point residents in the mitigation plan, and met with the licensee and the developer over their repeated objections.

10. These allegations were not part of the May 4, 2005 complaint, and were mentioned for the first time in Complainants’ April 19, 2005 rebuttal to the licensee’s answer. They are not related to the licensee’s compliance with the terms of its license, which is the subject of the complaint. For example, Complainants assert that the Commission’s Division of Hydropower Compliance and Administration prematurely approved the licensee’s mitigation plan without Complainants’ participation. Complainants’ rebuttal at 2-3 (filed April 24, 2004). However, the licensee filed its mitigation plan in response to Complainants’ concerns about public access to the shoreline, and neither the license nor staff’s letter order include any provision for consultation with Complainants or any other members of the public. Similarly, Complainants maintain that they terminated their relationship with a mediator from the Commission’s Dispute Resolution Service “because he was no longer a neutral or willing to abide by the original mediation terms and conditions.” *Id.* at 3. The apparent basis for this allegation is that the mediator met with the developer, over the objection of representatives of Duncan’s Point resort, as well as with the licensee and Duncan’s Point residents. However, it is common practice for mediators to meet with interested parties separately, as well as together, as part of the process of seeking to understand the parties’ opposing views. The remainder of Complainants’ arguments concerning staff’s alleged bias are too vague and unsupported to warrant further discussion.

### **B. National Environmental Policy Act**

11. Complainants argue that the Commission’s authority over AmerenUE’s approval of construction of a seawall and grant of an easement for an effluent discharge pipe across project boundaries triggered the Commission’s environmental evaluation responsibilities under the National Environmental Policy Act (NEPA). Complainants further maintain that, because these actions by the licensee were subject to the Commission’s control and responsibility, they constituted “major federal actions” within the meaning of section 102(2)(C) of NEPA and section 1508.18 of the regulations of the Council on Environmental Quality (CEQ), and therefore required the Commission to

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<sup>9</sup> Request for rehearing at 2.

prepare an environmental impact statement (EIS).<sup>10</sup> In the alternative, they argue that, at a minimum, the Commission was obliged to prepare an environmental assessment (EA) to determine whether those actions would significantly affect the quality of the environment.

12. In support of their argument, Complainants cite and discuss a number of cases in which a federal agency's responsibility or control over the actions of a non-federal entity were found to constitute a major federal action under NEPA.<sup>11</sup> Complainants confuse the concept of "major federal action" under NEPA with that of federal responsibility or control. The two are not interchangeable. An action by a nonfederal actor may be considered "federal" if it is subject to a federal agency's responsibility or control. Thus, our environmental regulations recognize that the actions of our nonfederal licensees can trigger the Commission's environmental responsibilities.<sup>12</sup> However, section 102(2)(C) of NEPA requires an EIS for "major Federal actions significantly affecting the quality of the human environment." Under CEQ regulations, an agency must prepare either an EIS or an EA (followed by a finding of no significant impact or an EIS) for all major federal actions that have not been categorically excluded.<sup>13</sup> Thus, a nonfederal action that is subject to the Commission's responsibility or control must also be sufficiently major in scope to trigger the requirement to prepare either an EA or an EIS.

13. The actions in this case, authorization of a seawall and an effluent discharge pipe, are neither major nor significant. Rather, as explained in our May 9 Order, these actions are considered sufficiently insignificant that the Commission permits its licensees, pursuant to its standard land-use article, to authorize them without prior Commission approval. They are also categorically excluded under our regulations from the

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<sup>10</sup> See 42 U.S.C. § 4332(C); 40 C.F.R. §1508.18.

<sup>11</sup> In support, Complainants cite *Ross v. Federal Highway Administration*, 162 F.3d 1046, 1052 (10<sup>th</sup> Cir. 1998); *Ramsey v. Kantor*, 96 F.3d 434, 446 (9<sup>th</sup> Cir. 1996); *Sierra Club v. Hodel*, 848 F.2d 1068, 1091-92 (10<sup>th</sup> Cir. 1988); *Bunch v Hodel*, 793 F.2d 129, 134-35 (6<sup>th</sup> Cir. 1986); and *RESTORE: The North Woods v. Dept. of Agriculture*, 968 F. Supp 168, 176-77 (D. Vt. 1997). Unlike the situation here, all of these cases involved major actions with potentially significant environmental effects, requiring the preparation of either an EA or an EIS.

<sup>12</sup> See generally 18 C.F.R. Part 380.

<sup>13</sup> See 40 C.F.R. § 1501.4.

requirement to prepare an environmental review document.<sup>14</sup> Accordingly, neither an EIS nor an EA was required in connection with these actions.

### **C. Clean Water Act**

14. Complainants argue that AmerenUE's approval of Pebble Creek's effluent discharge pipe, authorization of placement of fill dirt by Pebble Creek in a wetlands area, and proposed placement of a park in a wetlands area amounted to violations of the Clean Water Act (CWA), and that our May 9 Order did not properly consider these violations. Complainants concede that it is the responsibility of AmerenUE or the developer to obtain the necessary permits if their activities are regulated by the CWA. Specifically, they recognize that the Commission is not subject to the requirement to obtain a national pollutant discharge elimination system (NPDES) permit for the effluent discharge pipe under section 402(a) of the CWA, or a dredge and fill permit for the placement of fill material in wetlands under section 404 of the CWA. However, Complainants assert that AmerenUE's license "arguably imposes obligations on FERC to ensure that the licensee and Pebble Creek are in compliance" with these CWA provisions.<sup>15</sup>

15. As noted in our May 9 Order, the developer has obtained both a construction permit and an operating permit for its wastewater treatment facility. AmerenUE was therefore authorized under its license to grant an easement for the effluent discharge pipe. Complainants argue that it is unclear whether the permit authorizes the discharge of nitrogen or phosphorus, for which Missouri has not established standards. They assert that, if Pebble Creek has not disclosed that its wastewater treatment facility will discharge

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<sup>14</sup> See 18 C.F.R. § 380.4(19), which categorically excludes the following actions from the requirement to prepare either an EA or an EIS: "Approval of proposals under Part I of the Federal Power Act and Part 4 of [the Commission's regulations concerning licenses, permits, and exemptions] to authorize use of water power project lands or waters for gas or electric utility distribution lines, radial (sub-transmission) lines, communication lines and cables, storm drains, sewer lines not discharging into project waters, water mains, piers, landings, boat docks, or similar structures and facilities, landscaping or embankments, bulkheads, retaining walls, or similar shoreline erosion control structures." Although effluent discharge pipes from permitted wastewater treatment facilities are not expressly mentioned in the regulation, they are structures or facilities that are similar to storm drains, sewer lines not discharging into project waters, or water mains (because the effluent undergoes treatment at the wastewater treatment facility before it is discharged).

<sup>15</sup> Request for rehearing at 10.

these substances, their discharge might not be authorized under the permit. They further maintain that the Commission has the authority to prevent the licensee from authorizing the developer to use its permit until the developer has the necessary authorization. Complainants argue that this issue can be easily resolved by holding an evidentiary hearing.

16. Deciding this matter, either with or without an evidentiary hearing, would require the Commission to resolve issues concerning the developer's application for a discharge permit, the state's decisions authorizing construction and operation of the wastewater treatment facility, and the scope of activities authorized under the state-issued permit. These are issues involving the administration and enforcement of the CWA and are therefore outside the Commission's jurisdiction under the FPA. We note that Complainants have appealed the state's issuance of an operating permit for the wastewater treatment facility. Any issues concerning the validity of the permit or the discharges authorized therein can and must be raised either before the state permitting agency in the first instance, or on appeal of the state permit.<sup>16</sup>

17. Complainants suggest that the licensee and the developer may be in violation of section 404 of the CWA by dredging or filling wetlands without a permit.<sup>17</sup> They dispute the licensee's statement that neither the seawall nor the discharge pipe is located on wetlands, and that any man-made aspects of the park will not occupy wetlands. They add

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<sup>16</sup> Complainants argue that, because the appeal is still pending, the hearing officer has not yet made a recommendation to the Missouri Clean Water Commission for approval or disapproval of the permit. Request for rehearing at 11. The construction permit was issued on January 5, 2004, and the operating permit was issued on May 5, 2004. The permit was not stayed pending appeal and is therefore effective. If it is subsequently modified on appeal, the Commission can then consider whether any action may be required in connection with the modification.

<sup>17</sup> Request for rehearing at 13. Complainants' arguments concerning this issue are conditional and somewhat confusing. For example, they state: "The relevance of AmerenUE's and Pebble Creek's alleged noncompliance with the § 404 dredge and fill program is less clear than their alleged noncompliance with the NPDES permit program by Pebble Creek's wastewater treatment facility." *Id.* at 12. They also state: "If the Corps determines that the seawall, the area filled with dirt by Pebble Creek, or the area in which the park is to be located include wetlands regulated under the CWA's dredge and fill permit program, then AmerenUE and Pebble Creek have violated or are violating § 404 by dredging or filling wetlands without a permit." *Id.* at 13.

that the “Army Corps of Engineers required Pebble Creek to get a 404 permit which it has shown no evidence of providing.”<sup>18</sup>

18. In its September 7, 2004 Letter Order, staff required that AmerenUE request the Corps of Engineers to determine whether any property owned by Pebble Creek is, or was at the time of purchase, a wetland area and, if so, to designate such area in the Lake of the Ozarks’ shoreline management plan.<sup>19</sup> On July 11, 2005, the licensee made a filing in response to that letter order, stating that all wetlands in the Pebble Creek development area have been identified by Corps or National Wetland Inventory maps and will be included and designated as such in the shoreline management plan for the project. By letter issued on September 1, 2005, staff found that this response fulfilled part of the requirements of its letter order and directed the licensee to file additional information by September 30, 2005.<sup>20</sup> At this juncture, we find nothing in the record to indicate that the licensee’s actions are in violation of section 404 of the CWA. In any event, the Corps of Engineers is responsible for administration and enforcement of the section 404 permit program, and any allegations of noncompliance with that program should be brought to that agency’s attention.

### **C. National Historic Preservation Act**

19. Complainants argue that the Commission has indirect jurisdiction over the activities of the Pebble Creek developer, because AmerenUE authorized the developer’s activities pursuant to its Commission-issued license under the FPA. Complainants therefore maintain that, pursuant to section 106 of the National Historic Preservation Act (NHPA), the Commission was required to consult with Duncan’s Point residents concerning the adverse effects of the developer’s activities on the “historic fabric” of Duncan’s Point.

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<sup>18</sup> *Id.*

<sup>19</sup> Complainants assert that they have already presented evidence on the map from the licensee’s 2003 shoreline management plan that the proposed park is in a wetland area. *Id.* at 13, *citing* Exhibit 35 to Complainant’s rebuttal (filed April 19, 2005). Although this map does show some wetlands, it is unclear whether any of these wetlands are at the location of the park. As mentioned above, staff has required the licensee to file additional information concerning this issue by September 30, 2005. After reviewing the licensee’s response, staff will determine whether any further action may be required.

<sup>20</sup> *See* letter from John Estep, FERC, to Warren Witt, AmerenUE (dated September 1, 2005).

20. As discussed in our May 9 Order, the Commission fully complied with the requirements of section 106 of the NHPA with respect to the licensee's authorization of the seawall and effluent discharge pipe. Staff determined that the seawall and effluent discharge pipe had no adverse effect on the historic values of Duncan's Point, and requested comments from the Missouri State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation. The Missouri SHPO did not respond. The Advisory Council requested additional information regarding staff's finding of no adverse effect, which staff provided on January 6, 2005.<sup>21</sup> After receiving the requested information, the Advisory Council did not file a response. The Advisory Council's regulations implementing section 106 provide that, if the Advisory Council does not respond within fifteen days, the Commission may assume that the Advisory Council concurs with its finding of no adverse effect.<sup>22</sup> As a result, the Commission was not required to engage in consultation concerning the avoidance or mitigation of adverse effects.<sup>23</sup>

21. Complainants also suggest that, pursuant to section 110 of the NHPA, the Commission should not have granted a license to AmerenUE, or should not renew its existing license, because the licensee has allowed significant adverse effects to Duncan's Point, despite having the legal power to avoid such effects, by authorizing the developer to construct the seawall and install the effluent discharge pipe. Section 110 of the NHPA

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<sup>21</sup> Complainants' assertion that the Commission did not provide the Advisory Council with the requested information is therefore incorrect. *See* request for rehearing at 15.

<sup>22</sup> *See* 36 C.F.R. § 800.5(c)(3).

<sup>23</sup> Although the Missouri SHPO found that the Pebble Creek development would adversely affect the "historic fabric" of Duncan's Point, the SHPO made no similar findings with regard to the seawall or effluent discharge pipe. As explained in our May 9 Order, the Commission's jurisdiction is limited to the licensee's authorization of the seawall and discharge pipe. The Commission has no authority, direct or indirect, over the remainder of the Pebble Creek development, which is outside the project boundary and does not require any authorization from either the Commission or the licensee. It would serve no purpose for the Commission to engage in consultation concerning any possible adverse effects of the Pebble Creek development as a whole on Duncan's Point, because the Commission has no authority to require the developer to take any action to avoid or mitigate those effects.

requires a federal licensing agency to ensure that it will not grant a license “to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property . . . or, having legal power to prevent it, allowed such significant adverse effect to occur.”<sup>24</sup> Section 110 applies, by its express terms, to actions of an applicant prior to the agency’s grant of a federal license. Thus, it cannot be applied retroactively to AmerenUE’s existing license. The possible applicability of section 110 to AmerenUE’s application for a new license does not concern the licensee’s compliance with its existing license, and therefore has no bearing on this proceeding. Moreover, as discussed above, staff has found that the licensee’s authorization of the seawall and discharge pipe had no adverse effect on the historic values of Duncan’s Point. Therefore, section 110 is inapplicable to this proceeding.

22. Finally, Complainants now assert, for the first time, that AmerenUE has violated the terms of Article 29 of its license. That article requires the licensee to consult and cooperate with the SHPO, before beginning construction or development of any project works or other facilities at the project, to determine the need for and extent of any archaeological or historic resource surveys and any mitigation measures that may be necessary. Complainants maintain that Article 29 applies not only to the licensee’s construction or development of project works or other facilities at the project, but also to the development of “other facilities at the project” pursuant to the licensee’s authorization under Article 41. This is incorrect. Article 29 is a general provision that requires the licensee to consult with the SHPO before engaging in ground-disturbing activities that could damage or disrupt archaeological or historic resources. Article 41 is a more specific provision that authorizes the licensee to grant permission for certain types of use and occupancy of project lands and waters, and to convey certain interests in project lands and waters for certain other types of use and occupancy, without prior Commission approval. The consultation requirements of Article 29 do not apply to the licensee’s authorizations under Article 41; rather, the consultation requirements that apply to those authorizations are set forth in Article 41.

23. As Complainants correctly point out, Article 41(e)(1) requires the licensee to consult with federal and state fish and wildlife or recreation agencies, as appropriate, and the SHPO, before conveying any interest in project lands under paragraphs (c) or (d) of that article. Complainants argue that, because AmerenUE authorized the effluent discharge pipe under Article 41(d), the licensee was obligated to consult with these agencies. Consultation under Article 41(e)(1) must be “as appropriate,” taking into

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<sup>24</sup> 16 U.S.C. § 470h-2(k).

account the scope of the proposed authorization. While we agree that it might have been advisable for the licensee to consult with the SHPO before authorizing the right-of-way for the discharge pipe, staff's subsequent consultation pursuant to section 106 of the NHPA resulted in a determination of no adverse effect. Consequently, we find no need for any remedial action concerning this issue.

#### **D. Public Access Plan**

24. Complainants assert that, although the staff's letter order of September 7, 2004, requires the development of a park in one location, our May 9, 2005 Order describes a different location, and staff's letters of November 10, 2004, and February 23, 2005, fail to mention the development of the two-acre park.<sup>25</sup> They note that the February 23, 2005 letter directs the completion of these areas so that they could be open to the public for the start of the 2005 recreational season, and argue that "none of this has been resolved."<sup>26</sup>

25. These arguments relate to the terms of staff's letter orders and the adequacy of the licensee's compliance with them. As noted earlier, AmerenUE recently filed additional information in response to staff's letter order of September 7, 2004. Staff's letter order of September 1, 2005, found that the licensee's response was satisfactory with respect to some, but not all, of the outstanding compliance matters.<sup>27</sup> To the extent that Complainants have a quarrel with matters resolved in staff's September 7 Order, they have failed to timely seek rehearing of that order and cannot raise those matters here. To the extent their complaints regarding the park stem from matters that staff is still considering, they are not yet ripe for consideration here.

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<sup>25</sup> Request for rehearing at 16.

<sup>26</sup> *Id.* at 17.

<sup>27</sup> Among other things, staff clarified that, as described in the September 7, 2004 Letter Order, the location of the two-acre park to be named in honor of Daniel R. Duncan, founder of Duncan's Point, is the same as the location described as the access to Lick Creek Cove. *See* staff's letter order of Sept. 1, 2005, at 1 n. 1. The May 9 Order incorrectly referred to the location of the park as the crossroads of the Pebble Creek development and Duncan's Point. 111 FERC ¶ 61,190 at P 22.

Docket No. EL05-73-001 and Project No. 459-136

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The Commission orders:

The request for rehearing, filed on June 8, 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 )

Magalie R. Salas,  
Secretary.